TEAM CODE: R

BEFORE THE HON'BLE SUPREME COURT OF INDIA

Special Leave Petitions under Article 136 of Constitution of India

SLP No. ...../2014 with SLP No...../2014 with SLP No ...../2014

FOREIGN LENDERS **……...PETITIONERS**

VERSUS

JEEVANI LIMITED **……...RESPONDENT**

&

LIFELINE LIMITED **……...PETITIONER**

VERSUS

PROMOTERS OF JEEVANI **……...RESPONDENT**

&

SWASTH LIFE LIMITED **……...PETITIONER**

VERSUS

COMPETITION COMMISSION OF INDIA & LIFELINE LIMITED……...RESPONDENT

MEMORIAL FOR THE PETITIONERS

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

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STATEMENT OF JURISDICTION

IT IS HUMBLY SUBMITTED THAT THE PETITIONERS HAVE FILED THE THREE SPECIAL LEAVE PETITIONS BEFORE THE HON'BLE SUPREME COURT OF INDIA UNDER ARTICLE 136 OF THE CONSTITUTION OF INDIA.

THE SPECIAL LEAVE PETITIONS HAVE BEEN CLUBBED TOGETHER BY THE HON'BLE COURT FOR THEIR JOINT HEARING AND DISPOSAL. THE PETITIONERS VERY HUMBLY SUBMITS TO THE JURISDICTION OF THIS HON'BLE COURT.

THE PRESENT MEMORIAL SETS FORTH THE FACTS, CONTENTIONS AND ARGUMENTS IN THE PRESENT CASE.

STATEMENT OF FACTS

1. Jeevani Limited incorporated in the year 1990 under the Companies Act, 2013 with its registered office in New Delhi and Lifeline Limited incorporated under the Companies Act, 2013 having its registered office in Mumbai in and around November, 2011, both companies initiated negotiations for a possible merger. A scheme of arrangement was prepared and Jeevani completely merged into Lifeline. All assets and liabilities of Jeevani were transferred to Lifeline. Three promoters of Jeevani sold their entire promoter shareholding of their stake in Jeevani to Lifeline. This sale of stake was affected vide a separate sale agreement between Lifeline and the Promoters.
2. Jeevani and Lifeline filed an application u/s 391 of Companies Act, 1956 in the Delhi High Court for approval of the Scheme. The court ordered a meeting of the creditors to be convened. Jeevani issued a public notice in a local English newspaper and a local language newspaper and also sent notices to the creditors informing about the meeting. The scheme was passed by a vote of majority thereafter the Delhi High Court sanctioned the scheme.
3. Prior to the public announcement of the merger made by it, certain foreign lenders of Jeevani had invoked arbitration proceedings against it and on 27th July, 2010 had obtained a foreign arbitral award. Till date no proceedings for enforcement of this foreign award has been filed by the foreign lenders. The foreign lenders made an application before the Delhi High Court for recall of the order approving the scheme of amalgamation. They contended that they were not sent notice despite being creditors of Jeevani. Infact, they constituted a separate class of creditors. The Company Judge dismissed their application and refused to set aside the scheme. They went into appeal to the D.B of the Delhi High Court, which also dismissed the appeal of the foreign lenders. Against this order the foreign lenders have approached the Supreme Court of India.
4. The newly merged Lifeline received notices from the US Food & Drug Administration for providing drugs of below par quality and in violation of the requisite production parameters set out by the FDA. Lifeline filed a suit against the Promoters before the Delhi High Court for damages arising out of breach of the share sale agreement, for compensation for wrongful gain and unjust enrichment of Promoters by way of defrauding and misrepresenting to Lifeline. Lifeline alleged that the fact of the pending

investigations was concealed by the Promoters with mala fide intention to ensure that they get an inflated price for their shares. The Promoters contended that the Delhi High Court has no jurisdiction between the parties and must be referred to arbitration. Lifeline contended that there is no arbitration clause in the agreement. Single judge of the Delhi High Court held that the relevant clause did not constitute an arbitration clause whereas upon appeal the D.B. reversed the order. Hence, aggrieved by the order Lifeline has approached the Supreme Court.

