

**BEFORE THE SECURITIES APPELLATE TRIBUNAL
MUMBAI**

Appeal No. 137 of 2009

Date of decision : 07.10.2009

Dr. Jayaram Chigurupati
8-2-120/112/88-89,
Park View Estate, 4th Floor,
Road No.2, Banjara Hills,
Hyderabad – 500 034.

..... Appellant

Versus

1. Securities and Exchange Board of India
SEBI Bhavan, Plot No.C-4A, G Block,
Bandra Kurla Complex, Bandra (East),
Mumbai – 400 051.

2. Daiichi Sankyo Company
having its office at 3-5-1, Nihon Bashi,
Honcho, Chuoku, Tokyo,
Japan – 103-8426.

3. Ranbaxy Laboratories Limited
Plot no.90, Sector 32,
Gurgaon – 122 001.

4. Zenotech Laboratories Limited
Park View Estate,
4th Floor, Road No.2, Banjara Hills,
Hyderabad.

..... Respondents

Mr. Ravi S., Senior Advocate with Mr. Vinay Chauhan, Advocate for the Appellant

Mr. Kumar Desai Advocate with Ms. Daya Gupta Advocate for Respondent no.1.

Mr. Iqbal Chagla, Senior Advocate, Mr. Janak Dwarkadas, Senior Advocate with
Mr. Rohan Rajadhyaksha, Advocate for Respondent no.2.

Mr. H. S. Mattewal, Senior Advocate with Mr. Anand Pathak and Mr. R. S. Sachdeva,
Advocates for Respondent no.3

None for Respondent no.4.

Coram : Justice N.K. Sodhi, Presiding Officer
Samar Ray, Member

Per : Justice N.K. Sodhi, Presiding Officer

Whether Daiichi Sankyo Company Limited (hereinafter called Daiichi/acquirer)
wrongly computed the price to be offered to the shareholders of Zenotech Laboratories

Limited (for short the target company) which has been indirectly acquired by the former is the short question that arises for our consideration in these two Appeals no. 137 and 139 of 2009 which involve common questions of law and fact. Daiichi has offered Rs.113.62 per share to the shareholders of the target company whereas the appellants want Rs.160 per share. In order to answer this question, it is necessary to refer to the facts in some detail.

2. Both the appellants are shareholders of the target company. The appellant in Appeal no. 137 of 2009 is the promoter and managing director of the target company and holds along with his wife, 26 per cent of its shareholding whereas the appellant in the other Appeal holds 63,300 shares of that company.

Ranbaxy – Zenotech Deal:

3. Ranbaxy Laboratories Limited (for short Ranbaxy) is a public limited company having its registered office in Industrial Area, SAS Nagar, Mohali, in the State of Punjab. It is a reputed pharmaceutical company producing a wide range of generic medicines which it claims to export to over hundred countries. On October 3, 2007, Ranbaxy entered into a share purchase agreement with the promoters of the target company including the appellant in Appeal no. 137 of 2009 for acquiring 27.35 per cent shares of the target company at a price of Rs.160 per share. On the same day, that is, October 3, 2007, the board of directors of the target company also agreed to issue and allot to Ranbaxy on preferential basis 54,69,538 fully paid up shares of the face value of Rs.10 each of the target company at a cash price of Rs.160. Pursuant to the said purchase and preferential allotment, Ranbaxy was to hold 44.59 per cent shares in the target company. Since Ranbaxy's acquisition was in excess of 15 per cent shares/voting rights in the target company, Regulations 10 and 12 of the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 (hereinafter referred to as the takeover code) got triggered and Ranbaxy made a public announcement on October 5, 2007 to the shareholders of the target company for acquiring 20 per cent shares at an offer price of Rs.160 per share. The offer opened on December 24, 2007 and closed on January 15, 2008 and the last date for acceptance / rejection of shares tendered and payment for shares accepted under the said offer was January 28, 2008. In this open

offer, Ranbaxy received only 7,58,851 shares being 2.20 per cent of the total share capital of the target company from the shareholders of that company and its post offer shareholding in the target company came to 46.79 per cent. What is important to note here is that between January 16, 2008 and January 28, 2008, Ranbaxy acquired shares in the open offer at a price of Rs.160 per share from the shareholders of the target company. On completion of the open offer made as per the public announcement published on October 5, 2007, Ranbaxy made on January 30, 2008, a post offer public announcement to the equity shareholders of the target company making it known, among other things, that it holds 46.79 per cent shares of the target company.

