Team Code — **B**

Before

THE HONOURABLE SUPREME COURT OF INDIA

U/Art. 136 of The Constitution of India, 1950

Fifth Annual

NLIU - JURIS CORP NATIONAL CORPORATE LAW MOOT COURT COMPETITION, 2014-15

5th September to 7th September 2014

MEMORIAL *for* RESPONDENTS

In the matter of

APPELLANTS		**RESPONDENTS**
FOREIGN LENDERS	***v.***	LIFELINE LTD.
LIFELINE LTD.	***v.***	PROMOTERS OF JEEVANI LTD.
SWASTH LIFE LTD.	***v.***	COMPETITION COMMISSION OF INDIA & LIFELINE LTD.

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STATEMENT OF JURISDICTION

The RESPONDENTS submit to the Jurisdiction of the Supreme Court of India under Article 136 of The Constitution of India, 1950.

STATEMENT OF FACTS

APPEAL I

Jeevani is a listed public company incorporated in year 1990 under the Companies Act, 2013 whereas Lifeline is another public company registered & incorporated under the Companies

Act, 2013. On 27th January, 2012 it was decided that Jeevani would completely merge into Lifeline. However, 18% stake of the promoters was affected vide a separate Share Sale Agreement(hereinafter 'the Agreement'). Thereafter, on 5th July, 2013, the Delhi High Court approved the scheme of amalgamation (hereinafter 'the scheme'). However, in early August, 2013, the Foreign Lenders of Jeevani made an application for recall of order dated 5th July, 2013 and contended that Scheme should be set aside as they had not received the notice of the Scheme. Subsequently, both the single and Division Bench of the Delhi High Court dismissed the petition and subsequently the Foreign Lenders have appealed before the Supreme Court and the matter is pending arguments.

APPEAL II

Soon after merger, Lifeline received notices from the US Food and Drug Administration for providing drugs of below par quality. On scrutiny, it was found that investigation by FDA was commenced much before merger of Jeevani and Lifeline took place. Owing to this, Lifeline filed a suit against promoters for arising damages arising out of contract dated 23rd March, 2013. However, the promoters contended that Delhi High Court has no jurisdiction as the agreement had no arbitration clause. Afterwards, the Hon'ble Single Judge of Delhi High Court held that the clause could be regarded as arbitration clause and held that Court has jurisdiction to look into issues. On appeal, the Division Bench held that the clause amounts to an arbitration clause and referred the matter to Empowered Group in terms of agreement. Aggrieved by this, Lifeline appealed to the Supreme Court of India and the matter is pending arguments.

APPEAL III

In the meanwhile, and soon after the merger, Lifeline decided to introduce a new drug "Novel". However, in the year 2010 Swasth was assigned few of the developed R&D projects and IPRs of Jeevani. Thereafter, Swasth filed a suit for infringement of its IPR

alleging that the drug 'Novel' is similar to its drug 'Inventive' which was already present in the market and got an injunction order against the Lifeline. Afterwards, Swasth launched a similar cost effective drug akin to 'Novel' which captured large chunk of market and thereafter withdrew the case and vacated the injunction against Lifeline. Against this backdrop, Lifeline approached Competition Commission of India (hereinafter 'the Commission') for alleged abuse of dominant position. Thereafter, the Commission directed an investigation which was challenged by Swasth in the Delhi High Court. However, both the Single and Division Bench dismissed the petition and accordingly Swasth has appealed to the Supreme Court.

STATEMENT OF ISSUES

ISSUE 1: Whether or not the Scheme of Arrangement should be set aside?

ISSUE 2: Whether or not the clause contained in Share Sale Agreement constitutes an arbitration clause?

ISSUE 3: Whether or not the Commission order for directing investigation is erroneous and bad in law?

SUMMARY OF ARGUMENTS

1. Scheme of Arrangement should not be set aside.

RESPONDENT submits that the scheme of arrangement should not be set aside as interest of APPELLANT is not affected by the scheme and they do not form a separate class. Hence, there was no need to call them for the meeting.

2. Dispute resolution clause in an arbitration agreement.

RESPONDENTS submit that the dispute resolution clause is an arbitration agreement as it fulfils all the essentials and the intention of parties to go for arbitration is to be bound by tribunal's

decision. Further, clause 3 is incorporated to vest supervisory jurisdiction to the Delhi court.

