TEAM CODE: T

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

THE SUPREME COURT OF INDIA

Lifeline Ltd.……..…...Appellants

V/S

Promoters of Jeevani……...Respondents

CLUBBED WITH

Foreign Banks (Foreign Lenders)……..…..……Appellants

V/S

Lifeline Ltd.……...……...…….……. Respondents

AND

Swasth Ltd.…….……..Appellants

V/S

Lifeline Ltd. & CCI…….……...Respondents

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List of Abbreviations

Sec.	Section
Ors	Others
vs.	Versus
Ltd.	Limited
Art.	Article
SC	Supreme Court
HC	High Court
SCC	Supreme Court Cases
AIR	All India Reporter
Edn.	Edition
Co.	Company
Pvt.	Private
&	And
US	United States
FDA	Food and Drugs Administration
R&D	Research and Development
IPR	Intellectual Property Right
BCLC	Butterworths Company Law Cases
SCL	Sebi and Corporate Laws
ARBLR	Arbitration Law Reporter
CCI	Competition Commission of India
ITR	Income Tax Reporter

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10. *Bishwanath Prasad Radhey Shyam vs. Hindustan Metal Industries, AIR (1982) SC 1444*
11. *Jayanti Dharma Teja vs. Secretary Government of India, (1984) 148 ITR 316 (AP)*
12. *In re: Accreditation Commission for Conformity Assessment Bodies Pvt. Ltd., Case no. 51/2012*

BOOKS REFERRED:

1. 'Law of Arbitration' by Justice Bachawat (2nd Edn.)
2. 'Law Relating to Arbitration and Conciliation' by PC Markanda (7th Edn.)
3. 'The Law Lexicon Encyclopedic Law Dictionary' by P Ramanatha Aiyar (2nd Edn.)
4. Taxmann's 'Indian Patents Law and Procedure' by D.P. Mittal (2002)
5. Taxmann's 'Competition Law and Practice' by D.P. Mittal (2nd Edn.)

OTHERS:

1. Hong Kong Arbitration e-bulletin by Herbert Smith
2. www.manupatrafast.com
3. www.indiankanoon.com
4. www.scconline.com
5. www.cci.gov.in

STATEMENT OF JURISDICTION

The Appellants in the instant case have the honor to submit this Memorial before The Supreme Court of India, in pursuance of Sec. 53T of the Competition Act, 2002; Sec. 10 of the Companies Act, 2013; and Art.136 of the Constitution of India.

STATEMENT OF FACTS

- **Jeevani Ltd.** is a pharmaceutical Co. incorporated in the year 1990 under the Companies Act, 2013 and its registered office is in New Delhi. It is a listed public Co. with its equity shares listed on the Bombay Stock Exchange. In July, 2011 Jeevani issued a statement announcing that the Co. was looking forward for expansion in the market.

- **Lifeline Ltd.** is also a listed public Co. registered & incorporated under the Companies Act, 2013 with its registered office in Mumbai. After establishing itself in the food products market, Lifeline decided to foray into the pharmaceutical sector. Lifeline approached Jeevani for a possible partnership to venture into pharmaceutical sector.

- **Swasth Life Ltd.** (Swasth) is a sister concern of the Promoters of the erstwhile Jeevani in the pharmaceutical sector. The drug 'Inventive' was being manufactured and sold by Swasth. In 2010, Swasth got assigned the absolute rights of the few developed and completed R&D projects of the Jeevani.

- **Foreign Banks (Foreign lenders)** were certain creditors of Jeevani. A consortium agreement was made between the foreign lenders and Jeevani for providing financial assistance to the latter.

