5TH NLIU – JURIS CORP NATIONAL CORPORATE LAW MOOT COURT COMPETITION 2014

Before

THE HON'BLE SUPREME COURT OF INDIA AT NEW DELHI

(**CIVIL APPELLATE JURISDICTION u/Art. 133**)

CIVIL APPEAL NO. ____

FOREIGN LENDERS … APPELLANT

V.

LIFELINE LIMITED …RESPONDENT

WITH

CIVIL APPEAL NO. ____

LIFELINE LIMITED … APPELLANT

V.

PROMOTERS OF JEEVANI …RESPONDENT

WITH

CIVIL APPEAL NO. ____

SWASTH LIFE LIMITED …APPELLANT

V.

CCI & LIFELINE LIMITED …RESPONDENT

MEMORIAL *for* THE APPELLANT

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases

Statutes

Treatises

STATEMENT OF JURISDICTION

The Appellant has the honour to submit before the Honourable Supreme Court of India, the memorandum of the present case in the Civil Appeals filed under Article 133 of the Constitution of India. It sets forth the Facts, Contentions and Law in support of Appellant's case.

STATEMENT OF FACTS

I

"Jeevani", is a listed company incorporated 1990 registered under the Companies Act (2013), having its registered office in New Delhi is listed on the Bombay Stock Exchange. It is a leading pharmaceutical giant with a market presence. In July, 2011 it was announced that Jeevani sought to expand its market reach. "Lifeline" is another company that is listed under the Companies Act, 2013 registered in Bombay. It is a popular food company in India that is traded internationally. They decided to foray into the Pharmaceutical sector.

II

In November, 2011 negotiations for a merger commenced and on 27th January, 2012 said decision was made. As per the decision, Jeevani was due to merge with Lifeline with all assets and liabilities being transferred. There are three shareholders who are the promoters of Jeevani, were due to sell their stakes to Lifeline. However, the sale of stake was impacted by a separate sale agreement that was agreed on 23rd March, 2012 between Lifeline and Promoters. The agreement had provisions regarding disclosure of information by either of the concerned parties.

III

It explicitly states that the R&D's and IPR's of Jeevani became property of Lifeline and all associated rights. The Scheme was finalised on 5th March, 2012 but unfortunately the application was rejected by Bombay Stock Exchange. On 30th May, 2012 the two companies filed an application under Section 391, of the Companies Act, 1956 at the Delhi HC. The Companies Judge ordered for a meeting of the creditors as per Chapter V. A majority resolution in support of the Scheme was passed.

IV

Prior to public announcement being made by Jeevani, several foreign lenders initiated arbitration proceedings at a tribunal in Hong Kong, due to payments arrears to be made under a Consortium agreement for financial assistance to Jeevani. On 27th July, 2010, an arbitral award was given in favour of the foreign lender. Till date proceedings for enforcement has

been initiated. In early August, 2013 there was an application before the Company Judge to recall order dated 5th July, 2013.

V

The Company Judge dismissed the application of the foreign lenders. The Division Bench of the Delhi HC dismissed the appeal of the foreign lenders. It has now been challenged at the Supreme Court.

VI

After the merger, Lifeline was involved in various sectors that Jeevani had a presence in, which includes supply of generic drugs in the United States. They soon received notices from the FDA for low quality of production of drugs. On further internal investigation, that the plants in question were grown much before the above mentioned merger took place.

VII

Lifeline filed a suit against Promoters at Delhi HC for damages due to breach of contract dated March 23rd, 2013 for compensation for wrongful gain and unjust enrichment of Promoters by way of defrauding and misrepresenting to a bonafide purchaser. Lifeline have also alleged that non declaration of impending proceedings amounts to malafide intention to avail best possible share price. The Promoters claim that the Delhi HC does not have jurisdiction as the agreement's dispute resolution clause has an arbitration clause. However, Lifeline contended that no such clause was present.

