Team Code: M

5TH NLIU – JURIS CORP NATIONAL CORPORATE LAW MOOT COURT

COMPETITION, 2014

IN THE HON'BLE SUPREME COURT OF INDIA AT NEW DELHI

APPEAL NO. _____ OF 2014

IN MATTER OF ARTICLES 32,226, SECTIONS 390, 391 OF COMPANIES ACT, 1956,

SECTIONS 46, 47, 48, 49 OF ARBITRATION AND CONCILIATION ACT, 1996 AND

SECTIONS 2, 4, 19, 26 OF THE COMPETITION ACT, 2002

COMPANY APPEAL NO. ____ OF 2014

FOREIGN LENDERS……...APPELLANT

v.

JEEVANI LTD & LIFELINE LTD……RESPONDENT

CIVIL APPEAL NO. ____ OF 2014

LIFELINE LTD……APPELLANT

v.

PROMOTERS…….……RESPONDENT

WRIT APPEAL NO. ____ OF 2014

SWASTH LIFE LTD.....……...APPELLANT

v.

LIFELINE LTD & COMPETITION COMMISSION OF INDIA……..RESPONDENTS

UPON SUBMISSION TO THE HON'BLE CHIEF JUSTICE AND HIS COMPANION JUSTICES OF THE

SUPREME COURT OF INDIA

MEMORANDUM ON BEHALF OF APPELLANTS

TABLE OF CONTENTS

INDEX OF AUTHORITIES

[A]. **CASES**

[B]. **BOOKS**

1. SRIDHARAN & PANDIAN, GUIDE TO TAKEOVERS AND MERGERS, 2nd Ed., Lexis Nexis Butterworths Wadhwa, 2006.

2. SARMA RAMA, *COMMENTARY ON INTELLECTUAL PROPERTY LAWS,* Edn. 2009, Lexis Nexis Butterworths Wadhwa.

3. JUSTICE SARAF B.P., JUSTICE JHUNJHUNUWALA, S.M., LAW OF ARBITRATION AND CONCILIATION, 5th Ed., Snow white, 2009.

4. BASU, DURGA DAS, *COMMENTARY ON THE CONSTITUTION OF INDIA*, 8th Ed., Lexis Nexis Butterworths Wadhwa ,2009

5. BASU, N.D., LAW OF ARBITRATION AND CONCILIATION, 10th Ed., Orient Publishing Company, 2003.

6. A RAMAIYA, GUIDE TO THE COMPANIES ACT, 17th Edition 2010, Part 1, LexisNexis Butterworths Wadhwa,

8. JUSTICE NARAYANA P.S., INTELLECTUAL PROPERTY LAW IN INDIA, 5th Ed., Gogia Law Agency, 2010.

9. JUSTICE NARAYANA P.S., THE COMPANIES ACT, 1956, Ed. 2006, ALT Publications.

[C]. **LEGAL DATABASE**

Manupatra

SCC Online

Westlaw International

[D]. **LEGISLATIONS**

1. Constitution of India, 1950
2. The Companies Act, 1956

3. The Companies Act, 2013
4. The Competition Act, 2002.
5. Indian Contract Act, 1872
6. The Arbitration and Conciliation Act, 1996.

STATEMENT OF JURISDICTION

Article 132 of the Constitution of India, 1950 reads as follows:

Appellate jurisdiction of Supreme Court in appeals from High Courts in certain cases:

(1) An appeal shall lie to the Supreme Court from any judgment, decree or final order of a High Court in the territory of India, whether in a civil, criminal or other proceeding, if the High Court certifies under Article 134A that the case involves a substantial question of law as to the interpretation of this Constitution.

Further, the Hon'ble Supreme Court of India can invoke its inherent powers and tag matters. The Hand book of Information about Practice & Procedure, 3rd Edition 2011 at Chapter VI (A)(2)(f), page 35, states:

(f) The fresh matters involving cross parties are tagged and heard together.

STATEMENT OF FACTS

Jeevani is a listed public company with its shares listed on the Bombay Stock Exchange. Lifeline is another listed public company which is a major producer of food products in the Indian Market. Negotiations began between Lifeline and Jeevani in November 2011 and both companies decided to merge on 27th January 2012. It was decided that Jeevani would completely merge into Lifeline and all its assets and liabilities would be transferred to Lifeline. It was also decided that the "Promoters" of Jeevani, who were majority shareholders, would sell 18% of their stake in Jeevani to Lifeline through a separate sale agreement entered into on 23rd March 2012 between Lifeline and Promoters. This agreement contained specific representations as regards disclosure of information which may be vital to

the transaction and also that all intangible properties including the active R & D and IPRs of Jeevani would become the property of Lifeline. On 30th March 2012, Jeevani and Lifeline filed an application under S. 391 of Companies act and after following the provisions of Part V, on 5th July 2013, the Delhi High Court approved the scheme.

