Team Code — **B**

Before

THE HONOURABLE SUPREME COURT OF INDIA

U/Art. 136 of The Constitution of India, 1950

Fifth Annual

NLIU - JURIS CORP NATIONAL CORPORATE LAW MOOT COURT COMPETITION, 2014-15

5th September to 7th September 2014

MEMORIAL *for* APPELLANTS

In the matter of

APPELLANTS		**RESPONDENTS**
Foreign Lenders	*v.*	**Lifeline Ltd.**
Lifeline Ltd.	*v.*	**Promoters of Jeevani Ltd.**
Swasth Life Ltd.	*v.*	**Competition Commission of India & Lifeline Ltd.**

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STATEMENT OF JURISDICTION

The APPELLANTS have approached the Supreme Court of India under Article 136 of the Constitution of India, 1950.

STATEMENT OF FACTS

APPEAL I

Jeevani is a listed public company incorporated in year 1990 under the Companies Act, 2013 whereas Lifeline is another public company registered & incorporated under the Companies Act, 2013. On 27th January, 2012 it was decided that Jeevani would completely merge into Lifeline. However, 18% stake of the promoters was affected vide a separate sale agreement (*hereinafter* 'the Agreement'). Thereafter, on 5th July, 2013, the Delhi High Court approved the scheme of amalgamation (*hereinafter* 'Scheme'). However, in early August, 2013, the

foreign lenders of Jeevani made an application for recall of order dated 5th July, 2013 and contended that Scheme should be set aside as they had not received the notice of the Scheme. Subsequently, both the single and Division bench of the Delhi High Court dismissed the petition and subsequently the foreign lenders have appealed before the Supreme Court and the matter is pending arguments.

APPEAL II

Soon after merger, Lifeline received notices from the US Food and Drug Administration for providing drugs of below par quality. On scrutiny, it was found that investigation by FDA was commenced much before merger of Jeevani and Lifeline took place. Owing to this, Lifeline filed a suit against promoters for damages arising out of contract dated 23rd March, 2013. However, the promoters contended that Delhi High Court has no jurisdiction as the agreement had no arbitration clause. Afterwards, the Hon'ble Single Judge of Delhi High Court held that the clause could be regarded as arbitration clause and held that Court has jurisdiction to look into issues. On appeal, the Division Bench held that the clause amounts to an arbitration clause and referred the matter to Empowered Group in terms of agreement. Aggrieved by this, Lifeline appealed to the Supreme Court of India and the matter is pending arguments.

APPEAL III

In the meanwhile, and soon after the merger, Lifeline decided to introduce a new drug 'Novel'. However, in the year 2010 Swasth was assigned few of the developed R&D projects and IPRs of Jeevani. Thereafter, Swasth filed a suit for infringement of its IPR alleging that the drug 'Novel' is similar to its drug 'Inventive' which was already present in the market and got an injunction order against the Lifeline. Afterwards, Swasth launched a similar cost effective drug akin to 'Novel' which captured large chunk of market and thereafter withdrew the case and vacated the injunction against Lifeline. Against this backdrop, Lifeline

approached Competition Commission of India (*hereinafter* 'CCI') for alleged abuse of dominant position. Thereafter, the Commission directed an investigation which was challenged by Swasth in the Delhi High Court. However, both the single and Division bench dismissed the petition and accordingly Swasth has appealed to the Supreme Court.

STATEMENT OF ISSUES

ISSUE 1: Whether or not the Scheme of Arrangement should be set aside?

ISSUE 2: Whether or not clause 2 of the Share Sale Agreement constitutes an arbitration agreement?

ISSUE 3: Whether or not the Commission's order for directing investigation is erroneous and bad in law?

SUMMARY OF ARGUMENTS

1. **SCHEME OF ARRANGEMENT SHOULD BE SET ASIDE.**

APPELLANT submits that the scheme of arrangement should be set aside as appellants are creditors of the company who are affected by the scheme and whose meeting has not been convened. Moreover, they form a separate class.

2. **AGREEMENT DOES NOT CONTAIN AN ARBITRATION AGREEMENT.**

APPELLANT submits that the clause is not an arbitration agreement as it fails to fulfil the essentials required. It is further submitted that there is no intention to arbitrate reflected from the agreement as the parties have agreed to submit their dispute to Delhi court.