VIII

The Single Judge of the Delhi High Court held that the clause could not be regarded as an arbitration clause. Consequently, the court had jurisdiction to look into the issues involved and the matter was kept for completion of pleadings and arguments on a later date. This Order was challenged in appeal by the Promoters to the Division Bench of the Delhi High Court. It held that Single Judge had erred in its decision and that the clause indeed constitutes an arbitration clause.Accordingly, disputes were referred to the Empowered Group pursuant to the terms of the agreement. Aggrieved by said Order of the Division Bench, Lifeline approached the Supreme Court of India, with the matter remaining pendig for argument.

IX

Meanwhile, Lifeline introduced a new drug called 'Novel' into the market. 'Novel' was considerably cheaper than other life saving drugs in the market, including the drug "Inventive". Inventive was manufactured and sold by Swasth Life Limited ("Swasth"), a sister concern of the Promoters, of the erstwhile Jeevani. In 2010, Swasth got assigned absolute rights to a few of the developed and completed R & D projects and IPRs of Jeevani. A suit for infringement of its IPRs was filed by Swasth in the Delhi High Court alleging that Novel' was substantially similar to its drug "Inventive" and was based on certain IPRs which have been assigned to Swasth. This was done prior to the launch of the drug 'Novel' by Lifeline. Interim injunction was obtained by Swasth against Lifeline who was restrained from launching 'Novel' until further orders of the Court. Meanwhile, Swasth launched a similar cost effective drug in the market, cornering a large chunk of the same. Subsequently, it withdrew it's case against Lifeline and the interim injunction was vacated.

X

Consequently, an application was filed before the Competition Commission of India (the "CCI") on behalf of Lifeline. Swasth was accused of abusing its dominant position by indulging in bad faith litigation. The CCI 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 submit its report within 45 days. Said report is awaited.

XI

Aggrieved by the Order of the CCI, Swasth filed a writ petition making Lifeline and the CCI a party in the Delhi High Court. It was submitted that the CCI's Order for directing investigation was bad in law as Swasth, in its endeavor to protect its IPRs could not be held, even prima facie, to be abusing its dominance. Upon arguments, the Delhi High Court held that CCI has made prima facie finding, and has only directed for an investigation on the allegations made against Swasth. Consequently, it was held that no adverse effect is caused to Swasth in pursuance of which the writ petiiton filed by it was dismissed. On appeal, the Division Bench also did not find any reason to interfere with the order of Hon'ble Single Judge and accordingly Lifeline has come before the Supreme Court against the order of the Division Bench.

STATEMENT OF ISSUES

The following questions are presented before the Hon'ble Supreme Court of India for its consideration:

1. Whether the Scheme of arrangement should be set aside?
2. Whether the **Dispute Resolution** clause is an arbitration agreement?
3. Whether the investigation by the CCI is bad in law?

SUMMARY OF ARGUMENTS

1. THE SCHEME OF ARRANGEMENT SHOULD BE SET ASIDE

It is humbly submitted that the Scheme of Arrangement should be set aside as [1] the approval of the BSE was not obtained, [2] notice was not sent to the foreign lenders who are creditors, and [3] the foreign lenders constitute a separate class of lenders.

2. THE DISPUTE RESOLUTION CLAUSE IN THE SHARE SALE AGREEMENT IS AN ARBITRATION AGREEMENT.

The Appellant Company humbly submits that the dispute resolution clause in the Share Sale Agreement [*hereinafter 'Agreement'*] is an arbitration agreement as [1] the necessary conditions prescribed under s.7 of the Arbitration & Conciliation Act, 1996 [*hereinafter 'the Act'*] are satisfied, [2] there exists an intention to arbitrate between the parties, [3] the arbitration agreement is not uncertain or vague, and [4] the Jurisdiction clause does not override the arbitration agreement.

