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

BEFORE THE

THE HON'BLE SUPREME COURT OF INDIA

FOREIGN LENDERS **(APPELLANT)**

V.

JEEVANI **(RESPONDENT)**

AND

LIFELINE **(APPELLANT)**

V.

PROMOTERS **(RESPONDENT)**

AND

SWASTH **(APPELLANT)**

V.

LIFELINE **(RESPONDENT 1)**

CCI **(RESPONDENT 2)**

ON SUBMISSION TO THE SUPREME COURT OF INDIA WRITTEN SUBMISSION FOR THE APPELLANT

UNDER THE ARTICLE 136 OF CONSTITUTION OF INDIA, 1950

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LIST OF ABBREVATIONS

AIR	All India Reporter
All	Allahabad High Court
Cal	Calcutta High Court
Cri LJ / Cr LJ	Criminal Law Journal
CCI	Competition Commission of India
ILR	Indian Law Reporter
UOI	Union of India
Ed.	Edition
Guj	Gujarat High Court
Corp.	Corporation
IC	Indian Cases
Mad	Madras High Court
n.	Foot Note no.
Ori	Orissa High Court
p.	Page No.
P&H	Punjab and Haryana High Court
Pat	Patna High Court
PP.	Page No. or Pages
Raj	Rajasthan High Court
SC	Supreme Court
SCC	Supreme Court Cases
SCJ	Supreme Court Journal
SCR	Supreme Court Reporter
Sec.	Section
v.	Versus

INDEX OF AUTHORITY

STATUES:

- The Companies Act, 1956
- Arbitration and Conciliation Act, 1996
- The Competition Act, 2002
- Indian Constitution, 1950

CASES:

Books:

- *The Companies Act,*(17th edn Lexis Nexis Butterworth Wadhwa Nagpur 2011)
- A.M Chakraborti, *Company Botices Meetings and Resolutions*, (5th edn Taxamann Publications (P.) Ltd.)
- MP Jain, *Principles of Administrative law*, (6th edn 2007)
- Justice S.B Malik, *The Arbitration and Conciliation* Act, (4th edn Universal Law Publishings Co.)
- Justice R.P Sethi, *Law of Arbitration And Conciliation*, (Ashoke Law House)
- D.P Mittal, Competition Law and Practise, (3rd edn Taxamann Publications (P.) Ltd 2012)

STATEMENT OF JURISDICTION

The Hon'ble Supreme Court of India is empowered to hear all the cases together by the virtue of Article 136 of Constitution of India, read with Order 55 Rule 5 of Supreme Court Rules, 2013.

136. Special leave to appeal by the Supreme Court

(1) Notwithstanding anything in this Ch., the Supreme Court, may in any discretion, grant special leave to appeal from any judgment, decree, determination, sentence or order in any cause or matter passed or made by any court or tribunal in the territory of India.

(2) Nothing in clause (1) shall apply to any judgment, determination, sentence, or order passed or made by any court or tribunal constituted by or under any law relating to Armed force.

The Order 55 Rule 5 reads as:

Where there are two or more appeals arising out of the same matter, the Court may at any time either on its own motion or on the application of any party, order that the appeals be consolidated. Unless otherwise ordered by this Court the liability of the parties to pay separate Court-fees shall not be affected by any order for consolidation.

The parties shall accept any judgment of the court as final and binding upon them and shall execute it in its entirety and in good faith.

STATEMENT OF FACTS

CASE 1

Jeevani Limited ("Jeevani") and Lifeline Limited, ("Lifeline") are listed public companies registered and incorporated under the Companies Act. After a lot of deliberations and negotiations, both companies decided to merge. Jeevani completely merged into Lifeline and all assets and liabilities of Jeevani was transferred to Lifeline. A scheme of arrangement, for Jeevani, (the "Scheme") was prepared. It was decided that three promoters of Jeevani would sell their entire promoter shareholding to Lifeline and this sale of stake was affected vide a separate sale agreement, along with all intangible properties including the active R & D and IPRs of Jeevani.

The Scheme was finalized and was filled before Bombay Stock Exchange for approval, approval was not given. Jeevani and Lifeline filed an application under Section 391 of the Companies Act, 1956 for approval of the Scheme before Delhi High Court. The Hon'ble Company Judge ordered for a meeting of the creditors to be convened. A meeting of the creditors was accordingly held and the Scheme was passed by a vote of majority. Thereafter the Scheme was also approved by the Hon'ble Delhi High Court on 5th July 2013. Certain creditors of Jeevani, mainly foreign banks ("foreign lenders") invoked arbitration proceedings before a foreign arbitral tribunal and award was passed in favor of the foreign lenders.