Background of the Case:

1. **Scheme**: Around November, 2011, both companies initiated negotiations for a possible merger, and decided to merge in a way that Jeevani would completely merge into Lifeline. An agreement was made between the three promoters of Jeevani and Lifeline stating that all intangible properties including the active R & D and

IPRs of Jeevani would become the property of Lifeline. A scheme of arrangement was prepared. An agreement was made between the three promoters of Jeevani and Lifeline stating that all intangible properties including the active R & D and IPRs of Jeevani would become the property of Lifeline. The Scheme was finalized on 5th march 2012 and filed before Bombay stock and was not approved. An application u/s 391of Companies Act 1956 was filed by Jeevani and Lifeline for approval of Scheme by Hon'ble Delhi HC and Judge ordered the meeting of creditors and the meeting of the creditors to whom notice was sent was accordingly held and the Scheme was passed. The Scheme was also approved by Hon'ble Delhi HC and Bombay HC.

2. Foreign lenders had jointly, invoked arbitration proceedings before a foreign arbitral tribunal constituted in Hong Kong, against Jeevani and foreign arbitral award was passed in favour of foreign lenders on 27th July 2010. Under the award, Jeevani was required to pay the amounts. In August 2013, foreign lenders filed an application against the Scheme, contending that they constituted a separate class of creditors and they had not received the notice of the Scheme and hence, the Scheme should be set aside. The Co. strived that the foreign lenders are not the creditors of the Co. and whether the foreign lenders even constitute a class of creditors is disputed. The application was dismissed and the Judge refused to set aside the Scheme. Against this, the foreign lenders went in appeal to the Division Bench of Delhi HC, which was also dismissed and now in appeal before the SC of India.

3. After the merger, Lifeline received notices from the US FDA for providing drugs of below par quality. The investigation by the FDA on drugs produced by Jeevani was commenced much before the merger. A suit was filed by the Lifeline against the promoters of Jeevani for damaged of breach of contract contending that the pending investigations were concealed by promoters to get inflated prices for their shares. The promoters strived that the Delhi HC had no jurisdiction as the contract had an arbitration clause. However, Lifeline contended that there is no such clause. The Single Judge held the above couldn't be an arbitration clause. This

order was challenged by Promoters to the Division Bench and was held that the Single judge had erred in its decision and an arbitration clause was constituted and the disputes were to be decided by the Empowered group. Against the order, Lifeline has approached the SC of India.

4. After the merger, Lifeline decided to introduce a drug ' Novel'. This drug was published to be considerably cheaper than other drugs present in the market including ' Inventive'. Swasth filed a suit for infringement of its IPRs and was able to obtain interim injunction against Lifeline. While, Swasth launched a new cost effective drug and captures a large chunk of market and withdrew its injunction. Lifeline filed an application before Competition Commission of India alleging that Swasth abused dominant position and indulged in bad faith litigation. The CCI *prima facie* viewed that the Swasth may have abused its position and directed the DG CCI to investigation submit its report. Swasth filed a writ petition against the order and made Lifeline and CCI a party in Delhi HC, submitting that the Swasth while protecting its IPR cannot be held even *prima facie*, to be abusing its dominance. The court held that CCI has made prima facie finding and directing an investigation on vague allegations. Although no adverse effect is caused to Swasth and it found no reason to interfere with the investigation and dismissed the petition. On appeal, the Division bench also found no reason to interfere with the order and accordingly, Lifeline has come before SC against the order of the Division Bench.

STATEMENT OF ISSUES

The following questions have been presented before the SC of India:

1. Whether the Foreign lenders constitute a separate class of creditors of Jeevani and whether the 'Scheme' should be set aside?

2. Whether the Division bench has erred in its decision and whether the agreement constitutes an arbitration clause?

3. Whether the Division Bench has erred in its decision and whether the investigation ordered by CCI adversely affected Swasth Ltd.?

SUMMARY OF ARGUMENTS

1. Whether the foreign lenders constitute a separate class of creditors and whether the 'Scheme' should be set aside? It is humbly submitted before the Hon'ble Court that the foreign lenders (foreign banks) constitute a separate class of creditors and the 'scheme' should be set aside. This argument is threefold; *firstly,* the foreign banks constitute a class of creditors; *Secondly,* there was a consortium agreement between the parties and a foreign arbitral award was passed against Jeevani; *thirdly,* no notice of the meeting of the creditors was convened to the lenders & the scheme stands unworkable.

