**TEAM CODE: E**

BEFORE THE HONOURABLE SUPREME COURT

OF INDIA

Civil Appeal No. _____ Of 2014

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UNDER SECTION 109 OF THE CODE OF CIVIL PROCEDURE, 1908 READ WITH ORDER XLVII RULE 5 OF THE SUPREME COURT RULES, 1966.

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FOREIGN LENDERS ……APPELLANT

v.

LIFELINE LIMITED ……RESPONDENT

AND

LIFELINE LIMITED……..APPELLANT

v.

PROMOTERS……RESPONDENT

AND

SWASTH LIFE LIMITED…….....APPELLANT

v.

COMPETITION COMMISSION OF INDIA AND LIFELINE LIMITED...RESPONDENT

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WRITTEN SUBMISSIONS ON BEHALF OF THE APPELLANT

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# STATEMENT OF JURISDICTION

The Appellant have come under an appeal to the Supreme Court pursuant to Section 109 of the Code of Civil Procedure 1908.

Section 109 reads *"When appeals lie to the Supreme Court— Subject to the provisions in Chapter IV of Part V of the Constitution and such rules as may, from time to time, be made by the Supreme Court regarding appeals from the Courts of India, and to the provisions hereinafter contained, an appeal shall lie to the Supreme Court from any judgment, decree or final order in a civil proceeding of a High Court, if the High Court certifies-(i) that the case involves a substantial question of Law of general importance; and(ii) that in the opinion of the High Court the said question needs to be decided by the Supreme Court."*

The Hon'ble Supreme Court in the instant case has tagged the following three appeals using its inherent powers under Order XLVII Rule 5 of The Supreme Court Rules 1966 at the requests of the counsel.

*Rule 5 reads "the Court may at any time either on its own motion or on the application of any Party, order that the appeals be consolidated"*

*"Unless otherwise ordered by this Court the liability of the Parties to pay separate Court fees shall not be affected by any order for consolidation"*

***Thus, the Court has the jurisdiction to hear the matter and adjudicate accordingly.***

# STATEMENT OF FACTS

I. Jeevani Limited is one of the leading market players in the pharmaceutical industry whereas Lifeline Limited is a popular Company in the Indian market as a major producer of food products.

II. Lifeline approached Jeevani for a possible partnership to venture into the pharmaceutical sector, thereafter both Companies decided to amalgamate whereby it was decided that Jeevani would completely merge into Lifeline. Both the Companies on 30th March 2012 approached the Delhi High Court to get the Scheme approved, subsequently the Court ordered for a meeting of creditors to be convened and Jeevani accordingly issued notices for the same. The Scheme was approved by a vote of majority in the meeting consequently the Delhi High Court also approved the Scheme on 5th July 2013. It was also decided that the three Promoters of Jeevani who were also majority stakeholders in the Company would sell their entire promoter shareholding (18% shares) in Jeevani to Lifeline. This sale of stake was affected by a 'separate sale agreement.'

III. Prior to this, Certain foreign banks with whom Jeevani had entered into an agreement to provide financial assistance invoked arbitration proceedings before a foreign arbitration tribunal constituted in Hong Kong .The arbitral award was passed in favour of the banks on 27th July 2012. In early August 2013 the foreign lenders made an application before the Delhi High Court for recall of the order passed on 5th July and setting aside the Scheme.

IV. The Hon'ble Company Judge however dismissed the application, against this order the foreign lenders appealed to the Division Bench of the Delhi High Court which

also dismissed the appeal. This order has been challenged before the Supreme Court of India.

V. The sale agreement required the Parties to make specific representations regarding disclosure of information, which may be vital to the transaction. The agreement contained a clause that the disputes between the Parties would be referred to an empowered committee of three Executives of Lifeline. After the merger, Lifeline unearthed the fact that a FDA investigation on drugs produced by Jeevani at its plants in India had commenced much before the merger took place. Accordingly Lifeline filed a suit against the Promoters for damages arising out of breach of contract. The Hon'ble Singe Judge held that the clause could not be regarded as an arbitration clause whereas on appeal by the Promoters, the Division Bench took a contrary view to this. Aggrieved by this order of the Division Bench, Lifeline has approached the Supreme Court of India.