3. **CCI'S ORDER FOR DIRECTING INVESTIGATION IS ERRONEOUS AND BAD IN LAW.**

APPELLANT submits that the Commission's order for directing investigation is bad in law as due procedure enshrined under Article 21 of the Constitution and Natural Justice enshrined under Article 14 are violated.

ARGUMENTS ADVANCED

I. THE SCHEME SHOULD BE SET ASIDE AS MEETING OF FOREIGN LENDERS WHO ARE AFFECTED BY THE SCHEME WAS NOT CONVENED

[¶ 1] The purpose behind convening a meeting of creditors and shareholders under S. 391[1] before scheme is finally approved by court is to hear the parties whose interest will be affected by the sanctioning of the scheme.[2] A separate meeting must be convened for those creditors who form a separate class, as their interests are different from other creditors.[3]

[¶ 2] The APPELLANT contends that as foreign lenders are creditors of the company [**A**] and as their interest will be affected by the scheme, [**B**] the scheme should be set aside. Further, they do form a separate class [**C**] and hence, before sanction there meeting must have been conducted as it is a pre-requisite [**D**].

A. FOREIGN LENDERS ARE CREDITORS OF THE COMPANY.

[¶ 3] A creditor is a person who may enforce his claim against the company by an action of debt.[4] The APPELLANT submits that once an award has been pronounced, the rights and liabilities of the parties with respect to the claims that were raised before the tribunal stands conclusively decided.[5] Moreover, the parties must owe the same respect to an arbitration award as is owed to a judgement of a court of last resort.[6]

[¶ 4] In *Dalhousie*[7] the question before the court was 'when an award for payment of

[1] Companies Act, 1956, § 391.

[2] In re Essar Oil Ltd., (2005) 62 S.C.L. 345 (Guj.).

[3] K. Sudhakar Gupta v. Electro Thermics Pvt. Ltd., (2004) 122 Comp. Cas. 625 (A.P.).

[4] Tube Investment of India Ltd. v. Everest Cycles Ltd., (1984) 56 Comp. Cas. 165 (Gauhati).

[5] Satish Kumar v. Surrender Kumar, A.I.R. 1970 S.C. 833.

[6] Bhajahari Saha Banikya v. Behary Lal Basak, (1906) I.L.R. 33 Cal. 881.

[7] Dalhousie Jute Company Ltd. v. Mulchand Lakshmichand, (1983) 53 Comp. Cas. 607

money is obtained but not yet enforced, whether a relationship of debtor-creditor exists between the parties'. It was held that, as the respondent holds an award in his favour, the company, by reason of agreement between the parties is obliged to abide by the result of that award. The court need not delve into the question of enforceability of the award and must see whether *prima facie*, the award entails a debtor-creditor relationship between the parties.

[¶ 5] In the present case, the Foreign Lenders have obtained an arbitral award under which Jeevani has to pay a specific amount to them.[8] As this award is a final adjudication of their claims, even though the foreign lenders have not yet enforced the arbitral award, it becomes a contractual liability of Jeevani to abide by the result of the award. Therefore, a creditor-debtor relationship exists between the Foreign Lenders and Jeevani.

B. INTEREST OF FOREIGN LENDERS WILL BE AFFECTED BY THE SCHEME.

1. Creditor should have a prerogative to decide whether his interest would be affected or not.

[¶ 6] In the *Miheer Mafatlal case*,[9] it was held that jurisdiction of the Company Court, in examining a scheme of arrangement, is peripheral, supervisory and not appellate, since such decision should be left to the commercial wisdom of the members who have approved the scheme.[10] Furthermore, it is a matter of perception of creditor to decide whether he would be adversely affected by being required to deal with the transferee company, with whom he had no prior dealings.[11] If an affected class does not approve the scheme, the court cannot

(Cal.); SEE ALSO Kalyani S.P.G. Mills Ltd v. STC., (1983) 53 Comp. Cas. 632 (Cal.).

[8] MOOT PROPOSITION, ¶ 6.

[9] Miheer H. Mafatlal v. Mafatlal Industries Ltd., (1996) 87 Comp. Cas. 792 (S.C.).

[10] 3 A. RAMAIYA, GUIDE TO COMPANIES ACT 4023 (Lexis Nexis Butterworths Wadhwa Nagpur 17th Ed. 2010).

