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

BEFORE THE HON'BLE SUPREME COURT OF INDIA

S.L.P. (CIVIL) NO. ___ OF 2014

UNDER ARTICLE 136 OF THE CONSTITUTION OF INDIA

SWASTH LIMITED ……**APPELLANT**

V.

LIFELINE LIMITED & COMPETITION COMMISSION OF INDIA……**RESPONDENTS**

LIFELINE LIMITED……**APPELLANT**

V.

PROMOTERS……..……**RESPONDENTS**

FOREIGN LENDERS……...**APPELLANT**

V.

JEEVANI LIMITED……..**RESPONDENTS**

MEMORANDUM ON BEHALF OF THE RESPONDENTS

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BOOKS REFERRED

1. Volume 6, Commentary on The Constitution of India, Durga Das Basu,8th Edition,2010.
2. Volume 7, Commentary on The Constitution of India, Durga Das Basu,8th Edition,2010.
3. Volume 1, Guide to Competition Law, SM Dugar, 5th Edition,2010
4. Mulla The Code of Civil Procedure, 14th Edition,2005
5. Volume 1, Law of Arbitration and Conciliation by Justice RS Bachawat,5th Edition, 2010
6. Volume 2, Law of Arbitration and Conciliation by Justice RS Bachawat,5th Edition, 2010
7. Guide to the Companies Act, A Ramaiya, 17th Edition 2010.
8. Guide to takovers and mergers,NR Sridharan and PH Arvindh Pandian, 3rd edition,2010
9. Mergers et al , S Ramanujam, 3rd edition, 2011

LEGAL DATATBASES

1. Manupatra, SCC Online, Westlaw, Lexis Nexis.

LEXICON

1. Garner Bryana, Black's Law Dictionary,9th Edition,2009

LEGISLATIONS

1. The Companies Act, 1956.
2. The Arbitration and Conciliation Act, 1996.
3. The Competition Act, 2002.
4. The Code of Civil Procedure, 1908.
5. The Indian Limitation Act, 1963.
6. Constitution of India,1950

STATEMENT OF JURISDICTION

THE PRESENT MATTER HAS BEEN BROUGHT BEFORE HON'BLE SUPREME COURT OF INDIA UNDER ARTICLE 136 OF THE CONSTITUTION OF INDIA.

Art 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

I. Scheme of Arrangement sanctioned by the Delhi High Court

Two listed public companies, Jeevani Limited ("Jeevani") and Lifeline Limited ("Lifeline") entered into a scheme of arrangement whereby Jeevani would completely merge into Lifeline and all assets and liabilities of Jeevani would be transferred to Lifeline. Jeevani issued a notice of meeting to its creditors by publishing an advertisement and a meeting of creditors to whom notice was sent was accordingly held and resolutions supporting the Scheme were passed by a vote of majority. The Delhi High Court approved the Scheme on 5th July, 2013. Certain creditors of Jeevani who were foreign banks ("Foreign lenders") had not received notice of Scheme and were not able to attend the meeting of creditors and hence want the Scheme to be set aside.

II. Jurisdiction under the Share Sale Agreement

Promoters of Jeevani entered into a Sale Agreement on 23rd March, 2012 with Lifeline wherein, the Promoters who are also majority shareholders would sell their entire shareholding i.e. 18% of their stake in Jeevani to Lifeline. Soon after the merger, as a result of the investigations by the Food and Drug Administration ("FDA") for providing drugs of below par quality which commenced much before the merger, Lifeline filed a suit against Promoters before the Delhi High Court for damages arising out of breach of contract whereas, Promoters relied upon the Share Sale agreement clauses contesting any dispute should be referred to arbitration.

III. Writ Petition against the order of Competition Commission of India

After the merger, Lifeline decided to introduce a new life saving drug by the name of 'Novel' after developing the active R & D which became the property of Lifeline after its merger with Jeevani. The drug 'Inventive' presently being the premier drug in the

market was being manufactured and sold by Swasth Life Limited ("Swasth"), a sister concern of the Promoters, of the erstwhile Jeevani. Swasth got assigned absolute rights in 2010 to a few of the developed and completed R&D projects and IPRs of Jeevani. Swasth filed a suit for infringement and obtained an interim injunction against Lifeline. Meanwhile, Swasth launched a similar cost effective drug in the market, cornering a large chunk of the market and withdrew the case against Lifeline. Based on the above Lifeline filed an application before CCI alleging that Swasth was abusing its dominant position by indulging in bad faith litigation. CCI passed an order directing the DG CCI to investigate.