5. Lifelines decided to introduce a new cost effective drug in the market by the name of "Novel" by further developing the active IPR & R&D of erstwhile Jeevani which would be even cheaper than the leading drug in the market "Inventive" produced by Swasth Life Ltd- a sister concern of Promoters of Jeevani. Swasth filed a suit for infringement of its IPRs in the Delhi High Court alleging that the new drug "Novel" was substantially similar to its drug "Inventive" and was based on certain IPRs which have been assigned to Swasth by Jeevani. Swasth was able to obtain an interim injunction against Lifeline who was restrained from launching the new drug "Novel". Swasth launched a similar cost effective drug in the market, cornering a large chunk of the market, after which it withdrew the case against Lifeline and the interim injunction was vacated.
6. The Competition Commission of India upon an application filed by Lifeline was of the prima facie view that Swasth may have abused its dominance and passed an Order directing the DG CCI to investigate on the information provided by Lifeline. Aggrieved by the order of the CCI, Swasth filed a writ petition in the Delhi High Court contending that it was merely protecting its IPR. The court held that the CCI had only made a *prima facie* view and no adverse effect is cause to Swasth by directing an investigation against Swasth. The writ petition was accordingly dismissed. On appeal the D.B. did not find any reason to interfere with the order of the single judge of Delhi High Court and so Swasth has now approached to the Supreme Court.

STATEMENT OF ISSUES

THE FOLLOWING ISSUES ARE PRESENTED BEFORE THE HON'BLE COURT IN THE PRESENT MATTER:

1. WHETHER THE ORDER SANCTIONING THE SCHEME OF AMALGAMATION SHOULD BE RECALLED?
2. WHETHER THE DISPUTE BETWEEN THE PROMOTERS OF JEEVANI AND LIFELINE LTD. BE REFERRED TO ARBITRATION?
3. WHETHER THE PRIMA FACIE VIEW FORMED BY THE COMPETITION COMMISSION OF INDIA WAS BAD IN LAW?

SUMMARY OF ARGUMENTS

1. WHETHER THE ORDER SANCTIONING THE SCHEME OF AMALGAMATION SHOULD BE RECALLED
   - 1.1. THE FOREIGN LENDERS ARE CREDITORS OF JEEVANI
   - 1.2. THE ENFORCEMENT OF FOREIGN ARBITRAL AWARD IS NOT BARRED BY THE LIMITATION ACT
   - 1.3. THE FOREIGN LENDERS CONSTITUTE A SEPARATE CLASS OF CREDITORS OF JEEVANI
   - 1.4. THE FOREIGN LENDERS SHOULD HAVE BEEN SERVED UPON A NOTICE OF THE SCHEME OF AMALGAMATION
2. WHETHER THE DISPUTE BETWEEN THE PROMOTERS OF JEEVANI AND LIFELINE LTD. BE REFERRED TO ARBITRATION
   - 2.1. THE RELEVANT EXTRACT CANNOT BE REGARDED AS AN ARBITRATION AGREEMENT
   - 2.2. THE CLAUSE FAILS TO SATISFY THE TEST TO BE REGARDED AS AN ARBITRATION CLAUSE
   - 2.3. THE PRE-REQUISITE OF INVOCATION OF ARBITRATION AGREEMENT IS ABSENT
   - 2.4. THE INTENTION OF THE PARTIES IS NOT TO ARBITRATE
3. WHETHER THE PRIMA FACIE VIEW FORMED BY THE COMPETITION COMMISSION OF INDIA IS BAD IN LAW
   - 3.1. THE DELHI HIGH COURT WAS INCORRECT IN ITS VIEW IN DISMISSING THE WRIT PETITION FILED BY THE PETITIONERS
   - 3.2. SWASTH DID NOT INDULGE IN BAD FAITH LITIGATION
   - 3.3. THE PETITIONER DID NOT ABUSE ITS DOMINANT POSITION

