TEAM CODE: Z

IN THE HON'BLE SUPREME COURT OF INDIA

THE APPEAL FILED UNDER ARTICLE 136 OF THE INDIAN CONSTITUTION

IN APPEAL NO: _____/ 2014

IN THE MATTER OF

FOREIGN LENDERS OF JEEVANI & ORS.

V.

LIFELINE LIMITED & ORS.

WRITTEN SUBMISSION ON BEHALF OF THE PETITIONERS

TABLE OF CONTENTS

INDEX OF AUTHORITIES

CASES CITED:

BOOKS

1. Pollock and Mulla, Edited by Nilima Bhadbhade Indian Contract and Specific relief Acts, Volume 1, 12th Edition, Lexis Nexis Butterworths

2. MP Jain, Indian Constitutional Law, Vol-2, 6th Edn-2010

3. A RAMAIYA, guide to the Companies Act, part 3, 17th Edition 2010, Lexis Nexis Butterworths Wadhwa.

4. S Ramanujam, Mergers et al, 3rd Edition 2012, Lexis Nexis Butterworths Wadhwa.

5. Dr. P C Markanda, Naresh Markanda, Rajesh Markanda, Law realting to Arbitration and Conciliation, 8th Edition, Lexis Nexis

6. Sir John Woodroffe, Ameer Ali, Commentary on the Code of Civil Procedure, 1908, 4th Edition, Delhi Law House

7. Justice RS Bachawat, Law of Arbitration & Concilation, Volume 1, 5th edition, Lexis Nexis Butterworths Wadhwa.

8. CR Datta, The Company Law, Volume 3, 6th Editon 2008, Lexis Nexis Butterworths Wadhwa.

ONLINE RESOURCES

1. http://www.cci.gov.in/
2. http://www.manupatrafast.in
3. http://www.westlawindia.com/
4. http://europa.eu/

STATEMENT OF JURISDICTION

THE PETITIONERS HUMBLY SUBMIT THIS MEMORANDUM BEFORE THE HON'BLE SUPREME COURT OF INDIA, INVOKING ITS JURISDICTION OF UNDER ARTICLE 136 OF THE CONSTITUTION OF INDIA

STATEMENT OF FACTS

1. Jeevani Limited and Lifeline Limited merged in 2012 by a scheme of arrangement for Jeevani, by which the three promoters of Jeevani, had to sell their entire promoter shareholding (18%) to Lifeline. This sale of stake was affected vide a separate sale agreement between Lifeline and the Promoters which contained specific representations as regards disclosure of vital information by either of the parties. The Scheme was filed before the Bombay Stock Exchange for its approval, which was not granted.
2. Jeevani and Lifeline filed an application under Section 391 of the Companies Act, 1956 before the Delhi HC for initiating the process of approval of the Scheme. A meeting of the Creditors was ordered. Subsequent to the meeting, the Scheme was approved by the majority and later by the Court.
3. Some foreign lenders who had been parties to a consortium agreement with Jeevani, made an application before the Delhi HC for the recall of the order approving the Scheme. The foreign lenders have an arbitral award in their favour granted by a foreign arbitral tribunal in Hong Kong against Jeevani. The application of the foreign lenders being rejected, both by the Hon'ble Company Judge and the Division Bench of the Delhi HC, the lenders have now filed an appeal before the Supreme Court.
4. Lifeline, which continued with the operations of the erstwhile Jeevani of supplying generic drugs to the USA, received a notice from the FDA for providing drug below par quality. Lifeline filed a suit against the Promoters before the Delhi HC for damages arising out of breach of the contract by way of defrauding and misrepresenting to Lifeline, after it was unearthed that the investigation by FDA on drugs produced by Jeevani had commenced before the Scheme took place.
5. The Promoters contended that the Delhi HC has no jurisdiction to hear the matter as the agreement between the parties had an arbitration clause in it. The Hon'ble Single Judge of the

Delhi HC held that the said clause could not be regarded as an arbitration clause. The same was challenged by the Promoters before the Division Bench of the Delhi HC, which held that the clause constitutes an arbitration clause. Lifeline has approached the SC of India challenging this order.

