TEAM CODE: B1

BEFORE THE HON'BLE SUPREME COURT OF INDIA

Special Leave Petition No. …….. Of 2014

The Appeal concerning the challenge to the orders passed by Delhi High Court in cases related to scheme of arrangement, arbitration and abuse of dominance respectively.

FOREIGN LENDERS — APPELLANT

VERSUS

LIFELINE LIMITED — RESPONDENT

AND

LIFELINE LIMITED — APPELLANT

VERSUS

PROMOTERS — RESPONDENT

AND

SWASTH LIFE LIMITED — APPELLANT

VERSUS

LIFELINE LIMITED & CCI — RESPONDENT

MEMORANDUM ON BEHALF OF RESPONDENTS

DRAWN AND FILED BY COUNSELS FOR RESPONDENTS

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STATEMENT OF JURISDICTION

THE HON'BLE SUPREME COURT OF INDIA EXERCISES JURISDICTION TO HEAR AND ADJUDICATE OVER THE MATTER UNDER ARTICLE 136 OF THE CONSTITUTION OF INDIA, 1950.

THE RESPONDENTS HUMBLY SUBMITS TO JURISDICTION OF THE HON'BLE COURT WHICH HAS BEEN INVOKED BY THE APPELLANT. HOWEVER, THE RESPONDENT RESERVES THE RIGHT TO CHALLENGE THE SAME. THE PROVISION UNDER WHICH THE APPELLANT HAS APPROACHED THE HON'BLE COURT IS READ HEREIN UNDER AS:

ARTICLE 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 ARMED FORCES.

STATEMENT OF FACTS

1. Jeevani Limited ("**Jeevani**") and Lifeline Limited ("**Lifeline**") are listed public companies. On January 2012, it was decided that Jeevani will completely merge into Lifeline. Thereafter, a "Scheme of Arrangement' (the "**Scheme**") for Jeevani was prepared. Apart from this, three promoters of Jeevani (the "**Promoters**") will sell their entire promoter shareholding to Lifeline. On 5th July 2013, the Scheme was approved by the Hon'ble Delhi High Court and later on, Lifeline got the approval of Hon'ble Bombay High Court for the scheme.

2. 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. On 27th July 2010, foreign arbitral award was passed in favour of the foreign lenders. But the award is yet to be enforced. In 2013, the foreign lenders approached the Hon'ble Delhi High Court for recall of order dated 5th July 2013. Hon'ble Court dismissed the application of foreign lenders. This order is now pending before the Supreme Court of India.

3. After the merger, the newly merged Lifeline received notices from the US Food and Drug Administration (the "**FDA**") for providing drugs of below par quality. Lifeline filed a suit against the Promoters. The matter is pending before the Supreme Court of India.

4. Soon after the merger, Lifeline, decided to introduce a new life saving drug, 'Novel.' But, Swasth Life Limited ("**Swasth**") obtained an interim injunction order against Lifeline. Thereafter Lifeline filed an application before Competition Commission of India (the "**CCI**") alleging that Swasth was abusing its dominant position. Thereafter, CCI decided to investigate the matter. Swasth being aggrieved by the Order of the CCI filed a writ petition in the Delhi High Court. After dismissal of appeal in Delhi High Court, Swasth has come before the Supreme Court. And Supreme Court has tagged all the matters together for hearing.

ISSUES RAISED

1. WHETHER THE SCHEME OF ARRANGEMENT WAS VALID?

2. WHETHER THE AGREEMENT CONTAINS AN ARBITRATION CLAUSE?

3. WHETHER SWASTH HAS ABUSED ITS DOMINANT POSITION?

SUMMARY OF ARGUMENTS

1. **WHETHER THE SCHEME OF ARRANGEMENT SANCTIONED UNDER SECTION 391 IS VALID?**

   It is submitted that the Scheme of arrangement should not be set aside because of two reasons, firstly, the foreign lenders do not have a claim in the company as the arbitral award is not enforceable against the company and the enforcement proceedings are barred under Limitation Act, 1963. Secondly, the foreign lenders do not constitute a class of creditors thus no notice was required to be sent to them for creditors meeting.