Prior to the Public Announcement made by Jeevani, certain creditors of Jeevani which included foreign banks, had jointly invoked arbitration proceedings against Jeevani at a foreign arbitral tribunal in Hong Kong against which they received a Foreign Arbitral award on 27th July 2010, under which Jeevani was to pay to the foreign lenders under a consortium agreement. No proceedings for the enforcement of the same have been initiated till date.

In august 2013, these foreign lenders of Jeevani made an application before the Delhi High Court for recall of approval of the scheme and contended that they had not received the notice of the scheme and were not able to attend the meeting of creditors and that they constituted a separate class of creditors and therefore the scheme should be set aside. The appeal now lies at the Hon'ble Supreme Court.

Soon after merger, Lifeline received notices from US Food and Drug administration for providing drugs of below par quality as a result of investigation by FDA on Drugs produced by Jeevani was commenced much before the Merger took place. Lifeline filed a suit against the Promoters before the Delhi High Court for damages arising out of a breach of contract and for compensation for wrongful gain by way of defrauding and misrepresenting to a bonafide purchaser on 23rd March 2013. The Promoters contended that the Delhi High Court has no Jurisdiction as the agreement had an arbitration clause and dispute should be referred to arbitration. An appeal lies from the Division Bench of the Hon'ble High Court to the Hon'ble Supreme Court in the instant matter.

In the meanwhile, Lifeline decided to introduce a new life saving drug 'Novel' which was manufactured after further developing the active R & D which became property of Lifeline

after the merger. The new drug was considerably cheaper than other drugs including 'Inventive' which was the premier drug in the market manufactured and sold by Swasth Life Limited (herein after referred to as Swasth) which was a sister concern of the promoters of the erstwhile Jeevani. Before 'Novel' could be launched, Swasth filed a suit for infringement of IPRs in the Delhi High Court alleging that 'Novel' was similar to its drug 'Inventive'. Swasth was able to obtain an interim injunction and in the meantime, launched a similar cost effective drug in the market and withdrew the case against Lifeline after cornering a major chunk of the market.

Lifeline filed an application before the Competition Commission of India alleging that Swasth was abusing its dominant position by indulging in bad faith litigation and CCI based on the allegations Prima Facie found that Swasth may have abused its dominance and passed an order directing the DG CCI to investigate.. Swasth has now approached the Hon'ble High Court in an appeal from the Division Bench of the Hon'ble Delhi High Court alleging that the order of CCI is bad in law.

STATEMENT OF ISSUES

ISSUE I WHETHER THE ORDER PASSED BY HON'BLE COMPANY JUDGE OF DELHI HIGH COURT APPROVING THE SCHEME OF ARRANGEMENT MUST BE RECALLED.

ISSUE II WHETHER THE SHARE SALE AGREEMENT BETWEEN THE PROMOTERS AND LIFELINE CONTAINS AN ARBITRATION CLAUSE.

ISSUE II WHETHER THE PRIMA FACIE ORDER PASSED BY CCI FOR INVESTIGATION SHOULD BE QUASHED.

SUMMARY OF ARGUMENTS

ISSUE I WHETHER THE ORDER PASSED BY HON'BLE COMPANY JUDGE OF DELHI HIGH COURT APPROVING THE SCHEME OF ARRANGEMENT MUST BE RECALLED.

The contentions raised on behalf of the appellant in the instant matter are that the classification of creditors in the merger scheme (hereinafter mentioned as the scheme) between Jeevani and Lifeline was incorrect and in contravention to Sec. 391 of the Companies Act, 1956 on the grounds that [1.1] that they form a separate class of creditors under the scheme and [1.2] they were to be considered as creditors of Jeevani.

ISSUE II WHETHER THE SHARE SALE AGREEMENT BETWEEN THE PROMOTERS AND LIFELINE CONTAINS AN ARBITRATION CLAUSE.

It is humbly contended on behalf of the appellants that the Clause 2 of the share sale agreement between the promoters and Lifeline is not an Arbitration Clause as all the essential conditions to constitute a valid arbitration agreement are not met and the validity of the agreement is in question and not the disputes arising out of the contract.

ISSUE III WHETHER THE PRIMA FACIE ORDER PASSED BY CCI FOR INVESTIGATION SHOULD BE QUASHED.

