TEAM CODE- D1

5th NLIU – JURIS CORP NATIONAL CORPORATE LAW MOOT COURT COMPETITION, 2014

IN THE HON'BLE SUPREME COURT OF INDIA

FOREIGN LENDERS…….Appellants
V/S
LIFELINE LIMITED……...Respondent

AND

LIFELINE LIMITED……..……..Appellant
V/S
PROMOTERS……...…….….Respondents

AND

SWASTH…….…….Appellant
V/S
DG CCI AND
LIFELINE……...…….……Respondents

(6TH SEPTEMBER 2014)

MEMORIAL SUBMITTED ON BEHALF OF RESPONDENTS

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Statues:

Indian case laws:

20. MCX Stock Exchange Ltd. v. National Stock Exchange of India Ltd., Dot Ex International Ltd. and Omnesys Technologies Pvt. Ltd**.,** [2011] 109 SCL 109 (CCI).
21. Micromax Informatics Ltd. v. Telefonaktiebolaget LM Ericsson (Publ), MANU/CO/0066/2013.
22. Miheer H Mafatlal v. Mafatlal Industries Ltd., (1996) 87 Comp Cas 792.
23. M/s. DLF Limited v. Competition Commission of India, MANU/TA/0012/2014.
24. M/s. Fast Way Transmission Pvt. Ltd., M/s. Hathway Sukhamrit Cable & Datacom Pvt. Ltd., M/s. Creative Cable Network Pvt. Ltd. through its Managing Director and Mr. Gurdeep Singh v. Kansan News Pvt. Ltd. through its Director and Authorized Signatory Mr.Kanwar Sandhu and Competition Commission of India through its Secretary, MANU/TA/0011/2014.
25. M/s. HNG Float Glass Ltd. v. M/s. Saint Gobain Glass India Ltd., 2013 Comp LR 876 (CCI).
26. M/s. Magnus Graphics v. M/s. Nilpeter India Pvt. Ltd., Mr. Alan Barretto, Managing Director, Mr.Manish Kapoor, Sales Manager and M/s. Sai Com Codes Flexo Print Pvt. Ltd.,MANU/CO/0073/2013.
27. Murtaza & Sons v. Nazir Mohd. Khan, AIR 1970 SC 668.
28. National Insurance Co. Ltd. v. Boghara Polyfab Pvt. Ltd., AIR 2009 SC 170.
29. National Stock Exchange v. Competition Commission of India, MANU/TA/0016/2014.
30. Noy Vallesina SpA v. Jindal Drugs Limited, (2006) 3 Arb LR 510.
31. P.Anand Gajapathi Raju & Ors.v.P.V.G. Raju (Died) & Ors., AIR 2000 SC 1886.
32. Punjab State v. Dinanath & Ors., AIR 2007 SC 2157.
33. Rukmanibai Gupta v. Collector, Jabalpur, 1980 (4) SCC 566.
34. S.B.P. & Co. v. Patel Engineering Ltd., 2005 8 SCC 618.
35. Shin-Etsu Chemical Co. Ltd. v. Aksh Optifibre Ltd., 2005 (6) Scale 561.
36. State of U.P. and Ors. v. Renusagar Power Co. and Ors., AIR 1988 SC 1737.
37. Sumitomo Corporation v. CDC Financial Services (Mauritius) Limited and Ors., (2008) 4 SCC 91.
38. Sundaram Brake Linings Ltd. v. Kotak Mahindra Bank Ltd., M.S. Subramanian and G. Manikandan, (2010) 4 Comp LJ 345 (Mad).
39. Thyssen Stahlunion Gmhb v. Steel Authority of India Ltd., AIR 1999 SC 3923.

40. Venturbay Consultants Private Limited and Ors. v. Their respective shareholders and Creditors and Ors., MANU/AP/0531/2013.
41. Vijay Narayanan v. Prabhakaran, ILR 2006 (1) Kerala 743.
42. Vijay Sekhri and Anr v.Tinna Oils and Chemicals and Tinna Agro Industries Ltd. and Ors, [2011] 100 CLA 344 (Delhi).
43. Visa International Ltd. v. Continental Resources (USA) Ltd., (2009) 2 SCC 55.

Foreign case laws:

1. AKZO Chemie BV v. E.C. Commission, [1993] 5 C.M.L.R. 215.
2. DHN Food Distributors v. Tower Hamlets LBC, [1976] 1 W.L.R. 852.
3. General Manager, Northern Railway v. The Metal Powder Company Ltd., (2007) 1 MLJ 769.
4. Jagson International Ltd. v. Frontier Drilling, 2004 (76) DRJ 299.
5. Merchandise transport Ltd v. British Transport Commission, [1962] 2 Q.B. 173.
6. Rackurd and Ors. v. Gross, (2005) 1 WLR 3505.
7. United States v. Bestfoods, (1998) 524 US 51.