IV. Litigation

1) The Foreign lenders being aggrieved by order passed by the Hon'ble company judge of the Delhi High Court approving the scheme, made an application before the Hon'ble Company Judge for recall of order which however was dismissed. In appeal the Division Bench also dismissed the appeal of foreign lenders.

2) Lifeline filed a suit against Promoters in Delhi High Court. Hon'ble Single Judge held the Court had jurisdiction. In appeal the Division bench set aside the decision of the Hon'ble Single Judge and held the clause constitutes an arbitration clause.

3) Aggrieved by the Order of Competition Commission, Swasth filed a writ petition which was dismissed by the Hon'ble Single Judge. In appeal Division bench also dismissed the application.

The respective aggrieved parties have now approached the Supreme Court by way of Special Leave Petition.

STATEMENT OF ISSUES

I. THE AGREEMENT BETWEEN LIFELINE AND PROMOTERS DOES NOT CONSTITUTE AN ARBITRATION CLAUSE AND HENCE THE DELHI COURT HAD JURISDICTION UNDER SECTION 9 OF THE CODE OF CIVIL PROCEDURE

II. COMPETITION COMMISSION'S ORDER FOR INQUIRY UNDER SECTION 26(1) OF COMPETITION ACT, 2002 IS BAD IN LAW AND THE AGGRIEVED PARTY CAN AVAIL THE REMEDY OF WRIT AGAINST SUCH ORDER.

III. THE SCHEME SANCTIONED BY THE HIGH COURT UNDER SECTION 391 OF COMPANIES ACT, 1956 SHOULD BE SET ASIDE.

SUMMARY OF ARGUMENTS

[Issue 1] <u>The Agreement between Lifeline and Promoters does not constitute an arbitration clause and hence the Delhi Court had jurisdiction under section 9 of the code of civil procedure</u>

In the presence of Clause 3 (**Jurisdiction clause**) in the Sale Agreement between Lifeline and Promoters whereby "***ALL DISPUTES*** *touching upon the subject matter of the agreement shall be subject to the jurisdiction of Delhi Courts"*, the stand of the Respondents that the Agreement constitutes an arbitration clause cannot be accepted since Clause 2.1(**Dispute Resolution**) of the Agreement is not indicative of the decision of the empowered committee to be final, binding and conclusive with respect to any **dispute** but only with respect to **questions and issues** relating to the meaning, scope, instructions, claims, right or matters of interpretation of and under the Agreement.

[Issue 2] Competition Commission's order for inquiry under Section 26(1) of Competition act, 2002 is bad in law and the aggrieved party can avail the remedy of writ against such order.

Competition Commission had after receiving information under Section 19 of the Competition Act, 2002 formed a prima facie opinion as to abuse of dominance by Swasth by reason of indulging in bad faith litigation and had ordered for inquiry under Section 26(1) of the Act. The order was an impugned one as it was bad in law due to reasons of being against well-established doctrine given by European Commission in this regard. Being bad in law, the Delhi High Court had power to set aside such impugned order by issuing Writ of Certiorari.

[Issue 3] The Scheme sanctioned by the High court under section 391 of Companies Act, 1956 should be set aside

Foreign lenders by virtue of Consortium agreement and Arbitral award passed by a foreign arbitral tribunal were Creditors of Jeevani and even constituted a separate class of creditors and thus were entitled to a notice of meeting under Section 391(1) for the scheme of arrangement which was not received by them which consequently affects their rights, claims and liabilities. Thus the scheme of arrangement sanctioned by the Court under section 391 should be set aside.

ARGUMENTS ADVANCED

1 THE AGREEMENT BETWEEN LIFELINE AND PROMOTERS DOES NOT CONSTITUTE AN ARBITRATION CLAUSE AND HENCE THE DELHI COURT HAS JURISDICTION UNDER SECTION 9 OF THE CODE OF CIVIL PROCEDURE

In the backdrop of the above referred aspect, it will be appropriate to consider Section 7(1) of the Arbitration and Conciliation Act, 1996 ("**Act**") which is relevant and connected with the issue in question.