VI. Soon after the merger, to increase its profitability, Lifeline decided to introduce a new life saving drug by the name of "Novel" into the market. This drug was published to be considerably cheaper than other life saving drugs in the market including the drug "Inventive" which was manufactured by Swasth.

VII. Before lifeline could launch its drug, Swasth filed a suit for infringement of its IPRs in the Delhi High Court. Swasth was hence able to obtain an interim injunction against Lifeline. After this, Swasth launched a similar cost effective drug and cornered the market and subsequently withdrew the case.

VIII. Consequently Lifeline approached CCI alleging that Swasth abused its dominance by way of vexatious litigation. The CCI further passed an order directing the DG to investigate. Aggrieved by the order of the CCI Swasth filed a writ petition in the Delhi High Court to establish that CCI's investigation was bad in Law. The Delhi High Court dismissed the petition, subsequently even the Division Bench dismissed the appeal, and now Swasth has appealed before the Supreme Court of India.

# STATEMENT OF ISSUES

I. WHETHER THE SCHEME SANCTIONED BY THE HON'BLE DELHI HIGH COURT ON 5TH JULY 2013 SHOULD BE SET ASIDE?

II. WHETHER THE HON'BLE DELHI HIGH COURT HAS THE JURISDICTION TO HEAR THE SUIT FILED BY LIFELINE FOR BREACH OF CONTRACT?

III. WHETHER THIS COURT SHOULD ENTERTAIN THE APPEAL AGAINST THE DECISION OF THE HIGH COURT AND WHETHER THERE HAS BEEN ABUSE OF DOMINANCE BY SWASTH?

# SUMMARY OF ARGUMENTS

## I. WHETHER THE SCHEME SANCTIONED BY THE HON'BLE DELHI HIGH COURT ON 5TH JULY 2013 SHOULD BE SET ASIDE?

It is humbly submitted by the Appellant that the order dated 5th July, 2013 should be recalled and the Scheme sanctioned should be set aside because the Company has not fulfilled its statutory obligations. Moreover, it has concealed material facts from the Hon'ble Court which is one of the pertinent grounds to set aside the Scheme.

## II. WHETHER THE HON'BLE DELHI HIGH COURT HAS THE JURISDICTION TO HEAR THE SUIT FILED BY LIFELINE FOR BREACH OF CONTRACT?

It is submitted by the Appellant that the Division Bench of the Delhi High Court had erred in Law by ruling that the suit filed for the breach of contract by Lifeline should be arbitrated by the Arbitration Tribunal because as per the Law laid down by the Supreme Court in various cases the Arbitration Tribunal is not Competent to arbitrate on issues of fraud and misrepresentation which the present suit concerns.

## III. WHETHER THIS COURT SHOULD ENTERTAIN THE APPEAL AGAINST THE DECISION OF THE HIGH COURT AND IF THERE HAS BEEN ABUSE OF DOMINANCE BY SWASTH?

It is contended by the Appellant that the Division Bench of the Delhi High Court erred in Law in dismissing the appeal filed by Sawasth primarily because the order of the Competition Commission to investigate Swasth was bad in Law and should be set aside because Swasth does not hold a dominant position in the market. Moreover, even assuming that it had advantages over the other firms there was no abuse of dominance on the Part of Swasth.

# ARGUMENTS ADVANCED

## I. WHETHER THE SCHEME SANCTIONED BY THE HON'BLE DELHI HIGH COURT ON 5TH JULY 2013 SHOULD BE SET ASIDE.

The Appellant had made an application to the Delhi High Court in August 2013 to recall the Order passed by the Hon'ble Delhi High Court. The said application was made under Rule 9 of the Company Court Rules, 1959 which gives inherent power to the Court to pass any order as may be necessary for the ends of Justice or to prevent the abuse of the process of Court.