It is humbly contended on behalf of the appellant that the order passed by the Competition Commission of India under Section 26 of the Competition Act, 2002 directing the DG to investigate against Swasth is bad in law as the principles of natural justice have not been followed. It is further contended that Swasth was merely exercising its IPR rights and there is no case of abuse of dominance made out. In addition, it is Swasth who is facing the adverse effects of the investigation and thus, the investigation must be stopped by quashing the prima facie order.

ARGUMENTS ADVANCED

ISSUE 1

WHETHER THE ORDER PASSED BY HON'BLE COMPANY JUDGE OF DELHI HIGH COURT APPROVING THE SCHEME OF ARRANGEMENT MUST BE RECALLED.

The contentions raised on behalf of the appellant in the instant matter are that the classification of creditors in the merger scheme (hereinafter mentioned as the scheme) between Jeevani and Lifeline was incorrect and in contravention to Sec. 391 of the Companies Act, 1956[1] on the grounds that [1.1] that they form a separate class of creditors under the scheme and[1.2] they were to be considered as creditors of Jeevani

1.1 THE APPELLANTS ARE CREDITORS OF JEEVANI

A creditor is a person who acquires the right to proceed against his debtor due to operation of law or due to rule of court or competent authority.[2] It is therefore humbly contended that the appellants are creditors of Jeevani because [1.1.1] There is a right created in favour of Appellants by the award and [1.1.2] The award is an evidence of existence of debt of Jeevani towards Appellants.

1.1.1 THE AWARD IS AN EVIDENCE OF EXISTENCE OF DEBT OF JEEVANI AGAINST APPELLANTS

As per Section 390 of the Companies Act, 1956 creditor would mean those whose debts are admitted on proof of debt.[3] A proof of debt is a conclusive criteria to determine the liability

[1]Companies Act, 1956 (Act No. 1 of 1956)

[2]*Ex Sud Ltd.* v. *Indian Aluminium Cables Ltd.*(2005)ILR 1Delhi275

[3]*Rikhabchand Mohanlal Surana* v. *The Sholapur Spinning and Weaving Company Ltd.* 1974(76)BOMLR748

of company towards a creditor.[4] A creditor is one to whom a sum is payable or becomes payable in the future by reason of a present obligation.[5]

An un-filed award has some legal force and effect and cannot be treated as a mere waste paper. It is the evidence of the fact that the matter of adjudication has settled the rights and liabilities of the parties.[6] The rights involved in the award remain effective as between the parties for some purpose, and, can neither be called an invalid document nor a mere waste paper.[7]

The only grounds under which the party against whom a foreign arbitration award is passed cn object are the grounds mentioned under section 48 of Arbitration and Conciliation Act, 1996 (hereinafter mentioned as the Arbitration Act)[8] . The grounds mentioned in Section 48 of the abovementioned act only relate to validity of award under the law of the land and does-not give scope for challenging the subject matter of the award.[9] Therefore the arbitration award is a conclusive evidence of the debt due by one party to another.

In the instant matter prior to the arbitration proceedings being initiated by appellants they were the creditors of Jeevani by virtue of the loan lent towards its working capital. The arbitration award is an evidence of the same. Enforcement of the same would have only meant that appellants were creditors of Jeevani by virtue of the arbitration award. The un-enforcement therefore does not take away the right of appellants as creditors of Jeevani by virtue of the loan lent.

---

[4]*Tube Investment of India Ltd. and Anr.* v. *Everest Cycles Ltd.* [1984]56CompCas165(Gau)

[5]*Silver Shield Construction and Trading Limited* v. *Recondo Limited* (1994) 15 CLA 92

[6]*In Re: Unique Cardboard Box Mfg. Co. P. Ltd.*[1978]48CompCas599(Cal)

[7]*Dalhousie Jute Company Ltd.* v.*Mulchand Lakshmi Chand* [1983]53CompCas607(Cal)

[8]Arbitration and Conciliation Act, 1996, Act no. 26 of 1996

[9]*Noy Vallesina Engineering Spa & Ors.* v. *Jindal Drugs Ltd.* 2006(3)ARBLR510(Bom)

If an award is not filed as a decree of court, the claim involved in the award cannot be enforced, although such an un-filed award for some other purpose might remain a good piece of evidence as between the parties which evidence can be utilised in any other litigation as between such parties.[10] Such an unfiled award can be utilised by way of defence in an action involving the rights of parties which formed the subject-matter of the claim sought to be adjudicated upon and can operate as an instrument of *Res-judicata*.[11]

1.1.2 RIGHT IS CREATED IN FAVOUR OF APPELLANTS BY THE AWARD

An arbitration award is final adjudication of rights and liabilities of parties by court of their own choice. An award settles the rights and liabilities of the parties.[12]It creates some rights and such rights exist until the same are set aside.[13]

