

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

IN THE SUPREME COURT OF INDIA.

TEAM CODE:A

SPECIAL LEAVE PETITION

1. FORIEGN BANKS (FOREIGN LENDERS)

... APPELLANT

V.

LIFELINE LIMITED

...RESPONDENT

CLUBBED WITH SPECIAL LEAVE PETITION

2. LIFELINE LIMITED

... APPELLANT

V.

THREE PROMOTERS OF JEEVANI

...

RESPONDENT

CLUBBED WITH SPECIAL LEAVE PETITION OF

3. SWASTH LIFE LIMITED

...APPELLANT

V.

LIFELINE LIMITED

... RESPONDENT NO.1

COMPETITION COMMISSION OF INDIA.

... RESPONDENT NO.2

MEMORIAL ON BEHALF OF RESPONDENTS

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LIST OF ABBREVIATIONS

Abbreviation	Full Form
&	And
AIR	All India Reporter
Cal.	Calcutta
CAT	Central Administrative Tribunal
FDA	Food and Drug Administration
CCI	Competition Commission of India
Comp Cas	Competition Cases
CPC	Civil Procedure Code
HC	High Court
DG	Director General
ECR	European Court Reports
SC	Supreme Court
FB	Full Bench
IPR	Intellectual Property Rights

INDEX OF AUTHORITIES.

STATUTES, ARTICLES AND REPORTS:-

The Competition Act 2002

The Arbitration & Conciliation Act 1996

The Companies Act 1956

The Companies Act 2013

The Patents Act 1977

The Limitation Act 2005

The Contract Act 1872

The Constitution of India

BOOKS REFERRED TO:-

Black's Law Dictionary

The Law of Arbitration and Conciliation by S.K Chawla

Competition Law & Practice by D. P. Mittal

Taxmann's Company Law and Practice by A.K Majumdar

DYNAMIC LINKS:-

www.indiankanoon.org

www.judis.nic.in

www.vakilno1.com

STATEMENT OF JURISDICTION

Under Article 136 of the Constitution, Special leave Petition the appellants have approached the Hon'ble Supreme Court.

136. Special leave to appeal by the Supreme Court.

(1) Notwithstanding anything in this Chapter, the Supreme Court may, in its discretion, grant special leave to appeal from any judgment, decree, determination, sentence or order in any cause or matter passed or made by any court or tribunal in the territory of India.

(2) Nothing in clause (1) shall apply to any judgment, determination, sentence or order passed or made by any court or tribunal constituted by or under any law relating to the Armed Forces.

STATEMENT OF FACTS

1 Jeevani Limited (“**Jeevani**”) is a listed public company incorporated in the year 1990 under the Companies Act, 2013 with its registered office in New Delhi. Its equity shares are listed on the Bombay Stock Exchange. Jeevani is one of the leading market players in the pharmaceutical manufacturing industry. In addition to holding a considerable market share in this sector in India, Jeevani also had a global presence with its products being sold in some countries of Asia and Europe and also in United States of America and Brazil. In a statement issued by Jeevani in July, 2011 it was announced that in an effort to meet the growing global demands of industry standards, increasing challenges of the oncoming competition in the market and reaching maximum profitability, Jeevani was looking forward to opportunities for expansion in the market.

2 Lifeline Limited, (“**Lifeline**”) is another listed public company registered & incorporated under the Companies Act, 2013 having its registered office in Mumbai. Lifeline is a popular company in the Indian market as a major producer of food products and is known for the quality and variety of food products in India. Lifeline is amongst the few Indian companies whose products are traded internationally. Realizing the huge potential in the pharmaceutical sector and only after establishing itself in the abovementioned market, Lifeline decided to foray into the pharmaceutical sector. Lifeline approached Jeevani for a possible partnership to venture into this sector. In and around November, 2011, both companies initiated negotiations for a possible merger.