2. **WHETHER THERE EXISTS AN ARBITRATION CLAUSE IN THE SHARE SALE AGREEMENT?**

   It is humbly submitted that there exists an arbitration clause in the share sale agreement and thus the court shall have no jurisdiction over the issue, and the dispute shall be arbitrated even if the allegations of fraud are levelled.

3. **WHETHER SWASTH LIFE LIMITED HAS ABUSED ITS DOMINANCE?**

   It is humbly submitted before the Hon'ble court that the Swasth Life has a dominant position in the relevant market and it has abused its dominance in the relevant market. Thus the CCI's order for investigation was not bad in law.

ARGUMENTS ADVANCED

ISSUE: 1: WHETHER THE SCHEME OF ARRANGEMENT SANCTIONED UNDER SECTION 391 IS VALID?

1. It is humbly submitted before the Hon'ble Supreme Court of India that in the instant case, the Jeevani Limited and Lifeline Limited, referred as **'Company'** after merger, approached the Hon'ble High Court of Delhi for the approval of the scheme of arrangement and the Hon'ble High Court under the mandate of Chapter V of The Companies Act, 1956 ordered for a meeting of creditor to be convened.[1] Since the creditors meeting, duly convened, passed the scheme by a vote of majority, the Hon'ble Delhi High Court approved the Scheme of arrangement. Thus it is contended that the scheme of arrangement sanctioned under § 391 is valid. Furthermore, it is submiteed that the foreign lenders are not the creditors of the company. Also, the foreign lenders do not constitute the separate class of creditors.

1.1. FOREIGN LENDERS ARE NOT THE CREDITORS OF THE COMPANY

2. It is humbly submitted that the foreign lenders though had provided financial assistance to the company[2], but they are not the creditors of the company as they do not have any claim against the company, as the arbitral award against the company is not enforceable.[3] Moreover, it is contended that the foreign award is barred under the provisions of Limitation Act, 1963.[4]

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[1] Moot Proposition ¶ 5.

[2] Moot Proposition ¶ 6.

[3] Bharat Aluminium Company & Ors. v. Kaiser Aluminium Technical Service Inc. & Ors, (2012) 9 SCC 552.

[4] Orient Middle East Lines ltd. & Anr. v. Brace Transport Corporation of Monrovia and Ors. AIR 1986 Gujarat 62.

1.1.1. Foreign Arbitral Award is not enforceable against the company

3. It is humbly submitted that in the case of *Bharat Aluminium Company and ors. etc. etc.* v. *Kaiser Aluminium Technical Service, Inc. and ors. etc. etc*.[5] it was held that the Part I of the Arbitration and Conciliation Act, 1996 would have no application to international commercial arbitration held outside India, and such awards shall be under the jurisdiction of Indian courts only when they are sought to be enforced in India in accordance with Part II of this Act.
4. It is humbly submitted before the Hon'ble court that the Foreign arbitral award does not come under the purview of 'foreign award' under Section 44 of the Arbitration and Conciliation Act, wherein it is clearly mentioned that the award must be from the territories which have been notified by the Central Government, in the Official Gazette, declare to be territories to which the New York Convention of 1958 applies.[6]
5. Thereby it is brought to the notice of the Hon'ble court that the Foreign Arbitral Award received by the foreign lenders in Hong Kong is not applicable in the case at hand as when the arbitral award was received by the foreign lenders i.e., on 27th July 2010[7], Hong Kong was not notified as the convention country by the Indian government[8] thereby rendering it as not to be a foreign award.