The non-filing of petition for enforcement proceedings does not dissolve the rights that are already created by the award. Part II of the arbitration act only deals with enforcement of rights already created and does not deal with creation and settlement of rights and liabilities. A foreign arbitral award was passed in favour of the appellants[14]and therefore rights were created in favour of appellants by the arbitration award. The right of the appellants to cast a vote as creditor was deprived of by Jeevani since existence of rights to proceed against a company is a sufficient ground to be entitled for notice and to vote in the scheme.[15]

[10]*Satish Kumar* v. *Surinder Kumar* [1969] 2 SCR244

[11]*Kalyani Spg. Mills Ltd.* v. *Shiva Trading Co.*[1983]53CompCas632(Cal)

[12]*Bhajahari Saha Banikya* v. *Behary Lal Basak* [1906] ILR 33 Cal 881 at page 888; *Satish Kumar* v. *Surinder Kumar* [1969]2SCR244

[13]*Dalhousie Jute Company Ltd.* v. *Mulchand Lakshmi Chand* [1983]53CompCas607(Cal); *Satish Kumar* v. *Surinder Kumar* [1969]2SCR244

[14]Factual Matrix, Para. 6

[15]*G.V. Films Ltd. Re*, (2009) 150 Com Cases 415 (Mad)

1.2 APPELLANTS FORM A SEPARATE CLASS OF CREDITORS

In order to constitute a class, members belonging to the class must form a homogeneous group with commonality of interest.[16]If the interests of the creditors are so dissimilar that they are reasonably unlikely to take the same view about the scheme and would reasonably feel that any one view would unreasonably benefit one or unreasonably prejudice the other then they would form different classes.[17] In a consortium agreement where many entities being one party has certain rights due against the other party which in general is a single entity then it is deemed that the many entities have common interest in the consortium agreement.[18]

In the instant matter the appellants are a group of creditors who initiated an arbitration proceeding against Jeevani for payments to be made under a consortium agreement providing financial assistance to Jeevani.[19] Therefore all the creditors within the consortium agreement had a homogenous interest. Banks and financial institutes being unsecured creditors can be classified in a separate class. It is not possible to suggest that other institutions can be equated with the banks and financial institutions.[20]

In the instant matter since the appellants had provided for financial assistance to working capital, they would fall under the category of financial institutes and banks and hence have to be a separate class.[21]

---

[16]*Miheer H. Mafatlal* v. *Mafatlal Industries Ltd.*AIR1997SC506

[17]*Darshana Praful Kenia* v. *Alstom Power India Ltd.* 2003(5)BomCR421

[18]*State of Kerala* v. *Zoom Developers Pvt. Ltd.& Ors.* (2009)4SCC563

[19]Factual Matrix, Para. 6

[20]*Wipro Finance Ltd* v. *Suman Motels Ltd.*1999(4)BomCR1; *Maneckchowk and Ahmedabad Manufacturing Co. Ltd., In re* [1970] 40 Comp Cas 819

[21]*Wipro Finance Ltd* v. *Suman Motels Ltd.*1999(4)BomCR1

Court shall recall its own order when the creditors are deprived of their right to vote or are not classified correctly.[22] In the instant matter the appellants were wrongly not sent the notice of arrangement and thereby deprived of the right to vote and were wrongly not classified as separate class. Therefore it is humbly submitted that Hon'ble court recall the order sanctioning the scheme.

ISSUE 2

WHETHER THE SHARE SALE AGREEMENT BETWEEN THE PROMOTERS AND LIFELINE CONTAINS AN ARBITRATION CLAUSE.

It is humbly contended on behalf of the appellants that the Clause 2 of the share sale agreement between the promoters and Lifeline is not an Arbitration Clause. An arbitration agreement is an agreement where the parties submit to arbitration between them. It may be in the form of an arbitration clause in a contract or in the form of a separate agreement and it shall be in writing.[23]

2.1THE CLAUSE 2 OF THE SHARE SALE AGREEMENT IS NOT AN ARBITRATION CLAUSE

It is humbly contended before the Hon'ble Supreme Court that the Clause 2 of the Share Sale Agreement[Hereinafter referred to as SSA] between the Promoters and Lifeline is not an arbitration clause. For deciding whether the parties have agreed to refer an issue to an expert or whether they have agreed to resolve through arbitration, one can follow a general set of guidelines as laid down by our courts as such:

(i) existence of disputes as against intention to avoid future disputes;

[22] *Commerzbank Ag. and Anr.* v. *Arvind Mills Ltd.* [2002]110CompCas539(Guj*)*

[23] Sec. 7, Arbitration and Conciliation Act, 1996.

