5TH NLIU - JURIS CORP NATIONAL CORPORATE LAW MOOT COURT COMPETITION

2014

TEAM CODE: J

IN THE SUPREME COURT OF INDIA

FOREIGN LENDERS	**V.**	**JEEVANI LIMITED**
APPELLANT		RESPONDENT
	CLUBBED WITH	
LIFELINE LIMITED	**V.**	**PROMOTERS OF JEEVANI**
APPELLANT		RESPONDENT
	CLUBBED WITH	
SWASTH LIFE LIMITED	**V.**	**COMPETITION COMMISSION OF INDIA**
		LIFELINE LIMITED
APPELLANT		RESPONDENTS

CIVIL APPEALS UNDER ARTICLE 133(1) OF THE CONSTITUTION OF INDIA AGAINST ORDERS OF THE DELHI HIGH COURT

MEMORANDUM FOR THE APPELLANTS

INDEX

INDEX OF AUTHORITIES

Cases

Foreign Cases

Statutes/ Regulations/ International Agreements

Articles

Books/ Commentaries

STATEMENT OF JURISDICTION

The appellants have approached the Hon'ble Supreme Court of India under Article 133(1) of the Constitution of India and Section 109 of the Civil Procedure Code, 1908 challenging separate orders passed by the High Court of Delhi. In the exercise of its inherent powers under Section 151 of the Civil Procedure Code, 1908, the Hon'ble Court has consolidated different appeals given that the disputes arise out of the same transaction.[1] The Appellants humbly submit to the appellate jurisdiction of the Hon'ble Supreme Court of India under the aforementioned provisions.

[1] *Chittivalasa Jute Mills v. Jaypu Rewa* AIR 2004 SC 1687; *Indian Bank v. Maharshtra* AIR 1998 SC 1952; *Surat Goods Transport Pvt Ltd Co v. Asharam* AIR 1983 Guj 147

STATEMENT OF FACTS

Background

1. Jeevani Limited (**Jeevani**) and Lifeline Limited (**Lifeline**), two public listed companies, decided that Jeevani would completely merge into Lifeline and all its assets and liabilities would be transferred to Lifeline. A **scheme** of arrangement was prepared keeping for the purpose along with a share transfer agreement with the **Promoters**. The agreement provided, *inter alia,* specific representations as regards to disclosure of information and for a complete transfer of all intangible properties of Jeevani to Lifeline.

Case 1: Foreign Lenders v. Jeevani Ltd

2. On 30th March 2012, Jeevani and Lifeline filed an application under Section 391 of the Companies Act, 1956 for initiating the process of approval of the Scheme by the Delhi High Court. Jeevani issued a notice of meeting to its creditors by publishing an advertisement and accordingly, the meeting was held and passed by a vote of majority after which the High Court approved did also.
3. Certain **Foreign Lenders** who had won an arbitral award against Jeevani but had not filed enforcement proceedings, made an application for recall of order of the Delhi High Court approving the Scheme as that they had not received notice for the meeting despite being a separate class of creditors. The Single and Division bench of the High Court dismissed the application of the Foreign Lenders.

Case 2: Lifeline Ltd v. Promoters of Jeevani

4. Lifeline received notices from the US FDA for providing drugs of below par quality and in violation of the requisite production parameters by them. On further scrutiny by Lifeline, it was unearthed that the investigation on drugs produced by Jeevani at its plants in India was commenced much before the merger of Jeevani and Lifeline took place.

5. Lifeline filed a suit against the Promoters before the Delhi High Court for breach of the contract for concealing the fact of the pending investigations with malafide intention resulting in unjust enrichment. The Promoters, on the other hand, contended that the Court had no jurisdiction as the agreement between the parties had a clause for arbitration in case of a dispute. While the Single judge in the Delhi High Court dismissed the argument of the Promoters, the Division bench upheld the validity of the arbitration clause.

Case 3: Swasth Life Ltd v. Competition Commission of India & Lifeline Ltd

6. Soon after the merger, Lifeline decided to introduce a life saving drug "Novel" in the market using its newly-acquired R&D. The new drug Novel was awaited in the market as it was considered to be cheaper than other life saving drugs in the market, including the premier drug "Inventive", sold by **Swasth** Life Limited. Before Lifeline could launch 'Novel', Swasth filed a suit for infringement of its IPRs in and were able to obtain an interim injunction against the launch of the new drug 'Novel'. In the meanwhile, Swasth launched a similar cost effective drug in the market, cornering a large chunk of the market, after which it withdrew the case against Lifeline and the interim injunction was vacated.

