Team code:L

Before the Hon'ble Supreme Court of India

UNDER ARTICLE 133 (1) OF THE CONSTITUTION OF INDIA

Foreign Banks	*Versus*	**Lifeline Ltd.**
	Civil Appeal ……/2014	

with

Lifeline Ltd.	*Versus*	**Promoters of Jeevani Ltd.**
	Civil appeal …../2014	

with

Swasth Ltd. and ors.	*Versus*	**Lifeline Ltd.**
	Civil Appeal …../2014	

Civil Appellate Jurisdiction case no…../2014

Memorial on behalf of the Appellants

TABLE OF CONTENTS

INDEX OF AUTHORITES i

1. LIST OF CASES: i
2. STATUTES, RULES AND CIRUCULARS REFERRED: ii
3. BOOKS REFERRED: ii

STATEMENT OF JURISDICTION iii

STATEMENT OF FACTS iv

STATEMENT OF ISSUES vi

SUMMARY OF ARGUMENTS vii

ARGUMENTS ADVANCED ..... - 1 -

I.) Whether foreign lenders were required to be called at the meeting of creditors for scheme of arrangement under section 391 of Companies Act, 1956? ..... - 1 -

I.i) Whether foreign lenders are creditors of Jeevani? ..... - 1 -

I.ii) Whether foreign lenders constitute a separate class? ..... - 3 -

I.iii) Whether non-approval by Bombay Stock Exchange can make the scheme redundant? ..... - 5 -

II) Whether Clause 2 of the Agreement (Scheme) between Lifeline and Promoters is an Arbitration Clause? ..... - 5 -

III.i) Whether the investigation under Section 26(1) is liable to be set aside. ..... - 9 -

ii. Whether the CCI had a *prima facie* case of abuse of dominance under Section 4 of the Competition Act against Swasth? ..... - 11 -

PRAYER ix

INDEX OF AUTHORITES

LIST OF CASES:

1. *Bharat Synthetics Ltd. v. Bank of India,* [1995] 82 Comp. Cas. 437 (Bom.) (India). -2 -
2. *H.N.G. Float Glass v. Saint Gobain Glass*, Case No. 51 of 2011 (India). - 12 -
3. *In Re. Maneckchowk & Ahmedabad Mfg. Co. Ltd.,* [1970] 40 Comp. Cas. 819 (Guj.) (India). - 3 -
4. *Indian Oil Corporation v. Competition Commission of India*, C.C.I. Case No. 14/2012 (India). - 10 -
5. *Institute of Chartered Accountants of India v. Competition Commission of India*, W.P.(C.) 2815/2014 (India). - 10 -
6. *Karnataka Power Corporation Limited And Another v. M./S. Deepak Cables (India) Ltd*., S.C. CIVIL APPEAL NO. 4424 OF 2014 (India). - 6 -, - 9 -
7. *Peeveear Medical Agencies Kerela v. All India Organization of Chemists and Druggists*, Case No. 30 of 2011 (India). - 13 -
8. *Smt. Rukmanibai Gupta v. Collector, Jabalpur and others,* (1980) 4 S.C.C. 556 (India). - 7 -
9. *Soverign Life Assurance Co. v. Dodd,* [1892] 2 Q.B.D. 573 (C.A.) (England). - 3 -
10. *State Bank of India v. Engineering Majdoor Sangh*, MANU G.J. 0191 2000 (India). - 3 -
11. *State Bank of India v. Engineering Majdoor Sangh,* MANU. G.J. 0191 2000 (India). - 2 -
12. *State Bank of India v. Alstom Power Boilers Ltd.,* [2003] 43 S.C.L. 449 (India). - 4 -
13. *Uma Investments Pvt. Ltd. v. State of Tamil Nadu*, 1976 Mh.L.J. 411 (India). - 1 -

STATUTES, RULES AND CIRUCULARS REFERRED:

1. Company Court Rules, 1959.
2. Listing Agreements of Bombay Stock Exchange.
3. The Arbitration and Conciliation Act, 1996.
4. The Companies Act, 1956.
5. The Competition Act, 2002.
6. The Constitution of India, 1950.
7. The Patent Act, 1970.

BOOKS REFERRED:

1. C.R. Dutta, *The Company Law* (Vol. 2, 6th ed., Wadhwa and Co. Nagpur, 2008).
2. *Company Law Digest 1913-2009* (Vol. 2, 3rd ed., Taxmann Publisher Pvt. Ltd., 2009).
3. K. Sekhar, *S.E.B.I. Capital Issues Debentures and Listing* (Vol. 2, 3rd ed., Wadhwa and Co. Nagpur, 2003).

