TEAM CODE: W

Before

THE HON'BLE SUPREME COURT OF INDIA

AT DELHI

IN MATTERS BETWEEN:

FOREIGN LENDERS … APPELLANT

V.

JEEVANI LTD. …RESPONDENT

LIFELINE LTD. …APPELLANT

V.

PROMOTERS OF JEEVANI LTD. …RESPONDENT

SWASTH LIFE LTD. …APPELLANT

V.

LIFELINE LTD. & OTHERS …RESPONDENTS

A SPECIAL LEAVE PETITION UNDER ARTICLE 136 OF THE CONSTITUTION OF INDIA

MEMORANDUM ON BEHALF OF THE APPELLANTS

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STATEMENT OF JURISDICTION

THE APPELLANT HAS APPROACHED THE HON'BLE SUPREME COURT OF INDIA THROUGH A SPECIAL LEAVE PETITION UNDER ARTICLE 136 OF THE CONSTITUTION OF INDIA CHALLENGING THE ORDERS OF THE HON'BLE HIGH COURT OF DELHI. THE HON'BLE SUPREME COURT ENTERTAINS JURISDICTION AS THERE INVOLVES SUBSTANTIAL QUESTION OF LAW.

"136. Special leave to appeal by the Supreme Court

(1) Notwithstanding anything in this Chapter, the Supreme Court may, in its 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."

STATEMENT OF FACTS

1. Jeevani Limited ("Jeevani"), a listed public company incorporated in the year 1990 under the Companies Act, 2013 with its registered office in New Delhi is a leading player in the pharmaceutical manufacturing sector holding considerable market share in India and few other countries. Lifeline Limited ("Lifeline") is another listed public company registered and incorporated under the Companies Act, 2013 having its registered office at Mumbai. Lifeline is major producer of food product in India and is well established in that industry. Realizing the huge potential in the pharmaceutical sector and as Jeevani Ltd. wanted to expand its market, the two companies discussed a possible partnership.

2. Thereafter, on 27th January, 2010 both companies decided to merge, whereby it was agreed that Jeevani Ltd. was to completely merge with Lifeline Ltd and all assets and liabilities of the former company would be transferred to Lifeline Ltd.

3. Three promoters of Jeevani Ltd. holding 18% shareholding in Jeevani Ltd. sold their entire holding under a share-sale agreement effected on 23rd March, 2012. The agreement contained specific representations as to disclosure of material facts by both parties

4. The scheme was finalized on 5th March, 2012 and soon after, the scheme was filed before the BSE for its approval which in turn was denied. On 30th March, 2012, both the companies filed an application under S. 391 of the Companies Act, 1956 seeking approval of the Hon'ble Delhi High Court. The Court ordered a meeting of the creditors to be convened and Jeevani Ltd. called for a meeting by publishing advertisement in a local English newspaper and a local language newspaper containing the terms of the proposal. Thereafter, a meeting of the creditors was held and the scheme was approved by a vote of majority. The scheme was later approved by the Hon'ble Delhi High court on 5th July, 2013. Around the

same time, the Hon'ble Bombay High Court approved the Scheme which had been applied by Lifeline separately.

5. Prior to the scheme, foreign lenders of Jeevani Ltd. had invoked arbitration proceedings for payment of amounts due to them. On 27th July, 2010, a foreign arbitral award was passed in favour of the foreign lenders requiring Jeevani Ltd. to pay them amount stated in the award. The foreign lenders filed an application before the Hon'ble High court of Delhi recalling the scheme as they were creditors of the company and the company had not issued a notice to them. Further, they contended that they formed a separate class of creditors. Jeevani Ltd. refuted both the claims. The Hon'ble Judge dismissed the application, as did the Division Bench on an appeal. This order has been challenged in the Hon'ble Supreme Court and is pending arguments.

6. After merger, Lifeline Ltd. continued operations of Jeevani Ltd. which included supplying of genetic drugs to USA. Lifeline Ltd. was served with notices from FDA for providing drugs at below par quality. It was found out that the FDA investigation at Jeevani's plants in India commenced much before the merger. Lifeline Ltd. filed a suit against the Promoters before the Hon'ble Delhi High Court for damages arising out of breach of contract, claiming compensation for wrongful gain and unjust enrichment by way of defrauding and misrepresenting to Lifeline Ltd. by concealing the pending investigations. The Promoters challenged the jurisdiction of the Hon'ble Delhi High Court contending that the share-sale agreement contained an arbitration clause, which Lifeline Ltd. refuted. The Hon'ble Single Judge of the Delhi High Court held that the clause did not constitute an arbitration clause, which the Hon'ble Division Bench on an appeal reversed. Aggrieved by this, Lifeline Ltd. has approached this Hon'ble Supreme Court and is pending arguments.