1.1.2. The Foreign award is barred under the Limitation Act, 1963.

6. Arguendo, even if the foreign award is enforceable against the company, then it is brought to the notice of the Hon'ble court that the foreign lenders had received the arbitral award in the Hong Kong against the company on 27th July 2010, but they have not yet proceeded for the

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[5] *Supra* 3.

[6] The Arbitration and Conciliation Act, §44(b) (1996).

[7] *Supra* 2.

[8] Ministry of Law and Justice, The Gazette of India, (Aug. 28. 2014).

enforcement of arbitral award.[9] It can be clearly ascertained from the facts that the time span of 3 years has already elapsed from the date of award, thereby making the arbitral award barred by the Limitation Act, 1963.[10] In the case of *Rudolf A. Oetkar* v. *Mohammed Orri,* it was held that the residuary provisions of the Limitation Act, 1963 shall apply on the cases of arbitration, and awards not enforced within 3 years from when the right to apply for enforcement accrues, shall become barred under Limitation Act, 1963, thereafter.[11]

7. Furthermore, it has been in the case of *Orient Middle East Lines ltd. & Anr.* v. *Brace Transport Corporation of Monrovia and Ors*[12] that the period of limitation would be governed by the residual provision under the Limitation Act, 1963, i.e., the period would be three years from the date when the right to apply for enforcement accrues.

1.2. FOREIGN LENDERS DO NOT CONSTITUTE A SEPARATE CLASS OF CREDITORS.

8. It is a settled legal principle that it is upon the company to decide and mention in its scheme of arrangement about the class of creditors.[13] It is a question of looking at the rights of those involved and not their personal interests.[14] Since the foreign lenders are not the creditors of the company, they won't come under any class of the creditors.

9. Arguendo, even if the Foreign Lenders are the creditors of the company. It was held in the case of *In Re: Maneckchowk & Ahmedabad Mfg. Co. Ltd.*[15] that creditors composing of different

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[9] *Supra* 2.

[10] The Limitation Act, Part X Sch. Div 1 (1963).

[11] Rudolf A. Oetkar v. Mohammed Orri, 2005 (1) CHN 495.

[12] *Supra* 4.

[13] Seksaria Cotton Mills Ltd. v. A.E Naik and Others, (1967) 37 Com Cas 656.

[14] STEPHEN GIRVIN, SANDRA FRISBY & ALASTAIR HUDSON, CHARLESWORTH'S COMPANY LAW 774 (18th ed. 2011)

[15] In Re: Maneckchowk & Ahmedabad Mfg. Co. Ltd., (1970) 40 Com Cases 819 (Guj).

classes must have different interest. And in the present case the interest of foreign lenders are not different from other creditors, and mere the fact of them being arbitral award holder would not be sufficient to make them a separate class of creditor. As creditors who have secured a decree are regarded not as a separate class from other creditors.[16]

10. Section 391 (1) (b) of The Companies Act, 1956, mentions that a scheme of arrangement is proposed between the company and its creditors or any class of them. In the present case it is clearly apparent from the facts that the scheme of arrangement was for the company and its creditors. Since there was no separate scheme offered for the foreign lenders. It is lucid that they were not the separate class of creditors.

1.2.1. No notice was required to be sent to the Foreign Lenders.

11. As the foreign lenders are not the creditors of the company nor do they constitute a separate class of creditors, company did not default in not sending them notice for the creditors meeting, as the scheme of arrangement is between the company and its creditors or any class of them.[17] Therefore the company was not required to send any such notice to the foreign lenders.

1.3. THE SCHEME SHOULD NOT BE SET ASIDE

12. It is contended that the company complied with all the statutory provisions as well as the orders of the Hon'ble Company judge.[18] The scheme was passed by the vote of majority.[19] Furthermore, even if the foreign lenders are creditors of the company, the scheme should not be set aside as in

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[16] Jalpaiguri Banking and Trading Co. Ltd., Re (1935) 5 Com Cases 335; Hari Charan Karanja v. Ulipur Bank Ltd., (1942) 12 Com Cases 110.