The foreign lenders of Jeevani made an application before the Hon'ble Company Judge contending that they constituted a separate class of creditors and no meeting was convened for them, the Scheme should be set aside. Both the Hon'ble Company Judge and Division bench of

Delhi High Court dismissed the appeal of foreign lenders. The matter is now pending before Supreme Court.

CASE 2

Lifeline continued with the operations of the erstwhile Jeevani, of supplying generic drugs to the USA. Soon after, Lifeline received notices from the US Food and Drug Administration for providing drugs of below par quality and in violation of parameters set out by the FDA. It was unearthed in investigation by FDA on drugs produced by Jeevani at its plants in India was commenced much before the merger of Jeevani and Lifeline.

Lifeline filed a suit against the Promoters before the Delhi High Court for damages arising out of breach of the contract before Delhi High Court. The Promoters contended that the Delhi High Court has no jurisdiction as the agreement between the parties had an arbitration clause and any dispute arising between them should be referred to arbitration. The Hon'ble Single Judge of the Delhi High Court held that the above clause is not an arbitration clause. The Division Bench held that the Single Judge had erred in its decision and that the clause constitutes an arbitration clause. Lifeline has approached the Supreme Court of India and the matter is pending.

CASE 3

Lifeline decided to introduce a new life saving drug "Novel" into the market. This new drug was manufactured after further developing the active R & D which became the property of Lifeline after its merger with Jeevani. The new drug Novel was eagerly awaited in the market. The drug "Inventive" was manufactured and sold by Swasth Life Limited ("Swasth"), a sister concern of the Promoters, of the erstwhile Jeevani and had in year 2010 got assigned absolute rights of few

R & D projects and IPRs of Jeevani. Before Lifeline could launch drug 'Novel', Swasth filed a suit for infringement of its IPRs and obtain an interim injunction on launching "Novel".

In the meanwhile, Swasth launched a similar cost effective drug and after it withdrew the case against Lifeline and the interim injunction was vacated. Lifeline filed an application before the "CCI" alleging that Swasth was abusing its dominant position by indulging in bad faith litigation. 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 to DG CCI to investigate. Swasth being aggrieved by the Order of the CCI filed a writ petition making Lifeline and the CCI a party in the Delhi High Court and the writ petition 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 Swasth has come before the Supreme Court.

ISSUES INVOLVED

ISSUE 1:

Whether the Foreign Lenders constitute a "Separate class of creditors" and whether the scheme is liable to be set aside on this account?

ISSUE 2:

Whether the clause from "the Sale Agreement" constitutes an "arbitration clause" and whether the jurisdiction of the court is barred?

ISSUE 3:

Whether the "Swasth" abused its dominant position by indulging in "bad faith litigation" and whether the order of CCI for directing investigation is tenable in law?

SUMMARY OF ARGUMENTS

CONTENTION 1: THAT THE FOREIGN LENDERS DO CONSTITUTE A "SEPARATE CLASS OF CREDITORS" AND THE SCHEME IS LIABLE TO BE SET ASIDE ON THIS ACCOUNT.

It is appellant humbly submitted that they constitute a separate class of creditors, as per section 391 of the Companies Act it is mandatory to send notice to each class of creditors. It also violates the doctrine of Principle of Natural Justice .The doctrine of natural justice is not only to secure justice but to prevent miscarriage of justice. As a matter of fact the doctrine is now termed as a synonym of "fairness" in the concept of justice and stands as the most accepted methodology.

CONTENTION 2: THAT THE CLAUSE FROM "THE SALE AGREEMENT" DOES NOT CONSTITUTE AN "ARBITRATION CLAUSE" AND THE JURISDICTION OF THE COURT IS NOT BARRED.

The Appellant humbly submits that clause of the Sale Agreement does not constitute an arbitration clause. The clause 3 of the Sale Agreement deals with the jurisdiction of the Delhi High Court. The jurisdiction of the court cannot barred even if both the clause are there in an agreement and therefore the court has no obligation to refer the matter to the arbitration. It is true that mere existence of arbitration clause does not bar the jurisdiction of civil court automatically.

CONTENTION 3: THAT THE "SWASTH" HAS NOT ABUSED ITS DOMINANT POSITION BY INDULGING IN BAD FAITH LITIGATION AND THE ORDER OF CCI FOR DIRECTING INVESTIGATION IS NOT TENABLE IN LAW.

