TEAM CODE: E

BEFORE THE HONOURABLE SUPREME COURT

OF INDIA

Civil Appeal No. _____ Of 2014

UNDER SECTION 109 OF THE CODE OF CIVIL PROCEDURE, 1908 READ WITH ORDER XLVII RULE 5 OF THE SUPREME COURT RULES, 1966.

FOREIGN LENDERS ……APPELLANT

v.

LIFELINE LIMITED ……RESPONDENT

AND

LIFELINE LIMITED……..APPELLANT

v.

PROMOTERS……RESPONDENT

AND

SWASTH LIFE LIMITED…….....APPELLANT

v.

COMPETITION COMMISSION OF INDIA AND LIFELINE LIMITED….RESPONDENT

WRITTEN SUBMISSIONS ON BEHALF OF THE RESPONDENT

TABLE OF CONTENTS

INDEX OF AUTHORITIES IV

STATEMENT OF JURISDICTION VI

STATEMENT OF FACTS VII

STATEMENT OF ISSUES IX

SUMMARY OF ARGUMENTS X

ARGUMENTS ADVANCED 1

I. WHETHER THE SCHEME SANCTIONED BY THE HON'BLE DELHI HIGH COURT ON 5TH JULY 2013 SHOULD BE SET ASIDE? 1

A. That the foreign lenders have no locus standi to object to the Scheme. 1

i. That the award is not enforceable under Part II of the Arbitration and Conciliation Act, 1996. 1

ii. That the award is not enforceable under Part I of the Arbitration and Conciliation Act, 1996. 2

iii. That using the correct interpretation of law as laid in the case of BALCO is not barred. 4

B. That foreign lenders do not constitute separate class of creditors. 5

i. That by virtue of being foreign lenders they do not constitute separate class. 5

II. WHETHER THE HON'BLE DELHI HIGH COURT HAS THE JURISDICTION TO HEAR THE SUIT FILED BY LIFELINE FOR BREACH OF CONTRACT? 6

A. That the division Bench of Hon'ble Delhi high Court was right in concluding that there was a valid arbitration agreement. 6

B. That the arbitration tribunal is competent to arbitrate the present dispute. 7

III. WHETHER THIS COURT SHOULD ENTERTAIN THE APPEAL AGAINST THE DECISION OF THE HIGH COURT AND IF THERE HAS BEEN ABUSE OF DOMINANCE BY SWASTH? 9

A. That this Court should not entertain the appeal against the decision of the High Court.9

B. That the relevant market can be established. 10

C. That the appellant had a dominant position in the relevant market. 12

D. That the appellant abused its dominant position in the relevant market. 13

PRAYER 15

INDEX OF AUTHORITIES

STATUTES

Arbitration and Conciliation Act, 1996 ..... 2, 4

Convention on the Recognition and Enforcement of Foreign Arbitral Awards 2

INDIAN CASES

Bharat Aluminium Co.v. Kaiser Aluminium Technical Service Inc, (2012) 9 SCC 552 ..... 2, 3

Bhatia InterNational v Bulk Trading SA and Anr, AIR 2002 SC 1432 3

Bull Machines Pvt Ltd. v. J.C.B India Ltd, Case No. 105 of 2013(CCI) 14

CCI v. Steel Authority of India Ltd., (2010) 10 SCC 744 9

Core Health Care Ltd v. Nirma Ltd, (2007) 138 CompCas 204 5

Gwalior Rayons Silk Manufacturers Co. Ltd. v. Custodian of Vested Forests, Palghat and another, AIR 1990 SC 1747 3

Hindustan Petroleum Corp. Ltd v. Pinkcity Midway Petroleum, AIR 2003 SC 2881 ..... 7, 8

I.C Golakh Nath and Ors v. State of Punjab and Anr, AIR 1967 SC 1643 4

In Re: Arvind Mills Ltd., (2002) 111 CompCas 118 (Guj) 5

Institute of Chartered Accountants of India v. Price Warehouse and Anr, AIR 1998 SC 74 4

K.K Modi v. K.N.Modi and Ors, (1998) 3 SCC 573 6

Konkola Copper Mines v. Stewards and Lloyds of India Limited, 2013 (5) BomCR 29 4

N.Radhakrishnan v. Maestro Engineers and Ors, (2010) 1 SCC 72 8

Namrata Marketing Pvt. Ltd v. CCI, AIR 2014 All 11 ..... 9, 10

NNR Global logistics Co. Ltd v. Aargus Global Logistics Pvt Ltd, O.M.P 61 of 2012 4

P. Anand Gajapathi Raju & Ors. v. P.V.G. Raju & Ors, AIR 2000 SC 1886 ..... 7, 8

Renusagar Power Co. Ltd. v. General Electric Co and Anr, AIR 1985 SC 1156.....6

Swiss Timing Ltd. v. Organizing Committee, Commonwealth Games, (2014) 6 SCC 677 8