[11] In Re Mayfair Ltd., (2004) 122 Comp. Cas. 748 (Bom.).

confirm the scheme even if it considers that the class has been fairly dealt with.[12] Hence, in the present case, as the Bombay Stock Exchange has not approved the scheme,[13] it is for the creditors to exercise their commercial wisdom to decide whether their interest would be hampered by the scheme and the court should not intervene.

2. Foreign Lenders have an interest in the Scheme.

[¶ 7] When there is a charge created against the property of the company and in favour of the creditor, from the date itself, he becomes a secured creditor of the company and if an arbitration award did not make any difference in the status of creditors, legally they will continue to be secured creditors.[14] Also, a creditor having a right over the assets forming subject matter of the scheme will have an interest over the scheme as well.[15]

[¶ 8] In the present case, the Foreign Lenders are secured creditors of the company by virtue of the consortium agreement and the arbitration award acknowledges the fact that their debt still exists. Hence, they will continue to be secured creditors of the company as they have an interest over the assets being transferred under the scheme.

C. FOREIGN LENDERS FORM A SEPARATE CLASS.

1. Foreign Lenders hold a separate legal right against the company and thus have a separate interest.

[¶ 9] If a group within a class has a different interest from the rest of the class, such group must be treated as a separate class for the purpose of the scheme.[16] In the *D.A. Swamy case,* [17]

[12] In Re Magnaquest Solutions (P.) Ltd., (2008) 141 Comp. Cas. 728 (A.P.).

[13] Moot Proposition ¶ 4.

[14] Infrastructure Leasing & Financial Ltd. v. B.P.L. Ltd., (2008) 144 Comp. Cas. 544 (Ker.).

[15] In Re British Commonwealth Holding Ltd., (1992) B.C.C. 58; SEE ALSO 2 BUCKLEY, BUCKLEY ON COMPANIES ACT 425.25 (Lexis Nexis Butterworths Wadhwa Nagpur 15th ed. 2009).

[16] In Re Maneckchowk & Ahmedabad Manufacturing Ltd., (1970) 40 Comp. Cas. 819 (Guj.).

Madras High court relying upon the *Manekchowk case,*[18] held that a group of persons would constitute a class when it is shown that they have conveyed all interests and their claims are capable of being ascertained by any common system of valuation.

[¶ 10] In the present case, the Foreign Lenders have obtained an arbitration award against the company and hence their claims against the company would be ascertained by enforcement of the award unlike other secured creditors and not by any common system of valuation and thus, they cannot constitute a same class.

2. Foreign lenders have a separate interest by virtue of being off shore lenders.

[¶ 11] Palmer[19] states that a class must be confined to those whose interests are not so dissimilar so as to make it impossible for them to consult together and that a class, which has an interest that could be affected in a different manner,[20] requires the protection of a separate meeting.[21] In the *Manekchowk case*,[22] the court opined that when one finds a different set of facts existing among different creditors, which may differently affect their minds and judgement, they must be divided into different classes.

[¶ 12] In the present case, unlike domestic counterparts, foreign lenders do not have a protection under SARFAESI Act,[23] which does not require an intervention of the court and will have to depend on the complicated and time-consuming court process for recovery of their debts. Therefore, the risk involved for a foreign lender is much more as compared to a

[17] D.A. Swamy & Ors. v. India Meters Ltd., (1994) 79 Comp. Cas. 27 (Mad.).

[18] In Re Maneckchowk & Ahmedabad Manufacturing Ltd., (1970) 40 Comp. Cas. 819 (Guj.).

[19] 2 FRANCIS PALMER, SIR, PALMER'S COMPANY LAW 12.040 (Sweet & Maxwell 25th ed. 2010).

[20] In Re British Commonwealth Holding Ltd., (1992) B.C.C. 58.

[21] Sovereign Life Assurance Co. v. Dodd, (1892) 2 Q.B. 573.

[22] In Re Maneckchowk & Ahmedabad Manufacturing Ltd., (1970) 40 Comp. Cas. 819 (Guj.).

[23] Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002.

domestic lender and it is sufficient enough to differently affect their minds and judgment.

