TEAM CODE- D1

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

IN THE HON'BLE SUPREME COURT OF INDIA

FOREIGN
LENDERS……..……..Petitioners
V/S
LIFELINE LIMITED……...Respondent

AND

LIFELINE
LIMITED…….…….Petitioners
V/S
PROMOTERS……...…….…..Respondents

AND

SWASTH……..……..Petitioners
V/S
DG CCI AND
LIFELINE……...…….…….Respondents

(6TH SEPTEMBER 2014)

MEMORIAL SUBMITTED ON BEHALF OF PETITIONERS

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Statues:

Constitution:

Regulations and rules:

Indian case laws:

18. In Re. Hawk Insurance Co. Ltd, (2001) 2 Butterworths Company Law Cases 480.
19. In Re: LG Electronics System India Limited, [2003]116 CompCas 48(Delhi).
20. In Re: Maneckchowk and Ahmedabad Mfg. Co. Ltd., (1970) 40 CC 819.
21. In Re Nursery Spinning and Weaving Corporation Ltd., (1881) ILR 5 Bom 92.
22. In Re:Siel Ltd.,[2004] 122 CompCas 536(Delhi).
23. In Re.: Wearwell Cycle Co. (I.) Ltd, [1998] 94 CompCas 723 (Delhi).
24. In Re:Zee Interactive Multimedia, [2002] 111 CompCas 733 (Bom).
25. Indranath Banerjee v. Rooke, (1910) ILR 37 Cal 81.
26. Jagdish Chander v.Ramesh Chander & Ors., 2007 (2) ARBLR 302 (SC).
27. Life Insurance Corporation of India v. Harjeet Kaur, MANU/JH/0860/2014.
28. M/s. HNG Float Glass Ltd. v. M/s. Saint Gobain Glass India Ltd., 2013 Comp LR 876 (CCI).
29. Mahabir Kishore and Ors. v. State of Madhya Pradesh,[1990] 184 ITR 548 (SC).
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32. Oriental Middle East Lines Ltd. & Anr. v. Brace Transport Corporation of Monrovia and Ors., AIR 1986 Guj62.
33. Seksaria Cotton Mills Ltd.v. A.E.Naik & Ors., AIR 1967 Bom 341.
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3. Grant v. Easton (1883) 13 QBD 302.
4. HIH Casualty & General Insurance Ltd & Ors v. McMahon & Ors, [2007] 1 All ER 177.
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7. Jones v. Bowden, (1813) 4 Taunt 847.
8. Moorgate Mercantile Corporation Ltd. v. Twitchings. (1997) AC 890.
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STATEMENT OF JURISDICTION

The petitioners have approached the Hon'ble Supreme Court of India under Article 136 of the Constitution of India.

STATEMENT OF FACTS

1. Description of companies: Jeevani Ltd.- a public company with its equity shares listed on BSE, incorporated in 1990 under Companies Act 2013. It is a leading market player and also has a global presence. **Lifeline Ltd.-** a listed public company registered and incorporated under the companies act 2013 having its registered office in Mumbai. It is a major producer of food products in India and its products are also traded internationally. **[Moot proposition ¶ 1]**

2. The merger: Lifeline decided to foray into the pharmaceutical sector. It approached Jeevani for a partnership. On 27.01.2012, they decided to merge. It was decided that Jeevani would completely merge into lifeline and all assets and liabilities of Jeevani would be transferred to lifeline. A scheme of arrangement for Jeevani was prepared which was finalized on 5.03.2012 and was filed before the BSE and the approval was denied for the same. **[Moot proposition ¶ 2]**

3. The share sale agreement: The three promoters of Jeevani decided to sell their entire promoter shareholding i.e. 18% of their stake in Jeevani to lifeline. This was effected vide a Share Sale Agreement dated 23.03.2012. It also contained representations for disclosure of material information by either of the parties. Further, all intangible properties including active R&Ds, IPRs and rights accruing from them were also transferred.**[Moot proposition ¶ 3]**

4. The meeting of creditors and other formalities: On 30.03.2012 Jeevani & Lifeline filed an application under Section 391 of the Companies Act, 1956 for seeking approval of the scheme by the Delhi HC. The Court ordered a meeting of creditors in accordance under its mandate of chapter V of the Act. A notice of meeting was given in a local English language newspaper and local language newspaper. The scheme was approved by the Delhi high court on 5th July, 2013 upon resolutions being passed. **[Moot proposition ¶ 4]**