The Tamil Nadu Film Exhibitors Association vs. CCI, New Delhi, (W.P.Nos.12085 and 14411 of 2013).....9

World Sports Group Ltd. v. MSM Satellite Pte. Ltd., AIR 2014 SC 968 8

FOREIGN CASES

BBI/Boosey and Hawkes, (1988) 4 CMLR 67 14

Europemballage Corporation and Continental Can v. Commission (1973) ECR 215 .....10, 14

Hoffmann la Roche v. Commission, (1979) ECR 461 13

Hugin v. Commission, (1979) ECR 1869.....13

ITT Promedia v. Commission, (1998) ECR-II 2937 14

Mettler Toledo v. Ackermaan, 908 f. Supp. 240/M.D. PA.(1995) 13

Michelin v Commission, (1983) ECR 346 12

Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (ITP) v Commission of the European Communities, (1989) ECR 1141.....13

United Brands v. Commission, (1978) ECR 207.....13

BOOKS

HALSBURY'S LAWS OF ENGLAND.....1

OTHER AUTHORITIES

Law Commission of India, Report No. 246.....8

Ministry of Law and Justice, Notification Number (S.O. 580) (E) dated 19th March, 2012 1

Report of S.V.S Raghvan Committee on Competition Law.....11, 12

STATEMENT OF JURISDICTION

The present matter derives its jurisdiction from Section 109 of the Code of Civil Procedure 1908.

Section 109 reads *"When appeals lie to the Supreme Court— Subject to the provisions in Chapter IV of Part V of the Constitution and such rules as may, from time to time, be made by the Supreme Court regarding appeals from the Courts of India, and to the provisions hereinafter contained, an appeal shall lie to the Supreme Court from any judgment, decree or final order in a civil proceeding of a High Court, if the High Court certifies-(i) that the case involves a substantial question of law of general importance; and(ii) that in the opinion of the High Court the said question needs to be decided by the Supreme Court."*

The Hon'ble Supreme Court in the instant case has tagged the following three appeals using its inherent powers under Order XLVII Rule 5 of The Supreme Court Rules, 1966 at the requests of the counsel.

Rule 5 reads "the Court may at any time either on its own motion or on the application of any Party, order that the appeals be consolidated"

"Unless otherwise ordered by this Court the liability of the Parties to pay separate Court fees shall not be affected by any order for consolidation"

Thus, the Court has the jurisdiction to hear the matter and adjudicate accordingly.

STATEMENT OF FACTS

I. Jeevani Limited is one of the leading market players in the pharmaceutical industry whereas Lifeline Limited is a popular Company in the Indian market as a major producer of food products.

II. Lifeline approached Jeevani for a possible Partnership to venture into the pharmaceutical sector, thereafter both Companies decided to amalgamate whereby it was decided that Jeevani would completely merge into Lifeline. Both the Companies on 30th March 2012 approached the Delhi High Court to get the Scheme approved, subsequently the Court ordered for a meeting of creditors to be convened and Jeevani accordingly issued notices for the same. The Scheme was approved by a vote of majority in the meeting consequently the Delhi High Court also approved the Scheme on 5th July 2013. It was also decided that the three Promoters of Jeevani who were also majority stakeholders in the Company would sell their entire promoter shareholding (18% shares) in Jeevani to Lifeline. This sale of stake was affected by a 'separate sale agreement.'

III. Prior to this, certain foreign banks with whom Jeevani had entered into an agreement to provide financial assistance invoked arbitration proceedings before a foreign arbitration tribunal constituted in Hong-Kong .The arbitral award was passed in favour of the banks on 27th July 2012. In early August 2013 the foreign lenders made an application before the Delhi High Court for recall of the order passed on 5th July and to set aside the Scheme.

IV. The Hon'ble Company Judge as well as the Division Bench of the Delhi High Court dismissed the application. This order has been challenged before the Supreme Court.

V. The Sale Agreement required the Parties to make specific representations regarding disclosure of information which may be vital to the transaction. The agreement

contained a clause that the disputes between the Parties would be referred to an Empowered Committee of three Executives of Lifeline. After the merger, Lifeline unearthed the fact that a Food and Drug Administration (FDA) investigation on drugs produced by Jeevani at its plants in India had commenced much before the merger took place. Accordingly Lifeline filed a suit against the Promoters for damages arising out of breach of Contract. The Hon'ble Singe Judge held that the clause could not be regarded as an arbitration clause whereas on appeal by the Promoters, the Division Bench took a contrary view to this. Aggrieved by this order of the Division Bench, Lifeline has approached the Supreme Court of India.

