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……..……**RESPONDENT**

FOREIGN LENDERS……...**APPELLANT**

V.

JEEVANI LIMITED……..**RESPONDENT**

MEMORANDUM ON BEHALF OF THE RESPONDENTS

TABLE OF CONTENTS

INDEX OF AUTHORITIES

CASES **PAGE NO.**

OTHER AUTHORITIES

BOOKS

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 DATABASE

Manupatra, SCC Online, Westlaw, Lexis Nexis.

LEXICONS

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 RAISED

I. WRIT PETITION FILED AGAINST AN ORDER ISSUED BY COMPETITION COMMISSION OF INDIA UNDER SECTION 26(1) OF COMPETITION ACT, 2002 IS NOT MAINTAINABLE.

II. THE AGREEMENT BETWEEN LIFELINE AND PROMOTERS CONSTITUTES AN ARBITRATION CLAUSE AND HENCE THE DELHI HIGH COURT HAS NO JURISDICTION.

III. THE SCHEME SANCTIONED BY THE DELHI HIGH COURT UNDER SECTION 391 OF COMPANIES ACT, 1956 SHOULD NOT BE SET ASIDE.

SUMMARY OF ARGUMENTS

[ISSUE I] Writ petition filed against an order issued by Competition Commission of India under Section 26(1) of Competition Act, 2002 is not maintainable.

An order passed by the Competition Commission under Section 26(1) of the Competition Act after receiving information under Section 19 of the Act and forming a *prima facie* opinion directing the Director General to investigate into abuse of dominance is an administrative order and does not effectively determines any right or obligation of the parties. Being an administrative order, the High Court doesn't have power to grant a writ against the order.

[ISSUE II] The Agreement between Lifeline and Promoters constitutes an arbitration clause and therefore the Delhi High Court has no jurisdiction to hear and decide the suit.

In the presence of Clause 2 under the head Dispute Resolution of the Sale Agreement between Lifeline and Promoters, there exists an intention to arbitrate any dispute arising between them by an empowered committee comprising of three executive level personnel of the Company as arbitrators whose decision shall be final, binding and conclusive on the parties to the Agreement upon all questions and issues relating to the meaning, scope, instructions, claims, rights or matters of interpretation of and under the Agreement.

[ISSUE III] The Scheme sanctioned by the Delhi High Court under Section 391 of the Companies Act, 1956 should not be set aside.

Foreign lenders do not come under the ambit of the expression 'Creditors' within the Companies Act, 1956 because of the withdrawal of Jeevani from the consortium agreement entered between the company and the lenders as a result of which, it did not receive the financial assistance as per the agreement, for which arbitration proceedings were initiated by the lenders for damages arising out of breach of contract on part of Jeevani. Therefore, in the present case, the foreign lenders cannot be termed as creditors of the company, because of which, notice of meeting was not sent to them. But, they can be said to be a contingent liability of the company whose interests are protected under the scheme and hence, the scheme should not be set aside.

ARGUMENTS IN DETAIL

1 WRIT PETITION FILED AGAINST AN ORDER ISSUED BY COMPETITION COMMISSION OF INDIA UNDER SECTION 26(1) OF COMPETITION ACT, 2002 IS NOT MAINTAINABLE.

From the perusal of facts it's clear that Competition Commission of India on receiving information from the Informant **[Lifeline]** under Section 19 of the Competition Act followed the specified procedure mentioned in the act and only after forming a *prima facie* opinion did it pass the order for inquiry under Section 26(1).

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) …….

While determining the maintainability of Writ Petition against an order under Section 26(1), the Court should first examine the nature of the order. It's submitted that the order passed under Section 26(1) is an administrative order and this would further be established under **point 1.1**.