6. Soon after the merger, Lifeline decided to introduce a new life saving drug 'Novel', which was much cheaper, by further developing the active R&D of the erstwhile Jeevani. Swasth, a sister concern of Jeevani had sometime in the year 2010 got assigned absolute rights to a few of the developed and competed R&D and IPRs of Jeevani. Before Novel was launched, Swasth filed a suit of infringement of its IPRs against Lifeline, as Novel was substantially similar to Inventive (A product of Swasth), and also obtained an interim injunction against them from launching Novel. In the meanwhile, Swasth launched a similar cost effective drug, cornering a major chunk of the market, after which it vacated the injunction filed against Lifeline.
7. Lifeline filed an application before the CCI alleging Swasth abused dominant position by indulging in bad faith litigation. CCI directed the DG CCI to investigate on the matter. Swasth filed a Writ Petition in the Delhi HC against Lifeline and CCI, and submitted that the order CCI was bad in law as it was just trying to protect its IPRs, and cannot be held, even *prima facie* to be abusing its dominance. The Delhi HC and later a Division bench did not find any reason to interfere with the investigation as no adverse effect was caused to Swasth and accordingly Swasth has come before the SC of India against the order of the Division Bench.
8. Given the fact that these litigations involve the same parties and disputes arise out of the same transactions and also on the request of the Counsel's appearing in the matter, the Supreme Court has tagged the matters together for hearing.

STATEMENT OF ISSUES

ISSUE 1: WHETHER THE FOREIGN LENDERS ARE CREDITORS TO THE COMPANY AND WHETHER THE SCHEME CAN BE SET ASIDE

ISSUE 2: WHETHER THE PARTIES ARE BOUND BY THE ARBITRATION CLAUSE IN THE AGREEMNT BETWEEN THEM AND WHETHER FRAUD WAS COMMITTED BY THE PROMOTERS

ISSUE 3: WHETHER SWASTH HAS ABUSED ITS DOMINANT POSITION BY INDULGING IN BAD FAITH LITIGATION AND WHETHER THE INVESTIGATION OF THE DG CCI SHOULD BE INTERFERED WITH.

SUMMARY OF PLEADINGS

I. The foreign lenders form a special class of creditors and the Scheme should be set aside.

Any person having a pecuniary claim against the company capable of estimate is a creditor. The Petitioners also have a foreign arbitral award from Hong Kong which will be enforceable on application to the Court. Being a consortium, they are different from other foreign lenders.

II. The parties are not bound by the Arbitration Clause and the promoters committed fraud.

It has been held that the where the clause in the contract provided that the final decision in the event of a dispute as regards the terms and condition of the dispute would lie with the Managing Director was not an arbitration agreement. Here, the dispute resolution lay in the hands of the Executive Personnel (Management Officials) of the Company, thus proving that the said clause is not an arbitration clause.

III. Swasth did not abuse its dominant position and the investigation against Swasth should be quashed.

The CCI is empowered to direct its DG to inquire into a matter in which the Commission has formed a *prima facie* opinion a certain enterprise or group is indulging in activities in violation of Section 3 or Section 4 of the Competition Act. The CCI after taking into account several factors such as the market share, temporary injunction, patent-linkage, was of a *prima facie* opinion that the petitioner might have abused its dominant position in the market. The investigation is just for the collection of evidences, and in no way causes any adverse effect to the petitioner.

ARGUMENTS ADVANCED

I. The foreign lenders form a special class of creditors and the Scheme should be set aside.

1.1.The Petitioner has the requisite locus standi to appear before the court

In the given case at hand, Jeevani, while applying for approval of the High Court, did not disclose the fact that the interests of a foreign consortium of banks are involved in the era of globalisation, and an expanding securities trading market it is vital information to disclose whether a foreign consortium of lenders having a foreign award, are creditors of the company or not. Where the judgment raises issues of law of general public importance, special leave would be granted from a second Petitioner decision.[1] Hence, the petitioner, under Article 136, has the requisite *locus standi* to appear before the Court.