7. Lifeline Ltd. decided to introduce a new life-saving drug by the name "Novel" which is considerably cheaper than the product "Inventive" manufactured by Swasth Life Ltd., a

sister concern of the erstwhile Jeevani Ltd. Swasth Life Ltd. filed an infringement suit against Lifeline alleging that "Novel" was substantially similar to "Inventive" and was developed based on the IPRs assigned to it by Jeevani Ltd. in the year 2010 and thereby got an interim injunction restraining the launch of the drug. In the meanwhile, Swasth Life Ltd. launched a cost-effective drug, cornered a huge chunk of the market and withdrew the case against Lifeline Ltd. Lifeline Ltd. filed an application before the CCI alleging Swasth Life Ltd. for abusing its dominant position by indulging in bad faith litigation. The CCI based on the allegations made was of the *prima face* view that Swasth Life Ltd. may have abused its dominant position and ordered the DG CCI to investigate the matter and submit a report within 45 days. The report of DG is still awaited. Being aggrieved, Swasth Life Ltd. filed a writ petition before the Hon'ble Delhi High Court submitting that the order for directing investigation was bad in law. The Hon'ble Single Judge upheld the order of the CCI and so did the Division Bench stating that only an investigation has been ordered on the allegations made Swasth Life Ltd. and as such no adverse effect is caused to it. This order has been challenged by Swasth Life Ltd. in the Hon'ble Supreme Court.

QUESTIONS PRESENTED

1. WHETHER FOREIGN LENDERS CONSTITUTE SEPARATE CLASS OF CREDITORS AND WOULD NON-ISSUANCE OF NOTICE TO CREDITORS INVALIDATE THE SCHEME?
2. WHETHER THE DISPUTE RESOLUTION CLAUSE IN THE SHARE SALE AGREEMENT CONSTITUTES AN ARBITRATION CLAUSE?
3. WHETHER THE ORDER OF THE CCI DIRECTING THE DG TO INVESTIGATE IS BAD IN LAW?

SUMMARY OF PLEADINGS

1. Whether foreign lenders constitute separate class of creditors and would non-issuance of notice to creditors invalidate the scheme?

The Appellants have provided financial assistance to the Respondent Company under a consortium agreement. Even a *'contingent or prospective creditors'* are creditors within the meaning of Companies Act, 1956. The creditor does not lose his position as a creditor by virtue of non performance of requisite steps in order to enforce his right. The Appellants form a separate class of creditors as they have divergent interests from that of the other creditors. Rule 73 of the Companies (Court) Rules, 1959 casts a mandatory obligation on the Company to issue individual notices to the creditors and failure to issue notice can invalidate the entire scheme.

2. Whether the dispute resolution clause in the share sale agreement constitutes an arbitration clause?

The dispute resolution clause constitutes an amicable dispute resolution clause and not an arbitration clause. The use of the word 'amicable' shows the manifest intention of the parties to not enter into an adversarial method of dispute resolution. In order to constitute an arbitration clause, the wordings must be clear, unambiguous and unequivocal.

3. Whether the order of the CCI directing the DG to investigate is bad in law?

The Appellant have not abused the judicial process to deter competition. The Appellant filed a suit against Respondent to protect IPR. Therefore, the claim is bonafide. The CCI was of prima facie view that there was an abuse of dominant position by the Appellant, based on the allegation of the Respondent. The Commission did not apply its mind and record reasoning while arriving at such conclusion, and therefore, the Appellant submits that the reference to Director General is bad in law.

PLEADINGS

Foreign lenders V. Jeevani Ltd.