VI. Soon after the merger, to increase its profitability, Lifeline decided to introduce a new life saving drug by the name of "Novel" into the market. This drug was published to be considerably cheaper than other life saving drugs in the market including the drug "Inventive" which was manufactured by Swasth.

VII. Before lifeline could launch its drug, Swasth filed a suit for infringement of its IPRs in the Delhi High Court. Hence, Swasth was able to obtain an interim injunction against Lifeline. After this, Swasth launched a similar cost effective drug and cornered the market and subsequently withdrew the case.

VIII. Consequently Lifeline approached Competition Commission of India (CCI) alleging that Swasth abused its dominance by way of vexatious litigation. The CCI further passed an order directing the Director General (DG) to investigate. Aggrieved by the order of the CCI Swasth filed a writ petition in the Delhi High Court to establish that CCI's investigation was bad in law. The Delhi High Court dismissed the petition, subsequently even the Division Bench dismissed the appeal, and now Swasth has appealed before the Supreme Court of India.

STATEMENT OF ISSUES

I. WHETHER THE SCHEME SANCTIONED BY THE HON'BLE DELHI HIGH COURT ON 5TH JULY 2013 SHOULD BE SET ASIDE?

II. WHETHER THE HON'BLE DELHI HIGH COURT HAS THE JURISDICTION TO HEAR THE SUIT FILED BY LIFELINE FOR BREACH OF CONTRACT?

III. WHETHER THIS COURT SHOULD ENTERTAIN THE APPEAL AGAINST THE DECISION OF THE HIGH COURT AND IF THERE HAS BEEN ABUSE OF DOMINANCE BY SWASTH?

SUMMARY OF ARGUMENTS

I. WHETHER THE SCHEME SANCTIONED BY THE HON'BLE DELHI HIGH COURT ON 5TH JULY 2013 SHOULD BE SET ASIDE?

It is humbly submitted by the Respondent that the Hon'ble Delhi High Court was right in dismissing the application filed by the foreign lenders because they have no locus standi to object to the Scheme primarily because they have no pecuniary interest in the Company. Moreover, their claim for a separate meeting is also flawed because they do not constitute a separate class of creditors vis-à-vis the Scheme.

II. WHETHER THE HON'BLE DELHI HIGH COURT HAS THE JURISDICTION TO HEAR THE SUIT FILED BY LIFELINE FOR BREACH OF CONTRACT?

It is submitted by the Respondent that the Hon'ble Delhi High Court was right in ruling that the clause in the Sale Agreement constitutes an arbitration clause and in the light of the recent Supreme Court judgment regarding 'arbitrability of fraud' and the mandatory nature of the Section 8. It is the contention of the Respondent that the matter ought to be referred to the arbitration tribunal.

III. WHETHER THIS COURT SHOULD ENTERTAIN THE APPEAL AGAINST THE DECISION OF THE HIGH COURT AND IF THERE HAS BEEN ABUSE OF DOMINANCE BY SWASTH?

It is the contention of the Respondents that the Appellant had no locus-standi to file the writ petition and the Hon'ble Delhi High Court was right in dismissing it. Further, it is the contention of the Respondents that Swasth had abused its dominance in the market by way of vexatious litigation.

ARGUMENTS ADVANCED

I. WHETHER THE SCHEME SANCTIONED BY THE HON'BLE DELHI HIGH COURT ON 5TH JULY 2013 SHOULD BE SET ASIDE?

A. THAT THE FOREIGN LENDERS HAVE NO LOCUS STANDI TO OBJECT TO THE SCHEME.

In order to ascertain that no notice was required to be sent to the "foreign lenders" it is essential to establish that they were not the creditors of the Company. The expression creditor here includes every person having a pecuniary interest, whether actual or contingent, against the Company.[1] The foreign lenders had obtained an award passed by an arbitral tribunal constituted in Hong-Kong. Though it is disputed on a prima facie basis that these foreign lenders are creditors, the claim of the Appellant is that they are creditors by virtue of the award in their favour. The Respondent humbly submits that the foreign lenders are not creditors as it would be established that an award passed by the arbitration tribunal in Hong-Kong is not enforceable under Part I or Part II of the Arbitration and Conciliation Act, 1996.

i. That the award is not enforceable under Part II of the Arbitration and Conciliation Act, 1996.

It is humbly submitted before the Hon'ble Court that the award which was passed by the Foreign Arbitral tribunal on 27.7.2010 is not enforceable by virtue of the fact that the Arbitration Award was passed in Hong-Kong and even though India and Hong-Kong are signatory to the New York Convention but India has only recognized Hong-Kong as a reciprocatory Nation vide a notification in the Official Gazette dated 19.03.2012[2].Hence

[1] HALSBURY'S LAWS OF ENGLAND, 848 (4TH EDITION, VOLUME 7).

