TEAM CODE: B1

BEFORE THE HON'BLESUPREME COURT OF INDIA

Special Leave Petition No.. **……..** /2014

The Appeal Concerning the challenge to the orders passed by Delhi High Court in cases related to scheme of arrangement, arbitration and abuse of dominance respectively

FOREIGN LENDERS APPELLANT

VERSUS

LIFELINE LIMITED RESPONDENT

AND

LIFELINE LIMITED APPELLANT

VERSUS

PROMOTERS RESPONDENT

AND

SWASTH LIFE LIMITED APPELLANT

VERSUS

LIFELINE LIMITED & CCI RESPONDENT

MEMORANDUM ON BEHALF OF APPELLANT

DRAWN AND DRAFTED BY COUNSELS FOR APPELLANT

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STATEMENT OF JURISDICTION

THE HON'BLESUPREME COURT OF INDIA EXERCISES JURISDICTION TO HEAR AND ADJUDICATE THE MATTER UNDER ARTICLE 136 OF THE CONSTITUTION OF INDIA, 1950.

THE HON'BLE COURT HAS THE AUTHORITY TO GRANT SPECIAL LEAVE AGAINST THE ORDER OF HON'BLE HIGH COURT OF DELHI UNDER ART. 136 OF THE CONSTITUTION OF INDIA. THE PROVISION UNDER WHICH THE PETITIONER HAS APPROACHED THE HON'BLE COURT IS READ HEREIN UNDER AS:

ARTICLE 136 – SPECIAL LEAVE TO APPEAL BY THE SUPREME COURT

(1) NOTWITHSTANDING ANYTHING IN THIS CHAPTER, THE SUPREME COURT MAY, IN ITS DISCRETION, GRANT SPECIAL LEAVE TO APPEAL FROM ANY JUDGMENT, DECREE, DETERMINATION, SENTENCE OR ORDER IN ANY CAUSE OR MATTER PASSED OR MADE BY ANY COURT OR TRIBUNAL IN THE TERRITORY OF INDIA.

(2) NOTHING IN CLAUSE (1) SHALL APPLY TO ANY JUDGMENT, DETERMINATION, SENTENCE OR ORDER PASSED OR MADE BY ANY COURT OR TRIBUNAL CONSTITUTED BY OR UNDER ANY LAW RELATING TO ARMED FORCES.

STATEMENT OF FACTS

1. Jeevani Limited ("**Jeevani**") and Lifeline Limited ("**Lifeline**") are listed public companies. On January 2012, it was decided that Jeevani will completely merge into Lifeline. Thereafter, a "Scheme of Arrangement' (the "**Scheme**") for Jeevani was prepared. On 5th July 2013, the Scheme was approved by the Hon'ble Delhi High Court and later on, Lifeline got the approval of Hon'ble Bombay High Court for the scheme.
2. Certain creditors of Jeevani, mainly foreign banks (**"foreign lenders"**) had jointly, invoked arbitration proceedings before a foreign arbitral tribunal constituted in Hong Kong, against Jeevani. On 27th July 2010, foreign arbitral award was passed in favour of the foreign lenders. But the award is yet to be enforced. In 2013, the foreign lenders approached the Hon'ble Delhi High Court for recall of order dated 5th July 2013. This order is now pending before the Supreme Court of India.
3. After the merger, the newly merged Lifeline received notices from the US Food and Drug Administration (the "**FDA**") for providing drugs of below par quality. Lifeline filed a suit against the Promoters. The matter is pending before the Supreme Court of India.
4. Lifeline decided to introduce a new life saving drug, 'Novel.' But, Swasth Life Limited ("**Swasth**") obtained an interim injunction order against Lifeline. Thereafter Lifeline filed an application before Competition Commission of India (the "**CCI**") alleging that Swasth for abuse of dominant position Thereafter, CCI decided to investigate the matter. Swasth being aggrieved by the Order of the CCI filed a writ petition in the Delhi High Court. After dismissal of appeal in Delhi High Court, Swasth has come before the Supreme Court. And Supreme Court has tagged all the matters together for hearing.