D. MEETING OF A CLASS AFFECTED BY A SCHEME IS MANDATORY.

[¶ 13] It is submitted that the whole object behind requirement of issuing notice to shareholders and creditors is to hear all the affected persons.[24] If a class whose interests are affected by a scheme does not assent to the scheme or approve it in a meeting convened for the purpose, the court will have no jurisdiction to confirm the scheme even if it considers that the class concerned is being fairly dealt with or that it would approve the scheme.[25] In the *Magnaquest Solutions case*,[26] the court agreed with this reasoning and went ahead to state that the court has no power to usurp the rights of the class of members or creditors to decide whether or not to approve the scheme. Therefore, it can be stated that the fact that there has not been a proper class meeting of creditors is fatal to the sanctioning of the scheme.[27]

[¶ 14] In the present case, it has already been shown in the fore-stated argument [**C**] that the foreign lenders of the company are affected by the scheme of amalgamation and that they do form a separate class of creditors, as their interest is different from other secured creditors. Thus, unless foreign lenders give their consent to the scheme, the court has no jurisdiction to approve the scheme.

II. THE AGREEMENT DOES NOT CONTAIN AN ARBITRATION CLAUSE.

[¶ 15] An arbitration agreement is a written agreement to submit present or future differences to arbitration, in respect of a defined legal relationship.[28] Courts have laid down

[24] Gujrat Kamdar Sahkari Mandal v. Ramkrishna Mills Ltd., (1998) 92 Comp. Cas. 692 (Guj.).

[25] In Re Coimbatore Cotton Mills Ltd., (1980) 50 Comp. Cas. 623 (Mad.).

[26] In Re Magnaquest Solutions Private Ltd., (2008) 141 Comp. Cas. 728 (A.P.).

[27] In Re United Provident Assurance Co. Ltd., (1910) 2 Ch. 477.

[28] Arbitration and Conciliation Act, 1996, § 2(a), § 7.

certain attributes, which must be present in an agreement to be called an arbitration agreement.[29] It is submitted that the dispute resolution clause, in the present case, is not an arbitration clause as it fails to fulfil the essentials of an arbitration agreement, specifically the agreement does not contemplate the matter to be referred to a tribunal in case of a dispute [**A**]. The forum so chosen was not intended to act judicially as it was a mere expert determination [**B**] and, moreover, there exist no intention to arbitrate [**C**]. In the alternative, matters of fraud are not arbitrable in an arbitral tribunal [**D**].

A. THE CLAUSE DOES NOT CONTEMPLATE THAT THE DISPUTE IS TO BE REFERRED TO AN ARBITRAL TRIBUNAL.

[¶ 16]In *State of Orissa v. Sri Damodar Das*,[30] where a similar clause regarding dispute resolution was present, the court placed reliance on the *Tipper Chand's case*,[31] and held that the clause was not an arbitration agreement as an arbitration agreement must provide expressly or by necessary implication, a reference to an arbitrator named therein in an event of a present or future dispute.[32] This is based upon the statutory requirement of Section 7 of Arbitration and Conciliation Act, 1996, necessitating that for a clause to constitute an arbitration agreement it must contain a reference of a dispute to the tribunal, without which it is difficult to spell out the intention of the parties to submit the matter to the tribunal.[33]

[¶ 17]Furthermore, even if the agreement is devoid of explicit words such as "arbitration"

[29] P. Dasartharama Reddy Complex v. Government of Karnataka and Anr., (2014) 2 S.C.C. 201; SEE ALSO Bihar State Mineral Development Corporation and Anr. v. Encon Builders, (2003) 7 S.C.C. 418; Vishnu (dead) by L.R.s v. State of Maharashtra and Ors., (2014) 1 S.C.C. 516.

[30] State of Orissa & Anr. v. Sri Damodar Das, A.I.R. 1996 S.C. 942.

[31] State of U.P. v. Tipper Chand, (1980) 2 S.C.C. 341.

[32] *Ibid.*

[33] K.K. Modi v. K.N. Modi (1998) 3 S.C.C. 573; SEE ALSO Bharat Bhushan Bansal v. U.P. Small Industries Corporation Ltd., Kanpur, (1999) 2 S.C.C. 166.

or "arbitrator" it can be construed as an arbitration agreement only if the agreement stipulates that a reference shall take place in case of a dispute, as the very essence of arbitration flows from the intention of the parties to submit before the tribunal.[34] In the present case, the clause does not state any such reference to a tribunal expressly. Accordingly, it fails to satisfy the fundamental requirement of an arbitration agreement.