Books referred:

1. S M DUGAR, GUIDE TO COMPETITION LAW (5d ed.).
2. T. RAMAPPA, COMPETITION LAW IN INDIA (1d ed.).
3. JUSTICE R S BACHAWAT, LAW OF ARBITRATION & CONCILIATION (5d ed.).
4. C R DATTA, THE COMPANY LAW (6d ed., LexisNexis Butterworths Wadhwa Nagpur).
5. K R SAMPATH, LAW AND PROCEDURE FOR MERGERS/ JOINTVENTURES/ AMALGAMATIONS/ TAKEOVERS AND CORPORATE RESTRUCTURE (4d ed.).
6. PALMERS COMPANY LAW 2.1526 (2217 25 ed., Thompson Sweet and Maxwell).

Other authorities:

1. Report of High level Committee on Competition policy and Law(Raghavan Committee).
2. Official Journal of the European Union, *Communication from the Commission- Guidance on the Commission's enforcement priorities in applying Article 82 of the EC treaty to abusive exclusionary conduct by the dominant undertaking*, (Aug. 29, 2014*), http;//eur-lex.europa.eu/legal-content/EN/ALL?uri=CELEZ:52009XC0224(01).*

SUMMARY OF FACTS

1. Description of companies: Jeevani Ltd.- a public company with its equity shares listed on BSE, incorporated in 1990 under Companies Act 2013. It is a leading market player and also has a global presence. **Lifeline Ltd.-** a listed public company registered and incorporated under the companies act 2013 having its registered office in Mumbai. It is a major producer of food products in India and its products are also traded internationally. **[Moot proposition ¶ 1]**

2. The merger: Lifeline decided to foray into the pharmaceutical sector. It approached Jeevani for a partnership. On 27.01.2012, they decided to merge. It was decided that Jeevani would completely merge into lifeline and all assets and liabilities of Jeevani would be transferred to lifeline. A scheme of arrangement for Jeevani was prepared which was finalized on 5.03.2012 and was filed before the BSE and the approval was denied for the same. **[Moot proposition ¶ 2]**

3. The share sale agreement: The three promoters of Jeevani who decided to sell their entire promoter shareholding i.e. 18% of their stake in Jeevani to lifeline. This was effected vide a Share Sale Agreement dated 23.03.2012. It also contained representations for disclosure of material information by either of the parties. Further, all intangible properties including active R&Ds, IPRs and rights accruing from them were also transferred.**[Moot proposition ¶ 3]**

4. The meeting of creditors and other formalities: On 30.03.2012 Jeevani & Lifeline filed an application under Section 391 of the Companies Act, 1956 for seeking approval of the scheme by the Delhi HC. The Court ordered a meeting of creditors in accordance under its mandate of chapter V of the Act. The meeting was convened and the Scheme was passed by a vote of majority. The scheme was approved by the Delhi high court on 5th July, 2013 upon resolutions being passed. All other relevant approvals were also taken**[Moot proposition ¶ 4]**

5. Issue no. 1: Foreign lenders mainly banks, had invoked arbitration proceedings against Jeevani

in an arbitral tribunal in Hong Kong for payments under consortium agreement for financial assistance. An arbitral award for a certain amount was passed on 27.07.2010 in favour of the foreign lenders. The same has not been enforced. In early August 2013 foreign lenders made an application before the company judge for recall of order dated 5.07.2013 as they formed a separate class of creditors, they had not received the notice of scheme and no meeting was convened for them. The company contended that they were not creditors and no notice was required The application was dismissed by the Company Judge, on appeal it was dismissed by the division bench of Delhi High Court. This order is challenged before the Supreme Court. **[Moot proposition ¶ 5]**

6. Issue no. 2: After the merger when Lifeline continued activities of Jeevani, it received notices from US FDA for providing below par quality drugs. The matter of pending investigations was concealed by Jeevani. Lifeline filed a suit against the promoters before the Delhi high court for damages for breach of contract and compensation for wrongful gain and unjust enrichment. The promoters contended that the High Court had no jurisdiction as the agreement dated 23.03.2012 had an arbitration clause and the same to be referred to arbitration. The Delhi HC held that the clause was not an arbitration clause. This Order was reversed by the Division Bench of the HC and the parties were referred to arbitration. As a result lifeline has approached to the SC against this order. **[Moot proposition ¶ 6]**

7. **Issue no. 3:** After the merger lifeline introduced a new life saving drug by the name of **"novel"** using its active R&D which was cheaper than other drugs in the market including inventive which was the premier drug. Inventive produced by **Swasth,** a sister concern of promoters. Swasth filed a suit for infringement of its IPRs (over which it got absolute rights from Jeevani in 2010) against Lifeline. Swasth obtained an interim injunction and in the meantime launched its own cost effective drug and withdrew the case thereafter. Lifeline approached CCI to order probe into the alleged

abuse of dominant position upon a *prima facie* finding. Swasth approached the Delhi HC to quash the investigations. The same was denied by the HC which was further affirmed by the division bench. Consequently, Swasth approached the SC against the order of the bench. **[Moot proposition ¶ 7]** The aforementioned matters are tagged together for hearing in the Supreme Court on 6th September, 2014.