The Courts have set aside the Scheme in various cases especially when there were allegations of fraud. In the present case the Appellant aver that there was fraud committed by the Company in the process of getting the Scheme sanctioned in the following ways:-

1. Material facts pertaining to the investigation by FDA was concealed.
2. Non-disclosure to the Court about the existence of the Creditors (foreign lenders).

It is not necessary to trace all the objections with respect to the sanction of the Scheme for the simple reason that it does not fulfil the pre-requisites as referred to above. The Scheme sanctioned by the impugned order of the learned Company Judge deserves to be set aside on this ground alone.[1]

Moreover the intention of the legislature has been reflected by the Court, which held that where it finds the Scheme to be fraudulent and intended for a purpose other than what it professed to be, it may be rejected even at the very outset without even calling a meeting of the Creditors.[2]

[1] Mahendra Kumar Sanghi v. Ratan Kumar Sanghi, RLW 2003 (3) Raj 1529.

[2] In Re: Bedrock Ltd, [2000] 101CompCas 343 (Bom).

## A. THAT THE 'FOREIGN LENDERS' ARE CREDITORS AND HAD TO BE SERVED A NOTICE OF THE MEETING.

i. ***That the foreign lenders constitute creditors.***

The Appellant humbly submits that the expression creditor here includes every person having a pecuniary claim, whether actual or contingent, against the Company.[3] It is evident that the Appellant has a foreign award passed in its favour on 27 July 2010[4] from a foreign arbitration Tribunal in a non-conventional State.[5] International commercial arbitrations may take place in India or outside India. Outside India an international commercial arbitration may be held in a convention Country or in a non-convention Country. Strictly speaking an award passed in an arbitration, which takes place in a non-convention Country, would not be a "domestic awards". Thus the necessity is to define a "domestic award" as including all awards made under Part I. The definition indicates that an award made in an international commercial arbitration held in a non-convention Country is also considered to be a "domestic award".[6] Thus, by the virtue of this award it is clear that the Appellant remain not only creditors but also judgment creditors. Once objections (if any) are rejected, the award is by itself capable of execution as a decree.

The Limitation period for filing an appeal to set aside an award is three months[7] from the date of receiving the arbitral award. Hence, by virtue of the Respondent not filing an appeal the award has become final and binding on the Parties. Moreover, it has been held that a decree holder is deemed to be a creditor as per the provisions of the Companies Act, 1956[8]

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[3] HALSBURY'S LAWS OF ENGLAND, 848 (4TH EDITION, VOLUME 7)

[4] Moot problem, paragraph 6, page 2.

[5] Ministry of Law and Justice, Notification Number (S.O. 580 (E) dated 19th March 2012.

[6] Bhatia International v. Bulk Trading SA and Anr, AIR 2002 SC 1432.

[7] Section 34(3), Arbitration and Conciliation Act, 1996.

[8] Section 390(c), Companies Act, 1956.

ii. ***That the Company had a statutory obligation to send notices to all the creditors.***

The Company has not fulfilled its statutory duty of sending notices to all the creditors. It was further essential for them to call all creditors who are getting affected by the Scheme. The responsibility for determining which creditors are to be summoned to a meeting as constituting a class is of the applicant Company.[9] Further no sanctity is attached to the Scheme when all creditors are not notified.[10]

In Arguendo, assuming but not accepting that the Appellant was a disputed creditor nevertheless the Respondent had to notify the Court such material facts so that the Court could issue directions for further steps to be taken during convening of meeting[11]. Thus, it can be concluded that the Respondent have not notified either in the Balance Sheet or directly to the Court about the existence of the foreign lenders thereby not fulfilling their statutory obligations.