ARGUMENTS ADVANCED

1. THAT THE ORDER SANCTIONING THE SCHEME OF AMALGAMATION MUST BE RECALLED

1.1. THE FOREIGN LENDERS ARE CREDITORS OF JEEVANI

1.1.1. Since Jeevani owes money to the foreign lenders, they are "prospective creditors" of Jeevani.

A creditor includes every person having a pecuniary claim, whether actual or contingent, against the company.[1] A person to whom a company owes a balance amount after setoff would be in the category of a creditor.[2] The term "creditor" in Sec. 391(1) of The Companies Act, 1956 would take in its fold all categories of creditors whether secured or unsecured, actual or contingent.[3] The word "creditor" in Sec. 391 of the Companies Act, 1956 is used in the widest sense so as to include all persons having pecuniary claims against the company. The amount due need not be ascertained and he is still a creditor if the claim is present or future, certain or contingent, ascertained or sounding only in damages.[4]

The foreign lenders of Jeevani had jointly, invoked arbitration proceedings before a foreign arbitral tribunal constituted in Hong Kong, against Jeevani. The arbitration was initiated for payments to be made under a consortium agreement providing financial assistance to Jeevani, entered into between the foreign lenders and 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.[5]

It is humbly submitted that even if the names of the foreign lenders may not appear in the book debts still they are the prospective creditors of Jeevani by the virtue of the foreign

[1] Halsbury's Laws of England, 4th Edn., Vol. 7, para 1530, page 848

[2] *Chunilal* v. *Bank of Upper India*, (1917) 40 IC 904

[3] (1977) 47 Comp Cases 257 (Del)

[4] *Seksaria Cotton Mills Ltd.* v. *A.E. Nayak & Ors*, (1967) 37 Com Cases 656

[5] Factsheet, ¶ 6

arbitral award. Hence, adequate provisions could be made for such claimants by appropriate modification under Sec. 391(2) by the court when such claims are found to be genuine and maintainable.[6]

1.1.2. *The enforcement of foreign arbitral award is not barred by the Limitation Act.*

Where an award is certified and attested as the "final" award, it can be directly put into execution. It is now a settled law as laid down in *Fuerst Day Lawson Ltd.* v. *Jindal Exports*[7] that a foreign arbitral award is already stamped as a decree and therefore, there arises no question of making "foreign award" a rule of court/decree again." It is not necessary to take up separate proceedings one for determination of enforceability of the award and the other to take up execution thereafter and both the reliefs can be sought in the same proceedings.[8]A separate proceeding would only contribute to protracted litigation and suffering of litigants in terms of money, time and energy.[9] Under Sec. 49 of The Arbitration & Conciliation Act, 1996, the court, if satisfied that the award is enforceable, shall enforce it as a decree of that court.[10] Holder of a foreign award is entitled to put the award in execution directly without taking out these proceedings for a determination that the award is enforceable.[11] Thus, "the award shall be deemed to be a decree" of the court without being actually so decreed.

Thus, keeping in mind the meaning of the word "enforcement", enforcement under Sections 47-49 of the Arbitration & Conciliation Act, 1996 is nothing else but the execution as contemplated u/o 21 of C.P.C., 1908. The procedure set out in these sections ensures legality,

[6] *Modiluft Ltd*. In Re., (2004) 119 Com Cases 142 (Del)

[7] AIR 2001 SC 2293

[8] *Euro- Asia Chartering Corp. Pvt. Ltd.* v. *Fortune International Ltd*., AIR 2002 Bom 447

[9] *Alcatel India Ltd*. v. *Koshika Telecom Ltd.,*

[10] *Bhoomata Rice Mill* v. *Maheshwari Trading Corp.,* (2010) 5 RAJ 357

[11] *Euro- Asia Chartering Corp. Pvt. Ltd.* v. *Fortune International Ltd*., AIR 2002 Bom 447

validity and existence of an award so that it can be executed as a decree of the court.[12] In *Compania Naveria 'SODNOC'* v. *Bharat Refineries Ltd. & Anr.*[13], it was observed by the Madras high Court that since, under the Act, 1996, a foreign award is already stamped as a decree and the party having a foreign award can straight away apply for enforcement of it and in such circumstances, the party having a foreign award has got 12 years time like that of a decree holder. Therefore, the court held that it cannot be said that the present petition is barred by limitation. The Delhi High Court has recognized in *Dorstner* v. *Sand Plast*[14], that a foreign award would be enforceable under this chapter by the force of the convention. Thus, it is humbly contended that the initiation of enforcement proceeding is not barred by law of limitation.

