TEAM CODE: C1

IN THE HON'BLE SUPREME COURT OF INDIA

In matters between:

I.

FOREIGN LENDERS **...Appellant**

AND

LIFELINE LIMITED &

(ERSTWHILE KNOWN AS LIFELINE LIMITED AND JEEVANI LIMITED)

...Respondents

II.

LIFELINE LIMITED **...Appellant**

AND

PROMOTERS, JEEVANI LIMITED **...Respondent**

III.

SWASTH LIFE LIMITED **...Appellant**

AND

LIFELINE LIMITED &

COMPETITION COMMISSION OF INDIA **...Respondents**

Written Submission on behalf of the Appellants

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STATEMENT OF JURISDICTION

The Appellants in each case humbly submit before the Honorable Supreme Court of India, the memorandum for the Appellants in the case of Foreign Lenders v. Lifeline Limited (Erstwhile known as Lifeline Limited & Jeevani Limited) ***and*** Lifeline Limited v. Promoters, Jeevani Limited ***and*** Swasth Life Limited v. Lifeline Limited & Competition Commission of India filed as an appeal before this Hon'ble Court from the decisions of the Hon'ble High Court of Delhi.

The present memorandum sets forth the facts, contentions and arguments in the present case.

SUMMARY OF FACTS

Jeevani Limited is a listed public company, incorporated in 1990 with its registered office in New Delhi. Jeevani is one of the leading market players in the pharmaceutical manufacturing industry. As of July 2011, the company has been looking for opportunities for expansion in the market. Lifeline Limited is another listed public company, incorporated and registered in Mumbai. It is involved in food production and is looking to foray into the pharmaceutical sector.

November 2011

Lifeline approached Jeevani for a possible partnership to venture into the pharmaceutical sector. Both companies initiated negotiations for a possible merger.

27 January 2012

It is decided that Jeevani would completely merge into Lifeline and all assets and liabilities of Jeevani would be transferred to Lifeline. A Scheme of arrangement is prepared for the same.

5 March 2012

Scheme is finalised and filed before the Bombay Stock Exchange for approval. However, such approval was not provided.

23 March 2012

The three promoters of Jeevani, also majority shareholders in Jeevani, agree to sell their entire promoter shareholding to Lifeline via a separate sale agreement. This agreement contained specific representations regarding disclosure of information by either party, which may be vital to the transaction. Further, all intangible properties including active research and development and intellectual property rights belonging to Jeevani would also become Lifeline's property, with all rights vested in Lifeline.

30 March 2012

Jeevani and Lifeline jointly file an application under Section 391 of the Companies Act, 1956 for approval of Scheme by the Delhi High Court. In accordance with the provisions, Jeevani issued notice of meeting to its creditors by publishing an advertisement in a local language and local English language newspaper. The meeting was held and a resolution was passed in support of the Scheme, by a vote of majority.

5 July 2012

Delhi High Court further approved the Scheme. All other relevant approvals were taken by Jeevani. Lifeline also received the Bombay High Court's approval for the Scheme.

Prior to public announcement by Jeevani, arbitration proceedings initiated in a tribunal in Hong Kong, against Jeevani by certain creditors, mainly foreign banks, for the payments to be made under a consortium agreement between the lenders and Jeevani. The award passed on 27 July 2010, in favour of the foreign lenders, directing Jeevani to pay amounts to them. No proceeding for enforcement of such award till date.

Early August 2013

The foreign lenders of Jeevani make an application before Delhi High Court for recall of order dated 5 July 2013 stating, they constitute a separate class of creditors and they had not received notice of the meeting. The Company contended that no notice was required to be sent to the foreign lenders as they are not creditors of the Company and do not constitute a separate class. The Hon'ble Company Judge as well as on appeal, the Division Bench dismissed the application of the foreign lenders. This matter is now before this Hon'ble Court.

After the merger, Lifeline continued with the operations of the erstwhile Jeevani, including supplying generic drugs to the United States of America. However, Lifeline received notices from the US Food and Drug Administration (FDA) stating the drugs produced were of below par quality and violate the parameters set out by the FDA. On further scrutiny, Lifeline discovered the investigation by the FDA on

the drugs produced by Jeevani had commenced before the merger took place. Lifeline filed a suit for breach of contract against the Promoters of Jeevani before the Delhi High Court claiming compensation for wrongful gain of Promoters by way of defrauding and misrepresenting a bonafide purchase by Lifeline. The Promoters contended that the High Court did not have jurisdiction as the Share Sale Agreement dated 23 March 2013 had an arbitration clause. Lifeline contended that no such clause existed. Upon differing opinions of the Court, even on appeal, this matter is now before this Hon'ble Court.

