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BEFORE

THE HON'BLE SUPREME COURT OF INDIA

[S.C.R., ORDER XXI RULE 3(1)(a)]

CIVIL APPELLATE JURISDICTION

SPECIAL LEAVE PETITION

(UNDER ARTICLE 136 OF THE CONSTITUTION OF INDIA)

FOREIGN LENDERS (APPELLANT)

V.

PROMOTERS OF ERSTWHILE JEEVANI (RESPONDENT)

AND

LIFELINE (APPELLANT)

V.

PROMOTERS OF ERSTWHILE JEEVANI (RESPONDENT)

AND

SWASTH (APPELLANT)

V.

LIFELINE AND CCI (RESPONDENT)

[THE SUPREME COURT EXERCISING ITS INHERENT POWER UNDER ORDER LV RULE 5 OF THE SUPREME COURT RULES, 2013 HAS TAGGED THE MATTER TOGETHER FOR HEARING]

PROMOTERS, FOREIGN LENDERS AND SWASTH……APPELLANTS

LIFELINE AND CCI……..RESPONDENTS

Memorial Submitted on behalf of APPELLANTS

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STATEMENT OF JURISDICTION

The Appellant most humbly approaches the Hon'ble Supreme Court of India in pursuance of Article 136 (Special Leave Petition) of the *Constitution of India, 1950*

THE PRESENT MEMORANDUM SETS FORTH THE FACTS, CONTENTIONS AND ARGUMENTS IN THE PRESENT CASE

STATEMENT OF FACTS

Jeevani Limited (**"Jeevani"**) is a listed public company incorporated in the year 1990 under the Companies Act, 2013 with its registered office in New Delhi. Its equity shares are listed on the Bombay Stock Exchange. *Jeevani* is one of the leading market players in the pharmaceutical manufacturing industry. Limited, ("***Lifeline***") is another listed public company registered & incorporated under the Companies Act, 2013 having its registered office in Mumbai. *Lifeline* is a popular company in the Indian market as a major producer of food products and is known for the quality and variety of food products in India. *Lifeline* approached *Jeevani* for a possible partnership to venture into this sector.

After a lot of deliberations and negotiations, both companies on 27th January 2012 decided to merge. A scheme of arrangement, for *Jeevani*, (the "**Scheme**") was prepared keeping this in mind. It was also decided that the three promoters of *Jeevani* (the "**Promoters**") who are also majority shareholders in the company would sell their entire promoter shareholding i.e.18% of their stake in *Jeevani* to *Lifeline*. The Scheme was finalized on 5th March 2012 and immediately

thereafter the Scheme was filed before the Bombay Stock exchange for its approval. However, the Bombay Stock Exchange did not provide its approval.

On 30th March 2012, *Jeevani* and *Lifeline* filed an application under Section 391 of the Companies Act, 1956 (the "**Companies Act**") for initiating the process of approval of the Scheme by the Hon'ble Delhi High Court. Thereafter the Scheme was also approved by the Hon'ble Delhi High Court on 5th July 2013 and subsequently by the Bombay High Court.

Prior to the public announcement being made by *Jeevani*, certain creditors of *Jeevani*, mainly foreign banks (**"foreign lenders"**) had jointly, invoked arbitration proceedings before a foreign arbitral tribunal constituted in Hong Kong, against *Jeevani*. On 27th July 2010 a foreign arbitral award was passed in favour of the foreign lenders against *Jeevani*. Under the foreign arbitral award *Jeevani* was to pay to the foreign lenders the amounts as stated in the arbitral award. Till date no proceeding for enforcement of this foreign award has been filed by the foreign lenders. In early August 2013 the foreign lenders of *Jeevani* made an application before the Hon'ble Company Judge for recall of order dated 5th July 2013 passed by the Hon'ble Company Judge of the Delhi High Court approving the Scheme. The foreign lenders contended that they had not received notice of the Scheme and were not able to attend the meeting of creditors. The foreign lenders, further contended that they constituted a separate class of creditors and in view of the fact that there was no meeting convened for them, the Scheme should be set aside. The Company however contended that the foreign lenders are not creditors. The Hon'ble Company Judge however dismissed application filed by the foreign lenders and refused to set aside the Scheme. Against this order the foreign lenders went in appeal to the Division Bench of the Delhi High Court, which also after due consideration of facts dismissed the appeal of the foreign lenders.