1.2.The Foreign Lenders are Creditors

Every person having a pecuniary claim against the company, whether actual or contingent is a creditor.[2] In general, any person having a pecuniary claim against the company capable of estimate is a creditor.[3] A consortium has been defined as "an association of two or more business entities of different nationalities temporarily joined together for the performance of a limited task".[4] It is "an ad hoc or ongoing, informal or formal, sometimes 'shell', association of two or more business/governmental/financial entities to profitably

[1] Balakrishna v. Ramaswami, AIR 1965 SC 195

[2] HALSBURY'S LAWS OF ENGLAND, 5th Edn.

[3] SIR FRANCIS BEAUFORT PALMER, PALMER'S COMPANY LAW (24th ed. 1987)

[4] Hannon, Use of an International Consortium in a Major International Project, in 1970 PRIVATE INVESTORS ABROAD 103, 105.

pursue, generally on a competitive basis, one or more common commercial activities."[5] If an association is formed for conducting business for the purpose of profit, it is a partnership and the liability of the individual members incurred or contracts made on behalf of the association by officers or individual members is governed by the law of partnership.[6] As the relationship between the members of the consortium is purely contractual, there is no *a priori* intention to adopt the fiduciary impositions of partnership.[7] A consortium also is distinguished from a joint venture in that the consortium lacks two very important characteristics of the joint venture: (1) a joint property interest in the subject matter of the venture, and (2) a right to participate or share in the profits.[8] Therefore, a consortium agreement is different from a joint venture or a partnership. One of the main features of the members of the consortium is the contractual relationship with one another.

The peculiarity of the Consortium agreement entered into by Jeevani and the Foreign Lenders is that it was for the sake of providing financial assistance to Jeevani. Recovery of the money lent is the pecuniary claim against Jeevani. Hence they are creditors of Jeevani. Even if the consortium agreement made Jeevani a part of Consortium, they will still be bound by the rights and liabilities given in the contract, which makes the foreign lenders creditor to Jeevani.

[5] C. DHAWAN & L. KRYZANOWSKI, *EXPORT CONSORTIA: A CANADIAN STUDY* 9-10 (1978)

[6] WILLISTON ON CONTRACTS, (3rd ed. 1959).

[7] International Consortia: Definition, Purpose and The Consortium Agreement, Joseph Russell Milton, Fordham International Law Journal, Vol 3 Issue 2 1979

[8] *Ibid.*

1.3.<u>The Foreign Lenders are a special class of creditors.</u>

According to Section 391, a Scheme cannot be approved without the consent of all the classes of Creditors. In *Sovereign Life Assurance Co.* v. *Dodd*[9], the Court had to consider whether certain creditors formed a single class or two different classes. It was held: "I*t seems plain that we must give such a meaning to the term class as will prevent the section being so worked as to result in confiscation and injustice, and that it must be confined to those persons whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest.*"

In *re Maneckchowk & Ahmedabad Mfg. Co. Ltd.*[10], it was held that: "*Speaking very generally, in order to constitute a class, members belonging to the class must form a homogenous group with commonality of interest.*"

Therefore, there are two criteria to form a separate class- commonality of interests and a homogenous group. Here, the consortium of foreign banks forms a homogenous group. Their rights and liabilities are reciprocal to each other. They, as a consortium, have the commonality of interests, which is one of the most basic features of forming a consortium.[11]

Creditors can be divided into three categories of preferential creditors, secured creditors and unsecured creditors, each having a commonality of interest. A separate class within a class can be created if it is proved that the rights of that separate class was different from the other creditors in the same class.[12] In the given facts, even if they are secured creditors like other secured creditors, or unsecured creditors like other unsecured creditors,

[9] Sovereign Life Assurance Co. v. Dodd (1892) 2 QBD 573 (CA)

[10] Re Maneckchowk & Ahmedabad Mfg. Co. Ltd. (1970) 40 Com Cases 819 (Guj.)