3. CCI's Action For Directing Investigation Is Not Bad In Law.

Commission action for directing investigation is a mere Direction *Simpliciter*, which cannot be challenged in a Court of law. Moreover, it neither violates Article 14 nor Article 21 of the constitution.

ARGUMENTS ADVANCED

I. THE SCHEME SHOULD NOT BE SET ASIDE AS IT IS NEITHER UNFAIR NOR AFFECTS THE INTEREST OF FOREIGN LENDERS.

[¶ 1] The RESPONDENT contends that once the court has approved a scheme, it is for the objector to show that the scheme is unfair to a class and affects him adversely and therefore, the court should reject the scheme.[1] Moreover, for approval of scheme of amalgamation, a company is required to convene meeting of only those members or creditors whose interest would be affected by the scheme.[2] The APPELLANT has a burden of proving that the scheme is unfair to a class and adversely affects his interest **[A.]** The APPELLANT does not form a separate class **[B.]** and the interest of APPELLANT will not be affected by the scheme **[C.]**

A. BURDEN IS ON APPELLANT TO PROVE THAT SCHEME IS UNFAIR TO A PARTICULAR CLASS AND THAT HIS INTEREST IS ADVERSELY AFFECTED.

[¶ 2] In *Zee Interactive,*[3] the court held that for setting aside a scheme, objecting creditor must show that there is a debt due to him, that the creditor would be adversely affected by sanctioning of the scheme and that the scheme is unjust and unfair to a particular class of creditors to whom the objecting creditor belongs.[4] Moreover in *Sanvijay Alloys case*,[5] the court stated that the scope of judicial review in such matters is very limited and court may interfere only if the whole scheme is unfair and unreasonable. Also, the scheme cannot be said to be unfair to a whole class if only one creditor has objected to it.[6]

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[1] In Re Zee Interactive Multimedia Ltd., (2002) 111 Comp. Cas. 733 (Bom.).

[2] Union of India v. Asia Udyog Pvt. Ltd., (1974) 44 Comp. Cas. 359.

[3] In Re Zee Interactive Multimedia Ltd., (2002) 111 Comp. Cas. 733 (Bom.).

[4] In Re Mayfair Ltd., (2004) 122 Comp. Cas. 748 (Bom.).

[5] In Re Sanvijay Alloys (P.) Ltd., (2004) 122 Comp. Cas. 754 (Bom.).

[6] In Re Shyam Telecom Ltd., (2007) 135 Comp. Cas. 387 (Raj.).

[¶ 3] In the present case, the only objectors to the scheme are the Foreign Lenders. Requisite majority of creditors and also the Court has already approved the scheme. Moreover, at the time of sanctioning of the scheme Foreign Lenders raised no such objections. Hence, while objecting at this stage, a heavy burden of proof lies on them to show that the scheme is unfair to a particular class and that it affects them adversely.

B. FOREIGN LENDERS DO NOT FORM A SEPARATE CLASS.

1. Different terms have not been offered in the Scheme for Foreign lenders so as to form a Separate Class.

[¶ 4] A class consists of persons whose rights are similar in terms of the compromise.[7] Unless a separate and different type of scheme of compromise or arrangement is offered to a sub-class of a class of creditors or shareholders otherwise equally circumscribed by the class, no separate meeting of such sub-class of the main class of members or creditors is required to be convened.[8] Also, different terms offered under the scheme can be the only criteria for identifying a class for the purpose of convening a separate meeting of such class.[9]

[¶ 5] In the present case, for qualifying to be a separate class Foreign Lenders must show that separate terms have been offered to them under the scheme. Since the court has approved the scheme, it can reasonably be presumed that no such separate term was offered under the scheme and this burden of proof lies with them.

2. Foreign Lenders do not qualify as a separate class merely by being off-shore creditors.

[7] In Re Mather & Platt Fire Systems Ltd., (2008) 142 Comp. Cas. 209 (Bom.).

[8] Miheer H. Mafatlal v. Mafatlal Industries Ltd., (1996) 87 Comp. Cas. 792 (S.C.); SEE ALSO 2 FRANCIS PALMER, SIR, PALMER'S COMPANY LAW 12.040 (Sweet & Maxwell 25th ed. 2010).