(ii) the tribunal or forum so chosen is intended to act judicially after taking into account relevant evidence before it and the submissions made by the parties before it and

(iii)the decision is intended to bind the parties. Nomenclature used by the parties may not be conclusive. One must examine the true intent and purport of the agreement.[24]

In *Carus Wilson and Greene, Re*[25], It was held that if the intention of the parties was that an inquiry in the nature of judicial inquiry should be held which hears the respective cases and decides upon evidence laid before him then the case is one of an arbitration. On the other hand, cases in which a person is appointed to ascertain some matters for purpose of preventing differences from arising, not of settling them when they have arisen, then the case is one not of an arbitration but of mere valuation. Thus all such cases must be determined according to each particular circumstances to determine if the person is intended to be an arbitrator or to act as a dispute resolving mechanism.[26]

In the present case, it cannot be said that the Clause 2 of SSA which empowers an "*Empowered Committee Comprising of (three) executive level personnel*"[27] to take decisions is an arbitral tribunal although its decision is determined to be final, binding and conclusive as it is not required to hear evidences or arguments of the parties before passing the decision. This clause is merely a clause to "*amicably resolve the disputes between the parties"*[28].

[24]Justice Dr. B.P. Saraf & Justice S. M. Jhunjunuwala, *Law of Arbitration and Conciliation,* 5th Edn., 2009, Snow White Publications.

[25]*Carus Wilson and Greene, Re,* [1896] 18 QBD 7

[26]*Dewanchand* v. *State of Jammu & Kashmir*, AIR 1961 J&K 58; *State of U.P.* v. *Shri Padamsingh Rana,* AIR 1971 all 270

[27]Factual Matrix, Para. 9

[28]Clause 2.2., Share Sale agreement, Para. 9, Factual Matrix

In *K. K. Modi* v. *K. N. Modi*[29], the following attributes that must be present for an agreement to be considered as an arbitration agreement were laid as under:

1. The arbitration agreement must contemplate that the decision of the tribunal must be binding on the parties to the agreement
2. That the jurisdiction of the tribunal to decide the rights of parties must derive either from the consent of the parties or from an order of the court or from a statute, the terms of which make it clear that the process is to be an arbitration
3. The agreement must contemplate that the substantive rights of the parties will be determined by the agreed tribunal
4. That the tribunal will determine the rights of the parties in an impartial and judicial manner with the tribunal owing an equal obligations of fairness towards both sides.
5. That the agreement of the parties to refer their disputes to the decision of the tribunal must be intended to be enforceable in law.

It is humbly contended before this Hon'ble court that none but the first attribute is present in the share sale agreement between the Promoters and Lifeline, therefore it cannot be said that Clause 2 is an Arbitration clause. The Clause 2 does not enunciate that the empowered committee will determine the substantive rights of the parties and neither does it enunciate that the committee will determine the rights in an impartial and judicial manner.

A contract may provide that disputes arising under it are to be resolved by some third person acting not as arbitrator but as an expert.The decision given in such cases by the expert is not an award. 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 result

[29] *K. K. Modi* v. *K. N. Modi,* AIR 1998 SC 1297: (1998) 3 SCC 573; *Bharat Bhushan Bansal* v. *U.P. Small Industries Corporation Ltd.*, (1999) 2 SCC 166

of his own expertise and investigations. The procedure involved is not arbitration and the act does not apply.[30]

Thus it is humbly submitted that the Clause 2 of the Share Sale Agreement is not an arbitration clause and thus the decision of the single judge of the Delhi High Court was correct and it is the division bench which has erred in its decision.

2.2 CLAUSE 3 OF SSA IS APPLICABLE IN THE PRESENT MATTER.

It is humbly contended that the Presence of Clause 3 of the SSA conferring Jurisdiction on the Delhi Courts clearly postulates that the clause 2 is not an Arbitration Clause and that it is, in fact, the jurisdiction of the Delhi courts which shall prevail. In *Wellington Associates ltd.* v. *Kirit Mehta*[31] the Supreme Court has held that when an agreement is clear that the parties submitted themselves to the exclusive jurisdiction of the courts in Bombay, the clause stating "any dispute or difference arising in connection with these persons may be referred to arbitration", the conclusion would be that the provision enabling arbitration is not a firm or mandatory arbitration clause.