STATEMENT OF ISSUES

I. WHETHER THE SCHEME OF ARRANGEMENT WAS VALID?

II. WHETHER THE AGREEMENT CONTAINS AN ARBITRATION CLAUSE?

III. WHETHER SWASTH HAS ABUSED ITS DOMINANT POSITION?

SUMMARY OF ARGUMENTS

1. **WHETHER THE SCHEME OF ARRANGEMENT SHOULD BE SET ASIDE?**

   It is submitted that the scheme of arrangement should be set aside because, firstly foreign lenders are the creditors of the company. Secondly, foreign lenders constitute the separate class of the creditors, thus the notice of creditors meeting should have been served to them.

2. **WHETHER THERE EXISTS ARBITRATION CLAUSE IN THE AGREEMENT BETWEEN LIFELINE LIMITED AND PROMOTERS OF THE ERSTWHILE JEEVANI LIMITED?**

   It is humbly submitted that the agreement between Lifeline and the Promoters of the erstwhile Jeevani Limited doesn't have an arbitration clause, and, the matter can only be tried in a civil court because it constitutes serious issues of fraud.

3. **WHETHER SWASTH LIFE LIMITED HAS ABUSED ITS DOMINANCE?**

   It is humbly submitted that the Swasth has not abused its dominance in the relevant market and the CCI's order for investigation was bad in law.

ARGUMENTS ADVANCED

ISSUE: 1: WHETHER THE SCHEME OF ARRANGEMENT SHOULD BE SET ASIDE?

1. It is humbly submitted before the Hon'ble Court that the scheme approved by Hon'ble Company Judge shall be set aside as the foreign lenders did not receive the notice of the creditors meeting[1] and by the virtue of being the arbitral award holders they have a claim against the company, thereby notice should have been served to them. Also, they constituted separate class of creditors, thereby a separate meeting should have been held for them.

1.1 FOREIGN LENDERS ARE CREDITORS OF THE COMPANY.

2. A creditor of the company is a person to whom the company owes a debt.[2] The debt could be existing or contingent.[3] Creditors means one who gives credit for money or goods one to whom debt is owing[4] and also includes a decree holder[5] which clearly indicates that foreign lenders have a claim against the company and thus they are the creditors of the company.

1.1.1.Foreign Lenders have a claim against the company.

3. Since, the foreign lenders have yet not enforced the arbitral award they have a claim against the company. Supreme Court in the case of *Seksaria Cotton Mills Ltd.* v. *A.E Naik and Others*[6], held: "It is clear that the word "creditor" in section 474 includes claimant, and according to

[1] Moot Proposition ¶ 6.

[2] K.R SAMPATH,., LAW AND PROCEDURES ON CORPORATE RESTRUCTURE LEADING TO MERGERS/AMALGAMATIONS, TAKEOVER, JOINT VENTURE, LLPS AND CORPORATE RESTRUCTURE 479, (Snow White Publications Pvt. Ltd. 8th ed.2012).

[3] Seksaria Cotton Mills Ltd. v. A.E Naik and Others, (1967) 37 Com Cas 656.

[4] Bangladesh Road Transport Corporation v. M/s Ashraf Jute Mills ltd. (1990) 10BLD 344.

[5] Jitendra nath Singh v. The Official Liquidator and Ors., (2013) 1SCC462;Jugal Kishore Saraf v. Raw Cotton Co. Ltd., AIR 1955 Bom 77; Provincial Insolvency Act, 1929, §2 (1)(a).

[6] *Supra* 3.

section 528 a claimant may have a claim which is present or future."