[9] In Re Siel Ltd., (2003) 47 S.C.L. 631 (Del.); SEE ALSO 2 BUCKLEY, BUCKLEY ON COMPANIES ACT 425.25 (Lexis Nexis Butterworths Wadhwa Nagpur 15th ed. 2009)

[¶ 6] In *Arvind Mills case*,[10] it was held that when off-shore lenders and on-shore lenders are treated alike by the company and no distinction is kept by the company amongst the secured creditors, there cannot be a separate class formed by way of which a preferential treatment is given to some secured creditors.[11] Since there arises no conflict of commercial interest between the Foreign Lenders and other secured creditors on account of same scheme being offered to both of them, no separate class can be formed in the present case.[12] Therefore as, different terms have not been offered to the Foreign Lenders, they cannot form a separate class only by virtue of being off shore creditors.

C. FOREIGN LENDERS WERE NOT REQUIRED TO BE CALLED FOR THE MEETING AS THEIR INTERESTS ARE NOT AFFECTED BY THE SCHEME.

[¶ 7] In cases of amalgamation, all creditors are not entitled as of right to participate in the process of sanctioning of the scheme[13] and court will have a discretion in convening a meeting of creditors or any class of them, which would be exercised only if creditors or any class of them would be adversely affected by the scheme.[14] Furthermore, when there are several classes of creditors and the scheme does not affect the rights of a particular class, it is not necessary for notice of any meeting to be sent to the members of that class and their dissent to the scheme may be disregarded.[15]

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[10] In Re Arvind Mills Ltd., (2002) 111 Comp. Cas. 118 (Guj.).

[11] Commerz Bank Ag. v. Arvind Mills Ltd., (2002) 110 Comp. Cas. 539 (Guj.).

[12] 3 A. RAMAIYA, GUIDE TO COMPANIES ACT 4024 (Lexis Nexis Butterworths Wadhwa Nagpur 17th Ed. 2010).

[13] Union of India v. Asia Udyog Pvt. Ltd., (1974) 44 Comp. Cas. 359.

[14] In Re ICICI Ltd., (2003) 115 Comp. Cas. 465 (Bom.); SEE ALSO In Re Dabur Foods Ltd. & Anr., (2008) 144 Comp. Cas. 378 (Del.).

[15] In Re Tea Corp. Ltd., (1904) 1 Ch.D. 12 (C.A.); SEE ALSO In Re Clydesdale Bank, 1950 S.C. 30.

[¶ 8] The court in *Vikrant Tyres Ltd. case*[16] held that Section 391(1)[17] does not make it obligatory either upon the court or the company to serve the notice of creditors' meeting on every creditor of the company and this failure will not amount to invalidation of meeting or any resolution passed therein.[18] The whole object behind requirement of issuing notice to shareholders and creditors is to hear all the affected persons.[19] Thus, there exists no requirement to call creditors whose interests are not affected by the scheme to a meeting convened for consideration of sanction of the scheme.

[¶ 9] Wherein all assets and liabilities are transferred from the transferor company to the transferee company which is financially sound, the interest of an objecting creditor who obtained an arbitration award against the company was held to be well protected and not to be affected by the scheme as the award can be enforced against the transferee company.[20]

[¶ 10] In the present case, the Foreign Lenders have obtained an arbitration award in their favour[21] and thus their debt against the company has been acknowledged and quantified by the tribunal. Hence, the interest of creditors is well protected and by virtue of enforcement of the award, they will receive the debt due under the award, thereby implying that there was no requirement for them to be called for the meeting.

II. THE DISPUTE RESOLUTION CLAUSE IS AN ARBITRATION AGREEMENT.

[¶ 11] The RESPONDENT contends that there is no specific form of an arbitration

[16] In Re Vikrant Tyres Ltd., (2005) 126 Comp. Cas. 288 (Kar.).

[17] Companies Act, 1956 § 391.

[18] Bhagat Ram Kohli v. Angel's Insurance Co. Ltd., (1937) 7 Comp. Cas. 161.

[19] Gujrat Kamdar Sahkari Mandal v. Ramkrishna Mills Ltd., (1998) 92 Comp. Cas. 692 (Guj.).