STATEMENT OF JURISDICTION

The Appellants in the present case have come before the Hon'ble Supreme Court of India under *Article 133(1)* of the Constitution of India, after obtaining a certificate of Appeal from the Hon'ble High Court of Delhi under *Article 134A* of the Constitution of India.

STATEMENT OF FACTS

I. Jeevani is a listed public company and one of the leading players in the pharmaceutical manufacturing industry. On 27th January, 2012 it was decided that Jeevani would completely merge into Lifeline, which was another listed public company manufacturing food products. A Scheme was prepared to this effect containing agreements of sale of stake, disclosure of information and transfer of all assets and liabilities including intangible properties from Jeevani to Lifeline. On 5th March, the Scheme was finalized and sent for approval to the Bombay Stock Exchange, which did not provide its approval.

II. Thereafter, Jeevani filed an application for initiating the process of approval of the Scheme in the Delhi High Court on March 30, 2012. The Company Judge ordered for a meeting of creditors to be convened, in pursuance of which Jeevani issued a notice through advertisements in the local newspapers. On 5th July, 2013 the Scheme was approved by the Delhi High Court and the Bombay High Court. In August 2013, certain foreign lenders of Jeevani approached the Delhi High Court against the approval of the Scheme, contending that they were a separate class of creditors. . The Hon'ble Company Judge rejected their contention and on appeal the Division Bench also refused to set aside the Scheme. This order was then challenged before the Supreme Court. Before the announcement of the Scheme, the foreign lenders had invoked arbitration proceedings against Jeevani, in lieu of certain payments which they were entitled to. On 27th July, 2010 an arbitral award was passed in favour of the foreign lenders which they did not enforce.

III. Meanwhile, the newly merged Lifeline received notices from the US FDA for providing drugs of below par quality. It was discovered that these investigations by the FDA had been going on much before the merger. Thus, Lifeline filed a suit for breach of contract against the Promoters of Jeevani, alleging concealment of information with malafide intention. The

Promoters contended that the Delhi High Court had no jurisdiction as the disputed agreement had an arbitration clause. The Hon'ble Single Judge held that there was no arbitration clause and on appeal, the Division Bench reversed this finding and held that clause 2 of the Share Sale Agreement dated 23rd March 2013 was an arbitration clause. Thereby, Lifeline filed an appeal to the Supreme Court against this order.

IV. After the merger, Lifeline decided to introduce a new life saving drug in the market called "Novel", which was expected to be considerably cheaper than the premier drug available in the market called "Inventive". This drug was being manufactured by a company called "Swasth" which was a sister concern of the Promoters of the erstwhile Jeevani. Before, Lifeline could launch its new drug in the market; Swasth obtained an interim injunction against them claiming that the new drug "Novel" was similar to its drug "Inventive". Consequently, Swasth launched a similar new cost effective drug in the market, after which it withdrew the case and vacated the injunction.

V. Lifeline filed an application in the Competition Commission of India alleging that Swasth was abusing its dominance by indulging in bad faith litigation. The CCI was of the view that there was a *prima facie* case against Swasth and ordered for an investigation. Swasth filed a suit in the Delhi High Court against the DG investigation which was dismissed by the Single Judge as well as the Division Bench. Swasth then appealed to the Supreme Court. All the three matters were clubbed together for hearing.

STATEMENT OF ISSUES

I.) Whether foreign lenders were required to be called at the meeting of creditors for scheme of arrangement under section 391 of Companies Act, 1956?

I.i) Whether foreign lenders are creditors of Jeevani?

I.ii) Whether foreign lenders constitute a separate class?

I.iii) Whether non-approval by Bombay Stock Exchange can make the scheme redundant?

II.) Whether Clause 2 of the Agreement (Scheme) between Lifeline and Promoters is an Arbitration Clause?

III.i) Whether the investigation under Section 26(1) is liable to be set aside.

III.ii) Whether the CCI had a *prima facie* case of abuse of dominance under Section 4 of the Competition Act against Swasth?

SUMMARY OF ARGUMENTS

I.) Whether foreign lenders were required to be called at the meeting of creditors for scheme of arrangement under section 391 of Companies Act, 1956?