4. Furthermore, it is contended that operation of any provisions of law shall not bar the foreign lenders from claiming their rights as creditor as it has been held in a case by this court that "creditor may apply it at his discretion to any lawful debt actually due and payable to him from the debtor, whether its recovery is or is not barred by the law in force for the time being as to the limitation of suits."[7]

1.1.2. Notice of the Creditors Meeting should have been served to the Foreign Lenders.

5. As mandated under Companies (court) Rules, 1959, notice of the meeting should be given to the creditors and/or members, or to the members or creditors of any class, individually by the Director or by any person as the court may direct[8], as well as along with individual notices, notice of the meeting may also be published in the newspapers.[9]
6. It has been held by this Hon'ble court in a case that the sanctioning court has to see to that all the requisite statutory procedure for supporting such a scheme has been complied with and that the requisite meeting as contemplated by Section 391(1)(a) have been held.[10]
7. Sub-section 2 of the Section 391 of the Companies Act, 1956 requires that the resolution approving the scheme of arrangement should be passed by majority in number representing 3/4th in value of the creditors or class of creditors and/or members of class of members as the case may be. If the resolution granting approval to the scheme of arrangement is passed by more than 3/4 in value of the creditors but, is not carried by the majority in number of the creditors, the scheme would not be approved by the court.

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[7] M/s. Industrial Credit and Development Syndicate Now Called I.C.D.S. Ltd. v. Smt. Smithaben H. Patel and Ors., AIR1999SC1036.

[8] Companies (Court) Rules, Rule 73 (1959).

[9] Companies (Court) Rules, Rule 74 (1959).

[10] Miheer H Mafatlal v. Mafatlal Industries Ltd., (1996) 1 SCC 579.

8. In the instant case the Hon'ble Company Judge ordered for the convening of creditors meeting, however, to the derogation of orders of Hon'ble Company Judge as well as to the mandate of Companies (court) rules, no notice was sent to the Foreign Lenders.
9. In the case of *In Re: Vikrant Tyres Limited* has observed that "in the event such a shareholder or creditor is not served with personal notice, he can appear in such a meeting by virtue of the said meeting having been made known to him by public notice"[11], but in the case at hand the notice of meeting was published in the local English language newspaper and local language newspaper[12], making it wholesomely inaccessible to the foreign lenders, and thus they would not have in any case got the notice of the creditors meeting.
10. It is submitted that company has neither sent notice of meeting of the creditors to foreign lenders nor has given wide publication to the advertisement of notice, and the scheme was apparently passed by majority. Foreign lenders are thus kept in the dark of the proposed scheme of arrangement which is not in consonance with the object of Sub-section 2 of Section391 of the Act which ordinarily requires approval by majority in number of the creditors representing more than 3/4th in value of the credit.[13]
11. All these circumstances clearly indicate that the Company never had the intention to include foreign lenders in the creditors meeting and thereby excluding them from the creditors meeting.

1.2.FOREIGN LENDERS CONSTITUTE THE SEPARATE CLASS OF CREDITORS.

12. Section 391 of the Companies Act, refers a scheme of arrangement between a company and a 'class of members' or a creditors and 'class of creditors'[14]. Different creditors in a company may have different rights. Thus "class must be confined to those whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common

[11] In Re: Vikrant Tyres Limited, [2005]126 Comp Cas288 (Kar).

[12] Moot Proposition ¶ 5.

[13] The Companies Act, §391 (2) (1956).

[14] The Companies Act, §391 (1)(c) (1956).

interest."[15] It is a question of looking at the rights of those involved and not their personal interests.[16]