[2] Ministry of Law and Justice, Notification Number (S.O. 580) (E) dated 19th March, 2012.

awards passed by a foreign tribunal in Hong-Kong only on or after 19.03.2012 are enforceable under Part II of the Arbitration and Conciliation Act of 1996.

Substantiating further, a plain reading of the provisions of New York Convention, 1958[3] and Arbitration and Conciliation Act, 1996[4] would make it clear that awards passed in non-conventional countries are not enforceable under Part II. Hence, it is virtually evident that there was specific intention of the legislature to exclude awards passed in non-conventional Country from Part II of the Arbitration and Conciliation Act, 1996.

ii. That the award is not enforceable under Part I of the Arbitration and Conciliation Act, 1996.

Provisions of the Act[5] clearly lay down that awards passed only under this Part shall be considered as a domestic award. A clear interpretation of this has been laid down in BALCO's[6] judgment where the Supreme Court interpreted the above mentioned section and held that *"The non-convention award cannot be incorporated into the Arbitration Act, 1996 by process of interpretation."*

This interpretation of the Supreme Court clearly flows down from the intention of the legislature and the statute. The Arbitration and Conciliation Act, 1996 is a compilation of Arbitration Act, 1940 read with 1961 Act, and the Arbitration (Protocol and Convention) Act, 1937. It was never the intention of the legislature to include awards passed by the non-convention States in any of these legislations and it was never the intent of the legislature under the Arbitration and Conciliation Act, 1996 to include awards passed in non-convention

[3] Section 44, Arbitration and Conciliation Act, 1996.

[4] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Article III.

[5] Section 2(7), Arbitration and Conciliation Act, 1996.

[6] Bharat Aluminium Co.v. Kaiser Aluminium Technical Service Inc, (2012) 9 SCC 552.

States. Further it was observed by the Apex Court that *"It is said, indeed rightly, that in seeking legislative intention, judges not only listen to the voice of the legislature but also listen at tentatively to what the legislature does not say."*[7] Thus while interpreting these laws what needs to be given importance to is the fact that awards passed in non-convention States were not provided for by the legislature in any of the above mentioned Statues. This clearly goes to show the specific intent of the legislature in excluding awards passed by non-conventional States.

It would be fair to state that the interpretation made in the case of Bhatia[8] International was incorrect where the interpretation was made by the Court to specifically fill the lacuna that was there in the law with respect to non-convention States. However such interpretation does not reflect the true and specific intent of the legislature and was overruled by BALCO[9] where it was specifically held that there is no lacunae in the system and even if there is it is job of the Parliament to fill it. Further the Supreme Court held *"Where, however, the words were clear, there is no obscurity, there is no ambiguity and the intention of the Legislature is clearly conveyed, there is no scope for the Court to innovate or take upon itself the task of amending or altering the statutory provisions. In that Situation the Judges should not proclaim that they are playing the role of a law-maker merely for an exhibition of judicial valour. They have to remember that there is a line, though thin, which separates adjudication from legislation. Where, therefore, the "language" is clear, the intention of the Legislature is to be gathered from the language used. What is to be borne in mind is as to what has been*

[7] Gwalior Rayons Silk Manufacturers Co. Ltd. v. Custodian of Vested Forests, Palghat and another, AIR 1990 SC 1747.

[8] Bhatia InterNational v Bulk Trading SA and Anr, AIR 2002 SC 1432.

[9] Bharat Aluminium Co.v. Kaiser Aluminium Technical Service Inc, (2012) 9 SCC 552.

said in the Statute as also what has not been said".[10] Hence, where the intent of the legislature was crystal clear there was no need to interpret it the way it was done in the case of Bhatia which in turn was invalidated by the interpretation in the case of BALCO.

iii. That using the correct interpretation of law as laid in the case of BALCO is not barred.

The doctrine of prospective overruling was laid down in the case of Golakh Nath[11] and the Apex Court laid down certain rules which were to be adhered to while applying prospective overruling. It is not a point of dispute that the ratio laid down in BALCO is to be applied prospectively and since the agreement entered into between the Parties here was pre BALCO hence, the ratio laid down in BALCO is not applicable. Nevertheless, it does not preclude the Respondent from using the interpretation of the Statue that was laid down by the Apex Court in the judgment. Courts[12] in India have used the interpretations laid down in BALCO for correctly understanding the Statue and hence we see no reason in not applying the correct interpretation of the provisions of the Act[13] as laid down in the case of BALCO.