Foreign lenders are creditors of Jeevani as they have pecuniary claim against the company. Jeevani has misled the Delhi High Court by creating an impression that foreign lenders are not its creditors and hence their meeting was not required to be called.

I.i) Whether foreign lenders are creditors of Jeevani?

Foreign lenders are creditors of Jeevani and by not sending the notice of meeting, Jeevani has not complied with the rule 73 of the Companies (Court) Rules. "Creditor" would be a person having a pecuniary claim against the company, whether actual or contingent or to whom the debt is owed.

I.ii) Whether foreign lenders constitute a separate class?

In order to constitute a class, members belonging to the class must form a homogeneous group with commonality of interest. Foreign lenders are a homogeneous class themselves and hence they should be treated as a separate class of creditors.

I.iii) Whether non-approval by Bombay Stock Exchange can make the scheme redundant?

Filing an application under section 391 before the High Court even before taking a no objection certificate from BSE which is a requirement under Listing Agreement is violation of such agreement.

II.) Whether Clause 2 of the Agreement (Scheme) between Lifeline and Promoters is an Arbitration Clause?

The arbitration clause as interpreted by the Supreme clause should have a clear showcase of intention of parties to go to the court. In the present case the clause is not talking about amicable dispute resolution outside the court in case of dispute arising in the subject matter of the agreement. The jurisdiction of Delhi High Court is clearly mentioned and agreed upon by both parties in case of dispute relating to subject matter of the agreement.

III.i) Whether the investigation under Section 26(1) is liable to be set aside.

The preliminary investigation by the CCI under Section 26(1) is unwarranted as the dispute is not subject to the jurisdiction of the CCI and is covered under The Patents Act, 1970. The Patents Act provides for regulatory and statutory functions related to having its own Appellate Board under Chapter XIX and jurisdiction of Suits concerning infringement of Patents under Chapter XVIII. Therefore, the CCI does not have jurisdiction to look into the matter or conduct investigations as the dispute falls under the mechanism provided in the Patents Act, 1970.

ii. Whether the CCI had a *prima facie* case of abuse of dominance under Section 4 of the Competition Act against Swasth?

A dominant enterprise as defined under Section 4 cannot be qualified on the mere fact that Swasth had a brand image with the largest acceptance of customers. The relevant product market as defined in Section 2 (t) of the Competition Act and with regard to Section 19(7) can be determined as a pharmaceutical manufacturing industry, which is a highly competitive market. Swasth could not be dominant only on account of being the largest player in the market.

ARGUMENTS ADVANCED

I.) Whether foreign lenders were required to be called at the meeting of creditors for scheme of arrangement under section 391 of Companies Act, 1956?

I.i) Whether foreign lenders are creditors of Jeevani?

It is humbly submitted before the honourable bench that foreign lenders are creditors of Jeevani and by not sending the notice of meeting, Jeevani has not complied with the rule 73 of the Companies (Court) Rules. *"Creditor" would be a person having a pecuniary claim against the company, whether actual or contingent*[1]or to whom the debt is owed. Pecuniary claims are founded on money considerations.

Rule 73[2]. Notice of meeting.- *The notice of meeting to be given to the creditors and/or members, or to the creditors or members of any class, as the case may be, shall be in Form No. 36, and shall be sent to them individually by the Chairman appointed for the meeting, or, if the Court so directs, by the company (or its Liquidator), or any other person as the Court may direct, by post under certificate of posting to their last known address not less than 21 clear days before the date fixed for the meeting. It shall be accompanied by a copy of the proposed compromise or arrangement and of the statement required to be furnished under section 393, and a form of proxy in Form No. 37.* Foreign lenders invoked arbitration proceedings for payments to be made under a consortium agreement providing financial assistance to Jeevani[3]. This clearly shows that foreign lenders have pecuniary claim against

---

[1] *Uma Investments Pvt. Ltd. v. State of Tamil Nadu*, 1976 Mh.L.J. 411 (India).

[2] Companies (Court) Rules, 1959.

[3] *Moot Proposition* at 6.

Jeevani as they have provided them financial assistance. The fact that foreign arbitral award which is in favour of lenders, is not enforced shows that Jeevani still has outstanding payments towards foreign lenders. Therefore, foreign lenders are the creditors of the company and they should have been served with the notice of meeting.