Section 7: Arbitration agreement

(1) In this Part, "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.

(2).....

Plain reading of the aforementioned provision clearly show that the Arbitration clause must purport to *submit a disputed matter to the judgment of one or more persons called arbitrators*.[1]

1.1 What is a Dispute under the Arbitration and Conciliation Act, 1996?

Before moving forward, it is expedient to understand what constitutes a "Dispute". The term "dispute" must be interpreted in light of its "ordinary meaning"[2]. Differences or disputes exist only if one party makes a claim or demand and the other party refuses or denies the same[3].

[1] Collins v. Collins, 28 LJ Ch 186

[2] Agri Gold Exims Ltd. V. Sri Lakshmi Knits & Wovens, (2007) 2 SCALE 296 (Supreme Court, 2007)

[3] Pragati International Projects v. Equipment Corporation of India Ltd. (2007) 1 RAJ 315 (Rajasthan High Court,2007)

In the case of **State of U.P. v. Tipperchand**[4], the **Supreme Court** held that a clause in a contract which provided that "*the decision of the Superintending Engineer for the time being shall be final, conclusive and binding on all parties to the contract upon all questions relating to the meaning of the specifications, design, drawing and instructions, hereinbefore mentioned" and that "the decision of such Engineer as to....., shall also be final, conclusive and binding upon the contractor, is not an arbitration agreement***".** Similarly in a case before **Allahabad High Court**[5], where a clause in an agreement provided that the decision of the Chief Engineer would be final on matters of specification, drawings, instructions, etc., it was held that the *Chief Engineer was not thereby empowered by the clause to decide any difference or dispute arising out of the contract. The clause in question did not constitute an arbitration agreement.*

Reference in this connection is made to the Judgment of the **Supreme Court** in the case of **Rukmanibai Gupta v. The Collector, Jabalpur and Ors**[6] where it was held *what is required to be ascertained in an arbitration agreement is whether the parties have agreed that in the event of disputes between them in respect of the subject matter of contract those shall be referred to arbitration and the decision taken by the body to whom it is referred to is final.* Based on the above principle, the **Orissa High Court**[7] observed that in two similar clauses, **the additional use of the words "in the event of a dispute" in one clause was held to imply an intention to form an arbitration agreement, while the other clause, which did not contain those words, was held to be not an arbitration agreement**.

[4] State of U.P. v. Tipperchand, AIR 1980 SC 1522 (Supreme Court, 1980)

[5] Ganga Pollution Control Unit v. Civil Judge, Allahabad, AIR 2001 All 149 (Allahabad High court, 2001)

[6] Smt. Rukmanibai Gupta v. The Collector, Jabalpur and Ors, AIR 1981 SC 479 (Supreme Court, 1981)

[7] Patitapaban Mohapatra v. S.E. Eastern Circle, AIR 2008 Ori. 80 (DB) (Orissa High Court, 2008)

Therefore, it is contended that a plain reading of Clause 2.1 of the agreement does not indicate the determination of a matter in **dispute** by the empowered committee but only the **finality of decision** of the empowered committee upon ***questions and issues*** relating to meaning, scope, instructions, claims, right or matters of interpretation under the Agreement. Furthermore, *the existence of a dispute is an essential condition for the exercise of jurisdiction by an arbitrator*[8] and *if there is no dispute there can be no right to demand arbitration*[9] .It is argued that the absence of this essential requisite of a dispute in an arbitration agreement shows there was no intention to arbitrate under the Sale Agreement between Lifeline and Promoters.

1.1.1 "DISPUTE RESOLUTION" as heading of Clause 2.

