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

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2014

NLIU, BHOPAL

IN THE HON'BLE SUPREME COURT OF INDIA

MEMORANDUM

For

APPELLANT

FOREIGN LENDERS (APPELLANT)

V.

LIFELINE (RESPONDENT)

WITH

LIFELINE (APPELLANT)

V.

PROMOTERS OF JEEVANI (RESPONDENT)

WITH

LIFELINE AND CCI (APPELLANT)

V.

SWASTH (RESPONDENT)

LIST OF ABBREVIATION

AIR…….All India Report
All……Allahabad
AP……...…….Andhra Pradesh
Bom…….....…….…..Bombay
Cal……..……..……Calcutta
CCI……Competition Commission of India
Co……...….. Company
CompCas……...……Company Case
CompLJ……Company Law Journal
CompLR……..Company Law Review
C.W.N…….Calcutta Weekly Notes
Del……..….Delhi
DG……..…Director General
ECR……..…..Excise and Custom Report
FDA……..…….Food And Drug Administration
HC……..High Court
IPRs……..…Intellectual Property Rights
Kar…….……..Karnataka
P & H……...……...Punjab & Haryana
SC….……Supreme Court
SCC…...…….Supreme Court Cases
SCL……..……SEBI and Corporate Laws
SCR…….……Supreme Court Reporter
SLP……...Special Leave Petition
u/s.. …….……..Under Section
UOI……..…..……Union of India

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3. Companies Act 2013
4. Compition Act 2002
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STATEMENT OF JURISDICTION

THE APPELLANT HAVE THE HONOR TO SUBMIT BEFORE THE HON'BLE SUPREME COURT OF INDIA, THE MEMORANDUM FOR THE APPELLANT UNDER ARTICLE 132 (REGULAR APPEAL) OF THE CONSTITUTION OF INDIA, 1950.

THE PRESENT MEMORANDUM SETS FORTH THE FACT, CONTENTIONS AND ARGUMENTS IN THE PRESENT CASE

STATEMENT OF FACTS

Lifeline who is a major producer of food products approached Jeevani, a pharmaceutical manufacturing industry for a possible partnership. Both companies on 27th January 2012 decided to merge and it was decided that Jeevani would completely merge into Lifeline and all assets and liabilities of Jeevani would be transferred to Lifeline. It was also decided that the three promoters of Jeevani who are also majority shareholders in the company would sell their entire promoter shareholding i.e.18% of their stake in Jeevani to Lifeline. The sale of stake was affected on 23rd March 2012 vide a separate sale agreement between Lifeline and the Promoters which contained specific representations as regards disclosure of information, by either of the parties, which may be vital to the transaction in which the parties were entering into. The agreement also specifically provided that all intangible properties including the active R & D and IPRs of Jeevani would become the property of Lifeline and all rights accruing from it would vest with Lifeline.

The scheme was finalized on 5th march 2012 after which it was sent to Bombay stock exchange for approval but BSE did not approve the scheme. On 30th march 2012 Jeevani filed a case in Delhi High Court u/s 391 of Companies act 1956, now 231 of the Companies act 2013, for initiating the procedure for approval of the scheme. The court passed an order under chapter 5 of companies act for meeting of the creditors to be convened. Jeevani issued a notice of meeting to its creditors by publishing an advertisement in a local English language newspaper and local language newspaper containing the terms of the proposal and explaining its effect. A meeting of the creditors to whom notice was sent, was accordingly held and resolutions supporting the Scheme were passed by a vote of majority. On 5th july 2013 Delhi High Court sanctioned the scheme. Lifeline also approached the Bompaby High Court for approval of the scheme of arrangement under the relevant section of the Companies act which also got approved.

In August 2013 the foreign creditors filed an application before the company judge recalling the order passed on 5th July 2013 sanctioning the scheme. The said creditors are foreign lenders who prior to this arrangement had jointly invoked arbitration proceedings against Jeevani before a foreign arbitral tribunal constituted in Hong Kong and a foreign arbitral

award was passed on 27th July 2010 in favor of the foreign lenders in which Jeevani was to pay the amounts as stated in the award but till date no proceeding has been initiated to enforce the award. The foreign lenders contended that they had not received notice of the Scheme and were not able to attend the meeting of creditors. They further contended that they constituted a separate class of creditors and in view of the fact that there was no meeting convened for them, the Scheme should be set aside. The company contended that the foreign creditors are not the creditors of the company so they should not be any notice. The company judge dismissed the application filed by the foreign creditors and refused to set aside the scheme. The appeal went to the division bench of Delhi High Court who after consideration of facts dismissed the appeal of the foreign creditors and therefore the present appeal arises.