## B. THAT THE ACTION OF VEILING THE MATERIALS FACTS FROM HON'BLE COURT DURING THE PROCESS OF SANCTIONING THE SCHEME AMOUNTS TO FRAUD.

i. ***That fraud has been committed by the Respondent***

*a) Non-disclosure to the Court about the existence of the Creditors (foreign lenders).*

The whole object behind the statutory requirement of issuing a notice to the shareholder and creditor of the Company is to hear all the affected persons as the Scheme proposed if accepted by Court would affect right of such interested person. Therefore, before sanctioning of the Scheme is sought from the Court, such a Scheme is to be placed before the creditors

[9]In Re: Maneckchowk and Ahemdabad Manufacturing Co. Ltd., (1970) 40 CompCas 819 (Guj).

[10] In Re: Kaveri Entertainment Ltd., (2003) 45 SCC 294.

[11]In Re: Mahaluxmi Cotton Mills Ltd., AIR 1950 Cal 399.

and shareholders of the Company so that they will have an opportunity to have their say in the matter.[12]

It is clearly evident that the Respondent has concealed from the Court material facts with respect to the foreign lenders. It has already been established that the foreign lenders are creditors of the Company and hence given such a situation, it was obligatory on the part of the Company to provide such information to the Court and by not doing so it has concealed material facts from the Court. *In arguendo,* assuming that the foreign lenders were disputed creditors yet such information had to be provided to the Court as established earlier so that the Court could issue certain directions. It is an admitted fact that the Respondent has not given notice to the Foreign lender' which further shows the mala-fide intention of the Respondent in getting the Scheme passed as the Scheme is binding on all the creditors[13].

*b) Concealment of FDA Investigation.*

Interpretation of the relevant provisions[14] makes it clear that all the material facts are sine qua non for sanctioning the Scheme. The fact that a FDA investigation was going on against the Company had to be revealed because of the nature of penalty that would accrue if the investigation had substance.[15] Thus the investigation was a material fact as it had the capacity of changing the decision of the creditors and also the Court in sanctioning the Scheme.In the ***Vodafone*** judgment[16], this Court has taken the view that once the transaction is shown to be fraudulent, sham circuitous or a device designed to defeat the interests of the shareholders, investors, Parties to the contract and also for tax evasion, the Court can always lift the corporate veil and examine the substance of the transaction.

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[12] In Re: Vikrant Tyres Ltd., (2005) 126 CompCas 288 (Kar).

[13] In Re: Navjivan Mills Co. Ltd., (1972) 42 CompCas 265 (Guj).

[14] Section 391 and 392, Companies Act, 1956.

[15] Federal Food, Drug and Cosmetic Act, 21 U.S.C 301 Section 303(5) (2002)

[16] Vodafone International Holdings B.V v. Union of India and Anr , 2012 (6) SCC 613.

ii. ***That in cases of fraud the Scheme should be set aside.***

It is settled Law that in judicial proceedings once fraud is proved, all advantages gained by playing fraud can be taken away. Suppression of any material fact or document amounts to fraud on the Court. Every Court has an inherent power to recall its own order obtained by fraud as the order so obtained is non est.[17] Fraud is proved when it is shown that a false representation has been made (i) knowingly, or (ii) without belief in its truth, or (iii) recklessly, careless whether it be true or false. Suppression of a material document would also amount to fraud on the Court.[18]

Each circumstance may not be sufficient to prove fraud, but all the circumstances taken together may indicate fraud. It is always open to a Party to show to the Court that the Party which is seeking an order in his favour, is defrauding the Court. Similarly, it must also be mentioned that the provisions of Law confer wide powers on the Courts and those powers are exercisable not only at the time of making an order under Section 391 of the Companies Act, 1956 but also at any time thereafter. The Courts have such wide statutory powers and responsibility in order to see whether the working of arrangement Scheme is in the best interest of the persons who are to be principally affected, i.e., the shareholders and the creditors[19]

In the opinion of this Court it is not necessary that there should be direct proof of fraud, the same can be inferred from various circumstances, which are brought on record. Even if individual facts were not able to prove fraud, it would be sufficient if all the circumstances taken together indicate a fraud.[20] Hence, in the light of the above mentioned arguments it can

[17] Meghmala and Ors. v. G. Narasimha Reddy and Ors, (2010) 8 SCC 383.