The Supreme Court in a number of Judgements has stated that to constitute an arbitration agreement, the parties must be ad-idem, that is, agreed to the same thing in the same sense and the arbitration clause must not be ambiguous. There must be consensus ad-idem between the parties.[32] In the present SSA, the presence of both Clause 2 and 3 clearly postulates that the parties were not ad-idem and that there was ambiguity in the agreement. An Arbitration

[30]Ronald Bernstien, *Hand book of Arbitration Practice*, 1998, ed. 19

[31]*Wellington Associates ltd.* v. *Kirit Mehta*, AIR 2000 SC 1379; (2000) 4 SCC 272

[32]*Ramji Dayawala & Ltd.* v. *Invest Import,* AIR 1981 SC 2085. ; *Dr. H.S. Rikhy* v. *The New Delhi Municipal Committee,* AIR 1962 SC 554

agreement must be not be ambiguous. It must certain or capable of being certain.[33] The present clause 2 of the share sale agreement is neither certain nor is it capable of being certain and hence it is ambiguous.

In *U.P. Rajkiya Nirman Nigam Ltd*. v. *Indure Pvt. Ltd.*[34]on no consensus ad-idem between the parties on material terms of the contract and as such, no concluded contract had, therefore, emerged and arbitration agreement being part of such un-concluded contract did not exist. Following this principle laid down by the Supreme Court, assuming but not admitting that the Clause 2 of the share sale agreement is an arbitration clause, the lack of ad-idem between the parties and the ambiguity in the SSA has led to an unconcluded contract and therefore the presence of arbitration clause cannot be said. Where there is no concluded contract between the parties, there can be no arbitration agreement. [35]

Further, in the present case, the promoters defrauded and misrepresented to Lifeline about the pending investigations proceeded upon by the FDA to obtain the consent of Lifeline for the SSA and to obtain unjust enrichment to get an inflated price for their shares. The parties are said to consent when they agree upon the same thing in the same sense. Consent can be said to be free when it is not induced by coercion, or undue influence or fraud or misrepresentation or mistake as to a matter of fact essential to the agreement[36]. The acts of the promoters clearly represent that they had malafide intentions and there was misrepresentation and fraud in their actions and therefore the agreement did not have Free consent. The agreement is therefore voidable at the option of Lifeline. The current dispute is

[33]*Union of India* v. *Ram Iron Found,* (1987) 2 Arb LR 250 (Del)

[34]*U.P rajkiya Nirman Nigam Ltd*. v. *Indure (P) Ltd,* (1996) 2 SCC 667; AIR 1996 SC 1373

[35]*Union of India* v. *Mohan meakin brewarie ltd*. AIR 1988 NOC 33 (Delhi); *Indian Meters Ltd*. v. *Punjab State Electricity Board,* (1993) 1 SCC 230

[36]Section 12 to 21, Indian Contract Act, 1872.

regarding the validity of the agreement and for ascertaining the damages arising out of recession of the contract and therefore falls within the purview of Clause 3 and not Clause 2.

It is further contended that under the act, the arbitral tribunal must be both "impartial" and "independent".[37] A person may not be appointed in an arbitration in which he may not be independent, in the sense that he may be connected or associated with one of the parties in any capacity, such as employee, director or managing director, chairman, even if there are no justifiable doubts as to his impartiality.[38] Assuming but not admitting that the Present clause 2 is an Arbitration clause, the committee comprises of three personnel of the same company and therefore it can be reasonably assumed that they can't be impartial and independent while adjudicating the dispute and therefore they cannot be appointed in the arbitration proceedings and thus the arbitration clause becomes void.

Thus it is humbly submitted before this Hon'ble court that the present clause 2 of the share sale agreement is not an arbitration clause and the SSA by itself is hampered by misrepresentation and fraud and is an unconcluded contract and therefore the order of the division bench should not be held to be sustainable.

ISSUE 3

WHETHER THE PRIMA FACIE ORDER PASSED BY CCI FOR INVESTIGATION SHOULD BE QUASHED.

It is humbly contended on behalf of the appellant that the order passed by the Competition Commission of India under Section 26 of the Competition Act, 2002 directing the DG to investigate against Swasth is bad in law as the principles of natural justice have not been followed. It is further contended that Swasth was merely exercising its IPR rights and there is

[37] Section 10(7)(b), Arbitration and Conciliation Act, 1996.

[38] Justice Dr. B.P. Saraf & Justice S. M. Jhunjunuwala, *Law of Arbitration and Conciliation,* 5th Edn., 2009, Snow White Publications.

no case of abuse of dominance made out. In addition, it is Swasth who is facing the adverse effects of the investigation and thus, the investigation must be stopped by quashing the prima facie order.

[3.1.]THE ORDER OF THE CCI IS BAD IN LAW.