1.1 Whether an order under Section 26(1) constitutes an administrative order?

"*An investigation order issued under Section 26(1) of the Competition Act is only an administrative direction to one of its own wing departmentally and is without entering upon any adjudicatory process. Direction under Section 26(1) of Competition Act, 2002 after formation of prima facie opinion is a direction simpliciter to cause an investigation into the matter and does not effectively determines any right or obligation of the parties to the Lis and does not entail civil consequences for any person and therefore, is not appealable.***"**[1] An order under Section 26(1) is an administrative order and the aggrieved party has a right to challenge it at Section 26(7) stage. Thus the Competition commission, on basis of a *prima facie* opinion, while issuing a directive to Director General to investigate into abuse of dominant position by Swasth under Section 19 of the act had only issued an **administrative order** which didn't determine any right or obligation of the parties and caused no adverse effects to Swasth.

1.2 Whether Delhi High Court has jurisdiction under Article 226 to allow a Writ Petition against an administrative order?

1.2.1 Whether a writ petition is maintainable against an 'administrative order'?

"*The Commission is a statutory body, established under the Act with the legislative mandate inter alia to prevent the practices having adverse effect on competition, to promote and sustain competition in the markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in the markets, in India. To perform the above mentioned functions, under the scheme of the Act, the Commission is vested with*

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

inquisitorial, investigative, regulatory, adjudicatory and advisory jurisdiction." [2] It's expedient to note that while passing an administrative order under Section 26(1), the Competition Commission acted in the inquisitorial powers vested to it under the act. The Act provides Competition Commission the power to look into any activities or agreements which are in contravention of the provisions of the act and for this purpose it may direct the Director General, appointed under Section 16 of the Competition Act, to investigate any such violation. "*Where the decision is within the exclusive administration domain of duly constituted authority, it cannot be interfered under Article 226*."[3]

It's submitted that Writ of Certiorari prayed by Appellant from the Court can't also be granted against an administrative order. The general rule that Certiorari or Prohibition will not lie against an executive or administrative authority (not being under quasi-judicial duty) has been established since early case of **Khulsadas**.[4] In **Radheshyam v State of M.P**., this court denied any relief under Article 226 against an order of State Government superseding a Municipal Committee for period of incompetence, though rules of Natural Justice were not complied with, on the ground that order under Section 53A of C.P. & Berar Municipal Act, 1922 was an administrative act.

It has been held by the Apex Court, "*Certiorari is available against a statutory commission, if it has to exercise a quasi-judicial function, e.g. the making of a scheme, after hearing parties,*[5] *but not if it is legislative or administrative in nature*."[6]

---

[2] *In re* Case No 3/2011 filed by Shri Shamsher Kataria against Honda Siel Cars India Ltd and anr ; (August 25,2014) & Nissan Motors India Pvt. Ltd. v The Competition Commission of India (2014) 5 MLJ 267 (Madras,2013)

[3] Union of India v. Nagesh, (2002) 7 SCC 603 : (2003) I MLJ 89 (Supreme court,2002)

[4] Prov of Bombay v. Khulsadas, (1950) SCR 621 (631)

[5] R. v. Electricity Commrs., (1924) 1 KB 171

[6] Cf. Harper v. Secy. of State, (1955) 1 A11 ER 331

It would also be important to consider the legislative intent of making Section 26(1) of the Competition Act non-appealable under the act itself. "*First, expeditious disposal of matters before the Commission and the Tribunal is an apparent legislative intent from the bare reading of the provisions of the Act and more particularly the Regulations framed thereunder. Second,* ***if every direction or recording of an opinion are made appealable then certainly it would amount to abuse of the process of appeal.*** *Besides this, burdening the Tribunal with appeals against non-appealable orders would defeat the object of the Act, as a prolonged litigation may harm the interest of free and fair market and economy*".[7]

1.2.2 <u>Arguendo, even if an administrative order can be interfered with, the Courts can do so only on certain grounds.</u>

The Apex Court has summarized the grounds on which an administrative action can be interfered with in **Ganesh Bank of Kurundwad Ltd v. Union of India**[8]. 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.[9] It's important to note that Competition Commission while passing the order under section 26(1) didn't breach any of the above grounds.