[18] Gowri Shankar and Anr v. Joshi Amba Shankar Family Trust and Ors., AIR 1996 SC 2202.

[19] Central Bank of India v. Ambalal Sarabhai enterprises Ltd., (1999) 3 Comp. LJ 98 (Guj).

[20] In Re: Spice Communications Limited and Anr, [2011] 165 CompCas 334 (Delhi).

be concluded that the Company did not fulfill its statutory obligations with respect to the Scheme and moreover the Scheme has been obtained by means of fraud and is liable to be set aside.

## II. WHETHER THE HON'BLE DELHI HIGH COURT HAS THE JURISDICTION TO HEAR THE SUIT FILED BY LIFELINE FOR BREACH OF CONTRACT.

### A. THAT THE DISPUTE IS NOT ARBITRABLE THUS THE DELHI HIGH COURT HAS THE JURISDICTION TO HEAR THE MATTER.

The Delhi High Court has erred in referring the matter to arbitration because of the fact that the issue itself is not arbitrable. The term 'arbitrability' has different meanings in different contexts. One of the facets of arbitrability, relating to the jurisdiction of the arbitral tribunal, is as under: (i) whether the disputes are capable of adjudication and settlement by arbitration? That is, whether the disputes, having regard to their nature, could be resolved by a private forum chosen by the Parties (the arbitral tribunal) or whether they would exclusively fall within the domain of public fora (Courts).[21]

From the facts of the case it is clearly evident that there has been serious accusation of fraud and misrepresentation against the Promoters for not revealing the information which had to be revealed according to the share agreement which they had entered into.

Dealing with the issue of arbitrability of fraud the Hon'ble Supreme Court has enlisted fraud as one of those issues which is not arbitrable by the arbitral tribunal under the 1940 Act.[22] Further this point of view has been continued by the Hon'ble Supreme Court which held that since the case relates to allegations of fraud and serious malpractices on the part of the

[21] Booz Allen and Hamilton Inc. v. SBI Home Finance Ltd. and Ors, AIR 2011 SC 2507.

[22] Amarchand Lalit Kumar v. Shree Ambica Jute Mills Ltd., AIR 1966 SC 1036.

Respondent, such a situation can only be settled in Court through furtherance of detailed evidence by either Parties and such a situation cannot be properly adjudicated by the arbitrator.[23]

It is also no doubt true that where existence of an arbitration agreement can be found, apart from the existence of the original agreement, the Courts would construe the agreement in such a manner so as to uphold the arbitration agreement. However, when a question of fraud is raised, the same has to be considered differently. Fraud, as is well known, vitiates all solemn acts.[24]

Further, it was held that no stay can be granted when there were serious allegations of fraud and misrepresentation was established. It was desirable that the matter should be tried in a Court. The said allegations, which require adducing of and appreciation of detailed evidence, cannot be gone into under arbitration.[25]

The above decision squarely applies to the facts of the present case where there are serious allegations of fraud and misrepresentation as the Promoters had concealed certain essential information, which they were obliged to disclose.

The reasons for non-arbitrability are the short-comings and deficiencies of the enquiry before an arbitrator. 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

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[23]N. Radhakrishnan v. Maestro Engineers and Ors, (2010) 1 CompLJ 154.

[24]India Household and Healthcare Ltd. v. LG Household and Healthcare Ltd, AIR 2007 SC 1376.

[25] Nitya Kumar Chatterjee v. Sukhendu Chandra , AIR 1977 Cal 130; Bharat Rasiklal Ashra v. Gautam Rasiklal Ashra and Anr, AIR 2011 SC 3562.

are best left to the Civil Court and that the arbitrator will not be competent to go into the said issues I do not think that the present Act had done anything to remove the said inadequacies and deficiencies which are inherent in an arbitration proceeding.[26]When such allegations of fraud are made it is settled rule that the arbitrator cannot look into the evidence of such allegations as The Rules of Procedure and evidence are not building on the proceedings before an arbitrator vide Section 19(1) of the Arbitration Act.[27]