STATEMENT OF ISSUES

A. **WHETHER THE ORDER SANCTIONING THE SCHEME CAN BE SET ASIDE?**
B. **WHETHER THE APPEAL TO THE ORDER OF THE HIGH COURT REFERRING PARTIES TO ARBITRATION CAN BE ALLOWED?**
C. **WHETHER THERE EXISTS A PRIMA FACIE CASE OF ABUSE OF DOMINANT POSITION BY SWASTH?**

SUMMARY OF ARGUMENTS

A. THE ORDER SANCTIONING THE SCHEME SHOULD BE SET ASIDE

An objection to the Scheme can only be done if it is patently illegal or against the interest or rights of the creditors. It is humbly submitted that the Scheme is just and reasonable and has been sanctioned after observing procedure prescribed under Chapter V of the Companies Act. Further , the appellants do not constitute a separate class of creditors and the said application has been made with a mala fide intent to coerce money out of the Company as they are not its creditors.

B. THE APPEAL DOES NOT MERIT ACCEPTANCE ON ANY GROUND

There are two grounds of objection to this appeal.The firast being regarding the maintainability of challenge to the Order of the High Court which is not appealable and secondly the grounds on which the order is challenged come under the adjudication of the Arbitral tribunal.

C. THERE EXISTS A PRIMA FACIE CASE OF ABUSE OF DOMINANT POSITION

In order to initiate investigations under § 26(1) of Competition Act, 2002 there should be a prima facie case. In the instant matter, Swasth was a dominant player in the market and had abused such dominant position. Further the doctrine of Lifting of corporate veil should be applied in order to determine the liability to the holding company in the matter of disputed transfer of IPRs as this holding company happens to be the holding company of the promoters as well and the matter of Swasth gaining absolute rights over IPRs of Jeevani was in the knowledge of the holding company.

ARGUMENTS ADVANCED

A. THE ORDER SANCTIONING THE SCHEME SHOULD NOT BE SET ASIDE

The Order sanctioning the Scheme should not be set aside as the Scheme was just and reasonable and was sanctioned after following the procedure prescribed under Chapter V of the Companies Act,1956.The contention of the Foreign Lenders that the Scheme should be set aside as there was not notice sent to them and they are a separate class of creditors does not hold ground and such application has been made to use the Scheme under § 391 to coerce money out of the Company when they are not the Creditors of the Company anymore.

A.1 The scheme is just and reasonable

A court considers, while sanctioning the Scheme, whether the proposed scheme is lawful and just and fair to the whole class of creditors or members including the dissenting minority to whom it is offered for approval and which has been approved by such class of persons with required majority vote.[1] It is the duty of the court under § 391 to consider the interests of the companies, shareholders and creditors as a whole, while sanctioning the scheme and not the personalized interest of a group of creditors,[2] ,thus when the scheme has been passed by a vote of majority unless it adversely affects the interest of certain creditors, the court has neither the expertise nor the discretion to delve deep into the merits of the scheme as an appellate authority.[3]

In the instant case, the said merger was taking place for increasing profitability of the transferor company and its shareholders. Moreover, the prescribed process of approval for sanction of

[1] Miheer H Mafatlal v. Mafatlal Industries Ltd., (1996) 87 Comp Cas 792.

2 Venturbay Consultants Private Limited and Ors. v. Their respective shareholders and Creditors ,MANU/AP/0531/2013; Chembra Orchard Produce Ltd. v. Regional Director of Company Affairs & Anr., AIR 2009 SC 1278.

[3] Monarch Project and Finmarkets Limited, MANU/MH/1328/2014; In re Sussex Brick Co. Ltd., [1960] 30 Comp Cas 536.

scheme under § 391 to 394 of the Companies Act was followed, the interests of all the creditors were taken into consideration as a meeting was convened and the Scheme was passed by creditors by a vote of majority.[4] Thus, all aspects were taken into consideration while sanctioning the Scheme. It is humbly submitted, that the averment of the Foreign Lenders that the Scheme is unfair to them and should be set aside does not hold ground as their interest was also taken into consideration as the arbitral award was a contingent liability in the transfer of all assets and liabilities. Thus, the Scheme is not vitiated only on the ground of lack of notice to certain creditors, and, a separate meeting for foreign lenders was not convened as they were not a separate class for the purpose of the Scheme. Therefore, the Scheme is just and fair and should not be set aside.