1.2. THE FOREIGN LENDERS CONSTITUTE A "SEPARATE CLASS" OF CREDITORS OF JEEVANI

A "class" must be confined to those persons whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest.[15] Speaking very generally, in order to constitute a class, members belonging to the class must form a homogenous group with commonality of interest. It is humbly submitted that the foreign lenders are creditors of Jeevani by the virtue of the foreign arbitral award passed against Jeevani. Under the foreign arbitral award Jeevani was to pay to the foreign lenders the amounts as stated in the arbitral award.[16] Thus, the foreign lenders constituted a separate class of creditors secured by the foreign arbitral award. Therefore, the company ought to have held separate class meeting for the foreign lenders.

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[12] *Centro Trade Minerals & Metals Inc.* v. *Hindustan Copper Ltd.*,

[13] AIR 2007 Mad 251

[14] (1995) 1 Arb LR 282

[15] *Sovereign Life Assurance Co.* v. *Dodd*, (1892) 2 QB 573 (CA)

[16] Factsheet, ¶ 6

The court has to classify creditors or members if there are such classes and before sanctioning the scheme to see that their respective interest are taken care of.[17] The court does not function as a mere rubber stamp or post office and it is incumbent upon the court to be satisfied prima facie that the scheme is genuine, bona fide and in the interest of the creditors and the company.[18]

A reading of Sec. 391 of the Companies Act, 1956 would make it amply clear that where different terms are supposed to be offered to different class of creditors under the proposed scheme, then in that event a separate class should be said to be constituted in respect of each class of creditors or shareholders and in that event, separate meetings are to be held for such different class of creditors.[19] If the creditors do not have commonality of interest and if their rights and interest under a compromise will have different effect, they are to be separately treated and cannot be included into one class. Moreover a group of persons would constitute one class when it is shown that all of them have a common interest and they are not adversely situated.[20]

1.3.THE FOREIGN LENDERS SHOULD HAVE BEEN SERVED UPON A NOTICE OF THE SCHEME OF AMAGAMATION BETWEEN JEEVANI & LIFELINE

Amalgamation should not only be beneficial to the companies, but should also be in the interest of the creditors and members of both the transferor and the transferee companies.[21] The Supreme Court set aside an approved scheme because legal requirements of merger and

[17] *Bhagwati* v *New Bank of India Ltd*., (1950) 20 Comp Cases 68

[18] *Gaya Sugar Mills Ltd*. v. *Nand Kishore Bijoria*, AIR 1955 SC 441

[19] SIEL Ltd. In Re, (2003) 47 SCC 631

[20] *Ibid*

[21] *Shankaranarayana Hotels Pvt. Ltd.* v. *Official Liquidator*, (1992) 74 Comp Cases 290 (Ker)

amalgamation were not required with. The sanction of the Court is not an empty formality and therefore, the Court has to observe the proper procedure.[22]

It is humbly submitted that the Company Judge sanctioned the scheme of amalgamation on 5th July, 2013. Thus, Jeevani will completely merge into Lifeline. As a result Jeevani will cease to exist as a legal entity. But in the scheme of amalgamation finds no mention the debts owed by Jeevani to the foreign lenders. The Court cannot sanction a scheme which has not been approved by the creditors even if the consent of the creditors has been withheld *mala fide* or arbitrarily or even if the court considers the scheme to be reasonable and beneficial to the creditors.[23] Thus, Jeevani by arguing that the foreign lenders are not creditors of the company and therefore no notice was required to be sent to them fraudulently overrule their objections.