Further it was held that Sub-section (1) of Section 8 provides that where the judicial authority before which an action is brought in a matter, will refer the Parties to arbitration the said matter in accordance with the arbitration agreement. This, however, postulates, in our opinion, that what can be referred to the arbitrator is only that dispute or matter which the arbitrator is competent or empowered to decide. [28]

Though the agreement between the Parties to resolve the disputes by an alternative forum before the arbitrator should be strictly complied with but when the dispute involves consideration of substantial questions of Law and contested allegations of fraud, misrepresentation etc which depends on adducing of and scrutiny of detailed oral and documentary evidence, then the Parties as well as the Civil Court would be justified in ignoring the Arbitration clause. Provisions of the 1996 Act[29] provide for the Arbitrator to seek the assistance of the Court in taking evidence is an example of the admitted deficiencies of a proceeding before the arbitrator. Even after obtaining such assistance from the Civil Court, the Arbitrator would still be unable to appreciate the demeanor of the witnesses, which is an essential feature of appreciation of oral evidence. The Court held "*Assuming that the grounds of challenge of an arbitration award as provided under the New Act has been*

[26] H.G. Oomor Sait and another v. O. Aslam Sait, (2001) 2 MLJ 672.

[27] H.G. Oomor Sait and another v. O. Aslam Sait, (2001) 2 MLJ 672.

[28] Haryana Telecom Ltd. v. Sterlite Industries (India) Ltd, AIR 1999 SC 2354

[29] Section 27, Arbitration and Conciliation Act, 1996.

*narrowed down compared to the old Act, that would be all the more reason why the jurisdiction of the Civil Court to go into such contentions issues like substantial questions of Law or serious allegation of fraud etc., requiring detailed evidence, should be properly reserved for a Civil Court to go into and decide.*"[30]

Finally, even though the Supreme Court has held in the case of Swiss Timing[31] that serious allegations of fraud is also an arbitrable issue but this doesn't overrule the position of Law as laid down in the case N.Radhakrishnan[32] purely because of the fact that single Judge cannot overrule a judgment of Division Bench.

## III. WHETHER THIS COURT SHOULD ENTERTAIN THE APPEAL AGAINST THE DECISION OF THE HIGH COURT AND IF THERE HAS BEEN ABUSE OF DOMINANCE BY SWASTH.

### A. THAT THE COURT SHOULD ENTERTAIN THE APPEAL AGAINST THE DECISION OF THE HIGH COURT.

The Delhi High Court erred in Law in dismissing the petition. It is contended by the Appellant that in the given case[33] the Court drew an analogy between information received by the CCI and its function of ordering a prima-facie investigation with the nature and proceedings of FIR. The Hon'ble Court observed "*If Section 26 is read with Section 19, it would be clear that the information received under Section 19 is to be placed before the Commission; and if the Commission finds a prima facie case, it can direct the investigation; and it has an option to drop the matter if there is no prima facie case. It is, therefore, not*

[30] H.G. Oomor Sait and another v. O. Aslam Sait, (2001) 2 MLJ 672.

[31] Swiss Timing Ltd v. Organizing Committee, Commonwealth Games, (2014) 6 SCC 677.

[32] N. Radhakrishnan v. Maestro Engineers and Ors, (2010) 1 CompLJ 154.

[33] Kingfisher Airlines v. CCI, (2010) 4 CompLJ 557(Bom).

*necessary that the investigation would be ordered in each and every case. Therefore, the information that is received can be treated as if it is an F.I.R. It will have to be found out by the Commission from that information whether there is any material in the said information which requires them to take cognizance of the complaint and then order an investigation." "Therefore, at the prima facie stage, it is never concluded whether there is breach or otherwise. Therefore, at preliminary stage, it is only to be seen if there is a reason to believe that there is a breach of Sections 3 and 4. The Law is well settled that the Court should not stifle the investigation at all, except for compelling reason or when F.I.R. does not disclose any offence at all."* Since this matter also concerns section 19 of the Competition Act, 2002 followed by an investigation being ordered under Section 26(1), it is contended that the Court should hear this petition because the charge as seen in the prima-facie view taken by the CCI is completely baseless as to the abuse of dominance. Had the prima-facie charge been reasonable enough then the petition filed by the Appellant would be bad in Law, but in the instant case the prima facie view taken in itself has no basis. The High Court of Andhra Pradesh made similar observations.[34] Hence the appellant is of the view that the appeal is maintainable.

