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5TH NLIU – JURIS CORP NATIONAL CORPORATE LAW MOOT

COURT COMPETITION 2014

BEFORE THE HON'BLE SUPREME COURT OF INDIA

CIVIL APPELATE JURISDICTION

CIVIL APPEAL NO: …of…20..

Lifeline Limited v. Promoters of Jeevani

Heard with

CIVIL APPEAL NO: …of…20..

Foreign Lenders v. Lifeline Limited

And

CIVIL APPEAL NO: …of…20..

Swasth Life Limited v. Lifeline Limited

MEMORIAL FILED ON BEHALF OF THE APPELLANTS

Counsel Appearing on Behalf of the Appellants

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ii. AVTAR SINGH, COMPETITION LAW 35, (1st ed. Eatern Book Company, Lucknow, 2012).

iii. BUCKLEY, COMPANIES ACT, (15th ed. LexisNexis Butterworths Wadhwa, Nagpur).

iv. D.P. MITTAL, COMPETITION LAW & PRACTICE, (2nd ed. Taxmann Allied Services (P.) Ltd. 2008).

v. DR. B.P. SARAF AND S.M. JHUNJHUNUWALA, LAW OF ARBITRATION AND CONCILIATION, (6th ed. Snow White Publishers 2012).

vi. HALSBURY'S LAWS OF ENGLAND 848, (4th ed. Vol. 7 LexisNexis Butterworths Wadhwa, Nagpur).

vii. PALMER, COMPANY LAW, (24th ed. Sweet & Maxwell).

viii. R.S. BACHAWAT, LAW OF ARBITRATION AND CONCILIATION, (5th ed. Vol.1 LexisNexis Butterworths Wadhwa, Nagpur 2010).

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STATEMENT OF JURISDICTION

The Appellants have approached the Hon'ble Supreme Court of India under Art. 133 of the Constitution of India. The Memorandum on behalf of the Appellants is submitted to the jurisdiction of the Hon'ble Court to deal in the present matter.

Article 133: Appellate jurisdiction of Supreme Court in appeals from High Courts in regard to civil matters

An appeal shall lie to the Supreme Court from any judgment, decree or final order in a civil proceeding of a High Court in the territory of India if the High Court certifies under Article 134A (a) that the case involves a substantial question of law of general importance; and (b) that in the opinion of the High Court the said question needs to be decided by the Supreme Court (2) Notwithstanding anything in Article 132, any party appealing to the Supreme Court under clause (1) may urge as one of the grounds in such appeal that a substantial question of law as to the interpretation of this Constitution has been wrongly decided. (3).....

Article 134 A: Certificate for appeal to the Supreme Court

Every High Court, passing or making a judgment, decree, final order, or sentence, referred to in clause (1) of Article 132 or clause (1) of Article 133, or clause (1) of Article 134 (a) may, if it deems fit so to do, on its own motion; and (b) shall, if an oral application is made, by or on behalf of the party aggrieved, immediately after the passing or making of such judgment, decree, final order or sentence, determine, as soon as may be after such passing or making, the question whether a certificate of the nature referred to in clause (1) of Article 132, or clause (1) of Article 133 or, as the case may be, sub clause (c) of clause (1) of Article 134, may be given in respect of that case

STATEMENT OF FACTS

Jeevani decided to merge with Lifeline on 27th January 2012 and all assets and liabilities of Jeevani were to go to Lifeline. An application was filed under Section 391 of the Companies Act, 1956 to the Delhi HC which ordered for a meeting of the creditors to be convened. Resolutions supporting the Scheme were passed by a vote of majority. The Scheme was approved by the Delhi HC on 5th July 2013. The Foreign Lenders objected to this scheme and the matter is now before the Supreme Court.

After the merger, Lifeline received notices from the US FDA for providing drugs of below par quality. Lifeline filed a suit against the Promoters before the Delhi HC seeking damages and compensation due to fraud and misrepresentation. The Promoters contended that the agreement between the parties had an arbitration clause. The Hon'ble Single Judge held that the clause could not be regarded as an arbitration clause. The order was challenged and the Division Bench held vice-versa. Aggrieved by this order, Lifeline has approached the SC.