13. In the case of *Sovereign Life Assurance v. Dodd*[17]it was observed that the creditors whose policies had matured and who had crystallized claim would form a different sub-class from the creditors whose claims were not crystallized. In the instant case the rights and claims of the foreign lenders is entirely different from any other class as they have arbitral award for the repayment of debt against the company and thus it can be said that their claim has been crystallized. Furthermore, it has been held in the case of *In re: SIEL Ltd*that if the creditors do not have commonality of interest and if their rights and interests under a compromise would have different effect, they are to be separately treated and cannot be included into one class.[18] Furthermore, it has been held by this Hon'ble court that the court does not for itself decide what class of creditors or members should be made parties to the scheme. This is for the company to decide.[19] Thus it was the onus of the company to mention in the scheme of arrangement for separate class of creditors, i.e., the foreign lenders.
14. Thereby it is contended by relying on the judgment of *SBI v. Alston Power Boilers Ltd.*[20], that a separate meeting of the foreign shareholders shall be held. As it was observed in the case that unless a separate and different type of scheme of compromise is offered to a sub-class or a class of creditors or shareholders otherwise equally circumscribed by the class no separate meeting of such sub-class of the main class of members or creditors is required to be convened.[21]

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[15] Sovereign Life Assurance Co, v. Dodd1852 2 QB 573.

[16]STEPHEN GIRVIN, SANDRA FRISBY & ALASTAIR HUDSON, CHARLESWORTH'S COMPANY LAW 774 (18th ed.2011).

[17] *Supra* 15.

[18] In Re: SIELLtd, (2003) 47 SCL 631.

[19] *Supra* 3.

[20]SBI v. Alston Power Boilers Ltd.,(2003) 116 Com Cas (Bom).

[21]*Id*.

1.3.SCHEME SHOULD BE SET ASIDE.

15. As held in the case of *In Re: Maneckchowk & Ahmedabad Mfg. Co. Ltd.* "if the creditors and members are not properly classified and if the meeting of the proper class of creditors and members is not separately held, the scheme approved at such meeting cannot be sanctioned"[22] Furthermore, as it has already been submitted that the foreign lenders are Creditors of the Company[23] and they also constitute a separate class of creditors[24] and in addition to this they should have been served with the notice of the meeting of creditors[25], thus the scheme should be set aside.

ISSUE: 2: WHETHER THERE EXISTS ANY ARBITRATION CLAUSE IN THE AGREEMENT BETWEEN LIFELINE LIMITED AND PROMOTERS OF ERSTWHILE JEEVANI LIMITED?

16. It is humbly submitted before the Hon'ble Court that the Share Sale Agreement (herein after referred as 'the Agreement') between the promoters of erstwhile Jeevani and Lifeline doesn't have an arbitration clause. Moreover, it is also contended the Delhi High Court does have jurisdiction over the subject matter.

2.1.THE AGREEMENT DOESN'T HAVE AN ARBITRATION CLAUSE.

17. It is humbly submitted before the Hon'ble Apex Court that an arbitration agreement is not required to be in particular form.[26] What requires to be ascertained is whether the parties have agreed that if the disputes arise between them in the respect of subject matter of the contract, such dispute shall be referred to the arbitration, and then such an agreement would spell out to

[22] In Re: Maneckchowk & Ahmedabad Mfg. Co. Ltd. [1970] 40 Comp Case 819(Guj).

[23] *Supra* 3.

[24] *Supra* 15.

[25] *Supra* 8.

[26] Smt. Rukmanibai Gupta v. Collector Jabalpur And Ors., AIR 1981 SC 479.

be an arbitration agreement.[27] In this regard, it is contended that disputes arise between Lifeline and Promoters are not referred to the Arbitration.

18. According to Section 7 of the Arbitration and Conciliation Act, 1996, an arbitration agreement is defined as an agreement by the parties to submit to the arbitration all or certain disputes which have arisen or may arise.[28] "Thus dispute has to be submitted to an arbitration tribunal.
19. Usually, under the arbitration clause, disputes relating to or arising out or in connection with the contract or in relating or in relating to any matter connected there with, shall be referred to arbitration. But, an arbitration clause stipulates that there should be some dispute. And, it is the duty of the Court to find out the nature of the agreement and whether it falls under the ambit of arbitration[29].
20. In the instance case, disputes touching upon subject matter of the agreement were made subject to jurisdiction of Delhi High Court[30] and the same has not been referred to the empowered committee. Moreover, agreement to refer dispute to arbitration must be expressly or impliedly spelt out from the clause.[31]. But in the instant case, the agreement neither expressly nor impliedly spell out that dispute arising out from the agreement is referable to arbitration. Thus, it is humbly submitted before this Hon'ble Court that the agreement doesn't have an arbitration clause.