B. THE CLAUSE IS SUGGESTIVE OF AN EXPERT DETERMINATION THAN ARBITRATION.

[¶ 18]In order to determine whether a particular agreement amounts to an arbitration agreement or an expert determination, the following two fundamental grounds should be taken into consideration.[35]

1. The Committee of Executives is intended to act as an Expert.

[¶ 19]In *K.K. Modi case,*[36] a clause referring the dispute to the chairman was held to be an expert determination, as it required application of his own mind and expertise. Moreover, despite the use of word 'dispute' in the agreement, the purpose of the chairman was to provide clarification upon the question raised. Also, where a clause uses 'questions' instead of 'dispute', it cannot be called an arbitration agreement as the person referred to is expected to determine the question and not a dispute.[37] Hence, the concerned clause nowhere asserts that the committee intends to deal with a dispute; rather the clause reflects the intention of parties to submit questions on a specific point and receive clarification.[38]

[34] MICHAEL J. MUSTILL, SIR ET AL., MUSTIL & BOYD COMMERCIAL ARBITRATION 45 (Lexis Nexis 2nd ed. 2010).

[35] JOHN KENDALL ET AL., EXPERT DETERMINATION 278 (Sweet & Maxwell 4th ed. 2008).

[36] K.K. Modi v. K.N. Modi, (1998) 3 S.C.C. 573; SEE ALSO Cursetji Jamshedji Ardaseer Wadia v. Dr. R.D. Shiralee, A.I.R. 1943 Bom. 32.

[37] State of Orissa v. Bhagyandhar Dash, (2011) 7 S.C.C. 406; SEE ALSO Bharat Bhushan Bansal v. U.P. Small Industries Corporation Ltd., Kanpur, (1999) 2 S.C.C. 166.

[38] Ram Lal Jagan Nath v. Punjab State through Collector, A.I.R. 1966 Punj. 436.

2. The Committee is not intended to act Judicially.

[¶ 20]It is submitted that one of the most noteworthy attribute of an arbitration proceeding is that the arbitration tribunal is intended to perform a judicial function;[39] as it arrives at a decision on the evidence and submissions of the parties and on the law governing the contract.[40] On the other hand, an expert makes his own enquiries and applies his own expertise while arriving at a decision and is not bound by a set of rules.[41]

[¶ 21] The dispute resolution clause does not contemplate a judicial determination, as judicial determination requires oral submission from both the parties and recording of evidence that are not contemplated by the clause. Therefore, the dispute resolution clause is not an arbitration agreement; rather the party intended it to be an expert determination.

C. INTENTION TO ARBITRATE IS NOT REFLECTED IN THE AGREEMENT.

[¶ 22]In order to determine whether a clause is an arbitration agreement or not, intention to arbitrate plays a vital role and it should be expressly stated in the agreement.[42] Reference made to the tribunal must be specific to constitute an arbitration agreement.[43] Moreover, clause providing for a tribunal to sit as experts does not signify an intention to refer disputes to arbitration.[44] Following are the factors which can also be taken into account while stating that the parties did not intended to go into arbitration.

[39] FRANCIS RUSSELL, RUSSELL ON ARBITRATION 59 (Sweet & Maxwell 23rd ed. 2007); SEE ALSO M/S. P. Dasratharama Reddy v. Government of Karnataka & Anr., (2014) 2 S.C.C. 201.

[40] Bharat Bhushan Bansal v. U.P. Small Industries Corporation Ltd., Kanpur, (1999) 2 S.C.C. 166; SEE ALSO 1 GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 227 (Walter Kluwer India 2010).

[41] K.K. Modi v. K.N. Modi, (1998) 3 S.C.C. 573.

[42] *Ibid.*

[43] State of Orissa & Anr. v. Sri Damodar Das, A.I.R. 1996 S.C. 942;

[44] MICHAEL J. MUSTILL, SIR ET AL., MUSTIL & BOYD COMMERCIAL ARBITRATION 49 (Lexis Nexis 2nd ed. 2010)

1. Delhi Courts have Jurisdiction on disputes upon the agreement's subject matter.

[¶ 23]All the disputes arising out of this agreement shall be subject to jurisdiction of Delhi courts.[45] The inclusion of clause 3 manifests the intention of the parties to resolve their dispute through Delhi courts. On the other hand, Clause 2 does not mention "Dispute" or "Reference". Hence, clause 3 indicates the intention of the parties to adjudicate all the disputes and differences in the competent civil court.[46]

[¶ 24]Similarly, on a conjunctive reading of Clause 2 and Clause 3 it is clear that there is no arbitration agreement and it is also submitted that the said clause not only provides the territorial jurisdiction by stating a competent court at Delhi but, in essence and in effect, it stipulates that all the differences or disputes arising out of the agreement touching the subject-matter of the agreement shall be decided by a competent court at Delhi.