3 After a lot of deliberations and negotiations, both companies on 27th January 2012 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, (the “**Scheme**”) was prepared keeping this in mind. It was also decided that the three

promoters of Jeevani (the “**Promoters**”) who are also majority shareholders in the company would sell their entire promoter shareholding i.e.18% of their stake in Jeevani to Lifeline. However this sale of stake was affected vide a separate sale agreement entered into on 23rd March 2012 between Lifeline and the Promoters. This agreement, inter alia, contained specific representations as regards disclosure of information, by either of the parties, which may be vital to the transaction which the parties were entering into. It was also specifically provided in this agreement that all intangible properties including the active R & D and IPRs of Jeevani would become the property of Lifeline and all rights accruing from it would vest with Lifeline.

4. The Scheme was finalized on 5th March 2012 and immediately thereafter the Scheme was filed before the Bombay Stock exchange for its approval. However, the Bombay Stock Exchange did not provide its approval.

5. On 30th March 2012, Jeevani and Lifeline filed an application under Section 391 of the Companies Act, 1956 (the “**Companies Act**”) for initiating the process of approval of the Scheme by the Hon’ble Delhi High Court. The Hon’ble Company Judge in accordance with the mandate of Chapter V of the Companies Act ordered for a meeting of the creditors to be convened. Jeevani issued a notice of meeting to its creditors by publishing an advertisement in a local English language newspaper and local language newspaper containing the terms of the proposal and explaining its effect. A meeting of the creditors to whom notice was sent, was accordingly held and resolutions supporting the Scheme were passed by a vote of majority. Thereafter the Scheme was also approved by the Hon’ble Delhi High Court on 5th July 2013. All other relevant approvals were taken by Jeevani. Around the same time, Lifeline had separately approached the Bombay High Court under the relevant provisions of the Companies Act for approval of its scheme of arrangement. Same was approved by the Bombay High Court and has not been challenged.

6. Prior to the public announcement being made by Jeevani, certain creditors of Jeevani, mainly foreign banks (“**foreign lenders**”) had jointly, invoked arbitration proceedings before a foreign arbitral tribunal constituted in Hong Kong, against Jeevani. 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 favor of the foreign lenders against Jeevani. Under the foreign arbitral award Jeevani was to pay to the foreign lenders the amounts as stated in the arbitral award. Till date no proceeding for enforcement of this foreign award has been filed by the foreign lenders.

7. In early August 2013 the foreign lenders of Jeevani made an application before the Hon’ble Company Judge for recall of order dated 5th July 2013 passed by the Hon’ble Company Judge of the Delhi High Court approving the Scheme. The foreign lenders contended that they had not received notice of the Scheme and were not able to attend the meeting of creditors. The foreign lenders, further contended that they constituted a separate class of creditors and in view of the fact that there was no meeting convened for them, the Scheme should be set aside. The Company however contended that the foreign lenders are not creditors of the Company and no notice was required to be sent to them and the fact that whether they even constitute a class of creditors is disputed. The Hon’ble Company Judge however dismissed application filed by the foreign lenders and refused to set aside the Scheme. Against this order the foreign lenders went in appeal to the Division Bench of the Delhi High Court, which also after due consideration of facts dismissed the appeal of the foreign lenders. This order is now under challenge before the Supreme Court of India and is pending arguments.

8. After the merger, the newly merged Lifeline continued with the operations of the erstwhile Jeevani, which included its supplying generic drugs to the United States of America.

However soon after, Lifeline received notices from the US Food and Drug Administration (the “FDA”) for providing drugs of below par quality and in violation of the requisite production parameters set out by the FDA. On scrutiny by Lifeline, it was unearthed that the investigation by FDA on drugs produced by Jeevani at its plants in India was commenced much before the merger of Jeevani and Lifeline took place. Lifeline filed a suit against the Promoters before the Delhi High Court for damages arising out of breach of the contract dated 23rd March 2013 , for compensation for wrongful gain and unjust enrichment of Promoters by way of defrauding and misrepresenting to a bona fide purchaser i.e. Lifeline. The Promoters contended that the Delhi High Court has no jurisdiction as the agreement dated 23rd March 2013 between the parties had an arbitration clause and any dispute arising between them should be referred to arbitration. However, Lifeline contended that there is no arbitration clause in the agreement.