[17] The Companies Act, § 391 (1)(c) (1956).

[18] Moot Proposition ¶ 5.

[19] *Id.*

the case of *In Re: Flextronics Technologies (India) P. Ltd*[20] the court held that in any event, even if objector claimed himself to be a creditor, simply because creditors meeting was not convened and consent was not obtained even, as per provisions of scheme, it did not mean that, scheme should be scuttled, while deciding about approval of a scheme by Court, mere consent of shareholders or creditors could not be a sole criteria. In the case of *Commissioner of Income Tax* v. *S.M. Holding & Finance (P) Ltd.,* it was observed that since the scheme is just and reasonable, also approved by the vote of majority, the scheme should not be set aside, merely because there is an objector to the scheme, who is none other than the sole dissenter.[21]

ISSUE 2: WHETHER THERE EXISTS AN ARBITRATION CLAUSE IN THE SHARE SALE AGREEMENT?

13. It is humbly submitted before the Hon'ble Court that Share Sale Agreement (herein after referred as 'the Agreement') which was signed between the Promoters of erstwhile Jeevani and Lifeline contains an arbitration clause. In addition to this, it is submitted that Delhi High Court doesn't have jurisdiction over the instant case.

2.1. THE AGREEMENT CONTAINS ARBITRATION CLAUSE.

14. Arbitration agreement means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not[22]. In the instant case, Promoters and Lifeline agreed to submit dispute to arbitration arising out of the agreement[23]. It is submitted that the agreement

[20] In Re: Flextronics Technologies (India) P. Ltd, [2011]163 Comp Cas 289(Mad).

[21] Commissioner of Income Tax v. S.M. Holding & Finance (P) Ltd., (2003) 180 CTR Bom 312, 2003 264 ITR 370 Bom.

[22] The Arbitration and Conciliation Act, § 7(1) (1996).

[23] Moot Proposition ¶ 9.

fulfils all the requirements which are necessary for being an arbitration agreement.

2.1.1. Arbitration Clause

15. An arbitration agreement may be in the form of an arbitration clause in a contract[24]. It is submitted that there is no separate arbitration agreement, but the agreement which was signed between the Promoters and Lifeline has an arbitration clause[25].

2.1.2. Written Agreement

16. In order to be a binding arbitration agreement between the parties, the same must be in writing.[26] Agreement to refer disputes or difference to arbitration must be expressly or impliedly spelt out from the clause.[27] It is submitted that the agreement is in written form and therefore satisfied the requirement of Section 7 (3) of the Arbitration and Conciliation Act, 1996.

17. In the case of *KK Modi* v. *KN Modi*[28], Hon'ble Supreme Court held that the arbitration agreement must contemplate that the decision of the tribunal will be binding on the parties to the agreement. It is submitted that in the instant case, the parties agreed that the decision of the arbitral tribunal shall be final and binding upon the parties[29].

18. In order to determine the real nature of the agreement, it is necessary to ascertain the intention of the parties at the time of entering the agreement[30]. In this regard it is submitted that both the parties had intention to make an arbitration agreement. The Hon'ble Supreme Court in the case

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[24] *Supra* 23 at § 7 (2); Jayant N.Seth v. Gyaneshwar Apartment Cooperative Housing Society Ltd., 2000 (1) RAJ 117 (Bom).

[25] *Supra* 24.

[26] MM Acqua Technologies Ltd v. Wig Brothers Builders Ltd, 2001(3) RAJ 531 (Del).

[27] State of Orissa v. Damodar Das, AIR 1996 SC 942.

[28] KK Modi v. KN Modi 1998 AIR SC 1297.

[29] Moot Proposition ¶ 9.