It is appellant submits that in the instant case the Swasth has absolute rights over the R&D and IPRs of Jeevani. The "Novel" drug was manufactured using the R&D and IPRs on which the Swasth has the absolute right. As Swasth has the absolute rights on the IPRs so the CCI has no power to investigate into the matter and thus it is bad in law.

ARGUMENTS ADVANCED

CONTENTION 1: THAT THE FOREIGN LENDERS DO CONSTITUTE A "SEPARATE CLASS OF CREDITORS" AND THE SCHEME IS LIABLE TO BE SET ASIDE ON THIS ACCOUNT

It is humbly contented before the Hon'ble Supreme Court of India that the creditors constitute separate class of creditors and the scheme is liable to be set aside as the notice of the meeting of the creditors of the company was not given to the foreign lenders

1.1 THAT THE REQUISITES TO CONSTITUE A SEPARATE CLASS OF CREDITORS

It is contented that the foreign lenders constitute a separate class of creditors as there interest are different from that of other creditors.

A group of people will constitute separate "class" if their interests are different from rest of the class or they are treated differently in the scheme, such groups must be treated as a separate class for the purpose of the scheme. If people with heterogeneous interests are combined in a class, naturally, the majority having common interest may ride rough shod over the minority representing a distinct interest. The Court has to classify creditors or members if there are such classes and before sanctioning the scheme, to see that their respective interests are taken care of.

"What constitutes a class?: Creditors constitute the separate class if their interests are different. When one finds a different state of fact existing among different creditors which may differently affect their minds and their judgment, they must be divided into different classes. "Class" must be confined to those people persons whose rights are not so dissimilar as to make it impossible

for them to consult together with a view to their common interest. If the creditors have different interests and constitute separate classes then a general meeting of all creditors will not be the proper thing, for the views of a distinct class ought to be ascertained from the votes of that class only. A general meeting of all creditors may not protect the class interest as such.[1]

In the Instant case the foreign lenders constitute a separate class of class as they have separate interest. They have separate interest in sense that they have invoked foreign arbitral tribunal and the award was passed in the favour of the foreign lenders according to which Jeevani has to pay the amount to foreign lenders stated in the award and that the Jeevani without giving them notice about the meeting took the approval for the scheme.

1.2 THAT IT IS AGAINST THE PRINCIPAL OF NATURAL JUSTICE AND THE SCHEME IS LIABLE TO BE SET ASIDE

It is humbly contented before the Hon'ble court the there is a violation of the Principle of natural Justice as being the creditors of the Company it is the right of the Foreign lenders to receive notice of the meeting of the creditors and thus the scheme should be set aside.

The doctrine of natural justice is not only to secure justice but to prevent miscarriage of justice. As a matter of fact the doctrine is now termed as a synonym of "fairness" in the concept of justice and stands as the most accepted methodology.

[1] Bhagwanti v. New Bank of India Ltd.; : AIR1950P&H111

The term "notice" which means "a being known" or a knowing is wide enough in legal circle to include a plaint filed in a suit.[2]When a statute requires a notice to be given, the requirement is invariably regarded as mandatory, and an action taken without such a notice would be invalid.

In the instant case as it is mandatory as per the provisions of section 391 of the Companies Act,1956 that the notice of the meeting should be given to each and every class of creditors, which is been violated. It is violation of the Principle Natural Justice as well and hence the scheme should be set aside.

In **Jaswant Singh Mathura Singh v. Ahmedabad Municipal Corporation**[3], it was held it is mandatory to give special notice to each interested person. This was in consonance with principle of natural justice .The legislature has made a distinction between general notice and special notice. Non – observance of this condition will vitiate of the final scheme. The main reason for the Court to hold special notice mandatory was that the town planning scheme would adversely affect property rights.

In the light of the aforementioned judgment, it is clear that each and every person interested is entitled to receive notice. In the case in hand no notice was sent to the foreign creditors and the meeting was done accordingly.

The meaning to the term “class” must be given as it will prevent the section being so worked as to result in confiscation and injustice and it must be confined to those persons whose rights are

[2] Commissioner of sales Tax v. Subhash &co. (2003) 3 SCC 454,460,461:AIR 2002 SC 1628
[3] AIR 1991 SC 2130: 1992 Supp(1) SCR 5

not so dissimilar as to make it impossible for them to consult together with a view to their common interest.[4]

The scheme should be set aside as the court as to classify creditors or schemes, to see that their respective interests are taken care of. Though the court does not consider what class of creditors or members should be made parties to the scheme but it is on the court to sanction or reject the scheme. Moreover, when the company has decided what classes are necessary parties to the scheme; it may happen that one class will consist of a small number of persons who will be willing to bind by the scheme. In that case it is necessary to convene their meeting, as the company is expected to offer identical compromises and hold meeting for each class otherwise, it may be discriminatory. In the case in hand as "foreign lenders" form a separate "class" of creditors, therefore, they should be made a party to the scheme and consent of all its members should be obtained so that interest of each interested person should be taken care of.