2. Whether the Division bench has erred in its decision and whether the agreement constitutes an arbitration clause? It is humbly submitted before the Hon'ble court that the division bench has erred in its decision and that the agreement does not constitutes an arbitration clause. The argument is threefold; *firstly,* there is no *consensus ad idem* between the parties, *Secondly,* there is dispute in the appointment of the Empowered Committee and *thirdly,* the concealment of facts by the Promoters of Jeevani was of *malafide* intention.

3. Whether the Division Bench has erred in its decision and whether the investigation ordered by CCI adversely affected Swasth Ltd.? It is humbly submitted before the Hon'ble Court that the division bench has erred in its decision and that the investigation ordered by CCI adversely affected Swasth Ltd. The argument is *threefold; firstly,* the interim injunction brought by Swasth against Lifeline was justified, *secondly,* Swasth had all the rights to launch a new drug in the market, *thirdly,* the investigation ordered by CCI was on arbitrary *prima facie* finding with had an adverse effect on Swasth.

ARGUMENT ADVANCED

1. **Whether the foreign lenders constitute a separate class of creditors and whether the 'Scheme' should be set aside?** It is humbly stated that the foreign lenders (foreign banks) constitute a separate class of creditors and the 'scheme' should be set aside. This argument is threefold; *firstly,* the foreign banks constitute a class of creditors; *Secondly,* there was a consortium agreement between the parties and this affects the debts of the Jeevani; *thirdly,* no notice of the meeting of the creditors was convened to the lenders & the scheme stands unworkable.

A. Foreign Lenders constitute a separate class of creditors. S. 230 of the Companies Act 2013 states that-

Where the compromised is proposed-

- *between a Co. and its creditors or any class of them; or*
- *between a Co. and its members or any class of them;*

• *Application u/s 230 to the Court (Tribunal), can be moved by:*

- *Company*
- *Any Creditor*
- *Member*
- *In the case of a company which is being wound up, the liquidator.*

In landmark judgment of *Bhagwanti v New India Ltd*[1] the SC held that- 'The *court has to classify creditors or members if there are such classes and before sanctioning the scheme, to see that their respective interest are taken care of.'*

[1] *Bhagwanti vs. New India Ltd (1950) 20 com cases 68: AIR 1950 EP 111*

A group of persons would constitute one class when it is shown that they have conveyed all interest and their claims are capable of being ascertained by any common system of valuation. The group styled as a class should ordinarily be-

- Homogeneous
- Commonality of interest
- Compromise offered to them must be identical.

Commonality of interests constitutes a class. Ex: Deposit holders, Debenture holders, foreign creditors, preferential creditors, secured creditors and unsecured creditors. Broadly speaking, in Sovereign Assurance vs. Dodd Ltd[2]. –*' a group of persons would constitute one class when it is shown that they have conveyed all interest and their claims are capable of being ascertained by any common system of valuation. The group styled as a class should ordinarily be homogeneous and must have commonality of interest and the compromise offered to them must be identical.'* In the light of above judgment it is clear that the foreign banks had the commonality of interest as their rights were common i.e. they had a consortium agreement with the Jeevani. They constitute a class of creditors of Jeevani.

B. **Unfairness of Scheme to the Class of Creditors:** It is humbly submitted before the Hon'ble Court that a consortium agreement was made between the foreign lenders and Jeevani for providing financial assistance to the Jeevani and an arbitration proceeding against Jeevani were constituted in Hong Kong. It has been contended in the previous argument that the foreign creditors constitute a separate class of creditors and no notice of the meeting of the creditors