Meanwhile, Lifeline decided to introduce a new life saving drug called 'Novel', which it created upon further developing the active research and development which was originally Jeevani's property. Another drug 'Inventive' is the premier drug in the market, manufactured by Swasth, a sister concern of the Promoters of Jeevani. Sometime in 2010, Swasth got assigned a few of the complete and developed research and development projects and intellectual property rights of Jeevani. Before Lifeline could launch 'Novel', Swasth filed a suit for infringement of its intellectual property, stating 'Novel' is substantially similar to 'Inventive' and alleged that it was based on the intellectual rights assigned to Swasth. An interim injunction was obtained by Swasth, which restrained the release of 'Novel'. During this time, Swasth launched a similar cost effective drug and cornered a large chunk of the market, after which it withdrew its case and vacated the injunction.

Upon this, Lifeline filed an application with the Competition Commission of India (CCI), stating Swasth had abused its dominant position by indulging in bad faith litigation. Finding a prima facie establishment of such fact, the CCI passed an order directing the Director General of the CCI to investigate in the matter.

Swasth, aggrieved by the Order of the CCI, filed a writ petition in the Delhi High Court stating that its endeavour to save its intellectual property rights cannot be seen as abuse of dominant position. The High Court dismissed the writ petition, stating that the investigation would continue as no adverse effect has been caused to Swasth. On appeal, the dismissal was upheld. At present, the matter is before this Hon'ble Court.

STATEMENT OF ISSUES

I. WHETHER OR NOT THE ORDER DATED 5.07.2012 APPROVING THE SCHEME OF ARRANGEMENT BETWEEN THE RESPONDENTS CAN BE RECALLED?

II. WHETHER OR NOT:

(i) THERE IS AN ARBITRATION CLAUSE PRESENT IN THE SHARE SALE AGREEMENT?

(ii) THERE HAS BEEN A BREACH OF CONTRACT?

III. WHETHER OR NOT THE APPELLANT HAS ABUSED ITS DOMINANT POSITION?

SUMMARY OF ARGUMENTS

I. WHETHER OR NOT THE ORDER DATED 5.07.2012 APPROVING THE SCHEME OF ARRANGEMENT BETWEEN THE RESPONDENTS CAN BE RECALLED?

The order approving the scheme must be recalled. The Appellants not only fall under the category of creditors but they also constitute a separate class of creditors. Considering such aspects, the statutory requirements to be followed before the presentation of a scheme to the Court, as under the Companies Act, 1956 and the Companies (Court) Rules, 1959 was not followed.

II. WHETHER OR NOT:

(i) THERE IS AN ARBITRATION CLAUSE PRESENT IN THE SHARE SALE AGREEMENT?

(ii) THERE HAS BEEN A BREACH OF CONTRACT?

The Respondent has not obliged with the contractual duties as under the Share Sale Agreement entered into by the parties as the Respondent has defrauded and misrepresented material facts with respect to the sale. Further, the existence of an arbitration clause is refuted as the clause of the Agreement clearly bestows jurisdiction regarding the subject matter of the Agreement with the courts of Delhi.

III. WHETHER OR NOT THE APPELLANT HAS ABUSED ITS DOMINANT POSITION?

The Appellant has not abused its dominant position. It has acted to prevent its IPRs from being exploited. Mere large share of the market is not equivalent to abuse of dominant position. Further, the investigation of the second Respondent causes an adverse effect to the Appellant where there is no dominant position or abuse of such position thereof.