5. Issue no. 1: Foreign lenders mainly banks, had invoked arbitration proceedings against Jeevani before an arbitral tribunal in Hong Kong for payments under consortium agreement for financial

assistance signed between them. An arbitral award for a certain amount was passed on 27.07.2010 in favour of the foreign lenders. In early August 2013 foreign lenders made an application before the company judge for recall of order dated 5.07.2013 as they formed a separate class of creditors, they had not received the notice of scheme and no meeting was convened for them. The company contended that they were not creditors and no notice was required for them. The application was dismissed by the Company Judge, on appeal it was further dismissed by the division bench of Delhi High Court. This order is challenged before the Supreme Court. **[Moot proposition ¶ 5]**

6. Issue no. 2 and 3: After the merger when Lifeline continued activities of Jeevani, it received notices from US FDA for providing below par quality drugs. The matter of pending investigations was concealed by Jeevani. Lifeline filed a suit against the promoters before the Delhi high court for damages for breach of contract and compensation for wrongful gain and unjust enrichment. The promoters contended that the High Court had no jurisdiction as the agreement dated 23.03.2012 had an arbitration clause and the same to be referred to arbitration. The Delhi HC held that the clause was not an arbitration clause. This Order was reversed by the Division Bench of the HC. As a result lifeline has approached to the SC against this order. **[Moot proposition ¶ 6]**

7. **Issue no. 4:** After the merger lifeline introduced a new life saving drug by the name of **"novel"** which was cheaper than other drugs in the market including inventive which was the premier drug. Inventive produced by **Swasth** a sister concern of promoters. Swasth filed a suit for infringement of its IPRs against Lifeline. Swasth obtained an interim injunction but withdrew the case later. Lifeline approached CCI to order probe into the alleged abuse of dominant position upon a prima facie finding. Swasth approached the Delhi HC to quash the investigations. The same was denied by th HC which was further affirmed by the division bench. Consequently, Swasth approached the SC against the order of the bench. **[Moot proposition ¶ 7]** The aforementioned matters are tagged together for hearing in the Supreme Court on 6th September, 2014.

STATEMENT OF ISSUES

1. **WHETHER THE ORDER SANCTIONING THE SCHEME SHOULD BE SET ASIDE?**
2. **WHETHER THERE IS AN ARBITRATION CLAUSE IN THE SHARE SALE AGREEMENT?**
3. **WHETHER THE PETITIONER IS ENTITLED TO DAMAGES FOR BREACH OF CONTRACT AND COMPENSATION FOR UNJUST ENRICHMENT OF THE RESPONDENT?**
4. **WHETHER THE INVESTIGATION ORDER BY THE DG CCI SHOULD BE QUASHED?**

SUMMARY OF ARGUMENTS

A. THE ORDER SANCTIONING THE SCHEME SHOULD BE SET ASIDE.

The Scheme of Arrangement sanctioned vide order dated 5.07.2013 is unjust to the petitioners as it does not follow the due process of approval prescribed under § 391 of Companies Act,1956 and denies the right of petitioners as creditors. Hence, the order is bad in law and should be recalled.

B. ORDER REFERRING PARTIES TO ARBITRATION SHOULD BE SET ASIDE.

The order referring parties to arbitration should be set aside as there was no arbitration clause in the share sale agreement. The Empowered Committee constituted under the agreement was not intended to be an arbitral tribunal as its decision making was non judicial in nature , while the disputes were subject to the jurisdiction of Delhi courts. Since a reference should only be made if an arbitration clause exists hence the order in the present case is erroneous.

C. **LIFELINE IS ENTITLED TO DAMAGES FOR BREACH OF CONTRACT AND COMPENSATION FOR WRONGFUL GAIN AND UNJUST ENRICHMENT**.

There was active concealment of facts material to the Share Sale Agreement by the respondent, which was primarily done to obtain the petitioner's consent. Such concealment qualifies as Fraud under § 17 of the Indian Contract act,1872. Therefore, the petitioner is entitled to claim damages which includes compensation for wrongful gain and unjust enrichment, compensation for breach of contract. Further, the petitioner can also rescind the contract on account of breach.

D. THE ORDER FOR INVESTIGATION BY THE DG CCI FOR ABUSE OF DOMINANT POSITION SHOULD BE QUASHED.

In order to direct investigations into a matter there should be a prima facie case under §26(1) of the Competition Act, 2002. Furthermore, when an appeal for an interim injunction for patent infringement is filed in the high Court, the Competition Commission cannot entertain the complaints of the aggrieved party as the Indian Patent Act, 1970 provides redressal mechanism for the same. Therefore, in the instant case, no prima facie case is made out against the petitioner as there was no dominant position. Further, the respondent should have taken recourse to § 106 of the Indian Patents Act, 1970 instead of filing a complaint with the CCI.