7. Based on the above Lifeline filed an application before the Competition Commission of India (**CCI**) alleging that Swasth was abusing its dominant position by indulging in bad faith litigation. The CCI based on the allegations made by Lifeline passed an Order directing the DG to investigate on the information provided. Swasth being aggrieved by the Order of the CCI filed a writ petition before the Delhi High Court submitting 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. The Single and Division Bench of the Court dismissed the writ petition. **All the three cases have come before the Supreme Court.**

STATEMENT OF ISSUES

1. **WHETHER IN THE FACTS AND CIRCUMSTANCES OF THE CASE, JEEVANI WAS LIABLE TO PROVIDE A NOTICE TO THE FOREIGN LENDERS WHEN CONVENING A MEETING OF VARIOUS CLASSES OF CREDITORS UNDER SECTION 391 OF THE COMPANIES ACT, 1956.**

2. **WHETHER ON THE ALLEGATION OF FRAUD OR ANY DISPUTE ARISING FROM THE SHARE TRANSFER AGREEMENT, THE PARTIES CAN INVOKE ARBITRATION PROCEEDINGS UNDER CLAUSE 2 OF THE AGREEMENT OR DOES THE COURT HAVE JURISDICTION OVER THE MATTER.**

3. **WHETHER THE COMPETITION COMMISSION OF INDIA WAS CORRECT IN ORDERING THE DIRECTOR GENERAL TO INVESTIGATE INTO THE ALLEGATIONS OF ANTICOMPETITIVE BEHAVIOUR ALLEGED BY LIFELINE AGAINST SWASTH UNDER SECTION 26(1) OF THE COMPETITION ACT, 2002.**

SUMMARY OF ARGUMENTS

1. **The Foreign Lenders constituted a separate class of creditors so as to have been given a notice of the scheme under Section 391 of the Companies Act, 1956**

   The appellants submit that the Foreign Lenders did constitute a separate class of creditors and yet, did not receive notice of the Scheme and were not able to attend the meeting of creditors. In view of the fact that there was no meeting convened for them, the Scheme should be set aside. The appellants submit the following twofold argument: *firstly*, that the foreign lenders are creditors of Jeevani and *secondly*, foreign lenders constitute a separate 'class of creditors' so as to have been given a notice about the Scheme.

2. **Clause 2 of Share Transfer Agreement cannot be construed to be an arbitration clause**

   The Appellants humbly submit that Clause 2 of the Share Transfer Agreement is not an arbitration clause and that only a Court of law has the competence to decide on the dispute that has arisen between the two parties. The Appellants content the following twofold argument: *one*, that the Empowered Committee is incompetent to constitute the arbitral tribunal for the dispute and *two*, that the clause is vague and uncertain.

3. **The order passed by the Competition Commission of India is bad in law**

   The respondents humbly submit that the investigation ordered by the Competition Commission of India (CCI) under section 26(1) of the Competition Act, 2002 is bad in law. The appellant submits the following twofold argument: firsty, that there exists no prima facie case against Swasth to allow the CCI to order an investigation into the matter and secondly, that the remedy sought by the Respondents can only be in addition to, and not in the derogation of the Patents Act, 1970.

ARGUMENTS ADVANCED

1. THE FOREIGN LENDERS CONSTITUTED A SEPARATE CLASS OF CREDITORS SO AS TO HAVE BEEN GIVEN A NOTICE OF THE SCHEME UNDER SECTION 391 OF THE COMPANIES ACT, 1956

The appellants humbly submit that the Foreign Lenders constituted a separate class of creditors and yet, did not receive notice of the Scheme and were not able to attend the meeting of creditors. In view of the fact that there was no meeting convened for them, the Scheme should be set aside. The appellants submit the following argument: *firstly*, that the foreign lenders are creditors of Jeevani and *secondly*, foreign lenders constitute a separate 'class of creditors' so as to have been given a notice about the Scheme.

A. The Foreign lenders are creditors of Jeevani provided under section 391 of the Companies Act, 1956

The Appellants humbly submit that they are legitimate creditors of Jeevani for the following reasons; *one* the arbitral award against Jeevani is enforceable in India and *therefore; two* the foreign lenders can be termed as creditors of the Respondent Company.

i. The arbitral award is enforceable in India

Part II of the *Arbitration and Conciliation Act, 1996* provides for the enforcement of foreign awards in India. In such awards firstly, the legal relationship between the parties must be commercial and secondly, the award must be made in a convention country, to which reciprocal provision applies.[2] The award passed by the foreign arbitral tribunal on 27th July 2010[3] satisfies the definition laid down in the Act.[4] The foreign award is, on the face of it,