9. The extract of relevant clause from the Share Sale Agreement as relied upon by the Promoters are stated below:-

1. Governing Law

1.1. This Agreement shall be interpreted and construed in accordance with the laws of India.

2. Dispute Resolution

2.1. Decision of an empowered committee comprising of (three) executive level personnel of the Company shall be final, binding and conclusive on parties to this Agreement upon all questions and issues relating to the meaning, scope, instructions, claims, right or matters of interpretation of and under this Agreement.

2.2. The parties shall endeavor to amicably resolve the above mentioned issues.

3. Jurisdiction

3.1. All disputes touching upon the subject matter of the agreement shall be subject to the jurisdiction of Delhi courts.”

10 The Hon’ble Single Judge of the Delhi High Court held that the above clause could not be regarded as an arbitration clause and kept the matter for completion of pleadings and arguments on a later date. This Order of the Single Judge was challenged in appeal by the Promoters to the Division Bench of the Delhi High Court. The Division Bench held that the Single Judge had erred in its decision and that the clause constitutes an arbitration clause and accordingly referred the disputes to be decided by the Empowered Group in terms of the agreement. Aggrieved by this Order of the Division Bench of the Delhi High Court, Lifeline has approached the Supreme Court of India and the matter is pending for arguments.

11. In the meanwhile, and soon after the merger, Lifeline to increase its profitability, decided to introduce a new life saving drug by the name of “Novel” into the market. This new drug was manufactured after further developing the active R & D which became the property of Lifeline after its merger with Jeevani. The new drug Novel was eagerly awaited in the market as it was published to be considerably cheaper than other lifesaving drugs in the market, including the drug “Inventive” presently being the premier drug available in the market. The drug “Inventive” was being manufactured and sold by Swasth Life Limited (“Swasth”), a sister concern of the Promoters, of the erstwhile Jeevani. Swasth had sometime in the year 2010 got assigned absolute rights to a few of the developed and completed R & D projects and IPRs of Jeevani. Before Lifeline could launch drug ‘Novel’, Swasth filed a suit for infringement of its IPRs in the Delhi High Court 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. Based on its arguments, Swasth was able to obtain an interim injunction against Lifeline who was restrained from launching the new drug ‘Novel’ until further orders of the Court. In the meanwhile, 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.

12. Based on the above Lifeline filed an application before the Competition Commission of India (the “CCI”) alleging that Swasth was abusing its dominant position by indulging in bad faith litigation. The CCI based on the allegations made by Lifeline was of the *prima facie* view that Swasth may have abused its dominance and passed an Order directing the DG CCI to investigate on the information provided by Lifeline and submit its report within 45 days. The report of the DG is still awaited.

13. Swasth being aggrieved by the Order of the CCI filed a writ petition making Lifeline and the CCI a party in the Delhi High Court. Swasth submitted that CCI’s Order for directing investigation was bad in law as Swasth in its endeavor to protect its IPRs cannot be held, even *prima facie*, to be abusing its dominance. Upon hearing the arguments of Swasth, Lifeline and the CCI, the Delhi High Court held that CCI has made *prima facie* finding, and has only directed for an investigation on the allegations made against Swasth. As such no adverse effect is caused to Swasth and dismissed the writ petition filed by Swasth. On appeal, the Division Bench also did not find any reason to interfere with the order of Hon’ble Single Judge and accordingly Lifeline has come before the Supreme Court against the order of the Division Bench.

14. 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 exercising its inherent powers has tagged the matters together for hearing.

STATEMENT OF ISSUES

- I. Whether the Foreign banks constitute a separate class of creditors?
- II. Whether the Sale Agreement constitutes an Arbitration clause?
- III. Whether the decision of the competition commission is bad in law?