A. THE FOREIGN LENDERS ARE CREDITORS

A.1. The Appellants respectfully submit that they have provided financial assistance to the Respondent Company under a consortium agreement[1]. Creditors whose names appear in the books of the company should be considered as creditors. Relying upon the definition of creditors given in Halsbury's Laws of England[2], as the Appellants have a pecuniary claim against the company which is capable of an estimate, it is the humble submission of the Appellants that they constitute creditors of the Respondent Company. As per schedule 6 of the Companies Act, 1956, the lenders of financial assistance are to be reflected as creditors in the Balance Sheet of the company. Further, the foreign arbitral tribunal acknowledged the position of the Appellants as creditors and thus has passed an award directing the Respondents for payment of amount as stated in the award. In the present case, the amount under the award will be due to the Appellants once the award is enforced in India. It is humbly submitted that even contingent or prospective creditors are creditors within the meaning of Companies Act, 1956[3].

A.2. The Appellants humbly submit that without prejudice to the previous submission, it cannot be contended that the enforcement of the arbitral award is barred by limitation. Section 49 of the Arbitration and Conciliation Act, 1996 states that where the court if satisfied that the foreign award is enforceable, the award shall be deemed to be a decree of

[1] ¶ 6 of the Moot proposition

[2] Volume 7(3) Edn. 4

[3] Chitta Ranjan (Benode) Ghuha v. M.Ameen. 1948 [18] Comp Cas 228 [Cal]

that Court. In effect, it is the contention of the Appellant that procedure for recognition tantamounts to procedure of execution. In terms of A. 136 of the Limitation Act, 1963, the limitation period governing the execution of a decree is 12 years. Therefore, the Appellant humbly submits that the enforcement of arbitral award is not barred by limitation.

A.3. Without prejudice to the contention already made, the Appellants submit that a creditor does not lose his position as a creditor by virtue of non performance of requisite steps in order to enforce his right. Even if the enforcement of the arbitral award is barred by limitation, the debt merely becomes unenforceable and does not constitute cessation of liability[4]. The debt remains a debt though the creditor by reason of a rule of procedure cannot himself bring an action upon it[5]. In support of this proposition, reliance is to be placed on the Supreme Court ruling in the matter of ***Bombay Dyeing and Manufacturing Co. Ltd. v. State of Bombay[6],*** where the court has clearly held that, "even in cases where the remedy of a creditor is barred by limitation the debt itself is not extinguished but merely becomes unenforceable"[7]. The Kerala High Court in the matter of ***Thankappan. V.K., Manager vs. Uthiliyoda Muthukoya[8]*** ruled that, "In the case of a debt barred by lapse of time, the right of the creditor to recover the debt is not transferred to or conferred upon the debtor. It becomes dormant and becomes unenforceable in a court of law. That does not mean that debt is destroyed or extinguished and that the creditor is not entitled, under any circumstances, to claim or recover it in any manner whatsoever". Further, although enforcement of a debt being barred by limitation does not ipso facto lead to conclusion that there was cessation or

[4] Kohinoor mills Co. Ltd. V. CIT [1963] 49 ITR 578 (Bom)

[5] Mahant Singh vs U Ba Yi (1939) 41 BOMLR 742

[6] AIR 1958 SC 328

[7] CIT v. Sugauli Sugar Works P.ltd.

[8] 2011 (2) KLT 953

remission of liability, it is also not possible to conclude that debt had become unenforceable[9]. Therefore it is submitted that the Appellants are creditors of the Respondent Company.

B. THE FOREIGN LENDERS ARE A SEPARATE CLASS OF CREDITORS.

B.1. The Appellants respectfully submit that they form a separate class of creditors. It is submitted that a 'class' will be determined by finding a different state of facts existing among different creditors which may differently affect their minds and their judgment[10]. Since there is an arbitral award passed in favour of the Appellants, if they are classified under the same class, the scheme will adversely affect their interest under the award. The fact that the scheme of arrangement overrides the terms in the arbitral award will affect the judgment of the Appellants, warranting them to be classified as a separate class of creditors. Even though the Companies Act, 1956 or the Articles of Association do not provide for such a class within the class of creditors, in a given contingency it is the contention of the Appellants that because of their separate and conflicting interests vis-a-vis other creditors, a separate class of such separately interested creditors should have been constituted. Further, the Calcutta High Court, in the matter of ***Rajshahi Banking Corporation v. Surebala Debi***[11] ruled that, "a depositor who had not obtained a decree and one who had, could not be regarded as belonging to the same class for the purpose of Section 153, Companies Act, and that a notice sent to such decree-holder asking him to attend a meeting of depositors for the purpose of considering a scheme was not binding on him and he was not bound by anything decided at the meeting". Thus it is humbly submitted that S. 153, being similar to S.391, placing reliance on the above mentioned case, the Appellants holding a foreign arbitral award have to be classified as a separate class of creditors.