It is contended that mere mention of **Dispute** in the heading of the clause does not render it to be an arbitration clause. In the absence of ambiguity in the clause, the question of looking into the heading of that clause does not arise, and the mention of the term 'arbitration' in the heading would not be determinative.[10]

1.1.2 Jurisdiction Clause determining disputes

In the light of the terms of the Sale Agreement, Clause 3 purports to determine ***"ALL DISPUTES"*** touching upon the matter of the agreement to be heard and decided by the Delhi courts only, thereby not subjecting any matter to clause 2.1 of the Agreement. It is argued that arbitration agreements should be strictly construed in the sense that clear language should be introduced into the contract which is to have the effect of ousting the jurisdiction of the court

[8] Nandram Hanutram v. Raghunath & Sons Ltd., AIR 1954 Cal 245 (Calcutta High Court, 1954)

[9] Uttamchand Saligram v. Jewa Mamooji, AIR 1920 Cal 143 (Calcutta High Court, 1920)

[10] YL eServices Private Ltd. V. Silverline Business and Tech Park Private Ltd., AIR 2008 Kant 127 (Karnataka High Court, 2008)

and compelling the parties to have recourse to arbitration for the decision of disputes[11], which clearly is not the case in the present matter before this court. In that respect, the Hon'ble Single Judge of the Delhi High Court was correct in upholding that clause 2 of the Agreement could not be regarded as an arbitration clause.

1.2 Whether Clause 2.1 of the Agreement constitutes an expert determination or an arbitration?

"*Whether the agreement is an arbitration agreement or an agreement for valuation ultimately depends upon the intention of the parties as appearing from the words used by them. The use of words "judge", "arbitrator", "adjudge" and similar expressions is not conclusive*."[12]

Russel on Arbitration[13] states *"Many cases have been fought over whether a contract's chosen form of dispute resolution is expert determination or arbitration. This is a matter of construction of the contract, which involves an objective enquiry into the intention of the parties.* Reliance can be placed on **Bharat Bhushan Bansal v. U.P Small Industries Corp. Ltd**[14].where the **Supreme Court distinguished expert determination and arbitration**. Similarly in the case of **K.K. Modi v. K.N. Modi and Ors**., the **Supreme Court** had the occasion to consider the essential ingredients of an arbitration clause. Among the ingredients described in the said judgment, two important ingredients are; *that the agreement between the parties must contemplate that substantive rights of parties will be determined by the agreed Tribunal and that the Tribunal will determine the rights of the parties in an impartial and*

[11] T.W Thomas & Co, Ltd. v Portsea Steamship Co. Ltd. (1912) AC 1; Ganpatrai Gupta v. Moody Bros., (1950) 85 CLJ 136 at p. 143.

[12] Devika Mehra v. Ameeta Mehra, (2004) 77 DRJ 651 (Delhi High Court, 2004)

[13] Russel on Arbitration, 37 (21st edn), para 2.014s

[14] Bharat Bhushan Bansal v. U.P. Small Industries Corp. Ltd., (1999) 2 SCC 166 (Supreme Court, 1999)

judicial manner with the Tribunal owing an equal obligation of fairness towards both sides and also that the agreement of the parties to refer their disputes to the decision of the Tribunal must be intended to be enforceable in law. **There is a difference between an expert determination and arbitration**[15]. In the light of the above principle, it is clear from Clause 2 of the agreement that in respect of *questions and issues* relating to the meaning, scope, instructions, claims, right or matters of interpretation connected with the contract, the parties shall submit to the decision of the Empowered Committee which is to be final, binding and conclusive, the intention of an arbitration being absent.

1.3 <u>In Arguendo, even if there exists an arbitration clause, it would become unenforceable.</u>

An arbitration clause becomes unenforceable where the dispute involves a question of fraud. The word 'fraud' for this purpose is to be taken in its ordinary meaning in which dishonesty is an essential ingredient. In this case[16] it was held**-**"*It is also no doubt true that where existence of an arbitration agreement can be found, apart from the existence of the original agreement, the courts would construe the agreement in such a manner so as to uphold the arbitration agreement. However, when a question fraud is raised, the same has to be considered differently. Fraud as is well-known vitiates all solemn acts. A contract would mean a valid contract; an arbitration agreement would mean an agreement which is enforceable in law*". Therefore when a party's case proceeds on serious allegations of fraud, it taints the entire agreement, including the arbitration clause. Based on the aforementioned principle, it is submitted that where the appellant has proceeded to take an action against the promoters for breach of contract on grounds of fraud and misrepresentation, the only mode of dispute resolution would be under the jurisdiction of Delhi courts.

[15] K.K Modi v. K.N Modi and Ors., (1998) 3 SCC573 (Supreme Court, 1998).