[20] In Re Vikrant Tyres Ltd., (2005) 126 Comp. Cas. 288 (Kar.).

[21] MOOT PROPOSITION, ¶ 6.

agreement,[22] and before arriving to a conclusion the words mentioned must be scrutinized closely to gather the intention of the parties to enter arbitration.[23] As per the statute[24] and its interpretation,[25] a few essential features, must be present in an agreement irrespective of the form it is drafted.[26] The present dispute resolution clause in the contract is an arbitration agreement as it fulfills all the such essentials, namely, existence of present or future difference in connection with some contemplated affair [**A**]; existence of intention of the parties to settle such difference by a private tribunal [**B**]; and intention of the parties to be bound by the tribunal's decision. [**C**]. Apart from these essentials, it is also contended that Clause 2 is not an expert determination and Clause 3 provides for supervisory jurisdiction **[D]**.

A. THERE EXISTS A PRESENT OR FUTURE DIFFERENCE IN CONNECTION WITH SOME CONTEMPLATED AFFAIR.

[¶ 12]The purpose of arbitration is to resolve the dispute between two parties in a defined legal relationship.[27] Accordingly, the clause to be an agreement must either explicitly or impliedly[28] mention that a dispute must arise in order to invoke arbitration proceeding. The clause in the present case, has well defined the situations in which a dispute will be submitted before the tribunal. Although, it does not contain the exact word 'dispute', nonetheless, the

[22] Jagdish Chander v. Ram Chandra, (2007) 5 S.C.C. 719.

[23] Rukmani Gupta v. Collector, Jabalpur, (1980) 4 S.C.C. 556.

[24] Arbitration and Conciliation Act, 1996 § 7.

[25] K.K. Modi v. K.N. Modi, (1998) 3 S.C.C. 573.

[26] P. Dasartharama Reddy Complex v. Government of Karnataka and Anr., (2104) 2 S.C.C. 20; SEE ALSO Bihar State Mineral Development Corporation v. Encon Builders, (2003) 7 S.C.C. 418.

[27] Arbitration and Conciliation Act, 1996 § 7; SEE ALSO MICHAEL J. MUSTILL, SIR ET AL., MUSTIL & BOYD COMMERCIAL ARBITRATION 41 (Lexis Nexis 2nd ed. 2010).

[28] FRANCIS RUSSELL, RUSSELL ON ARBITRATION 72 (Sweet & Maxwell 23rd ed. 2007).

word 'Issue' which is synonymous to dispute [29] has been used.

[¶ 13]If it were to be argued that the dispute arising is not being 'referred' to a tribunal, it should be noted that a similar clause where the word 'reference' was not used was held to be an arbitration clause and the court stated that intention to submit the matter to a person's decision must appear from the agreement.[30] Therefore, the present clause fulfills the basic requirement of an arbitration agreement i.e. presence of dispute.

B. THE PARTIES INTENDED THE DISPUTE TO BE RESOLVED BY A PRIVATE TRIBUNAL.

[¶ 14]The essence of an arbitration agreement is that the parties must repose trust and faith in a person or committee for deciding their dispute and the parties must make it explicit in their agreement.[31] The requirement of a clear description of the adjudicating authority[32] is fulfilled as the present clause provides a committee of three executive level personnel[33] as the authority and hence, it is clear that the choice of the tribunal is consensual.

C. THE CLAUSE SUBSTANTIATES THE INTENTION OF THE PARTIES TO GET INTO ARBITRATION.

1. The Parties intended to be bound by the Decision of the Committee.

[¶ 15]The essence of a submission to arbitration is that it comprises a contract to honour the decision of the arbitrator and a mandate to the arbitrator to make a binding determination of the legal rights of the parties.[34] Where the decision of the person to whom the dispute is

[29] BLACK'S LAW DICTIONARY 907 (9th ed. 2009).

[30] Rukmani Gupta v. Collector, Jabalpur, (1980) 4 S.C.C. 556.

[31] R.S. BACHAWAT, J., JUSTICE BACHAWAT'S LAW OF ARBITRATION & CONCILIATION 252 (Wadhwa & Co. 5th ed. 2005).

[32] K.K. Modi v. K.N. Modi, (1998) 3 S.C.C. 573.