When the newly merged lifeline continued the business of Jeevani of supplying generic drugs to the USA it received notices from the US Food and Drug Administration (the FDA) for providing below par quality of drugs and in violation of the requisite production parameters set out by the FDA. On further scrutiny, it was unearthed that the investigation by FDA on drugs produced by Jeevani at its plants in India was commenced much before the merger took place. Lifeline filed a suit against promoters before Delhi High Court regarding the damages arising out of breach of contract on 23 March 2012, for compensation of wrongful gain and unjust enrichment of promoters by way of defrauding and misrepresenting Lifeline. The Promoters contended that the Delhi High Court has no jurisdiction as the agreement dated 23rd March, 2012 between the parties had an arbitration clause and any dispute arising between them should be referred to arbitration.

The single judge bench of Delhi High Court held that this could not be a ground of arbitration clause and therefore the court has the jurisdiction to look into the matter. This order was appealed by the promoters in Division Bench and the Division Bench held that the single bench judge erred in its decision and those clauses constitutes an arbitration clause and the dispute to be decided by the Empowered Group in terms of the agreement. The Lifeline aggrieved with the decision of the Division Bench of Delhi High Court and has approached the SC.

Lifeline filed an application before Competition Commission of India against Swasth alleging that Swasth was abusing the dominant position by indulging in bad faith litigation. The CCI based on the litigation filed by lifeline on the prima facie of the case believed that Swasth

might have abused the dominance and passed an order under sec 26(1) of competition act to the DG to investigate on the information given and submit its report within 45 days and the report is still awaited. Swasth was aggrieved by the order of the CCI filed a writ petition making Lifeline and CCI a party in Delhi High Court. Swasth submitted that CCI's Order for directing investigation was bad in law as Swasth in its endeavor to protect its IPRs cannot be held, even prima facie, to be abusing its dominance .on hearing the arguments from both the party the Delhi High Court held that CCI on prima facie finding ordered for investigation and as such no adverse effect is found on Swasth and there is no reason to interfere with in investigation of DG CCI and dismissed the writ petition filed by Swasth. The division bench did not find any reason to interfere with the order of the single bench judge of Delhi High Court.

QUESTIONS PRESENTED

I. WHETHER THE FOREIGN LENDERS WHO OBTAINED DECREES AGAINST THE COMPANY FORMED A SEPARATE CLASS OF CREDITORS FORM THE OTHERS WHO HAD NOT OBTAINED DECREES, AND IT WAS NECESSARY TO CONVENE A MEETING OF THE DECREE HOLDER CREDITORS BEFORE THE SCHEME COULD BE MADE BINDING ON THEM ?

II. WHETHER CLAUSE 2.1 CONSTITUTE AN ARBITRATION CLAUSE AND ACCORDINGLY SHOULD BE REFERRED TO THE EMPOWERED GROUP COMMITTEE COMPRISING OF THREE EXECUTIVE LEVEL PERSONNEL OF THE COMPANY?

III. WHETHER A DIRECTION PASSED BY THE COMMISSION U/S 26 (1) OF THE ACT WHILE FORMING PRIMA FACIE OPINION WOULD BE APPEALABLE U/S 53 (A) (1) OF THE ACT?

SUMMARY OF ARGUMENTS

I. WHETHER THE FOREIGN LENDERS WHO OBTAINED DECREES AGAINST THE COMPANY FORMED A SEPARATE CLASS OF CREDITORS FORM THE OTHERS WHO HAD NOT OBTAINED DECREES, AND WAS IT NECESSARY TO CONVENE A MEETING OF THE DECREE HOLDER CREDITORS BEFORE THE SCHEME COULD BE MADE BINDING ON THEM ?

Foreign lenders do not constitute a separate class of creditors and are included in the ambit of secured creditors. If due to inadvertent omission or a bona fide mistake, a creditor of the company is not issued notice under section 391, it would not be fatal to the resolutions passed in such a meeting, held without notice to the creditor. All the requirements of section 391 of the Companies act 1956 have been duly complied by the company and all the necessary approvals have been obtained. And the company further states that the scheme does not harm the interest of the creditors in any manner whatsoever. As already being mentioned in the scheme that all the assets and liabilities of the company Jeevani would stand transferred to company Lifeline after the merger. Therefore all the litigations, suits, appeals, proceedings, etc. initiated by or against the transferor-company shall be substituted with the name of transferee-company on the scheme being sanctioned.