Lifeline decided to introduce a new cheap life-saving drug "Novel" after further developing the active R&D which became its property after the merger. Before Lifeline could launch 'Novel', Swasth filed a suit in the Delhi HC for infringement of its IPRs alleging that it was substantially similar to "Inventive". An interim injunction was passed against Lifeline restraining it from launching 'Novel'. Swasth launched a similar cost effective drug in the market, withdrew the case against Lifeline and the interim injunction was vacated. Lifeline filed an application before the CCI alleging that Swasth was abusing its dominant position. CCI passed an order directing the DG to investigate. Swasth filed a writ in the Delhi HC submitting that CCI's order was bad in law as it cannot be held to be abusing its dominance. The HC dismissed the writ. The Division Bench also did not interfere with the order. Swasth has thus come before the SC. The above matters are tagged together for hearing.

STATEMENT OF ISSUES

I. Whether there exists an arbitration clause in the Share Sale Agreement between Lifeline and the Promoters of Jeevani?

II. Whether order of the Company Judge of the Hon'ble Delhi HC approving the Scheme of arrangement for Jeevani is liable to be set aside?

III. Whether the Competition Commission of India was justified in directing the DG to investigate on the allegations by Lifeline against Swasth?

SUMMARY OF ARGUMENTS

I. Whether there exists an arbitration clause in the Share Sale Agreement between Lifeline and the Promoters of Jeevani?

The Share Sale Agreement does not contain an arbitration clause as per S.7 of the Arbitration & Conciliation Act, 1996. In the absence of such clause, a dispute arising between the parties cannot be referred to an arbitral tribunal for adjudication. Through a plethora of cases it has been established that requirements of an arbitration clause are clearly not fulfilled in this case. Moreover, the Respondent is alleged to have committed fraud and misrepresentation and such matters are not arbitrable and should be tried by the court.

II. Whether order of the Company Judge of the Hon'ble Delhi HC approving the Scheme of arrangement for Jeevani is liable to be set aside?

Individual notices should be given to all the creditors and the Court is then persuaded on the basis of such representation to dispense with the holding of the meeting as per S.391 of the Companies Act, 1956. The lenders did not receive any such notice. Moreover, the lenders constitute a separate 'class' due to homogeneity of interests. The Scheme is not fair and hence, should be set aside.

III. Whether the Competition Commission of India was justified in directing the DG to investigate on the allegations by Lifeline against Swasth?

Lifeline wanted to launch its new cost effective drug. The new drug was similar to the drug "Inventive". Therefore, Swasth filed a case to obtain an interim injunction to protect its IPRs. Swasth also came out with a similar cost effective drug because it had the IPRs to do so, and then withdrew the case. This action can in no way be termed as bad faith litigation as Swasth was only trying to protect its IPRs and this action is in the nature of a Quia Timet injunction. Here the CCI was not justified in directing the DG to investigate on the allegations made by Lifeline as the CCI is trying to override the jurisdiction of the Delhi HC.

ARGUMENTS ADVANCED

I. Whether there exists an arbitration clause in the Share Sale Agreement between Lifeline and the Promoters of Jeevani?

It is humbly submitted that Cl.2.1 of the Share Sale Agreement ("the Agreement") entered into between Lifeline and the Promoters of Jeevani does not constitute an arbitration clause as per S.7 of the Arbitration & Conciliation Act, 1996 ("the Act").

- **No intention to arbitrate**

The intention of the parties to enter into an arbitration agreement shall have to be gathered from the terms of the agreement.[1] Clauses 2 and 3 do not express such an intention.

a. No reference of disputes

S.7 of the Act states: *""Arbitration agreement" means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not."*

A bare reading of the above clearly states that there must necessarily be a submission of disputes. To elaborate, it conveys that there has to be intention, expressing the consensual acceptance to refer the disputes to an arbitrator.[2]As per the Hon'ble SC in *State of UP v. Tipper Chand*[3], the agreement in question was held not constituting an arbitration agreement as it did not mention any dispute or reference of such dispute for decision. Moreover, the Apex Court[4] has held that there should be an obligation to such reference.