1) The decision passed was certainly legal and within the scope of the powers of the Commission as provided by the Act; **2)** The commission didn't commit any error of law in

[7] Competition Commission, *supra* Note 1

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

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

passing the order. This will be further illustrated in **point 1.3. 3)** There was no breach of rules of natural justice. As "*right of notice of hearing is not contemplated under the provisions of Section 26(1) of the Competition Act, 2002*."[10] **4)** The decision of the commission of ordering an investigation after forming a *prima facie* view to look into abuse of dominance on part of Swasth was a reasonable decision and commission while making the order followed the procedure laid down under the act. The order was within the powers vested on commission. So there was no abuse of powers on behalf of the commission and the decision was a reasonable one as further substantiated by **point 1.3**.

1.3 Whether the Competition Commission's administrative order under Section 26(1) directing the Director General to inquire into abuse of dominance, bad in law?

The Preamble and Section 18 of the Competition Act, 2002 make it a duty of the commission to eliminate practices having adverse effect on competition, promote and sustain competition, protect the interests of consumers, and ensure freedom of trade carried on by other participants, in market in India. Competition Commission for this purpose has been given vast powers under the act to examine any anti-competitive behavior and to ensure fair competition. To determine whether the decision of Competition Commission was bad in law in passing the order under Section 26(1) we have to look into the following questions:

1.3.1 Whether Competition Commission in determining prima facie view that Swasth may have abused its dominance, erred in its order?

Competition Commission on receipt of information under Section 19 is bound to express its opinion under Section 26, as to whether a prima facie case exists. While dealing with information pertaining to Section 4 of the Act which deals with Abuse of Dominant Position and forming a prima facie view, the commission need not define relevant market, relevant

[10]Competition Commission, *supra* Note 1

geographic market and relevant product market.[11] It should also be noted that the Competition Commission in Bull v. JCB observed that "**predation through abuse of judicial processes presents an increasingly threat to competition, particularly due to its relatively low anti-trust visibility.**"[12]Swasth while withdrawing its injunction after cornering large market share thus may have violated Section 4 of the Competition Act and thus the Commission's order under Section 26(1) for inquiry can't be held to be bad in law. It's also important to mention that Section 3(5) of the Competition Act protects the Intellectual Property Rights of a person, subject to reasonable condition. No similar protection is provided under Section 4 of the Act. And thus an order for inquiry under Section 26(1) regarding Abuse of Dominant Position cannot be held to be invalid or bad in law if it deals with abuse due to restrictions caused by use of Intellectual Property Rights.

1.3.2 <u>Whether Competition Commission's Order will cause a jurisdictional hurdle between Delhi High Court and Competition Commission?</u>

Section 62 of the Competition Act makes it clear that provisions of Competition Act are in addition to and not in derogation of the other existing laws. Thus this Commission has obligation and jurisdiction to visit the issues of competition law. Pendency of a civil suit in High Court does not take away the jurisdiction of the Commission to proceed under the Competition Act.[13] The Competition Commission while inquiring into the matter will look into the effect of the filing and withdrawal of injunction on competition, whereas the Delhi High Court is concerned with infringement of intellectual property rights.

---

[11]Kingfisher Airlines Limited v. Competition Commission of India (2010)4CompLJ557(BOM) (Bombay High Court,2010)

[12]*In re* Case No 105/2013 filed by M/s Bull Machines Pvt. Ltd. Against M/S JCB India Ltd. (March 11, 2014).

[13]In re Case No 50/2013 filed by Micromax Informatics Limited against Telefonaktiebolaget LM Ericsson (Publ) (November 12,2013))

2 THE AGREEMENT BETWEEN LIFELINE AND PROMOTERS CONSTITUTES AN ARBITRATION CLAUSE AND THEREFORE THE DELHI HIGH COURT HAS NO JURISDICTION TO HEAR AND DECIDE THE SUIT.