After the merger, the newly merged *Lifeline* continued with the operations of the erstwhile *Jeevani*, which included its operations of supplying generic drugs to the United States of America. However soon after, *Lifeline* received notices from the US Food and Drug Administration (the "**FDA**") for providing drugs of below par quality was unearthed that the investigation by FDA on drugs produced by *Jeevani* at its plants in India was commenced much before the merger of *Jeevani* and *Lifeline* took place. *Lifeline* filed a suit against the Promoters before the Delhi High Court for damages arising out of breach of the contract dated 23rd March 2013 , for compensation for wrongful gain and unjust enrichment of Promoters by way of defrauding and misrepresenting to a bonafide purchaser i.e. *Lifeline*. *Lifeline* has approached the Supreme Court of India and the matter is pending for arguments.

In the meanwhile, and soon after the merger, *Lifeline* to increase its profitability, decided to introduce a new life saving drug by the name of "Novel" into the market. The new drug Novel was eagerly awaited in the market as it was published to be considerably cheaper then other life saving drugs in the market, including the drug "Inventive" presently being the premier drug available in the market. The drug "Inventive" was being manufactured and sold by *Swasth* Life Limited ("***Swasth***"), a sister concern of the Promoters, of the erstwhile *Jeevani*. *Swasth* had sometime in the year 2010 got assigned absolute rights to a few of the developed and completed R & D projects and IPRs of *Jeevani*. Before *Lifeline* could launch drug 'Novel', *Swasth* filed a suit for infringement of its IPRs in the Delhi High Court and was able to obtain an interim injunction against *Lifeline* and in the meanwhile, *Swasth* launched a similar cost effective drug in the market.

Lifeline filed an application before the Competition Commission of India (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. *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. Upon hearing the arguments of *Swasth*, *Lifeline* and the CCI, the Delhi High Court held that CCI has made *prima facie* finding, and has only directed for an investigation on the allegations made against *Swasth*. As such no adverse effect is caused to *Swasth* and therefore it found no reason to interfere with the investigation of the DG CCI and dismissed the writ petition filed by *Swasth*. On appeal, the Division Bench also did not find any reason to interfere with the order of Hon'ble Single Judge and accordingly *Lifeline* has come before the Supreme Court against the order of the Division Bench and the Supreme Court exercising its inherent powers has tagged the matters together for hearing.

STATEMENT OF ISSUES

1. Whether the special leave petition in the consolidated appeal is maintainable?
2. Whether the 'Scheme' approved by the Delhi High Court is liable to be set aside?
3. Whether the clause 2.1 of Share Sale Agreement fulfils all the requisites of an Arbitration Agreement?
4. Whether *Swasth* is involved in Anti-Competitive Practices and Abuse of Dominance in the pharmaceutical industry?

SUMMARY OF PLEADINGS

ISSUE I: WHETHER THE SPECIAL LEAVE PETITION IN THE CONSOLIDATED APPEAL IS MAINTAINABLE?

1. It is humbly submitted before the Hon'ble Supreme Court that the special leave petition filed by *Swasth* is maintainable as a substantial question of law is involved in the present case and the power under Article 136 can always be invoked when a question of law of general public importance arises and even question of fact can also be a subject matter of judicial review under Article 136. The High Court had erred in dismissing the appeal of *Swasth* against the order of the CCI as all facts were not placed on record causing miscarriage of justice.
2. The present case warrants a special stature as it is pervaded by errors and injustice. In the present case, proper inquiries were not conducted by the CCI. All alternative remedies were exhausted resulting in the appellants taking recourse to Article 136.

ISSUE II: WHETHER THE 'SCHEME' APPROVED BY THE DELHI HIGH COURT IS LIABLE TO BE SET ASIDE?

1. It is submitted before this Hon'ble Court that the 'Scheme' approved by the Hon'ble Delhi High Court is liable to be set aside. The Appellant (Foreign lenders) in this case constitute a separate class of creditors for whom no meeting was convened which is in contravention of section 391 of the Companies Act, 1956.
2. It is further submitted that the Publication of notice was not proper. *Jeevani* was a listed company with its registered office at New Delhi and its equity shares were listed at the Bombay Stock exchange. *Jeevani* issued a notice of meeting to its creditors by publishing an advertisement in a local English language newspaper and local language

newspaper containing the terms of the proposal and explaining its effect. *Jeevani* did not provide any notice to the foreign creditors by the company regarding the scheme of arrangement and the meeting of creditors. Proper disclosure of all information was not done and the merger was not in accordance with SEBI guidelines

ISSUE III: WHETHER THE CLAUSE 2.1 OF SHARE SALE AGREEMENT FULFILS ALL THE REQUISITES OF AN ARBITRATION AGREEMENT?