While according sanction, there are mandatory requirements, such as to see whether the meeting of the concerned was duly held and conducted; that it was accepted by a competent majority; that it was for common advantage, reasonable, prudent and proper in every aspec[4]*t.* By securing the order of dispensing with holding of the meeting, the company had given the go by to the statutory requirements and that petition for sanction of such scheme of amalgamation should be rejected[5]. Foreign lenders, being one of the creditors are a concerned party to the scheme as they would be affected by the merger of lifeline and Jeevani. Hence, even their interests have to be taken care of and the mandate of holding their meeting cannot be done away with.

In the case of *State Bank of India v. Engineering Majdoor Sangh*[6] an impression was created by the applicant that there were no secured creditors of the company in liquidation which led the company judge to pass the orders for sanctioning the scheme, compromise and arrangement proposed by Engineering Majdoor Sangh. This order was recalled by the court as the applicant had misled the court for passing the impugned order for sanctioning the scheme of compromise by misleading the court about the absence of secured creditors. The Appellants most humbly contend that, Jeevani has misled the Delhi High Court by creating an impression that foreign lenders are not its creditors and hence their meeting was not required to be called. Such an order should be recalled as Jeevani has made false statement.

---

[4] *Bharat Synthetics Ltd. v. Bank of India,* [1995] 82 Comp. Cas. 437 (Bom.) (India).

[5] *Id.*

[6] *State Bank of India v. Engineering Majdoor Sangh,* MANU. G.J. 0191 2000 (India).

It would be a great public disaster if the fountain of justice is allowed to be poisoned by anyone resorting to filing of false affidavits or giving of false statements and fabricating false evidence in a court of law[7].

I.ii) Whether foreign lenders constitute a separate class?

Section 391of Companies Act, 1956 provides:-

"391. Power to compromise or make arrangements with creditors and members - (1) Where a compromise or arrangement is proposed -

(a) between a company and its creditors or any class of them; or

(b) between a company and its members or any class of them;"

The Appellants further submit that The word 'class' is vague, and to find out what is meant by it one must at the scope of the section. It seems plain that one must give such a meaning to the term 'class' as will prevent the section from being so worked as to result in confiscation and injustice, and that it must be confined to those persons whose rights are not so dissimilar as to make them impossible for them to consult together[8].

In order to constitute a class, members belonging to the class must form a homogeneous group with commonality of interest[9]. It is contended that foreign lenders are a homogeneous class themselves and hence they should be treated as a separate class of creditors. *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 class*[10]. Therefore, if

---

[7] *State Bank of India v. Engineering Majdoor Sangh*, MANU G.J. 0191 2000 (India).

[8] *Soverign Life Assurance Co. v. Dodd,* [1892] 2 Q.B.D. 573 (C.A.) (England).

[9] *In Re. Maneckchowk & Ahmedabad Mfg. Co. Ltd.,* [1970] 40 Comp. Cas. 819 (Guj.) (India).

[10] *Id.*

foreign lenders are clubbed together with the other creditors then their interest will not be taken into consideration.

Whether a particular group of members or creditors would form a class distinct from other members or creditors would largely depend upon the facts and circumstances of each case; the court being required to consider several factors[11]. Foreign lenders had initiated legal proceedings against Jeevani by way of arbitration before a foreign arbitral tribunal[12], which suggests that they are not on good terms with the said company. Therefore, it is impossible for them to consult with the other creditors who do not have any such history.

Apart from the broad distinct classes like secured and unsecured creditors, there can be further sub-classes[13]. In case of secured creditors, some creditors may have sufficient security of specific asset or assets which are greater than amount of debt while others may have security of other specific asset[14]. Amongst unsecured creditors, some may be preferred like the Government or the workers who may have a statutory preference over others[15]. So, the general principle would be whether the interest of the creditors who claim to belong to a different class are so dissimilar to the interest of the other creditors that it would be impossible for them to sit and consult together and take a common view of their common interest[16]. Because of the lack of common interest and homogeneity, it is impossible for foreign lenders to sit and consult with other creditors. Hence the Appellants plead that they be treated as a separate class.

---

[11] *State Bank of India v. Alstom Power Boilers Ltd.,* [2003] 43 S.C.L. 449 (India).

[12] *Moot Proposition* at 6.

[13] *State Bank of India v. Alstom Power Boilers Ltd.,* [2003] 43 S.C.L. 449 (India).

[14] *Id.*

[15] *Id.*

[16] *Id.*

I.iii) Whether non-approval by Bombay Stock Exchange can make the scheme redundant?