2.1.1.The dispute is not arbitrable as it involves serious issues of Fraud.

21. Arguendo, it is humbly submitted before this Hon'ble Court that the settled position in law is that when serious allegations of fraud in a contract, are levelled against a party, the matter can

[27] *Id*; Union of India v. A.L. Rallia Ram, AIR 1963 SC 1685; Chief Conservator of Forests v. Ratan Singh Hans, AIR 1967 SC 166.

[28] M/s. Premlaxmi and Co. v. Trafalgar House Construction India Ltd., 1998(4) ALL MR412.

[29]Salecha Cables (P) Ltd v HPSEB,1995 AIHC 762 (HP).

[30]Moot Proposition ¶ 9.

[31]State Of Orissa and Anr. v. Damodar Das,(1996) 2 SCC 216.

only be decided by a civil court.[32] In such a situation the dispute is not referred to the arbitral tribunal as the very existence of the agreement comes into question and the matter of fraud involves production of evidences which can only be examined by a civil court. In the instant case, there was fraud and misrepresentation committed by the promoters against Lifeline. The promoters concealed the fact of pending investigation with the mala fide intention to ensure that they get an inflated price for their share.[33].

22. Thus it is submitted that even if there exists an arbitration clause, the same is having insufficient powers to deal with the instant case. Hence, Lifeline is bound to approach Civil Court.

2.2. THE MATTER CAN ONLY BE TRIED BY A CIVIL COURT.

23. In the case of *N. Radhakrishnan* v. *Maestro Engineers and Ors.*[34] the Hon'ble Supreme Court held that where a dispute concerns serious allegations pertaining to fraud, such dispute cannot be referred to arbitration. And the Court didn't allow the matter in furtherance of justice to be arbitrated due to involvement of serious issues of fraud.

24. In the case of *H.G. Oomor Sait & Anr* v. *O. Aslam Sait*[35] had reiterated that the short-comings and deficiencies of the enquiry before an arbitrator are well known. The nature of the enquiry before an arbitrator is summary and Rules of procedure and evidence are not binding. The Arbitrator need not be even a law-knowing person. That is the reason why over a century, Courts have repeatedly held that in cases where substantial questions of law arise for consideration or issues which require serious consideration of evidence relating to fraud and misrepresentation etc. are involved, such cases are best left to the civil court and that the Arbitrator will not be competent to go into the said issues.

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[32] Ivory Properties and Hotels Pvt. Ltd. v. Nusli Neville Wadia 2011(2) ARBLR479 (Bom).

[33] Moot Proposition ¶ 8.

[34] N. Radhakrishnan v. Maestro Engineers and Ors.,2009(6)ALD130(SC).

[35] H.G. Oomor Sait & Another v. O. Aslam Sait, (2001) 2 MLJ 672.

25. Thus, it is humbly submitted before this Hon'ble court that only civil court can entertain the present matter and the agreement is not having an arbitration clause.

2.2.1.Hon'ble High Court of Delhi has Jurisdiction over the Issue.

26. It is humbly submitted before this Hon'ble Court that Delhi High Court does have jurisdiction over the instant case. It is clearly written in the agreement[36] that Delhi civil courts do have jurisdiction over the disputes arise between the promoters and Lifeline.

27. The judicial authorities can decide on jurisdiction[37]. Thus, Hon'ble Delhi High Court can decide its own jurisdiction in this subject matter. And an agreement can't take away the power of any civil court to decide whether it has jurisdiction or not.