BODY OF PLEADINGS

I. WHETHER OR NOT THE ORDER DATED 5.07.2012 APPROVING THE SCHEME OF ARRANGEMENT BETWEEN THE RESPONDENTS CAN BE RECALLED?

It is submitted before this Hon'ble Court that the order dated 5th July 2013 must be recalled in the interests of justice and equity. The approved scheme must be recalled on the belowmentioned grounds:

1.1. An arbitral award lies in the favour of the Appellants which has not been enforced yet making such party the creditors of the Respondent. The foremost issue is whether the Appellants will be creditors of the Respondent. Under a scheme of arrangement, the secured creditors after obtaining an arbitration award do not cease to be secured creditors and still remained bound by the terms.[1] As per the principle laid down above, the Appellants have secured an arbitral award, making them judgment creditors where the award has not been enforced. The non-enforcement of the award cannot disqualify them from being creditors of the Respondent.

The arbitral award was passed in Hong Kong on 27th July, 2010. Hong Kong was not recognised by the Indian Government as a reciprocatory territory at the time of the passing of the arbitral award. An arbitral award made in a territory of a non reciprocating state or a state to which the Geneva Convention or the New York Convention applies but has not been notified by the Central Government is considered as a Non-Convention foreign award in India. The law is not clear on the effect of a non-convention foreign award since the overruling of *Bhatia International*[2] with respect to an award given after 6th September, 2012. Thus different possibilities must be addressed on such issue. The first approach that must be looked at is that where arbitration takes place in a non-convention country the award is not considered a foreign award. It will be considered a domestic

[1] Infrastructure Leasing and Financial Services Ltd. v. BPL Ltd., (208) 144 Com Cases 144.

[2] (2002) 4 SCC 105.

award.[3] As a rule, a domestic arbitral award is itself legally enforceable as a decree of the court after three months on the date on which it was received by the parties, provided that no application for setting aside of the order was made, or if it has been made it has been rejected.[4] Non-convention foreign awards are enforceable in India under common law on grounds of justice, equity and good conscience.[5]

The second approach that could be considered is the decision of the Bombay High Court where it has observed that the reasoning contained in the decision and the interpretation provided to certain sections of the Arbitration Act should be applicable even in respect of arbitration agreements entered into prior to 6 September 2012.[6] Following the abovementioned principle, even though the arbitral award was made in 2010 when Hong Kong was not recognised by the Central Government, S. 44 of the Arbitration and Conciliation Act, 1996, can now be seen to include awards made pre-6 September 2012 and hence the burden of enforcing such an award lies on the Appellants. For a foreign award to be made enforceable in India as a decree of the court, the Appellant must seek the enforcement of the award before the courts in India. Considering the limitation period that may exist upon the enforcement of the award, Article 136 of the Limitation Act, 1963 will come into force which states that for the execution of any decree or order of a civil court the period of limitation is twelve years. This period starts after the passing of the decree or order.[7] Therefore, the

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[3] *Bhatia International*, (2002) 4 SCC 105.

[4] ASHWINIE KUMAR BANSAL, ARBITRATION AGREEMENTS & AWARDS: LAW OF INTERNATIONAL AND DOMESTIC ARBITRATION, 428 (Universal Law Publishing Co., 2nd Ed.).

[5] Badat & Co., Bombay v. East India Trading Co., AIR 1964 SC 538.

[6] Konkola Copper Mines (PLC) v Stewarts Lloyds of India Ltd , Appeal (L) No. 199 of 2013 in Arbitration Petitioner No. 160 of 2013 with Notice of Motion (L) No. 915 of 2013; and Appeal (L) No. 223 of 2013 in Review Petition No. 22 of 2013 in Arbitration Petition No. 160 of 2013.

[7] T. R. DESAI, COMMENTARY ON THE LIMITATION ACT, 1289 (Universal Law Publishing Co., 10th Ed.).

arbitral award that is held by the Appellants can be enforced as the limitation period has not expired and they still exist as creditors of the Respondents. In cases where a party has obtained a foreign arbitral award and where such award has not yet been enforced, such party will still be considered a creditor.[8]

1.2. The Appellants constitute a separate class of creditors of the erstwhile Jeevani Ltd. Creditor includes any person having any sort of pecuniary claim against the company. The holder of an arbitral award will have different interest as compared to the ordinary creditors that a company tends to have which may be trade, sundry, promoters etc. The decree holder will seek for the enforcement of the award in the Indian courts as well as may seek specific obligations by virtue of such enforcement. A decree holder will be considered to be a separate class of creditors of a company.[9] An arbitral award needs specific enforcement and is a statutorily enforced debt as has been mentioned in the previous submissions.