SUMMARY OF ARGUMENTS

I. Whether the Foreign banks constitute a separate class of creditors?

In the instant matter, an arbitration award was passed in favor of the foreign lenders against Jeevani. However since the award of 2010 no proceedings for enforcement of this foreign award has been filed by the foreign lenders. It cannot be that a foreign award can be enforced at any time, since even a domestic award can be enforced only within a specified time limit.

II. Whether the sale agreement constitutes an Arbitration clause?

There are three executive personnel of an empowered committee of the Company who's decision shall be final, binding and conclusive on parties to the Agreement upon all questions and issues relating to the meaning, scope, instructions, claims, rights or manners of interpretation of under the mentioned Agreement.

III. Whether the decision of the competition commission is bad in law?

Swasth is liable for abuse of dominant position under Section 4 of the Competition Act because – *first*, it enjoys a dominant position in the relevant market and *second*, its practice amount to abuse of such dominant position. *Second*, Swasth engaged in predatory behavior. Therefore, Cheat'em is liable for abuse of dominant position under Section 4 of Competition Act and the order of the CCI directing the DG to investigate is not bad in law under S. 26(1) of the Competition Act 2002.

ARGUMENTS ADVANCED

I. The Foreign banks do not constitute a separate class of creditors.

- In the instant dispute the Foreign Banks (foreign lenders) do not constitute as creditors or even a separate class of creditors. As certain Foreign lenders jointly invoked arbitration proceeding before a Foreign Arbitral Tribunal constituted in Hong Kong against Jeevani for payment to be made under a consortium agreement .On 27th July, 2010, an arbitration award was passed in favor of the foreign lenders against Jeevani and Jeevani was to pay the amount stated in the award to the foreign lenders respectively. Since the award of 2010 no proceedings for enforcement of this foreign award has been filed by the foreign lenders.
- When two companies amalgamate and merge into one the transferor company loses its entity as it ceases to have its business. However their respective rights and liabilities are determined under the scheme but the corporate entity of the transferor company ceases to exist with effect from the date the merger is made effective¹
- Also after an award is passed the merger was decided in 2012, as the merger scheme has specifically provided that all the assets and liabilities of Jeevani were to be transferred to lifeline and now lifeline will liable for all the liabilities of Jeevani. The foreign lenders are no longer the creditors of Jeevani, as after the arbitration award was passed in Hong Kong, the foreign creditors no longer have ceased to give any financial aid whatsoever. And because they no longer constitute as creditors of Jeevani the notice for approval of the scheme was not sent to them as also their vote does not count any longer. A creditor is a person or company to whom money is owed.
- It cannot be that a foreign award can be enforced at any time, since even a domestic award can be enforced only within a specified time limit. The New York Convention

¹ Saraswati industrial syndicate Ltd. V. Commissioner of Income Tax, Haryana, Himachal Pradesh, Delhi- III, New Delhi, AIR 1991 SC 70.

states that each contracting state shall enforce foreign arbitral award in accordance with the rules of procedure of the territory where the award is relied upon. It is clear that this Article enables the state wherein the award is sought to be enforced to impose⁹, under its procedural law, time limits within which the enforcement of the award is sought.

- Since Part II of the 1996 Act does not prescribe any time limit, the Limitation Act, 1963, would apply¹⁰ The Arbitration and Conciliation Act does not prescribe any time limit within which a foreign award must be applied to be enforced. However various High Courts have held that the period of limitation would be governed by the residual provision under the Limitation Act i.e. the period would be three years from the date when the right to apply for enforcement accrues. The High Court of Bombay has held that the right to apply would accrue when the award is received by the applicant.² i.e from 27th July, 2010. The Foreign banks till early August, 2013 have not yet filed for enforcement of the award. Since the limitation period of 3 years has already expired and therefore Jeevani does not consider them as creditors anymore and so they were not served the notice of the meeting because they do not constitute a separate class of creditors.
- Sections 391 to 394 of the Companies Act are a complete code in themselves, as regards corporate law, embodying the entire scope and procedure to be followed for court sanctioned mergers, amalgamations and arrangements. As a corollary, the court would not be allowed to usurp jurisdiction where it has none. The company itself, its members, its creditors (or class of creditors) or the liquidator (in case of a company in winding up) may make the application to the appropriate court.
- A scheme of compromise or arrangement must be approved by a resolution passed by not less than three-fourths in value of the total creditors (or class of creditors) or members (or

² 2007 (1) RAJ 339 (Bom), AIR 1986 Gujarat 62.

class of members), as the case may be, present and voting either in person or through proxies. There is no rigid formula for determining a class of creditors or members. It is the discretionary power of the court to determine these classes. Essentially, 'class' means persons whose rights are so similar that they can be combined together with a view to achieve a common interest.