[16]India Household and Healthcare Ltd v. LG Household and Healthcare Ltd., AIR 2007 SC 1376, (2007) 5 SCC 510 (Supreme Court, 2007)

2 COMPETITION COMMISSION'S ORDER FOR INQUIRY UNDER SECTION 26(1) OF COMPETITION ACT, 2002 IS BAD IN LAW AND THE AGGRIEVED PARTY CAN AVAIL THE REMEDY OF WRIT AGAINST SUCH ORDER.

From the perusal of facts it's clear that Informant **(Lifeline)** provided Competition Commission information pertaining to Swasth abusing its dominance by indulging in bad faith litigation under Section 19 of the Competition Act, and after forming a *prima facie* opinion, issued an order under Section 26(1) for inquiry as to any abuse of dominance on part of Swasth. Section 26 is produced below here for ready reference-

Section 26: Procedure for inquiry under section 19-

(1) On receipt of a reference from the Central Government or a State Government or a statutory authority or on its own knowledge or information received under section 19, if the Commission is of the opinion that there exists a *prima facie* case, it shall direct the Director General to cause an investigation to be made into the matter:

Provided that if subject-matter of an information received is, in the opinion of the Commission, substantially the same as or has been covered by any previous information received, then the new information may be clubbed with the previous information.

(2) …….

2.1 Whether Competition Commission's order for inquiry under Section 26(1) of Competition Act, 2002 is bad in law?

"The Commission considers that 'in principle the bringing of an action, which is the expression of the fundamental right of access to a judge, cannot be characterized as an abuse' **unless '**an undertaking in a dominant position brings an action

(i) which cannot reasonably be considered as an attempt to establish its rights and can therefore only serve to harass the opposite party, and

(ii) which is conceived in the framework of a plan whose goal is to eliminate competition.

Under the first of the two criteria the action must, on an objective view, be manifestly unfounded. The second criterion requires that the aim of the action must be to eliminate competition. **Both criteria must be fulfilled in order to establish an abuse.**

The fact that unmeritorious litigation is instituted does not in itself constitute an infringement of Article 86 (now Article 102) of the European Commission Treaty pertaining to Anti-trust laws, unless it has an anti-competitive object. **Equally, litigation which may reasonably be regarded as an attempt to assert rights vis-à-vis competitors is not abusive, irrespective of the fact that it may be part of a plan to eliminate competition.**"[17]

From the perusal of the facts it's clear that Swasth had in year 2010 got assigned absolute rights of certain R&D and IPRs of Jeevani. While filing a suit for interim injunction for infringement of IPRs, Swasth was asserting its rights provided by these IPR's and protecting them and even by withdrawing its injunction application it can't be held to be even prima facie abusing its dominance. Applying the above mentioned test laid down in Point 1 of ITT Promedia case, the Competition Commission should have taken into account, that filing and withdrawal of injunction was only for the purpose of protecting its IPRs.

Even if it eliminated the competition in the process, the factors mentioned in the above test are cumulative and it can't be held to be an abuse. Thus Swath in its endeavor to protect its IPRs cannot be held to be even prima facie abusing its dominance and Competition Commission should have on receipt of information made an order Under Section 26(2) of the Act. **Thus it is submitted that the order of Commission under Section 26(1) was bad in law.**

[17]Case T-111/96, ITT Promedia NV v Commission of the European Communities. Judgment of the Court of First Instance (Fourth Chamber, extended composition). European Court reports 1998, Page II-02937

2.2 Whether writ petition filed before Delhi High Court under Article 226 against an order under Section 26(1) by Competition Commission of India is maintainable?

An order under Section 26(1) of the Competition Act, 2002 is an administrative order as was held in **Competition Commission of India v. Steel Authority of India Ltd.**[18]and "Court has jurisdiction to review an administrative order which is perverse or arbitrary".[19]

The Apex Court has summarised the grounds on which an administrative action can be interfered with in **Ganesh Bank of Kurundward Ltd v. Union of India**[20]. It has held that in any case there should be judicial restraint while making judicial review in administrative matters. The duty of Court while interfering in an administrative order is a) to confine itself to the question of legality; b) to decide whether the decision making authority exceeded its power; c) committed any error of law; d) breached rules of natural justice; e) reached a decision which no reasonable tribunal would have reached; f) abused its powers.[21]

The Competition Commission's administrative order passed under Section 26(1) was clearly an error apparent at the face of law and was bad in law. An order which suffers from manifest error and if allowed to stand, it amounts to perpetuation of grave injustice.[22]

Thus the Court has power to issue writ of certiorari to set aside the administrative order passed under Section 26(1).