When a company merges with another, it is important to take into account the interests and the liabilities that is owed to certain parties. The approval of the creditors (each class of them) has to be obtained at specially convened meetings as per the high court's directions.[10] In order to constitute a class, members belonging to the class must form a homogeneous group with commonality of interest.[11] The Appellants cannot be considered to have a commonality of interest with the other creditors of the Respondent. This could be in terms of their interests, or in terms of the enforcement of the amounts that are owed to them.[12] The thinking and manner of acting upon their interests of

[8] Vinayak Oils and Fats Pvt. Ltd. v. Andre (Cayman Islands) Trading Ltd., 2005 (2) ARBLR 551 Cal.

[9] Serajganj Loan Office v. Nilkantha Lahiri A.I.R. 1935 WB 777.

[10] Companies Act, 1956, Section 391(1).

[11] Maneckchowk & Ahemedabad Mfg. Co. Ltd., In Re (1970) 40 Com Cases 819 (Guj); Sovereign Life Assurance Co.v. Dodd, (1892) 2 QBD 573.

[12] In re, Ipco Paper Mills Ltd**.,** [1984] 55 Comp Cas 281 (Bom).

the other creditors of the Respondent cannot be construed to be the same as that of the Appellants. It is important that the rights and interests of the creditors are taken care of during the classification of the creditors.[13] It is for the company to decide the different classes of creditors, in accordance with what the scheme purports to achieve.[14] Where the classes are not properly formed, the courts approval is questionable and must be reversed.[15] The fact that there has been no proper class meeting is fatal to the approval of the scheme and makes the scheme questionable.[16]

As per the arbitral award dated 27 July 2010, certain amounts were to be paid to the Appellants by Jeevani Ltd. Such amount still being due to them classifies the Appellants as creditors of the Respondents and considering that they have separate interests from that of the other creditors of the Respondent should be treated as a separate class.

1.3. The statutory requirement to provide a notice to the Appellants has not been complied with. Notice of the meeting should be given to all the members of the company or all the creditors.[17] If the court has approved a scheme when all the creditors have not been notified, such a scheme can be sought to be recalled.[18] The Companies Act, 1956 specifically states that the approval of the creditors must be taken after sending such creditors the requisite notice.[19] Additionally, notice of the meeting given to the creditors must be adequate. The adequacy of the notice has to be considered from the point of

[13] S RAMANUJAM, MERGERS ET AL, 391 (LexisNexis Butterworths Wadhwa Nagpur, 3rd Ed, 2012).

[14] Jaypee Cement Ltd. Re. (2004) 122 Com Cases 854.

[15] S RAMANUJAM, *supra* note 13 at 245.

[16] In Re, Tea Corpn. Ltd., Sorsbie v. Tea Corpn. Ltd. [1904] 1 Ch.D. 12 (C.A.).

[17] Indian Cresent Bank Lts., Re, (1949) 53 CWN 183;Bhagat Ram Kohli v. Angels Insurance Co. Ltd., (1937) 7 Com Cases 161.

[18] Kaveri Entertainment Ltd, Re, (2003) 45 SCL 294.

[19] Mahendra Kumar Sanghi v. Ratan Kumar Sanghi, (2003) 44 SCL 592 (Raj).

view of the persons receiving it.[20] Where a number of creditors have not been given the notice, the scheme cannot be rightly approved even if it has been passed by three-fourth majority of the creditors who attended the meeting and even if approved can be questioned.[21] Further, Rule 73 of the Company (Court) Rules, 1959 deals with the notice of the meeting. It states that the notice of the meeting should be given to the creditors and shall be sent to them individually by the Chairman appointed for the meeting, or, if the Court so directs, by the company (or its Liquidator), or any other person as the Court may direct, by post under certificate of posting to their last known address not less than 21 clear days before the date fixed for the meeting. It shall be accompanied by a copy of the proposed compromise or arrangement and of the statement required to be furnished under S. 393, and a form of proxy. The notice under S. 391 must be sent individually to each creditor.[22] It can be clearly seen that Rule 73 has not been complied with in terms of the notice having been sent to the creditors individually. The Respondents published a notice only in the local English and local language newspapers and have not complied with the mode of sending a notice to individual creditors as provided for under Rule 73. The notice for such meetings must also be sent to each creditor[23] which was not carried out by the Respondents. The mode of giving notice in the present case cannot be considered to be an adequate notice. On such a ground this order approving the scheme of arrangement between the Respondents must be recalled on the *prima facie* ground that the provisions of S. 391 of the Companies Act, 1956 have not been followed. As explained above, the standard to be followed in giving notice to creditors has not been followed by the Respondents, who have only met with the bare minimum requirements.