[2] *Sovereign Assurance vs. Dodd Ltd. (2001) BCLC 755*

under Rule 73 of Company (Court) Rules 1959 had been convened to them. Our view is supported by various judgments of this court and the HCs. As far as the scheme is concerned, we quote herein below the judgment of this court in case of *Miheer H. Mafatlaal vs. Mafatlaal Industries Ltd*[3].-'*On the reading of the provision of Sec. 391*[4] *and 393 it becomes at once clear that the Co. court which is called upon to sanction such a scheme has not merely to go by the ipse dixit of the majority of the shareholders or creditors or their respective classes who might have voted in favor of the scheme with a view to finding out whether the scheme is fair, just and reasonable and is not contrary to any provisions of law and it doesn't violate any public policy. No court of law would ever countenance any scheme of compromise or arrangement arrived at between the parties and which might be supported by the requisite majority if the Court finds that it is an unconscionable or an illegal scheme or is otherwise unfair or unjust to the class of shareholders or creditors for whom it is meant. Therefore, the fairness of the scheme qua them also has to be kept in view by the company Court while putting its seal of approval on the scheme concerned placed for its sanction.'*

In the case of *Sakamaari Steel & Alloys Ltd*[5]*.,* the learned Single Judge of Bombay HC held that- *'Sec. 391(1) is not a sign post but a check-post whereat it is a duty of the Court to examine the genuineness and the bonafides of the Scheme itself.'* A reading of the above judgment would, therefore, show that at the stage of issuance of Summons for Directions to convene a meeting, though the Co. Judge has to apply its mind, *prima facie*, on the genuineness of the Scheme, basically the entire exercise is to verify whether the numerous conditions are satisfied.

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[3] *Miheer H. Mafatlaal vs. Mafatlaal Industries Ltd. (1997) 1 SCC 579*

[4] Sec. 230 of The Companies Act, 2013

[5] *Sakamaari Steel & Alloys Ltd. (1981) MH 004*

In *Re: Cash and Carry Wholesale Traders Pvt. Ltd*[6]., the Hon'ble Apex Court held that- *'an application moved for summons by a Co. for directions to convene a meeting of creditors and members to consider the proposed scheme of amalgamation, it must be heard and decided ex-parte and if hearing at the threshold stage is required to be given to contributors, creditors and the shareholders then the entire scheme would become unworkable.'* A reading of the above three judgments of the Courts it can be derived that the Co. Judge, before approving the Scheme, has to verify-

- the genuineness of the Scheme,
- is otherwise *unfair or unjust* to the class of shareholders or creditors for whom it is meant,
- That the scheme is fair, just and reasonable and is not contrary to any provisions of law and it doesn't violate any public policy.

In the present case, it is a fact that there was a consortium agreement to provide financial assistance to Jeevani. A Foreign Arbitral award was also passed against Jeevani, under which the Jeevani was required to pay the amounts to be foreign lenders. It is submitted that the foreign arbitral award is enforceable in India under the New York Convention, 1958. Under Sec.44 of the Arbitration and Conciliation Act 1996, the Indian court recognizes and enforces foreign arbitral awards only if the awards satisfy the following two conditions-: '*1. there is a valid agreement in writing for arbitration to which the New York Convention applies; and 2. the arbitral award is made in a territory which the Indian Government, being satisfied that reciprocal provisions have been made may, by notification in the official Gazette, declare to be a territory to which the New York Convention applies*.' On March 19, 2012, the government of

[6] *Re: Cash and Carry Wholesale Traders Pvt. Ltd. (2009) 2 SCC 547*

India declared that the People's Republic of China, including the Hong Kong Special Administrative Region and the Macau Special Administrative Region, is a territory to which the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (commonly known as the "New York Convention") applies for the purpose of enforcement of foreign arbitral awards in India on or after 19th March 2012[7]. It is clearly provided that the foreign award passed against the Jeevani is enforceable in Indian Territory which makes the foreign lenders an important class of creditors of Jeevani. Any decision taken without giving prior notice to them would certainly affect their interests in the Jeevani Ltd. Thus, it can be concluded that the foreign lenders are the creditors and the Scheme was unfair and unjust to them as their right to attend the meeting and vote for/against the Scheme was infringed.