[2] Arbitration and Conciliation Act 1996, § 44 (c); See also *Centro Trade Minerals & Metals Inc. v. Hindustan Copper Ltd* (2006) 11 SCC 245

[3] Factsheet at ¶ 6

commercial in nature as it is in respect of money. Secondly, Hong Kong, where the award was passed, has been notified by the Central Government of India to bear valid arbitral awards in accordance with section 44(b).[5] Therefore provided that the award is not challenged by the award debtor and is allowed to stand, the award is enforceable in India.[6] The award cannot be presumed to be challenged in the future when taken to Court for enforcement[7] because section 48 does not confer an *ipso facto* jurisdiction on courts for annulment of an award made outside the country.[8] A foreign award shall be enforceable in India as if it were an award made on a matter referred to arbitration in India.[9]

Additionally, the New York Convention, to which India is a member, provides that "*Each Contracting state shall recognize arbitral awards as binding".*[10] Therefore assuming that the existence of an arbitral award satisfying applicable jurisdictional requirements has been satisfactorily proven by the award-creditor, these conventions impose a presumptive obligation on national courts to recognize international arbitral awards.[11] In addition to this, the fundamental purpose of the New York Convention is to facilitate the recognition and enforcement of international arbitral awards–specifically by ensuring that they are recognized as "binding" on the parties.[12] Hence, the award is presumed to be accruing upon Jeevani.

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[4] Arbitration and Conciliation Act 1996, § 44

[5] The Gazette of India, Notification No. 502 (F. No. 12(164)/2012-Judl.) dated 24.03.2012

[6] *Naval Gent Maritime Ltd v. Shivnath Rai Harnarain (I) Ltd* 174 (2009) DLT 391

[7] Arbitration and Conciliation Act 1996, § 49

[8] *ABC Laminart Pvt Ltd & Anr v. AP Agencies, Salem* AIR 1989 SC 1239; *Bharat Aluminium Co Ltd & Ors v. Kaiser Aluminium Technical Service Inc& Ors* AIR 2012 SC (Supp) 444

[9] Foreign Awards (Recognition and Enforcement) Act 1961, § 4

[10] Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) 1958, Art. III

[11] Gary B Born, *International Commercial Arbitration* (2nd edn., Kluwer Law International 2001) 779-80

[12] Arbitration and Conciliation Act 1996, §46; Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) 1958, Art. III & V

ii. The foreign lenders can be termed as creditors of the company

The expression 'creditor' includes every person having an actual or contingent claim, which is pecuniary nature.[13] Courts have adopted a very wide interpretation of the term "creditor" so as to include every person who has a quantifiable claim for recovery against anyone, whether actual, contingent, unliquidated or prospective.[14] A 'creditor' as per Section 391 of the *Companies Act, 1956* includes contingent creditor.[15] A contingent creditor is one to whom nothing is at present due but a right in whose favor will arise on the happening of a contingency which is already provided for,[16] which in the present case is the enforcement of the foreign award in India which is presumed to be accruing as per argument (i) above. The claimant thus is taken to be a creditor for the purposes of a scheme.

B. The foreign lenders constitute a separate class of creditors.

The object of creditors' meeting is to ascertain as to whether the money is payable to them by the transferor or the transferee company will be jeopardized if the court grants sanction to the proposed scheme of amalgamation. The company is to secure the amount of the creditors and the question that remains is determination of existence and extent of liability of each creditor.[17] A creditor who has not been paid has *locus standi* to participate in the matter of scheme of amalgamation.[18] The court would attach no sanctity to a scheme when all the creditors have not been notified.[19] The Appellants humbly content that in view of no notice

[13] *Halsbury's Laws Of India* (4th edn, Lexis Nexis-New Delhi 2009) 848; Kamal Gupta, *C R Dutta on the Company Law* (6th edn, LexisNexis 2008) 5203

[14] *State of Kerala v. VR Kalliyanikutty* (1999) 3 SCC 657; *Bank of Bihar Ltd v. Damodar Prasad & Anr* AIR 1969 SC 297; *Tika Ram & Sons (P.) Ltd v. CIT* (1964) 34 Com Cases 151; *Re: T&N Ltd* [2007] 1 All ER 851

[15] *Seksaria Cotton Mills Ltd v. AE Naik* AIR 1967 Bom 341

[16] *Chitta Ranjan Guha v. M. Ameen* AIR 1948 Cal 242

[17] *In Re: L. G. Electronics System (India) Ltd* (2003) 116 Com Cases 48 (Delhi)

[18] ibid

[19] *Re: Kaveri Entertainment Ltd* (2003) 45 SCL 294

being sent to the foreign lenders who constituted a separate class of creditors[20], the Scheme should be set aside under Section 392 of the Companies Act, 1956.