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[9] Commissioner of Income Tax v Jain Exports Pvt Ltd, (2013) 85 CCH 066 DelHC

[10] Per Buckley on the Companies Act 13th edition at page 406

[11] (1936) 40 C W N 1104 at p. 1105.

B.2. The Appellants respectfully submit that the basis for the determination of classes of creditors for the purpose of sanctioning scheme of arrangement is: that the classes shall be grouped on the basis of 'commonality of interest' and the class formed must be homogenous group. As defined by Law Lexicon[12], "A person is said to have interest in a matter when he has rights, liabilities, advantages, duties or the like whether present or future connected with it." Further, the members of a class ought to have the same "interest" in the company, ought to be only creditors entitled to look to the same "source" or "fund" for payment, and ought to encompass all of the creditors who do have such an identity of legal rights[13]. The arbitral award passed in favour of the Appellants constitute an advantage over the other creditors. The Appellants alone have the right to enforce the payment of their debt by way of the said award. As a result the Appellants have interest distinct from that of other creditors. It is the submission of the Appellants that if creditors of the company have divergent interests then they cannot be clubbed together into one class[14].

B.3. It is humbly submitted that the claims of the Indian lenders and Appellants cannot be ascertained by the same system of valuation as the Appellants claims are valued in a currency other than the Indian rupee. Reliance for this proposition is to be placed on the ruling of the Division Bench of the Madras High Court, in the matter ***of D.A. Swamy v. India Meters Ltd***[15]., wherein the Court observed that, "Broadly speaking, 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

[12] Per LAW LEXICON, 967 (P RAMANATHA AIYAR., 2nd edn., 2010).

[13] Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd (1988), 72 C.B.R. (N.S.) 20 at paras. 43-44

[14] Hindustan lever employees union V. Hindustan lever 1994 4 BomCR 465

[15] [1994] 79 Comp. Cas. 27

should ordinarily be homogeneous and must have commonality of interest and the compromise offered to them must be identical[16]". Further there may be considerable difference between the position of a creditor who is governed by Indian law and a creditor who is governed by foreign law. The remedy available to Appellants in case where the Respondent Company fails to pay the loan is different from that of the Indian creditors thus making them stand on a different footing. It is a well settled principle that such a meaning must be given 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 the common interest[17]. Therefore, it is the humble submission of the Appellants that they have divergent interests from that of the other creditors of the company and thus constitute a separate class of creditors.

C. NOTICE OUGHT TO HAVE BEEN SERVED ON THE FOREIGN LENDERS.

C.1. The Appellants respectfully submit that Rule 73 of the Companies (Court) Rules, 1959 casts a mandatory obligation on the Company to issue individual notices to the creditors. As per Rule 73 of the said Rules, the notice of the meeting to be given to the creditors shall be in Form 36 and shall be sent to them individually by the authority concerned. Whenever a statute declares that a thing 'shall' be done, the natural and proper meaning is that a peremptory mandate is enjoined. Further, the whole object behind this statutory requirement of issuing a notice to the creditors of the company is to hear all the affected persons as the scheme proposed if accepted by Court would affect right of such interested person. Before sanctioning of the scheme is sought from the Court, such a scheme is to be placed before the creditors of the company so that they will have an opportunity to

[16] Re Anglo American Insurance Ltd. (2001) BCLC 755

[17] Sovereign Life Assurance V. Dodd 1892 2 QB 573

have their say in the matter. Therefore, the law requires not only personal service of notice to the creditors but also a public notice by way of paper publication[18]. On an equitable principle of law, all creditors, especially foreign creditors, whose rights are to be affected under a scheme, must be served an individual notice conveying the scheme of arrangement in order to protect their rights. It is not prudent to imagine that lenders residing in a country having no circulation of the newspaper in which the notice was published, to have knowledge of the same. Therefore, it is the submission of the Appellants that an individual notice ought to have been served on them.