[18]Competition Commission of India Steel Authority of India Limited and Anr. (2010) 10 SCC 744 (Supreme Court, 2010)

[19] M.P. State Co-op Dairy Federation Ltd. V. Rajnesh Kumar Jamindar, (2009) 15 SCC 221(Supreme Court, 2009)

[20] Ganesh Bank of Kurundwad Ltd. v. Union of India, (2006) 10 SCC 645 (Supreme Court, 2006)

[21] Reliance Energy Ltd. v. Maharashtra State Road Development Corporation Ltd. (2007) 8 SCC 1: (2007) 11 JT 1. (Supreme Court, 2007)

[22] Ashok Kumar v. Sita Ram, AIR 2001 SC 1692 : (2001) 4 SCC 478 (Supreme Court, 2001)

3 THE SCHEME SANCTIONED BY THE HIGH COURT UNDER SECTION 391 OF COMPANIES ACT, 1956 SHOULD BE SET ASIDE

From the perusal of the facts of the present case, it is apparent that pursuant to the consortium agreement and the foreign arbitral award passed in favor of the foreign lenders, they became the creditors of the company and were thus entitled to a notice of meeting for the scheme of arrangement under Section 391(1) of the Companies Act, 1956 (hereinafter, the **'Act'**) which was not received by them, thereby, affecting their rights and claims as creditors of the company under the Act. Before proceeding further, the first question which needs to be answered before this Hon'ble Court is with regards to the status of the foreign lenders as Creditors under the Act.

3.1 Foreign lenders fall under the ambit of the expression "Creditors" and they further constitute a separate class of creditors within the scope of Section 391.

The Halsbury's Laws of England defines 'creditor' '*as every person having a pecuniary claim whether actual or contingent, against the company*.' [23]In the case **Seksaria Cotton Mills Ltd. v. A.E. Naik and others[24],** it was observed: *"The word "creditor" in section 391 is used in the widest sense so as to include all persons having pecuniary claims against the company. The amount due need not be ascertained and he is still a creditor if the claim is present or future, certain or contingent, ascertained or sounding only in damages."*

In the present case before the Hon'ble Court, the foreign lenders comprising mainly of foreign banks entered into a consortium agreement wherein, they provided financial assistance to Jeevani, thereby developing a pecuniary claim against the company. From plain

[23] HALSBURY'S LAWS OF ENGLAND, Fourth Edn., Vol 7, para 1530, page 848.

[24] Seksaria Cotton Mills Ltd. v. A.E. Naik and others, (1967) 37 Com Cases 656. (Bombay High Court, 1967)

reading of the above cited definition, it is clear that the foreign lenders come under the ambit of the expression 'Creditor' within the Act.

Further, it is submitted that a foreign arbitral award was passed against Jeevani whereby, Jeevani was to pay the foreign lenders the amounts as stated in the award by reason of which the foreign lenders *ipso facto* become creditors of the company.

The foreign arbitral award passed by the foreign arbitral tribunal constituted in Hong Kong is a Non Convention Award as Hong Kong was not a notified country under **Section 44(b) of the Arbitration and Conciliation Act, 1996**. [Hong Kong was notified a reciprocating territory under Section 44(b) of the Act on 19th March, 2012].

Thus the award does not fall under the definition of Foreign award under Section 44 and would either be a Domestic Award under Part 1 of the Arbitration and Conciliation Act, 1996, if part 1 wasn't specifically excluded as was held in to **Supreme Court's** judgement in **Bhatia International v. Bulk Trading S.A** or a Judgement of a Foreign Court, if part 1 was excluded as was held in **Badat & Co. v West India Trading Co**.[25] and in **Food Services of America, Inc. v. Pan Pacific Specialities Ltd.**[26]

[Although Bhatia International v. Bulk Trading has been overruled by the Supreme Court in **Bharat Aluminium Co. v Kraiser Aluminium Technical Services**[27] , the apex court provided that the law now declared in the latter case shall apply prospectively, to all the arbitration agreements executed hereafter [i.e. after 6th September, 2012].