Clause 24(f) of the Listing Agreement requires a company to file with the Stock Exchange(s), for approval, any scheme/petition proposed to be filed before any Court or Tribunal under sections 391, 394 and 101 of the Companies Act, 1956, at least one month before it is presented to the Court or Tribunal. Section 73 of the Companies act makes it obligatory for companies offering its securities to the public through prospectus to get themselves listed on one or more stock exchanges. The scheme was finalised on 5th March 2012 and immediately thereafter the scheme was filed before Bombay Stock Exchange, however, the BSE did not provide its approval[17]. This clearly shows that there must be some problem with the scheme because of which BSE did not provide its approval.

Filing an application under section 391 before the High Court even before taking a no objection certificate from BSE which is a requirement under Listing Agreement is violation of such agreement. Also, non-approval of scheme by the BSE should have been taken into consideration by the company law judge and that such scheme should not have been sanctioned.

II) Whether Clause 2 of the Agreement (Scheme) between Lifeline and Promoters is an Arbitration Clause?

It is humbly submitted before the Hon'ble court that the said clause is not an arbitration clause as contended by the appellants, Lifeline. Arbitration agreements are defined under Section 7 of Arbitration and Conciliation Act, 1996 relevant provisions of which read as follows:

---

[17] *Moot Proposition* at 4.

Arbitration agreement:-

(1) In this Part, "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.

(2) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(3) An arbitration agreement shall be in writing.

(5) The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract.

The supreme court in a recent judgment *Karnataka Power Corporation Limited And Another v M/S Deepak Cables (India) Ltd*[18] interpreted the above section and said that an arbitration agreement stipulates that the parties agree to submit all or certain disputes which have arisen or which may arise in respect of defined legal relationship, whether contractual or not, there cannot be a reference to an arbitrator. To elaborate, it conveys that there has to be ***intention,*** expressing the consensual acceptance to refer the disputes to an arbitrator.

According to the definition given under section 7[19] and the interpretation as mentioned above, an arbitration agreement contains the following essentials:

- It should be in writing or should be agreed upon orally, clearly without any ambiguity.

[18] *Karnataka Power Corporation Limited And Another v. M./S. Deepak Cables (India) Ltd.*, S.C. CIVIL APPEAL NO. 4424 OF 2014 (India).

[19] The Arbitration and Conciliation Act, 1996.

- The parties should have a common intention to resolve the matter which is clearly the subject matter of the clause, outside the court.

On a careful reading of the said clause[20] as a whole, it is demonstrable that it provides for the parties to amicably settle any disputes or differences arising in connection with the contract. The first part, as is perceptible, is that when disputes or differences of any kind arise between the parties to the contract relating to *the meaning, scope, instructions, claims, right or matters of interpretation of and under this Agreement,* decision of an empowered committee comprising of (three) executive level personnel of the Company shall be final, binding and conclusive on parties. There is also a stipulation that his decision in respect of every matter so referred to shall be final and binding upon the parties. To understand the intention of the parties, this part of the clause is important. On a studied scrutiny of this postulate, it is graphically clear that it does not provide any procedure which would remotely indicate that the concerned committee is required to act judicially as an adjudicator by following the principles of natural justice or to consider the submissions of both the parties.

The second part of the clause says that the parties should *endeavour* to amicably solve the dispute. It does not provide for an obligation to not go to court in case of a dispute.[21]

In the case of *Smt Rukmanibai Gupta*[22]*,* the division bench clarified the status of a clause which does not contain the term "arbitration" itself: -

"If it appears from the terms of the agreement by which a matter is submitted to a person's decision that the intention of the parties was that he should hold an inquiry in the nature of a

[20] *Moot Proposition* at 9.

[21] *Moot Proposition* at 9.

[22] *Smt. Rukmanibai Gupta v. Collector, Jabalpur and others,* (1980) 4 S.C.C. 556 (India).

judicial inquiry and hear the respective cases of the parties and decide upon evidence laid before him, then the case is one of an arbitration"

This above rule implies that the parties should have a clear intention to hold an inquiry in the nature of a judicial inquiry, which in the present case is ambiguous. It also says that both the parties should be heard and ample evidence should be provided, but in the present case this stand is unclear in the agreement.

Moreover, the agreement provides a vague composition of the committee. Since interests of both parties are required to be taken into consideration in any arbitration, this committee can be biased towards the Appellants in this case, since three executive level members of the Company (which is Lifeline in this case) will constitute the decision panel.