In view of the above, the case of *Soveriegn Life Assurance Co v. Dodd*[21] has laid down the test of 'similarity and dissimilarity' to determine who constitute a class of creditors. While the test of similarity requires a similarity of legal rights and interests within the class, the test of dissimilarity requires a dissimilarity of legal rights and interests between various classes of creditors.

i. Commonality of interest amongst the foreign lenders

The Appellants content that the court has to classify creditors or members if there are such classes and before sanctioning the scheme, to see their respective interests are taken care of.[22] As such, a 'class' has to be confined to those persons who form a homogenous group and have commonality of interest.[23] Their rights have to be similar enough for them to be able to consult together to view their common interest, in a collective manner.[24] The Foreign lenders had jointly invoked arbitration proceeding against Jeevani and the amount due was to be paid to all of them.[25] Therefore their legal right against Jeevani arises from the same cause, that is, the arbitral award and their interest lies in the same objective, that is, to claim the arbitral award from the company.

[20] Companies Act 1956, § 391

[21] *Sovereign Life Assurance Co v. Dodd* [1892] 2 QB 573

[22] *Bhagwanti v. New Bank of India Ltd* AIR 1950 EP 111

[23] *DA Swamy & Ors v. India Meters Ltd* (1992) 1 MLJ 523

[24] *Sovereign Life Assurance Co v. Dodd* [1892] AC 2 BQ 573; A Ramaiya, *Guide to the Companies Act* (17th edn, LexisNexis Butterworths Wadhwa 2010) 4023

[25] Factsheet at ¶ 6

ii. Dissimilarity of legal rights amongst the foreign lenders and other classes of creditors

The Appellants submit that there exists dissimilarity of legal rights among the foreign lenders and other classes of creditors.[26] Their rights are so dissimilar that it is impossible for them to consult together for their common interest.[27] Moreover, even after the scheme is approved by majority of the creditors, it is possible that the court disregard the three-fourth majority approval as it has to be seen that the interest of the creditor is also protected and that the transferee company would acknowledge liability to him.[28]

2. CLAUSE 2 OF SHARE TRANSFER AGREEMENT CANNOT BE CONSTRUED TO BE AN ARBITRATION CLAUSE

The Appellants humbly submit that Clause 2 of the Share Transfer Agreement is not an arbitration clause and that only a Court of law has the competence to decide on the dispute that has arisen between the two parties. The Appellants content the following twofold argument: *one,* that the Empowered Committee is incompetent to constitute the arbitral tribunal for the dispute and *two,* that the clause is vague and uncertain.

A. The Empowered Committee is not competent to be appointed the arbitral tribunal for the dispute

The Appellants argue that the Empowered Committee is not competent to be arbitrating on the dispute for the following reasons: *one,* there is a likelihood of bias or prejudice on part of the empowered committee; *two,* the composition of the committee goes against the principles of natural justice; *three,* considering the clause as an arbitration clause would be going

[26] *Miheer H Mafatlal v. Mafatlal Industries Ltd* JT 1996 (8) 205

[27] ibid

[28] *In re: Auto Steering India Pvt Ltd* (1977) 47 Comp Case 257 (Delhi)

against the public policy of India and *four,* the dispute arises out of a serious allegation that an arbitrator is incompetent to decide on.

i. There is a likelihood of bias on part of the empowered committee

The appellants submit that there is a likelihood of bias or prejudice in the decision-making capacity of the members of the empowered committee and hence contend that any decision made by such a committee would be oblique in nature. Bias has three limbs, namely, pecuniary bias, personal bias, and official bias.[29] The test of likelihood of bias is whether a reasonable person, in possession of reasonable information, would have thought that bias was likely and whether the person concerned was likely to be disposed to decide the matter in a particular way.[30]

Similarly, there is a grave apprehension with regard to the Arbitrator being an employee in a company because there would be a valid and reasonable apprehension of bias because of the position that the person occupies and the interest that he might have in the matter in question for example, a Director.[31] Thus, there is a reasonable possibility of any of the three limbs of bias creeping into any decision made by the members of the empowered committee as they are closely related on pecuniary, personal, and official basis to the Company and hence could very well be partial in its decision-making.[32] As per the Arbitration Act, 1996, the arbitrator

[29] *State of UP v. Mohd Nooh* AIR 1958 SC 86; *Rattan Lal Sharma v. Dr Hari Ram (Co- education) Higher Secondary School* AIR 1993 SC 2155*; Kamta Prasad v. State of Uttar Pradesh* 1999 (1) CLR 830