[33] MOOT PROPOSITION ¶ 9.

[34] Arenson v. Arenson, (1976) 1 Lloyd's Rep. 179.

referred is made final,[35] as denominative of the nature of the agreement the agreement is an arbitration agreement.[36] In the present instance, the intention is clear as clause states that the decision of the committee would be final, binding and conclusive.[37]

2. The proper construction of the Agreement projects the Intention of the parties to refer the dispute to Arbitration.

[¶ 16]In constructing a contract all parts of it must be given effect where possible, and no part of it should be treated as inoperative or surplus.[38] Intention of parties was derived through the use of marginal note in *Tipper Chand case*.[39] In the present case, Clause 2 comes under the title 'dispute resolution',[40] which makes it clear that the parties intended the following process to be a method to resolve their dispute.

3. Clause 2.2 suggests the parties shall endeavour to resolve issue amicably.

[¶ 17]The purpose of Clause 2.2 is to suggest that in case of an issue arising between the parties, there shall be an attempt to resolve it in an amicable manner. The use of the word 'endeavor' suggests that it does not bar the parties from entering into arbitration. Moreover, it represents a standard practice wherein amicable resolution can be introduced as a preliminary step of dispute resolution.[41] Since, Clause 2 fulfills the criteria of an arbitration agreement, its purpose is to suggest parties to try and resolve their issue and it does not make it

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[35] Rukmani Gupta v. Collector, Jabalpur, (1980) 4 S.C.C. 556.

[36] Bihar State Mineral Development Corporation v. Encon Builders, (2003) 7 S.C.C. 418.

[37] MOOT PROPOSITION ¶ 9.

[38] Newall v. Lewis, (2008) 4 Cost. L.R. 626; SEE ALSO KIM LEWISON, SIR, THE INTERPRETATION OF CONTRACTS 342 (Sweet & Maxwell 4th ed. 2007).

[39] State of U.P. v. Tipper Chand, (1980) 2 S.C.C. 341.

[40] MOOT PROPOSITION ¶ 9.

[41] Trimex International FZE Ltd. Dubai v. Vedanta Aluminium Ltd., India, (2010) 3 S.C.C. 1; SEE ALSO Sime Darby Engineering SDN, BHD v. Engineers India Ltd., (2009) 7 S.C.C. 545.

mandatory upon them.

D. CLAUSE 2 IS NOT AN EXPERT DETERMINATION AND CLAUSE 3 PROVIDES FOR SUPERVISORY JURISDICTION.

1. The clause does not suggest Expert Determination.

[¶ 18]It is submitted that the dispute resolution clause is not an expert determination clause as it fails to qualify any of its parameters. In *K.K. Modi*,[42] the court stated that intention of the parties must be enquired into and it distinguished function of an expert from that of an arbitrator based on latter's judicial function.[43]

[¶ 19] Conditions regarding adduction of evidence by the parties or giving an opportunity of hearing them is an implicit part of the decision making process and are to be followed regardless of their express mention in the agreement.[44] Hence, it is not a criterion for an arbitration clause to spell out duties, which are already implicit in the process.[45]

[¶ 20]In the present case, the committee is required to decide and such decisions are not only final and binding on the parties, but they are conclusive which clearly spells out the finality of such decisions as also its binding nature. The language must be given consideration here as the decision over matter of claims and rights can only be provided after an adjudicatory process is concluded; an expert cannot adjudicate on the rights of the parties.

2. Clause 3 vests Territorial Jurisdiction to the Delhi Court.

[¶ 21]Where two or more courts have jurisdiction to try suit or proceeding, parties through a

[42] K.K. Modi v. K.N. Modi, (1998) 3 S.C.C. 573.

[43] FRANCIS RUSSELL, RUSSELL ON ARBITRATION 37 (Sweet & Maxwell 23rd ed. 2007).

[44] JOHN KENDALL ET AL., EXPERT DETERMINATION, 278 (Sweet & Maxwell 4th ed. 2008).