A.1.1 The Scheme is not vitiated due to lack of notice

§ 391 does not make it obligatory upon the court or the company to serve a notice of the creditors meeting on each and every creditor of the company .When a meeting under § 391 is held to consider the Scheme, and a majority of the creditors approve the Scheme, lack of notice does not vitiate the Scheme unless the interest of any creditor is not adversely affected. .[5]

In the present case the Scheme was passed by a vote of majority in a meeting convened for creditors.[6]Also, since the Scheme does not adversely affect the interest of Foreign Lenders as their arbitral award was transferred as a contingent liability, therefore, the Scheme is not vitiated and cannot be said to be unjust or mala fide due to lack of notice.

A.1.2 The Foreign Lenders did not constitute a separate class

[4] Moot proposition¶ 4

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

[6] Moot Proposition ¶ 4.

Where different terms are offered to different class of creditors under the proposed compromise or arrangement, then in that event a separate class could be said to be constituted in respect of each class of creditors or shareholders and in that event separate meetings are to be held for such different class of creditors..[7]In Re: Arvind mills Ltd.[8], while considering the objection of off shore lenders that they were a separate class and a separate meeting should be convened for them, the Court stated "as far as the Company is concerned, offshore lenders as well as onshore lenders have been treated alike and no distinction is kept by the Company within the secured creditors under the Scheme" , the claim of the off shore lender was rejected as their rights were the same as the domestic lenders for the purposes of the Scheme.

In the present case, the purpose of the Scheme is 'transfer of all assets and liabilities'. This means that all assets and liabilities are being transferred from transferor to transferee company, thus, the Scheme only transfers the ownership all assets and does not release any assets and no question comes regarding differential rights of the creditors with respect to payment , the Scheme transfers the claim of each and every creditor as a liability, irrespective of the loan being in Indian or foreign currency, hence, the creditors under the Scheme have commonality of interest with regard to payment of their dues and the rights under the Scheme are the same. Therefore, the Foreign lenders are not being given rights separate from other creditors under the Scheme and there is no need to constitute them as a separate class of creditors.

A.2 The Foreign Lenders are not creditors of the Company

Enforcement of Foreign Awards is governed by Part II of the Arbitration and Conciliation Act,

[7] In re:Siel Limited, [2004] 122 Comp Cas 536 (Delhi); Commerz Bank Ag. & Anr. v. Arvind Mills Ltd., [2002] 110 Comp Cas 539 (Guj).

[8] (2003) 4 GLR 2968.

,1996. There is a limitation period with regard to application for enforcement under § 47 of the Indian Limitation Act, 1963.Thus the claim of the Foreign Lenders which is in the form of an arbitral award is barred by limitation and they are not creditors of Lifeline.

A.2.1 The said award is governed by the Indian Limitation Act

It is humbly submitted that a procedural law operates during the continuance of the proceedings before the arbitrator to govern the procedure and conduct thereof. The authority of the courts administering the procedural law ceases when the proceedings before the arbitrator are concluded.[9] The process of enforcement of an award is not governed by the procedural law that the arbitrator followed. In the instant case, the Foreign Award was passed by a Hong Kong tribunal,[10] however, the procedural law of Hong Kong will not apply for enforcement proceeding and the said proceeding will be governed by the Indian Limitation Act, 1963.

A.2.2 The arbitral award is barred by limitation

If a person in whose favor the foreign award is made desires to make an application for execution of that award when the Court is yet to record its satisfaction that the Award is enforceable, the period of limitation for making such an application would be governed by Article 137 of the Schedule of the limitation. According to Article 137 the period of limitation is three years from the date when the right to apply accrues.[11] the limitation period for the enforcement of a foreign arbitral award is 3 years. Therefore, in the instant case, the award being passed on 27th July, 2010[12] the foreign lenders could have enforced their claim till the 27th July 2013. Since the said award was enforceable post the merger also but the same was not enforced till the last date, the said award is

[9] Thyssen Stahlunion Gmbh v. Steel Authority of India Ltd., AIR 1999 SC 3923.

[10] Moot proposition¶ 5.

[11] Noy Vallecina Engineering SpA v. Jindal Drugs Limited, (2006) 3 Arb LR 510.

[12] Moot Proposition¶ 5.

no longer enforceable. Therefore, it is humbly submitted that the foreign lenders are not the creditors of the Company.

A.2.3 Application for recall of order is mala fide

The Scheme under § 391 of the Companies Act is not a tool in the hands of a creditor to recover money or to coerce a company to pay.[13]In the present case, once the claim of the Foreign Lenders was time barred, the challenge to the Scheme was made with a mala fide intention to coerce money out of the Company for a claim the Company does not owe to the Foreign Lenders anymore. Thus, the application made is an abuse to the process of law and should be dismissed.