3. THE APPEAL FILED BY SWASTH CANNOT BE ENTERTAINED.

It is humbly submitted that the investigation started by CCI is not bad in law as the Competition Commission of India's order is "direction simpliciter", the protection of its Intellectual Property Rights by Swasth does not preclude it from Section 4 and of being in a dominant position, and Swasth has indeed abused dominant position.

ARGUMENTS ADVANCED

1. THE SCHEME OF ARRANGEMENT SHOULD BE SET ASIDE

It is humbly submitted that the Scheme of Arrangement should be set aside as [1] the approval of the BSE was not obtained, [2] notice was not sent to the foreign lenders who are creditors, and [3] the foreign lenders constitute a separate class of lenders.

1.1. The approval of the BSE was not obtained

It is submitted that the scheme of arrangement was filed with the Bombay Stock Exchange post the 5th March, 2012, but that the BSE did not provide its approval to the scheme. Clause 24 of the Listing Agreement dictates that a Scheme of Agreement must be brought to the BSE for approval and be given at least 1 month notice, as per *Compact Power Sources (P) ltd, In re*[1].

In the instant case, the Company failed to provide one month notice to BSE, and so did not comply with Clause 24, Listing Agreement requirements, and so the Scheme should be set aside.

1.2. Notice was not sent to the foreign lenders who are creditors

With relation to the expiry of the arbitration award, given the three year limitation stipulated under the limitations act, it is submitted that The Arbitration and Conciliation Act is a special act, in that it defines limitations placed on certain actions within the act, that the Limitations Act cannot be applied to it (The Arbitration and Conciliation Act)[2]. Section 47, as it is argued with Section 37 of the Act in *ONGC v Jagson International Ltd*, does not specify a limitation, and as such no law of limitation can be applied to it. This view is upheld in many cases, such as *Uttam Namdeo Mahale v. Vithal Deo*[3]. It is hence submitted that the foreign creditors, indeed being creditors, were not served notice and hence the High Court ruling should be recalled.

It is submitted that notice of the scheme of arrangement was not sent to the foreign lenders of Jeevani. Pursuant to an application being filed with the Hon'ble High Court, the Hon'ble Company Judge ordered for a meeting of the creditors to be convened. Thereafter, Jeevani issued notice of meeting to its creditors by way of publication of an advertisement containing

[1] (2004) 52 SCL 139
[2] 2005 (5) BomCR 58
[3] AIR 1997 SC 2 695

the terms of proposal and explaining its effect, in local English and vernacular newspapers The foreign lenders, being situated outside India, did not receive notice of the meeting.

It is submitted that the appropriate manner in which to intimate creditors of the company is the send individual notices along with copy of the scheme, explanatory statement and form of proxy to each creditor of the company, as was done in the case of *In Re, Arvind Mills Ltd.*[4] as well as in the case of *In Re, Mafatlal Industries Ltd.*[5]

1.3. The foreign lenders constitute a separate class of lenders

It is submitted that the foreign lenders constitute a separate class of creditors. Where subordinate creditors have an interest in the company which could be affected in a way which is different from the effect on other creditors, then they would constitute a separate class.[6] Further, in the landmark case *Sovereign Life Assurance Co Vs Dodd*[7], the facts concerning a scheme of arrangement, Bowen LJ said:

"It seems plain that we must give such a meaning to the term class as will prevent the section 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 it impossible for them to consult together with a view to their common interest."

In essence, a group of persons constitutes one class once it can be show that this group conveys all interest and that the said group's claims are can be ascertained by any common system of valuation. This group, which is to be considered a class, is usually homogenous and possesses commonality of interest and receive identical offers of compromise.[8]

It is submitted that the foreign lenders initiated arbitration against Jeevani for payments to be made under a consortium agreement providing financial assistance to Jeevani, between the foreign lenders and Jeevani. On 27th July, 2010, the foreign lenders received an award in their faovour, under which Jeevani was to pay to the foreign lenders all amounts as stated in the arbitral award.