28. It was held in *Ivory Properties and Hotels Pvt. Ltd.* v. *Nusli Neville Wadia*[38] that the case constituted serious triable issues should be determined before civil court. And jurisdiction of the Court to award compensation in case of breach of contract is unqualified[39]. Thus it is humbly submitted that Delhi High Court has jurisdiction over this matter.

ISSUE: 3:WHETHER SWASTH LIFE LIMITED HAS ABUSED ITS DOMINANCE?

29. It is humbly submitted before this Hon'ble Apex Court that Swasth Life Limited (herein after referred as 'Swasth') has not abused its dominance by bad faith litigation. And the order passed by Competition Commission of India (herein after referred as 'CCI') directing Director General (herein after referred as 'DG') to investigate this case was bad in law.

3.1.SWASTH HAS DOMINANT POSITION IN THE RELEVANT MARKET

30. It is humbly submitted that Swasth enjoys a dominant position in the relevant market which enables it to prevent effective competition being maintained in the relevant market by giving it

[36]Moot Proposition ¶ 9.

[37] Sudarshan Chopra and Ors. v. Company Law Board And Ors., 2004 (2) ARBLR 241 P H, (2004) 137 PLR 12, 2004 52 SCL 429.

[38] Ivory Properties and Hotels Pvt. Ltd. v. Nusli Neville Wadia 2011(2)ARBLR479 (Bom).

[39]Fateh Chand v. Balkishan Das, 1963 AIR 1405, 1964 SCR (1) 515.

the power to behave to an appreciable extent independently of its competitors, and consumers.[40] Ascertaining of dominance involves a two stage procedure. The first step involves the determination of relevant market where the firm operates while the second step involves the assessment of the way in which an enterprise enjoys dominance[41].

3.1.1.Swasth Operates in the Relevant Market.

31. Section 2(r) of the Competition Act, 2002, defines relevant market as the market which may be determined by CCI with reference to the relevant product market or relevant geographic market or with reference to both the markets. It is submitted that Swasth operated in the relevant product market.

3.1.1.1. Relevant Product Market is the Pharmaceutical Market.

32. "Relevant product market" means a market comprising all those products or services which are regarded as interchangeable or substitutable by the consumer, by reason of characteristics of the products or services, their prices and intended use.[42] It was held in various cases of the European Court of Justice, that "Where the goods or services can be regarded as interchangeable, they are within the same product market."[43] The same was justified wherein the court held that 'the relevant product market includes those commodities which are reasonably interchangeable by consumers for the same purpose'.[44]

33. The existence of relevant product market for an enterprise is examined according to the factors laid down under Section 19(7) of the Competition Act, 2002, which, *inter alia*, includes end-

[40] United Brands v. Commission, [1978] ECR 207.

[41] RICHARD WHISH, COMPETITION LAW 174 (6th Ed. Oxford Press Publication 2009).

[42] Competition Act, 2002, Act 12 of 2003, § 2(t).

[43] RICHARD WHISH, COMPETITION LAW 174 (6th Ed. Oxford Press Publication 2009).

[44]Brown Shoe v. United States, 8 L.Ed.2d 510, (S.Ct. 1961), United States v. E.I. du Pont de Nemours & Co. 100 6 L.Ed. 1264 (S.Ct., 1955).

use of goods.[45] The instant case satisfies the requirement of Section 19(7) (a) of the Competition Act, 2002 and i.e. end–use of product.

34. Moreover, in the case of *United States* v. *Grinell Corp.*[46], the court held that 'relevant market may be such that in which close substitute products are available.' Also in the case of *M/s. Santuka Associates Pvt. Ltd.* v. *All India Organization of Chemists and Druggists & Ors.*[47], it was held that a market in which medicines are being sold comes under the scope of relevant product market.

3.1.2.Swasth has Dominant Position in the Relevant Product Market.