[45] Mallikarjun v. Gulbarga University, (2004) 1 S.C.C. 372.

jurisdiction clause can agree that the matter shall be tried by one of such courts.[46] It is argued that it cannot be said that the purpose of Clause 3 is to submit the dispute to the court rather than the arbitration, as it would run contrary to the well-established principles of interpretation of document and to the statutory mandate leaning in favour of reference to arbitration.[47] Where similar jurisdiction clause was present together with an arbitration clause, the court stated that the parties would not introduce ostensibly contradictory clauses, as the intention of the parties is to refer the dispute to arbitration, and the particular court agreed upon will exercise *supervisory jurisdiction* over the arbitration.[48]

[¶ 22]In addition, an appreciation of the purpose of the transaction or the clause under consideration is clearly a useful aid in understanding its scope and operation.[49] The interpretation that the jurisdiction clause will override the dispute resolution clause would render the dispute resolution clause otiose, which is against the purpose of the agreement. In *Enercon*,[50] the court emphasized that courts must strive to make a seemingly unworkable arbitration agreement workable. Therefore, it is submitted that purpose of clause 3 is to confer territorial jurisdiction upon the Delhi court.

III. CCI'S ACTION IS NOT BAD IN LAW AND ERRONEOUS IN NATURE.

[¶ 23]The RESPONDENTS contend that the direction of the Commission for investigation to the Director General (*hereinafter* 'DG') for the alleged abuse of dominant position by the APPELLANT is not bad in law. Since the Commission's action of directing investigation is a continuing executive action & direction *simpliciter* in nature and is in pre-mature stage, it

[46] Balaji Coke Industry Pvt. Ltd. v. Maa Bhagwati Coke Pvt. Ltd., (2009) 9 S.C.C. 403.

[47] AEZ Infratech Pvt. Ltd. v. SNG Developers Ltd., (2014) 211 D.L.T. 215.

[48] *Ibid.*

[49] GERARD MCMEEL, THE CONSTRUCTION OF CONTRACTS 214 (Oxford University Press 2nd ed. 2010).

[50] Enercon (India) Ltd. & Ors. v. Enercon GMBH & Anr., (2014) 5 S.C.C. 1.

cannot be challenged in a Court [**A**]. Moreover, the procedure for formation of a *prima facie* case does not violate APPELLANT'S fundamental rights [**B**] and the Commission's action does not prejudicially affect the right of the APPELLANT [**C**].

A. THE ACTION OF THE COMMISSION IS A CONTINUING EXECUTIVE ACTION & DIRECTION *SIMPLICITER* IN NATURE AND IN A PRE-MATURE STAGE, WHICH CANNOT BE CHALLENGED.

[¶ 24]The Commission's direction to the DG for an investigation is a continuing executive action & direction *simpliciter,* which does not extend to an adjudicatory process, is not subject to challenge [**1**]. Also, there is statutory exclusion of Section 26(1) of the Competition Act, 2002 (herein after referred to as "the Act") regarding existence of a *prima facie* case from Sections 53A & 53B and subsequently to 53T [**2**].

1. Continuing Executive action & Direction *Simpliciter*, which does not enter into any Adjudicatory process, is not subject to Challenge.

[¶ 25]The issuance of a direction to DG to cause an investigation is a mere direction without entering upon any adjudicatory process.[51] Whenever the Commission passes a direction, which is at a preliminary stage and of preparatory nature, then such direction cannot be deemed as an order.[52] Moreover, in *M. Nagaraj case,*[53] it was held that the executive actions of an authority, which does not extend to an adjudicatory process, cannot be challenged in the Court of law as it is merely in pre-mature stage for getting challenged. Hence, Commission's action to start an investigation, without entering into any adjudicatory process, cannot be challenged in a court of law.

2. Section 26(1) is excluded from ambit of Appeal under Section 53A and 53B.

[51] C.C.I. v. Steel Authority of India, Ltd., (2010) 10 S.C.C. 744.

[52] *Ibid.*

[53] M. Nagaraj v. Union of India, (2006) 8 S.C.C. 212.

[¶ 26]The legislature has specified an exhaustive list of orders against which an appeal lies under Section 53A of the Act and Opinion/Decision of authority under sec 26(1) of the Act is excluded from its ambit. The legislative intention must be ascertained from the plain reading of the words incorporated in the statute.[54] In the present case, taking the *prima facie* view and issuing the direction to the DG for investigation which falls under Sec 26(1) would, thus, not be an order appealable under Section 53A. The mere fact that a decision made under 26(1) can't be brought forward under 53A and 53B reflects the fact that the same decision cannot be questioned under 53T. Therefore, the RESPONDENTS submit that Commission's existence of *prima facie* case cannot be challenged in a Court of law.