B. THE APPEAL DOES NOT MERIT ACCEPTANCE ON ANY GROUND

B.1 Challenge to the Order is not maintainable

Once the parties are referred to arbitration, the provisions of the Arbitration and Conciliation Act become applicable and an appeal can only be made under the provisions of the Act. § 16 enables the arbitral tribunal to determine questions with regard to existence of arbitration clause as well as the merits of the case, an appeal lies therein only under § 37 of the Act or through challenge to the arbitral award under § 34. In the present case, the impugned order referring parties under § 8 of the Act is not appealable under § 37. Hence, challenge to the impugned order on the basis of non existence of arbitration clause is not maintainable.

B.1.1Arbitral Tribunal has jurisdiction over the matter

1. § 8 of the Arbitration and Conciliation Act, 1996[14], is peremptory in nature, once a prima facie[15] finding has been made by the Court with regard to existence of arbitration agreement and

[13] In Re: Zee interactive Multimedia Ltd., 2002 (3) ALLMR 788; In Re: Sterlite Industries (India Ltd.), [2014] 119 CLA 244(Mad.).

[14] Hereinafter, The Act.

subject matter of the dispute, the Court is bound to refer parties to arbitration as provided in the Agreement.[16]

2. After a dispute is referred to arbitration, all rights and remedies are governed by the provisions of the Act[17] including agitations with regard to existence or validity of the Agreement which would be adjudicated upon by the Arbitral Tribunal to whom such parties are referred.[18]

3. When a dispute is referred to arbitration under § 8, further judicial intervention is barred under § 5 and 16 of the Act.[19]§ 16 enshrines the Kompetenz principle which enables the arbitral tribunal to make a decision over existence or validity of the arbitration agreement and to rule on its own jurisdiction,[20]this has been done to ensure minimum judicial intervention in the arbitration proceedings.[21]Any further judicial intervention would render § 16 nugatory. In the present case, the parties have been referred to arbitration, in accordance with the arbitration

---

[15] Bharti Televentures v. DSS Enterprises Pvt. Ltd., 2005(2) ArbLR 561(Delhi); JSM Corpn. Pvt. Ltd. v. IndoChine India Ltd, 2011(3) ARBLR 227(Delhi); Shin-Etsu Chemical Co. Ltd. v. Aksh Optifibre Ltd., 2005 (6) Scale 561.

[16] Magma Leasing & Finance Ltd. v. Potluri Madhavilata, (2009) 10 SCC 103; Kalpana Kothari v. Smt. Sudha Yadav, 2002 SAR (Civil) 64.

[17] P.Anand Gajapathi Raju & Ors.v.P.V.G. Raju (Died) & Ors., AIR 2000 SC 1886; Vijay Narayanan v. Prabhakaran, ILR 2006 (1) Kerala 743.

[18] Devinder Kumar Gupta v. Realogy Corporation and Anr., 182 (2011) DLT 32; BASF Styrenics Pvt. Ltd. v. Offshore Industrial Construction Pvt. Ltd., AIR 2002 Bom 289.

[19] K.V. Aerner v. Bajranglal Agarwal, (2001) 6 Supreme 265;Sundaram Brake Linings Ltd.v. Kotak Mahindra Bank Ltd., M.S. Subramanian and G. Manikandan, (2010) 4 CompLJ 345 (Mad); Fittjee Ltd., New Delhi v. Sandeep Gupta & Ors., 2006 (4) MPLJ 518.

[20] S.B.P. & Co. v. Patel Engineering Ltd., 2005 8 SCC 618;National Insurance Co. Ltd. v. Boghara Polyfab Pvt. Ltd., AIR 2009 SC 170.

[21] General Manager, Northern Railway v. The Metal Powder Company Ltd., (2007) 1 MLJ 769;Jagson International Ltd. v. Frontier Drilling, 2004 (76) DRJ 299.

agreement between them.[22]the impugned order is challenged on the ground of non existence of arbitration clause, this challenge is against the scheme of the Act as the Act specifically provides for challenge with regard to existence of arbitration clause under § 16 before the arbitral tribunal, moreover, as the parties have already been referred to arbitration, any further judicial intervention with regard to jurisdiction is barred under § 5 of the Act. If the challenge to the order is entertained by the Court, it would be against the duty of the Court to give effect to the intention of the legislature and would render § 16 nugatory.