D. THE SCHEME IS LIABLE TO BE SET ASIDE

D.1. The Appellant respectfully submits that the scheme is liable to set aside due to lack of procedural compliance. Relying upon the submissions already made, the Appellants contend that the scheme should be set aside as the creditors are not issued notice of the meeting. Further the SEBI circular[19] and clause 24 (f) of Listing Agreement stipulates that an application under section 391 of the Companies Act, 1956 to the Court shall be made only after the lapse of 30 days from the date of filing of scheme before the Stock Exchange. In the instant case, the scheme was filed before the Bombay Stock Exchange shortly after 5th March, 2012 and an application to the Hon'ble Delhi High Court was made on 30th March, 2012. This shows the non compliance of procedural requirements, therefore causing the scheme to be set aside[20].

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E. THE DISPUTE RESOLUTION CLAUSE CONSTITUTES AN AMICABLE DISPUTE RESOLUTION CLAUSE.

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[18] In re Vikrant Tyres Ltd., [2003] 47 SCL 613 (KAR.)

[19] CIR/CFD/DIL/5/2013, dated February 4, 2013.

[20] In Re: Compact Power Sources Pvt. Ltd. and Anr.-2004(2)ALD747

E.1. The Appellant respectfully submits that the dispute resolution clause contained in the agreement constitutes an amicable dispute resolution clause. Clause 2.2 of the dispute resolution clause states that the parties shall endeavor to amicably resolve the issues. Relying upon the Black's law dictionary, the word 'amicable' means, friendly or agreed or assented to by parties having conflicting interests or a dispute; as opposed to hostile or adversary. "Amicable settlement" appears to be an appropriate word to denote modes of dispute resolution in which the parties retain their freedom to decide the outcome of their dispute. It could cover negotiation, mediation and conciliation. International chamber of commerce recognizes mediation as a method of amicable dispute resolution. The Arbitration and Conciliation Act, 1996 defines Conciliation as the process of amicable settlement of disputes by the parties with the assistance of a conciliator. It is a practice amongst the parties to dispute to amicably settle the issue as it restores broken relationship, saves time, energy and money[21]. Therefore, it is the submission of the Appellant that use of the word 'amicable' refers to amicable dispute resolution.

E.2. The Appellant further submits that Clause 2.1 of the dispute resolution clause puts forth the constitution of the panel which resolves the dispute and the issues which can be settled by way of amicable dispute resolution. The said clause also authorizes the decision of the Empowered Committee to be binding on the parties. In order to break the impasse, the parties to dispute as a practice, make the decision of the panel to be binding on them. In the instant case, the parties to the agreement had entered into a binding amicable dispute resolution, as an alternative to the two-step amicable dispute resolution and arbitration

[21] Mr. Vikram Bakshi and Ors. Vs. Ms. Sonia Khosla (Dead) By L.Rs. [2014]184CompCas392 (SC)

process[22]. Therefore it is the humble submission of the Appellant that the binding amicable dispute resolution is valid.

E.3. Without prejudice to the submissions made, the Appellant respectfully submits that even if Clause 2.1 is assumed to be ambiguous, applying the principle of *noscitur a sociis*, since Clause 2.1 and 2.2 are analogous to each other, they should be understood in their cognate sense. Relying upon the ruling of the Supreme Court of Canada in matter of ***R. v. Daoust***[23] where the Court held that, "The *noscitur a sociis* rule ... the meaning of a term may be revealed by its association with other terms where the latter may not be read in isolation", Clause 2.1 in the instant agreement has to be read in association with Clause 2.2 in order to understand its true meaning. It is the submission of the Appellant that since Clause 2.2 envisages an amicable settlement of the questions and issues arising under Clause 2.1, the entire dispute resolution clause should be read to mean amicable dispute resolution method.