In the light of the issue raised, it would be expedient to consider Section 2 and Section 7 of Arbitration and Conciliation Act, 1996 ("**Act**") which are relevant and connected with the issue in question. **"Arbitration**" is defined in the well-known case of **Collins v Collins[14]:** "*An arbitration is a reference to the decision of one or more persons, either with or, without an umpire of a particular matter in difference between the parties*."

2.1 Whether requisites of an Arbitration Agreement are fulfilled?

The **Supreme Court** in ***Jagdish Chander***[15] has laid down attributes or elements of an arbitration agreement. They are: (**a**) The agreement should be **writing.** (**b**) The parties should have agreed to refer any **disputes** (present or future) between them to the decision of a private tribunal. (**c**) The **private tribunal should be empowered** to adjudicate upon the disputes in an **impartial manner,** giving due opportunity to the parties to put forth their case before it. (**d**) The parties should have agreed that the decision of the private tribunal in respect of the disputes will be **binding** on them.

From the perusal of the abovementioned attributes of an arbitration agreement, it is submitted that Clause 2 of the Sale agreement fulfils each attribute in the following manner:

Agreement to be in writing:

Section 7 (3) of the Act most emphatically prescribes that '*an arbitration agreement shall be in writing*'. Section 7(4) provides that an arbitration agreement is in writing if it is contained in a document signed by the parties. Hence it can be safely said that the Sale Agreement between Lifeline and Promoters is contained in a document signed by the parties.

---

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

[15] Jagdish Chander v. Ramesh Chander, (2007) 5 SCC 719 (Supreme Court,2007)

Existence of Dispute:

"Dispute" in respect of a matter which under an arbitration agreement is to be referred to arbitration should be given its ordinary meaning[16] and includes any claim which the other party refuses to admit or does not pay whether or not there was any answer to the claim in fact or in law[17]. A "dispute" will even include claims that are not agreed, though they might not yet have been rejected.[18] Turning to the terms of Clause 2 (**Dispute Resolution**) of the Agreement in question, there is a clear indication of referring **claims** to the empowered committee whose decision shall be final binding and conclusive on the parties and hence amounts to the determination of the dispute by an arbitration. The **Supreme Court** observed in ***Patel Engineering***[19] that issues relating to whether the claim is within the purview of the arbitration clause are best left for determination by the arbitral tribunal.

Agreement to refer the matter to an arbitral tribunal whose decision shall be binding:

The position under Section 10 (1) of the Act is that the parties are free to determine the number of arbitrators which should not, however, be an even number. Parties are also free to agree on the procedure of appointment under section 11(2) of the Act. **Mustill and Boyd** state **"***The arbitration agreement must contemplate that the decision of the tribunal will be binding on the parties to the agreement*"[20] In the instant case it is agreed by the parties to refer all questions and issues to the empowered committee comprising of three executive level personnel of the Company whose decision shall be **final, binding and conclusive.** In ***Jagdish Chander's case***[21] it was observed: "*Even if the words 'arbitration' and 'arbitral*

---

16 Agri Gold Exims Ltd. v. Sri Lakshmi Knits & Wovens,(2007)1RAJ686 (Supreme Court,2007)

17 Halki Shipping Corpn v. Sopex Oils Ltd., (1998) 1 WLR 726

18 BHC Agro (India) Pvt. Ltd. v. Director of Horticulture, Govt. of A.P. AIR 2008 (NOC) 23 (Andhra Pradesh,2007)

19 S.B.P & Co. v. Patel Engineering Ltd., AIR 2006 SC 450 (Supreme Court,2005)

20 Mustill And Boyd, "Commercial Arbitration" 30(2nd edn.)

21 Jagdish Chander, *supra* Note 15

tribunal' (or arbitrator) are not used with reference to the process of settlement or with reference to the private tribunal which has to adjudicate upon the disputes, in a clause relating to settlement of disputes, it does not retract from the clause being an arbitration agreement if it has the attributes or elements of an arbitration agreement…"