**B. THAT THE RELEVANT MARKET CAN BE ESTABLISHED.**

According to section 2(r), section 2(s) and section 2(t) of The Competition Act, 2002 relevant market, relevant geographic market and relevant product market have been defined respectively.The relevant market in our case is the life saving drugs market in the pharmaceutical sector.

[34] Sanaparededdy Maheedhar Seshagiri and Anr. v. State of Andhra Pradesh and Anr, 2007 (13) SCC 165

Although strictly according to the definition of relevant product market the consumer aspect must be taken into account while determining relevant product market, in the sense that only demand side substitutability must be taken into account; but in the European case[35], the relevant product market was defined through supply side substitutability. The Court had held that the three different types of light metal packaging containers didn't form three different markets but were part of the same market for light metal packaging containers. *From the supply side, it would include all producers who could, with their existing facilities, switch to the production of such substitute goods.*[36] Hence supply side substitutability has been used to define the market in cases where it was difficult to establish the market through demand side substitutability. Now to determine interchangeability similar end use and similar characteristics of the product can be established from the consumer side since that too is an essential under the provisions of the law. In the present case the concept of supply side substitutability will also be used to establish the relevant market.

In the current market there were other producers also in the high range that competed with the drug Inventive. Since Inventive was the premier drug, it can be deduced that there were other drugs competing in the market too and they had their own consumer base therefore the end use of all these drugs were similar. Hence, it can be concluded that all such drug manufacturers possessed the essential facilities to deliver similar end use by virtue of which they were able to compete in the first place. Considering the above mentioned, if the price of the cost effective drug of Swasth were to increase there is a significant chance that the other producers may try to produce similar drugs which would compete with the drug in question after the increase in price; since all the manufacturers do possess the technology to deliver similar end use. Considering this it could be safely concluded that *supply side substitutability*

[35]Europemballage Corporation and Continental Can v. Commission (1973) ECR 215

[36]Report of S.V.S Raghvan Committee on Competition Law, 2000, Paragraph 4.4.7.

*does exist and inter-changeability between the high range and low range products also exits which is why it is fair to say that the life saving drugs market is the relevant product market.*

So far as the relevant geographic market is concerned it may be pointed out that as per the provisions of The Competition Act, 2002 it comprises the area in which the conditions of competition for supply of goods or provision of services or demand of goods or services are distinctly homogenous and can be distinguished from the conditions prevailing in the neighbouring areas. As nothing has been brought on record or is otherwise discernible there from to reflect heterogeneity in the conditions of competition with respect to the relevant product, it is to be assumed that the conditions of competition for supply of the product in question are homogenous throughout India. Hence, the relevant geographic market in the present case may be taken as whole of India.

### C. THAT THE APPELLANT DID NOT HAVE A DOMINANT POSITION IN THE RELEVANT MARKET.

The European Court of Justice[37] states that dominant position refers to a situation of economic strength, which gives the enterprise power to obstruct the maintenance of an effective competition in the market concerned because it allows the enterprise to conduct itself in a way that it is independent of from its competitors, clients and customers.

For establishing dominant position and its abuse it is necessary to 1) define the relevant market 2) access market strength 3) consider whether the conduct amounts to an abuse of the position. It is contended by the Appellant that the second and third aspects are absolutely absent in the present case.