Further substantiating in the case of Konkola[14], it was held by the Court that *"In our view, it would not be appropriate, while applying the ratio of the judgment in BALCO to hold that the reasons which are contained in the judgment would operate with prospective effect." "It would be impermissible to hold that the interpretation which has been placed by the Supreme Court on the provisions of Section* 2(1)(e) *would apply only prospectively. The judgment of the Supreme Court is declaratory of the position of law that the Court having jurisdiction*

[10] Institute of Chartered Accountants of India v. Price Warehouse and Anr, AIR 1998 SC 74.

[11] I.C Golakh Nath and Ors v. State of Punjab and Anr, AIR 1967 SC 1643.

[12] Konkola Copper Mines v. Stewards and Lloyds of India Limited, 2013 (5) BomCR 29; NNR Global logistics Co. Ltd v. Aargus Global Logistics Pvt Ltd, O.M.P 61 of 2012.

[13] Section 2(7), Arbitration and Conciliation Act, 1996.

[14] Konkola Copper Mines v. Stewards and Lloyds of India Limited, 2013 (5) BomCR 29.

over the place of arbitration can entertain a proceeding in the exercise of its supervisory jurisdiction as indeed the Court where the cause of action arises" Hence, it goes without saying that there is no bar for this Court to refrain from using BALCO's correct interpretation of the law which in turn is the intent of the legislature. Since, the award passed by the Arbitration tribunal in Hong-Kong is not enforceable in India they are not decree holders in India. Moreover, their claim that they are creditors by virtue of holding the award is also negated. Since they were not creditors there was no need for the Company to issue notices to them with respect to the Scheme of Amalgamation. Section 391 says that it is a statutory requirement to issue notices to all creditors. After having established that the creditors had no pecuniary interest in the Company there was no requirement to issue notices to them.

B. THAT FOREIGN LENDERS DO NOT CONSTITUTE SEPARATE CLASS OF CREDITORS.

It is contended by the Appellant that they form a separate class of creditors by virtue of an arbitration award in their favour. In the light of these contentions, Assuming that their award is enforceable it does not change the fact that they do not constitute a separate class of creditors as substantiated below.

i. That by virtue of being foreign lenders they do not constitute separate class.

Foreign creditors per se do not constitute separate class of creditors.[15]In the present case there is no dissimilarity of interest vis-à-vis the Scheme as far the creditors are concerned and further the Courts have held that the as long as the treatment of the creditors are same under the Scheme and they do not have conflicting interest, there is no need to constitute a separate class for them. Foreign lenders perceiving that their interest differs because of having an award in their favour does not necessarily classify them under separate class of creditors.[16]

[15] Core Health Care Ltd v. Nirma Ltd, (2007) 138 CompCas 204.

[16] In Re: Arvind Mills Ltd., (2002) 111 CompCas 118 (Guj).

II. WHETHER THE HON'BLE DELHI HIGH COURT HAS THE JURISDICTION TO HEAR THE SUIT FILED BY LIFELINE FOR BREACH OF CONTRACT?

A. THAT THE DIVISION BENCH OF HON'BLE DELHI HIGH COURT WAS RIGHT IN CONCLUDING THAT THERE WAS A VALID ARBITRATION AGREEMENT.

Section 7 of the Arbitration and Conciliation Act, 1996 lays down the essentials of a valid arbitration agreement which was further reiterated by this Court[17], which have been fulfilled in the present case as follows:

1. The usage of the words 'Final, binding and conclusive'[18] proves beyond all doubts that the Parties contemplated that the decision of the tribunal would be binding on them.
2. The fact that the Parties have agreed upon the same terms implies that the jurisdiction of the tribunal was derived from the consent of the Parties. There was a clear intention to arbitrate.
3. The use of the word ' relating to' which has been held by the Courts[19] to have the widest possible ambit goes to show that the tribunal would determine substantive rights of the Parties.
4. The Parties have voluntarily agreed to be bound by the decision of an Empowered Committee consisting three Executives of the Company thereby waving their claims for any biasness and acquiescing to the fact that the tribunal would be fair in their adjudicating process.

[17] K.K Modi v. K.N.Modi and Ors, (1998) 3 SCC 573.

[18] Para 9, Page 4, Moot Problem.

[19] Renusagar Power Co. Ltd. v. General Electric Co and Anr, AIR 1985 SC 1156.

Apart from these conditions there are other statutory provisions which have also been complied accordingly. Hence, it is evident that there exist a valid arbitration agreement and thus the Division Bench of the Hon'ble Delhi High Court was right in its ruling.