Without prejudice to the other arguments, it is humbly submitted that Cl.2 of the Agreement relates merely to "*all questions and issues relating to the meaning, scope, instructions,*

[1]Rukmani Bai Gupta v. Collector of Jabalpur, AIR 1981 SC 479.

[2]Chloro Controls India Pvt. Ltd. v. Severn Trent Water Purification Inc. & Ors., 2013 (1) SCC 641.

[3]State of Uttar Pradesh v. Tipper Chand, 1980 (2) SCC 341.

[4]Jagdish Chander v. Ramesh Chander, (2007) 3 SCC 719.

claims, right or matters of interpretation of and under this Agreement". There has not been any mention of a dispute arising between the parties to the Agreement. The power of the 'empowered committee' is only as regards the above- mentioned. Further, it is contended that the committee could make decisions on its own discretion as Clause 2.1 does not in any way emphasise "submission" of "any dispute". It is only meant for a proper implementation of the settlement already arrived at in the Share Sale Agreement.

b. Disputes to be resolved by Delhi courts

Cl. 3.1 states that "*All disputes touching upon the subject matter of the agreement shall be subject to the jurisdiction of Delhi courts.*" The Hon'ble SC in *Karnataka Power Transmission Corporation Ltd. & Anr.* v. *Deepak Cables (India) Ltd.*[5] held that such a clause really means that the disputes and differences are left to be adjudicated by the competent civil court. It is essential in arbitration that there is a private third party[6] to adjudicate the disputes, but in the present matter the court itself has the power of settlement of disputes. There is clearly no intention to substitute jurisdiction of courts discernible from language of the clause, by arbitration process. Exclusive jurisdiction has been conferred in Delhi courts for resolution of disputes. To fall under S.7, there must be clear and unambiguous language[7] of the clause expressing intention of the parties to have their disputes settled by arbitration. An analysis of Clause 2.1, read in conjunction with Clause 3, establishes that there is no such unequivocal intention.

- **Committee does not constitute an arbitral tribunal**

a. *No judicial determination of substantive rights*

[5]Karnataka Power Transmission Corporation Ltd & Anr. v. Deepak Cables (India) Ltd., AIR 2014 SC 1626.

[6]Bihar State Mineral Development Corporation v. Encon Building, (2003) 7 SCC 418.

[7]Wellington Associates Ltd v. Kirit Mehta, AIR 2000 SC 1379.

In *K.K. Modi* v. *K.N. Modi,*[8] the Apex Court stated that the agreement must contemplate that substantive rights of parties will be determined by the agreed tribunal. Such determination has to take place in a judicial manner. In the present case, the decision of the committee is not as regards the substantive rights of the parties but is for interpretation of the Agreement itself. In *Hormusji & Daruwala* v. *District Local Board,*[9] the clause stated that the president of the board shall be judge of the meaning and interpretation of the contract and for any complaint, his decision would be considered final. It was held that the clause did not amount to an arbitration agreement as it was an administrative and not a judicial act. An arbitral tribunal arrives at its decision on the evidence and submissions of the parties and must apply the law[10], but if a person(s) makes his own enquiries and decides on the basis of his own knowledge, this is not a judicial decision. In the matter at hand, the Agreement does not provide or refer to any such procedure which shows that the Empowered Committee is to act judicially after considering the submissions[11]of both parties.

b. *Expert determination*

A contract may provide that disputes arising under it are to be resolved by some third party acting not as an arbitrator but as an expert. The decision given in such cases by experts is not an award. Such a person is under no obligation to receive submissions and is entitled to arrive at his decision solely upon the result of his own expertise and investigations.

This court[12] while noting the distinction between a 'preventer of disputes' and an 'adjudicator of disputes', observed that an expert decides claims, rights, or matters in any way pertaining

[8]K.K. Modi v. K.N. Modi, 1998 (3) SCC 573.

[9]Hormusji & Daruwala v. District Local Board, AIR A934 SIND 200.