Daiichi-Ranbaxy Deal:

4. On June 11, 2008, Daiichi entered into a share purchase and share subscription agreement with Ranbaxy, Mr. Malvinder Mohan Singh, its promoter and Mr. Shivinder Mohan Singh, another promoter and others to acquire 12,99,34,134 fully paid up equity shares of Ranbaxy of the face value of Rs.5 each at a price of Rs.737/- per fully paid up equity share in cash representing 30.91 per cent of its fully paid up equity share capital. Daiichi also agreed to subscribe to 4,62,58,063 fully paid up equity shares of Ranbaxy of the face value of Rs.5 each representing in the aggregate 11 per cent of its paid up equity share capital and 2,38,34,333 warrants of Ranbaxy, each warrant exercisable for one equity share of face value of Rs.5 each of Ranbaxy at a price of Rs.737 per equity share. On the acquisition of shares by Daiichi in pursuance to the aforesaid share purchase and share subscription agreement, the provisions of the takeover code got triggered and Daiichi made on June 16, 2008, a public announcement to the shareholders of Ranbaxy to acquire upto 9,25,19,126 fully paid up equity shares of face value of Rs.5 each representing in the aggregate 22.01 per cent of its fully paid up equity share capital. This public offer was necessary in terms of Regulations 10 and 12 of the takeover code. On October 20, 2008, the open offer was completed and Daiichi held on that date 22,06,90,423 equity shares in Ranbaxy representing in the aggregate 52.5 per cent of its issued, subscribed and fully paid up equity share capital. As a result of this, Ranbaxy became a subsidiary of Daiichi on October 20, 2008 and, therefore, “person acting in concert” with Daiichi in terms of Regulation 2(1)(e)(2)(i) of the takeover code.

Thereafter, Daiichi acquired further shares from the promoters of Ranbaxy and its total shareholding in Ranbaxy on November 7, 2008 came to 63.92 per cent of its equity share capital. This further acquisition is not very relevant for our purpose.

Daiichi-Zenotech offer:

5. With Daiichi acquiring Ranbaxy, the former indirectly acquired 46.79 per cent of the share capital of the target company which was held by Ranbaxy. This indirect acquisition by Daiichi also triggered the takeover code and it was required to make a public announcement in terms of Regulation 14(4) within three months of consummation of the acquisition of the company holding shares of or control over the target company. Ranbaxy is the company which was earlier holding the shares of and controlling the target company. The process of acquisition of Ranbaxy was completed only on October 20, 2008 and it was within three months from this date that Daiichi was required to make a public announcement for the indirect acquisition of the target company. Accordingly, on January 19, 2009, Daiichi made a public announcement under Regulations 10 and 12 of the takeover code to acquire 20 per cent shares from the shareholders of the target company. The price that was offered to the shareholders of the target company was Rs.113.62 per share. Regulation 20(11) of the takeover code requires that the letter of offer that is sent to the shareholders should contain justification or the basis on which the price has been determined. The justification that has been offered by Daiichi to the shareholders of the target company is contained in clause 1.9 of the public announcement and the same is reproduced hereunder for facility of reference:

“1.9 The shares of the Target Company are frequently traded on the BSE within the meaning of Regulation 20(4) of the Regulations. The Offer Price of Rs.113.62 per equity share is justified in terms of Regulation 20(4) of the Regulations as it is the higher of the following* :

i.	The negotiated price under the SPSSA#	N.A.
ii.	Highest Price paid by Acquirer for any acquisition (including by way of allotment in a public or rights or preferential issue) during the 26-weeks prior to the date of the public announcement to shareholders of RLL	N.A.
iii.	The average of the weekly high and low of the closing prices of shares of the Target Company on BSE during the 26 weeks period preceding the date of public announcement to shareholders of RLL.	Rs.113.62
iv.	The average of the daily high and low prices of the shares of the Target Company on BSE during the 2 weeks period	Rs.103.51

	preceding the date of public announcement to shareholders of RLL	
v.	Highest Price paid by Acquirer for any acquisition (including by way of allotment in a public or rights or preferential issue) during the 26-weeks prior to the date of the PA.	N.A.
vi.	The average of the weekly high and low of the closing prices of shares of the Target Company on BSE during the 26 weeks period preceding the date of the PA.	Rs.106.03
vii.	The average of the daily high and low prices of the shares of the Target Company on BSE during the 2 weeks period preceding the date of the PA.	Rs.109.52

* Regulation 20(12) of the Regulations states that the offer price for indirect acquisition of control shall be determined with reference to the offer price computed, in accordance with Regulation 20(4) or 20(5) based on the date of the public announcement for the parent company and the date of public announcement for acquisition of shares of the target company, whichever is higher.