As the arbitration agreement doesn't specifically exclude Part 1, the arbitral award would become a domestic award and an arbitral award which is a domestic award passed under Part

[25] Badat & Co. v. East India Trading Co., (1964) 4 SCR 19: AIR 1964 SC 536 (Supreme Court, 1964).

[26] Yearbook of Commercial Arbitration, Vol. XXIX (2004), Canada No. 10, p.581

[27] Bharat Aluminium Co. V. Kraiser Aluminium Technical Services (2012) 9 SCC 552 (Supreme Court, 2012)

1 of the act is a final award and is enforceable as a decree of a court[28]. Also if the objections to the award are not sustained (or if there are no objections within the time allowed under Section 34(3) of the Arbitration Act) the award itself becomes enforceable as if it were a decree of the court[29].

Therefore, by virtue of domestic award, the award is enforceable as a decree and since it can be directly executed under provisions of Order 21 of Civil Procedure Code[30] and not barred by Art 136 of Limitation Act[31] which prescribes a period of 12 years for execution of decrees, the award makes Jeevani a Judgement Debtor under Section 2(10) of Civil procedure code, thereby making Foreign Lenders the creditors of the company.

3.1.1 Separate Class of Creditors

From various case laws, both under the English Act and the Indian Companies Act, 'creditors' can be divided into three broad categories of preferential creditors, secured creditors and unsecured creditors. In a landmark judgment of **Sovereign Life Assurance Co. v. Dodd**[32]**,** whose principles have been followed by several Indian Courts**,** the judge observed: *"All unsecured creditors will normally form a single class, except where some of them are to be treated in a manner different from the rest and have different interests which might conflict. In such a case, fresh classes will be carved out."*

Gujarat High court in **Maneck Chowk and Ahmedabad Mfg Co. Ltd.,**[33] held:

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[28] Statement of Objects and Reasons to Arbitration and Conciliation Act,1996, Para 4(vii)

[29] Section 36 of The Arbitration and Conciliation Act,1996

[30] The Civil Procedure Code,1908

[31] The Indian Limitation Act, 1963.

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

[33] Maneck Chowk and Ahmedabad Mfg Co. Ltd., In re, (1970) 2 Comp LJ 300 (Gujarat High Court, 1970)

"It is always a moot question as to what constitutes a class. However, speaking broadly, it is shown that a group of persons would constitute a "class" when they have conveyed all interests, and their claims are capable of being ascertained by a common system of valuation. The group who are styled as 'class' must have 'commonality of interest' and ordinarily be 'homogenous' and they have been offered identical compromise. This will provide a rationale for determination of the peripheral boundaries of classification. Even if there are different groups within a class, the interests of which are different from the rest of the class or who are to be treated differently in the scheme, such groups must be treated as separate classes for the purpose of the scheme. "

Buckley on the Companies Act[34], has observed

"It is a formidable difficulty to say what constitutes a class of creditors. The creditors composing the different classes must have different interest. When one finds a different state of fact existing among different creditors which may differently affect their minds and their judgment, they must be divided into different classes."

It is expedient to note in view of the above cited authorities that in the present case, the foreign lenders constitute a separate class of creditors whose interests, rights and claims are different from the rest of the creditors which makes it impossible for them to consult together as there exists a distinction between the interests of the lenders and other creditors by virtue of the terms of the Consortium agreement entered between the foreign lenders and Jeevani. For instance, External Commercial Borrowing can be differentiated from domestic borrowing on a number of grounds like The ECB guidelines issued by the Reserve Bank of India which regulate not only the returns but also the tenure and amount of the loan, the sectors and purposes for which loan can be availed, the type of security and so on. The Transaction Costs involved, the Enforcement Remedies available and the Institutional Issues

[34] BUCKLEY ON THE COMPANIES ACT, 13th Edition, page 406

associated also differentiate domestic lending from an External Commercial Borrowing, thereby leading to difference in interests of the lenders.

Thus, the treatment to be accorded under the scheme to the foreign lenders has to be different from the rest of the creditors of the company and all the creditors cannot be clubbed together when there is no commonality of interest between them.