[10]Ved Prakash Gupta v. Municipal Corporation Of Greater Bombay, 1999 (1) BomCR 112.

[11]State of Orissa & Ors. v. Bhagyadhar Dash, 2011 (7) SCC 406.

[12]Ibid.

to the contract and the object of his decision is to avoid disputes and not decide disputes in a quasi-judicial manner. In the present case too, the Empowered Committee has been given the responsibility to prevent any disputes between the parties by providing clarity as to the scope and meaning of the Agreement.

Thus, ingredients to hold a particular agreement as an arbitration agreement have not been satisfied in the present case. If there is vagueness and uncertainty, it will be incapable of being construed as an arbitration agreement.[13] No intention to arbitrate is apparent. Moreover, in the absence of arbitration clause in an agreement, a dispute arising between the parties cannot be referred to an arbitral tribunal for adjudication.[14]

- **Arguendo: Matters alleging fraud and misrepresentation should not be referred to arbitration**

Assuming, arguendo, that there exists an arbitration clause in the Agreement, it is humbly submitted that in the case of *N. Radhakrishnan* v. *Maestro Engineers & Ors.,* the SC upheld that *"since the case relates to allegations of fraud and serious malpractices on the part of respondents, such a situation can only be settled in court through furtherance of detailed evidence by the parties and such a situation cannot be properly gone into by the Arbitrator… For the furtherance of justice, it should be tried in a court of law which would be more competent and have the means to decide such a complicated matter involving various questions and issues raised in the present dispute."*

In *Abdul Kadir* v. *Madhav Prabhakar Oak*,[15] the Hon'ble SC held that where serious allegations of fraud are made against a party then the matter should be tried in open court and

[13]Dharma Prathishthanam v. Madhok Construction Pvt. Ltd., (2005) 9 SCC 686.

[14]Karnataka Power Transmission Corporation Limited & Anr. v. Deepak Cables (India) Ltd, AIR 2014 SC 1626.

[15]Abdul Kadir v. Madhav Prabhakar Oak, AIR 1962 SC 406.

not referred to arbitration. Once a *prima facie* case is established, public inquiry should take place. In *Oomor Sait* v. *Aslam Sait,*[16] it was held that the civil court could refuse to stay suits under certain grounds, despite the existence of an arbitration clause. The nature of the enquiry before an arbitrator is summary in nature and rules of procedure and evidence are not binding, therefore wherever the dispute involves a consideration of substantial questions of law or complicated questions of fact which would depend upon detailed oral/documentary evidence, the civil court is not prevented from proceeding with the suit.

In *Booz Allen and Hamilton* v. *SBI Home Finance*[17], the Apex Court held that generally and traditionally all disputes relating to rights in personam are considered to be amenable to arbitration and all disputes relating to rights in rem are required to be adjudicated by courts and public tribunals, being unsuited for private arbitration. Although in the cases of *World Sport Group*[18] and *Avitel Post Studioz*[19] the courts have favoured arbitrability of fraud. However, in both of these cases, there was international arbitration involved, whereas, in the present case, domestic arbitration is involved. Thus, the principle of arbitrability of fraud cannot be extended to the present circumstances.

The Division Bench of the Hon'ble Delhi HC has hence erred in referring the dispute to be decided by the Empowered Committee.

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[16]Oomor Sait v. Aslam Sait , 2001 (3) CTC 269.

[17]Booz Allen & Hamilton v. SBI Home Finance, (2011) 5 SCC 532.

[18]World Sports Group (Mauritius) Ltd. v. MSM Satellite (Singapore) Ltd, Civil Appeal No. 895 of 2014, Supreme Court.

[19]Avitel Post Studioz Ltd, & Ors. v. HSBC PI Holdings (Mauritius) Ltd., Appeal NO.196 of 2014, Bombay.

II. Whether order of the Company Judge of the Hon'ble Delhi HC approving the Scheme of arrangement for Jeevani is liable to be set aside?

It is humbly submitted that the Hon'ble Delhi HC has erred in dismissing the appeal of the foreign banks for setting aside the Scheme of arrangement ("Scheme") for Jeevani.