II. WHETHER CLAUSE 2.1 CONSTITUTE AN ARBITRATION CLAUSE AND ACCORDINGLY SHOULD BE REFERRED TO THE EMPOWERED GROUP COMMITTEE COMPRISING OF THREE EXECUTIVE LEVEL PERSONNEL OF THE COMPANY?

Clause 2.1 do not constitute an arbitration agreement as there was no mention in this clause of any dispute, much less of a reference thereof. In the present case, the Empowered committee is more in the category of an expert who will decide claims, rights, or matters in any way pertaining to the contract. The intention appears to be more to avoid disputes than to decide formulated disputes in a quasi-judicial manner.

III. WHETHER A DIRECTION PASSED BY THE COMMISSION U/S 26 (1) OF THE ACT WHILE FORMING PRIMA FACIE OPINION WOULD BE APPEALABLE U/S 53 (A) (1) OF THE ACT?

Section 53A(1) clearly states appeals against any direction issued or decision made or order passed by the commission under sub-section (2) and (6) of section 26, section 27, section 28, section 31, section 32, section 33, section 38, section 39, section 43, section 44, section 45 or section 46 of this Act are appealable. The Commission is required to perform inquisitorial and regulatory functions in order to form a prima facie opinion under Section 26(1) of the Act and that is different from the adjudicatory function performed by it under Section 26(2) of the Act. Therefore, the functioning of the Commission under Section 26(1) is a mere fact finding enquiry which has no effect on the determination of the rights of the parties concerned and provides discretion to the Commission for grant of hearing to the affected parties and henceforth is not appealable.

ARGUMENTS ADVANCED

I. WHETHER THE FOREIGN LENDERS WHO OBTAINED DECREES AGAINST THE COMPANY FORMED A SEPARATE CLASS OF CREDITORS FORM THE OTHERS WHO HAD NOT OBTAINED DECREES, AND IT WAS NECESSARY TO CONVENE A MEETING OF THE DECREE HOLDER CREDITORS BEFORE THE SCHEME COULD BE MADE BINDING ON THEM ?

The contention raised on behalf of the foreign lenders in substance is that they are the creditors of the company but at the time when the scheme was put forward or sanctioned by the Court they had already become a decree-holder, and as there was no arrangement with the class of creditors to which they belonged, they was not bound by scheme and the same should be set aside. The grievance of the foreign lenders is that from the commencement of the proceedings of merger, neither a notice was given to them, nor a meeting was convened or conducted, nor prior permission was obtained from them in order to come for such an arrangement of merger.

The said creditors are foreign lenders mainly foreign banks who prior to this arrangement had jointly invoked arbitration proceedings against Jeevani, before a foreign arbitral tribunal constituted in Hong Kong. And on 27th July 2010, a foreign arbitral award was passed in favour of the foreign lenders in which Jeevani was to pay the amounts as stated in the award. The said award is binding on the petitioner for all purposes as the same has not been set aside.

The scheme of merger was formulated between Jeevani and Lifeline wherein it was decided that Jeevani would completely merge into Lifeline and all the assets and liabilities of Jeevani would be transferred to Lifeline. On 30th March 2012, Jeevani and Lifeline filed an application under Section 391 of the Companies Act, 1956 now section 231 of companies act, 2013 for initiating the process of approval of the Scheme by the Hon'ble Delhi High Court. The Hon'ble Company Judge in accordance ordered for a meeting of the creditors to be convened. Jeevani issued a notice of meeting to its creditors by publishing an advertisement in a local English language newspaper and local language newspaper containing the terms of the proposal and explaining its effect. A meeting of the creditors to whom notice was sent, was accordingly held and resolutions

supporting the Scheme were passed by a vote of majority. Thereafter the Scheme was also approved by the Hon'ble Delhi High Court on 5th July 2013.

The creditors would like to bring to notice that the transferor company has applied and obtained the approval from the Court without projecting the proper facts regarding their liabilities to their creditors and also neglected to obtain consent or no objection letter from foreign lenders.