2. Parties intended to resolve the dispute amicably.

[¶ 25]The term 'amicable'[47] tends to bar the jurisdiction of the arbitral tribunal, as it projects the intention of the parties to resolve the dispute through mutual understanding. A bare agreement to negotiate is not enforceable and express words to such effect should be there.[48] If such was the intention of the parties that amicable settlement be simply a prerequisite to commencement of arbitration proceedings, Clause 2.2 must have been placed at the beginning of the clause, which is generally the practice in such a scenario and is recognized by the court.[49] In this case, the drafters did not follow such positioning. Hence, Clause 2 is devoid of the essentials of an arbitration agreement and this is corroborated by

[45] MOOT PROPOSITION ¶ 9.

[46] Karnataka Power Transmission Corp. Ltd. v. Deepak Cables Ltd., A.I.R. 2014 S.C. 1626.

[47] MOOT PROPOSITION ¶ 9.

[48] Aiton v. Transfield, (1999) N.S.W.S.C. 996; SEE ALSO 1 JOSEPH CHITTY ET AL., CHITTY ON CONTRACTS 2-136 (Sweet & Maxwell 13th ed. 2008).

[49] Trimex International F.Z.E. Ltd. Dubai v. Vedanta Aluminium Ltd., (2010) 3 S.C.C. 1.

Clause 2.2 which reflects the intention of the parties to amicably resolve the dispute.

D. *IN ARGUENDO*, MATTERS OF FRAUD ARE NOT ARBITRABLE.

[¶ 26]Fraud is defined as a false representation of a matter of fact whether by words or by conduct, by false or misleading allegations, or by concealment of that which should have been disclosed, which deceives and is intended to induce another in reliance upon it to part with some valuable thing belonging to him or surrender a legal right.[50]

[¶ 27]In the *N. Radhakrishnan case*,[51] the Apex Court opined that where a case involves allegations pertaining to fraud and malpractice, or where complex question of fact are raised, then the matter must be tried in court and the arbitrator would not be competent to deal with such matters.[52] Such cases involve the production of evidence, hence arbitration would not be an appropriate forum to handle these cases.[53]

[¶ 28]In the present case, the promoters concealed the fact of the ongoing FDA investigations[54] from Lifeline and received an inflated price for their shares. It is submitted that the contract contained specific representations as regarding disclosure of information, which may be vital for the transaction.[55] Hence, fraud is committed upon Lifeline and the present matter cannot be referred to an arbitral tribunal.

III. COMMISSION'S ORDER FOR DIRECTING INVESTIGATION IS

[50] Commissioner of Customs, Kandla v. M/S Essar Oil Ltd. & Ors., (2004) 11 S.C.C. 364.

[51] N. Radhakrishnan v. Maestro Engineers, (2010) 1 S.C.C. 72; SEE ALSO India Household and Healthcare Ltd. v. LG Household & Healthcare Ltd., A.I.R. 2007 S.C. 1376.

[52] Abdul Kadir Shamsuddin Bubere v. Madhav Prabhakar Oak, (1962) 3 S.C.R. Supl. 702; SEE ALSO RS BACHAWAT, J., JUSTICE BACHAWAT'S LAW OF ARBITRATION & CONCILIATION 277 (Wadhwa & Co. 5th ed. 2005).

[53] 1 GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 720 (Walter Kluwer India 2010).

[54] MOOT PROPOSITION ¶ 8.

[55] MOOT PROPOSITION ¶ 3.

ERRONEOUS AND BAD IN LAW.

[¶ 29]The APPELLANT contends that the order of the Commission for directing investigation to the Director General (*hereinafter* 'DG') is erroneous and bad in law as it violates the fundamental rights and principles of natural justice enshrined under the Constitution. In furtherance of this, the order violates Art. 21 of the Constitution [**A**] and the order for directing investigation violates Art. 14 and principles of natural justice [**B**].