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[20] C.R. DATTA ON THE COMPANY LAW, 5206 (LexisNexis Butterworths Wadhwa Nagpur, 6th Ed., 2008).

[21] Re Auto Steering India Pvt Ltd [1977] 47 Com Cases 257 (Del).

[22] K.R. CHANDRATRE, COMPANY MEETINGS, LAW PRACTICE AND PROCEDURE, 862 (LEXISNEXIS BUTTERWORTHS WADHWA NAGPUR, 2ND ED.).

[23] Court Practice Note, (1934) WN 142.

By virtue of such submissions, the Appellants are creditors of the Respondent by way of the arbitral award. Since they are a decree holder, they will constitute a separate class of creditors due to a commonality of interest that may not exist with the other creditors. Further, they ought to have received a notice regarding the proposed scheme. As the provisions of the Companies Act, 1956 were not adhered to and the meetings that were statutorily required were not held such an approved scheme is liable to be set aside.

II. WHETHER OR NOT:

(i) THERE IS AN ARBITRATION CLAUSE PRESENT IN THE SHARE SALE AGREEMENT?

(ii) THERE HAS BEEN A BREACH OF CONTRACT?

It is humbly submitted before this Hon'ble Court that clause 3.1 of the Share Sale Agreement (SSA) clearly states that any disputes touching upon the subject matter of such agreement is subject to the jurisdiction of the Delhi courts thus making such Hon'ble Court the right forum to approach in the present matter. It is also submitted before this Hon'ble Court that the Respondents in the present case have acted in a manner that is not *bona fide* and have misled the Appellants thus breaching their contractual obligations

2.1. There is no arbitration clause that is present in the SSA. The share sale agreement entered into by the parties specifically states that the courts of Delhi will have jurisdiction over all disputes touching upon the subject matter of the agreement. The Respondents contention that this matter is to be dealt through arbitration is opposed, as there is no arbitration clause in the SSA. Any general reference stating that all disputes will be referred to arbitration cannot be said to be an arbitration agreement, more particularly so when one of the parties had filed a suit under another clause in the agreement which states that courts in a particular state will have exclusive jurisdiction in the event of any

legal/judicial proceeding.[24] If 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 such agreement.[25] In an arbitration agreement, what is essential is that the parties should intend to make a reference or submission to arbitration, and should be *ad idem* in this respect.[26] In *Star Trading Corporation v. Rajratna Naranbhai Mills Company Ltd,*[27] the Court observed that "an arbitration agreement does not in any way oust the jurisdiction of the court which is otherwise competent to entertain and decide a dispute. In other words, there is no antithesis between an arbitration agreement and the jurisdiction of the court to entertain a dispute covered by the arbitration agreement."

The dispute must be covered by the arbitration clause in question which is a pre-requisite for assumption of jurisdiction by an arbitrator.[28] With respect to the present case, the Share Sale Agreement very clearly mentions that the Committee comprising of three executive level company personnel will be constituted only for the purpose of interpretation, meaning and scope of the Agreement, and not in the case of any disputes such as breach of contract, arising between the parties to the Agreement, as is argued.

2.2. Even if there is an existing arbitration clause in an agreement, where there is fraud by a party, the arbitration clause is vitiated. In the case of *India Household and Healthcare Ltd. v. LG Household*

[24] Sankar Sealing Systems Pvt Ltd v. Jain Motor Trading Co., 2004 (1) Arb LR 496 (Mad).

[25] Teamco Pvt Ltd. V. T.M.S. Mani, AIR 1967 Cal 168 (DB); Satyam Shivam Sundram v. Blue Star Ltd., AIR 2006 NOC 695 (Ori).

[26] O. P. MALHOTRA, LAW AND PRACTICE OF ARBITRATION AND CONCILIATION, 359 (LexisNexis Butterworths Wadhwa Nagpur, 3rd Ed.).