B. THAT THE ARBITRATION TRIBUNAL IS COMPETENT TO ARBITRATE THE PRESENT DISPUTE.

Further, the only aspect remaining is the competency of the arbitration tribunal to adjudicate on the particular dispute. Section 5 of the Arbitration and Conciliation Act, 1996 clearly lays down the intent of the legislature that the Courts shall exert minimum intervention in matters concerning arbitration which come before it.[20] In the matter before us, the arbitration agreement covers all the disputes between the Parties as is evident from the wide ambit of the word 'relating to' used in the arbitration clause. The peremptory nature of section 8 of the Arbitration and Conciliation Act, 1996 has been further recognized by this Court in various judgments[21]. It has been held by the Court[22] that: *"The language of Section 8 is peremptory. It is therefore, obligatory for the Court to refer the Parties to arbitration in terms of their arbitration agreement. Nothing remains to be decided in the original action or the appeal arising there from. There is no question of stay of the proceedings till the arbitration proceedings conclude and the Award becomes final in terms of the provisions of the new Act"*. Hence, it has been recognized that when an application is made under section 8(1) and all conditions given there under have been satisfied then it is obligatory on the Courts to refer the matter to arbitration. Lastly, the only issue that might arise in this case is of arbitrability of fraud. It has been laid down in various judgments passed by this Court that the tribunal is

[20] P. Anand Gajapathi Raju & Ors. v. P.V.G. Raju & Ors, AIR 2000 SC 1886.

[21] Hindustan Petroleum Corp. Ltd v. Pinkcity Midway Petroleum, AIR 2003 SC 2881.

[22] P. Anand Gajapathi Raju & Ors. v. P.V.G. Raju & Ors, AIR 2000 SC 1886.

competent to arbitrate on that matter. It was held by the Court in the case of Swiss-timing[23] that the arbitration tribunal is competent to arbitrate even when there are serious allegations of fraud and misrepresentation because Section 16 of the Arbitration and Conciliation Act, 1996 lays down that the arbitration tribunal is competent to rule on its own jurisdiction.

The Court held that the law laid down in N. Radhakrishnan[24], which would be greatly relied by the Appellant is bad in law and the Court reasoned it as: 1.The peremptory nature of section 8 was not addressed by the Court which has been recognized by the Supreme Court in various judgments[25]. 2. The law laid down in Hindustan Petroleum[26] case was neither distinguished nor followed. 3. Moreover, provisions under section 16 were not even considered by the Court. In this judgment the Court lays down a difference between 'void' and 'voidable' and further states that in cases if voidable contract it would be improper to not refer the matter for arbitration. Such propositions were also upheld in another case[27] and although that case was pertaining to Part II of the Arbitration and Conciliation Act, 1996 yet the principle laid down could still be applied and in the light of these judgments the dynamic interpretation of the Statue by the Apex Court is clearly evident.

The intention of the legislature for the same is also reflected in the 246th law Commission's Report[28] which seeks to amend the Act and insert a new provision under section 16 sub section 7 which makes fraud arbitrable. It can be rightly concluded that the both the judicial

[23] Swiss Timing Ltd. v. Organizing Committee, Commonwealth Games, (2014) 6 SCC 677.

[24] N.Radhakrishnan v. Maestro Engineers and Ors, (2010) 1 SCC 72.

[25] P. Anand Gajapathi Raju & Ors. v. P.V.G. Raju & Ors, AIR 2000 SC 1886.

[26] Hindustan Petroleum Corp. Ltd v. Pinkcity Midway Petroleum, AIR 2003 SC 2881.

[27] World Sports Group Ltd. v. MSM Satellite Pte. Ltd., AIR 2014 SC 968.

[28] Law Commission of India, Report No. 246, August 2014.

atmosphere and the legislature have moved towards holding that fraud is an arbitrable issue and it is humbly pleaded that this Court should also rule accordingly.

III. WHETHER THIS COURT SHOULD ENTERTAIN THE APPEAL AGAINST THE DECISION OF THE HIGH COURT AND IF THERE HAS BEEN ABUSE OF DOMINANCE BY SWASTH?

A. THAT THIS COURT SHOULD NOT ENTERTAIN THE APPEAL AGAINST THE DECISION OF THE HIGH COURT.

The foremost question that arises is whether the Delhi High Court was correct in dismissing the appeal by Swasth. It is the contention of the Respondents that the present Writ Petition filed in the Delhi High Court was not maintainable and hence this subsequent appeal too has no basis and further the Delhi High Court was right in its ruling.

It is contend that since the action of CCI to direct an investigation under section 26(1) of The Competition Act, 2002 was an administrative function in itself out of which no right or obligation arose, the said action should not be subject to Writs or Appeals in principle. Reference in this regard should be made to various decisions of the Court.[29] of to establish the same.The Court held that "*Direction under Section 26(1) of Competition Act, 2002 after formation of a prima facie opinion is a direction simpliciter to cause an investigation into the matter and does not effectively determine any right or obligation of the Parties to the lis and does not entail civil consequences for any person and therefore, is not appealable."*Now if the legislative intent is analyzed, it is apparent that it was the intention of the legislature to exclude section 26(1) from any appeals purely because of the reason that an order under

[29] CCI v. Steel Authority of India Ltd., (2010) 10 SCC 744; Namrata Marketing Pvt. Ltd v. CCI, AIR 2014 All 11; The Tamil Nadu Film Exhibitors Association vs. CCI, New Delhi, (W.P.Nos.12085 and 14411 of 2013).