[11] Supra Note 4

[12] Miheer H. Mafatlal v Mafatlal Industries Limited, (1997) 1 SCC 579

they have separate right by the virtue of being in a consortium, as well as being foreign lenders. Since they are a consortium, they are different from other foreign lenders. And since they are foreign lenders, they are different from other classes of consortiums or lenders. In *Commerzbank AG. And Anr.* v. *Arvind Mills Ltd.*[13], the Court held that all secured creditors- whether lenders in forcing currency and lenders in Indian rupees constitute one single class of creditors. However, the facts of the said case can be easily distinguished from the given case. The court, in that case was concerned with a single foreign creditor, whereas the present scenario deals with a consortium. Therefore, the said case is not applicable in the present circumstances.

In addition to the agreement, the petitioners also got an arbitral award from the arbitration tribunal in Hong Kong. For a foreign award to be recognised in India, two conditions to be considered as an arbitral award, that is, the award must be given in a dispute arising out of commercial relationship[14] and the award issued must be a country notified by the Indian government to be a country to which the New York Convention applies, under Section 44(b) of The Arbitration and Conciliation Act, 1996. Here the arbitral award is given by the Hong Kong Arbitration Tribunal, in a dispute arising out of the consortium agreement to provide financial assistance. Hong Kong was notified as the territory where New York Convention was ratified, in the Gazette of India on 19th March, 2012.[15] An Act of Legislature has a retrospective effect, unless notified otherwise. Here, both these conditions have been

[13] Commerzbank AG. And Anr. v. Arvind Mills Ltd. (2002) 2 GLR 1182

[14] RM Investments Trading Co Pvt Ltd v. Boeing Co & Anr, 1994 (4) SCC 541

[15] Prateek Bagaria & Vyapak Desai , Foreign Arbitration Award: China (Including Hong Kong Sar And Macao Sar) Notified As Convention Country, 1996; Available on http://www.nishithdesai.com/information/research-and-articles/nda-hotline/nda-hotline-single-view/article/foreign-arbitration-award-china-including-hong-kong-sar-and-macao-sar-notified-as-convention-coun.html (last accessed on 30th August 2014)

fulfilled in the arbitral award, thereby making it enforceable in India. The Arbitration and Conciliation Act, 1996 does not prescribe any time limit within which a foreign award is to be enforced. Thus, it has to be governed under the Limitation Act, 1963, which specifies 3 years for enforcement of the award. An arbitral award does not cause a change in the status of the creditors.[16] Therefore, at the time of application to the Court under Section 391, the foreign lenders were still creditors of the company. Even after the expiry of the period for enforcement of arbitral award, the foreign lenders do not cease to be the creditors of the company[17] and remained bound by the said consortium agreement and thus a meeting especially for them should have been called before the Scheme was approved. The notice given in local newspapers wouldn't suffice as a valid Notice, as it is practically not possible for Foreign Entities to keep a tab on local newspapers. Jeevani should have acted in good faith and intimated the foreign lenders about the merger.

The Respondent humbly submits that the Petitioners constitute a special class of creditors and thus a special meeting should have been convened for them. Since a class of creditors was omitted from the meeting; the Scheme should be set aside.

II. The parties are not bound by the Arbitration Clause and the promoters committed fraud.

2.1.<u>The petitioner has the requisite locus standi in the matter</u>

The decision given by the division bench of the Hon'ble High Court of Delhi was passed *per incuriam*, as it had gone against the judgement of Supreme Court, in N. Radhakrisnan v. Maestro Engineering. Thus, there was a grave injustice for the Petitioner due to the decision

[16] Infrastructure Leasing and Financial Services Ltd. v. BPL Ltd. , (2008) 144 Com Cases 544

[17] *Ibid.*

of the High Court. A duty is enjoined upon the SC to exercise its power by setting right the illegality in the judgments is well-settled that illegality must not be allowed to be perpetrated and failure by the SC to interfere with the same would amount to allowing the illegality to be perpetuated.