It is submitted that as parties entitled to payment of sums under the arbitration award, the foreign lenders constitute a separate class of creditor.

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[4] [2002] 111 CompCas 118 (Guj)
[5] [1995] 84 CompCas 230 (Guj)
[6] *In Re, British & Commonwalth Holdings plc. (No.3),* 1992 BCLC 322
[7] [1892] 2 QB 573
[8] *(2001) BCLC 755*

2. THE DISPUTE RESOLUTION CLAUSE IN THE SHARE SALE AGREEMENT IS AN ARBITRATION AGREEMENT.

The Appellant Company humbly submits that the dispute resolution clause in the Share Sale Agreement [*hereinafter 'Agreement'*] is an arbitration agreement as [1] the necessary conditions prescribed under s.7 of the Arbitration & Conciliation Act, 1996 [*hereinafter 'the Act'*] are satisfied, [2] there exists an intention to arbitrate between the parties, [3] the arbitration agreement is not uncertain or vague, and [4] the Jurisdiction clause does not override the arbitration agreement.

2.1. The Dispute Resolution clause satisfies the necessary conditions for an arbitration agreement prescribed under s.7 of the Arbitration & Conciliation Act, 1996.

It is submitted on behalf of the Appellant Company that pursuant to section 2(b) of the Act, reference must be made to section 7 to determine the meaning of what constitutes an arbitration agreement.[9] In accordance with section 7, any agreement by the parties to submit to arbitration, disputes which may arise in respect of a defined legal relationship would constitute an arbitration agreement.[10] Another relevant precondition is that the agreement must be in writing.[11]

In the instant matter, the Appellant Company entered into the Share Sale Agreement with the Respondents wherein there existed an agreement between the parties to submit their disputes for arbitration in clause 2 titled **'Dispute Resolution'.** Additionally, the fact that the agreement is in writing cannot be called into question. Therefore it is submitted that the Dispute Resolution clause satisfies the necessary conditions for an arbitration agreement prescribed under s.7 of the Arbitration & Conciliation Act, 1996.

2.2. There exists an intention to arbitrate between the parties.

The Appellant Company pleads that there exists an intention to arbitrate between the parties as [1] Non-reference to the words 'arbitration' or 'arbitrator' does not affect the meaning of the Dispute Resolution clause and [2] The Dispute Resolution clause envisages a judicial determination and not an expert determination.

[9] S. 2(b), Arbitration & Conciliation Act, 1996

[10] S. 7(1), Arbitration & Conciliation Act, 1996

[11] S. 7(2) Arbitration & Conciliation Act, 1996

2.2.1. Non-reference to the words 'arbitration' or 'arbitrator' does not affect the meaning of the Dispute Resolution clause.

It is submitted on behalf of the Appellant Company that an arbitration agreement does not require being in a particular form.[12] The intention of the parties to refer any dispute that arises or which may arise in the future with respect to a particular subject matter to a tribunal to adjudicate upon the same would suffice to constitute an arbitration agreement.[13]

This intention of the parties is required to be gathered from the terms of the agreement wherein the terms must clearly indicate such intention to refer their disputes to a private tribunal as well as a willingness to be bound by the decision of the tribunal.[14]

Moreover, it is a settled position of law that for the purpose of construing an arbitration agreement, the term 'arbitrator' or 'arbitration is not required to be specifically mentioned therein.[15] However, this is provided that the essentials of an arbitration agreement which include that the agreement should be in writing, that the parties should agree to refer disputes to a private tribunal, and that the decision is binding on the parties are satisfied.[16]

Additionally, it is submitted that an arbitration agreement must be interpreted in a manner to give efficacy to the contract rather than to invalidate it without adopting a narrow, technical approach.[17]

In the instant factual matrix, Clause 2 is titled '**Dispute Resolution**'. Clause 2.1 provides that "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,