There aren't any clear parameters reflected in the facts which would make Swasth a dominant player in the market other than the fact that it holds certain patent rights and the abuse of such

[37] Michelin v. Commission, (1983) ECR 3461.

dominance as acquired by way of holding patent which is contested in this case is questionable. It is contended that holding a patent in itself is not a sufficient condition to prove dominance in a market, in fact some Courts have held that it is not a constituent at all. Other factors like market share, control of other essential facilities (transport, marketing etc. as the case may be), and control of supply chain aspects etc. have to be taken into account also. Also it must be realised that the Competition Act does not envisage to punish dominance as such, but illegal acquirement of dominance or its abuse or any other anti competitive activities. Dealing with the main question, does holding a patent right constitute dominance enough to be anticompetitive and is it a sufficient constituent in itself? There have been a number of judgements[38] where the proposition that patents are not sufficient constituent in themselves to establish dominance and that the intention to abuse through assistance of dominance must also be present. Such principles were held even after recognizing that patent rights tend to be exclusive in nature. In the case of Trixler brokerage[39] the Court said: *"At the outset, we must recognize that a manufacturer, such as appellee, has a natural monopoly over its own products, especially when the products are sold under trademark. Under such circumstances, there is no violation of the antitrust laws unless the manufacturer uses his natural monopoly to gain control of the relevant market in which his products compete."*

Hence, considering the nature of the product and considering its end use, the cost-effective drug of Swasth was not protected from competition or at least was subject to substantial competition; also the power to fix prices and terms was completely absent. Therefore it is fair to say that Swasth was not dominant in the market because patents are not sufficient constituents of dominance.

[38] Trixler brokerage co v. Ralson Purina, 505 F 2d 1045 (9th circuit 1974) ; Parke Davis and Co. v. Proble, [1968] C.M.L.R. 47.

[39] Trixler brokerage co v. Ralson Purina, 505 F 2d 1045 (9th circuit 1974).

## D. THAT THE APPELLANT EVEN IF IT WAS DOMINANT DIDN'T ABUSE ITS DOMINANT POSITION IN THE RELEVANT MARKET.

Even if it is assumed that Swasth is dominant, there is no abuse of such dominance. The Respondents claim is that abuse of dominance took place through vexatious litigation. Dealing with vexatious litigation reference, should be made to the grounds laid down in the Promedia[40] case which are regarded as essentials to prove vexatious litigation in a situation.

*"It could be abuse of dominance if:*

*1. Action which cannot be reasonably be considered as an attempt to establish its rights and hence can therefore only serve to harass the opposite Party.*

*2. Which is conceived in the framework of the plan whose goal is to eliminate competition."*

The principles laid down in the above-mentioned case talked of the action not being an attempt to establish rights and *only* being and attempt to harass the other Party. The Court recognised Swasth's right to file for infringement of patent and hence it was granted an injunction, also the fact that Lifeline isn't contending whether there was infringement or not goes to show that even Lifeline recognise that the rights accrued to Swasth. Assuming that there was litigation to gain an anticompetitive edge it would not be violative of any provision of Law according to the Noerr-pennington Doctrine. The doctrine derives from a line of US Supreme Court cases[41].This principle has been recognised by the CCI[42] too. Hence in the present case the attempt to influence the administrative machinery/adjudication machinery to recognise the infringement of IPR cannot be said to be a Part of vexatious litigation.

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[40] ITT Promedia v. Commission, (1998) ECR-II 2937.

[41] Eastern R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (U.S. 1961); United Mine Workers v. Pennington, 381 U.S. 657 (U.S. 1965).

[42] All India Tyre Dealers Federation v. Tyre Manufacturers, 2013 CompLR 0092 (CCI).

# PRAYER

*Wherefore*, in the light of facts stated, issues raised, arguments advanced and authorities cited, it is most humbly and respectfully prayed before this Hon'ble Court that it may be pleased to:

- To set aside the Scheme, which was sanctioned by the Delhi High Court vide an order dated 5th July, 2013.
- To Rule that the Hon'ble Delhi High Court has jurisdiction to hear the suit filed by Lifeline for breach of contract.
- To set aside the order passed by the CCI directing the DG to investigate Swasth as it is bad in Law.

And pass any other order or grant any other relief in favor of the Appellant, which this Learned Court may deem fit in the best interest of Justice.

*All of which is most humbly and respectfully submitted.*