A. REGULATION 16, 18 AND 19 VIOLATES ART. 21 OF THE CONSTITUTION OF INDIA.

[¶ 30]In the *Maneka Gandhi case,*[56] it was held that a procedure must satisfy certain requisites in the sense of being fair and reasonable. The procedure cannot be arbitrary,[57] unfair[58] or unreasonable.[59] Art. 21[60] in its expansive meaning envisage a fair procedure[61] and therefore any law would be violative of Art. 21 if it is vague,[62] unfair or unreasonable.[63] It is submitted that Regulations 16, 18 and 19 of the Competition Commission of India (General) Regulations, 2009 (*hereinafter* 'Regulations') violate Art. 21 of the Constitution of India. Art. 21 mandates that there must be procedure established by law and the authority must conform to procedural due process.[64] The entire scheme of formation o*f prima facie* case under the concerned regulations is devoid of any due procedure.

[56] Maneka Gandhi v. Union of India, A.I.R. 1978 S.C. 597.

[57] Govind v. State of Madhya Pradesh, A.I.R. 1975 S.C. 1378.

[58] Jolly George Varghese v. Bank of Cochin, A.I.R. 1980 S.C. 470.

[59] State of Maharashtra v. Praful B. Desai, (2003) 4 S.C.C. 601; SEE ALSO DURGA DAS BASU, COMMENTARY ON THE CONSTITUTION OF INDIA 3153 (LexisNexis Butterworths Wadhwa Nagpur 8th ed, 2008).

[60] CONSTITUTION OF INDIA, 1950 art. 21.

[61] Ranjitsingh Brahmakeetsingh Sharma v. State of Maharashtra, (2005) 5 S.C.C. 294.

[62] State of M.P. v. Baldeo Prasad, (1961) 1 S.C.R. 970.

[63] Francis Coralie Mullin v. Union Territory, A.I.R. 1981 S.C. 786.

[64] V. Sriharan v. Union of India & Ors., A.I.R. 2014 S.C. 1368.

[¶ 31]Regulation 16 fails to specify any kind of procedure for formation of existence of *prima facie* case against the alleged enterprise. Further, Regulation 18 also fails to conform to the cardinal principle of Art. 21 which manifests that there must be a due procedure followed by law.[65] Regulation 18 does not specify any appropriate and due procedure to be taken up by the Commission while forming its *prima facie* case. The entire scheme of forming of *prima facie* opinion is unguided by any procedure. Hence, the Commission's order for directing investigation after existence of *prima facie* case is devoid of any procedure violating Art. 21 of the Constitution.

B. THE COMMISSION'S ORDER VIOLATE ART. 14 AND PRINCIPLES OF NATURAL JUSTICE.

[¶ 32]Art. 14 of the Constitution envisages that the decision making process should be transparent, fair and open.[66] Reasonableness and fairness is the very essence of Art. 14 of the Constitution.[67] Art. 14 also restrict the unguided or uncontrolled discretionary power of the administrative authority in the matter of application of law.[68] The requirement of giving hearing is a facet of the principles of natural justice and in the absence of such hearing, the procedure adopted by the concerned authority would be unreasonable and unfair thereby violating Article 14 of the Constitution.[69]

[¶ 33]Moreover, it has been held in the *Mahesh Chandra case*,[70] that the essential requirement of natural justice is reasonable opportunity to the person charged with, which in turn, means (a) a reasonable notice;[71] (b) an adequate notice;[72] (c) a fair consideration of the

[65] Ramlila Maidan Incident v. Home Secretary, Union of India, (2012) 5 S.C.C. 1.

[66] Dutta Associates P. Ltd. v. Indo Merchantiles P. Ltd., (1997) 1 S.C.C. 53.

[67] Delhi Development Authority v. Joint Action Committee, (2008) 2 S.C.C. 672.

[68] Municipal Committeee, Patiala v. Model Town Residents Assn., (2007) 8 S.C.C. 669.

[69] Maneka Gandhi v. Union of India, A.I.R. 1978 S.C. 597.

[70] Mahesh Chandra v. Regional manager, U.P. Financial Corporation, A.I.R. 1993 S.C. 935.