The Appellant humbly prays that they do form a separate class of creditors and as no notice was given to them the scheme is liable to be set aside.

[4] Sovereign Life Assurance Co. v. Dodd (1892) 2 QB 573

CONTENTION 2: THAT THE CLAUSE FROM "THE SALE AGREEMENT" DOES NOT CONSTITUTE AN "ARBITRATION CLAUSE" AND THE JURISDICTION OF THE COURT IS NOT BARRED.

It is humbly submitted before the Hon'ble Supreme Court that the Clause 2 of the Share Sale Agreement is not an Arbitration clause and therefore the court has no obligation to refer the matter to the arbitration panel.

2.1 THAT THE CLAUSE DOES NOT CONSTITUES AN ARBITRATION CLAUSE

It is humbly contended that in order to constitute it as an arbitration clause, it should satisfy all the conditions lay in section 8 of the Arbitration and Conciliation Act.

It is submitted that in the instant case, Clause 2 of the Sale agreement lays that:

2.1 ***Decision of an empowered committee comprising of (three) executive level personnel of the Company shall be final, binding and conclusive on parties to this Agreement upon all questions and issues relating to the meaning, scope, instructions, claims, right or matters of interpretation of and under this Agreement.***[5]

It is clear from the first line that there has to be an empowered committee comprising of three executive personnel who will act as an internal committee for deciding a matter and that the decision given by them shall be final, binding and conclusive on both the parties. That nowhere shows that this is an arbitration clause.

[5] ¶ 5, Factscript.

The Supreme Court in case of **Jagdish Chander v. Ramesh Chander**[6] discussed the law while answering question whether a clause in partnership deed which require the party to mutually decide to refer the dispute to the arbitration, would be an arbitration agreement or not within the meaning of the act: where the clause relating to the settlement of disputes, contains words which specifically excludes any of the attribute of an arbitration agreement or contains anything that detracts from the arbitration agreement, it will not be an arbitration agreement.

In light of the aforementioned judgment, it is clear that there was no intention of the parties to constitute an arbitral tribunal as the line "*empowered committee comprising of three executive level members of the company*" suggests an internal mechanism of the Company. Such has been the observation of the Hon'ble Single Judge in the instant matter.

It is submitted that in the case in hand, Clause 3 of the Sale agreement lays that:

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

It is clear from the aforementioned clause that the parties have intention to refer the matter to Delhi High Court in case of any dispute. And thus the Delhi High Court have jurisdiction to look into the matter. Same has been the Hon'ble Single Judge of the Delhi High Court.

[6] 2007 (2) RAJ 683 (SC)

2.2 THE JURISDICTION OF THE COURT IS NOT BARRED EVEN IF THERE IS AN ARBITRATION CLAUSE.

It is humbly submitted that the jurisdiction of the court cannot barred even if both the clause are there in an agreement and therefore the court has no obligation to refer the matter to the arbitration.

For invoking the provisions of Section 8 of "the Act", the party filing an application for reference of dispute to the arbitral tribunal has to prove that the matter pending in the Court is covered by the arbitration agreement between the parties. Arbitration agreement has been defined in section 7 read with section 2(1) (b) of this Act. Without establishing the existence of a valid arbitration agreement, the party applying cannot ask for orders in terms of section 8.

It is true that mere existence of arbitration clause does not bar the jurisdiction of civil court automatically.[7]The Arbitration and conciliation Act, which is an special Act, does not oust the jurisdiction of the Civil Court to decide the dispute in a case where the parties to the arbitration agreement do not take appropriate steps as contemplated as in sub-section (1) and (2) of section 8.[8]

Before referring the parties to arbitration the court has to hold that action brought before it is the subject matter of an arbitration agreement and the parties before it are parties to the said agreement. The Court cannot on the mere asking of a party refer the parties to arbitration and stay the suit if the court.

[7] Mahesh Kumar v. State of Rajasthan State Road Transport Corporation, AIR 2006 Raj 56
[8] Sukanya Holdings Pvt. Ltd. v. Jayesh H. Pandya (2003) 5 SCC 531

Thus in the instant case the Court mere on asking of the one of the parties cannot refer the matter to the arbitration when the Court has Jurisdiction to look into that matter.