*2.2.**The Impugned Clause is not an Arbitration Clause***

The Supreme Court, in *K.K. Modi v. K.N. Modi & Others*[18] gave two important criteria as to what constitutes an arbitration agreement. The Court held:

"The agreement between the parties must contemplate that substantive rights of parties will be determined by the agreed Tribunal and that the Tribunal will determine the rights of the parties in an impartial and judicial manner with the Tribunal owing an equal obligation of fairness towards both sides and also that the agreement of the parties to refer their disputes to the decision of the Tribunal must be intended to be enforceable in law."

In *Discovery Properties & Hotels Pvt. Ltd. v. City and Industrial Development Corporation of Maharashtra Limited*[19], the Bombay High Court held that the where the clause in the contract provided that the final decision in the event of a dispute as regards the terms and condition of the dispute would lie with the Managing Director was not an arbitration agreement. Here, the dispute resolution lay in the hands of the Executive Personnel (Management Officials) of the Company, thus proving that the said clause is not an arbitration clause. In *K.K. Modi v. K.N. Modi & Others*[20], the Supreme Court distinguished between an arbitration and expert determination and held that referring any disputes related to

[18] K.K. Modi v. K.N. Modi & Others, (1998) 3 SCC 573

[19] Discovery Properties & Hotels Pvt. Ltd. v. City and Industrial Development Corporation of Maharashtra Limited, 2011 (1) Bom.C.R. 343

[20] K.K. Modi v. K.N. Modi & Others, (1998) 3 SCC 573

implementation of the clause by Chairman, IFCI or his nominees shall be an expert valuation. In the given scenario, the arbitration clause refers the disputes related to meaning, scope, right, instruction, claims or interpretation of the contract to the Empowered Committee consisting of 3 executive personals of the Company. Thus, referring disputes to the officials of the Company disqualifies the clause from serving the purpose of "Arbitration". Hence, the dispute resolution clause in the contract is not an arbitration agreement.

*2.3.**The Court, not the tribunal, has the jurisdiction to hear the matter.***

When a *prima facie* case of fraud is made out, the court will refuse to interfere on the basis of such agreement and leave the issue to be tried by the civil court.[21] The Supreme Court, in *N. Radhakrishnan v. Maestro Engineers*[22] , has suggested that even allegation of fraud and similar grave circumstances would oust the jurisdiction of the tribunal 'in the interests of justice'. The same has been held by the House of Lords in *Premium Nafta Products Ltd (20th Defendant) & Ors v. Fili Shipping Company Ltd & Ors*[23], affirming the Court of Appeals decision in *Fiona Trust v Privalov*[24] ,a similar case regarding the validity of the contract due to bribery. This is significant as The Arbitration and Conciliation Act, 1996, not unlike the law in the United Kingdom, has been modeled upon UNCITRAL Model Code on Arbitration, with a few modifications.

[21] India Household and Healthcare Limited v. LG Household and Healthcare Limited, (2007) 5 SCC 510

[22] N. Radhakrishnan v. Maestro Engineers, (2010) 1 SCC 72

[23] Premium Nafta Products Ltd (20th Defendant) & Ors v. Fili Shipping Company Ltd & Ors [2007] 2 All ER (Comm) 1053

[24] Fiona Trust v. Privalov, [2007] UKHL 40

In *H.G.Oomor Sait and another vs. O.Aslam Sait*[25], the Madras High Court held that where allegations of fraud are made, the parties need not be referred to arbitration. Gujarat High Court, in *Jayant Mulchand Shah* v. *Elsen Und Metall Aktiengesells and Ors.*[26], said that if the point in dispute is whether the contract in question containing the arbitration clause was ever entered into at all or was void ab initio, illegal, or obtained (for example) by fraud, duress or undue influence, the clause does not apply.

A constitutional bench of 7 judges of the Supreme Court resolved these contradictory positions and laid down the law in *SBP & Co.* v. *Patel Engineering Ltd. and Another*[27] :.