It is humbly contended before the Hon'ble Supreme Court that the CCI which is a statutory body created, has been vested with adjudicatory functions along with the regulatory powers[39]. As CCI is doing adjudicatory function, it is held to be a quasi-judicial body[40]. Any quasi-judicial body while determining disputes between the parties is required to adhere to the principles of natural justice[41] and any order passed in violation of principles of natural justice is null or void.[42]

It is further contended that the principles of Natural Justice have been violated in the instant matter. The two rules that have been evolved by Courts to determine the principles of natural justice in judicial as well as quasi-judicial process are[43]: a. No man shall be a Judge in his own cause; b. Hear the other side – *Audi Alteram Partem.*

Here, the second principle was not followed. The CCI based on the allegations made by Lifeline was of the *prima facie* view that Swasth may have abused its dominance and passed an order directing the DG CCI to investigate on the information provided by Lifeline and

[39]Sections 26(1), 26(8), 27, 33, 35, 36(2) of the Competition Act, 2002

[40]*Brahma Dutt* v. *Union of India* , (2005) 2 SCC 431; *CCI* v *SAIL*, (2010) 10 SCC 744

[41]*Canara Bank and Ors.* v. *Sri Debasis Das & Ors.,* AIR 2003 SC 2041, *Super Cassette Industries* v. *Entertainment Network India*, AIR 2004 Delhi 326

[42]*M/s. R.B. Shreeram Durga Prasad and Fatehchand Nursing Das* v. *Settlement Commission (IT & WT) and Anr.,* (1989) 1 SCC 628; *State of Orissa* v. *Dr. Binapani Dei*, AIR 1967 SC 1269.

[43]*Union of India* v. *Tulsiram Patel & Ors,* AIR 1985 SC 1416

submit its report within 45 days[44]. Based on the mere allegations made by Lifeline, CCI decided to initiate the investigation without even tryingto ascertain the validity of the IPR rights vested with Swasth.

Furthermore, the Supreme Court in the *CCI* v. *SAIL*[45] made a distinction between forming a *prima facie* opinion under Section 26(1) of the Act and passing an order by way of adjudication. The CCI is expected to form a prima facie view without entering upon any adjudicatory or determinative process. In the instant matter, the CCI cannot come to a conclusion of whether there was a prima facie abuse or not, without verifying the authenticity of the IPRs held by Swasth, thus the present matter cannot be decided prima facie but must be adjudicated upon by an adjudicatory process.

Thus, the prima facie order passed by CCI is bad in law and must be quashed.

[3.2.]THE HIGH COURT UNDER WRIT JURISDICTION CAN QUASH INVESTIGATIONS.

It is humbly contended that the Hon'ble High Courts can issue the writ of certiorari to a judicial or quasi-judicial body on the following grounds[46]:

1. Want or excess of jurisdiction; 2. Violation of procedure or disregard of principles of natural justice; 3. Error of law apparent on the face of the record.

As shown in the above sub issue, there has been a violation of principles of natural justice by CCI. The principle of audi alteram partem, has not been followed and thus, the writ jurisdiction can be invoked in the present matter.

[44]Factual Matrix, Para.12

[45]*CCI* v. *SAIL*,(2010) 10 SCC 744

[46]Basu, Durga Das, *Commentary on the Constitution of India*, 8th Edition, 2009

In *DLF & Ors.* v. *CCI*,[47] a writ petition was filed to challenge the order passed by CCI under Section 26(1) of the Competition Act and for quashing of the investigation report. The order passed by the CCI under Section 26(1) of the Act was challenged principally on the ground that it did not contain sufficient reasons for forming a *prima facie* opinion that an inquiry must be initiated against the Petitioners under the Act. The Hon'ble High Court of Delhi after examining the facts of the case granted a leave of two weeks to file the counter statement and ordered for a rehearing of both the parties. In the instant matter, the CCI violated principles of natural justice and erroneously came to the conclusion of the existence of prima facie case. CCI decided against Swasth even without sufficient material to do so. Thus, the Hon'ble Court must in the interests of justice invoke the writ jurisdiction and direct that the investigation be quashed.

[3.3.] SWASTH DID NOT ABUSE ITS DOMINANT POSITION.

It is humbly contended before the Hon'ble Supreme Court of India that Swasth did not abuse its dominant position under section 4 of the Competition Act, 2002. The acts of Swasth were solely in furtherance of protection of IPR rights.

Swasth acquired certain absolute IPR rights to a few of the developed and completed R & D projects and IPRs of Jeevani in 2010[48]. As per section 48 of the Indian Patents Act, 1960 an exclusive right has been conferred on the patentee to prevent the third party from making, using, offering for sale, selling or importing for those purposes that product in India in case of product patent and from the act of using that process, and from the act of using, offering for sale, selling or importing for those purposes the product obtained directly by that process in India in case of process patent. Today, drugs are been given both product as well as process

[47] *DLF & Ors.* v. *CCI*, W.P.(C) 22/2011 & CM No. 33/2011

[48] Factual Matrix, Para. 11

patent[49]. So, in the instant matter even if it is a product patent or a process patent, the right to prevent third parties from using the product or process exists.