[30] *Jiwan Kumar Lohia v. Durgadutt Lohia* AIR 1992 SC 188; *International Authority of India v. K.D. Bali & Anr* 1988 (2) SCC 360

[31] *Indian Oil Corp Ltd & Ors v. M/S Raja Transport(P) Ltd* (2009) 8 SCC 520; See also *Sheo Murti Shukla v. Indian Oil Corporation Ltd* 2013 (200) DLT 270

[32] *Rattan Lal Sharma v. Dr Hari Ram (Co- education) Higher Secondary School* AIR 1993 SC 2155

needs to be impartial[33] or the court has been granted the power to make it ground enough for his removal.[34]

ii. The constitution of the committee goes against the principles of natural justice

Furthermore, the constitution of the Empowered Committee goes against the principles of natural justice wherein recognition has been given to the fact that one cannot be a judge in his own cause.[35] It is in the interest of justice and equity that adjudication, whenever disputes arise between parties to a contract, should be by a person who is independent of any possible influences.[36]

iii. Considering the clause as an arbitration clause would be going against the public policy of India

The *Arbitration and Conciliation Act, 1996* says that an award is in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption.[37] The section of the Act is worded in such a manner as would suggest that it is the duty of the Court to examine whether the award has been affect by fraud or corruption in any manner or not.[38] It has been observed that "*corruption does not necessarily include an element of bribe taking. It is used in a much larger sense as denoting conduct, which is normally unsound or debased. The word is not synonymous with the words dishonestly or fraudulently but is much*

[33] Arbitration and Conciliation Act 1996, § 10(8), 12(1); See *also M/S Konkan Railway Corporation Ltd & Anr v. M/S Rani Construction Pvt Ltd* 2001 (2) ARBLR 565*; M/S Deep Trading Company vs M/S Indian Oil Corporation & Ors* AIR 2013 SC 1479

[34] Arbitration and Conciliation Act 1996, §24(1)(a); See also *Bihar State Mineral Dev. Corpn. & Anr. V. Encon Builders (I) Pvt. Ltd.* AIR 2003 SC 3688

[35] *Indian Oil Corp Ltd & Ors v M/S Raja Transport Pvt Ltd* (2009) 8 SCC 520

[36] Arbitration and Conciliation Act 1996, §10(8); *State of Karnataka & Ors v. Shri Rameshwara Rice Mills* AIR 1987 SC 1359

[37] Arbitration and Conciliation Act 1996, §34(2)(b)(ii) (Explanation)

[38] Arbitration and Conciliation Act 1996, §34(2)(b); See also *State of Kerala v. Som Datt Builders Ltd* AIR 2003 Ker 61

wider. It even includes conduct, which is neither fraudulent nor dishonest, if it is otherwise blameworthy or improper."[39]

In the present case, the high ranked executive officials have been appointed as members of a dispute resolving committee, any decision made by which would be final binding on the parties who are involved in a dispute regarding the very company the members of the empowered committee are employees of. Justice, in this regard, must not only be done, but also appear to be done.[40]

iv. The dispute arises out of a serious allegation that an arbitrator is incompetent to decide on

The case at hand points to a *prima facie* case of criminal cheating.[41] Lifeline was deceived into entering the agreement of share transfer due to the intentional omission by the Promoters about the pending FDA investigations against Jeevani. This has led to harm in terms of possible penalties and reputation and an undue gain to the Promoters by getting inflated values for their shares.

For a prima facie case of cheating, the test is whether there was sufficient ground for proceeding and not whether there was sufficient ground for conviction.[42] Hence, there remains no need for the intention to be proved and the fact that the other requirements of the offence are satisfied, it creates ground enough for proceeding thereby creating a *prima facie* case of cheating.

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[39] *Union of India v. Dr S Dutt* AIR 1966 SC 523

[40] *State of WB & Ors v. Shivananda Pathak & Ors* AIR 1998 SC 2050; *G Sarana v. University of Lucknow & Ors* AIR 1976 SC 2428; *Uma Nath Pandey & Ors v. State of UP & Anr* AIR 2009 SC 2375; *Mohan Lal Aggarwal v. Atinder Mohan Khosla* AIR 2004 SC 4004

[41] Indian Penal Code 1860, §415

[42] *Nirmaljit Singh Hoon v. State of West Bengal & Anr* (1973) 3 SCC 753; *Chandra Deo Singh v. Prokash Chandra Bose & Anr* AIR 1963 SC 1430