C. No Notice of Meeting: Rule 67 of the Co. (Court) Rules 1959: Summons for directions to convene a meeting: *'An application u/s 230 of Companies Act 2013, for an order convening a meeting of creditors and/or members or any class of them shall be by a Judge's summons supported by an affidavit.'*

Rule 73: Notice of Meeting:*' The notice of the meeting to be given to the creditors or members of any class, as the case maybe, shall be in Form 36 and shall be sent to them individually by the Chairman appointed for the meeting.'*

The Apex Court in *Chembra Orchard Produce Ltd. vs. Regional Director of Co. Affairs*[8] widely interpreted the above rules-*'If one examines Rule 67 in the context of Rule 73, one finds that after the Summons for Direction are issued as and when the meeting is ordered to be convened, the*

[7] Hong Kong Arbitration e-bulletin by Herbert Smith

[8] *Chembra Orchard Produce Ltd. vs. Regional Director of Co. Affairs (2009) 89 SCL 109 (SC)*

notice of meeting is required to be given to the creditors and/or members or such other classes enumerated in Rule 73'.A reading of the extract of the judgment would, therefore, show that the notice of the meeting should be convened individually by the Chairperson appointed to the members or creditors or any class of them, the meetings of creditors/members for whom the Scheme is proposed are concerned, it is enjoined by S. 230 that the requisite information as contemplated by the said provision is also required to be placed for the consideration of the voters so that the parties concerned before whom the Scheme is placed for voting can take an informed and objective decision whether to vote for the Scheme or against. In the present case, the foreign lenders are a class of creditors and were not able to attend any such meeting of the creditors as no such summons and notice was received and their right to vote for/against the Scheme was infringed. In the light of above argument, it is contended that the foreign lenders constitute a separate class of creditors u/s. 230 of Companies Act 2013 and since, no notice of meeting of the creditors was convened to them, the Scheme must stand unworkable.

2. Whether the Division bench has erred in its decision and whether the agreement constitutes an arbitration clause? It is humbly submitted before the court that the Division bench has erred in its decision and that the agreement does not constitutes an arbitration clause. The argument is threefold; *firstly,* there is no *consensus ad idem* between the parties, *Secondly,* there is dispute in the appointment of the Empowered Committee and *thirdly,* the concealment of facts by the Promoters of Jeevani was of *malafide* intention.

A. <u>Consensus Ad Idem:</u> In Sec.7 of Arbitration and Conciliation Act 1996, one of the essentials of Arbitration agreement, is that there must be agreement between the parties. In "Law

of Arbitration"[9], it is stated that- *"to constitute an arbitration agreement, there must be an agreement, that is to say, the parties must be ad-idem.'*

The SC, in U.P. Rajkiya Nirman Nigam Ltd vs. Indure Pvt. Ltd[10]. *&Ors* held that-

'In absence of consensus ad idem on material terms of contract to be entered into between parties there emerged no concluded contract.' Also, in *Taipack Ltd.and Ors. v. Ram Kishore Nagar Ma*[11]*l,* it was held that-*'there was no arbitration agreement between the parties and the arbitrator appointed had no jurisdiction to adjudicate the disputes between the parties in relation to the contract in question as for the existence of an agreement there has to be consensus ad idem between the parties i.e. they should agree to the same thing in the same sense.'* In the present case, the terms of the agreement[12] clearly indicate that the disputes must be resolved by the Delhi courts, whereas the respondents were of the opinion to refer the disputes to the Empowered group. It is cleared from the above agreement that there was no *consensus ad idem* between the parties and the clause does not fulfill the essentials of arbitration agreement.

B. Dispute in the appointment of Empowered Committee: It is humbly submitted before the Hon'ble Court that there was no arbitration agreement between the parties as the agreement lacks one of the essentials of an arbitration agreement. Sec. 7 of Arbitration & Conciliation Act 1996 provides the essentials of an arbitration agreement under which a necessary requirement is- *'There must be the intention of the parties to settle such differences by a private tribunal.'* It explains that one of the essential ingredients of a submission to arbitration is that the parties should intend that the dispute intended to be referred should be determined in a quasi judicial

[9] "Law of Arbitration" by Justice Bachawat [2nd Edn.] at page 19 of Chapter II

[10] *U.P. Rajkiya Nirman Nigam Ltd vs. Indure Pvt. Ltd. & Ors, 1996 SCC (2) 667*