There is no provision in the Act that when the subject matter of the suit includes subject- matter of the arbitration agreement as well as other disputes, the matter is required to be referred to arbitration. As held by the Apex Court[9] mere existence of an arbitration clause in an agreement clause in an agreement does not by itself operate as a bar to suit in the Court. The Judicial authority, in absence of any restriction has necessarily to decide whether in fact there is in existence a valid arbitration agreement and whether the dispute that is sought to be raised before it is covered by the arbitration clause, while exercising the power under section 8. It was also held that the judicial authority cannot act mechanically and refer the parties to arbitration but has to decide whether there exists a valid arbitration agreement and whether the dispute that is sought to be raised before it is covered by the arbitration clause.[10] Even if all the condition mentioned in section 8 are fulfilled, still it is the discretion of the writ court unlike other judicial authorities, has option but acts upon in terms of the said section refers and act accordingly. [11]

Since there is no arbitration clause in the Contract between Lifeline and Promoters, the Appellant most humbly pleads that the matter should be dealt within the jurisdiction of Delhi High Court.

[9] State of Uttar Pradesh v. Janki Saran Kailash Chandra, AIR 1973 SC 2071
[10] SBP & Co. v. Patel Engineering Ltd.(2005) 8 SCC 618
[11] Bharat Sanchar Nigam Ltd. v. BMW Industries Ltd., AIR 2007 (NOC) 1715 (Cal) (DB)

CONTENTION 3: THAT THE "SWASTH" HAS NOT ABUSED ITS DOMINANT POSITION BY INDULGING IN BAD FAITH LITIGATION AND THE ORDER OF CCI FOR DIRECTING INVESTIGATION IS NOT TENABLE IN LAW.

It is submitted that the Swasth has not abuse its dominance power as the Swasth has absolute rights on the R&D and IPRs which were used in manufacturing of the drug "Novel". The suit filed by Swasth was for the infringement of its IPRs and thus the order of CCI for directing investigation is not tenable in law.

3.1 THAT THE SWASTH HAS ABSOLUTE RIGHT ON THE R&D AND IPRs AND THE SUIT FILED IS NOT A BAD FAITH LITIGATION.

It is humbly contented that in the instant case the Swasth has absolute rights over the R&D and IPRs of Jeevani. The "Novel" drug was manufactured using the R&D and IPRs on which the Swasth has the absolute right.

Thus the suit filed by the Swasth cannot be considered as bad faith litigation as it was filed for the infringement of rights of Swasth on the IPRs. The phrase *"absolute right"* means that only the Swasth has the right to use those R&D and IPRs. It's the Lifeline at fault who has used the R&D and IPRs.

Section 4 of the Indian Competition Act defines dominant position as "dominant position means a position of strength, enjoyed by an enterprise, in the relevant market in India". In the instant matter it is nowhere mentioned that the Swasth was in a dominant position.

Hence Swasth cannot be held liable for being abusing its dominance power as it has filled the suit for the infringement of its IPRs and not for preventing the Lifeline to enter into market.

3.2 THAT THE ORDER OF CCI FOR DIRECTING INVESTIGATION IS NOT TENABLE IN LAW.

It is humbly contended that the CCI order to DG CCI for directing investigation is not tenable in law.

As per section 18 of the Act *"Subject to the provisions of this Act, it shall be the duty of the Commission to eliminate practices having adverse effect on competition, promote and sustain competition, protect the interest of consumers and ensure freedom of trade carried on by other participants, in markets in India."* The CCI has the power to direct investigation when there has been practices that adversely affect the competition or there is dominance of power by any of the participants.

But in the instant case Swasth is not abusing his dominant position as there was no bad faith litigation, the suit was filed for the infringement of its IPRs on which the Swasth has the absolute rights so the CCI has no power to investigate into the matter and thus it is bad in law.

Hence the Swasth should not be held liable for the abuse of its dominant position.

PRAYER

Wherefore in the light of issues involved, arguments advanced, reasons given and the authorities cited this Hon'ble court may be pleased:

To hold:

- That the Foreign Lenders constitutes a separate class of creditors and the scheme should be set aside
- That there is no Arbitration clause in the separate sale- agreement between Lifeline and Promoters
- That the Swasth has not abused its dominant position and the CCI order for directing investigation is bad in law.

Miscellaneous:

Any other relief which this Hon'ble court may deem fit to grant in the interests of *Justice, Equity and Good Conscience.* All of which is respectfully submitted.

For This Act of Kindness, the Respondents Shall Duty Bound Forever Pray.

Sd/-

(Counsels *for* the Appellants)