On the basis of the establishment of *prima facie* cheating and the fact that there has been a case of fraud lodged against the respondents, the appellants contend the fact that an arbitrator would not be competent to deal with the matter. The Hon'ble Supreme Court in *N. Radhakrishnan v. M/S Maestro Engineers & Ors*[43] has stated that whenever there arise serious allegations of fraud, or a possibility of criminal action for alleged commission of criminal offences, the matter, for the furtherance of justice, should be tried in a court of law which would be more competent and have the means to decide complicated matters involving various questions and issues raised.[44] Thus, it is the decision of the court which authorise the arbitration tribunal presiding over a dispute. The power granted is to the judiciary over the quasi-judiciary bodies to check, validate and contain the power that is handed over to the arbitrators in the Arbitration and Conciliation Act, 1996.[45]

Thus, the Court can proceed with a suit despite the presence of an arbitration clause if dispute involves serious questions of law or complicated questions of fact adjudication of which would depend upon detailed oral and documentary evidence.[46] Further, a Civil Court can refuse to refer matter to arbitration if complicated question of fact or law is involved or where allegation of fraud is made.[47] Thus, given the fact that the question of law here is complicated because of the involvement of a criminal offence and the fact that an allegation is made, the appellants submit and solicit the intervention of the court in this matter.

[43] *N Radhakrishnan v. M/S Maestro Engineers & Ors* AIR 2010 SC (Supp) 307

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

[45] Arbitration and Conciliation Act 1996, §16

[46] *M Venkatachalapathy v. United India Insurance Company Ltd* 2007 ACJ 94; *Oomor Sait HG v. Asiam Sait* 2001 (3) CTC 269

[47] ibid; See also *N Radhakrishnan v. M/s Maestro Engineers & Ors* AIR 2010 SC (Supp) 307

B. The Clause is vague and uncertain

The appellants submit that the alleged 'arbitration clause' in the contract was 'vague and uncertain' and hence cannot be enforced.[48] A mere agreement between two parties to be bound by the decision of person does not make that person an arbitrator under the Arbitration and Conciliation Act.[49]

For this purpose, clause 2.1 of the Share Sale Agreement needs to be observed. The clause does not clarify whether it is an arbitrator or some other redressal agency which would be resolving the dispute.[50] Furthermore, this clause does not mention the mode or method of appointment the 'arbitrators' other than mentioning the fact that an empowered committee would be brought into existence which would resolve the disputes arising between the parties. Thus, the vagueness and uncertainty of the clause would declare void the clause.[51]

3. THE ORDER PASSED BY THE COMPETITION COMMISSION OF INDIA IS BAD IN LAW

The respondents humbly submit that the investigation ordered by the Competition Commission of India (CCI) under section 26(1) of the *Competition Act, 2002* is bad in law. The appellant submits the following twofold argument: *firsty,* that there exists no *prima facie* case against Swasth to allow the CCI to order an investigation into the matter and *secondly*, that the remedy sought by the Respondents can only be in addition to, and not in the derogation of the *Patents Act, 1970.*

[48] *Teamco Pvt Ltd v. TMS Mani* AIR 1967 Cal 168; See also *Bhagwati Prosad Harlalka v. Kamala Mills Ltd* AIR 1959 Cal 687

[49] Arbitration and Conciliation Act 1996, §11; *Garg Builders and Engineers v. UP Rajkiya Nirman Nugam Ltd* AIR 1995 Del 111; See also *Fertilizer Corporation of India Ltd v. Domestic Engineering Installations Gorakhpur* AIR 1970 All 31

[50] *Jagatjit Jaiswal & Anr v. Karmajit Singh Jaiswal & Anr* 2008 (146) DLT 404; *Teamco Pvt Ltd v. TMS Mani* AIR 1967 Cal 168

[51] Indian Contract Act 1872, §29; *Uttam Singh Dugal & Co Pvt Ltd v. Hindustan Steel Ltd* AIR 1982 MP 206; *Jagatjit Jaiswal & Anr v. Karmajit Singh Jaiswal & Anr* 2008 (146) DLT 404

A. There exists a *prima facie* case against Swasth to allow the CCI to order an investigation into the matter under section 26(1) of the *Competition Act, 2002*.