F. THE DISPUTE RESOLUTION CLAUSE DOES NOT CONSTITUTE AN ARBITRATION CLAUSE.

E.1. The Appellant submits that Clause 2.2 of the dispute resolution clause states that the parties shall endeavor to resolves the questions and issues arising under clause 2.1 amicably. The use of the 'amicable' shows the manifest intention of the parties to not enter into an adversarial method of dispute resolution. In amicable dispute resolution, the parties control the process more than would normally be available to them in litigation or arbitration — where judges or arbitrators render binding decisions. Here, the parties actively decide on their own solution. Parties have the opportunity to talk about concerns they might ordinarily not discuss if not legally relevant in an arbitration or litigation. The main aim of amicable dispute resolution is to provide for proceedings that are flexible, party-controlled, rapid,

[22]Bowers, et al. v. Raymond J. Lucia Cos., Inc., 206 Cal. App. 4th 724 (2012)

[23] 2004 SCC 6

confidential, and inexpensive. The enforceability of an amicable dispute resolution decision is also within the control of the parties. Parties may decide to agree to follow a decision of the neutral third-party, even though the decision itself is unenforceable. It is the submission of the Appellant that these characteristic are in conflict with that of arbitration. Arbitration proceedings are adversarial and are binding on the parties. The award of the proceedings is enforceable in accordance with law. The International Chamber of Commerce excludes arbitration from amicable dispute resolution and only includes proceedings that cannot be enforced at law. Therefore, it is the humble submission of the Appellant that the use of the word 'amicable' negatives the clause form being an arbitration clause.

E.2. The Appellant further submits that in general, the same infirmities that will invalidate any contract will invalidate an agreement to arbitrate. If no mutual assent to the arbitration clause exists, an agreement to arbitrate will be invalid. That is, the parties to an agreement must have agreed to arbitrate the particular dispute before arbitration can be compelled. A party cannot be required to submit to arbitration any dispute which he has not agreed so to submit[24]. As observed by His Lordship Viscount Maugham, "In order to constitute a valid contract the parties must so express themselves that their meaning can be determined with a reasonable degree of certainty. It is plain that unless this can be done, it would be impossible to hold that the contracting parties had the same intention; In other words, the consensus ad idem would be a matter of mere conjecture[25]". In the instant case, the dispute as to the existence of the arbitration clause itself is a proof enough to show that the parties did not have a mutual assent as to invoke arbitration proceedings in case of any dispute. Therefore, it is the submission of the Appellant that the clause does not constitute an arbitration clause.

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[24] AT & T Technologies Inc. v. Communications Workers of Am., 475 U.S. 643, 648 (1986).

[25] G. Scammel and Nephew Ltd. v. H. C. and J. G. Ouston 1941 AC 251; Teamco Private Ltd. vs T.M.S. Mani AIR 1967 Cal 168

E.3. The Appellant further submits that, in order to constitute an arbitration clause, the wordings must be clear, unambiguous and unequivocal. An uncertain arbitration clause cannot be given effect to[26]. The dispute resolution clause in the said agreement contains two sub-clauses. Clause 2.2 unequivocally constitutes an amicable dispute resolution clause. Without prejudice to the previous submissions, even if clause 2.1 constitutes an arbitration clause, it cannot be given effect to as a reading of the two clauses together poses an uncertainty as to the method of dispute resolution to be adopted. Further, Clause 3 of the agreement states that all disputes touching upon the subject matter of the agreement shall be subject to the jurisdiction of the Delhi Courts. Relying upon the Madras High Court ruling in the matter of ***Shankar Sealing Systems P. Ltd. Vs. Jain Motor Trading Co.***[27], since clause 2.1 allegedly refers to arbitration and clause 2.2 manifestly refers to amicable dispute resolution, and clause 3 states that disputes arising will be subject to the jurisdiction of the Delhi Courts, it is submitted that by the said clause it was not intention of the parties that arbitration was to be the remedy. Without prejudice, even if there is presumption of arbitrability it may be overcome with "clear evidence" that the parties did not intend a claim to be arbitrable, as they have inserted two clauses which prove otherwise.[28] If the parties have failed to express their intention of having their disputes settled by arbitration by using clear, meaningful and unambiguous language and have failed to enter into a valid arbitration agreement, the Court has no choice but to say that there is no contract and it is not open to the

[26] Kanpur Agra Transport Corporation Vs. Respondent: United India Insurance Co. Ltd. and another AIR1990Cal59

[27] AIR 2004 Mad. 127

[28] Harvey v. Joyce, 199 F.3d 790

Court to create a contract for the parties[29]. Therefore, the Appellant respectfully submits that the dispute resolution clause could not be said to be a firm or mandatory arbitration clause.