35. It is humbly submitted that Swasth enjoys a dominant position in the relevant market which enables it to prevent effective competition being maintained in the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, and customers.[48] Under Section 19 of the Competition Act, 2002 factors have been given to determine whether an enterprise enjoys a dominant position or not.

3.1.2.1. Sale of the Enterprise.

36. Section 19 (4) (e) of the Competition Act, 2002, inter alia, talks about the sale of enterprise as a factor to determine whether an enterprise enjoys a dominant position or not. Swasth manufactures and sells 'Inventive,' which is the 'premier lifesaving drug' in the market. Moreover, after the interim injunction, Swasth was able to get a substantial control over the relevant market[49]. It shows that Swasth was having large sale in the relevant market.

3.1.2.2. Dependence of consumers on the Enterprise.

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[45] Neeraj Tiwari, *Merger under the Regime of Competition Law: A Comparative Study of Indian Legal Framework with EC and UK*, 23, Bond Law Review, 135 (2011).

[46] United States v. Grinell Corp. 305 F. Supp. 585 (S.D.N.Y., 1966), 384 US 563 (1966).

[47] M/s. Santuka Associates Pvt. Ltd.v. All India Organization of Chemists and Druggists & Ors., 2013CompLR223(CCI).

[48] United Brands v. Commission, [1978] ECR 207.

[49]Moot Proposition ¶ 11.

37. Under Section 19 (4) (f) of the Aforesaid Act, dependence of consumers on the enterprise has been mentioned as a factor to determine whether an enterprise enjoys a dominant position or not. It is submitted that Swasth manufactures and sells the premier lifesaving drug in the relevant product market. Moreover, after the grant of interim injunction, Swasth was able to corner the large chunk of the relevant market. And high sale indicates the dependence of consumers[50]. Thus, these facts show that consumers have been using or consuming the lifesaving drugs of Swasth. Hence, dependence of consumer on the Swasth is clear.

3.2.SWASTH HAS NOT ABUSED ITS DOMINANCE IN THE RELEVANT MARKET

38. It is submitted before the Hon'ble Court that Swasth has not abused its dominance position. Whatever has been done by Swasth was accordance with law and Swasth had rights to do so.

3.2.1.Swasth was the rightful owner of the R&D Projects and IPRs of Jeevani

39. It is submitted that Swasth got assigned absolute rights to few developed and completed R&D projects and IPRs of Jeevani[51]. The term 'assignment' means transfer of property[52]. What assignment is to intangible property, sale is to tangible property[53].The assignee becomes the owner of the patent and has the same rights as the original patentee had[54].

3.2.2.No violation of Section 4 (2) (c) of the Competition Act, 2002.

40. It is submitted that Swasth has not violated Section(2) (c) of Competition Act, 2002. Swasth was just protecting its IPR and infringement of its patent product and Swasth was entitled to

[50]M/s Esys Information Technologies Pvt. Ltd. v. Intel Corporation and others, Competition Commission of India, Case no. 48 of 2011.

[51]*Ibid.*

[52]Bostrom v. Bostrom, 60 N.D. 792, 236 N.W. 732, 734.

[53]RAMAN MITTAL, LICENSING INTELLECTUAL PROPERTY LAW AND MANAGEMENT (1st ed. Satyam Law International) (2011).

[54]*Ibid.*

file a suit against the infringement of its product before the Court of law[55].

41. In addition to this, it is submitted that the rights of patentee are negative rights which are enforceable at the instance of the patent holder[56]. Moreover, if Swasth wanted to create restrictions for Lifeline, then it would never withdraw its case, but Swasth did the opposite and withdrew the case[57]. Thus it is clear that Swasth has not indulged in a practice which restricts the entry of Lifeline in the relevant market.

3.2.3.There has been No Bad Faith Litigation by Swasth.

42. It is submitted that Swasth has not indulged in Bad Faith Litigation. Swasth was just exercising its rights. Bad Faith Litigation constitutes an anticompetitive act and is not merely legal harassment for personal motives[58]. In this case, Swasth has not committed any anticompetitive act.