Under the Competition Act, upon the receipt of any information alleging a practice of abuse of dominant position in a market[52], the CCI may order the Director General to inquire into the alleged contraventions under section 26(1).[53] This direction can be made only if the opinion of the CCI points to a *prima facie* case.[54] In the present case, the appellant contends that there did not exist any *prima facie* case to allow the respondent Commission to direct an investigation into the alleged contraventions by Swasth. The Appellant submits that *one,* it did not enjoy a dominant position in the market; *two,* the infringement case filed was as a matter of right and *therefore* there was no 'bad faith litigation' on part of the appellant.

i. Swasth's drug "Inventive" was not in a dominant position in the market

To allege any abuse of dominant position, two positions must be confirmed; *one*, that the party had a dominant position in the relevant market and *two*, an abuse of the dominant position by indulging in practices enumerated in section 4(2) of the Competition Act.[55] The assessment of a firm's dominance in a market is done by reading section 4 with 19(4) of the Competition Act.[56] As such, elements that constitute a dominant position are: (i) a position of

[52] Competition Act 2002, § 4(1)

[53] Competition Act 2002, § 19(1)

[54] Competition Act 2002, § 26(1). See also Competition Commission of India (General) Regulations 2009, r. 18; *Arshiya Rail Infrastructure Ltd v. Ministry of Railways & Container Corporation of India Ltd* [2013] 112 CLA 297; *Competition Commission of India v. Steel Authority of Indian Ltd & Anr* (2010) 10 SCC 744

55 *Kingfisher Airlines Limited, Dr Vijay Mallya v. Competition Commission of India & Ors* (2010) 4 Comp LJ 557; *Sanwar Mal Agarwal, Prop Jupiter Industries, Rajasthan v. Punjab National Bank & Anr* Case No. 08/2010 (CCI); *Sumit Sahni & Anr v. Sumel Heights Pvt Ltd* 2013 Comp LR 0673

[56] *Magnolia Flat Owners Association & Anr v. DLF Universal Ltd & Ors* 2012 Comp LR 94; *Prints India v. Springer India Pvt Ltd & Ors* [2012] 109 CLA 411

strength in the relevant market and (ii) a position that enables a firm to operate and influence competitive forces in the relevant market.[57]

The Appellants contend that there is nothing in the facts of the case to indicate Swasth's market dominance so as to *prima facie* allege a violation of section 4(2) of the Competition Act. For a claim on anticompetitive grounds, not only market power or a certain anticompetitive intention needs to be seen, but also the sufficient economic power, from whichever source, which allowed the 'dominant' to monopolise the market.[58] The facts of the case do not exhibit the prevalence of any of the host of factors stipulated in section 19(4) to ascertain a dominant position of Swasth in the market.[59]

Additionally, the Appellants contend that the mere possession of intellectual property cannot, by itself, be considered to confer a dominant position to the owner.[60] This is because a legal monopoly does not automatically lead to an economic monopoly in the market and that a monopoly acquired legally is not unlawful.[61]

ii. The infringement suit filed by Swasth was as a matter of right and hence, there was no abuse of a dominant position through 'bad faith litigation'

There was no abuse of dominant position by Swasth

The Appellant humbly submits that if *arguendo,* Swasth's patented drug 'Inventive' was dominant in the market, it did not abuse its dominant position to the detriment of the

[57] Competition Act 2002, § 4 Explanation (a); T Ramappa, *Competition Law in India* (3rd edn, Oxford University Press 2014) 159; *United States v. EI du Pont de Nemours & Co* 351 US 377

[58] *Sonam Sharma v. Apple Inc USA & Ors* [2013] 114 CLA 255; Paul Levine, 'Attempt to Monopolise under the *Sherman* Act: Defendant's Market Power as a Requisite to a *Prima Facie* Case' (1973) 73 Columbia LR 1451

[59] *Belaire Owner's Association v. DLF Ltd* [2011] 104 CLA 398; *Jindal Steel & Power Ltd v. Steel Authority of India Ltd* [2012] 107 CLA 278

[60] *Astrazeneca AB v. European Commission* [2010] 5 CMLR 28; *Volvo AB v. Erik Veng (UK) Ltd* [1998] ECR 6211; *IMS Health GmbH & Co OHG v. NDC Health GmbH & Co KG* [2004] ECR I-5039

[61] Peter R Willis (ed.), *Introduction to EU Competition Law* (1st edn, Informa Professional 2005) 126; Valeria Guimaraes de Lima e Silva, 'Sham Litigation in the Pharmaceutical Sector' (2011) 7 ECJ 455

Respondent company. This is because a legitimate exercise of intellectual property rights is not an abuse of one's 'dominant position'.[62] The *Patents Act, 1970* gives an exclusive right to the patent holder to prevent third parties from making, using, selling or importing the product without the consent of the patent holder.[63] This right can be exercised by filing an infringement suit to obtain an interim injunction at the option of the plaintiff under section 108 of the Act. By questioning the right the Appellant had to access the court, the CCI's order for investigation[64] infringes upon the statutory rights of the Appellant[65] for which the writ of *certiorari* was petitioned under section 226 to the High Court.[66]