[27] (1971) 41 Comp Cas 1023.

[28] O. P. MALHOTRA, *supra* note 26 at 365.

and Healthcare Ltd.[29], the Supreme Court held that where the existence of an arbitration clause can be found, apart from the existence of the original agreement, the courts would construe the agreement in such a manner so as to uphold the arbitration agreement. However, when a question of fraud is raised the same has to be considered differently, since fraud vitiates all sorts of solemn acts. In order to constitute fraud such acts should have been done by the party to the contract in order to deceive the other party, or to induce him to enter into the contract.[30] A fraud is an act of deliberate deception with the design of securing something by taking undue advantage of another.[31]

In this present instance, it can be clearly seen that the Respondents have acted in a fraudulent manner by not providing valid and material disclosure in terms of the investigation that the FDA had undertaken. The SSA contained specific representations regarding disclosure of information that may be vital to the transaction. The erstwhile Jeevani Ltd had a global presence with its products being sold in several countries including USA, it was necessary for the Respondents to divulge such information to a prospective buyer as such investigation would affect the business that shall now be carried out by such buyer. The FDA investigation was concealed by the Respondents with *mala fide* intention to ensure that they get an inflated price for their shares. In such a case of fraud, the existence of an arbitration agreement, even if it may seem to exist cannot be upheld.

2.3. There has been a breach of contract by the Respondents. To prove fraud, it must be proved that representations made were false to the knowledge of the party making them, that they were made for the purpose of being acted upon and that they were believed and acted upon and caused the actual damage alleged.[32] The Respondents did not disclose the existence of such investigations so as to ensure that the agreement would be carried out to safeguard their interests and to ensure a

[29] (2007) 5 SCC 510.

[30] Ram Chandra Singh v. Savitri Devi, (2003) 8 SCC 319; RC Thakkar v. Gujarat Hsg Board, AIR 1973 Guj 34.

[31] S.P. Chengalvaraya Naidu v. Jaganath, (1994) 1 SCC 1.

[32] Peoples' Insurance Co v. Sardar Sardul Singh Caveeshar, AIR 1962 Punj 543.

profitable sale which may have been affected if such disclosure was made. These representations were fraudulent in nature and the Respondents failed in their contractual duty of making the other party aware of all the relevant factors thus making them liable of a breach in contractual obligations

Where a vendor did not disclose to the purchaser of property about a material defect in the title that the property agreed to be sold was the subject matter of a pending litigation and attachment, the non-disclosure was held to be a fraudulent act and the purchaser was entitled to rescind the contract and claim back the earnest money.[33]

The Respondents have acted in a manner that is a breach of their contractual duty in terms of disclosure of vital information to the Appellants.

By virtue of the submissions above there does not exist a valid arbitration clause in the Share Sale Agreement. Additionally, fraud vitiates the possibility of the existence of an arbitration clause and there is a clear case of fraud and misrepresentation by the Respondents.

III. WHETHER OR NOT THE APPELLANT HAS ABUSED ITS DOMINANT POSITION?

The Appellant humbly submits before this Hon'ble Court that it has not abused its dominant position in any manner or as per the provisions of the Competition Act, 2002. The Appellant further submits that they have acted in a manner justified by law and with *bona fide* intention in order to protect their rights and interests.

3.1. There has been no establishment of the Appellant having a dominant position. It is submitted that in order to state that an entity is acting in a manner that is abusing its dominant position, it is necessary to establish the dominant position in the market. In the present case, the facts do not indicate in any

[33] Jaswant Rai v. Abnash Kaur (1974) ILR 1 Del 689.

manner a clear dominant position being held by the Appellant. It is only stated that upon the launch of its new drug, the Appellant 'cornered' a large chunk of the market.