The Court, before it sanctions a scheme of arrangement, must be satisfied that the procedures prescribed in the Act of 1956 are duly complied with. It should be also be confirmed that the interests of the members and the creditors of the companies concerned must be protected by seeing that they are duly and properly informed of the pros and cons of the proposed arrangement and they take an informed decision.

The following facts has emerged from the case-

(i) The scheme of arrangement of merger was made without the prior permission of the decree holder creditors/ foreign lenders.

(ii) The said arrangement if approved, all foreign lenders would lose their right to proceed against the securities originally furnished by Jeevani for availing the loan.

(iii) Apart from meeting of the creditors, meeting of the decree holder creditors should have also been convened and conducted.

(iv)The creditor banks from the commencement of the proceedings of the arrangement till it was approved by the Court, were kept in darkness.

(v) Even before the Court where the company sought the approval of the scheme, they suppressed all the necessary details, and if made, the Court would not have granted approval.

(vii) Lastly, the said arrangement of demerger and amalgamation lacked bonafide.

The petitioner in the lower courts have contended that the foreign lenders are not the creditors of the company and even if they do so they do not form a separate class of creditors and it is not obligatory to that notice of creditors meeting be served to every creditor. The contention of not

being creditors cannot be accepted as the arbitral award has not been executed and the amount has still not been paid.

The second part of contention that they do not form a separate class of creditors can be argued in the light of following cases-

The word ' class ' in Clause (1) of section 391 has not been defined in the Act. It must be given such a meaning as will prevent the section being so worked as to result in confiscation and injustice and it must be confined to those persons whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest.

In Mather & Platt Fire System Ltd., In re[1] the court held that the statue contemplates the holding of a meeting of class of creditors or, as the case may be, a class of members where the compromise or arrangement is sought to be effected not with the creditors or members in general, but with a particular class among them. In such a case, the compromise or arrangement upon being sanctioned would affect the rights of a class of members or class of creditors. Hence, it is that class, whose rights are to be affected, is provided with an opportunity of giving vent to its views at a meeting of the class. The holding of a meeting of the class must, therefore, be considered in the context of the compromise. The definition of 'class' is relatable to the terms of the compromise, which affects or modifies the rights of that class.

In Maneckchowk &Ahmedabad Mfg. Co. Ltd., In re[2], the court held that: "It is a formidable difficulty to say what constitutes a class of creditors, speaking very generally, in order to constitute a class, members belonging to the class must form a homogeneous group with commonality of interest. If people with heterogeneous interests are combined in a class, naturally the majority having common interest may ride rough shod over the minority representing a distinct interest. One test that can be applied with reasonable certainty is as to the nature of compromise offered to different groups or classes. The company will ordinarily be expected to offer an identical compromise to persons belonging to one class, otherwise it may be

[1] [2007] 79 SCL 432 (Bom.)

[2] (1970) 40 Com Cases 819 (Guj.)

discriminatory. At any rate, those who are offered substantially different compromise each will form a different class. Even if there are different groups within a class, the interests of which are different from the rest of the class or who are to be treated differently in the scheme, such groups must be treated as separate classes for the purpose of the scheme. Broadly speaking, a group of persons would constitute one class when it is shown that they have conveyed all interest and their claims are capable of being ascertained by any common system of valuation.

In Smt Bhagwanti v. New Bank of India Ltd.[3] –the court held that if the creditors have different interests and constitute separate classes, then a general meeting of all creditors will not be the proper thing, for the views of a distinct class ought to be ascertained from the votes of that class only. A general meeting of all creditors may not protect the class interest as such. Therefore, at the hearing for the sanction any creditors may appear and claim that he belongs to a special class of creditors and that the interest of that class has not been protected by the meeting which comprised all and sundry creditors and the Court will naturally have to enquire whether the body of persons making a similar claim as made by this objector do really form a separate and distinct class of creditors having special interest whose views required to be ascertained by a separate meeting of that class alone.

One of the tests to determine whether the two or more groups of members or creditors from a different class is whether the same scheme of arrangement or compromise offers the same terms to all or whether different terms are offered. If the scheme offers to the two groups of members or creditors different terms of arrangement, they would generally form a different class.