[30] Mohan Singh v. HP State Forest Corporation, 1999(3) RAJ 73.

of *Renusagar Power Company Ltd* v. *General Electric Company,*[31]held that whether a given dispute inclusive of the arbitrator's jurisdiction comes within the scope or purview of an arbitration clause or not primarily depends upon the terms of the clause itself and what the parties intend to provide. In this regard it is submitted that both the parties had intention to make an arbitration agreement and the terms of the agreement provide an arbitration clause. Furthermore, it is submitted that the agreement fulfils all the requirements of Section 7 of the aforesaid Act.

2.2. THE ARBITRAL TRIBUNAL HAS JURISDICTION.

19. It is humbly submitted before this Hon'ble Apex Court that arbitral tribunal has the authority to arbitrate on 'any matter' arising out of the agreement, i.e. even on the allegations of fraud. In the case of *Unissi (India) Pvt. Ltd*. v. *Post Graduate Institute of Medical Education and Research*[32] there were serious allegations of fraud but in spite of these, the Hon'ble Supreme Court referred the matter to the arbitral tribunal.

20. In the case of *National Insurance Co. Ltd.* v. *Boghara Polyfab Pvt. Ltd.*[33], Hon'ble Supreme Court held that arbitral tribunal has competence under section 16 of the Arbitration and Conciliation Act, 1996 to rule on its own jurisdiction. Thus, it is humbly submitted before this Apex Court that arbitral tribunal does have jurisdiction even in the cases where dispute is related to the jurisdiction of arbitral tribunal or validity of arbitration agreement. Hence, the instant case is bound to be referred before the arbitral tribunal.

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[31] Renusagar Power Company Ltd v. General Electric Company, AIR 1985 SC 1156.

[32] Unissi (India) Pvt. Ltd. v. Post Graduate Institute of Medical Education and Research, 2010(1)ALT2(SC).

[33] National Insurance Co. Ltd. v. Boghara Polyfab Pvt. Ltd., AIR 2009 SC170.

2.3. DELHI HIGH COURT DOES NOT HAVE JURISDICTION.

21. It is humbly submitted before the Hon'ble Supreme Court that Delhi High Court doesn't have jurisdiction over the dispute between the two parties. In the case of *Skanska Cementation India Ltd* v. *Bajranglal Agarwal*[34] it was held that if there is an arbitration clause then the dispute, if any, should be referred to arbitration. The language of § 8 of the abovementioned Act is peremptory in nature. In cases where there is an arbitration clause in an agreement, it is obligatory for the court to refer the parties to arbitration in terms of their arbitration agreement[35].

22. In the case of *BHEL* v. *C.N. Garg & Ors*.,[36] the court drew the conclusion that Section 5 of the Arbitration and Conciliation Act, 1996 was inserted to discourage judicial intervention. And party of the case has to wait till the award is made and then it can challenge the award under § 34 of the abovementioned Act. In addition to this, it is submitted that the Civil Courts have no jurisdiction where remedy is provided under the Arbitration and Conciliation Act, 1996.[37] Thus, it is submitted that Delhi High Court doesn't have jurisdiction over the dispute.

23. Arguendo, it is submitted that if Delhi High Court does have jurisdiction over this dispute, even then the dispute shall be referred to the arbitral tribunal. *Scott* v. *Avery*[38] clause contends that in arbitration cases, parties shall refer their disputes to arbitrator before coming to court. In the case of the *Vulcan Insurance Co. Ltd.* v. *Maharaj Singh*[39], Hon'ble Supreme Court upheld the validity of this aforesaid clause.

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[34] Skanska Cementation India Ltd v. Bajranglal Agarwal, 2003(2) RAJ 152 (Bom).

[35] P. Anand Ganapathi Raju v. P.V.G Raju(dead),2000 (4) SCC 539.

[36] BHEL v. CN Garg & Ors, 2001(57) DRJ 154 (DB).

[37] Pappu Rice Mills v. Punjab State Cooperative Supply and Marketing Federation Ltd., 2000 AIR (P&H) 276.

[38] Scott v. Avery ,(1856) 5 HL Cas 811.