1. It is humbly submitted that Clause 2.1 of the Share Sale Agreement is an arbitration clause and hence any dispute arising between the parties must be referred for arbitration. It is submitted that the intention of the parties to enter into an arbitration agreement shall have to be gathered from the terms of the Share Sale Agreement and here the terms of the agreement clearly indicate an intention of the parties to the agreement, to refer their disputes to a private tribunal (empowered Committee) for adjudication

ISSUE IV: WHETHER *SWASTH* IS INVOLVED IN ANTI-COMPETITIVE PRACTICES AND ABUSE OF DOMINANCE IN THE PHARMACEUTICAL INDUSTRY?

1. It is submitted that *Swasth* was validly assigned absolute rights to a few of the developed and completed R & D projects and IPRs of *Jeevani* and *Swasth,* in its endeavor to protect its IPRs cannot be held to be abusing its dominance
2. It is also submitted that *Swasth* cannot be implicated for malicious prosecution and bad faith litigation and such acts cannot be construed as abuse of dominance

ARGUMENTS ADVANCED

ISSUE I: WHETHER THE SPECIAL LEAVE PETITION IN THE CONSOLIDATED APPEAL IS MAINTAINABLE?

It is humbly submitted that the Hon'ble Supreme Court, exercising its inherent powers under Order LV, Rule 5; and on the request of the parties appearing in the matter, have tagged the matter together for hearing and the special leave petition filed by the foreign lenders against the order of the Delhi High Court making the erstwhile *Jeevani* as respondents[1], and the special leave petition filed by *Swasth* against the order of Delhi High Court making *Lifeline* and CCI respondents,[2] now consolidated by the Supreme Court, is maintainable. It can be substantiated through the following enunciated reasons:

1.1 Substantial question of law is involved in the present case

It is submitted that the jurisdiction of Supreme Court under Article 136 can always be invoked when a question of law of general public importance arises and even question of fact can also be a subject matter of judicial review under Article 136. It is an untrammeled reservoir of power incapable of being confined to definitional bounds.[3] The Delhi High Court had erred in dismissing the appeal of foreign lenders as they had failed to take note of the fact that they are creditors, substantiated by the fact that there was an arbitral award which was pending in its favour.[4] Normally, in exercising its jurisdiction under Article 136, the Supreme Court does not interfere with the findings of fact concurrently arrived by the High Court unless there is a clear

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[1] Paragraph 7 of moot proposition

[2] Paragraph 13 of moot proposition

[3] *Kunhayammed v. State of Kerala,* AIR 2000 SC 2587

[4] Paragraph 6 of moot proposition

error of law or unless some important piece of evidence has been omitted from consideration,[5] hence the present case warrants a re-examination of the facts and evidence.

The test to determine "substantial question of law" are as follows:

(1) Whether directly or indirectly it affects substantial rights of the parties, or

(2) The question is of general-public importance, or

(3) Whether it is an open question in the sense that there is no scope for interference by the High Court with a finding recorded when such finding could be treated to be a finding of fact[6]

1.1.1 The present case warrants a special stature as it is pervaded by errors and injustice

In general, the Court will not grant special leave, unless it is shown that exceptional and special circumstances exist, that substantial and grave injustice has been done and that the case in question presents features of sufficient gravity to warrant a review of the decision appealed against.[7] In the present case, proper inquiries were not conducted, substantiated by the fact that the report of the DG has not yet been submitted.[8] The CCI based on the allegations made by *Lifeline* was of the *prima facie* view that *Swasth* may have abused its dominance but *Swasth,* in its endeavor to protect its IPR cannot be held liable of abusing its dominance which will be substantiated in the subsequent issues. It would be open to the Supreme Court to interfere with the concurrent findings of fact if there is infirmity of excluding, ignoring and overlooking the

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[5] *Mehar Singh v. Shri Moni Gurudwara Prabandhak Committee,* AIR 2000 SC 492

[6] *Chunilal Mehta & Sons Ltd. v Century Spinning & Mfg. Co. Ltd* (1962) AIR 1314 (SC).

[7] *Fokatlal Prabhulal Bhatt v. State of Gujarat,* (2004) 3 SCC 447

[8] Paragraph 3 of moot proposition

abundant materials and evidence.[9] In the present case, the lower courts have acted illegally,[10] and the order is erroneous.[11] There was a misapplication of the fundamental principle of law [12] in the present case as the Delhi High Court overlooked the fact that there was an assignment of absolute rights by *Jeevani* to *Swasth*[13] much prior to the merger which entitles them the latter to ownership over the specified R&D projects.