In Manikganj Trading and Banking Co. Ltd. V. Madhabendra Kumar Shaha[4] , Rajshahi Banking Corporation v. Sura Bala Debi[5] and Rajshahi Banking Corporation and Trading Corporation Ltd. V. Pulin Behari Mukherjee[6].-It has been held that depositors who obtained decrees against a banking company before any scheme was embarked upon by the latter, ceased to be depositors and became decree-holders. They would constitute a separate class from ordinary depositors and

[3] [1950] 20 Comp. Cas. 68 (East Punj.)
[4] AIR 1936 Cal. 162
[5] (36) 40 C.W.N. 1104
[6] ('38) 42 C.W.N. 610

it was necessary that there should be a separate meeting of such creditors before the scheme could be sanctioned by the Court. The petitioner has failed to issue notice to the foreign lender with regard to the meeting of the creditors and therefore they contend, unless the decree is fully satisfied by the petitioner company, the scheme of amalgamation should not be sanctioned by this court.

Krishna Nath Sen v. Dinajpur Loan Office[7] the court held the depositors who have already obtained decrees do form a separate class from the ordinary depositors and it is necessary that there should be a separate meeting of such creditors before a scheme binding on them is sanctioned by the court. If no such separate meeting is conveyed and this fact is brought to the notice of the court which is invited to sanction the scheme binding on all the creditors, it should refuse to sanction it. Alternatively the parties affected might apply for a modification of the scheme by expunging the clause which made the scheme binding on that class of creditors who had no opportunity of having a meeting of their own.

Therefore in the present case the foreign lenders do constitute a separate class of creditors and it is to be noted that when a company has to alter its memorandum which is a much smaller event than merging the company in another company, a notice has to be issued to the creditors if the Court thinks that their interest would be effected then what could be the reason in the present case the court has not done so.

It can be pointed that if all the material particulars regarding the latest financial position of the company including the existing liability and the charges created for those liabilities were placed before the Court, the Court could have ordered notice to the decree holder creditors also and could have given them an opportunity to put forward their contentions. But when a large percentage of creditors were not given notice of the meeting then it could be put forward that the company with a mala fide intention has held the statutory meeting and has obtained three fourth majority by out of the creditors present and voting. And if such creditors were to appear before the Court and request the Court to take note of the conduct of the company, in not issuing notice to them and, thus, managing to secure a statutory majority, the Court would certainly take note of

[7] [1938] 8 Comp. Cas. 152 (Cal.)

this conduct of the company in deciding whether sanction is to be accorded to the scheme merely because the said scheme is approved by a statutory majority of creditors.

Therefore when the foreign creditors has not been issued with statutory notice as required under Sections 391 and 394 of the Act, the meeting convened and the resolutions passed in the meeting are all vitiated and therefore this court cannot take note of report submitted by the Chairman of the company stating that the scheme of amalgamation has been approved by the requisite majority of the creditors, where the whole object behind this 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.

II. WHETHER CLAUSE 2.1 CONSTITUTE AN ARBITRATION CLAUSE AND ACCORDINGLY SHOULD BE REFERRED TO THE EMPOWERED GROUP COMMITTEE COMPRISING OF THREE EXECUTIVE LEVEL PERSONNEL OF THE COMPANY?

The promoters of Jeevani while giving warranties have concealed the fact that an investigation by FDA was initiated against the company for providing drugs of below par quality and in violation of the requisite production parameters set out by the FDA, much before the merger took place. It gave a misrepresentation that there is no pending investigation against the company and showed the company in a very different light with a malafide intention to get an inflated price for their shares.

In the lower courts the promoters of erstwhile Jeevani have contended that an arbitration clause is present in share sale agreement and the disputes should be resolved by the tribunal.

2.1- Decision of an empowered committee comprising of (three) executive level personnel of the Company shall be final, binding and conclusive on parties to this Agreement upon all questions and issues relating to the meaning, scope, instructions, claims, right or matters of interpretation of and under this Agreement.

The above mentioned lines cannot be construed as an arbitration clause. Section 2(1)(b) defines `arbitration agreement' to be an agreement referred to in Section 7. Section 7 of the Act states that an `arbitration agreement' is 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. The arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement and shall be an agreement in writing.

A clause in a contract can be constructed as an "arbitration agreement" only if an agreement to refer disputes or differences to arbitration is expressly or impliedly spelt out from the clause.[8] The attributes or elements of an arbitration agreement are (a) the agreement should be in writing (b) the parties should have agreed to refer to any disputes (present or future) between them to the decision of a private tribunal (c) the private tribunal should be empowered to adjudicate upon the disputes in an impartial manner, giving due opportunity to the parties to put forth their case before it. (d) the parties should have agreed that the decision of the private tribunal in respect of the disputes will be binding on them.