2. THAT THE DISPUTE BETWEEN THE PARTIES CANNOT BE REFFERRED TO ARBITRATION

2.1. THE RELEVANT EXTRACT CANNOT BE REGARED AS AN ARBITRATION AGREEMENT.

2.1.1. <u>The clause fails to satisfy the test to be regarded as an arbitration clause.</u>

The following test has been laid down by the Supreme Court[24] to decide whether a clause can be regarded as an arbitration clause or not.

1. Whether the terms of the agreement contemplated that the intention of the parties was for the person to hold an enquiry in the nature of a judicial enquiry, hear the respective cases of the parties and decide upon evidence laid before him,

[22] *State of WB* v. *Sri Pranab Kr. Sur*, (2003) 114 Comp Cases 664 SC

[23] *Sehgal (M.M.)* v. *Sehgal Paper Mills Ltd.*, (1986) 60 Comp Cases 510 (P&H)

[24] *Mallikarjun* v. *Gulbarga University*, 2003 3 ALR 579

2. Whether the person was appointed to prevent differences from arising and not for settling them when they had arisen.

A deed of assignment was executed between two parties. One of the clauses therein referred adjudication by a committee or sub-committee. *There was no stipulation that the adjudication would be in a judicial manner or that it would be in a judicial manner or that it would be in an impartial or objective manner.* However, it was stated that the decision would be deemed to be final. It was held that parties never intended that the clause would constitute an arbitration agreement and that the mere fact that the parties had decided to accept the decision as final would not convert the said clause into an arbitration clause.[25]

In the case of *Cursetji Jamshedji Ardaseer Wadia* v. *Dr. R.D. Shiralee*[26], the test which was emphasized was whether the intention of the parties was to avoid disputes to resolve disputes. In a similar case of *Vadilal Chatrabhuj Gandhi* v. *Thakorelal Chimanlal Munshaw*[27] the test of preventing disputes or deciding disputes was also resorted to for the purpose of considering whether the agreement was a reference to arbitrator or not. It is humbly submitted that the relevant clause is more of a finality clause that aims to define, construct and interpret the share sale agreement. These fall in the "excepted matters" and as such, the clause only is limited to these. Infact, all disputes touching upon the subject matter of the agreement shall be subject to the jurisdiction of Delhi courts.[28]

[25] *Pride of Asia Films* v. *Essal Vision*, 2004 (3) Arb LR 169 (Bom)

[26] AIR1943 Bom 32

[27] AIR 1954 Bom 121

[28] Factsheet, ¶ 9

2.1.2. Existence of Dispute: Pre-requisite of invocation of arbitration agreement is absent.

Where there is a difference between the parties about the liabilities of each other, a dispute is clearly made out.[29] The word 'difference' or the word 'dispute' has a particular meaning in the law of arbitration. A difference may be, for instance, regarding the meaning if a particular term in the contract. It may be that one party feels that he has performed the contract, but the other party says that the real meaning of the contract is something else and what has been done is not the true performance of the contract. This then would be a difference. Under the law of arbitration, a dispute means that one party has a claim and the other party says, for some specific reasons that this is not a correct claim. This is a dispute.[30]

The use of the words 'differences' or 'disputes' in an arbitration agreement is important in defining its scope.[31] It is only the existence of a dispute which confers jurisdiction upon an arbitrator to adjudicate upon the dispute and if there is no dispute, there can be no right to demand arbitration at all because only disputes can be referred to arbitration. Under the 1940 Act[32], 'differences' could be referred to arbitration but under the 1996 Act[33], only 'disputes' can be referred to arbitration. Thus, the arbitration clause should state that disputes between the parties shall be referred to arbitration. The decided cases under the 1940 Act have to be applied with caution for determining the issues under 1996 Act.[34]

In the present case the arbitration agreement is vaguely worded and so cannot be given effect to. The intention to settle disputes by means of arbitration is nowhere indicated. In the case of

[29] *Jammu Forest Co.* v. *State of Jammu &Kashmir*, AIR 1968 J&K 86

[30] *Salecha Cables Pvt. Ltd.* v. *HPSEB*, (1995) 1 Arb LR 422

[31] P.C. Markanda (2012), *Arbitration Step by Step*, LexisNexis Butterworths Wadhwa, Nagpur, p. 6