ARGUMENTS ADVANCED

A-THE ORDER SANCTIONING THE SCHEME SHOULD BE SET ASIDE

An order can be recalled in order to do justice to the parties[1] if there is an apparent legal error, or is passed under some misconception or misrepresentation.[2]It is humbly submitted that the order dated 5th July 2013 by the Delhi High Court should be recalled as, the Scheme that it has sanctioned is mala fide and unjust to the petitioners. There are two reasons which substantiate the contention. Firstly, it does not consider the interest of the petitioners as creditors. Secondly, due process of approval prescribed under § 391 of the Companies Act 1956[3],[4] is not followed as notice has not been sent to all the creditors and a separate meeting has not been convened for separate class of creditors.

A.1 THE PETITIONERS ARE CREDITORS

Any person having a pecuniary claim against the company is a creditor.[5]A claim is an assertion of a right to remedy, relief or property, either general or before a tribunal.[6]A foreign award will be regarded, as creating a debt between the parties to it, the debtor's liability arising on an implied promise to pay the amount of the foreign judgment.[7]In the present case, a Consortium Agreement had been signed between Jeevani and Foreign lenders for the latter's financial

[1] G.T.Swamy & Anr. v. Good Luck Agencies & Anr., [1990] 69 Comp Cas 819 (Kar).

[2] Commerzbank Ag. And Anr. v. Arvind Mills Ltd., 2002 110 Comp Cas 539 Guj.

[3] Hereinafter,The Act.

[4]Miheer H. Mafatlal v. Mafatlal Industries Ltd., AIR 1997 SC 506; In Re: Alabama, New Orleans, Texas and Pacific Junction Railway Co., [1891] Ch 213.

[5] Seksaria Cotton Mills Ltd.v. A.E.Naik & Ors., AIR 1967 Bom 341.

[6] WHARTON'S LAW LEXICON, (14d ed. 2003).

[7] HALSBURY'S LAWS OF ENGLAND (5d ed. 2009); Grant v. Easton, (1883) 13 QBD 302.

assistance.[8]An arbitral award was passed under arbitration proceedings initiated for payments that arose under the agreement.[9]This award gives the creditors an ascertained amount of monetary claim against the Respondents.[10] Hence, the petitioners are creditors.

A.2 PROCESS PRESCRIBED FOR THE APPROVAL OF SCHEME WAS NOT FOLLOWED

There are three stages in which a scheme is sanctioned. The first involves summoning of meetings which involves notice to the stakeholders and convening separate meetings for separate classes.[11] In this case, notice had not been sent to the foreign lenders and separate meeting was not convened for their consent, thus, there was no compliance with the prescribed process of approval.

A.2.1 No Notice was sent to the foreign lenders

An applicant seeking sanction for the scheme of arrangement is under an obligation to follow the procedure prescribed under section 391.[12]Section 391(1) prescribes convening a meeting for stakeholders in a scheme and the duty of the applicants to notify all the stakeholders. In the present case, the applicants have committed omission of duty on their part with the intent to deny petitioners the right to their interest.

A.2.1.1 There was an Omission of duty on the part of the applicants

The applicant under § 391(1) has dual obligation. Firstly, under rule 67 read with rule 69 and form no.33 of Company Court Rules, 1959 to disclose all the material information concerning the creditors so that relevant order can be made by the court with regard to the notice

[8] Moot proposition ¶ 5.

[9] Moot proposition ¶ 5.

[10] NNR Global Logistics (Shanghai) Co. Ltd. v. Aargus Global Logistics Pvt. Ltd., 2012VIIIAD(Delhi)125

[11] In Re. Hawk Insurance Co. Ltd, (2001) 2 Butterworths Company Law Cases 480.

[12]In Re: Maneckchowk and Ahmedabad Mfg. Co. Ltd., (1970) 40 CC 819.

to be given to the creditors and advertisement of such notice.[13]

Secondly, there is obligation of dual notice under section 391 read with rule 73 and 74[14]. In order to pass the test of procedure ,the applicant is expected to send notice individually to all the creditors concerned[15] and widely publicize the meeting, such publicity should be in accordance with the extent and spread of the members/creditors who are to be convened to the meeting.[16]

In the present case, the applicants under § 391(1) did not disclose the fact of the existence of the petitioners as creditors to the Court, even though the petitioners had a vital interest in attending the meeting. The applicants also failed to send individual notice to the petitioners, also, the publicity of the meeting was done in a local newspaper even though the creditors of the applicant were spread worldwide. Hence, there was omission of duty on the part of the applicant.