The Acquirer has not paid any negotiated price to acquire any shares of the Target Company (whether directly or indirectly), including, without limitation, under the SPSSA.”

6. On reading the public announcement issued by Daiichi which was published on January 19, 2009 pegging the offer price at Rs.113.62 per share, the appellants and some other shareholders of the target company complained to the market regulator, the Securities and Exchange Board of India (hereinafter called the Board) bringing to its notice violations of the takeover code, which according to the appellants, had been committed by Daiichi while determining the offer price. By his letter dated January 27, 2009, the appellant filed his objections with the Board pointing out that Daiichi ought to have made the public announcement for the open offer to buy the shares from the shareholders of the target company at the offer price of Rs.160 per share. After exchange of some correspondence between the appellant and the Board, the latter by its communication dated June 22, 2009 finally rejected the claim of the appellant. It is against this communication that Appeal no. 137 of 2009 has been filed. The appellant in the other appeal had also filed his objections by way of complaints pointing out that the price offered by Daiichi was not in conformity with the takeover code and that the offer price for the shares of the target company should be Rs.160 per share instead of Rs.113.62 as offered by Daiichi. He also objected to the timing of the offer and his grievance is that the open offer made by Daiichi to the shareholders of the target company ought to have been made simultaneously with the offer made to the shareholders of Ranbaxy. These complaints have also been rejected by a communication

dated June 18, 2009 and Appeal no. 139 of 2009 is directed against this rejection. The two impugned communications are almost identical in substance.

7. We have heard the learned senior counsel on both sides.

8. The first grievance of the appellants is in regard to the timing of the open offer made by Daiichi to the shareholders of the target company. As already noticed, this open offer was made on January 19, 2009. The argument of the learned counsel for the appellants is that when Daiichi entered into a share purchase and share subscription agreement on June 11, 2008 with a view to acquire Ranbaxy, it (Daiichi) had agreed to indirectly acquire 46.79 per cent shares of the target company then held by Ranbaxy thereby triggering an obligation to make an open offer to its shareholders under Regulation 10 of the takeover code. The argument is that since Daiichi failed to make an open offer under Regulation 10 to the shareholders of the target company within four working days of June 11, 2008, it violated the mandatory provisions of Regulation 14(1) of the takeover code. The appellants contend that Daiichi should compensate the shareholders of the target company for the delay in making a public offer to them. We are unable to agree with the learned counsel for the appellants. The Explanation after Regulation 11 of the takeover code makes it clear that for the purposes of Regulation 10 and Regulation 11, acquisition shall mean and include direct acquisition in a listed company and also indirect acquisition by virtue of acquisition of companies whether listed or unlisted in India or abroad. It is, thus, clear that Regulations 10 and 11 apply to indirect acquisitions as well. It is true that when Daiichi entered into the agreement with Ranbaxy, it did agree to acquire indirectly the shares of the target company held by Ranbaxy and this indirect acquisition though triggers an obligation to make a public offer, the same is governed by the provisions of Regulation 14 (4) of the takeover code and not by Regulation 14(1). Regulations 14(1) and 14(4) of the takeover code which deal with timing of the public announcement of offer are reproduced hereunder for ease of reference:-

“14. (1) The public announcement referred to in regulation 10 or regulation 11 shall be made by the merchant banker not later than four working days of entering into an agreement for acquisition of shares or voting rights or deciding to acquire shares or voting rights exceeding the respective percentage specified therein:

Provided that

 (4) In case of indirect acquisition or change in control, a public announcement shall be made by the acquirer within three months of consummation of such acquisition or change in control or restructuring of the parent or the company holding shares of or control over the target company in India. “

It is not necessary for us to deal with this issue on first principles as these provisions came up for consideration of this Tribunal in Hardy Oil Pvt. Ltd. Vs. Securities and Exchange Board of India, Appeal no.132 of 2005 decided on March 8, 2006 wherein it was held as under :

“The explanation to Regulation 11 makes it clear that the acquisition referred to in Regulation 10 and 11 would include both direct and indirect acquisitions. If we read Regulation 14(1) in isolation it would cover both direct as well as indirect acquisition but when this clause is read along with clause (4) thereof it leaves no room for doubt that Regulation 14(1) deals only with direct acquisitions and Regulation 14(4) deals with all indirect acquisitions. The language of clause (4) of Regulation 14 is clear and it provides that in the case of indirect acquisition, a public announcement shall be made by the acquirer within 3 months of consummation of such acquisition.....