"Judicial authority is bound to refer the matter to arbitration once the existence of a valid arbitration clause is established. Thus, the judicial authority is entitled to, has to and bound to decide the jurisdictional issue raised before it, before making or declining to make a reference."[28]

Hence, there is no exclusive conferment of jurisdiction on the Arbitral Tribunal under section 16 to decide the existence or validity of the Arbitration Agreement and the same has to be done by the civil courts. Though the Supreme Court, in *Swiss Timing Limited v Organising Committee, Commonwealth Games*[29], had declared the earlier law laid down in *N. Radhakrishnan v. Maestro Engineers*[30] as *per incuriam*, the law still applies as the said bench which declared it *per incuriam* was a single judge bench. Thus, it could not declare the case

[25] H.G.Oomor Sait and another v. O.Aslam Sait, 2001 (3) CTC 269

[26] Jayant Mulchand Shah v. Elsen Und Metall Aktiengesells and Ors., AIR 1998 Guj 271

[27] SBP & Co. v. Patel Engineering Ltd. and Another (2005) 8 SCC 618

[28] *Ibid.*

[29] Swiss Timing Limited v. Organising Committee, Commonwealth Games 2014(2) Arb LR 460

[30] N. Radhakrishnan v. Maestro Engineers, (2010) 1 SCC 72

as per incuriam as it was given by a bench of higher quorum, as decided by the Supreme Court in *Central Board D.B. Community v. State of Maharashtra*[31]. Therefore, the decision in *N. Radhakrishnan v. Maestro Engineers*[32] , that in cases of fraud and misrepresentation, the court has jurisdiction to hear the matter, still holds good.

Since in this case, an accusation of fraud has been made, the Dispute Resolution Clause, it Is not up to the tribunal to hear the matter, but the Court.

2.4.<u>There was fraud and misrepresentation committed by the promoters of Jeevani.</u>

Fraud was defined in *Derry* v. *Peek*[33] as: "Fraud is proved when it is shown that a false representation has been made, knowingly, or without belief in its truth, or recklessly careless whether it be true or false."

According to FDA rules of procedure[34] a notice of inspection is mandatory to be produced before any site which is investigated. This notice of inspection has to be produced to the highest management official. Thus it can be deduced that the promoters were aware of the investigations being conducted in Jeevani. Thus a false representation was made knowingly, proving that this was an intentional misrepresentation.

The Explanation to Section 17 states that mere silence as to facts likely to affect the willingness of a person to enter into a contract is not fraud, unless the circumstances of the case are such that, regard being had to them, it is the duty of the person keeping silence to speak, or unless his silence is, in itself, equivalent to speech. Mere silence is not fraud unless

[31] Central Board D.B. Community v. State of Maharashtra, 2005 (1) K.L.T. 486

[32] N. Radhakrishnan v. Maestro Engineers, (2010) 1 SCC 72

[33] Derry v. Peek (1889) 14 AC 337 at p. 374

[34] Available at http://www.fda.gov/iceci/inspections/iom/default.htm (last accessed on 25th August 2014)

there is a duty to speak, or unless it is equivalent to speech.[35] Here, the sale agreement entered into by the promoters and Lifeline imposed a duty to speak. Thus not, revealing that Jeevani was under investigation by the FDA, amounts to Fraud.

A representation is material when a reasonable man would have been influenced by it in deciding whether or not to enter into the contract.[36] An investigation conducted by the world's biggest Drug Administration Agency on a pharmaceutical company operating in the USA is definitely a material information. Regardless of the fact that the investigation report was not finalised before the merger occurred, the fact that the inspection had occurred is material and must have been informed by the promoters. Revealing the on-going investigations against the Company, may not only deter Lifeline from entering into the merger, given the fact that a probable ban by FDA would have an impact on the marketability of the drugs worldwide, it would lower the bargaining power of the promoters. Hence, it can be deduced that the promoters withheld a piece of material information which they were obligated to reveal, to hike the price of their shares, gaining wrongfully and thus unjustly enriched.