A.2.1.2 The Scheme was mala fide

Mala fide means want of good faith or with an ulterior purpose.[17]The court while directing the summoning of the meeting should ensure that those who are to be affected by the arrangement proposed, have a proper opportunity of being present at the meeting,[18] and views and interests of those who were not present at the meeting receive an impartial consideration.[19] The object of holding a meeting of creditors is to ascertain whether the sums payable to them by the Transferor or Transferee companies may be jeopardized in any manner by the Court giving its sanction to

[13] Chembra Orchard Produce Ltd. v. Regional Director of Company Affairs, AIR 2009 SC 1278.

[14] Company Court Rules,1959.

[15] In Re: Auto Steering India P. Ltd., [1977] 47 Comp Cas 257 (Delhi).

[16] In Re: G.V.Films Ltd., [2009] 150 Comp Case 415 (Mad).

[17] State of Bihar v. P.P.Sharma, AIR 1991 SC 1260.

[18] *supra* note 10; In Re: Ansys Software Pvt. Ltd., [2004] 122 CompCas 526 (Kar).

[19] *supra* note 4.

the proposed Scheme.[20] As per §391(2) latest financial position[21] and latest auditor's report should be disclosed to the court. Company's contention that Appellants are not creditors implies that their claim against the Company does not find mention in the latest financial statement. However, the amount of the foreign lenders still remains due. Abovementioned omission of duty clearly demonstrates that these financial statements showing assets and liabilities of the company are inaccurate[22], the underlying agenda to pass through the scheme without proper notice, by merely showing some semblance of compliance of the provisions of the Act in order to deprive the Foreign Lenders of the opportunity of being present at the meeting so that their interests and views are not taken into consideration and they are deprived of their legitimate claim.

A.2.2 There was no separate meeting convened for separate class of creditors

§ 391 of the Act gives the Company the discretion to constitute creditors into separate classes as separate parties to the Scheme, in accordance with the purpose of the scheme.[23]If such classification is inadequate or unjust, the scheme may be set aside.[24] In the present case, the Company has unjustly recognized only one class of creditors in the Scheme i.e. the creditors domiciled in India. The Foreign Lenders were also entitled to be constituted as a separate class.

A.2.2.1 The Foreign Lenders constitute a separate class

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.

[20] In Re: LG Electronics System India Limited, [2003]116 CompCas 48(Delhi); In Re:Zee Interactive Multimedia, [2002] 111 CompCas 733 (Bom); Venturbay Consultants Private Limited and Ors. etc.etc. v. Their Respective Shareholders and Creditors and Ors. etc. etc., MANU/AP/0531/2013.

[21] Bharat Synthetics Ltd. v. Bank of India, (1995) 82 Com Cases 437 (Bom).

[22] Bedrock Ltd., In Re, (2000) 101 Com Cases 343 (Bom).

[23]In Re: Arvind Mills Ltd., (2003) 4 GLR 2968; *supra* note 18.

[24] *supra* note 12.

The group should be homogeneous and must have commonality of interest and the compromise offered to them must be identical.[25] In the present case foreign lenders are a group of creditors belonging under the jurisdiction of foreign courts. Their rights against the company and towards each other are determined as lenders under a unified contract. This contract confers certain exclusive rights against the Company on these creditors as a group, which are not available to other creditors. Thus, they have common interest under a unified contract and can be constituted as a class of creditors.

Secondly, Creditors being subject to separate legal regimes should be considered separately, any comparative disadvantage of such creditors should be looked into by the court.[26] In the present case, the scheme of arrangement is formed with the purpose of 'transfer of all assets and liabilities'[27].Liabilities are certain rights which the Company owes to its creditors which can be divided into two categories: substantive rights which consist of rights arising out of subject matter of the contract and procedural rights regarding the remedy under the agreement.[28]

1. Loan provided by the Foreign Lenders is of a special nature, and is an External Commercial Borrowing[29]hence, rights of the Foreign Lenders as creditors regarding mode of payment, repayment, security are governed by FEMA, 1999 and regulations issued by RBI under § 6 of the same act. While, the loan of domestic lenders is not governed by the same statute and their rights are governed by the general domestic system of law.

[25] In re: Siel Limited, [2004] 122 Comp Cas 536 (Delhi).

[26] HIH Casualty & General Insurance Ltd & Ors v. McMahon & Ors, [2007] 1 All ER 177.

[27] Moot Proposition ¶2.

[28] Oriental Middle East Lines Ltd. & Anr. v. Brace Transport Corporation of Monrovia and Ors., AIR 1986 Guj 62.