[39] Vulcan Insurance Co. Ltd. v. Maharaj Singh, AIR 1976 SC 287.

24. Furthermore, in the case of *K/S A/S Bill Biakh & K/S A/S Hill Brali* v. *Hundai Corp*[40], it was held that the judicial intrusion in the arbitral process should be kept to a minimum. Thus, if jurisdiction of Delhi High Court exits in this case, then the Hon'ble Court is duty bound to refer this case to arbitration. And Court can exercise its power to refer the case to arbitration[41].

ISSUE 3: WHETHER SWASTH LIFE LIMITED HAS ABUSED ITS DOMINANCE?

25. It is humbly submitted before this Hon'ble Apex Court that Swasth Life Limited (herein after referred as 'Swasth') has abused its dominance by bad faith litigation. And the order passed by Competition Commission of India (herein after referred as 'CCI') directing Director General to investigate this case was valid on merits and justified.

3.1. SWASTH HAS DOMINANT POSITION IN THE RELEVANT MARKET.

26. It is humbly submitted that Swasth enjoys a dominant position in the relevant market which enables it to prevent effective competition being maintained in the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, and consumers.[42] Ascertaining of dominance involves a two stage procedure. The first step involves the determination of relevant market where the firm operates while the second step involves the assessment of the way in which an enterprise enjoys dominance[43].

3.1.1. Swasth operates in the relevant market.

27. Section 2(r) of the Competition Act, 2002, defines relevant market as the market which may be determined by CCI with reference to the relevant product market or relevant geographic market or with reference to both the markets. It is submitted that Swasth operated in the relevant product

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[40] K/S A/S Bill Biakh & K/S A/S Hill Brali v. Hundai Corp, (1988) 1 Lloyd's Rep 187.

[41] Wankanner Jain Social Welfare Society v. Jugal Kishore Sapani, 2001(4) RAJ 574 (Mad).

[42] Case 27/76, United Brands v. Commission, [1978] ECR 207.

[43] RICHARD WHISH, COMPETITION LAW 174 (6th Ed. Oxford Press Publication 2009).

market.

3.1.1.1. Relevant product market is the pharmaceutical market.

28. Relevant product market means a market comprising all those products or services which are regarded as interchangeable or substitutable by the consumer, by reason of characteristics of the products or services, their prices and intended use.[44] It was held in various cases of the European Court of Justice, that "Where the goods or services can be regarded as interchangeable, they are within the same product market."[45] The same was justified wherein the court held that 'the relevant product market includes those commodities which are reasonably interchangeable by consumers for the same purpose'[46].

29. The existence of relevant product market for an enterprise is examined according to the factors laid down under Section 19(7) of the Competition Act, 2002, which, *inter alia*, includes end–use of goods.[47] The instant case satisfies the requirement of Section 19(7) (a) of the Competition Act, 2002 and i.e. end –use of product.

30. Moreover, in the case of *United States* v. *Grinell Corp.*[48], the court held that 'relevant market may be such that in which close substitute products are available.' Also in the case of *M/s. Santuka Associates Pvt*. Ltd. v. *All India Organization of Chemists and Druggists, Organization*

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[44] The Competition Act, 2002, § 2(t).

[45] RICHARD WHISH, COMPETITION LAW 174 (6th Ed. Oxford Press Publication 2009).

[46] Brown Shoe v. United States, 8 L.Ed.2d 510, (S.Ct. 1961), rev'd, 370 US 294, (1962); United States v. E.I. du Pont de Nemours & Co. 100 6 L.Ed. 1264 (S.Ct., 1955), rev'd, 351 US 377, (1956).

[47] Neeraj Tiwari, *Merger under the Regime of Competition Law: A Comparative Study of Indian Legal Framework with EC and UK*, 23, Bond Law Review, 135 (2011).