B. THE PROCEDURE FOR FORMATION OF A *PRIMA FACIE* OPINION AND DIRECTION TO DG DOES NOT VIOLATE FUNDAMENTAL RIGHTS.

[¶ 27]In order to file a writ, violation of a fundamental right or legal right is imperative.[55] It is submitted that the Commission's action of formation of *prima facie* opinion and direction for investigation to the DG does not violate Art. 21 as due procedure has been enshrined under the Competition Act [**1**] and it also does not violate Art. 14 as principles of natural justice have been followed in discharge of its functions [**2**].

1. Due Procedure has been enshrined under the Competition Act.

[¶ 28]It is the cardinal principal of Art. 21 that the expression 'procedure established by law' should be reasonable,[56] just[57] and fair,[58] and not arbitrary, whimsical and fanciful.[59] It

[54] Institute of Chartered Accountants of India v. Price Waterhouse, A.I.R. 1998 S.C. 74.

[55] ADM Jabalpur v. Shivkant Shukla, A.I.R. 1976 S.C. 1207.

[56] State of Punjab v. Gurdial Singh, A.I.R. 1980 S.C. 319.

[57] Indian Express Newspapers, Bombay v. Union of India, A.I.R. 1986 S.C. 515.

[58] Suman v. State of J & K, A.I.R. 1983 S.C. 319.

also envisages a procedural due process wherein the basic substantive and procedural rights are being protected.[60]

[¶ 29]It is submitted that sections 19, 26, 27 and 28 of the Act adhere to substantive due process. When an information is received under Section 19 of the Act, the Commission is expected to satisfy itself and express its opinion guided by Section 19(4) that a *prima facie* case exists, from the record produced before it and then to pass a direction to the DG to cause an investigation under Section 26(1) of the Act. The Commission adjudicates the rights of the parties and orders an enterprise to curb abuse of dominant position under Section 27 and 28 of the Act respectively only after due enquiry and after being satisfied that Section 4 of the Act has been contravened.

[¶ 30] It is further submitted that Regulation 17, 18 and 20 conforms to the principle of procedural due process. Regulation 17[61] provides that Commission can call for a preliminary conference of the parties to form an opinion of existence of *prima facie* case. Regulation 20(1)[62] says that the DG shall take into account all the relevant documents, information and statements received during the complaint while conducting the investigation. Lastly, Regulation 20(4)[63] mandates that the report of the Director General shall contain his findings on each of the allegations made in the information or reference, as the case may be, together with all evidences or documents or statements or analyses collected during the investigation. Hence, the procedure for formation of existence of *prima facie* case and the subsequent investigation adheres to the basic principle of procedural due process.

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[59] Delhi Transport Corporation v. Delhi Transport Corporation Mazdoor Congress, (1991) Supp. 1 S.C.C. 600.

[60] Smt. Selvi v. State of Karnataka, A.I.R. 2010 S.C. 1974.

[61] Competition Commission (General) Regulations, 2009, Regulation 17.

[62] Competition Commission (General) Regulations, 2009, Regulation 20(1).

[63] Competition Commission (General) Regulations, 2009, Regulation 20(4).

2. Principles of Natural Justice as embedded under Article 14 have been followed by Commission.

[¶ 31] The principles of natural justice as embedded under Article 14[64] require an opportunity of fair hearing, or *Audi Alteram Partem*.[65] The RESPONDENT submits that the Commission complied with these requirements.

[¶ 32]There is a statutory requirement of the applicability of the principle of *Audi Alteram Partem* under Section 26(5) and Section 26(8) of the Act after the investigation report has been submitted by the DG to the Commission.[66] Hence, the Act gives fair opportunity to the party to present its case and be heard before any order is passed.