1.2 Special Leave is granted when substantial justice has not been done an exceptional or special circumstances exist, both the elements being present in the case

The power under Article 136 is to be exercised sparingly and in exceptional cases only. Whenever there is an injustice done to a party in a proceeding before a court or tribunal, or there is a miscarriage of justice, or when a question of law of general public importance arises, or a decision shocks the conscience of the Court, the power can be exercised.[14] The Supreme Court being not only a court of law but also a court of equity, [15] it should not remain silent in cases when the lower court acts without jurisdiction or in violation of principles of natural justice or without a proper appreciation of material on record or the submissions made.[16]

1.2.1. All alternative remedies exhausted

The Supreme Court has imposed on itself a restriction that before invoking the jurisdiction of the Court under Article 136, the aggrieved party must exhaust any remedy which may be available

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[9] *Dubaria v. Har Prasad,* (2009) 9 SCC 346

[10] *Sangram Singh v. Election Tribunal* AIR 1955 SC 425

[11] *BhikajiKeshao v. BrijLalNandlal,* AIR 1955 SC 610

[12] *Municipal Board v. State Transport Authority,* AIR 1965 SC 458

[13] Paragraph 11 of moot proposition

[14] *Dhakeswari Cotton Mills Ltd. v.CIT,* AIR 1955 SC 65

[15] *Kunhayammed v. State of Kerala,* AIR 2000 SC 2587

[16] *Panchanan Mishra v. Digambar Mishra,* (2005) 3 SCC 143

under the law before the lower appellate authority or the High Court.[17] There must be an exhaustion of alternative remedies before approaching the Supreme Court under Article 136.[18] In the present case, the writ petition filed by *Swasth* was dismissed by the Delhi High Court and subsequently by the division bench and no letters patent appeal or writ appeal lies against the impugned judgment.[19] Hence, owing to exhaustion of all remedies, the petitioners have approached the Hon'ble Supreme Court.

ISSUE II: WHETHER THE 'SCHEME' APPROVED BY THE DELHI HIGH COURT IS LIABLE TO BE SET ASIDE?

It is submitted before this Hon'ble Court that the 'Scheme' approved by the Hon'ble Delhi High Court is liable to be set aside. The Appellant (Foreign lenders) in this case constitute a separate class of creditors and under section 391 of the Companies Act, 1956 a meeting of creditors, or of the member and class of members has to be conducted as per the direction of the tribunal.

2.1 The foreign lenders of *Jeevani* can be attributed the status of creditors

It is submitted before this Hon'ble court that the 'foreign lenders', mainly foreign banks can be attributed the status of creditors. Every person having a pecuniary claim against the company, whether actual or contingent is a creditor.[20] The foreign lenders were providing financial assistance to the *Jeevani* under a consortium agreement entered into by the two parties.[21] Section 2 (k) of *The Securitisation and Reconstruction of Financial Assets and Enforcement of Security*

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[17] *Nirma Ltd. V. Lurgi Lenteges Energietechnik Gmbh* (2002) 5 SCC 520

[18] *Bal Ram Prasad v. State of Uttar Pradesh,* AIR 1981 SC 1575

[19] ORDER XXI, RULE 3(5) of Supreme Court Rules, 2013

[20] S.Ramanujam, *Mergers et al: Issues, Implications and Case Laws in Corporate Restructuring,*3rd edition, Lexis Nexis, Gurgaon, 2011, at p. 70

[21] Paragraph 6 of Moot Proposition

Interest Act, 2002 defines "financial assistance" as any loan or advance granted or any debentures or bonds subscribed or any guarantees given or letters of credit established or any other credit facility extended by any bank or financial institution. In *Re Sakarmari Steel and Alloys Ltd,*[22]it was stated that the court has to consider certain circumstances before giving its approval, though the fact that three-fourth in value agreed to accept the scheme would be a strong circumstances in favour of sanctioning the scheme by the court. The scope of inquiry by the court cannot be laid down by any rigid principles or formulae or on the basis of judicial decisions. The circumstances to be taken into account include the fact that the scheme is not detrimental to the interests of the creditors or members or public interest.

2.1.1 Foreign lenders constitute a separate class of creditors

It is submitted that the 'Foreign Lenders' constitute a separate class of creditors by virtue of their separate interest and obligations towards *Jeevani*. In *Maneckchowk & Ahmedabad Mfg. Co. Ltd*.,[23] it was held that it is a formidable difficulty to say what constitutes a class of creditors. Speaking very generally, in order to constitute a class, members belonging to the class must form a homogeneous group with a commonality of interest. However, in *Sovereign Life Assurance Co. v Dodd,*[24] the Court had to consider whether certain creditors formed a single class or two different classes. The Court held that the word "class" is vague, and to find out what is meant by it one must look at the scope at the section, which is a section enabling the court to order a meeting of a class of creditors to be called. Under section 391 of the Companies Act, 1956 the tribunal is empowered to order a meeting of the creditors or class of creditors. Where there exist more than one class of creditors, then a separate meeting must be conducted for each of them.