- Subsequent to the scheme being approved by the members and/or creditors, a petition for sanctioning of the scheme is filed with the appropriate court within whose jurisdiction the registered office of the transferor and the transferee company is situated. The approved arrangement is, unless prejudicial to public interest or interest of the creditors, sanctioned by the court and a certified copy of the order is required to be filed with the Registrar of Companies.
- Normally, the term "foreign award" gains significance only for the purposes of enforcement in a country other than its country of origin. Section 48 of the Act is akin to Article V of the New York Convention.³
- Normally, the starting point of limitation would be the date of finality in the country where the award is made. However, there is a need of clear judicial authority on this point. It would be pertinent to note that neither under the old laws nor under the 1996 Act, the Indian courts are empowered to set aside a foreign award. The only enquiry which the court is supposed to make is about its enforceability.
- **Conditions for Enforcement of Foreign Awards** - The law of limitation (Limitation Act 1963) applies to arbitrations as it does to proceedings in court (*section 43, Act*). For these purposes, arbitration proceedings are deemed to have commenced (unless the parties have

³ 52 First Ed, 1986, Sweet & Maxwell.80 Asian International Arbitration Journal (2008) 4 AIAJ

agreed otherwise) on the date a request for the dispute to be referred to arbitration is received by the respondent (*section 21, Act*).⁴

- The usual limitation period is three years from the date of the commencement of the cause of action. Once time has started to run, no subsequent inability to bring the action stops the time running.⁵

II. Whether the sale agreement constitutes an Arbitration clause?

In the instant dispute arbitration clause does exist in the sale agreement between Lifeline and the three promoters of Jeevani.

⁴ 50 The 1996 Act, s 47(1).

⁵ 51 1995 Supp (2) SCC 280.

9. The extract of relevant clause from the Share Sale Agreement as relied upon by the Promoters are stated below:-

1. Governing Law

1.1. This Agreement shall be interpreted and construed in accordance with the laws of India.

2. Dispute Resolution

2.1. Decision of an empowered committee comprising of (three) executive level personnel of the Company shall be final, binding and conclusive on parties to this Agreement upon all questions and issues relating to the meaning, scope, instructions, claims, right or matters of interpretation of and under this Agreement.

2.2. The parties shall endeavor to amicably resolve the above mentioned issues.

3. Jurisdiction

3.1. All disputes touching upon the subject matter of the agreement shall be subject to the jurisdiction of Delhi courts.”⁶

As stated in point no. 2.1. Decision of an empowered committee comprising of Three Executive level personnel of the company shall be final, binding and conclusive on the parties to the agreement which constitutes as an arbitration clause. The 3 promoters of Jeevani and Lifeline have already selected this committee comprising of Three Executive level personnel who will decide upon any disputes arising between them relating to the meaning, scope, instructions, claims, right or matters of interpretation of and under this agreement.

Scope of the subject matter of arbitration

⁶ Factsheet point no.9

Any commercial matter, including an action in tort if it arises out of or relates to a contract, can be referred to arbitration. However, matrimonial, criminal, insolvency or anti-competition matters, or matters related to disputes involving rights in rem, cannot be referred to arbitration. Likewise, employment contracts and matters covered by statutory reliefs through statutory tribunals are also non-arbitral.