 As already observed, when clauses(1) and (4) of Regulation 14 are read together, it becomes clear that all direct acquisitions are governed by clause (1) and indirect acquisitions are covered by clause (4).”

Since Daiichi indirectly acquired the shares of the target company, such acquisition would be governed by Regulation 14(4). According to this regulation, a public announcement in the case of indirect acquisition could be made by the acquirers within three months of consummation of such acquisition. As already noticed, the acquisition of Ranbaxy which resulted in the indirect acquisition of the target company was completed only on October 20, 2008 and, therefore, the public announcement made by Daiichi on January 19, 2009 was within the prescribed time. No fault can, thus, be found with the impugned communications rejecting this objection raised by the appellants.

9. This brings us to the primary grievance of the appellants regarding the price offered by Daiichi to the shareholders of the target company. As already noticed, when Daiichi acquired Ranbaxy on October 20, 2008, it indirectly acquired the target company as well and we have to determine the offer price for this indirect acquisition for which a public announcement was made on January 19, 2009. It is on this date that the price for the shares of the target company has to be worked out as per the different parameters laid

down in Regulation 20(12) read with Regulation 20(4). Regulation 20 of the takeover code deals with the “Offer price”. The relevant parts of this Regulation with which we are concerned are reproduced hereunder for facility of reference:

“Offer price.

20.(1) The offer to acquire shares under regulation 10, 11 or 12 shall be made at a price not lower than the price determined as per sub-regulations (4) and (5).

(2)

(3)

(4) For the purposes of sub-regulation (1), the offer price shall be the highest of –
(a) the negotiated price under the agreement referred to in sub-regulation (1) of regulation 14;

(b) price paid by the acquirer or persons acting in concert with him for acquisition, if any, including by way of allotment in a public or rights or preferential issue during the twenty-six week period prior to the date of public announcement, whichever is higher;

(c) the average of the weekly high and low of the closing prices of the shares of the target company as quoted on the stock exchange where the shares of the company are most frequently traded during the twenty-six weeks or the average of the daily high and low of the prices of the shares as quoted on the stock exchange where the shares of the company are most frequently traded during the two weeks preceding the date of public announcement, whichever is higher;

Provided that.....

(5) to (11)

(12) The offer price for indirect acquisition or control shall be determined with reference to the date of the public announcement for the parent company and the date of the public announcement for acquisition of shares of the target company, whichever is higher, in accordance with sub-regulation (4) or sub-regulation(5).”

Offer price for indirect acquisition is to be determined according to sub-regulation (12) of Regulation 20. According to sub-regulation (12), the price of the shares of the target company has first to be worked out in terms of sub-regulation (4) as on the date of public announcement of the parent company and again, on the date of public announcement made for the acquisition of shares of the target company and whichever of the two is higher, shall be the offer price. In the instant case, the parent company is Ranbaxy and the date of public announcement made to its shareholders is June 16, 2008. The date of public announcement made to the shareholders of the target company is January 19, 2009. We have to, therefore, work out the price of the shares of the target company as on June 16, 2008 and January 19, 2009 and see which is higher of the two. The price on both these dates has to be computed according to the parameters prescribed in sub-regulation (4). Sub-regulation (4) also gives us three different modes as referred

to in clauses (a), (b) and (c) thereof of determining the price and the highest of the three as on June 16, 2008 and January 19, 2009 would be worked out and whichever is higher shall be the offer price. The intention of the framers of the takeover code is clear that while giving an exit option to the shareholders of the target company, they have to be given the highest price worked out on the basis of different parameters referred to in Regulation 20. Daiichi had undertaken this exercise which is reflected in the justification it gave to the shareholders of the target company. That justification is referred to in the chart reproduced in para 5 above. We shall now examine whether Daiichi correctly computed the offer price. The appellants do not dispute the calculations made by Daiichi in clause (i) and (iii) to (vii) of the chart in para 5 above. They dispute only clause (ii). In the disputed clause, Daiichi has calculated the price as per clause (b) of sub-regulation (4) read with sub-regulation (12) of Regulation 20 with reference to June 16, 2008, the date of public announcement of Ranbaxy which is the parent company. While working out this price as on June 16, 2008, Daiichi concluded that it had not acquired any shares of the target company in the twenty-six week period prior thereto and, therefore, sub-regulation (4)(b) was not applicable. It is for this reason that in the disputed clause (ii) of the justification, it said "N.A." We do not think Daiichi was right. It should also have worked out whether any "person acting in concert" with it had paid any price for acquisition during that period. This is the requirement of clause (b) of sub-regulation (4). Daiichi failed to do this. As per sub-regulation 4(b), we have to find out whether Daiichi or "persons acting in concert" with it paid any price for acquisition during the twenty-six week period prior to June 16, 2008. It is true that Daiichi did not pay any price to the shareholders of the target company during this period but Ranbaxy did. We have already noticed under the Ranbaxy-Zenotech deal that Ranbaxy paid in the open offer between January 16 and January 28, 2008, Rs.160 per share to the shareholders of the target company when it acquired their shares. January 2008 comes within the twenty-six week period prior to June 16, 2008. What is strenuously contended by the learned senior counsel appearing for Daiichi is that on June 16, 2008, Daiichi was not acting in concert with Ranbaxy and, therefore, the price paid by it in January 2008 would be of no consequence and sub-regulation 4(b) would not apply. It is emphatically argued that Daiichi correctly worked out the offer price and was right in informing the shareholders