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[22] (1981) 51 Com Cases 266 (Bom)

[23] 40 Com Cases 819 (Guj)

[24] (1892) 2 QBD 573

In *Re Gujarat Lease Financing Ld.,*[25] a Scheme of Arrangement was proposed between a company and the debenture holders to the exclusion of consortium of Banks. The Gujarat High Court held that the debenture holders form a particular class and the objecting consortium of banks formed a separate class. Hon'ble Delhi High Court's order for approval of scheme should be reversed: In *Bank of Baroda Ltd* v. *Mahindra Ugine Steel Co Ltd.,*[26] it was held that the Court cannot discharge its duties unless sufficient materials are placed on records as regards the method and basis of valuation of shares of the merging companies. Counsel begs to state that the order of the Hon'ble Delhi High Court, dated 5th July 2013, for approving the scheme of arrangement of *Jeevani* and *Lifeline*,[27] can be challenged as the Hon'ble Delhi High Court ignored the foreign lenders and no notice was relayed to them. It is placed on record that the factsheet explicitly states that under the foreign arbitral award, dated 27th July 2010, *Jeevani* was to pay the foreign lenders the particular sum as stated in the arbitral award.[28] Hence, the Hon'ble Delhi High Court's order for approval of scheme should be reversed.

2.2 The requisites of S. 391 of the Companies Act, 1956 were not fulfilled

It is submitted that the validity of the merger between *Jeevani* and *Lifeline* is contended due to non-fulfillment of the requisites under section 391 which are enunciated as under:

2.2.1. Publication of notice was not proper

Jeevani was a listed company with its registered office at New Delhi and its equity shares were listed at the Bombay Stock exchange.[29] *Jeevani* issued a notice of meeting to its creditors by

[25] (2002) 6 Comp LJ 263 (Guj)

[26] 46 Com Cases 227 (1976) (Guj)

[27] Paragraph 5 of the factsheet

[28] Paragraph 6 of the factsheet

[29] Paragraph 1 of the Moot Proposition

publishing an advertisement in a local English language newspaper and local language newspaper containing the terms of the proposal and explaining its effect.[30] *Jeevani* did not provide any notice to the foreign creditors by the company regarding the scheme of arrangement and the meeting of creditors. In *G.V. Films Ltd. v Metage Special Emerging Market Fund Ltd.*,[31] the court, while considering the Scheme of Arrangement found that the creditors of the company were spread all over India. The notice published covered only a small region.

2.2.2. Proper disclosure of all information not done

Under S. 15(1)(i) of *The Securitisation Companies and Reconstruction Companies (Reserve Bank) Guidelines and Directions, 2003;* every securitisation company or reconstruction company shall, in addition to the requirements of schedule VI of the Companies Act, 1956, prepare the names and addresses of the banks/financial institutions from whom financial assets were acquired and the value at which such assets were acquired from each such bank/financial institutions and annex them to its balance sheet. Hence, the merger is in contravention of the aforementioned act because the amount payable to the foreign lenders under the foreign arbitral award should have been taken into consideration.

2.3 The Merger was not in accordance with SEBI Guidelines

There are certain requirements that every listed company has to fulfill before the Scheme is submitted for sanction to the Hon'ble High Court as per Securities and Exchange Board of India Circular no CIR/CFD/DIL/5/2013 Dated February 4, 2013 on the subject *Scheme of Arrangement under the Companies Act, 1956–Revised requirements for the Stock Exchanges and Listed Companies.* The obligations of a listed company, inter alia, include the duty of the listed

[30] Paragraph 5 of the Moot Proposition

[31] (2010) 154 Com Cases 252

companies which are desirous of undertaking a Scheme of Arrangement under Chapter V of the Companies Act, 1956, (Amalgamation/ Merger/ Reconstruction/ Reduction Of Capital, etc.) to file the Draft Scheme with the stock exchanges.[32] Such listed companies shall place before its Audit Committee the Valuation Report obtained from an Independent Chartered Accountant. The Audit Committee shall furnish a report recommending the Draft Scheme, taking into consideration, inter alia, the aforementioned valuation report.[33] Finally, the listed companies shall be required to include the Observation Letter of the stock exchanges[34] and then bring the same to the notice of the Hon'ble High Court at the time of seeking approval of the Scheme.[35] The designated stock exchange, upon receipt of the Draft Scheme and the documents referred to in Clause 5.1 above, shall forward the same to SEBI within 3 working days[36] and thereafter the stock exchanges shall process the Draft Scheme and forward their "Objection/No-Objection" letter on the Draft Scheme to SEBI,[37] which will then take requisite steps to approve/disapprove the scheme. It is submitted that in this present case, there was a clear violation of the aforesaid provisions by moving the Hon'ble Delhi High Court for the process of approval of the scheme and the same was ratified by the High Court on 5th July.[38] Hence, it is submitted that the scheme be set aside as it is explicit contravention of SEBI guidelines.