[48] United States v. Grinell Corp, 305 F. Supp. 585 (S.D.N.Y., 1966).

of Pharmaceutical Producer of India, Indian Drug Manufacturers' Association and USV Ltd., [49], it was held that a market in which medicines are being sold comes under the scope of relevant product market. Thus, it is humbly submitted before this Hon'ble Court that in the instant case, relevant market is the relevant product market.

3.1.2. Swasth has dominant position.

31. It is humbly submitted that Swasth enjoys a dominant position in the relevant market which enables it to prevent effective competition being maintained in the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, and customers.[50] Under Section 19 of the Competition Act, 2002 factors have been given to determine whether an enterprise enjoys a dominant position or not.

3.1.2.1. Sale of the enterprise

32. Section 19 (4) (e) of the Competition Act, 2002, inter alia, talks about the sale of enterprise as a factor to determine whether an enterprise enjoys a dominant position or not. Swasth manufactures and sells 'Inventive,' which is the 'premier lifesaving drug' in the market. Moreover, after the interim injunction, Swasth was able to get a substantial control over the relevant market[51]. This shows that Swasth was having very good sale of its products in the relevant market.

3.1.2.2. Dependence of Consumers on the enterprise.

33. Under Section 19 (4) (f) of the Aforesaid Act, dependence of consumers on the enterprise has been mentioned as a factor to determine whether an enterprise enjoys a dominant position or not.

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[49] M/s. Santuka Associates Pvt. Ltd. v. All India Organization of Chemists and Druggists, and ors., 2013CompLR223(CCI).

[50] Supra 51.

[51] Moot Proposition ¶ 11.

Since, Swasth manufactures and sells the premier lifesaving drug in the relevant product market. Moreover, after the grant of interim injunction, Swasth was able to corner the large chunk of the relevant market. And high sale indicates the dependence of consumers[52]. Thus, these facts show that consumers have been using or consuming the lifesaving drugs of Swasth. Hence, dependence of consumer on the Swasth is clear.

34. The requirements laid down under Section 19(4) of the Competition Act, 2002, are satisfied. Hence, it can be deduced that Swasth enjoys a dominant position in the relevant market.

3.2. SWASTH HAS ABUSED ITS DOMINANCE.

35. It is humbly submitted before this Hon'ble Supreme Court that Swasth has abused its dominance by bad faith litigation. Through its act, Swasth has denied the market access to Lifeline and thus violates Section 4 (2) (c) of the Competition Act, 2002. It is submitted that a dominant enterprise should not use its position to impede competition in the relevant market[53].

3.2.1. Practice resulting in denial of market access.

36. Section 4 (2) (c) of the Competition Act, 2002 prohibits practices resulting in denial of market access. In this case, Swasth abused its dominant position by indulging in bad faith litigation. Due to this, Swasth was able to create barrier for Lifeline to enter into the relevant market. In the case of *M/s Bulls Machines Pvt Ltd.* v. *M/s. JCB India Ltd. And M/s J.C. Bamford Excavators Ltd.*[54] it was decided by CCI that abuse of litigation can come under the scope of § (2) (c) of the Competition Act, 2002.

3.2.1.1. Bad Faith Litigation

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[52] M/s Esys Information Technologies Pvt. Ltd. v. Intel Corporation and others, Competition Commission of India, Case no. 48 of 2011.

[53] United States Football League v. National Football League, 842 F.2d 1355 (2nd Cir. 1988).

[54] Competition Commission of India, Case No. 105 of 2013.

37. Bad faith litigation means when a party uses litigation as a tool to harass other party[55]. In the case of *McNeil-ppc, inc.* v. *L. Perrigo Company and Perrigo Company*[56], it was held that bad faith litigation includes a case when a patentee initiate's litigation on a patent which he knows is invalid or is not infringed. Dishonest intention or corrupt motive forms the basis of Bad Faith[57]. It is submitted that Swasth indulged in litigation for ulterior motive. It is clear from the facts that Swasth did not want the entry of Lifeline's 'new life saving drug' i.e. 'Novel' into the market because it wanted to maintain its dominance and to corner a large chunk of the relevant market. Swasth indulged in bad faith litigation just to harass Lifeline and to maintain its dominance. And this cause irreparable damages to Lifeline.