- **Locus standi**

While considering the scheme of amalgamation, the Court is to ascertain that it as a whole is just, fair and reasonable[20]; and not detrimental to the interest of those to be principally affected- the shareholders and creditors[21]. The expression "creditor" here includes every person having a pecuniary claim, whether actual or contingent, against the company.[22] The right which the creditor has is not the 'right to recover' the money but the title/right in the money itself.[23] While sanctioning the scheme, it is important to determine whether there is a reasonable mode, and whether the transferee company is acknowledging and able to discharge the said liability.[24] In the present case, since no such right of the foreign lenders was acknowledged, their interest has been adversely affected[25] and hence the foreign lenders can challenge the same.

- **No notice sent**

As per S.393(1)(a) of the Companies Act, 1956, notice is to be sent to creditors along with certain information as to the Scheme. R.73 of the Companies (Court) Rules, 1959 states that the notice of the meeting has to be given to the creditors or to the creditors of any class, as the

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[20] In Re Essar Telecommunication Holdings P. Ltd., In re India Securities Ltd., (2011) 167 Comp Cas 566.

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

[22] HALSBURY'S LAWS OF ENGLAND 848, (4th ed. Vol. 7 LexisNexis Butterworths Wadhwa, Nagpur).

[23] L. S. Synthetics Ltd. v. Fairgrowth Financial Services Ltd. & Ors., (2004) 11 SCC 456.

[24] In Re: Vikrant Tyres Ltd, ILR 2003 KAR 3885.

[25] Zee Interactive Multimedia Ltd. v. Siti Cable Network Ltd., AIR (37) 1950 CAL 399.

case may be, and shall be sent to them individually. While passing such orders on the application first made under S.391, a representation is made to the Court that individual notices of final hearing of the petition would be given to *all the creditors* and the Court is then persuaded on the basis of such representation to dispense with the holding of the meeting of the creditors.[26] In the present case, no notice was sent to the foreign lenders and hence they could not participate in the meeting convened. While sanctioning a scheme, it is the duty of the court to satisfy itself that the provisions of the statute have been complied with.[27] There has been a clear disregard to S.393(1)(a) herein.

In Re: Vikrant Tyres Ltd[28] observed that when a 3/4th majority is obtained by excluding certain creditors by not giving them notice, the Court would certainly take note of this. If the Court is satisfied that non-issue of notice was intentional, malafide and such exclusion has seriously affected the interest of those creditors, the Court may declare the meeting conducted invalid on the ground that the Court is not satisfied about the conduct of the company as well as the fairness of the scheme which is produced before Court for sanction.

Moreover, foreign lenders situated outside India could naturally have no reasonable access to such a notice. In the case of *Maether & Platt Fire Systems Ltd. Re*,[29] it was highlighted that a meeting can be invalidated if there has been a deliberate avoidance of notice. It was observed in *In Re Kaveri Entertainment Ltd*[30] that the court would attach no sanctity to a scheme when all the creditors have not been notified. The foreign lenders are kept in the dark of the proposed scheme, therefore, this is not in consonance of the object and purpose of the Act.

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[26] In Re Kaveri Entertainment Ltd, (2003) 117 Comp Cas 245.

[27] In Re: CHPL Enterprises P. Ltd., (2000) 2 Comp. L.J. 218 (AP).

[28] In Re: Vikrant Tyres Ltd, ILR 2003 KAR 3885.

[29] Maether & Platt Fire Systems Ltd. Re, (2008) 142 Com Cases 209.

[30] In Re Kaveri Entertainment Ltd, (2003) 117 Comp Cas 245.

- **Banks constitute a 'class of creditors'**

a) *Different system of valuation*

Classification of creditors is necessary when different creditors would be affected under the scheme differently.[31] It is submitted that the foreign banks have lent amount in foreign currency to Jeevani and hence form a separate class of creditors.