B.1.2Appeal lies in court only under § 37 or 34 of the Act

1. Right to appeal is a creature of the statute, no one has an inherent right to appeal against a decision of a court unless provided for by the Statute.[23] In case of reference of parties to arbitration an appeal would only lie under the provisions of the Act.[24]
2. Under Part I of the Act, a party can raise objection with regarding non existence of arbitration clause, if such objection is affirmed by the finding of the tribunal then an appeal lies against such finding under § 37 only, or, if such objection is overruled by the tribunal then the party can challenge the arbitral award under § 34.[25]
3. A remedy of appeal against an order passed by a 'judicial authority' while deciding a claim for reference to an arbitrator under § 8 of the Act , is clearly excluded by

[22] Moot Proposition¶6

[23] Ganga Bai v.Vijay Kumar, (1974) 2 SCC 393;Union of India v. Mohindra Supply Co., AIR 1962 SC 256.

[24] Sumitomo Corporation v. CDC Financial Services (Mauritius) Limited and Ors., (2008) 4 SCC 91; Shivnath Rai Harnarain India Co. v. G.G. Rotterdam, 164 (2009) DLT 197.

[25] *supra* note 20;Drishticon Properties Pvt. Ltd. v. Chopra Marketting Pvt. Ltd., 158 (2009) DLT 119;Babar Ali v. Union of India, (2000) 2 SCC 178.

usage of words 'and from no others' in § 37 of the Arbitration Act.[26]Therefore, challenge to the order under provisions of any other statute is not maintainable.[27]In the present case, the order under challenge has been made under § 8 which is not appealable under § 37 or § 34, moreover, the appeal against the order has not been made under the provisions of the Act, hence, the appeal does not merit acceptance by the Court on any ground.

However, notwithstanding the preliminary objection, if the hon'ble court would still like to proceed to the merits of the case ,then:

B.2 There is an arbitration clause in the share sale agreement

§ 7 of the Act does not prescribe any particular form of arbitration agreement and it is immaterial whether or not expression 'arbitration' or 'arbitrator' or 'arbitrators' has been used in the agreement.[28] What is required is to gather the intention of the parties as to whether they have agreed for resolution of the disputes through arbitration.[29]Essentials of an arbitration agreement were laid down in *K. K. Modi v. K.N. Modi*[30]as:

(1) The arbitration agreement must contemplate that the decision of the Tribunal will

be binding on the parties to the agreement, (2) that the jurisdiction of the Tribunal to decide the rights of parties must derive either from the consent of the parties or from an order of the Court, the terms of which make it clear that the process is to be an arbitration, (3) the agreement must

[26] In Re: Hind Samachar Limited, [2003] 117 Comp Cas 660 (P&H).

[27]Vijay Sekhri and Anr v.Tinna Oils and Chemicals and Tinna Agro Industries Ltd. and Ors, [2011] 100 CLA 344 (Delhi);Jindal Exports Ltd. v. Fuerst Day Lawson, (170) 2010 DLT.

[28] Visa International Ltd. v. Continental Resources (USA) Ltd., (2009) 2 SCC 55;Punjab State v. Dinanath & Ors., AIR 2007 SC 2157.

[29] Rukmanibai Gupta v. Collector, Jabalpur, 1980 (4) SCC 566;Bihar State Mineral Development Corporation v. Encon Builders, AIR 2003 SC 3688.

[30] 1998 (3) SCC 573.

contemplate that substantive rights of parties will be determined by the agreed tribunal, (4) that the tribunal will determine the rights of the parties in an impartial and judicial manner, with the tribunal owing an equal obligation of fairness towards both sides, lastly, (5) the agreement must contemplate that the tribunal will make a decision upon a dispute which is already formulated at the time when a reference is made to the Tribunal.

Applying the test to the present case, the clause states 'decisions' of an empowered committee shall be 'final, binding and conclusive'. The parties have expressly stated their intention to be bound by the decision of the empowered committee. The word 'Decision' subsumes adjudicating of disputes.[31]Thus, the Empowered Committee is intended to be a private tribunal which would adjudicate upon all issues or disputes arising out of the contract in accordance with the Governing law in the agreement and whose decisions would be final, conclusive and binding and would be enforceable as the agreement is lawful.

Secondly, The jurisdiction of the tribunal is intended to be derived from consent of the parties, if the parties consent to resolve the dispute through arbitration or from the order of the Court ,if they are referred by the Court under § 8 of the Act.

Lastly, the clause constituting the empowered committee is for 'Dispute Resolution', therefore, such committee is intended to come into picture only when a dispute arises relating to the share sale agreement. Hence, in the aforesaid view, it is humbly submitted that the agreement undoubtedly constitutes an arbitration clause and the parties have been correctly referred to arbitration. Therefore, the dispute between the parties should be adjudicated upon by the arbitral tribunal, further, issues with regard to the merits of the case cannot be raised as only those

[31] Mallikarjun v. Gulbarga University, 2003 (3) ARBLR 579 (SC).

grounds can be entertained by the Court upon which leave to appeal is asked and not the entire case at large.[32]

C. THERE EXISTS A PRIMA FACIE CASE OF ABUSE OF DOMINANT POSITION BY SWASTH

It is humbly submitted, an investigation can be ordered into an alleged abuse of dominant position under § 26(1) of the Competition act, 2002[33] if there exists a prima facie case. In the instant matter, Swasth is a dominant player in the market. Furthermore, it obtained an interim injunction in bad faith in order to curtail the entry of the respondents into the market and subsequently launched its own cost effective drug. Swasth also withdrew the case of patent infringement.[34] Therefore, the litigation was mala fide in order to eliminate the respondents from the market. Therefore, the given series of events form a prima facie case of abuse of dominant position and investigation should be carried out under § 26(1).