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[32] Clause 5.1 of the aforesaid circular

[33] Clause 5.2 of the aforesaid circular

[34] Clause 5.4(a) of the aforesaid circular

[35] Clause 5.4(b) of the aforesaid circular

[36] Clause 5.5 of the aforesaid circular

[37] Clause 5.6 and 5.7 of the aforesaid circular

[38] Paragraph 5 of Moot Proposition

ISSUE III: WHETHER THE CLAUSE 2.1 OF SHARE SALE AGREEMENT FULFILS ALL THE REQUISITES OF AN ARBITRATION AGREEMENT?

3.1. Clause 2.1 of the Share Sale Agreement is an Arbitration Clause

It is submitted that the intention of the parties to enter into an arbitration agreement shall have to be gathered from the terms of the Share Sale Agreement and here the terms of the agreement clearly indicate an intention of the parties to the agreement, to refer their disputes to a private tribunal (empowered Committee) for adjudication and willingness to be bound by the decision of such tribunal agreement, the words used are disclosing a determination and obligation to go to arbitration and not merely contemplating the possibility of going for arbitration. In the present case the clause 2.1 of share sale agreement explicitly seems to fulfill all the criteria mentioned in the Apex court Judgment in *Jagdish chander v. Ramesh Chander*.[39]

The above clauses must be tested in the light the following criteria as mentioned in the case of *Bihar State Mineral Dev. Corp. &. v. Encon Builders (I) Pvt. Ltd.*

The essential elements of an arbitration agreement are as follows:

1) There must be a present or a future difference in connection with some contemplated affair.
2) There must be the intention of the parties to settle such difference by a private tribunal.
3) The parties must agree in writing to be bound by the decision of such tribunal and the parties must be ad idem.[40]

3.1.1. There is a presence of Dispute involving legal rights, claims and issues arising from the Agreement and will be subject to judicial determination

The clause 2.1 of share sale agreement also makes it unambiguously apparent that all disputes involving the legal rights, claims and issues arising from the Agreement and judicial

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[39] *Jagdish Chander vs Ramesh Chander & Ors on 26 April, 2007*, CASE NO.: Appeal (civil) 4467 of 2002

[40] *Bihar State Mineral Development Corpn. v. Encon Builders (I) (P) Ltd*, 2003 (8) TMI 381

determination will be used for resolution of such dispute and this can be connoted from the extract of clause 2.1, which is "this agreement upon all questions and issues relating to the meaning, scope, instructions, claims, right or matters of interpretation of and under this agreement".

3.1.2. The Finality/binding nature of the decision of the empowered committee makes it evident that clause 2.1., is an Arbitration Agreement

It is submitted that the arbitration agreement must contemplate that the decision of the tribunal will be binding on the parties to the agreement.[41]The Clause 2.1 specifically uses words like "final, binding and conclusive on the parties to this agreement" and so it gives a clear view of the intention of parties to treat the decision of the committee as final or of binding nature. Hence without a pinch of doubt it can be asserted here that the clause 2.1 of the Share Sale Agreement is an Arbitration Clause. In the case of *Smt. Rukmanibai Gupta v. Collector, Jabalpur & Ors*[42], this Court dwelt upon the fact that disputes were referred to arbitration and the fact that the decision of the person to whom the disputes were referred was made final, as denominative of the nature of the agreement which the court held was an arbitration agreement. Also ***Parties are at "ad idem"*** In the case of *Shakti Bhog Foods Ltd. v. Kola Shipping Ltd.*[43], this Court held that from the provisions made under Section 7 of the Act, the existence of an arbitration agreement can be inferred from a document signed.

3.1.3. There is, as such, no requirement for using the word 'Arbitration'

Without prejudice to the averment raised above, it is relevant to mention that nowhere it is stipulated in the 1996 Act that parties must mention the name of the arbitrators in the arbitration

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[41] *K.K. Modi v. K.N. Modi*, 1998 (1) Arb LR 296

[42] *Smt. Rukmanibai Gupta v. Collector, Jabalpur & Ors*, (1980) 4 SCC 556

[43] *Shakti Bhog Foods Ltd. v. Kola Shipping Ltd*., (2009) 2 SCC 134

agreement for adjudicating the disputes that have arisen between the parties or which may arise in future. Thus, non-mentioning of the name of the arbitrator in the arbitration agreement does not make the arbitration clause nonexistent in law.[44]In fact in the share sale agreement clause 2.1 clearly mentions that the arbitrators must be three members comprising of executive level personnel. Even if the words 'arbitration' and 'arbitral tribunal (or arbitrator)' are not used with reference to the process of settlement or with reference to the private tribunal which has to adjudicate upon the disputes, in a clause relating to settlement of disputes, it does not detract from the clause being an arbitration agreement if it has the attributes or elements of an arbitration agreement.[45]