26(1) is an administrative direction and no rights or obligations accrue to any third Party as a result of such an order. In the High Court of Allahabad[30] where the writ petition filed by the petitioners was dismissed, the Court drew an analogy between Show cause notices and an order issued by the CCI. It was held that a show cause notice can only be challenged if the Competent Authority has no jurisdiction to issue the show cause notice otherwise such challenges were not maintainable. In the present case it is clearly established that the CCI had jurisdiction to initiate an investigation under 26(1) of the Competition Act 2002 if it felt that a prima- facie case exists. Moreover, no prejudice would be caused to the petitioner since no rights and obligations would accrue to him. Hence, it would have his right to challenge the findings of the DG CCI after the investigation. Moreover, in order to ascertain if such allegations which on a prima- facie basis seem strong actually hold true, it is very essential for an investigation to take place. The introduction of the petition is therefore contested.

B. THAT THE RELEVANT MARKET CAN BE ESTABLISHED.

According to section 2(r), section 2(s) and section 2(t) of The Competition Act, 2002 relevant market, relevant geographic market and relevant product market have been defined respectively.The relevant market in our case is the life saving drugs market in the pharmaceutical sector. Although strictly according to the definition of relevant product market the consumer aspect must be taken into account while determining relevant product market, in the sense that only demand side substitutability must be taken into account; but in the European case[31], the relevant product market was defined through supply side substitutability. The Court had held that the three different types of light metal packaging containers didn't form three different markets but were part of the same market for light metal packaging containers. *From the supply side, it would include all producers who could, with*

[30] Namrata Marketing Pvt. Ltd v. CCI, AIR 2014 All 11.

[31] Europemballage Corporation and Continental Can v. Commission (1973) ECR 215.

their existing facilities, switch to the production of such substitute goods.[32] Hence supply side substitutability has been used to define the market in cases where it was difficult to establish the market through demand side substitutability. Now to determine interchangeability similar end use and similar characteristics of the product can be established from the consumer side since that too is an essential under the provisions of the law. In the present case the concept of supply side substitutability will also be used to establish the relevant market.

In the current market there were other producers also in the high range that competed with the drug Inventive. Since Inventive was the premier drug, it can be deduced that there were other drugs competing in the market too and they had their own consumer base therefore the end use of all these drugs were similar. Hence, it can be concluded that all such drug manufacturers possessed the essential facilities to deliver similar end use by virtue of which they were able to compete in the first place. Considering the above mentioned, if the price of the cost effective drug of Swasth were to increase there is a significant chance that the other producers may try to produce similar drugs which would compete with the drug in question after the increase in price; since all the manufacturers do possess the technology to deliver similar end use. Considering this it could be safely concluded that *supply side substitutability does exist and inter-changeability between the high range and low range products also exits which is why it is fair to say that the life saving drugs market is the relevant product market*.

So far as the relevant geographic market is concerned it may be pointed out that as per the provisions of The Competition Act, 2002 it comprises the area in which the conditions of competition for supply of goods or provision of services or demand of goods or services are distinctly homogenous and can be distinguished from the conditions prevailing in the neighbouring areas. As nothing has been brought on record or is otherwise discernible there from to reflect heterogeneity in the conditions of competition with respect to the relevant

[32]Report of S.V.S Raghvan Committee on Competition Law, 2000, Paragraph 4.4.7.

product, it is to be assumed that the conditions of competition for supply of the product in question are homogenous throughout India. Hence, the relevant geographic market in the present case may be taken as whole of India.

C. THAT THE APPELLANT HAD A DOMINANT POSITION IN THE RELEVANT MARKET.

The European Court of Justice[33] states that dominant position refers to a situation of economic strength which gives the enterprise power to obstruct the maintenance of an effective competition in the market concerned because it allows the enterprise to conduct itself in a way that it is independent of from its competitors, clients and customers.

It is contended that in this case the fact that Swasth had Intellectual Property Rights (IPRs) of certain nature which allowed it to deliver the same end result and also make the drug cost effective, in itself constitutes dominant position in the market. Even though the market was cornered by Sawsth later, it still was in a dominant position by virtue of holding the IPR. Besides, even before it produced the cost effective drug their drug Inventive was still the premier drug in the market which represents a certain preference which was given to the drug by consumers which again indicates that it enjoyed the largest share in the high range products too. An enterprise owning products which are not easily interchangeable with other products on the market is likely to be in a dominant position. The possession of a technical advantage to lead a product development, or the ownership of an IPR is an important contributory factor to establishing dominance.