A group of persons would constitute one class when their claims are capable of being ascertained by any common system of valuation.[32] Where it is necessary for the claims to be expressed in a single currency as to ascertain the claim in the new holding, it is recognised that currency conversion at the date of valuation of claims in a liquidation is an integral part of achieving a *pari passu* distribution. It is an important feature which might be enforced by creditors.[33] A scheme which provides for conversion on a different basis involves a departure from the creditors' right in such distribution. Thus, the conversion rate would produce seriously unfair treatment. It has also been recognised that the volatility of currency markets can produce markedly different results depending on the choice and manner of valuation.[34]

In the present case, there has been no acknowledgment of claims of the foreign lenders. Their claims would be settled in accordance with a method of valuation which is separate from the other lenders/creditors. When one finds a different state of facts existing among different creditors which may differently affect their minds and their judgment, they must be divided into different classes.[35]

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[31] Jaypee Cement Ltd. Re, (2004) 122 Com Cases 854.

[32] Indequip Ltd. v. Maneckchowk & Ahmedabad Mfg. Co. Ltd., [1970] 2 CLJ 300.

[33] Telewest Communication Plc Re (No. 1), 2005 1 BCLC 752 (Ch D).

[34] Telewest Communication Plc Re (No. 2), 2005 1 BCLC 772 (Ch D).

[35] PALMER, COMPANY LAW, (24th ed. Sweet & Maxwell).

b) Separate interest

Scheme offered to other creditors was accepted by them because it was beneficial to their class in the domestic conditions, but the same is not beneficial to the foreign creditors because they have financed the Company with a specific business strategy in mind, which would fail if the Company ventures into another business, in which it does not have core competency. Since, the foreign lenders form a homogeneous group with commonality of interest, [36] different terms ought to have offered to the foreign creditors, thus, making them a separate class. It is important that the class should have been fairly represented.[37]

- **No meeting held**

Discretion to waive convening of meetings must be under exceptional circumstances,[38]none of which exists here. Also, no written consent to the proposed Scheme of the foreign lenders was taken, and no application[39]was made by the Company for an order to dispense with the meetings. Fragmenting them into a different class would have given them the power to veto the Scheme[40] which the foreign lenders could not enforce.

- **Scheme should be set aside**

A court may recall an order passed by it earlier if there has been an error committed by the Court prejudicing a party[41] and it has an inherent power to do so.[42] In light of the unfairness of the Scheme, it must be set aside. Application for recalling must be considered under R.6 & R.9 of the Rules which grants the court with inherent powers to give such directions or pass

[36] Sovereign Life Assurance Co. v. Dodd, [1892] 2 QB 573.

[37] BUCKLEY, COMPANIES ACT, (15th ed. LexisNexis Butterworths Wadhwa, Nagpur).

[38] S.M. Holding Finance P. Ltd. v. Mysire Machinery Manufacturers Ltd., (1993) 78 Com Cases 432(Kar).

[39] Bharat Explosives Ltd. Re, (2005) 58 SCL 370.

[40] Ibid.

[41] Budhia Swain & Ors. v. Gopinath Deb & Ors., (1999) 4 SCC 396.

[42] Indian Bank v. M/s Satyam Fibres India Pvt. Ltd., 1996 (5) SCC 550.

such orders as may be necessary for the ends of justice. If the mandatory procedure was not followed and a separate meeting not convened, the order must be recalled.[43]

In the case of *SBI* v. *Engg Majdoor Sangh*[44], where a scheme was sanctioned without issuing notices to any party and though the scheme was to operate differently on different classes of creditors, separate meetings of the affected classes were not called and the matter was thus recalled.

Amalgamation should not only be beneficial to the companies, but should also be in the interest of creditors and members of both the transferor and transferee-companies and should be in the public interest.[45] An act of court should prejudice none.[46] Hence a scheme can be set aside when it is not fair and reasonable. In the *Central Bank of India*[47] case, the Court had not only entertained an application filed after four years for recall of the amalgamation scheme but had also set aside the amalgamation order ten years after the scheme had been sanctioned. This above is consonance with the fact that rights of creditors must not be infringed. Therefore, the order of the Company Judge of the Hon'ble Delhi HC approving the Scheme of arrangement for Jeevani is liable to be set aside.