According to *Mohan Singh v. HP state Forest Corporation*[46], It was held that it is not necessary to constitute an arbitration agreement that the words 'arbitrator' or 'reference' or similar expressions should actually be used in the agreement. The court further elaborated that it is not always that when 2 persons agreed to be bound by a decision of their own choice that would constitute an arbitration agreement. In order to determine the real nature of the agreement, it is necessary to ascertain the intention of the parties at the time of entering the agreement. For this specific purpose, consideration must be given not only to the exact words of the agreement but also to the position, knowledge and skill of the person who whom the matter is referred for decision.

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[44] P C Markanda, Law relating to Arbitration and Conciliation, Lexis Nexis Butterworths Wadhwa, (eight Edition 2013), p. 177, also case can be cited ITC classic finance Ltd. V. Grapco mining and co. Ltd., 1998 (1) Arb LR 1

[45] *Jagdish Chander vs Ramesh Chander & Ors on 26 April, 2007*, CASE NO.: Appeal (civil) 4467 of 2002

[46] *Mohan Singh v. HP state Forest Corporation*, 1999(3) RAJ 73

3.2 The principle of effective interpretation dispenses away the unintended lacuna

The Supreme Court held that courts must strictly follow the "least intervention" policy in arbitration process and that they must only play a supportive role in encouraging the arbitration proceedings rather than letting it come to a grinding halt. The Supreme Court opined that where there is an omission which would be obvious even to an officious bystander the court should make good such omission to give effect to the arbitration agreement.[47] The defect in the arbitration clause may relate to the requirements mentioned above, but in most cases problems arise due to faulty drafting of the clause. Negotiators, especially corporate officers and counsel, are generally well versed in the subject matter of their business contract, but rarely master the same skills when it comes to drafting arbitration clauses.[48]

> *The Supreme Court held that although there were some errors in the drafting of the clause – such as the clause's failure to specify the procedure for appointment of a third arbitrator – the clause was not 'unworkable' or pathological. The Supreme Court held that courts are required to adopt a pragmatic approach and not a pedantic or technical approach while interpreting or construing arbitration clauses and must try to give effect to the intention of the parties to arbitrate – where this is clear. Therefore, when faced with a seemingly unworkable arbitration clause, it is the courts' duty to make the same workable within the limits permissible under the law.*[49]

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[47] India, arbitration friendly: supreme court brings Indian Arbitration Law up-to International Standards, Dispute Resolution Hotline, Nishith Desai Associates, (published on February 27, 2014), case can be cited: Shirlaw v. Southern Foundries, 1937 S. 1835

[48] Mala Sharma, Effective Interpretation Of Defective Arbitration Clauses: An International Approach, Effective Interpretation Of Defective Arbitration Clauses: An International Approach, Indian Council Of Arbitration, P. 13

[49] *Enercon (India) Ltd and Ors v Enercon Gmbh and Anr,* Civil Appeal No. 2086 of 2014 dated 14 February 2014.

So in a case of inartistic drafting, the court must see that if intention is clear from the point of view of the parties that they wished to submit to arbitration as a dispute resolution mechanism for any future disputes, then in such case the clause must be seen as an arbitration clause. Another prominent case is *VISA International Ltd. v. Continental Resources (USA) Ltd* [50], where it was held that no party can be allowed to take advantage of inartistic drafting of arbitration clause in any agreement as long as clear intention of parties to go for arbitration in case of any future disputes is evident from the agreement and the material on record, including surrounding circumstances. There are a plethora of cases in which it was held that jurisdiction clause doesn't vitiate arbitration.

ISSUE IV: WHETHER *SWASTH* IS INVOLVED IN ANTI-COMPETITIVE PRACTICES AND ABUSE OF DOMINANCE IN THE PHARMACEUTICAL INDUSTRY?