In the present case before this Hon'ble, it is submitted that the above requisite has been fulfilled and with that respect the arbitration clause is constituted. It is further submitted that interpretation of scope of arbitration clause is governed by two guiding legal principles: (1) that, as there is strong policy favoring arbitration, any doubt concerning scope of arbitrable issues should be resolved in favor of arbitration and (2) that an order to arbitrate particular grievance should not be denied unless it may be said with positive assurance that arbitration clause is not susceptible of interpretation that covers asserted dispute.[22]

2.2 <u>Whether particular form of arbitration clause required?</u>

Section 7 (2) says that an arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement. In **Rukmanibai Gupta v. Collector, Jabalpur, the Supreme Court** has laid down that an Arbitration clause is not required to be stated in any particular form[23]. If the intention of the parties to refer the dispute to arbitration can be clearly ascertained from the terms of the agreement, it is immaterial whether or not the expression 'arbitration' or 'arbitrator' has been used[24]. Hence, the whole thing turns upon the **intention** of the parties. In the case of **Jagdish Chander[25], the Supreme Court** expressed the scope of Section 7 as "*The intention of the parties to enter into an arbitration agreement shall have to be gathered from the terms of the agreement. If the terms of the agreement clearly indicate an intention on the part of the parties to the agreement to refer*

[22] Universal Marine Ins. Co. v. Beascon Ins. Co., (1984, WD NC) 588 F Supp 735

[23] Smt. Rukmanibai Gupta v. Collector, Jabalpur, AIR 1981 SC 479 (Supreme Court,1981)

[24] Punjab State v. Dina Nath, AIR 2007 SC 2157 (Supreme Court,2007)

[25] Jagdish Chander, *supra* note 15

their disputes to a private tribunal for adjudication and a willingness to be bound by the decision of such tribunal on such disputes, it is arbitration agreement."

It is thereby contested that in the case in hand the nomenclature used by the parties may not be conclusive but one must examine the true intent and purport of the agreement. A contract providing for arbitration is a commercial document *inter partes* and must be interpreted in such a manner as to give efficacy to the contract rather than to invalidate it[26]. The meaning of such a contract must be gathered by adopting a common sense approach and it must not be allowed to be thwarted by a pedantic and legalistic interpretation.[27]

2.3 <u>What is the nature of intervention of the Delhi courts under the Jurisdiction clause of the Sale Agreement?</u>

It is submitted before this Hon'ble court that from the perusal of Clause 3 under the Agreement, the nature of intervention of the Delhi Courts in matter of disputes touching upon the subject matter of the Agreement is with respect to dealing with an application under Section 9 of the Act. Furthermore, the clause is present to clarify that in such matters the jurisdiction of Delhi Courts and not Mumbai courts will apply.It is thereby contended that the arbitration clause under clause 2.1 of the agreement be treated independent of the Jurisdiction clause under clause 3. As held in the case of **Union of India v. McDonnell Douglas Corporation** that an arbitration clause in a commercial contract is an agreement inside an agreement. The parties make their commercial bargain but in addition agree on private tribunal to resolve any issues that may arise between them.[28] There is no provision in the Act which enables the court to throw away the arbitration clause from the agreement.

---

[26] Citibank N.A v. TLC Marketing PLC, AIR 2008 SC 118 (Supreme Court,2008)

[27] Union of India v. D.N. Revri & Co., AIR 1976 SC 2257 (Supreme Court,1976)

[28] Union of India v. Mc Donnell Douglas Corporation, (1993) 2 Lloyd's Rep.48

3 THE SCHEME SANCTIONED BY THE DELHI HIGH COURT UNDER SECTION 391 OF THE COMPANIES ACT, 1956 SHOULD NOT BE SET ASIDE.

From the perusal of the facts of the present case, it is apparent that a consortium agreement was entered into between Jeevani and the foreign lenders. But at a later stage, the company withdrew from the agreement because of the absence of need of financial assistance.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 do not fall under the ambit of the expression "Creditors" and they further do not constitute a separate class of creditors within the scope of Section 391.