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[43] Murlidhar Ratanlal Exports Ltd & Anr. v. Gujarat Road & Infrastructure Company Ltd., 2010 (4) TMI 607.

[44] SBI v. Engg Majdoor Sangh, (2000) 27 SCL 103.

[45] Shankaranarayan Hotels P. Ltd. v. Official Liquidator, (1992) 74 Com Cases 290 (Kar).

[46] M. Shankaraiah v. State of Karnataka, JT [1993] 5 28.

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

III. Whether the Competition Commission of India was justified in directing the DG to investigate on the allegations by Lifeline against Swasth?

- **No position of dominance established**

Explanation to S.4 of the Competition Act, 2002 states, "Dominant position means a position of strength enjoyed by an enterprise in the relevant market in India which enables it to (i) operate independently of competitive forces prevailing in the relevant market; (ii) affect its competitors or consumers or the relevant market in its favour." S. 19(4)[48]determines the factors the CCI has to have regard to while establishing dominant position. It is humbly submitted before the Hon'ble SC that Swasth Life Ltd. ("Swasth") was not in a position of dominance in the market as it could not operate independently. Neither Lifeline nor the CCI has established the same.

- **No Relevant Market exists**

"For establishing dominant position and its abuse it is necessary to

- *Define the relevant market, as the dominance does not exist in the abstract but in relation to a market in which the undertaking competes and after having so done,*
- *Assess market strength in order to see whether the undertaking possesses a certain level of market power,*
- *Consider whether the conduct of the undertaking amounts to an abuse of dominant position."*[49]

S. 19(5) of the Act states that, for the purpose of considering whether a market constitutes a "relevant market"[50], the Commission has to have regard to the relevant geographical market

[48]Competition Act 2002, § 19(4).

[49]D.P. MITTAL, COMPETITION LAW & PRACTICE, (2nd ed. Taxmann Allied Services (P.) Ltd. 2008).

[50] Competition Act, 2002, § 19(5).

and the relevant product market. It is humbly submitted that in the present case, there exists no relevant product market in which the parties operate.

S.2(t) defines a "*relevant product market" as "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."*

In the matter in hand there exists no relevant product market as Lifeline's drug "Novel" has not yet been launched, so there is no question yet of "Novel" and Swasth's new drug being substitutes for the consumers. Due to the fact that a relevant market cannot be defined in the matter in hand, it cannot be established that Swasth was in a position of dominance.

Arguendo: Assuming but not conceding that Swasth was in a position of dominance

- **No abuse of dominant position**

It is humbly submitted that a position of dominance is not contrary to law; only abuse of it is. Herein no *prima facie* case exists as the CCI has directed the DG to conduct investigation solely on the allegations of Lifeline that Swasth has indulged in bad faith litigation.

a) Right to protect IPRs

In the matter in hand there is no case of Swasth abusing its dominant position under S. 4(2). Swasth had sometime in the year 2010 got assigned absolute rights to a few of the developed and completed R & D projects and IPRs of Jeevani. Swasth cannot be said to indulge in sham litigation as it was merely trying to protect its IPRs which were assigned to it. *"Intellectual property law bestows on the owners of intellectual property certain rights to exclude others. These rights help the owners to profit from the use of their property. An intellectual property owner's rights to exclude are similar to the rights enjoyed by owners of other forms of private property."*[51] It was only to protect these IPRs that Swasth approached the Hon'ble Delhi HC.

[51] AVTAR SINGH, COMPETITION LAW 35, (1st ed. Eatern Book Company, Lucknow, 2012).

The Hon'ble SC has observed that, "*The plaintiff has established a prima facie case on merits that in case ex parte injunction is not granted to the plaintiff and defendant is able to launch the product, irreparable loss and injury would be caused to the plaintiff which cannot be compensated in terms of money. Balance of convenience is in favour of the plaintiff."*[52]

Also, in the case *Novartis Pharmaceuticals Corporation et al* v. *Wockhardt USA LLC et al,*[53]the Hon'ble High Court of Delhi held that where the three conditions for an interim injunction, namely, prima facie case, irreparable loss and balance of convenience were all in favour of the patent holder, an injunction could be granted.