4.1 *Swasth* was validly assigned absolute rights to a few of the developed and completed R & D projects and IPRs of *Jeevani*

It is submitted before the Hon'ble Court that *Swasth* was validly assigned absolute rights absolute rights to a few of the developed and completed R & D projects and IPRs of *Jeevani*,[51] and as such has absolute rights to the acts of making, using, offering for sale, selling or importing those products.[52]

4.1.1 The assignment confers on Swasth absolute rights over the assigned projects

[50] *VISA International Ltd. v. Continental Resources (USA) Ltd*, (2009) 2 SCC 55

[51] Paragraph 11 of Moot proposition

[52] Section 48 (a) of *The Patents Act, 1970*

It is submitted that an assignment is essentially the transfer of all the rights held by the patentee to the assignee.[53] It denotes the transfer of ownership. This general rule may be attributed to three principle cases: *Troy Iron and Nail Factory v. Corning,*[54] *Hapgood v. Hewitt,*[55] and *Oliver v. Rumford Chemical Works.*[56]

4.2. *Swasth,* in its endeavor to protect its IPRs cannot be held to be abusing its dominance

It is submitted that *Swasth,* in its endeavor to protect its IPRs cannot be held to be abusing its dominance, which can be substantiated through the following contentions;

4.2.1 The IPR and R&D projects assigned to Lifeline were "objectively similar" to the ones assigned to Swasth

It is contented that the IPRs which were transferred to *Lifeline* vide the merger were "objectively similar" to the ones assigned to *Swasth* in the year 2012. It is submitted that persuasive precedence be drawn from the US Supreme Court's rationale in the case of *PPG Indus., Inc. v. Guardian Indus. Corp*[57] wherein the plaintiff and the licensee were companies that exchanged patent licenses. The parties agreed that the licensee would have no rights to assign the license without the consent of the plaintiff. When the licensee merged with the defendant and continued to use the plaintiff's license, the plaintiff sued for infringement. The Hon'ble court held that the surviving corporation did not acquire license rights from the acquired corporation.

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[53] Sheldon W. Halpern et al, *Fundamentals of Intellectual Property Law: Copyright, Patent, and Trademark* 250 (1999).

[54] 55 U.S. 193 (1852)

[55] 119 U.S. 226 (1886)

[56] 109 U.S. 75 (1883)

[57] 597 F.2d 1090, 202 U.S.P.Q. 95 (6th Cir. 1979)

4.2.2 The new drug introduced by Lifeline, as such did not involve an inventive step

It is submitted that the new drug introduced by *Lifeline*, i.e. "Novel" did not involve an inventive step from the drug "Inventive" that was the premier drug available in the market. The inventive step should be more than a mere workshop improvement.[58] The patent must be new and useful and as such constitutes the violation of product patent of *Swasth. In Novartis AG & Ors. v. Union of India & Ors.*,[59] the Supreme Court stated that new product in chemicals and especially pharmaceuticals may not necessarily mean something altogether new or completely unfamiliar or strange or not existing before. The test is that there must be enhanced efficacy in relation to **S. 2(j), (ja), (l) and 3(d)** of *The Patents Act, 1970***.**

4.3 *Swasth* cannot be implicated for malicious prosecution and bad faith litigation and such acts cannot be construed as abuse of dominance

It is submitted that *Swasth* cannot be implicated for malicious prosecution and bad faith litigation as the litigation was on a valid point of law to prevent the other party from unjust enrichment and as such did not involve any vexatious claim or fraudulent litigation.[60]

It is also submitted that reasonable use of intellectual property rights are excluded from the rigors of S.3 and S. 4 of *The Competition Act,* 2002 and *Swasth* was acting in pursuance of furthering its research and innovation which doesn't amount to misuse, manipulation, distortion, contrivance or embellishment of ideas of another party.[61]

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[58] *Bishwanath Prasad Radhey Shyam* v. *Hindustan Metal Industries* (1979) 2 SCC 511

[59] 2013 (54) PTC 1 (SC) at p. 80

[60] *Sova Rani Dutta* v. *Debabrata Dutta* AIR 1991 Cal 185

[61] *Manju Bhardwaj v. Zee Telefilms Ltd* (1996) 20 CLA 229 and *Dr Vallal Peruman v. Godfrey Phillips (India) Ltd* (1995) 16 CLA 201

PRAYER

Wherefore it is prayed, in light of the issues raised, arguments advanced, and authorities cited, that this Hon'ble Court may be pleased to:

1. Declare that the Special Leave Petition is maintainable under Article 136 of the constitution of India, 1950.

2. Declare that the Hon'ble High Court of Delhi erred in dismissing the appeal of Foreign Lenders for disapproving the scheme of merger u/s 391-394 of the Companies Act, 1953.

3. Declare that the order passed by the Hon'ble High Court of Delhi against Swasth making it liable for acts construing to abuse of dominance was perverse and is liable to be quashed.

4. Declare that the said clause of the Share Sale Agreement between the promoters and Lifeline is an arbitration clause and subsequently refer the said matter for arbitration in order to ensure amicable settlement.

And Pass any other Order, Direction, or Relief that it may deem fit in the Best Interests of Justice, Fairness, Equity and Good Conscience.

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

Sd/-

(Counsel *for* the Appellant)