[12] *Rukmanibai Gupta v Collector of Jabalpur* AIR1981SC479

[13] *Ibid.*

[14] *Jagdish Chander v Ramesh Chander* 2007GLH(27)377

[15] *Bihar State Mineral Development Corporation v Encon Building* AIR2003SC3688; *Punjab State v Dina Nath* AIR2007SC2157

[16] *Karnataka Power Transmission Corporation Limited and Anr v Deepak Cables (India) Ltd* AIR2014SC1626

[17] *Citibank v TLC Marketing* AIR2008SC118

instructions, claims, right or matters of interpretation of and under this Agreement." Thus, the intention of the parties is to refer all disputes to an empowered committee to adjudicate upon the same. Moreover, the provision stipulates that the decision of the empowered committee would be final and binding upon the parties. Therefore, even though the **'Dispute Settlement'** clause does not utilize terms such as 'arbitration' or 'arbitrators', the same should be considered to be an arbitration agreement as the intention of the parties has manifested itself through the satisfying of the aforementioned criteria.

2.2.2. The Dispute Resolution clause envisages a judicial determination and not an expert determination

The Appellant Company submits that the **'Dispute Resolution'** clause envisages a judicial determination and not an expert determination. In *K.K. Modi v K.N. Modi*[18], the Supreme Court examined the difference between a judicial determination and expert determination and laid down certain guidelines to distinguish these concepts. Firstly, the arbitration agreement must contemplate that the decision of the tribunal will be binding on the parties to the agreement.[19] Moreover, the jurisdiction of the tribunal must stem from the consent of the parties and it must be in relation to the substantive rights of the parties.[20] Another important consideration is that the decision of the tribunal must apply the law intended by the parties.[21]

Additionally, where the terms of the agreement are ambiguous, the court must consider whether there are certain undetermined issues in the transaction which are required to be decided or whether there exists a formulated dispute between the parties.[22] In case of the former, the procedure would be an expert determination whereas in the latter case, the procedure would be arbitration.[23]

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[18] *K.K. Modi v K.N. Modi* AIR1998SC1297

[19] Mustill and Boyd, Commercial Arbitration, 2nd Edition, 30 as cited in *Joint Investments Pvt. Ltd. v. Escorts*, (2010) 170 DLT 487

[20] *Ibid*; *K.K. Modi v K.N Modi* AIR1998SC1297

[21] *Ibid*; *Punjab State v Dina Nath* AIR2007SC2157

[22] Russell on Arbitration, 21st Edition, 37, ¶ 2-014

[23] *Ibid.*

In the instant factual matrix, Clause 2.1 of the Agreement i.e. the **'Dispute Resolution'** clause contemplates that decision of the empowered committee will be binding on the parties. Moreover, the clause envisages the determination of substantive rights of the parties evidenced by the phrase 'all questions and issues relating to the meaning, scope, instructions, claims, right or matters of interpretation of and under this Agreement.' Moreover, Clause 1.1 of the Agreement i.e. the **'Governing Law'** clause read with the **'Dispute Resolution'** clause demonstrates that the adjudication of the disputes must be in accordance with laws of India as agreed by the parties.

Another important consideration in this regard is that the modalities of the Agreement were effectuated and did not require any expert determination. The only dispute that has emerged between the parties is whether there has been a breach of the Agreement on account of non-disclosure of vital information by the Respondents. In light of the aforesaid, it is submitted that the **'Dispute Resolution'** clause envisages a judicial determination.

2.3. The Dispute Resolution clause is not uncertain or vague.

In *Bhiwindiwala & Co. v Lakshman Das*[24], it was held that an arbitration agreement is not void for uncertainty or vagueness for want of information pertaining to the appointment of arbitrators. Therefore, even if the modalities pertaining to the appointment of arbitrators or the process thereof are undetermined, the arbitration agreement would be valid.[25]Additionally, section 10 of the Act envisages such circumstances ensuring that the agreement is not void for uncertainty.[26]

In the factual matrix, the **'Dispute Resolution'** clause specifies that a three member empowered committee would decide all questions pertaining to the meaning, scope, instructions, claims, right or matters of interpretation under the Agreement. Merely because the modalities for the appointment of the committee are undetermined would not in itself constitute a ground for invalidating the arbitration agreement. Therefore, it is submitted that the **Dispute Resolution** clause is not uncertain or vague.