[29] RBI/2014-15/3 Master Circular No. 12/ 2014-15.

2. The procedural rights of the Foreign Lenders and the domestic lenders are different, Foreign Lenders can recover their loan only through arbitration proceedings, and their claim is in the form of an arbitral award .While, the domestic lenders can recover their debt under § 19 of RDDBFI Act,1993 or through enforcement of security by possession or sale without judicial intervention under SARFAESI Act. Thus, the substantive and procedural rights of foreign lenders are different from domestic lenders and they are a separate class and were entitled to a separate meeting for approval of the Scheme.

B- ORDER REFERRING PARTIES TO ARBITRATION SHOULD BE SET ASIDE

Existence of arbitration clause is a condition precedent to referring parties to arbitration under § 8 of the Arbitration and Conciliation Act,1996.[30] Under § 8 of the Act, the judicial authority is necessarily to decide whether an arbitration clause exists[31].When a matter is entrusted to a civil court, it is ruled by the procedure of the Court[32] and an appeal lies if authorised by such rules, notwithstanding that the legal right claimed arises under a special statute which does not confer a right of appeal.[33] In the present case, there is no arbitration clause in the share sale agreement signed between the Promoters of Jeevani and Lifeline, hence the appeal challenging the order should be admitted and the order should be set aside.

B.1 There is no arbitration clause in the Share Sale Agreement

There should be expression of specific and direct intent in order to constitute a valid arbitration

[30] P.Anand Gajapathi Raju v. P.V.G Raju, [2000] 2 SCR 684;Waverley Jute Mills v.Ramon & Co., AIR 1963 SC 90.

[31] S.B.P & Co. v. Patel Engineering Ltd. and Anr., AIR 2006 SC 450.

[32] *Id*;Sukanya Holdings P. Ltd. v. Jayesh H. Pandya, AIR 2003 SC 2252;G.E.Capital Transportation Financial Services Ltd v. Amritajit Mishra, (2009) 3 Arb LR 51.

[33] Adaikappa Chettiar v. Chandresekhara Thevar, AIR 1948 PC 12.

clause.[34]

Firstly, The Committee under the clause was not intended to be an arbitral tribunal. Secondly, the disputes between the parties were intended to be subject to the adjudication of Delhi Courts.

B.1.1 The Empowered Committee was not intended to be an Arbitral Tribunal

If a clause regarding settlement of disputes is an arbitration clause, it would stipulate referring any present or future dispute to a private tribunal which would adjudicate upon the matter and whose decision would be binding on the parties.[35]On the other hand, if decision making of a committee takes decision not after giving hearing to both the parties but on the basis of its own observation, information and expertise, it is said to be committee with administrative functions.[36]

In the present case the dispute resolution clause states that decision of an empowered committee with regard to the subject matter of the contract will be final and binding, however, the clause does not contemplate judicial enquiry or hearing of any kind, it gives the committee the discretion to determine its mode of arriving at a decision, hence the committee is not adjudicating upon the matters.

B.1.2 Civil Courts have jurisdiction over disputes under the agreement

Where arbitration clause exists in the agreement, parties consensually oust the jurisdiction of the civil courts.[37] Dispute plays an important role

[34] Jagdish Chander v.Ramesh Chander & Ors., 2007 (2) ARBLR 302 (SC).

[35] K.K.Modi v. K.N.Modi, [1998] SCR1 601.

[36] *Id.*;State of Orissa& Ors. v. Bhagyadhar Dash, (2011) 7 SCC 406 ;Bharat Bhushan Bansal v. Uttar Pradesh Small Industries Corporation Ltd., Kanpur, [1999 (2) SCC166];State of Orissa v. Damodar Das, [1996 (2) SCC 216];Vishnu v. State of Maharashtra & Ors., 2013(4)ARBLR1(SC).

[37] Executive Engineer,Dhenakal Minor Irrigation Division v. N.C.Budharaj,(2001) 2 SCC 721;JSM Corpn. Pvt. Ltd. , 2011 (125)DRJ 129.

, if a purported arbitration clause does not mention

dispute between the parties, it is not an arbitration clause.[38] In case of agreements, there should be adoption of common sense and plain grammatical construction while giving effect to the intention of the parties as evidenced by the agreement itself.[39] In the present case, there has been no mention of the phrase 'dispute between the parties' under the dispute resolution clause while the phrase has been used under the jurisdiction clause which subjects all disputes arising out of the contract to the jurisdiction of civil courts of Delhi. If a common sense approach is followed then it is clear that the parties did not intend to oust jurisdiction of the civil courts over disputes between them. Hence, there was no arbitration clause in the agreement and the order referring parties to arbitration should be set aside.