[32] Section 2(a), Arbitration & Conciliation Act, 1996

[33] Section 7, Arbitration & Conciliation Act, 1996

[34] *Firm Ashok Traders* v. *Gurumukh Das Saluja*, (2004) 3 SCC 155

State of Uttar Pradesh v. *Tipper Chand*[35], a clause in the contract which provided that the *decision of the Superintending Engineer shall be final, conclusive and binding on all parties to the contract upon all questions relating to the meaning of the specifications, designs, drawings and instructions* was construed as not being an arbitration clause. This Supreme Court said that there was no mention in this clause of any dispute, much less of a reference thereof. It is humbly submitted that there is nothing to indicate that the parties ever intended to have the dispute referred to arbitration. There is no reference to the dispute in the said clause at all.

2.1.3. Heading of a clause does not indicate the law laid down in the clause.

The caption or heading of a clause does not decide the contents of a clause. Whether a particular term is a clause is an arbitration agreement or not, has to be decided by looking into the contents of the clause.[36] Thus, it cannot be referred to, for the purpose of construing the provision. It does not control the plain words of the section. It is the intent of the parties and the wordings of the clause, which are important and not mere description of the clause.

2.2.THE INTENTION OF THE PARTIES IS NOT TO ARBITRATE.

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 contract.[37] Where the parties are not *ad idem* about the dispute to be decided to by the arbitrators, there is no valid arbitration agreement.[38]

[35] AIR 1980 SC 1522

[36] *YL e-Services Pvt. Ltd.* v. *Silverline Business & Tech Park Pvt. Ltd*., AIR 2008 Kant 127

[37] *Satyam Shivam Sundaran* v. *Blue Star Ltd.,* AIR 2006 NOC 695 (Ori)

[38] *Sheodutt* v. *Pandit Vishnudatta,* AIR 1995 Nag 116

Any general reference stating that *all disputes will be referred to arbitration* cannot be said to arbitration agreement, more particularly so when one of the parties had filed a suit and another clause in the agreement stated that *Chennai courts will have exclusive jurisdiction in the event of any legal or judicial proceeding*.[39] It is only if the arbitration agreement makes it clear that the parties agree to oust the jurisdiction of the civil court and for all the disputes referred to arbitration and they did not want any of the disputes adjudicated by the civil court, the parties agree for resolution of the disputes through arbitration mandatorily or necessarily. The ouster of jurisdiction of civil courts should not be readily inferred.[40]

3. THAT THE PRIMA FACIE VIEW TAKEN BY COMPETITION COMMISSION OF INDIA IS BAD IN LAW

3.1. THE DELHI HIGH COURT WAS INCORRECT IN ITS VIEW IN DISMISSING THE WRIT PETITION FILED BY THE PETITIONER

In the light of the facts of the present case, "Inventive" was the premier life-saving drug available in the market. It is humbly submitted that Lifeline Ltd. was trying to promote their new drug "Novel" by putting the Petitioner into bad-faith litigation. The suit filed by the Petitioners had no *mala fide* intention to restrain Lifeline Ltd. from entering the relevant market.

'Price' must be used in the sense that it is does not vary with market conditions, as competitive prices do.[41] The provisions of Sec. 19(3) of the Competition Act has to be examined to satisfy rule of reason before the Commission can treat an agreement under Sec. 3(1) and 3(4) of the Act as creating appreciable adverse effect to competition in India.[42] The

[39] *Sankar Seeding System* v. *Jain Motor Trading Co.,* 2004 (1) Arb LR 496 (Mad)

[40] *Dilip Bafna* v. *K. S. Vasudeva*, MANU/KA/7257/2007

[41] *M/s Metalrod Ltd. Ghaziabad* v. *M/s Religare Finvest Ltd*., MANU/CO/0080/2011

[42] Section 19(4) of The Competition Act, 2002, *Big Entertainment Limited* v. *Karnataka Film Chamber of Commerce,* [2012] 108 CLA 116

main reason behind it is that the prices offered by Lifeline Ltd. are considerably cheaper because they had infringed certain IPR's of the Petitioner.[43]