The heading as given under the disputed clause is "dispute resolution" along with a relevant framework of the committee which shall be constituted in case of a dispute relating to the meaning, scope, instructions, claims, right or matters of interpretation of and under this Agreement [23]. This does not mean that any material breach in the *subject matter* of the agreement will be referred to the concerned committee, the subject matter here being "defrauding and misrepresenting material facts about the history of Jeevani"[24].

Whereas provision 3.1 of the disputed clause is clear on this point;

All disputes touching upon the subject matter of the agreement shall be subject to the jurisdiction of Delhi courts.[25]

[23] *Moot Proposition* at 9.

[24] *Moot Proposition* at 8.

[25] *Moot Proposition* at 9.

Adjudicating that such clauses cannot be regarded as arbitration clauses, the recent Supreme Court judgment in *Karnataka Power Transmission Corporation Limited and another v M/s. Deepak Cables (India) Ltd*[26] clarified the nature of such clauses which provides for a clear jurisdiction of Court in case of disputes arising due to breach of subject matter of the agreement.

Therefore, in the light of cases and authorities cited it is most humbly submitted before this Hon'ble Court that the concerned clause is not an arbitration clause and the disputed matter should be allowed to be tried before the Hon'ble Court.

III.i) Whether the investigation under Section 26(1) is liable to be set aside.

It is humbly prayed before the Hon'ble court that the preliminary investigation by the CCI under Section 26(1) is unwarranted and should be set aside as the dispute is not subject to the jurisdiction of the CCI and is covered under The Patents Act, 1970.

In the present factual scenario, Swasth filed a suit, in order to prevent Lifeline from infringing their IPRs by launching a drug similar to theirs.[27] Therefore, it can be logically inferred that Swasth was holding a patent over its drug "Inventive" due to which the Delhi High Court granted an interim injunction retraining Lifeline, as mandated under Section 108(1) of the Patents Act.

Section 48 of the Patents Act envisages the Rights of patentees and states that: *"a patent granted under this Act shall confer upon the patentee—*

---

[26] *Karnataka Power Corporation Limited And Another v. M./S. Deepak Cables (India) Ltd.*, S.C. CIVIL APPEAL NO. 4424 OF 2014 (India).

[27] *Moot Proposition* at 11.

(a)where the subject matter of the patent is a product, the exclusive right to prevent third parties, who do not have his consent, from the act of making, using, offering for sale, selling or importing for those purposes that product in India;"

Thus, the Patents Act provides for regulatory and statutory functions related to Pharmaceutical Product Patents having its own Appellate Board under Chapter XIX and jurisdiction of Suits concerning infringement of Patents under Chapter XVIII. Therefore, the CCI does not have jurisdiction to look into the matter or conduct investigations as the dispute falls under the mechanism provided in the Patents Act, 1970.

In the case of *Institute of Chartered Accountants of India v. Competition Commission of India*[28], a single judge of the Delhi High Court granted a stay on the preliminary investigation ordered by the CCI on issue of jurisdiction, which was upheld by a three-judge bench of the Delhi High Court. The case arose when a CA alleged abuse of dominance by the ICAI as they excluded other organizations and entities from conducting seminars and conferences under CPE programmes. The CCI directed an investigation by the DG under Section 26(1), against which the ICAI filed a suit in the Delhi High Court, which held that:

"…petitioner-institute cannot be subject to jurisdiction of respondent No.1 under the Competition Act when it is discharging its regulatory and statutory functions under the Chartered Accountants Act."

This position was further upheld in the case of *Indian Oil Corporation v. Competition Commission of India*[29], in which the Delhi High Court stayed the investigation by the CCI

[28] *Institute of Chartered Accountants of India v. Competition Commission of India*, W.P.(C.) 2815/2014 (India).

[29] *Indian Oil Corporation v. Competition Commission of India*, C.C.I. Case No. 14/2012 (India).

against Indian Oil Corporation Ltd (IOCL), Bharat Petroleum Corporation Ltd (BPCL) and Hindustan Petroleum Corporation Ltd (HPCL). The dispute arose when a complaint was registered with the CCI against these companies to probe allegations of cartelization and abuse of dominant position, while setting the price of petrol. The CCI ordered for a preliminary investigation into the matter, which was challenged on the basis that CCI has no jurisdiction to look into their price setting mechanism, on account of them being regulated by the Petroleum and Natural Gas Regulatory Board. The Delhi High Court accepted this contention and granted a stay on the investigation of the CCI.