C-LIFELINE IS ENTITLED TO DAMAGES FOR BREACH OF CONTRACT AND COMPENSATION FOR WRONGFUL GAIN AND UNJUST ENRICHMENT

It is humbly submitted, when consent is obtained through fraud, the contract becomes voidable and the party is entitled to rescind the contract, claim damages or both. In the instant, there was active concealment of facts materially essential to the contract. Hence, the party is entitled to the aforementioned remedies.

C.1 RESCISSION FOR BREACH OF CONTRACT

C.1.1The concealment amounts to fraud

It is humbly submitted that Section 17 of the Indian Contract, 1872 defines fraud. Clause (2) of the Act deals with "active concealment of a fact by one having knowledge or belief of the fact".

[38] State of U.P. v. Tipperchand, AIR 1980 SC 1522; DAVID ST. JOHN SUTTON, JUDITH GILL & MATHEW GEARING , RUSSELL ON ARBITRATION (23 ed., Sweet & Maxwell).

[39] Union of India v. D.M.Ravri & Co., [1977] 1 SCR 483; Jagatjit Jaiswal and Anr. v. Karmajit Singh Jaiswal and Anr., 2007(4) ARBLR 300 (Delhi).

Further, clause (5) of the Act states, "any such act or omission as the law specially declares to be fraudulent." In the instant case, there was concealment of the pending FDA investigation by the respondent.[40] It is also submitted that such concealment amounts to non-compliance with the relevant statutory provisions. The said concealment on the part of the respondent is fraudulent.

C.1.1.1There was concealment of information with a view to obtain the consent of the appellant

Mere non-disclosure of some immaterial facts does not amount to fraud unless it is found that the consent has been obtained by practicing deception.[41] In the instant case, there was non-disclosure of facts material to the share sale agreement and such non-disclosure was done primarily to obtain the petitioner's consent.

C.1.1.1.1 The facts concealed were material to the share sale agreement

As per Section 18 of the Indian Contract Act, if the representation so made is a part of the contract, the aggrieved party can claim damages for breach. Furthermore, a representation is material when a reasonable man would have been induced by it in deciding whether or not to enter into the contract[42]and whether or not the relevant circumstance would have had an effect on the mind of the other party in weighing the risk.[43]In the instant case, the said agreement contained specific representations as regards disclosure of information which may be vital to the transaction.[44]. The fact of pending FDA investigation was materially essential to the agreement as it would have had a bearing upon the petitioner's decision making prior to the merger and also

[40] Moot proposition ¶ 6.

[41] POLLOCK AND MULLA, INDIAN CONTRACT ACT AND SPECIFIC RELIEF ACT (13d ed. Lexis Nexis Butterworths Wadhwa Nagpur).

[42] Bhagwani Bai v. Life Insurance Corpn. Of India, AIR 1984 MP 126; GHCL Ltd. v. Securities and Exchange Board of India, MANU/SB/0049/2014.

[43] Pan Atlantic Insurance v. Pine top Insurance Co. Ltd., [1994]3 All ER 581 HL.

[44] Moot proposition ¶ 3.

for the price it would have paid for the shares of Jeevani. Therefore, the said concealment was done with the intention of obtaining the petitioner's consent.

C.1.1.2 The act of non-disclosure was fraudulent

It is humbly submitted that, mere silence is not fraud unless there is a duty to speak,[45] or unless it is equivalent to speech. Omission to mention a material fact is equivalent to express assertion that it does not exist.[46] This duty is not merely a moral duty but a legal duty to speak.[47]

C.1.1.2.1There existed a duty to disclose the matter of pending FDA investigation

Section 17(5) applies to such cases where disclosure of certain kinds of facts is expressly required by law and non-compliance thereof is expressly declared to be fraud.[48]

Furthermore, in contracts of *Uberrimae fidei*, the knowledge of material facts lies with one party alone and hence the party is under a duty to make a full disclosure of the facts. [49]non- fulfillment of such a requirement termed as fraudulent under the SEBI (FUTP) Regulations, 2003.[50]

In the instant case, there was a duty on the part of the respondent vide the Share Sale Agreement dated 23rd March, 2012 to disclose the matter of the pending investigation to the petitioner. The knowledge of the pending investigation was known to the respondents alone and the petitioners had no means of finding it out merely by exercising ordinary diligence.[51] The mere placing of a

[45] Moorgate Mercantile Co. Ltd. v. Twitchings, (1977) A.C. 890.