In the case of State of U.P v. Tipper Chand [9]a clause in the contract which provided that the decision of the Superintending Engineer shall be final, conclusive and binding on all parties to the contract upon all questions relating to the meaning of the specifications, designs, drawings and instructions was construed as not being an arbitration clause. The Supreme Court said that there was no mention in this clause of any dispute, much less of a reference thereof. The purpose of the clause was clearly to vest the Superintending Engineer with supervision of the execution of the work and administrative control over it from time to time.

Arbitration agreement to be distinguished from agreement for decision by an engineer or expert. Contracts may contain a clause that on certain questions the decision of an engineer, architect or another expert shall be final. The decision given in such cases by the Engineer etc. is not an award. As pointed out by Bernstein, such a person is under no obligation, unless the contract otherwise provides, to receive evidence or submissions and is entitled to arrive at his decision solely upon the results of his own expertise and investigations. The procedure involved is not arbitration, and the Arbitration Act does not apply to it. The primary material on which such

[8] Jagdish Chander v. Ramesh Chander [2007] 5 SCC 719).
[9] (1980) 2 SCC 341

person acts in his own knowledge and experience, supplemented if he thinks fit by (i) his own investigations; and/or (ii) material (which need not conforms to rules of "evidence") put up before him by either party. An arbitrator, on other hand, acts primarily on material put before him by parties.

In Bharat Bhushan Bansal v. U.P. Small Industries Corporation Limited, Kanpur[10], the two Judge Bench interpreted Clauses 23 and 24 of the agreement entered into between the parties for execution of work of construction of a factory and allied buildings of the Respondent at India Complex, Rai Bareli. Those clauses were as under:

Decision of the Executive Engineer of the UPSIC to be final on certain matters

23. *Except where otherwise specified in the contract, the decision of the Executive Engineer shall be final, conclusive and binding on both the parties to the contract on all questions relating to the meaning, the specification, design, drawings and instructions hereinbefore mentioned, and as to the quality of workmanship or materials used on the work or as to any other question whatsoever in any way arising out of or relating to the designs, drawings, specifications, estimates, instructions, orders or otherwise concerning the works or the execution or failure to execute the same whether arising during the progress of the work, or after the completion thereof or abandonment of the contract by the contractor shall be final and conclusive and binding on the contractor.*

Decision of the MD of the UPSIC on all other matters shall be final

24. Except as provided in Clause 23 hereof, the decision of the Managing Director of the UPSIC shall be final, conclusive and binding on both the parties to the contract upon all questions relating to any claim, right, matter or thing in any way arising out of or relating to the contract or these conditions or concerning abandonment of the contract by the contractor and in respect of all other matters arising out of this contract and not specifically mentioned herein.

It was argued on behalf of the Appellant that Clause 24 should be construed as an arbitration clause because the decision of the Managing Director was binding on both the parties. The two

[10] (1999) 2 SCC 166

Judge Bench analyzed Clauses 23 and 24 of the agreement, referred to the judgment in K.K. Modi v. K.N. Modi (supra), State of U.P. v. Tipper Chand , State of Orissa v. Damodar Das (supra) and observed:

In the present case, the Managing Director is more in the category of an expert who will decide claims, rights, or matters in any way pertaining to the contract. The intention appears to be more to avoid disputes than to decide formulated disputes in a quasi-judicial manner.

In the case of State of Orissa and Anr. v. Damodar Das[11], the Court considered a clause in the contract which made the decision of the Public Health Engineer, "final, conclusive and binding in respect of all questions relating to the meaning of specifications, drawings, instructions or as to any other question claim, right, matter of thing whatsoever in any way arising out of or relating to the contract, drawings, specifications, estimates or otherwise concerning the works or the execution or failure to execute the same whether arising during the progress of the work or after the completion or the sooner determination thereof the contract." This Court held that this was not an arbitration clause. It did not envisage that any difference or dispute that may arise in execution of the works should be referred to the arbitration of an arbitrator.

On a careful reading of the said clause, it is demonstrable that it provides for the parties to amicably settle any disputes or differences arising in connection with the contract. This is the first part. The second part, as is perceptible, is that when questions or issues of any kind arise between the parties to the contract relating to the performance of the works, it is to be referred to and settled by the empowered committee comprising of three executive levels of the company.