[¶ 33]Further, in the case of *W.N. Chadha case,*[67] the Supreme Court has held that *Audi Alteram Partem* is not applicable at an investigation stage where the investigating officer is not deciding any matter except collecting the materials for ascertaining whether a *prima facie* case is made out or not. It is also to be noted that Regulation 17(1) of the Competition Commission (General) Regulations, 2009 uses the word 'may', which does not make it obligatory for the Commission to hear the affected party at the investigation stage itself. Therefore, it cannot be contended that there is violation of principle of *Audi Alteram Partem* at the investigation stage.

C. COMMISSION'S DIRECTION FOR INVESTIGATION DOES NOT PREJUDICIALLY AFFECT THE RIGHT OF THE APPELLANT.

[¶ 34] The RESPONDENTS submit that the Commission's direction for investigation to the DG does not prejudicially affect the right of the APPELLANT as investigation is a fact finding

[64] CONSTITUTION OF INDIA, 1950 art. 14.

[65] Shrinivas Rao v. J. Veeriah, A.I.R. 1993 S.C. 929.

[66] C.C.I. v. Steel Authority of India, Ltd., (2010) 10 S.C.C. 744.

[67] Union of India v. WN Chadha, A.I.R. 1993 S.C. 1082.

process & is necessary to check abuse vis-à-vis Section 19 [**a**], and bad faith litigation is a ground for abuse of dominant position [**b**]. Alternatively, the Commission's order for investigation might reveal contravention of provisions other than section 4 of the Competition Act, 2002 [**c**].

1. Investigation is a fact finding process & is necessary to check abuse under Sec. 19.

[¶ 35] An investigation by the DG is necessary to ascertain the alleged abuse of dominant position made under Sec. 19 of the Act. Initiation of investigation does not sanction any punitive measures upon the party concerned and is merely a fact finding exercise,[68] which is akin to a departmental proceeding, which does not entail civil consequences.[69] Moreover, the Commission is not bound by the report of the DG under Sec. 26.

2. Bad faith litigation is a ground for abuse of dominant position.

[¶ 36]In *Bull Machine case*[70] the Commission held that where in its *prima facie* opinion that an enterprise is abusing its dominant position by way of bad faith litigation then the Commission can direct DG to investigate and objection cannot be raised against it. In the present case, the facts suggest that the APPELLANT launched a cost effective drug, thereby capturing the market, and thereafter vacated the interim injunction against RESPONDENTS that stopped them from manufacturing a similar drug, without further contesting the case. It is, therefore, manifest that APPELLANT has indulged in abuse of its dominant position by way of indulging in bad faith litigation.

3. *In Arguendo*, CCI's order for investigation might reveal contravention of provisions other than Section 4 of the Competition Act, 2002.

[68] Dhirendra Brahmachari v. The Union of India, (1979) 2 I.L.R. 65 (Del.); SEE ALSO A.K. Roy & Ors. v. Union of India, A.I.R. 1982 S.C. 710.

[69] C.C.I. v. S.A.I.L., (2010) 10 S.C.C. 744.

[70] In Re : Bull Machines Private Limited and Ors., Case No. 105 of 2013 (C.C.I.).

[¶ 37] It has been held in the case of *Grashim Industries*[71] *§* that even though the DG was directed to investigate on matter on alleged contravention of Section 3 but the report of DG manifested the contravention of Section 4. Therefore, the Commission is competent enough to treat the report of DG as separate information under Section 19 and initiate an investigation under Section 26.[72] Thus, in the present case, although the Commission has directed the DG to investigate the matter for the alleged contravention of Section 4 but there can be circumstances where the report of DG might allude and pinpoint towards the contravention of some other provisions.

PRAYER

In light of the facts of the case, arguments advanced and authorities cited, it is humbly requested that this Honourable Court may be pleased to adjudge and declare that-

1. That the Scheme of Arrangement as affected between Jeevani and Lifeline should not be set aside.

2. That clause 2 of the Agreement amounts to an arbitration agreement and the Empowered Group should adjudicate the same in accordance with the agreement.

3. That the Commission's order for directing investigation is not erroneous and bad in law.

Any order or further relief or direction, which the Honorable Court may deem fit and proper.

All of which is most humbly prayed

Sd./-

Counsel for the Respondents.

[71] Grashim Industries v. C.C.I., (2014) 119 C.L.A. 169 (Del.).

[72] Nissan Motors v. C.C.I., (2014) 5 M.L.J. 267.