Consequently, the Competition Act, 2002 specifically states that the contours of anti-competitive restraints will not apply with respect to those horizontal and vertical agreements which impose reasonable conditions to protect or restrain infringement of, the rights granted under intellectual property laws.[44] The survival of Petitioner is not possible even if they offer their products at such low price; hence the economic impact of the activities is appreciable. This contravenes the provisions of Sec. 19(3) (b) of the Competition Act; 2002.This can be inferred from the fact that Lifeline was able to launch the drug 'Novel' within a short span of time after its merger with Jeevani Ltd. which was substantially similar to 'Inventive'.

It is humbly submitted that The Delhi High Court was incorrect in its view of appreciating the adverse effect caused to Petitioner.

3.2.SWASTH DID NOT INDULGE IN BAD FAITH LITIGATION

'Bad faith' is a legal concept in which a malicious or bad motive on the part of a party in a *lis* undermines their case, which effects ability to maintain cause of action and obtain legal remedies.[45] If a court feels that these motives effectively abuse the law or the power or the court, it will generally deny eligibility for a legal remedy to which a party would otherwise be entitled.[46]

The determination of a plea of *mala fide* involves whether there is a personal bias or an oblique motive.[47]

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[43] Factsheet, ¶ 11

[44] Section 3(5), Competition Act, 2002

[45] *Jai Balaji Industries Ltd & Ajay Kumar Tantia* v *Union of India (UOI),* AIR 2011 Gau 109

[46] *Ibid*

[47] *State of Bihar & Anr* v. *PP Sharma, IAS & Anr.,* (1992) Supp (1) SCC 222

The injunction obtained by Petitioner was on the basis of infringement of its IPRs and Lifeline Ltd. as the new drug 'Novel' was substantially similar to its drug "Inventive" and was based on certain IPRs which have been assigned absolutely to the Petitioner.

There is no prohibition in law preventing Plaintiffs from withdrawing suit in pursuance of Application under Order 23 Rule 1 of C.P.C., 1908 resulting in dissolving of all interim orders but same will be subject to costs.[48]

In Hulas Rai Baij Nath v. *Firm K. B. Bass & Co*[49], the Hon'ble S.C. held "that the language of Order 23 Rule 1 of the said Code gives an unqualified right to a plaintiff to withdraw from a suit and, if no permission to file a fresh suit is sought under sub- Rule (2) of that Rule, the defendants become entitled to such costs as the court may award. It has been observed that there is no provision of the said Code which requires the Court to refuse permission to withdraw the suit and to compel the plaintiffs to proceed with it."

The mere fact that the Petitioner had withdrawn the case after launching a similar cost-effective drug was a mere co-incidence as the Research & Development of the IPR of the drug was underway and there was no ulterior motive behind two events.

In *FTC* v. *A.E. Staley Mfg. Co.*[50] the Supreme Court held that, in order to establish that he has acted in "good faith", a seller must "show the existence of facts which would lead a reasonable and prudent person to believe that the granting of a lower price would in fact meet the equally low price of a competitor".

In the case of Petitioner, it had acted in good faith as it had withdrawn the case in order to allow competition with Lifeline's drug 'Novel". It is submitted that the Petitioner in its endeavour to protect its IPR's and R&D cannot be held *prima facie*, to be abusing its

[48] *Surakshit Exports Private Limited & Ors* v. *M/s. GCG Transglobal Housing Project Pvt. Ltd.,* 188(2012)DLT243

[49] 1968 AIR 111

[50] 324 U.S. 746 (1946)

dominant position. The suit filed by the Petitioner was not bad in law as it was solely based on the ownership of IPRs. The injunction granted to Petitioner was on the basis of merits by hearing both the parties. In case of bad faith litigation, it would have not withdrawn the injunction granted by Delhi High Court and would have continued to restrain Lifeline from launching their drug 'Novel'.