Palmer's Company Law defines '**creditor**' as *"any person having a pecuniary claim against the company capable of estimate."* In the present case before the Hon'ble Court, it is most submitted that the company entered into a consortium agreement with the foreign lenders, but due to circumstances prevailing at that point of time and the absence of a need of financial assistance, it withdrew from the agreement and the financial assistance was never received by Jeevani because of which the foreign lenders never became the creditors of the company. It shall be expedient to note that in the present case, all the relevant approvals needed, were obtained by the company and the scheme was sanctioned by the Hon'ble Delhi High Court. The Bombay High Court in **Sakarmari Steel and Alloys Ltd. In re**[29]**,**has held: *"The Court has to consider certain circumstances before giving its approval, though the fact that three-fourths in value have agreed to accept the scheme would be a strong circumstance in favor of sanctioning the scheme by the court…..Some of the outstanding circumstances are:(a) The proposal of the scheme is made in good faith(b) The scheme is not detrimental to the interests of the creditors or members or public interest…Section 391(1) is not a signpost but a check*

[29]Sakarmari Steel and Alloys Ltd. In re (1981) 51 Com Cases 266 (Bom)

post whereat it is the duty of the court to examine the scheme for itself……A mere casual look is not enough."

Further, the company also received the **Regional Director's** approval as needed before sanctioning of a scheme. The regional director has to examine a number of issues before giving his approval which includes examining if there is any foreign interest in any of the companies. In the present case, all the relevant approvals were obtained by Jeevani and the High Court after considering the fairness and the reasonableness of the scheme gave its approval which would not have been the case if financial assistance would have been received by Jeevani.

Further, considering the foreign arbitral award which was passed by the foreign arbitral tribunal constituted in Hong Kong, it 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 as 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 by Supreme Court's in **Bhatia International v. Bulk Trading S.A**[30] which held, *"In cases of international commercial arbitration held out of India provisions of Part 1 would apply unless the parties by agreement, express or implied, exclude all or any of its provisions*". or a Judgment of a Foreign Court, if part 1 was excluded; as was held in **Badat & Co. v West India Trading Co.**[31]and in **Food Services of America, Inc. v. Pan Pacific Specialties Ltd.**[32]

[30] Bhatia International v. Bulk Trading S.A., : AIR 2002 SC 1432 (Supreme Court,2002)

[31] Badat & Co. v. West India Trading Co., AIR 1964 SC 536 (Supreme Court,1964)

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

[Although **Bhatia International v. Bulk Trading** has been overruled by the Supreme Court in **Bharat Aluminum Co. v Kraiser Aluminum Technical Services**[33] , 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 include Part 1, the arbitral award would become a foreign judgment. The Foreign judgment is not enforceable under Section 44A of Civil Procedure Code, 1908. Section 44A specifically excludes foreign arbitral awards which are recognized and passed as decree by Foreign Courts. Thus the foreign arbitral award which is recognized as foreign judgment is not enforceable in India and the foreign creditors didn't become creditors by virtue of the arbitral award.

Therefore, in view of Jeevani not receiving financial assistance, at best, there can be a case of damages arising out of breach of contract on part of the company for which the foreign arbitral award was passed by the foreign arbitral tribunal and the foreign lenders thereby become a contingent liability of the company**[as provided under Accounting Standard 29(AS-29)]** whose interests are protected under the present scheme wherein, all the assets and liabilities have been transferred to Lifeline. Contingent liabilities as provided under **AS-29** shall be classified as: a).Claims against the company not acknowledged as debt; b). Guarantees; c). Other money for which the company is contingently liable.

Therefore, in the present case, the foreign lenders cannot be termed as creditors of the company, but can be said to be a contingent liability of the company because of damages arising out of breach of contract on part of Jeevani and thus, their interests are protected under the scheme and hence, the scheme should not be set aside.