C.1 Swasth had a dominant position in the market

It is humbly submitted that explanation (a) to § 4 of the Act defines dominant position as a 'position of strength enjoyed by an enterprise, in the relevant market which enables it to:

(a) Operate independently of competitive forces prevailing in the relevant market or,[35]

(b) Affect its competitors or consumers or the relevant market in its favour.'[36]

[32] Murtaza & Sons v. Nazir Mohd. Khan, AIR 1970 SC 668.

[33] Hereinafter, the Act.

[34] Moot Proposition ¶ 7.

[35] MCX Stock Exchange Ltd. v. National Stock Exchange of India Ltd., Dot Ex International Ltd. and Omnesys Technologies Pvt. Ltd**.,** [2011]109SCL109(CCI).

[36] Shamsher Kataria Informant v. Honda Siel Cars India Ltd., MANU/CO/0066/2014; Official Journal of the European Union, *Communication from the Commission- Guidance on the Commission's enforcement priorities in applying Article 82 of the EC treaty to abusive*

It also includes substantial impact on the market including creating barriers to new entrants.[37] Furthermore, § 19(4) of the Act lays down certain factors in order to establish dominance of a particular enterprise in a market.

In the instant case, Swasth was a dominant player in the market as it had acquired absolute rights over certain IPRs[38] which enabled it to operate independently of competitive forces in the market.[39] Further, it was also able to affect its prospective competitors i.e. the respondent in its favour by obtaining an interim injunction.

Additionally, Swasth held a dominant position in market as per the following factors enumerated in § 19(4) such as the market share[40] as the drug 'inventive' which was produced by the Swasth was a premier drug available in the market; it signifies the dominance of the Swasth in the concerned market and size and resources of the enterprise, as the Swasth was a popular company in the Indian market whose goods were traded internationally[41]; it could be considered as an enterprise with vast resources.

---

exclusionary conduct by the dominant undertaking, (Aug. 29, 2014*), http;//eur-lex.europa.eu/legal-content/EN/ALL?uri=CELEZ:52009XC0224(01).*

[37]Report of High Level Committee on Competition Policy and Law (Raghavan Committee).

[38] Moot proposition ¶ 7.

[39]Micromax Informatics Ltd. v. Telefonaktiebolaget LM Ericsson (Publ), MANU/CO/0066/2013; M/s. Magnus Graphics v. M/s. Nilpeter India Pvt. Ltd., Mr. Alan Barretto, Managing Director, Mr. Manish Kapoor, Sales Manager and M/s. Sai Com Codes Flexo Print Pvt. Ltd.,MANU/CO/0073/2013.

[40] National Stock Exchange v. Competition Commission of India, MANU/TA/0016/2014; M/s. DLF Limited v. Competition Commission of India, Belaire Owners Association, State of Haryana, through the Department of Town Country and Planning, Haryana (DTCP) and Haryana Urban Development Authority, (HUDA) HUDA Complex, MANU/TA/0012/2014.

[41] Moot Proposition ¶ 1.

C.2 There was an abuse of dominant position by initiation of bad faith litigation proceedings

It is humbly submitted that as per § 4(2) (c) of the Act, there shall be an abuse of dominant position when an enterprise indulges in practice or practices resulting in denial of market access in any manner.

In the instant case, there has been an abuse of dominant position by the Swasth by indulging in bad faith litigation with a view to restraining the entry of the respondent into the market.

C.2.1 The injunction was obtained to create an entry barrier for the respondent

It is humbly submitted that, in order to establish abuse of dominance, exclusionary conduct needs to be shown.[42] Furthermore, there exists a prohibition to abuse of dominant position i.e. actions by an incumbent in a dominant position to protect its position of dominance by making it difficult for potential entrants to enter into the market.[43]

In the instant case, the Swasth obtained the interim injunction with the intention of prohibiting the respondent from launching a similar, but cheaper drug in the market.

C.2.1.1 The said matter requires lifting of corporate veil to determine mala fide transfer of IPRs

It is submitted that in certain cases,[44] holding and subsidiary company are considered as a single entity[45] and corporate veil can be pierced[46] and parent company can be held liable for the conduct of its subsidiary.[47] It was also held in the case of *Merchandise transport Ltd v British*

[42] M/s. HNG Float Glass Ltd. v. M/s. Saint Gobain Glass India Ltd., 2013 Comp LR 876 (CCI); *supra* note 35.