3.3.THE PETITIONER DID NOT ABUSE ITS DOMINANT POSITION

Competition law does not protect the mere possession of a dominant position, but only its abuse.[51] To be abused, first, the dominance has to be established to which it is essential to determine the relevant market.[52] Under the Competition Act, 2002 the relevant market defines a market with reference to the relevant product market or the relevant geographic market or with reference to both the markets.[53] Dominance by itself is not considered anti-competitive, but it may lead to anti-competitive results if it is misused or exploited by the entity enjoying such dominance.[54]In the present case, the relevant market is cost-effective life-saving drugs. Assessment of dominance is to be preceded by delineation of the correct relevant market in which dominance of the enterprise under consideration is to be assessed.[55] The existence of monopoly power has to be proved whether directly or with circumstantial evidence.

Abuse of Dominant position is "a position of strength, enjoyed by an enterprise, in the relevant market, in India which enables it to operate independently of comparative forces

[51] *Nissan Motors India Private Limited* v. *CCI,* (2014) 5 MLJ 267

[52] *Arshiya Rail Infrastructure Ltd.* v. *Ministry of Railways,* [2013] 112 CLA 297 (CCI)

[53] *Iqbal Singh Gumber & Mrs Hardeep Kaur* v. *Urearth Infrastructure Ltd. & Ors* CCI Case No. 10/2012.

[54] *Richard Whish, Competition Law* (7th Ed., Oxford University Press, 2012) pgs. 196-198

[55] *Sh. Surinder Singh Barmi* v. *Board for Control of Cricket in India (BCCI),* [2013] 113 CLA 579 (CCI)

prevailing in the relevant market; or affects its competitors or consumers or the relevant market in its favour."[56]

Pharmaceutical sector is characterised by strong competition by innovation, where substantial market shares are noticeably less meaningful than in other industry sectors, and do not communicate any useful information about the relevant factor of competition in this case, namely the degree of innovation.[57]

In view of the nature of the pharmaceutical product markets, exceptional circumstances are required in order for it to be possible for a pharmaceutical manufacturer to be dominant.[58]

That consideration is in conflict with the case-law, which has refused to accept the notion that the mere existence of intellectual property rights can give rise to market power.[59] To establish dominant position, factors laid down in Sec. 19(4) of The Competition Act, 2002 must be looked into.[60]

To the extent that, as in the present case, the possession and exercise of those intellectual property rights may be relevant evidence of the dominant position, it should be recalled that such a position is not prohibited *per se*; only the abuse of such a position is so proscribed.[61]

In *Tetra Pak* v. *Commission*[62], it was observed that the acquisition by an undertaking in a dominant position of a company holding an exclusive patent licence constituted the only means of competing effectively with the undertaking in the dominant position.

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[56] Section 4, Explanation (a), Competition Act, 2002, *United Brands* v. *Commission,* [1978] ECR 207.

[57] *Aztrazeneca AB* v. *Commission*, (2010) 5 CMLR 1585

[58] Ibid

[59] [2004] ECR 5039

[60] *Arshiya Rail Infrastructure Ltd.* v. *Ministry of Railways,* [2013] 112 CLA 297 (CCI)

[61] *Supra* note 57.

[62] 1990 ECR II- 1021

In the light of the facts of the present case and arguments presented, the Petitioner did not contravene any provision of Sections 4 and 19 of the Competition Act, 2002 so there is no abuse of dominance involved.

PRAYER

WHEREFORE, in the light of arguments advanced and authorities cited, the Petitioners humbly submits that the Hon'ble Court be pleased to:

a. Recall the order of the Hon'ble Delhi High Court dated 5th July, 2013 approving the scheme of amalgamation between Jeevani and Lifeline.

b. The dispute between the erstwhile Promoters of Jeevani and Lifeline Ltd. shall be referred to arbitration.

c. Hold that since the *prima facie* view of CCI was bad in law hence, the order of CCI directing investigation shall be recalled.

d. Award cost to the Petitioners.

And pass any other order that the court may deem fit in the larger interest of justice.

For this act of kindness, the Petitioners shall duty bound forever pray.

SD/-

Dated this..... Day of September, 2014.

(Counsels for the Petitioners)