E.4. The Appellant respectfully submits that an arbitration agreement should be strictly construed. Clear language should be introduced into any contract which is to have the effect of ousting the jurisdiction of the Courts and compelling the parties to have recourse to arbitration for decision of disputes[30]. In order that a dispute to constitute arbitration, agreement to refer disputes to arbitration must be spelt out expressly or impliedly[31]. As held by the Patna High Court in the matter of ***State Of Bihar Vs. Shiv Shankar Construction (P) Ltd***.[32], "In a works contract, clause in agreement used the expression that "all disputes and differences between parties shall be referred to Superintending Engineer and that his decision would be final and binding." It did not mean that parties agreed that such disputes shall be referred to Superintending Engineer for arbitration. It could not be termed as an arbitration agreement. Therefore, it is the submission of the Appellant that the said clause, upon strict construction does not constitute an arbitration clause.

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G. THE APPELLANT HAS NOT INDULGED IN BAD FAITH LITIGATION

G.1. The Appellant respectfully submits that they have not abused the judicial process to deter competition. The distinction between abusing the judicial process to restrain competition, and prosecuting a lawsuit that, if successful, will restrain competition, must guide any court's decision whether a particular filing is sham. The label "sham" is

[29] Teamco Private Ltd. vs T.M.S. Mani AIR 1967 Cal 168

[30] Ganpatrai Gupta v. Moody Brothers Ltd. reported in (1950) 85 Cal LJ 136, S. B. Sinha, J. observes at p. 143

[31] STATE OF ORISSA vs. DAMODAR DAS (AIR 1996 SC 942) STATE OF UP vs. TIPPER CHAND AIR 1980 SC 1522

[32] AIR 2008 Pat. 143

appropriately applied to a case, in which the plaintiff is indifferent to the outcome of the litigation itself, but has nevertheless sought to impose a collateral harm on the defendant by, for example, impairing his credit or abusing the discovery process. Litigation filed or pursued for such collateral purposes is fundamentally different from a case in which the relief sought in the litigation itself would give the Appellant a competitive advantage or, perhaps, exclude a potential competitor from entering a market with a product that infringes the Appellant's patent. Thus, economic sham litigation occurs when purpose is not to win a favorable judgment against a competitor but to harass him, and deter others, by the process itself - regardless of outcome - of litigating. The case of Appellant herein is in the latter, obviously legitimate, category. There was no unethical or other improper use of the judicial system; instead, Appellant invoked the court's jurisdiction to determine whether they could lawfully restrain competition with respondent. The relief they sought in their original action which was granted, would have had the anticompetitive consequences authorized by law. Access to the courts is far too precious a right to infer wrongdoing from nothing more than using the judicial process to seek a competitive advantage in a doubtful case. This is to say that litigation is not actionable under the antitrust laws merely because the Appellant is trying to get a monopoly. Appellant is entitled to pursue such a goal through lawful means, including litigation against competitors. The line is crossed when his purpose is not to win a favourable judgment against a competitor but to harass him, and deter others, by the process regardless of outcome of litigating. In the instant case, the Appellant filed a suit to prevent the Respondent from launching the new drug as it was substantially similar to the drug which the Appellant was manufacturing. The Appellant filed the instant suit bearing in mind the necessity of the outcome, therefore it cannot be alleged that the Appellant has abused the judicial process to deter competition

G.2. The Appellant respectfully submits that they have a prima facie case and thus the allegation that they has indulged in bad faith litigation cannot be sustained. In order to constitute litigation in bad faith, the plaintiff should proceed on a baseless claim. In the instant case, the Appellant has obtained a preliminary injunction restraining the respondent from launching the new drug which envinces that their claim is a bona fide one. In order to obtain a preliminary injunction a plaintiff must show (1) a reasonable likelihood of success on the merits, (2) That irreparable harm will result if preliminary relief is not granted, (3) That the balance of hardships favors the plaintiff, and (4) That granting the injunction will not disserve the public interest[33]. At the ex parte stage, the court would want to be convinced of the plaintiff's title to the right which is sought to be enforced against the defendant. The Appellant in the instant case has demonstrated a reasonable likelihood of success on the merits of the case (i.e., that the patent in issue is valid and infringed). Therefore, as the claim is bona fide, it cannot be contended that the Appellants have indulged in bad faith litigation.