[11] *Taipack Ltd. and Ors. vs. Ram Kishore Nagar Mal, 2007 (3) ARBLR 402 Delhi*

[12] Para 9, Moot Problem

manner. If it is not to be so determined, the agreement does not amount to a submission to arbitration and the person who decides the dispute is not an arbitrator. For example, when an agreement requires or permits an authority to decide a claim or dispute without hearing, or requires the authority to act in the interests of only one of the parties, or provides that the decision of the authority will not be final and binding on the parties, that if either party is not satisfied with the decision of the authority, he may file a civil suit seeking relief, it cannot be termed as an arbitration agreement. It is humbly submitted before the Apex court that the Empowered Committee appointed under the agreement, contradicts the basic eligibility criterion of an Arbitrator. Arbitrator has been defined as- '*A person to whose attention the matter in dispute, are submitted-a judge of the parties on choosing, whose function are quasi judicial and whose duties are not those of mere partisan agent but of an impartial judge, to dispense equal justice to all the parties and to decide the law and facts involved in the matters submitted with a view to determining and finally ending the controversy.'*[13] From the aforesaid arguments it can be deduced that there is no arbitration agreement between the parties as there is no *consensus ad idem* and the appointment of the said Empowered Committee is questionable. Empowered committee was constituted to resolve the general disputes of the agreement. All the disputes touching upon the subject matter of the agreement were under the jurisdiction of Delhi courts. Thus, in the suit filed against the promoters of Jeevani for damages arising out of breach of contract, Delhi HC had the jurisdiction to resolve the disputes.

C. <u>Malafide Intention of Promoters of Jeevani:</u> Sec. 17 of the Indian Contract Act, 1872 defines Fraud as-'*Fraud means and includes any of the following acts committed by a party to a contract, or with his connivance, or to induce him to enter into the contract:*

[13] 'The Law Lexicon Encyclopedic Law Dictionary' by P Ramanatha Aiyar (2nd Edn.)

1. *The suggestion, as a fact, of that which is not true, by one who does not believe it to be true;*
2. *The active concealment of a fact by one having knowledge or belief of the fact;*
3. *A promise made without any intention of performing it;*
4. *Any other act fitted to deceive;*
5. *Any such act or omission as the law specially declares to be fraudulent.*

In the landmark case of Archer vs. Stone[14], North J. said-*'It is necessary that the act should be committed with intent to deceive or to induce the other party to enter into the contract, i.e. if he tells a lie relating to any part of contract or its subject matter, which induces another person to contract, to deal with property in a way which he wouldn't do if he knew the truth, the man who tells the lie cannot enforce the contract.'* In the present case, the investigation proceedings by FDA against Jeevani were initiated much before the merger and the agreement of promoters was finalized. The non-disclosure of facts regarding investigation by the promoters of Jeevani amounts to active concealment of facts because the investigation proceedings have direct and material impact on the valuation of shares. Financial, legal, political factors have the direct impact on the valuation of the shares. Also, the investigation concerned with the quality of drugs supplied by Jeevani is under question, whereas, Lifeline is a Co. which is known for its quality of products. Apart from concealment of investigation proceedings, the matter concerning the IPRs of Jeevani is also disputed. In the agreement dated 23rd March 2012, the intangible properties were assigned to Lifeline. However, some of the IPRs were already assigned absolutely to Swasth Ltd., which further results in pending litigations for Lifeline. It is evident from the facts of the case that the promoters concealed the investigation proceedings from Lifeline in order to

[14] *Archer vs. Stone,(1898)78 LT 35*

induce latter to enter in to the contract. In the light of above argument, it is submitted before the Hon'ble court that the agreement contained no arbitration clause and the Delhi HC had the jurisdiction to resolve the dispute of the breach of contract between the parties.

3. Whether the Division Bench has erred in its decision and whether the investigation ordered by CCI adversely affected Swasth Ltd.?