It should also be noted that because of the reason of the claims and rights of the foreign lenders against the company being different from the other creditors of the company, it will result in confiscation and gross injustice, if they are not considered as a separate class because their rights can be affected as there runs a risk that the majority of the other creditors may ride rough shod over the minority.

3.2 <u>Whether Notice of meeting of the Scheme is required to be sent to the foreign lenders as creditors of the company?</u>

Rule 73 of the Companies (Court) Rules, 1959 makes it mandatory to send notice for calling of meeting to the creditors or members of any class for the purpose of approval of the scheme of arrangement by them.

The Madras High Court in the case **Ne Plus Technologies (P.) Ltd., In re**,[35] took the view that: *"The holding of the meeting is the very important step and the meeting cannot be regarded as a mere empty formality. Accordingly, the court held that the meeting necessarily has to be convened and the approval of the shareholders and the creditors should be taken care at."*

[35] Ne Plus Technologies (P.) Ltd., In re, (2002)112 CompCas 376 (Madras High Court, 2002)

3.2.1 Legislative intent behind making an application under Section 391(1) of the Act:-

The object of an application under Section 391(1) of the Act was discussed by the Karnataka High Court in the case **Ansys Software (P) Ltd., In re** [36] and also by the Delhi High Court in the case **SIEL Ltd.,** In re [37] , where the Court held: *"The whole object of making an application under section 391(1) of the Act is for permission to hold a meeting……..When law says that a meeting has a definitive purpose and object, it could not be done away with by the process of dispensation. Any dispensation of meetings will be a clear thing which is in conflict with the very provisions of law."*

In the present case, a separate class meeting of the foreign lenders was required to be called, sending a notice of which was obligatory on part of the company. But, there has been a deliberate omission by Jeevani in calling a meeting of the foreign lenders who constituted a separate class. The company did not even disclose the status of the foreign lenders as its 'creditors' before the Hon'ble Delhi High Court because of its malafide intentions and further did not send notice of meeting to the lenders.

Without prejudice to the above contentions, it is further submitted that even if the foreign lenders did not constitute a separate class of creditors, a notice of the creditor's meeting was required to be sent which was not adhered to by the company and this omission is not inadvertent, rather is an intentional omission by Jeevani.

3.3 Rights, Claims and Liabilities of the foreign lenders affected

"While exercising its power in sanctioning the scheme of amalgamation, the court has to satisfy itself that the provisions of the statute have been complied with, that the class was represented fairly, and the statutory majority was acting in a bona fide manner and not in an oppressive manner **and the arrangement is such as which prudent, intelligent or an**

[36] Ansys Software (P) Ltd., In re, (2005) 1 Comp LJ 60 (63) (Karnataka High Court, 2005)

[37] SIEL Ltd., In re, (2004) 122 Com Cases 536 (Delhi High Court, 2004)

honest manner or a member of the class concerned acting in respect of the interest might reasonably take"[38] It's humbly submitted that the Delhi High Court while sanctioning the scheme of arrangement should have considered the interests of Foreign Lenders who were creditors of the company and even constituted a separate class of creditors. The Learned Single Judge had thus erred while passing the scheme as it approved the Scheme of arrangement which doesn't include the Foreign Lenders as the creditors of Jeevani and is detrimental to the claims which foreign lenders have against the Company.

[38] In Re: Aksh Optifibre Ltd., (2007) 77 SCL 219 (Rajasthan High Court, 2007).

PRAYER

WHEREFORE, in light of the issues raised, arguments advanced and authorities cited it is most humbly and respectfully requested that this Hon'ble Supreme Court be pleased to:

1) Uphold the decision of the Hon'ble Single Judge of the Delhi High Court maintaining that Court had Jurisdiction and the Clause could not be regarded as Arbitration clause.
2) Set aside the Order passed by Competition Commission under Section 26(1) of the Competition Act,2002
3) Set aside the scheme of merger passed by the Delhi High Court under Section 391 of the Companies Act, 1956

AND/OR

Pass any other order that it deems fit in the interest of Justice, Equity and Good Conscience.

And for this, the Appellant as in duty bound, shall humbly pray.

Sd/-

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COUNSELS FOR THE APPELLANTS