It is humbly submitted that as in the present case the dispute falls under the remit of the Patents Act, 1970, the CCI does not have jurisdiction to investigate the issue. Therefore, by applying the doctrine of *lex specialis derogat legi generali,* it is humbly prayed before the Hon'ble Supreme Court that the investigation by the CCI under Section 26(1) is liable to be stayed.

ii. Whether the CCI had a *prima facie* case of abuse of dominance under Section 4 of the Competition Act against Swasth?

It is humbly prayed before the Hon'ble Supreme Court that there is no *prima facie* case against Swasth under Section 26(1) of the Competition Act, as there was no abuse of dominance in the market by Swasth.

It is submitted that Section 4 of the Act, defines 'dominant position' as a position of strength, enjoyed by an enterprise, in the relevant market, in India, which enables it to operate independently of competitive forces prevailing in the relevant market, or to affect its competitors or consumers or the relevant market in its favour." By virtue of Section 19(4), which enlists various factors which are used to determine the dominance in the market namely size and importance in market, size and importance of competitors and dominance

acquired through entry barriers by denying market access, it cannot be conclusively determined that Swasth was abusing its dominance or was in a dominant position at all.

Reliance is placed on the case of *H.N.G. Float Glass v. Saint Gobain Glass*[30], wherein the CCI had held that Saint Gobain was subject to competitive pressures, evident from the reduction in market share of established players upon the entry of new players. This implied low barriers to entry. CCI also stated that Saint Gobain could not be dominant only on account of being the largest player in the market.

Similarly, in the present factual scenario, Swasth's drug "Inventive" was only a premier drug in the market.[31] Thus, a dominant enterprise under Section 4 cannot be qualified on the mere fact that Swasth had a brand image with the largest acceptance of customers. The relevant product market as defined in Section 2 (t) of the Competition Act and with regard to Section 19(7) can be determined as a pharmaceutical manufacturing industry, which in terms of annual production and quantity sold of the relevant product, indicates a highly competitive market. Also, the entry of new companies in the market, like Lifeline[32], only shows low entry barriers in the market. Thus, the Appellants most humbly posit that it cannot be conclusively determined that Swasth has any economic strength or market power which can enable it to operate independently of competitive forces, like Lifeline which is an established and popular company in India with global presence.[33] Hence, it can be concluded that Swasth may be a large player in the market, but to attribute dominance under Section 19(4) of the Act is not borne out.

---

[30] *H.N.G. Float Glass v. Saint Gobain Glass*, Case No. 51 of 2011 (India).

[31] *Moot Proposition* at 11.

[32] *Id.*

[33] *Moot Proposition* at 2.

It is further submitted that there was no bad faith litigation undertaken by Swasth as alleged by the respondents.[34] As has been already affirmed by the Delhi High Court, Lifeline's drug "Novel" was infringing the IPR's of Swasth, in lieu of being substantially similar to their drug "Inventive".[35] The mere fact that Swasth, in exercise of its statutory right, withdrew the case[36] cannot be justified to abusing its dominance in any way. This is unduly stretching a fact beyond limit to substantiate a baseless allegation.

It is humbly submitted that such an interpretation will cause aspersions on the reputation[37] of Swasth which has reached the status of a premier drug manufacturing company in the market.[38]

Therefore, it can be conclusively established that there was no *prima facie* case against Swasth and an investigation was not warranted under Section 26(1) of the Competition Act.

[34] *Moot Proposition* at 12.

[35] *Moot Proposition* at 11.

[36] *Id.*

[37] *Peeveear Medical Agencies Kerela v. All India Organization of Chemists and Druggists*, Case No. 30 of 2011 (India).

[38] *Moot Proposition* at 11.

PRAYER

In the light of the arguments advanced and authorities cited, the Appellants humbly submit that the Hon'ble Court be pleased to adjudge and declare that:

1. Foreign lenders are indeed creditors of the company and therefore without their meeting being held the scheme between Jeevani and Lifeline should be set aside.
2. The clause in the agreement between lifeline and promoters is not an arbitration agreement and hence the jurisdiction of Delhi High Court is valid.
3. There was no prima facie case of dominance against Swasth and the preliminary investigation by the CCI is liable to be stayed.

All of which is respectfully affirmed and submitted

Counsels for Appellants

Sd/-