[24] *Bhiwindiwala & Co. v Lakshman Das* (1954) 24 AWR 317

[25] *Sat Pal v R.K. Ahuja* AIR1973PH197.

[26] Section 10, Arbitration & Conciliation Act, 1996

2.4. The Jurisdiction clause does not override the Dispute Resolution clause.

It is pleaded by the Appellant Company that thee basic tenets of interpretation of contracts provide that the agreement must be read as a whole.[27] Therefore, if on reading the document as a whole, it can be discerned that the parties have agreed to a particular term, it is the responsibility of the court to give effect to such terms of the contract.[28]

In the instant matter, the scheme of the Share Sale Agreement provides for the '**Dispute Resolution**' clause supplemented by a **'Jurisdiction'** clause thereafter. As aforesaid, the **'Dispute Resolution**' clause satisfies the prescribed criteria under the Act [infra 2.1]. Additionally, the Empowered Committee is competent to adjudicate on "all questions and issues relating to the meaning, scope, instructions, claims, right or matters of interpretation of and under" the Share Sale Agreement. The intention ofthe parties also clearly demonstrates the consent to be bound by the decision of the Empowered Committee. As a result, the same would constitute an arbitration agreement under the Act.

Therefore, in order to give effect to the Share Sale Agreement as a whole, the Appellant Company humbly submits that the Jurisdiction Clause merely confers the territorial jurisdiction on the competent court in Delhi. Consequently, the Jurisdiction Clause does not supersede the Dispute Resolution clause but provides that in case an award is passed by the arbitrator, all other proceedings under any of the provisions of the Act has to be instituted at the competent court at Delhi.

[27] *Khardah Co. v Raymon & Co*. 1963 SCR (3) 183

[28] *Ibid.*

3. THE APPEAL FILED BY SWASTH CANNOT BE ENTERTAINED.

It is humbly submitted that the investigation started by CCI is not bad in law as [1] the Competition Commission of India's order is "direction simpliciter", [2] the protection of its Intellectual Property Rights by Swasth does not preclude it from Section 4 and of being in a dominant position, and Swasth has indeed abused dominant position.

3.1. The Competition Commission of India's (hereon forth, CCI) order is a "direction *simpliciter*"

It is submitted that under Section 26(1) of the Indian Competition Act, 2002, (hereon forth the Act) the CCI has the power to direct the Director General (hereon forth, DG) of the CCI to start an investigation, after a reference has been made by the Central Government or a State Government or a statutory authority or on its own knowledge or information received under Section 19 of the Act, and a prima facie case of abuse of dominant power is found to exist by the CCI. Section 19 empowers the CCI to investigate any abuse of dominant power by receipt of information, in this case, specifically Section 19(1)(a), which reads, "[receipt of any information, in such manner and] accompanied by such fee as may be determined by regulations, from any person, consumer or their association or trade association"[29].

Passing of an Order instructing the DG to start an investigation into the actions of the accused enterprise is defined as a "direction *simpliciter*", an administrative action involving no adjudicatory process, and holds no grounds for appeal. This view is upheld by Justice S Kumar of the Supreme Court in the landmark judgement *Competition Commission of India v Steel Authority of India*:

"[…] the direction under Section 26(1) after formation of a prima facie opinion is a direction simpliciter to cause an investigation into the matter. Issuance of such a direction, at the face of it, is an administrative direction to one of its own wings departmentally and is without entering upon any adjudicatory process. It does not effectively determine any right or obligation of the parties to the lis […] 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. [Where] in the course of the proceedings before the Commission, the Commission passes a direction or interim order which is at the preliminary stage and of preparatory nature without recording findings which will bind the

[29] Section 19(1)(a), *The Indian Competition Act*, 2002

parties and where such order will only pave the way for final decision, it would not make that direction as an order or decision which affects the rights of the parties and therefore, is not appealable"[30].