There was no 'bad faith' litigation by Swasth

The infringement suit filed before the High Court of Delhi was not in bad faith. To prove bad faith litigation, the opposite party must establish that (i) the suit was objectively baseless and (ii) the suit concealed an attempt to interfere directly with the business relationships of the competitor.[67] There is no fact on record to demonstrate how the interim injunction was obtained if the suit was 'objectively baseless' because the Court followed due procedure.[68] Mere intent is not sufficient to prove baseless litigation[69] and even baseless litigation is not *per se* an instance of anticompetitive behaviour.[70]

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[62] *Hindustan Lever Ltd v. Godrej Soaps Ltd & Ors* AIR 1996 Cal 367; JK Das, *Intellectual Property Rights* (1st edn, Kamal Law House 2008) 42-45

[63] Patents Act 1970, § 48(a)

[64] Competition Act 2002, § 26(1)

[65] Patents Act 1970, § 108

[66] *Navinchandra Shakerchand Shah v. Ahmedabad Co-Operative Department Stores Ltd* 1979 (1) LLJ 60; *Bharat Sugar Mills Ltd & Ors v. Union of India & Ors* AIR 1984 Cal 102

[67] *RR v. Noerr Motor Freight* 365 US 127 (1961); *Professional Real Estate Investors v. Columbia Pictures Industries* 508 US 49 (1993)

[68] Civil Procedure Code 1908, O. XXXIX, r. 1&2

[69] Herbert Hovenkamp & Mark A. Lemley, *IP and Antitrust:A n Analysis of Antitrust Principles Applied to Intellectual Property Law* (2nd edn, Wolters Kluwer Law & Business 2013) 11.56

It is further submitted that even if the interim injunction was obtained in bad faith, the litigation was not anticompetitive in nature and that its remedy would lie through civil procedures and not through an antitrust mechanism.[71]

B. The remedy sought by the Respondents can only be in addition to, and not in derogation of the rights conferred by the Patents Act, 1970.

Section 62 of the Competition Act provides, "The provisions of this Act shall be in addition to, and not in derogation of, the provisions of any other law for the time being in force." In other words, the Act does not override provisions of other laws except when they are inconsistent with the provisions of the Act.[72] Formed on the principles of the TRIPS agreement, the Patent Act is to be in harmony and not inconsistent with the Competition Act.[73] It is submitted that the protection allowed to patent holders under section 48 of the Patents Act, though a qualified right subject to conditions,[74] is an absolute statutory right otherwise.[75] However, these statutory rights have been questioned by the CCI in passing an order to investigate into a legitimate exercise of these rights.[76] As a consequence, seeking a remedy under the Competition Act that goes against the protections provided under sections 48 and 108 of the Patents Act results in being derogatory against it and violates the principle in section 62 of the Competition Act.[77]

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[70] *California Motor Transport v. Trucking Unlimited* 404 US 508 (1972); Thomas A Balmer, 'Sham Litigation and the Antitrust Laws' (1980) 29 Buff LR 39

[71] Civil Procedure Code 1908, § 95

[72] Competition Act 2002, § 60; *Consumer Online Foundation v Tata Sky Limited & Ors* Case No. 2/2009 (CCI)

[73] TRIPS Agreement 1994, a. 40; *Novartis AG v. Union of India & Ors* AIR 2013 SC 1311; R Radhakrishnan & Balasubramanian, *Intellectual Property Rights: Text and Cases* (1st edn, Excel Books 2008) 72

[74] Patents Act 1970, § 47; *Chemtura Corporation v Union of India & Ors* 2009 (41) PTC 260

[75] *Hind Mosaic and Cement Works & Anr v. Shree Sahjanand Trading Corporation* 2008 (37) PTC 128; *Bayer Corporation & Anr v. Union of India & Ors* 2010 (43) PTC 12

[76] Competition Act 2002, § 26(1)

[77] *M/s Fair Air Engineers Pvt Ltd & Anr v. NK Modi* AIR 1997 SC 533

CONCLUSION AND PRAYERS

In light of the questions raised, issues presented and authorities cited, the appellants most humbly and respectfully pray before the Hon'ble Supreme Court to allow the appeal and adjudge and declare:

1. The Scheme of arrangement to be set aside in view of the Foreign Lenders not having been given notice to attend the meeting of creditors.
2. Clause 2 of the share sale agreement not to be held as an arbitration clause and hence Delhi Courts under Clause 3 should have jurisdiction to look into the issues involved.
3. The order of the CCI under Section 26(1) of the Competition Act, 2002 to be set aside due to the absence of any *prima facie* case against the appellant.

The Court may also be pleased to pass any such order as it may deem fit in terms of equity, justice and good conscience.

For this act of kindness, the Appellants shall duty bound forever pray.

Sd/-

(Counsel for the Appellants)