G.3. The Appellant humbly submits that a litigation to face antitrust liability "...must constitute the pursuit of claims so baseless that no reasonable litigant could realistically expect to secure favourable relief[34]," and the party asserting the claim must have a subjective intent to interfere directly with a competitor's business relationships by means of the litigation process, regardless of the outcome of the case[35]. There should be a subjective intent of squeezing the competitor's margin through the litigation. Further, as held in the ruling of

[33] Am. Red Cross v. Palm Beach Blood Bank, Inc., 143 F.3d 1407, 1410 (11th Cir. 1998); New England Braiding Co., Inc. v. A.W. Chesterton Co., 970 F.2d 878, 882 (Fed. Cir. 1992).

[34] Professional Real Estate Investors v. Columbia Pictures Indus., 508 US 49, 123 L. Ed. 611 at 625, 113 S Ct 1920, (1993).

[35] In Re independent serv. Orgs. Antitrust litig.,203 F.3d 1322,1326(Fed Cir. 2000)

ITT Promedia NV v Commission of the European Communities[36]**,** "In principle, to bring an action in court, which is the fundamental right of expression of access to the judiciary, cannot be characterized as an abuse" unless "a dominant firm filed an action (i) which cannot be reasonably considered an attempt to establish their rights, and can therefore only serve to reach the other party and (ii) that is conceived within a framework of a plan aimed at eliminating competition. In the instant case, the claim of the Appellant is not baseless as they had a lawful claim against the IPRs which were assigned to them. Further, the fact that the court recognized the existence of prima facie case negatives the contention that the claim was baseless. Additionally, any anti competitive consequences which arise out of a lawful suit is authorized by law and thus it cannot be contended that the Appellant wanted to eliminate competition by way of litigation. The Appellant further submits that a patentee's infringement suit is presumptively in good faith and that this presumption could only be rebutted with clear and convincing evidence that the patentee acted in bad faith[37]. Therefore, it is the humble submission of the Appellant that they have not indulged in bad faith litigation.

G.4. The Appellant respectfully submit that the Competition Commission at the stage of forming a prima facie view, as required under Section 26(1) of the Act, the Commission may not really record detailed reasons, but must express its mind in no uncertain terms that it is of the view that prima facie case exists, requiring issuance of direction for investigation to the Director General[38]. Such view should be recorded with reference to the information furnished to the Commission. In the instant case, the Commission was of prima facie view that there

[36] Case T-111/*96*

[37] Walker Process Eqpt., Inc. v. Food Machinery Corp. 382 U.S. 172 (1965)

[38] Competition Commission Of India vs Steel Authority Of India & Anr Civil Appeal No.7779 Of 2010

was an abuse of dominant position by the Appellant, based on the allegation of the Respondent. The Commission did not apply its mind and record reasoning while arriving at such conclusion, and therefore, the Appellant submits that the reference to Director General is bad in law. Further, all proceedings, including investigation and inquiry should be completed by the Director General most expeditiously and while ensuring that the time taken in completion of such proceedings does not adversely affect any of the parties[39]. In the Supreme Court ruling in the matter of ***Abdul Rehman Antulay V. R.S.Nayak*** it was held that wherever there was inordinate delay or wherever the proceedings were pending for too long and any further proceedings were deemed to be oppressive and unwarranted; they were put to an end by making an appropriate order. It was observed that right to speedy trial following from Article 21 encompasses all the stages, namely the stage of investigation, inquiry, trial, appeal, remission or re-trial. In the case under consideration, the DG's report was not furnished even after a lapse of 45 days. Therefore, it is the humble submission of the Appellant that this inordinate delay in filing the report caused worry, anxiety, expense and disturbance to the vocation and peace of the Appellant and thus warranted the approach through a writ petition.

[39] Competition Commission Of India vs Steel Authority Of India & Anr CIVIL APPEAL NO.7779 OF 2010

PRAYER

Wherefore, in the light of the facts presented, issues raised, argument advanced and authorities cited the Appellants humbly pray before the Hon'ble Supreme Court to graciously adjudge and declare that

1. The scheme should be set aside;
2. There is no arbitration clause in the share-sale agreement;
3. The CCI's order directing the investigation was bad in law;
4. The orders of the Hon'ble Delhi High Court are reversed;
5. For costs of and incidental to this appeal; and
6. This Hon'ble Court may be pleased to grant such further and other relief as it may deem fit.

Any other order as it deems fit in the interest of equity, justice and good conscience.

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

Sd/-

(Counsel for the Appellants)