In *Blakey and Co*. v. *Lathem and Co*.,[50] it was observed that 'to be new in the patent sense, the novelty must show invention.' This aspect of law relating to patentable inventions as prevailing in Britain has been considered in India as well.[51]

> *"A patent can be granted only for 'manner of new manufacture' and although an invention may be 'new' and relate to a 'manner of manufacture' it s not necessarily a 'manner of new manufacture' – it may be only a normal development of an existing manufacture."*

In the instant matter, Swasth honestly believed that the new drug, Novel was a drug which was being derived as a natural consequence of the existing Inventive. In bonafide intentions, Swasth instituted a suit as the new product could not be a patentable invention and thus, infringing the existing patent of Swasth. Also, it can be reasonably presumed that since Swasth was working for developing the new drug, it had knowledge of the properties of the new drug and so, was aware of the fact that a new drug which was a natural development of the original one was possible. After realising that Novel was different from Inventive and the new cost effective drug in the market, Swasth withdrew the suit to prevent vexatious litigation. Further, approaching the court in itself does not make the patent valid[52]. The High Court has applied its mind in reaching to the conclusion and any procedural irregularities or violations could be addressed by an appeal immediately by Lifeline. No attempt has been made by Lifeline to get the injunction quashed if they believed that they were falsely

---

[49]Sarma Rama, *Commentary on Intellectual property laws,* Edn. 2009, Lexis Nexis Butterworths Wadhwa.

[50]*Blakey and Co*. v. *Lathem and Co*,(1889) 6 RPC 184 (CA)

[51]*Biswanath Prasad Radhey Shyam* v. *Hindustan Metal Industries,*AIR 1982 SC 1444.

[52]*Wockhardt Ltd.* v. *Remed Healthcare Pvt. Ltd. & Anr.,* 210 (2014) DLT 233

implicated. Instead, they approached the CCI and alleged abuse of dominant position. Thus, it is humbly submitted that the litigation was instituted only for the purposes of IPR protection and the question of abuse of dominant position is a farce.

[3.4.] ADVERSE EFFECT ON SWASTH.

It is humbly contended before the Hon'ble Supreme Court of India, that the initiation of investigation by CCI has caused considerable adverse effect on Swath. The adverse effect on Swasth can be examined in two folds:a. Loss of Good will ; b. Monetary Loss

In the case of *Rohtas Industries* v. *S.D. Agarwal & Ors*.[53], the Supreme Court held that the Court cannot ignore the adverse effect of investigation on company and infraction of fundamental right guaranteed to share holder under Article 19(1)(g) of the Constitution while interpreting a particular section.

In *Hariganga Cement Ltd.* v. *Company Law Board & Ors*[54]., it was held that the investigation had an adverse effect on reputation and credibility of Petitioner-Company and might cause grave prejudice to its affairs and thus, the investigation was struck down.
In the instant matter, as stated in the earlier sub-issue, Swasth was merely exercising its IPR rights with bona fide intentions. It is Lifeline who approached the Competition Commission of India and filed a false suit against Swasth alleging abuse of dominance. The CCI erred in making a prima facie decision. The investigation that is being undertaken by the DG CCI is causing a considerable loss of reputation as well as monetary loss. Swasth was a leading drug manufacturer in the pharmaceutical market and this investigation undertaken against it is causing losses to the company and therefore it is humbly submitted before this Hon'ble Court that this investigation should be quashed.

[53] *Rohtas Industries* v. *S.D. Agarwal & Ors*, 1969 SCR (3) 108

[54] *Hariganga Cement Ltd.* v. *Company Law Board & Ors*, 1987 (2) Bom CR 250

PRAYER

In the light of the issues raised, arguments advanced and authorities cited, may the Hon'ble Supreme Court of India be pleased to:

1. Declare that the scheme of arrangement between Lifeline Ltd. and Jeevani Ltd. is invalid and recall the order sanctioning the scheme.

2. Declare that the Share Sale agreement between the Promoters and Lifeline Ltd. does notcontain an arbitration clause and recall the order of the division bench.

3. Quash the order of CCI for investigation against Swasth.

And/Or

Pass any order that the Hon'ble Court deem fits in the interest of justice, equity and good conscience.

For this, the Appellants shall forever humbly pray.

Counsel on behalf of the Appellants.