[43] *supra* note 37.

[44] Life Insurance Corporation v. Escorts, [1985] Supp 3 SCR 909; Merchandise transport ltd. v. British Transport Commission, (1961) 3 All ER 495.

[45] DHN Food Distributors v. Tower Hamlets LBC, [1976] 1 W.L.R. 852.

[46] PALMERS COMPANY LAW 2.1526 (2217 25 ed., Thompson Sweet and Maxwell).

Transport Commission [48] that character of a company or the nature of persons who control it is a relevant factor. The court will go behind the mere status of the company as a legal entity and will consider who are the persons who control the activities of the company.

Upon a careful perusal of the facts the following points may be essential to mention[49]:

1. Swasth was assigned absolute rights over certain IPRs of Jeevani Ltd. in 2010.
2. The Promoters who were majority shareholders in Jeevani transferred certain IPRs to the respondent vide the Share Sale Agreement dated 23.03.2012.
3. The Promoters are a sister concern of the Swasth. **Therefore, Swasth and the promoters are the subsidiaries of one holding company.**
4. Swasth claims infringement of certain IPRs by the respondent while manufacturing the drug "Novel" using its **Active R&D**.

Therefore, point 3 read with § 129(3) of the Companies Act, 2013 which provides for mandate for consolidated financial statements of the holding and subsidiary company, it can be inferred that the matter of Swasth gaining absolute rights over the IPRs of Jeevani was in the knowledge of the holding company as IPRs being an intangible asset would have been included in the consolidated balance sheet of the holding company. Further, referring to point 2, and a subsequent matter of patent infringement there is wrongful intent on the part of the holding company. The affairs of the holding company also include the affairs of the subsidiary company[50]; the corporate veil should be lifted[51] ,intent of the holding company should be seen.

---

[47] United States v. Bestfoods, (1998) 524 US 51.

[48] *supra* note 44, (1961) 3 All ER 495.

[49] Moot proposition ¶¶ 3, 7.

[50] Rackurd and Ors. v. Gross, (2005) 1 WLR 3505.

[51] State of U.P. and Ors. v. Renusagar Power Co. and Ors., AIR 1988 SC 1737.

C.2.2 The withdrawal of the case further signifies abuse of process of law to stifle competition

It is humbly submitted that as per § 4(2)(c) abuse of dominant position occurs when an enterprise creates an entry barrier to its competitors. [52] In the instant case, as has already been established, the Swasth created an entry barrier for the respondent and thereafter launched a similar cost effective drug thereby cornering a large chunk of the market share. Further, upon getting hold of a substantial part of the market, the Swasth withdrew the case.[53] Therefore, these series of events clearly signify that the injunction obtained by the Swasth was done in bad faith to restrict the potential entrant from launching its own product in the market.

C.3 The DG CCI can order investigation into the matter

It is humbly submitted that the investigation can be ordered if there exists a prima facie case under § 26(1). Further, the issuance of direction to the DG to order investigation is an administrative direction to one of its own wings departmentally and is without entering upon any adjudicatory process. It does not effectively determine any right or obligation of the parties to the litigation.[54] Therefore, in the instant case, the investigation by the DG CCI is merely an administrative order and it does not affect the Swasth's rights in any manner.

[52] AKZO Chemie BV v. E.C. Commission, [1993] 5 C.M.L.R. 215; M/s. Fast Way Transmission Pvt. Ltd., M/s. Hathway Sukhamrit Cable & Datacom Pvt. Ltd., M/s. Creative Cable Network Pvt. Ltd. through its Managing Director and Mr. Gurdeep Singh v. Kansan News Pvt. Ltd. through its Director and Authorized Signatory Mr.Kanwar Sandhu and Competition Commission of India through its Secretary, MANU/TA/0011/2014.

[53] Moot Proposition ¶ 7.

[54] Competition Commission of India v. Steel Authority of India Ltd. and Anr., 2010 Comp LR 61 (Supreme Court).

PRAYER FOR RELIEF

Wherefore in the light of the facts stated, arguments advanced and authorities cited, it is most humbly prayed before this **Hon'ble Supreme Court** to dismiss the petition (Petition No.1, 2, & 3) and adjudge and declare that:

1. The order dated 5.07.2013 should not be recalled.
2. The order referring parties to arbitration is valid and should be upheld.
3. That there exists a prima facie case against Swasth and the investigation order should not be quashed.

This Hon'ble court may also be pleased to pass any other order, which it may deem fit in light of justice, equity and good conscience.

All of which is most respectfully prayed.

Counsels on behalf of the Respondents

Place: Delhi

Date: 06.09.2014