Justice Kumar then goes on to cite a foreign case, *Automec Srl v Commission of the European Communities*:

"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"[31].

It is thus contended that there exists a differing situation the parties would be in, if the CCI gave an order under Section 26(2) of the Act: "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"[32]. The CCI has given direction under Section 26(1) of the Act, and not an order laying down its position – under Section 26(2), 26(5), 26(6) or 26(7) of the Act – after the DG has conducted his investigation. Thus, it is submitted that the Delhi High Court, as well as the Division Bench of the Delhi High Court are correct in their judgements.

3.2 The protection of its Intellectual Property Rights by Swasth does not preclude it from Section 4 of the Act, and of being in a dominant position

It is humbly submitted that, though Section 3(5) of the Act states that nothing in the Act shall restrict one's right to restrain any infringement, or impose reasonable conditions, as necessary for the protection of his rights accruing from six Acts, the ones relevant to the case at hand being The Copyright Act, 1957, and The Patents Act, 1970, it does not universally exclude all acts relating to the use one's Intellectual Property Rights to gain a dominant position and

[30] Para. 27 & 28, (2010) 10 SCC 744
[31] Para. 42, (1990) ECR II-00367
[32] *Supra* nt. 1, Para. 27

thereafter abuse it. Within the language of Section 3(5) of the Act, there is a caveat placed in that the actions taken to protect one's Intellectual Property Rights must be reasonable, which implies that unreasonable restriction would tantamount to not being protected by Section 3(5). When Section 4 is read with Section 19(4)(g) and Section 19(4)(m), which read as such:

"19(4) The Commission shall, while inquiring whether an enterprise enjoys a dominant position or not under Section 4, have due regard to all or any of the following factors, namely:-

(g) monopoly or dominant position whether acquired as a result of any statute or by virtue of being a Government company or a public sector undertaking or otherwise;

(m) any other factor which the Commission may consider relevant for the inquiry"[33].

It is evident that the limitations as to what can be taken into consideration while determining dominant position is not exhaustive, given Section 19(4)(m) of the Act, which states "any other factor" which the Commission finds relevant. Further, with regard to Intellectual Property Right, in the given case it is a right accruing from statute, and hence the dominant position held by Swasth falls under Section 19(4)(g) of the Act. Moreover, Justice Kumar, in *Competition Commission of India v Steal Authorities of India*, stated the following:

"The object of the Act is demonstrated by the prohibitions contained in Sections 3 and 4 of the Act […] The power of the Commission to make inquiry into such agreements and the dominant position of an entrepreneur, is set into motion by providing information to the Commission in accordance with the provisions of Section 19 of the Act and such inquiry is to be conducted by the Commission as per the procedure evolved by the legislature under Section 26 of the Act. In other words, the provisions of Sections 19 and 26 are of great relevance"[34].

On the basis of this, it is thus contended that there exists an inseparable link between Sections 3, 4, 19 and 26, and importance be given to Section 19. From this importance one can construe that as per Section 19(4)(g) and Section 19(4)(m) of the Act, protection of one's Intellectual Property Right does not exclude their actions from being an abuse of dominant position.

[33] Section 19(4), *The Indian Competition Act*, 2002
[34] *Supra* nt. 1, Para. 21

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

1. *The Scheme of Arrangement should be set aside*

2. *The Dispute Resolution clause in the Share Sale Agreement is an arbitration agreement.*

3. *The appeal filed by Swasth cannot be entertained.*

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

Sd./-

(Counsel for Appellants)