The fact that Swasth moved to the court before the launch of Novel does not cause hindrance in granting of injunction. As held in the case *M/s KRBL Limited* v. *Ramesh Bansal & Anr,* even though *"the defendant has so far not started using the impugned trademark/label in the course of trade on its vendible goods and business and nor has the plaintiff so far come across any of the impugned vendible goods under the impugned trademark/label in the market, however, the defendant is soliciting trade, distribution and marketing networks in relation to the impugned goods."*

It is obvious from the aforesaid that the present action is more in the nature of a ***"Quia Timet"*** *action, which is to nip in the bud the evil contemplated, the injury apprehended and the invasion threatened, though no actual injury or damage has been caused.* ***"Quia Timet"*** *is thus a preventive action to ensure that no damage is caused to the plaintiff.* The court hence granted against the defendants a *"permanent injunction from using, selling, soliciting,*

[52]Merck Sharp & Dohme Corporation & Anr. v. Aprica Pharmaceuticals Private Limited, CS(OS) 1236/2013.

[53]Novartis Pharmaceuticals Corporation et al v. Wockhardt USA LLC et a, Doc 2000.

exporting, displaying, advertising or by any other mode or manner dealing in or using the impugned trade mark/label"[54]

Swasth had the sole right to manufacture and sell such a drug, and thus, the case filed by Swasth against Lifeline was purely for the protection of its IPRs. This in no way can be termed as abuse of dominant position.

b) Market not restricted in any manner

During the period of the injunction, Swasth came out with a new similar cost effective drug in the market because it had the IPRs to do so. It must be noted that Swasth withdrew the case against Lifeline and the fact that the injunction was vacated depicts that Swasth did not restrict market access in any manner. Not only Lifeline but every other pharmaceutical company was allowed to enter the market if they pleased, provided it did not infringe the rights of Swasth. Thus it is humbly submitted before the Hon'ble SC that Swasth's actions were not anti-competitive in any way and it did not abuse its dominance by indulging in bad faith litigation, and in fact the case filed against Lifeline was purely Quia Timet in nature.

- **DG does not have power to conduct investigations under S. 26**

In light of the above, it is humbly submitted that no *prima facie* view of abuse of dominance by Swasth could be formed. Hence, CCI had no jurisdiction[55] to direct the DG to investigate into any alleged contravention stipulated under S.4. Moreover, the courts are the competent forum to settle disputes regarding IPR issues and the CCI is not conferred upon by such powers. By directing an investigation into baseless allegations, the CCI is trying to override the jurisdiction of the Delhi HC. Moreover, if the investigation is conducted, it would not

[54]M/s KRBL Limited v. Ramesh Bansal & Anr, CS(OS) 331/2007.

[55] Nissan Motors India Private Limited (NMIPL) v. The Competition Commission of India (CCI) Writ Petition Nos. 26488 of 2013, 31808 & 31809 of 2012.

only affect the goodwill and reputation of Swasth but would also infringe upon its right to keep the process of manufacture and sale of its products confidential.

Hence, it is humbly submitted that CCI's Order for directing investigation was bad in law as Swasth in its endeavour to protect its IPRs cannot be held, even *prima facie*, to be abusing its dominance.

PRAYER

Wherefore in the light of the issues raised, arguments advanced and authorities cited before this Hon'ble Court, the Counsel for Appellants most humbly prays to this Hon'ble Court to adjudge and declare the following:

1. The Division Bench of the Hon'ble Delhi High Court has erred in referring the matter to the Empowered Group.
2. The Scheme of arrangement for Jeevani sanctioned by order dated 5th July 2013 is liable to be set aside.
3. The Competition Commission of India has erred in directing the Director General to investigate into the allegation of abuse of dominance by Swasth Life Limited.

OR

May pass any order, decree or judgment in the light of justice, equity and good conscience, for which the counsel for Appellants shall pray duty bound to this Hon'ble Court.

APPELLANTS

Dated: _/_/2014

THROUGH

COUNSEL