[71] Grindlays Bank Ltd. v. Central Government Industrial Tribunal, A.I.R. 1981 S.C. 606.

explanation;[73] and (d) passing of a speaking order.[74]

1. Section 36 of the Act mandates the Commission to adhere to the principle of Natural Justice.

[¶ 34] Section 36 of the Competition Act, 2002 casts an obligation upon the Commission that every functions of the Commission shall be guided by the principles of natural justice. The use of the word 'shall' by the legislature puts a mandatory obligation on the Commission to strictly adhere to the principles imbedded in Section 36. It is to be noted that where the statute has used the word 'shall' then strict interpretation must be given for all the purposes of the act.[75] Further, in the case of *Chartered Accountants vs. L.K. Ratna,*[76] it was held that if natural justice is violated at the first stage, the right of appeal is not so much a true right of appeal as a corrected initial hearing and instead of fair trial followed by appeal, the procedure is reduced to unfair trial.

[¶ 35] Hence, it is mandatory on the part of the Commission to strictly conform to the principle of natural justice while discharging its function in any manner. Therefore, Commission's order for directing investigation without giving any notice and opportunity of hearing amounts to violation of principle of natural justice.

2. The Commission failed to pass a reasoned and speaking Order vis-à-vis Section 19.

[¶ 36] This Court in the *Krishna Swami case*,[77] held that in consonance with the settled principles of administrative jurisprudence, the Commission is expected to record at least

[72] Raj Kishore Jha v. State of Bihar, (2003) 11 S.C.C. 519.

[73] Krishna Swami v. Union of India, A.I.R. 1993 S.C. 1407.

[74] Union of India v. Mohan Lal Capoor and Ors., A.I.R. 1974 S.C. 87.

[75] C.C.E.C and St, Vishakhapatnam v. Jocil Ltd., (2011) 1 S.C.C. 681.

[76] Institute of Chartered Accountants v. L.K. Ratna, A.I.R. 1987 S.C. 71; SEE ALSO 1 M.P. JAIN ET AL., PRINCIPLES OF ADMINISTRATIVE LAW 499 (Wadhwa & Co. Agra 6th ed. 2007).

[77] Krishna Swami v. Union of India, A.I.R. 1993 S.C. 1407.

some reason even while forming a *prima facie* view. Delivering reasoned orders is now regarded as one of the principles of natural justice[78] and every order passed by an authority must be backed by materials on which its conclusion is based.[79]

[¶ 37]In the present case, the Commission completely failed to state any reasons, which can manifest towards the abuse of grounds as mentioned under Section 19(4). Hence, Commission's failure to record any reason vis-à-vis Section 19(4) for the alleged contravention violates Article 14 of the Constitution.

3. Commission violated the principle of *Audi Alteram Partem.*

[¶ 38] Regulation 18 (2)[80] of the Competition Commission of India (General) Regulations, 2009 provides that a direction of investigation to the Director General shall be deemed to be the commencement of an Inquiry under Section 26 of the Act. [81] This Court held in *Automotive Tyre Manufacturers Association case*,[82] that when the interest and reputation of a person is likely to be affected then fair opportunity to hear the concerned party had to be granted. Similar view was adopted in the case of *Vallimayil Ammal v. The Commission of Inquiry.* [83]

[¶ 39]It is contended that the Commission did not provide a fair chance of hearing to the APPELLANT, which caused an adverse effect and prejudicially affected its right. Therefore, the Commission while forming a *prima facie* case and directing an investigation under Section 26(1) violated the principle of *Audi Alteram Partem.*

[78] Union of India v. International Trading Co., (2003) 5 S.C.C. 437.

[79] Vasant D. Bhavsar v. Bar Council of India, (1999) 1 S.C.C. 45.

[80] Competition Commission of India (General) Regulations, 2009, Regulation 18 (2).

[81] Grashim Industries Ltd. v. C.C.I., (2014) 119 C.L.A. 169 (Del.).

[82] Automotive Tyre Manufacturers Association v. The Designated Authority & Ors., (2011) 2 S.C.C. 258.

[83] Vallimayil Ammal v. The Commission of Inquiry, (1968) I.L.R. 188 (Mad.).

PRAYER

In light of the facts of the case, arguments advanced and authorities cited, it is humbly requested that this Honorable Court may be pleased to adjudge and declare-

1. That the Scheme of Arrangement as affected between Jeevani and Lifeline should be set aside.
2. That clause 2 of the Share Sale Agreement does not amount to an arbitration agreement and that the matter should be adjudicated by the Delhi High Court.
3. That the Commission's order for directing investigation is erroneous and bad in law.

Any order or further relief or direction, which the Honorable Court may deem fit and proper.

All of which is most humbly prayed

Sd./-

Counsel for the Appellants.