It is humbly submitted before the Hon'ble Court that the division bench has erred in its decision and that the investigation ordered by CCI adversely affected Swasth Ltd. The argument is *threefold; firstly,* the interim injunction brought by Swasth against Lifeline was justified, *secondly,* Swasth had all the rights to launch a new drug in the market, *thirdly,* the investigation ordered by CCI was on arbitrary *prima facie* finding with had an adverse effect on Swasth.

A. <u>Interim Injunction against Lifeline was justified:</u> It is humbly submitted before the Hon'ble Court that the interim injunction brought by Swasth against Lifeline was justified. It is contended that in July 2010, Jeevani assigned absolute rights of IPRs of Jeevani to Swasth. In the agreement between Promoters of Jeevani and Lifeline Ltd., active IPRs of Jeevani would be transferred to Lifeline; however it would exclude the absolute rights assigned to Swasth Ltd.

Assignment has been defined as –*'Assignment is an instrument by which a patentee assigns his rights in the invention to another party, the assignee. The rights may be assigned in whole or in part. The assignee acquires all the rights, which previously belonged to the assignee. The rights then do not revert back to the assignor.' Assignment passes title to the patentee's rights with all accompanying rights of an ownership from the patentee to the assignee.*[15]' In the present case, it is a fact that the absolute rights of IPRs of Jeevani were assigned to Swasth Ltd. And thus, Swasth Ltd. as an assignee of the patent acquires absolute rights of ownership and it cannot be

[15] Taxmann's 'Indian Patents Law and Procedure' by D.P. Mittal (2002)

revert back to the assignor or to any other person/company. Lifeline has clearly infringed the patent right of the Swasth Ltd by launching the drug ' Novel' which was similar to the drug 'Inventive' of Swath and was based on the IPRs assigned to Swasth. According to Sec.104A. of Patents Act, 1970- Burden of proof in case of suits concerning infringement.-*(a) in any suit for infringement of a patent, where the subject matter of patent is a process for obtaining a product, the court may direct the defendant to prove that the process used by him to obtain the product, identical to the product of the patented process, is different from the patented process if.*

(b) There is a substantial likelihood that the identical product is made by the process, and the patentee or a person deriving title or interest in the patent from him, has been unable through reasonable efforts to determine the process actually used. (Provided that the patentee or a person deriving title or interest in the patent from him first proves that the product is identical to the product directly obtained by the patented process.) It is clear from the above said provision that Swasth had right to file a suit for infringement of its patent right against Lifeline.

B. Right of Swasth to launch a new drug in the market: It is humbly submitted before the Hon'ble Court that Swasth Ltd. had the right to launch a new cost effective drug in the market. It is stated that by introducing a new cost effective drug in the market, Swasth had only exercise its right for '**Patent of Addition**'. It is defined as- *'A patent of addition is the improvement or modification of an invention disclosed in the complete specification of the main invention*.' Sec. 54(2) of Patents Act,1970 further states that- *(2) Subject to the provisions contained in this sec., where an invention being an improvement in or modification of another invention, is the subject of an independent patent and the patentee in respect of that patent is also the patentee in respect of the patent for the main invention, the Controller may, if the patentee so requests, by order, revoke the patent for the improvement or modification and grant to the patentee a patent of addition in respect thereof, bearing the same date as the date of the patent so revoked.* In

Bishwanath Prasad Radhey Shyam v. Hindustan Metal Industries[16], the SC observed that- *'it is important to bear in mind that in order to be patentable an improvement on something known before or a combination or different matters already known, should be something more than a mere workshop improvement; and must independently satisfy, the test of invention or an 'invention step'. To be patentable the improvement or the combination must produce a new result, or a new article or a better or cheaper article than before. The combination of old known integers may be so combined that by their working inter-relation they produce a new process of improved result. Mere collection of more than one integers or things, not involving the exercise of any inventive faculty, does not qualify for the grant of patent.'* On the reading of the above judgment, it is clear that when Swasth launched a new cost effective drug in the market it was not abuse of its dominant position in the market. Swasth merely made an addition to its patent by making it more cost effective for the consumers of the product in the market.