Even The Raghavan Committee Report[34] said *"entry barriers could result from absolute advantages such as patents and access to certain inputs."* Similar views were held by the

[33] Michelin v Commission, (1983) ECR 346.

[34] Report of S.V.S Raghvan Committee on Competition Law, 2000, Paragraph 4.4.7.

European Court of Justice in various cases.[35]Technical advancement made Swasth the dominant player since even though the capacity of producers existed to produce similar drugs, the responsiveness would be considerably slower considering such advancement by way of Research & Development and Swasth's patent on the same. The IPR gave Swasth monopoly in cost effectiveness but considering the use of the drug there still was competition in that regard. Hence, Swasth is a dominant player but does not hold monopoly. In Metter Toledo[36], the Court distinguished between trade secrets and patents to say:*"The owner of a trade secret, unlike the owner of a patent, does not have a monopoly over the process or formula.*" which obviously means that the producer by way of patent has monopoly of certain process or formula and in our case the potential monopoly Swasth had monopoly over such process which helped the drug to be cost effective later makes the firm dominant. Also in another case[37] the European Court of Justice seems to have accepted that the appellant was dominant in the market for spare parts for its cash registers because other firms could not produce spares for fear of being sued by the appellant in the UK under the design copyright act. In another case[38] similar observations were made. Considering the above mentioned cases it would be fair to say that Swasth had dominance in the relevant market of life saving drugs by virtue of holding certain patent rights.

D. THAT THE APPELLANT ABUSED ITS DOMINANT POSITION IN THE RELEVANT MARKET.

In this case the abuse of dominance took place by way of vexatious litigation. It must be considered how the concept of abuse under Indian law is strikingly similar to the position

[35] Hoffmann la Roche v. Commission, (1979) ECR 461; United Brands v. Commission, (1978) ECR 207.

[36] Mettler Toledo v. Ackermaan, 908 f. Supp. 240/M.D. PA.(1995).

[37] Hugin v. Commission, (1979) ECR 1869.

[38] Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (ITP) v Commission of the European Communities, (1989) ECR 1141.

existing in the European law which was laid down in the Continental Can[39]Case. The position of law with regards to abuse effectively establishes that even if the attempts of abuse don't directly affect the consumers it is still under the purview of Section 4 of the Competition Act, 2002 if it fetters competition to a considerable extent. The Respondents contend that the Competition was affected in the instant case by way of vexatious litigation. Dealing with vexatious litigation we must refer to the grounds laid down in the Promedia[40] case which are regarded as essentials to prove vexatious litigation in a situation. *"It could be abuse of dominance if: 1) Action which cannot be reasonably be considered as an attempt to establish its rights and hence can therefore only serve to harass the opposite Party. 2) Which is conceived in the framework of the plan whose goal is to eliminate competition."*

It is imperative to realise that such intention in cases of vexatious litigation can only be analysed from the consequences of such litigation. In the present case if Swasth really wanted to establish its rights it would have never withdrawn the case and vacated the injunction, in normal course it would have wanted the injunction to continue so as to establish its rights regarding the patent and its infringement as such. It is fairly obvious hence that the first essential laid down above stands true for this situation since the action cannot be reasonably considered as an attempt to establish rights. The second principle also stands true since as soon as Swasth had captured the market after obtaining the injunction and hence effectively driving out competition it withdrew the case. Also in other cases[41] the CCI seems to have regarded it as an aspect of abusive behavior to have bought vexatious litigation against an undertaking for slavish imitation of its products. The CCI took similar view in another case[42].

[39] Europemballage Corporation and Continental Can v. Commission (1973) ECR 215.

[40] ITT Promedia v. Commission, (1998) ECR-II 2937.

[41] BBI/Boosey and Hawkes, (1988) 4 CMLR 67.

[42] Bull Machines Pvt Ltd. v. J.C.B India Ltd, Case No. 105 of 2013(CCI).

PRAYER

Wherefore, in the light of facts stated, issues raised, arguments advanced and authorities cited, it is most humbly and respectfully prayed before this Hon'ble Court that it may be pleased to:

- To dismiss the appeal filed by the Foreign Lenders and uphold the ruling of the Division Bench of the Delhi High Court.
- To Rule that the Delhi High Court has no jurisdiction to hear the suit filed by Lifeline for breach of contract and uphold the Division Bench's decision.
- To uphold the decision of the Division Bench of the Delhi High Court dismissing the appeal arising out of the decision of the single judge Bench which too initially dismissed the writ petition filed by Swasth.

And pass any other order or grant any other relief in favor of the Respondent, which this Learned Court may deem fit in the ends of Justice.

All of which is most humbly and respectfully submitted.