[46] Jones v. Bowden, (1813) 4 Taunt 847.

[47] Sher Khan v. Akhtar Din, AIR 1937 Lah 598.

[48] *supra* note 42, at 522; Timothy Finnerty v. Stiefel Laboratories Inc.,MANU/FEEE/0825/2014.

[49] Life Insurance Corporation of India v. Bhogadi Chandravathamma, AIR 1971 AP 41;Life Insurance Corporation of India v. Harjeet Kaur, MANU/JH/0860/2014.

[50] SEBI (FUTP) Regulations, 2003.Notification No. S.O 816 (E) dated 17.7.2013.

[51] In Re Nursery Spinning and Weaving Co. Ltd., (1881) ILR 5 Bom 92; Dyer v. Hargrave, (1805) 10 Ves. 505.

document on record of a company does not lead to the conclusion that every officer thereof had the means of discovering the truth merely by virtue of the document being on the records.[52]

C.1.2 The appellant company is entitled to rescind the contract

It is humbly submitted that, where a contract is induced by fraud the petitioner is entitled to rescind the contract.[53] In the instant case, the contract between petitioner and respondent was induced by fraud and therefore, the appellant is entitled to claim rescission for the same.

C.2 COMPENSATION FOR INJURY DUE TO BREACH OF CONTRACT , WRONGFUL GAIN AND UNJUST ENRICHMENT BY WAY OF DEFRAUDING

It is humbly submitted, the term "fraud" involves two elements, deceit and injury. In case of deceit, the deceived party can claim both rescission and damages.[54] The measure of compensation is arrived at by considering the difference in the position the plaintiff would have been in, had the representation been true and the position he is in, in the consequence of it being untrue.[55]Furthermore, injury is something either than economic loss, that is any harm caused to a person in body, mind or reputation.[56] It is also submitted that the term "fraud" and "wrongful gain" is defined under Section 447 of the Companies Act, 2014 and the said Section imposes a fine on a person committing fraud.[57]

Therefore, it is humbly submitted that the petitioner company should be awarded compensation for deceit which is the inflated price of shares which was charged from the petitioner in the event

[52] World Sport Group (India) Pvt. Ltd. v. BCCI, Arbitration Petition No. 978 of 2010 decided on 20-12-2010 (Bom).

[53] Doyle v. Olby (Ironmongers Ltd.), (1969) 2 Q.B. 158.

[54] Indranath Banerjee v. Rooke, (1910) ILR 37 Cal 81.

[55] Dambarudhar Behera v. State of Orissa, AIR 1980 Ori 188.

[56] Alkem Laboratories Ltd. v. Elnova Pharma, MANU/HP/0542/2014.

[57] Companies Act. § 447 (2013).

of the non-disclosure of pending FDA investigation consequentially leading to the unjust enrichment of the respondent.[58] Compensation should also be paid for the expenditure wasted in reliance on the contract.[59] It is also submitted that the unearthing of the matter of the pending investigation significantly affected the reputation of the petitoner in the market which was a consequential loss.[60] Therefore, compensation should also be paid for the same.

D- THE ORDER FOR INVESTIGATION BY THE DG CCI FOR ABUSE OF DOMINANT POSITION SHOULD BE QUASHED.

D.1There is no prima facie case of abuse of dominant position by Swasth

It is humbly submitted that, Section 26 of the Competition Act, 2002 lays down the procedure for inquiry under Section 19 in case of alleged contravention of provisions contained in Section 4(1). Clause (1) of the Section 26 states that the Competition Commission[61] can cause investigations to be made into a matter if a prima facie case is made out. In the instant case, there was no prima facie case as the petitioner did not have a dominant position in the market.

D.1 .1Swasth did not have a dominant position in the market

It is humbly submitted that Section 19(4) of the Competition Act, 2002 lays down certain factors in order to establish dominance of a particular enterprise in a market. The relevant factors have been discussed below:

1.Market share of the enterprise: it is humbly submitted that a firm with a low market share maybe in a position to abuse its dominance, while a firm holding a considerable size in market

[58]Mahabir Kishore and Ors. v. State of Madhya Pradesh, [1990] 184 ITR 548 (SC).

[59] East v. Maurer, (1991) 2 All ER 733 (CA).

[60]Smith New Securities Ltd. v. Scrimgeour Vickers Ltd., (1994) 3 All ER 344 (CA); *supra* note 54.