The language employed in the clause does not spell out the intention of the parties to get the disputes adjudicated through arbitration. It does not really provide for resolution of disputes.

Whereas in the present case it is clearly stated in clause 3.1 of the share sale agreement that any disputes and differences arising from the subject matter of the agreement shall be referred to the Delhi courts

[11] MANU/SC/0250/1996In

3.1. All disputes touching upon the subject matter of the agreement shall be subject to the jurisdiction of Delhi courts."

It really means that the disputes and differences are left to be adjudicated by the competent courts of Delhi[12].

III. WHETHER A DIRECTION PASSED BY THE COMMISSION U/S 26 (1) OF THE ACT WHILE FORMING PRIMA FACIE OPINION WOULD BE APPEALABLE U/S 53 (A) (1) OF THE ACT?

In the present case, CCI based on the allegations made by Lifeline formed the opinion that prima facie case existed against Swasth (a sister concern of erstwhile Jeevani) , and resultantly directed the Director General, appointed under Section 16(1) of the Act, to make investigation into the matter in terms of Section 26(1) of the Act. And therefore Swasth being aggrieved by the Order of the CCI filed a writ petition making Lifeline and the CCI a party in the Delhi High Court. Swasth submitted that CCI's Order for directing investigation was bad in law as Swasth in its endeavor to protect its IPRs cannot be held, even prima facie, to be abusing its dominance.

The said appeal is not maintainable as the direction issued by the CCI to the Director General to make investigation under section 26(1) of the competition act is not appealable.

This can be understood from the following provisions-
Section 26-Procedure for inquiry under section 19- (1)On receipt of a reference from the Central Government or a State Government or a statutory authority or on its own knowledge or information received under section 19, if the Commission is of the opinion that there exists a prima facie case, it *shall direct the Director General to cause an investigation to be made into the matter*:

Section 53 A(1)(a) specifies what are appealable. It clearly states appeals against any direction issued or decision made or order passed by the commission under sub-section (2) and (6) of section 26, section 27, section 28, section 31, section 32, section 33, section 38, section 39,

[12] Karnataka Power Trans. Cor. Ltd & othrs vs M/S Deepak Cables (India) Ltd

section 43, section 44, section 45 or section 46 of this Act are appealable. No other direction, decision or order of the Commission is appealable except those expressly stated can be appealed against though a person may be aggrieved by it.

The provisions of section 26 and 53A of the Act clearly depict the legislative intent that the framers never desired that all orders, directions and decisions should be appealable to the Tribunal. Once the legislature has opted to specifically state the order, direction and decision, which would be appealable by using clear and unambiguous language, the normal result would be that all other directions, orders etc. are not only intended to be excluded but, in fact, have been excluded from the operation of this provision.

The Supreme Court in the case of Steel Authority of India[13] has held that in terms of Section 53A(1)(a) of the Act, appeal shall lie only against such directions, decisions or orders passed by the Commission before the Tribunal which have been specifically stated under the provisions of Section 53A(1)(a). The orders, which have not been specifically made appealable, cannot be treated appealable by implication and therefore *taking a prima facie view and issuing a direction to the Director General for investigation would not be an order appealable under Section 53A.* The direction of the Commission under Section 26(1) of the Act is merely an administrative direction to its investigative arm without acting under the scope of its adjudicatory functions.

It does not effectively determine any right or obligation of the parties to the matter. Closure of the case causes determination of rights and affects a party, i.e. the informant resultantly; the said party has a right to appeal against such closure of case under Section 26(2) of the Act. On the other hand, mere direction for investigation to one of the wings of the Commission is akin to a departmental proceeding which does not entail civil consequences for any person, particularly, in light of the strict confidentiality that is expected to be maintained by the Commission in terms of Section 57 of the Act and Regulation 35 of the Regulations.

Wherever, in the course of the proceedings the Commission passes a direction or interim order which is at the preliminary stage and of preparatory nature without recording findings, which

[13] 2010 CompLR 0061 (Supreme Court)

will bind the parties, such order will only pave the way for final decision and it would not make that direction as an order or decision which affects the rights of the parties and therefore the order passed is not appealable.