38. In the case of *FDC Limited & Others* v. *Sanjeev Khandelwal & Others*[58] it was held that the aim of the law of Patent is to give exclusive rights to Patentee, but the same can't be employed as a tool for exploitation to cripple business rivals. It is contended that there was no infringement of IPR of Swasth and Novel was not substantially similar to Inventive. Novel was a 'new and cheaper lifesaving drug' which was being manufactured by a new step i.e. by further modification of active R & D of Lifeline[59].

39. In the landmark case of *Novartis AG* v. *Union of India & Ors*.,[60] the Supreme Court stated that "new products in pharmaceuticals may not necessarily mean something altogether new or completely unfamiliar or strange or not existing before". It is also submitted that Swasth was

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[55] Albert Neumann, Et Al., Appellants, v. The Reinforced Earth Company, 786 F.2d 424.

[56] McNeil-ppc, inc. v. L. Perrigo Company and Perrigo Company,337 F.3d 1362.

[57] Aman Ullah Khan and Others v. The Federal Government of Pakistan through Secretary, Ministry of Finance, Islamabad and Others, PLD 1990 1092.

[58] FDC Limited & Others v. Sanjeev Khandelwal & Others, 2007 (35) PTC 436 (Mad.).

[59] *Id.*

[60] Novartis AG v. Union of India & Ors., AIR 2013 SC 1311; (2013) 6 SCC 1.

aware that there was no case of infringement of IPR and this may be the reason behind the withdrawal of case right after the launch of new drug[61]. Thus, it is submitted that Swasth has abused its dominance by bad faith litigation.

3.3. CCI'S ORDER WAS NOT BAD IN LAW.

40. It is humbly submitted before this Hon'ble Court that the CCI's order to investigate this instant case was not bad in law. In the case of *Nagraj* v. *Krishna*[62], it was held that the expression 'prima facie case' means that there is a case which requires investigation and that the case is not based on erroneous vexatious grounds.

41. Function under Section 26 (1) of the Competition Act, 2002, of CCI is of preliminary nature and the order is an administrative order[63]. Moreover, directions passed by CCI under Section 26(1) of the aforesaid Act are not appealable[64]. CCI has just directed the Director General to investigate the matter[65] which is in pursuant to the powers granted to it by law[66]. Thus there is no cause of action at this stage to file the writ petition. Hence, it is submitted that CCI's order was not bad in law and Swasth has abused its dominance.

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[61] Moot Proposition ¶ 11.

[62] Nagraj v. Krishna, (1996) ILR Kar. 753.

[63] Competition Commission of India v. Steel Authority of India Limited and Anr., (2010) 10 SCC 744.

[64] Mittal D.P, Taxxmann's Competition Law & Practice , Taxmann Publications, 2011.

[65] Moot Proposition ¶ 12.

[66] Supra 46 at § 26 (1).

PRAYER FOR RELIEF

Wherefore, in the light of the authorities cited, questions presented and arguments advanced, it is most humbly pleaded before the Hon'ble Court that this Court adjudge in the interest of investors and in order to protect the integrity of the securities market and declare that:

1. The Scheme of Agreement was valid and sustain the order of the Delhi High Court.
2. That there is no Arbitration Clause in the Agreement and set aside the order of the Division Bench of Delhi High Court.
3. That Swasth has abused its dominant position and sustain the order of Competition Commission of India.

Or, issue any other suitable order or direction, which this Hon'ble Court may deem fit and proper in the highest interest of justice, equity and good conscience.

All of which is respectfully affirmed and submitted

Sd/-

Counsels for the Respondent(s)