43. Being big is not bad[59]. In the case of *National Research Development Corporation of India* v. *Delhi Cloth and General Mills Co. Ltd*.[60]It was held that the person being assignee of a patent has 'locus standi' to institute a suit for infringement of patent. Swasth was the rightful patentee of Inventive[61] and thus it can prevent third party to make, sell or offer to sell in the market[62].

44. In the case of *McNeil-ppc, inc*. v. *L. Perrigo Company and Perrigo Company*[63], it was held that bad faith litigation includes a case when a patentee initiates litigation on a patent he knows is

[55] National Research Development Corporation of India v. Delhi Cloth and General Mills Co. Ltd., AIR 1980 Del. 132.

[56] Bayer Corporation & Another v. Union of India, 2010 (43) PTC 12 (Del.) (DB).

[57]Moot Proposition ¶ 11.

[58] Albert Neumann, Et Al., Appellants, v. The Reinforced Earth Company,786 F.2d 424.

[59] Schott Glass India Pvt. Ltd v. CCI & Kapoor Glass Private Limited, COMPAT Case No. 91/2012.

[60]*Supra* 55.

[61] Moot Proposition ¶ 11.

[62] Patent Act, 1970, § 48.

[63] McNeil-ppc, inc. v. L. Perrigo Company and Perrigo Company, 337 F.3d 1362.

invalid or is not infringed. In the instant case, there is a case of infringement of its rights and interim injunction by court shows that there was a prima facie case of infringement of IPR[64]. It is a settled principle that an injunction can be obtained to restrain sale of a patent product by third party who has no permission from the patentee[65]. Hence, it is contended that Swasth had not abused its dominance and it was not indulged in bad faith litigation.

3.3.CCI'S ORDER FOR INVESTIGATION WAS BAD IN LAW.

45. CCI's order for directing investigation was bad in law as Swasth is entitled to protect its IPR can't be held, even prima facie, to be abusing its dominance. Swasth is entitled to sue Lifeline to protect the infringement of its IPRs[66]. It is submitted that CCI's order was bad in law because it is a 'subjective satisfaction' of the Commission to form a prima facie case[67] and the same must be based upon some material on the basis of which such opinion could reasonably be formed. And while forming a prima facie case, the relevant consideration is whether on the evidence laid it is possible to arrive at the conclusion in question[68].

46. But in this case, CCI has ignored the rights of Swasth and made a prima facie case in a hush which is not based upon any substantial material. Thus, it is submitted that the order is bad in law and Swasth can protect its IPRs.

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[64] Bajaj AutoLtd. v. TVS Motor Company Ltd., 2007 (34) PTC 444 (Del); Wockhardt Ltd. v. Hetero Drugs ltd. & Others, 2006 (32) PTC 65 (Mad).

[65] Kalman v. PCL Packaging (UK) Ltd., (1982) FSR 406.

[66] *Supra* 55.

[67] Dr. Jayanti Dharma Teja v. Secretary Government of India, (1984) 148 ITR 316 (AP).

[68] National Tobacoo Co. v. Fourth Industrial Tribunal, AIR 1960 Cal. 249.

PRAYER

Wherefore, in the light of the authorities cited, questions presented and arguments advanced, it is most humbly pleaded before the Hon'ble Court that this Court adjudge in the interest of investors and in order to protect the integrity of the securities market and declare that:

1. The Scheme of Agreement was not valid and set aside the order of the Delhi High Court.
2. That there is Arbitration Clause in the Agreement and sustain the order of the Division Bench of Delhi High Court.
3. That Swasth has not abused its dominant position and set aside the order of Competition Commission of India.

Or, issue any other suitable order or direction, which this Hon'ble Court may deem fit and proper in the highest interest of justice, equity and good conscience.

All of which is respectfully affirmed and submitted

Sd/-

Counsels for the Appellant(s)