In Automec Srl v. Commission of the European Communities[14]the Court of First Instance has held :--

"*42. As the Court of Justice has consistently held, any measure the legal effects of which are binding on, and capable of affecting the interests of, the applicant by bringing about a distinct change in his legal position is an act or decision against which an action for annulment may be brought under Article 173. More specifically, in the case of acts or decisions adopted by a procedure involving several stages, in particular where they are the culmination of an internal procedure, an act is open to review only if it is a measure definitively laying down the position of the institution on the conclusion of that procedure, and not a provisional measure intended to pave the way for that final decision*."

The objective of the Act is more than clear that the legislature intended to provide a very limited right to appeal. The orders which can be appealed against have been specifically stipulated by unambiguously excluding the provisions which the legislature did not intend to make appealable under the provisions of the Act.

Though it is agreed that right to appeal is a substantive right but it cannot be enforced in those cases where its omission is clearly stated either expressly or impliedly, as held in the case of Maria Cristina De Souza Sadder vs. Amria Zurana Pereira Pinto[15].

The Supreme Court held as under: "*5 ...It is no doubt well-settled that the right of appeal is a substantive right and it gets vested in a litigant no sooner the lis is commenced in the Court of the first instance, and such right or any remedy in respect thereof will not be affected by any repeal of the enactment conferring such right unless the repealing enactment either expressly or by necessary implication takes away such right or remedy in respect thereof*."

[14] [(1990) ECR II-00367]
[15] [(1979) 1 SCC 92],

Reference may also be made to M. Ramnarain Private Limited v. State Trading Corporation of India Limited[16], and Gujarat Agro Industries Co. Ltd. v. Municipal Corporation of the City of Ahmedabad[17] where it was held right of appeal is neither a natural nor inherent right vested in a party. It is substantive statutory right regulated by the statute creating it.

The words have been used by the legislature while drafting the competition act consciously and with a purpose. It has provided for complete mechanism ensuring their implementation under the provisions of the Act, therefore under Section 26(1) the Commission is expected to make a decision by formation of a prima facie opinion and issue a direction to cause an investigation to be made by the Director General and after receiving the report has to take a final view in terms of Section 26(6) and if it forms an opinion that there is no contravention it can close a case under Section 26(2). Having enacted these provisions, the legislature in its wisdom, made only the order under Section 26(2) and 26(6) appealable under Section 53A of the Act. Thus, it specifically excludes the opinion/decision of the authority under Section 26(1) and even an order passed under Section 26(7) directing further inquiry from being appealable

Is the commission under any statutory duty to issue notice to the aggrieved party?

The Commission is not under statutory duty to issue notice or grant a hearing at the stage of formation of a *prima facie* opinion in terms of Section 26(1) of the Act. When Section 26(1) of the Act is read with Regulation 17(2) which empowers the Commission to invite the information provider and such other person, as is necessary, for a preliminary conference to aid in formation of a prima facie opinion, there is nothing to suggest that the Commission is obliged to issue notice or grant a hearing to the affected parties. The above inference is further strengthened by the fact that the Commission after receiving the report from the DG is not only expected to forward the copy of the report, issue notice, invite objections or suggestions from the informant, Central Government, State Government, Statutory Authorities or the

[16] [(1983) 3 SCC 75]
[17] [(1999) 4 SCC 468].

parties concerned, but also to provide an opportunity of hearing to the parties before arriving at any final conclusion under Section 26(7) or 26(8) of the Act, as the case may be.

The Commission is required to perform inquisitorial and regulatory functions in order to form a prima facie opinion under Section 26(1) of the Act and that is different from the adjudicatory function performed by it under Section 26(2) of the Act. Therefore, the functioning of the Commission under Section 26(1) is a mere fact finding enquiry which has no effect on the determination of the rights of the parties concerned and provides discretion to the Commission for grant of hearing to the affected parties.

PRAYER

PRAYER FOR RELIEF

In light of the facts stated, arguments advanced and authorities cited, the Appellant, humbly prays before the Honorable Court, to adjudge and declare that:

[A]. To declare that the scheme of merger is not binding upon the foreign lenders and set aside the same.

[B]. To declare that clause 2.1 in the share sale agreement do not constitute an arbitration agreement.

[C] To order the promoters to pay damages for the unjust enrichment to recover for loss of bargain.

[D]. To declare that the appeal is not maintainable under section 53A(1).

The Court may also be pleased to pass any other order, which the court may deem fit in light of justice equity and good conscience. ***All of which is most humbly prayed!*** **RESPECTFULLY SUBMITTED,**

COUNSEL FOR APPELLANT