C. Arbitrary *Prima Facie* Investigation by CCI: It is humbly submitted before the Hon'ble Court that the investigation made by CCI against Swasth Ltd. was made on the arbitrary *prima facie* finding and the investigation adversely affected Swasth. It is stated in the previous argument that the Swasth had absolute ownership over the IPRs of Jeevani since 2010 and such ownership cannot revert back to its first owner or transferred to any other person/company. Swasth had the right to file a suit for infringement of its patent right u/s 104A of Patents Act, 1970. Further stated that the Swasth launched a new cost effective drug in the market and it was of the nature of 'Patent of Addition'. It cannot be said that Swasth abused its dominant position and was bad in litigation by filing a suit for infringement

[16] *Bishwanath Prasad Radhey Shyam vs. Hindustan Metal Industries, AIR 1982 SC 1444*

against Lifeline. Sec. 19 of the Competition Act, 2002: Inquiry into agreement and dominant position: The Commission can inquire or investigate into the matter only if the commission has material evidence in its possession suggesting *prima facie* infringement. Some material evidence must be in existence which at the outset without deeper probe, leads to that opinion. It has to be the subjective satisfaction of the commission arrived in an objective way, that there should be some material evidence on the basis of which opinion can be formed that there is a violation of law. Without its existence leading to a suggestion that there is an infringement, the commission cannot proceed. '*If there is a prima case – then it can direct inquiry only if it is of the opinion.*[17]*'* According to Art. (26)2 of Constitution of India-'*If no prima facie opinion can be formed, the commission should close the matter.'* In the landmark judgment of *Dr. Jayanti Dharma Teja v. Secretary Government of India*[18], the SC held that- *'Any opinion which is prima facie arbitrary, capricious, or perverse, or is based on subjective satisfaction on irrelevant facts has no value in the eye of law.' In re: Accreditation Commission for Conformity Assessment Bodies Pvt. Ltd*[19]. - The complaint by ACCAB alleged that both NABCB and NABL are having dominant position in the market and preventing / denying the complainant access to the market and thus sought a direction from CCI to all 14 respondents to accord recognition to accreditation services provided by the Complainant (ACCAB) at par with accreditation services provided by NABCB and NABL. Competition Commission of India (CCI) after examining the information / documents provided as well as on hearing the complainant passed an Order dated 07 November 2012

[17] Taxmann's 'Competition Law and Practice' by D.P. Mittal (2nd Edn.)

[18] *Jayanti Dharma Teja vs. Secretary Government of India, (1984) 148 ITR 316 AP*

[19] *In re: Accreditation Commission for Conformity Assessment Bodies Pvt. Ltd, Case no 51/2012*

under section 26(2) of The Competition Act, 2002 dismissing the complaint stating that "Commission finds that no ***prima facie*** case was made out against the opposite party"**.** In the light of above argument, it is contended that absolute patent rights were assigned to Swasth by the Jeevani in 2010 which cannot be reverted back to its first owner or to any other person/company and thus, the interim injunction obtained against Lifeline was justified as it was an infringement of the IPR of Swasth. Also, the new drug launched by Swath was not abuse of its dominant position as it was a cost effective drug which was a Patent in addition. It was launched to provide a cheaper drug for the consumers of the product in the market. Lastly, it is contended that the investigation which was initiated against Swasth by CCI was of arbitrary and capricious *prima facie* finding as all the material evidence supported that Swasth had the right to file a suit for infringement of its IPR and also to launch a cost effective drug as a Patent in Addition.

Prayer

In the light of facts and circumstances stated, issues raised, arguments advanced and authorities cited, it is most humbly submitted that this Hon'ble SC may be pleased to:

a. Declare the foreign lenders a separate class of creditors and declare the Scheme unworkable.

b. Declare that there was no arbitration clause in the agreement.

c. Declare the investigations ordered by CCI invalid.

d. Grant any other relief which this Hon'ble SC deems fit in the light of justice, equity and good conscience.

All of which is respectfully affirmed and submitted

Counsel for Appellants