III. Swasth did not abuse its dominant position and the investigation against Swasth should be quashed.

3.1. *CCI does not have the jurisdiction to look into the matter*

It is humbly submitted before the Honourable Court that CCI did not have the jurisdiction to hear the issue. Here, it is clearly stated that the suit for injunction was withdrawn by the petitioner. Withdrawal of a Civil Suit is dealt under Order XXIII of the

[35] Chartered Bank of India v. Imperial bank of India AIR 1933 Cal 366

[36] Bhagwani Bai v. Life Insurance Corpn of India AIR 1984 MP 126

Civil Procedure Code, 1908. Also, once an interlocutory application of Swasth for injunction has been disposed of, the party aggrieved by the interim injunction, as per S. 144 of the Civil Procedure Code, has to apply to the court of First Cause to claim restitution. In this case, the Court of First Cause is the Delhi High Court. The Constitution of India, under Article 227, grants to the High Court, a power of superintendence over all tribunals and inferior courts in India. Therefore, The CCI cannot look into the issue as it involves a question of law related to a higher court, even if there is an abuse of dominance involved.

3.2. ***Swasth cannot be held even prima facie liable for abusing its dominant position, as it was merely protecting its IPRs, and so the DG CCI investigation should be stopped.***

It is humbly submitted before this Hon'ble Court that IPR is granted for several compelling reasons. First, the progress and well-being of humanity rest on its capacity to create and invent new works in the areas of technology and culture. Second, the legal protection of new creations encourages the commitment of additional resources for further innovation. Third, the promotion and protection of intellectual property spurs economic growth, creates new jobs and industries, and enhances the quality and enjoyment of life.[37] IPR gives the inventor exclusive rights over the use of the invention for a particular amount of time.

S. 48 of the Indian Patents Act, 1970 confers upon the patentee the exclusive right to prevent third parties, who do not have his consent, from the act of making, using, offering for sale, selling or importing for those purposes that product in India.[38] Further, Ss. 43, 48, 53 of the Indian Patents Act, 1970 classifies that upon grant of a patent, a patentee secures, for a

[37] World Intellectual Property Organisation, *What is Intellectual Property, available on* http://www.wipo.int/export/sites/www/freepublications/en/intproperty/450/wipo_pub_450.pdf (last accessed on 30th August 2014)

[38] S.48(a) of the Indian Patents Act, 1970

term of twenty years from the date of filing of the application, the exclusive right to prevent third parties who do not have its consent from making, using, offering for sale, selling or importing patented products in India.

It was held in the case of *Mathew V. Mathew* v. *Ajith Kumar*[39], that in order to encourage the disclosure of improvements, any person may upon disclosure of his improvement at the Patent Office, demand to be given monopoly in the use of it for a period of 20 years. Giving the monopoly encourages invention. After the expiry of the term of the patent, the invention passes into the public domain.

It was argued in the case of *Bayer Corporation & Ors.* v. *Cipla, Union of India Others*[40] that when a pharmaceutical company first markets a drug, it is usually under a patent that allows only the pharmaceutical company that developed the drug to sell it. Generic drug can only be legally produced for drugs which are free of patent protection. The expiration or invalidation of the patent removes the monopoly of the patent holder on drug sales. This allows the company to recover the cost of developing that particular drug. After the patent expires, any pharmaceutical company can manufacture and sell that drug for a fraction of the original cost of testing and developing that particular drug.

It is therefore submitted that the petitioner was just exercising the exclusive IP rights. The injunction was obtained against Lifeline so as to protect its IPRs, as there was apprehension on the part of the petitioner that Lifeline was infringing its IPRs. The petitioner was very much within its right to obtain an injunction against Lifeline, as S. 48 of the Patents Act, 1970 confers the power to the patentee to restrict third parties from infringing their IPRs.

[39] Mathew V. Mathew v. Ajith Kumar OS.No. 2 of 2000(A), High Court of Kerala

[40] Bayer Corporation & Ors. v. Cipla, Union of India Others, ILR (2009) Supp. (2) Delhi 145

There was no *mala* fide intention on the part of the petitioners, and the injunction was obtained so as to prevent the irreparable damage, which the release of 'Novel' could have caused to the petitioner. The petitioner in an act of goodwill, voluntarily vacated the injunction as soon as they had got their share of market, which the IPR guarantees them. Lifeline could very well produce and sell 'Novel' after the vacation of injunction.