A passage from Ronald Bernstein brings the meaning of arbitration agreement in a clear relief. He says: “Where two or more persons agree that a dispute or a potential dispute between them shall be decided in a legally binding way by one or more impartial persons in a judicial manner, that is upon evidence put up before or them, agreement is called an arbitration agreement or a submission to arbitration”.¹

Among the attributes which must be present in an Arbitration agreement are:

- (1) The arbitration agreement must contemplate that the decision of the tribunal will be binding on the parties to the agreement.
- (2) That the jurisdiction of the tribunal to decide the rights of parties must derive either from the consent of the parties or from an order of the court or from a statute, the terms of which make it clear that the process is to be an arbitration.
- (3) The agreement must contemplate that substantive rights of the parties will be determined by the arbitral tribunal.
- (4) 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.
- (5) That the agreement of the parties to refer their disputes to the decision of the tribunal must be intended to be enforceable in law and lastly.

In the instant matter, all these attributes are satisfied. The share sale agreement intends to show that it is an arbitration agreement. The decision of the empowered committee is final, binding and conclusive.

It is not required that in an the arbitration agreement the word “arbitration” should be mentioned.²

Similarly, in the instant matter, though the word ‘arbitration’ is not mentioned in the sale agreement it constitutes an arbitration clause.

An Arbitration clause is not required to be in any particular form. What is required to be ascertained is whether the parties have agreed that if disputes arise between them in respect of the subject matter of the contract, such disputes shall be referred to arbitration, then such an arrangement would spell out an arbitration agreement.³

Arbitration clause contained in a sale-deed, though signed only by the vendor, is also an arbitration agreement, when its acceptance on the part of the purchaser is indicated by payment of consideration on his part, of the execution of the sale-deed and when the arbitration clause was also contained in the preceding sale agreement signed by both parties.⁴

III. Whether the decision of the competition commission is bad in law?

- In the instant matter Swasth has abused it’s dominant position by indulging in bad litigation. Swasth before Lifeline could launch his new product Novel which was a new

life saving drug manufactured after further developing the active R& D which became the property of Lifeline after the merger with Jeevani was considerably cheaper than other life saving drugs into the market filed for a suit for infringement of IPR's and obtained an interim injunction against Lifeline. In the meanwhile Swasth launched a similar cost effective drug in the market, cornering a large chunk of the market and then withdrew the case against Lifeline and the interim injunction was vacated.

- Swasth having a dominant position in the market has abused his position under section 4 of the Competition Act, 2002.
- Further, abuse of dominant position is dealt under Section 4 of the said Act. Such abuse is prominent by predatory pricing, limiting production of the goods, creating barriers to entry of such goods, denying market access, gaining advantage in another market by using dominant position in the present market.
- The case relates to manufacture of a low cost backhoe loader by Bull Machines but before it could formally launch it the was served with an "ex parte interim injunction order granted" by the Delhi High Court.
- It was alleged by JCB India to the court that Bull Machines had infringed the design registrations/copyright of the in developing the backhoe loader. The court order had restrained Bull Machines and its dealers from dealing in the product. "It is the case of the informant (Bull Machines) that the bad faith litigation initiated by JCB against it alleging infringement of its design rights was totally false and that the said legal proceedings before the High Court of Delhi were only initiated to harass it and prevent the launch of 'Bull Smart', which in effect would have competed with backhoe loaders of JCB in the relevant market," the CCI order said.

- Section 4 of the Competition Act has been violated by Swasth as it has abused its dominant position. For violation of section 4, the dominant position has to be established first [A.] and then seen whether it is abused [B.].⁷

A. SWASTH ENJOYS DOMINANT POSITION IN THE RELEVANT MARKET.

- Dominant position is defined as a position of strength, enjoyed by an enterprise, in the relevant market, in India, which enables it to operate independently of competitive forces prevailing in the relevant market; or affect its competitors or consumers or the relevant market in its favour.⁸ Therefore, first the relevant market needs to be identified. As submitted *supra*,⁹ the relevant market is that of life saving drugs in the market in India. In determining whether Swasth enjoyed dominant position, factors such as market share, size and resources of the enterprise, commercial advantage over competitors, and dependence of consumers on the enterprise and high cost of substitutable goods for consumers should be duly regarded.¹⁰
- In the present case, Swasth, through the patent over Inventive¹¹ and on launching his new cost effective drug he cornered a large chunk of the market had a monopoly over the market. Therefore, based on the above facts, it is submitted that Swasth was in a position of strength in the relevant market in India to affect its competitors or its consumers or the relevant market in its favor and hence, enjoyed dominant position in the relevant market.