[33]Bharat Aluminum Co. v Kraiser Aluminum Technical Services (2012) 9 SCC 552 (Supreme Court,2012)

Without prejudice to the above arguments, the question which comes next in the discussion is whether the foreign creditors constitute a separate class of creditors. In a landmark judgment of **Sovereign Life Assurance Co. v. Dodd**[34]**,** 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."* Reliance can also be placed on the decision of the Delhi High Court **In re, SIEL Ltd.,**[35] where the Court observed: *"…The terms of the scheme can only be the criterion for identifying class for the purpose of convening a separate meeting of such class."*

In the present case, **assuming while denying that the foreign lenders are the creditors of the company,** the lenders cannot form a separate class of creditors because it is for the company to decide what classes of creditors or members should be made parties to the scheme in accordance with what the scheme purports to achieve. The treatment which the scheme offers to the other creditors is in no way different than that provided to the foreign lenders because of the commonality in the interests possessed by the foreign lenders and the other creditors of the company. Furthermore, reliance can be placed on the decision of the Gujarat High Court in the case **Arvind Mills Limited In re**[36] where the Court held: *"All secured creditors – whether lenders in foreign currency or lenders in Indian rupees constitute one single class of creditors…….The classification of members or creditors can be founded on the basis of difference in the terms offered in the Scheme…….The inter se differences/disputes amongst some secured creditors could not be the criterion for constituting separate class of secured creditors in foreign currency. The foreign creditors were not entitled to be treated as a different class of secured creditors, a class within the*

[34] Sovereign Life Assurance Co. v. Dodd, (1892) 2 QBD 573 (CA)
[35] *In re* SIEL Ltd., (2004) 122 Com Cases 536 (Del) (Delhi High Court, 2003)
[36] Arvind Mills Limited In re (2002) 37 SCL Guj 660 (Gujarat High Court,2002)

class as there was no conflict of commercial interest between all of them especially when the same terms and conditions had been offered to all the secured creditors. "Therefore, in view of the aforementioned authorities, it shall be expedient to note that the foreign lenders did not constitute a separate class of creditors.

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>

The next question is in respect of notice to be sent to the foreign creditors for their meeting as a separate class of creditors. It is submitted that in view of the abovementioned contentions, it shall be pertinent to note that the foreign lenders did not qualify as creditors of the company and further, also did not form a separate class of creditors. Thus, **Rule 73 of the Companies (Court) Rules, 1959** which 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 does not apply in the present case and therefore, no notice was sent to the foreign lenders. **Assuming while denying that the foreign lenders are the creditors of the company**, it shall be expedient to note that an inadvertent error on part of the company in sending notices to creditors does not invalidate the meeting or the proposals passed therein. In respect of the submission, reliance can be placed on **Vikrant Tyres Ltd., In re,**[37] where it was held: "*Section 391 does not make it obligatory either upon the Court or the Company to serve a notice of the creditor's meeting on each and every creditor of the company, failure of which the law does not declare that such a meeting held is invalid or any resolution passed in such a meeting is void.* "

Therefore, it can be said that no notice of meeting was required to sent to the foreign lenders as they were neither creditors of the company, nor constituted a separate class of creditors and hence, the scheme should not be set aside in the present case.

[37] Vikrant Tyres Ltd., In re, (2003) 47 v SCL 613 (626) (Kar).(Karnataka High Court,2003)

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. Dismiss the appeal against the Order of Division bench of High Court for grant of Writ against the order of the Competition Commission.
2. Uphold the following Orders of the Divison Bench of the Delhi High Court:
   i) The clause mentioned in the Share Sale Agreement is an Arbitration Clause and accordingly refer the dispute to be decided by the Empowered Group in terms of agreement.
   ii) The Scheme of Arrangement is perfectly valid and shouldn't be set aside.

AND/OR

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

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

Sd/-

……

COUNSELS FOR THE RESPONDENTS