3.2. The Appellant has acted in a manner within the four corners of the Competition Act, 2002 and has not abused its dominant position. In the present case the Appellant has not violated the provisions of S. 4 of the Competition Act, 2002. Nevertheless, since the Respondents have been alleging that there has been an abuse of dominant position by the Appellant, it is necessary to look into this aspect. It is humbly submitted that even if there did exist a dominant position, there has been no abuse of such position thereof. It cannot be rightly said that the Appellant is acting in a wrongful manner merely because the Appellant has a sufficiently large market share. It is the right of the Appellant to protect its IPRs and this cannot be construed to mean an abuse of dominant position.[34] If an entry barrier is alleged in terms of a patent, which is an absolute advantage it cannot be considered to be an abuse of dominant position.[35] It is important to distinguish between growth due to efficiency and product superiority leading to a larger market share and the wilful restriction of acquisition and maintenance of market power.[36] It is humbly submitted that the Appellant has not manipulated the market in such a manner so as to ensure the elimination of competitors. There is also no predatory behaviour that has been exercised by the Appellant as the actions taken were in order to protect the absolute rights in terms of IPRs vested in the Appellant. It is legitimate for an undertaking to sell its product or services below the average cost to defend itself against competition.[37] Legitimate competition may involve certain level of aggressive behaviour. However this behaviour cannot be construed as anti-competitive in nature.[38] In *Nordenfelt v. Maxim*

[34] D.P. MITTAL, COMPETITION LAW AND PRACTICE, 319 (Taxmann, 3rd Ed.).

[35] Raghavan Committee Report, 4.4.8.

[36] S.M. DUGAR, GUIDE TO COMPETITION LAW, 820 (LexisNexis Butterworths Wadhwa Nagpur, 5th Ed.).

[37] *Id.* at 827.

[38] *Id.* at 921.

Nordenfelt Guns and Ammunition Co.[39] it was held that "It is sufficient justification, and indeed, it is the only justification if the restriction is reasonable in reference to the interest of the parties concerned and reasonable in reference to the interests of the public so framed and so guarded as to afford adequate protection to it the party in whose favour it is imposed, while at the same time is in no way injurious to the public."

3.3. The Appellant has the rights to protect its IPRs and is only acting in a competitive manner to protect its absolute rights. The Appellant has been assigned absolute rights to a few of the developed and completed R&D projects and IPRs of the erstwhile Jeevani Ltd. The drug, 'Novel' that was to be launched by the Respondent was substantially similar to the Appellant's drug 'Inventive'. Defending ones market position or market share is perfectly legal and legitimate.[40] The current market share is necessary but insufficient pre-requisite for dominance. IPRs are monopolistic rights that have been granted to a specific party. The owner has all the rights to exploit them and also the right to prevent others from doing so.[41] The law relating to IPRs gives the right-holder the right to exclude others from the use of his monopoly right, absolutely or on terms. An undertaking in a dominant position is entitled to protect its commercial interests, if it is threatened and takes such reasonable steps as it deems appropriate.[42]

3.4. The CCI has not acted in a *bona fide* manner. They have passed an order regarding an investigation to be made into the actions of the Appellant even without the existence of any *prima facie* evidence of an abuse of dominant position. It was held in the order of the CCI *In re, Gujarat Gas Company*[43], that if there is no *prima facie* evidence that the conduct of the party in question is abusive of the provisions of S. 4, then there is no *prima facie* case that is made to refer such matter for

[39] [1894] AC 535.

[40] Raghavan Committee Report, 4.4.9.

[41] United States v. General Electrical Company et al. 272 US 476.

[42] United Brands Co. v. Commission (1978) ECR 207.

[43] Case no. 50/2011, Order of the CCI under S. 26(1) of the Competition Act, 2002.

investigation to the DG CCI. Such investigation is bad in law and the CCI has not acted in conformity with its duties and functions thus wrongly affecting the Appellant who is acting in a manner that is reasonably expected by law and as any prudent business person would act.

Therefore, it is submitted that the Appellant has in no way abused its dominant position, if any; through its actions as such action was necessary to protect its own interests and rights. Further, the order of the CCI is bad in law and is not in conformity with the functions that it has been assigned.

PRAYER

Wherefore, in the light of the issues raised, arguments advanced, reasons given and authorities cited, it is humbly prayed before the Hon'ble Supreme Court to:

1. Allow the appeals.
2. Recall the order given by the High Court of Delhi, dated 5th July, 2012.
3. Award compensation to the Appellant for breach of contractual duty by the Respondent.
4. Declare that the Appellant is acting as per the provisions of Competition Act, 2002.

And any other relief that this Hon'ble Court may be pleased to grant in the interest of justice, equity and good conscience.

And for this act of kindness, the Appellants shall as duty bound ever pray.

Counsel for Appellants