On the other hand, abuse of dominance or unilateral conduct refers to the conduct of an enterprise that holds sufficient market power in a particular relevant market, such that it can operate independently of market forces and the competitive constraints imposed by its competitors. The Competition Act, 2002 prohibits the abuse of dominance by any enterprise or group[41]. However, it was held in *Jupiter Gaming Solutions Pvt. Ltd.* v. *Government of Goa & Ors*[42] that dominance per se is not bad, but its abuse is treated to be bad in Competition Law in India. Abuse is said to occur when an enterprise uses its dominant position in the relevant market in an exclusionary or /and an exploitative manner. The Act prescribes a three-step test for the determination of abuse of dominance:

- defining the relevant market;
- assessing dominance in the relevant market; and
- establishing abuse of dominance.

For determining whether a market constitutes a "relevant market" for the purposes of this Act, the Commission shall have due regard to the "relevant geographic market" and "relevant product market".[43] Several cases of the ECJ such as *NV Nederlands che Banden Industries*[44];

[41] S.4(1) of the Competition Act, 2002

[42] Jupiter Gaming Solutions Pvt. Ltd. v. Government of Goa & Ors, 2012 Comp LR 56 (CCI)

[43] Section 19(5) of the Competition Act, 2002

[44] N. V. Netherlands Banden Industrie Michelin v. Commission of the European Communities [1983] ECR 3451

Michelin v *Commission of the European Communities*[45], *Oscar Bronner GMBH*[46] observed that it is essential to define the relevant market and it must be defined both from the geographical and the product points of view.

The Act lays down that the Commission shall, while determining "relevant geographic market", have due regard to all or any of the following factors, namely: (a) regulator trade barriers; (b) local specification requirements; (c) national procurement policies; (d) adequate distribution facilities; (e) transport costs; (f) language; (g) consumer preferences; (h) need for secure, regular supplies or rapid after-sales services.[47]

The Act further lays down that the Commission shall, while determining the "relevant product market", have due regard to all or any of the following factors, namely: (a) physical characteristics or end-use of goods; (b) price of good or service; (c) consumer preferences; (d) exclusion of in-house productions; (e) existence of specialised producers; (f) classification of industrial products.[48]

In the instant case, the Commission has ordered an inquiry into the matter although all of the above-listed factors are unknown. A dominant position, and further an abuse of dominant position can never be inferred when none of the above factors are known. It was held by the Hon'ble Court that in the case of *Competition Commission of India* v *Steel Authority of India Ltd. & Anr.*[49] *"In consonance with the settled principles of administrative*

[45] Michelin v. Comm'n , 2002 O.J. (L 143) 1, 5 C.M.L.R. 388 (2002)

[46] Available at ; http://www.worldlii.org/e_u/cases/EUECJ/1998/C797.htm (last accessed on 25th August 2014)

[47] Section 19(6) of the Competition Act, 2002

[48] Section 19(7) of the Competition Act, 2002

[49] Competition Commission of India v. Steel Authority of India Ltd. & Anr. (2010)10 SCC 744

jurisprudence, the Commission is expected to record at least some reason even while forming a prima facie view.

It is therefore humbly submitted that the DG CCI should be directed to stop the investigation as there is no appropriate reason given by the Commission, while will hold the petitioner, even *prima facie* liable for abuse of dominant position.

PRAYER

Wherefore, in the light of facts of the case arguments advanced and authorities cited, it is humbly submitted that the Hon'ble Supreme Court of India may be pleased to declare and adjudge that:

- **The Foreign Lenders are Special Class of Creditors and set aside the Scheme**
- **The non disclosures amounted to Fraud and direct the Promoters to pay compensation for the loss incurred because of the same.**
- **The investigation proceedings against Swasth should be set aside.**

And pass any other order which the Court may deem in the ends of justice, equity, expediency and good conscience in favour of the petitioners. All of which is respectfully submitted.

Place: *S/d*_____

Date: (Counsel for the Petitioners)