[61] Hereinafter referred to as 'the Commission'.

may not be in a dominant position.[62]Therefore, in the instant case although the drug "inventive" produced by Swasth was a premier drug available in the market[63], the existence of dominant position cannot be attributed to its market share.[64]

2.Size and importance of the competitors: it is humbly submitted that the size of the competitors is an instrumental factor in determining the existence of dominance.[65] In the instant case the respondent company was in itself a popular company with an international presence.[66]

3.Commercial advantages over competitors: the position of strength can be determined by comparative advantages in terms of financial resources, technical capabilities, etc. to be able to do things which would affect its competitors.[67] In the instant case, the petitioner had no comparative advantages due to an equally efficient competitor.[68]

4.Entry barriers: competition restraints imposed on new entrants with regard to entry in market are also indicative of dominant position.[69] In the instant case, "inventive" was only a premier drug available in the market with other life-saving drugs in the market as well.[70]

D.1.2 The DG CCI cannot order investigations into matter

It is humbly submitted that, if no prima facie case of abuse is made out the Commission shall

[62] Report of the High level Committee on Competition Policy and Law (Raghavan Committee).

[63] Moot Proposition ¶ 7.

[64] M/s. HNG Float Glass Ltd. v. M/s. Saint Gobain Glass India Ltd., 2013 Comp LR 876 (CCI).

[65] Exclusive Motors Pvt. Ltd. v. Automobili Lamborghini S.P.A., 2012 Comp LR 1154 (CCI).

[66] Moot proposition ¶ 1.

[67] Discussed in MCX Stock Exchange Ltd. v. National Stock Exchange of India Ltd., Dot Ex International Ltd. and Omnesys Technologies Pvt. Ltd**.,** [2011] 109 SCL 109 (CCI).

[68] Refer point 3.

[69] *supra* note 61; Mr. Sumit Sahni and Mrs. Anumita Sahni v. Sumel Heights Private Limited and Vatika Limited, 2013 Comp LR 0673 (CCI).

[70] Moot proposition ¶ 7.

close the matter forthwith.[71] Therefore, it is humbly submitted that there was no dominant position, hence, no abuse, the DG CCI cannot carry further investigations into the matter.

D.2 The litigation was carried out in furtherance of protecting its IPRs

In order to establish abuse of dominance, exclusionary conduct needs to be shown.[72] An enterprise may exercise its power to defend its market position which is legal and legitimate.[73] It is humbly submitted that Section 48 of the Indian Patents Act, 1970 confers certain exclusive rights upon the patentee with regard to use or sale of the patented process or product obtained from that process.[74] Upon the infringement of the said rights, the aggrieved party can institute a suit and thereby claim relief under Section 108 of the Indian Patents Act. Therefore, the petitioner merely took recourse to the remedies at its disposal which was not done in bad faith.

Alternatively, the CCI does not have the jurisdiction to order a probe into the matter

It is humbly submitted that, the Commission has no jurisdiction to investigate the action of the petitioner inasmuch as the Patent Act itself provides adequate mechanism[75] to balance the rights of other stakeholders (in the event of threat of infringement).[76] Further, Section 68 of the Competition Act makes it clear that the provisions of the said Act shall be in addition to and not in derogation of any other law for the time being in force. Therefore, the respondent cannot file a complaint with the CCI when Patents Act provides a remedy.

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[71] Competition Act. § 26(2) (2002).

[72] *supra* note 61; *supra* note 64.

[73] *supra* note 59.

[74] Indian Patents Act. § 48 (1970).

[75] Indian Patents Act. § 106 (1970).

[76] Telefonaktiebolaget lm Ericsson (publ) v. CCI and Anr.,W.P.(C) 1006/2014; JCB India Limited and Anr. v. The Competition Commission of India, W.P. (C) 2244/2014.

PRAYER FOR RELIEF

Wherefore in the light of the facts stated, arguments advanced and authorities cited, it is most humbly prayed before this **Hon'ble Supreme Court** to allow the petition (Petition No.1, 2, 3 & 4) and adjudge and declare that:

1. The order dated 5.07.2013 is bad in law and should be set aside.
2. The order referring Jeevani and Lifeline to arbitration under Section 8 of the Arbitration and Conciliation Act,1996 is erroneous and should be set aside.
3. The appellants are entitled to rescind the contract and receive compensation for breach of contract, wrongful gain and unjust enrichment of the promoters.
4. The DG CCI does not have the jurisdiction to look into the matter of abuse of dominant position by Swasth and hence, the order for investigation should be quashed.

This Hon'ble court may also be pleased to pass any other order, which it may deem fit in light of justice, equity and good conscience.

All of which is most respectfully prayed.

Counsels on behalf of the Petitioners

Place: Delhi

Date: 06.09.2014