⁷ D.G.I.R. v. UB-Mec Batteries Ltd. [1996] 87 Comp. Cas. 891 (MRTPC).

⁸ § 4(Explanation a), Competition Act.

⁹ Arguments Advanced, ¶6.

¹⁰ § 19(4), Competition Act; *see also* Hoffmann-La Roche & Co. v. Commission (1979) ECR 461.

¹¹ Factsheet, ¶8

B. SWASTH HAS ABUSED IT'S DOMINAT POSITION.

- A dominant position by itself is not anti-competitive and what is prohibited is its abuse.¹² Limiting or restricting production of goods¹³ and indulging in practices practically resulting in denial of market access¹⁴ are relevant definitions of abuse of dominant position.
- *First*, imposing restrictions about where or to whom or in what quantity goods supplied may be sold is one practice which leads to denial of market access¹⁵ restricts where and to whom goods supplied may be sold¹⁶ and therefore, results in denial of market access to other importers in India.
- *Second*, limiting or restricting market for goods or services is anti-competitive, when a supplier in a dominant position insulates particular markets one from another and thereby engages in a differential pricing according to the level that each market can bear.¹⁷ In the present case, Swasth, doing precisely the same, has categorized markets and applied multiple pricing according to the level that each market can bear and by the circular, has insulated the market from one another.¹⁸ Therefore, such restriction is anti-competitive

¹² D. P. MITTAL, COMPETITION LAW & PRACTICE 248 (2d ed., Taxmann Allied Services (P) Ltd. 2008).

¹³ § 4(2)(b), Competition Act.

¹⁴ § 4(2)(c), Competition Act.

¹⁵ United States v. Griffith et al 334 US 100; D. P. MITTAL, COMPETITION LAW & PRACTICE 270 (2d ed., Taxmann Allied Services (P) Ltd.) (2008).

¹⁶ Factsheet, ¶18.

¹⁷ D. P. MITTAL, COMPETITION LAW & PRACTICE 269 (2d ed., Taxmann Allied Services (P) Ltd. 2008); RICHARD WHISH, COMPETITION LAW 604 (5th ed., Oxford University Press 2005); COMPETITION LAW TODAY 510 (Vinod Dhall ed., Oxford University Press 2007).

¹⁸ Factsheet, ¶17

and hence, abuse of dominant position. Therefore, it is submitted that Swasth is liable for abuse of dominance under section 4 of the Act.

- Since Swasth has acted on his own whims and fancies and abused its dominant power he attracted section 4 of the competition commission. As even on prima facie evidence under section 26(1) of the act, the commission has the right to direct the DG CCI to investigate into any matter which is referred to them regarding violation of any practice which affects the competition in the market by anyone whosoever.
- Therefore the competition commission's order directing the DG CCI to investigate on the information provided by lifeline is good in law. As section 4 of the Competition Act is directly hit by Swasth abusing his dominant position in the market.

PRAYER

In light of the facts stated, issues raised, arguments advanced and authorities cited, the counsels for Respondents humbly pray before the Hon'ble Supreme Court that it may be pleased to:

1. Adjudge and declare that the scheme of Merger between Life Line and Jeevani be set aside
2. Adjudge the sale agreement and declare that the clause therein mentioned does not qualify itself to be considered as an arbitration clause.
3. Adjude that the Competition Commissions actions are wholly bad in law and that it lacks the mandate of section 4 of the competiton act to grant an order as section 4 of the competiton act is not violated;

And pass any other order that the Hon'ble Court may deem fit in the interest of justice, equity and good conscience.

Respectfully Submitted;

Sd-

On Behalf of the Respondants