of the target company in clause (ii) of the chart referred to in para 5 above that sub-regulation 4(b) was not applicable. We have given our thoughtful consideration to the argument of the learned senior counsel appearing for the respondents but have not been able to persuade ourselves to agree with them. The argument of the learned senior counsel proceeds on the assumption that June 16, 2008 is the date for determining whether Daiichi and Ranbaxy were acting in concert with each other. On that date they were not acting in concert and this fact is of no consequence. We are of the view that the date for determining their relationship is January 19, 2009, the date on which public announcement was made to the shareholders of the target company. We say so because it is on this date that we are determining the offer price for the indirect acquisition of the target company. While determining the price on January 19, 2009, Regulation 20 requires Daiichi (the acquirer) to find out whether it, or any person acting in concert with it on that date, had paid any price for acquisition to the shareholders of the target company during the twenty-six week period prior to June 16, 2008, the date of public announcement of Ranbaxy, the parent company. This is necessary as it is one of the modes prescribed for determining the offer price as per Regulation 20(12) read with Regulation 20(4) of the takeover code. It is Daiichi's own case, as is clear from the public announcement made to the shareholders of the target company, that Ranbaxy became its subsidiary on October 20, 2008 when the acquisition of Ranbaxy got completed. Being a subsidiary, Ranbaxy shall be deemed to be acting in concert with Daiichi with effect from that date as per Regulation 2(1)(e)(2)(i) of the takeover code. According to this Regulation, "person acting in concert" comprises a company, its holding company or subsidiary unless the contrary is established. There is no question of the contrary being established in the instant case because Daiichi itself had made it known in the public announcement to the shareholders of the target company that Ranbaxy had become its subsidiary on October 20, 2008. It is, thus, clear that on January 19, 2009, the material date on which the offer price for indirect acquisition is being worked out, Ranbaxy, being a subsidiary, was acting in concert with the Daiichi and that it (Ranbaxy) had paid Rs.160 per share to the shareholders of the target company during January 16 and January 28, 2008 when it acquired their shares under the Ranbaxy-Zenotech deal which period falls within twenty-six weeks prior to June 16, 2008. In other words, Ranbaxy, a person

acting in concert with Daiichi on January 19, 2009, had paid during twenty-six weeks prior to June 16, 2008, Rs.160 per share to the shareholders of the target company. In this view of the matter, the price paid by Ranbaxy to the shareholders of the target company has to be reckoned with in terms of sub-regulation (4)(b) read with sub-regulation (12) of Regulation 20 while determining the offer price for the indirect acquisition of the target company. When we take into account the price paid by Ranbaxy, it becomes the highest as compared to the price worked out according to the other parameters laid down in sub-regulation (4) with reference to the dates of public announcement of Ranbaxy and the target company. It is this price which Daiichi shall have to offer to the shareholders of the target company. This is the only way to give purposive interpretation to the provisions of Regulation 20 so as to achieve the object of the takeover code. We have already observed that the object is to offer the highest price as per the prescribed parameters to the shareholders of the target company when they are given the option to exit. We are, therefore, satisfied that Daiichi wrongly computed the offer price for the indirect acquisition of the target company.

In the result, we answer the question posed in the opening part of our order in the affirmative, allow the appeals, modify the letter of offer issued by Daiichi and direct Daiichi to offer Rs.160 per share to the shareholders of the target company. There is no order as to costs.

Sd/-
Justice N.K. Sodhi
Presiding Officer

Sd/-
Samar Ray
Member

07.10.2009
ddg/-

Prepared and compared by – Devendra