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5TH NLIU – JURIS CORP NATIONAL CORPORATE LAW MOOT

COURT COMPETITION 2014

BEFORE THE HON'BLE SUPREME COURT OF INDIA

CIVIL APPELATE JURISDICTION

CIVIL APPEAL NO: …of…20…

Lifeline Limited v. Promoters of Jeevani

Heard with

CIVIL APPEAL NO: …of…20…

Foreign Lenders v. Lifeline Limited

And

CIVIL APPEAL NO: …of…20…

Swasth Life Limited vs. Lifeline Limited

MEMORIAL FILED ON BEHALF OF THE RESPONDENTS

Counsel Appearing on Behalf of the Respondents

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4. Companies (Court) Rules, 1959.
5. Competition Act, 2002.

STATEMENT OF JURISDICTION

The Appellants have approached the Hon'ble Supreme Court of India. The Memorandum on behalf of the Respondents is submits to the jurisdiction of the Hon'ble Court to deal in the present matter.

STATEMENT OF FACTS

1. Jeevani decided to merge into merged into Lifeline on 27th January 2012 and all assets and liabilities of Jeevani were to go to Lifeline. An application was filed under S.391 of the Companies Act, 1956 to the Delhi HC which ordered for a meeting of the creditors to be convened. Resolutions supporting the Scheme were passed by a vote of majority. The Scheme was approved by the Delhi HC on 5th July 2013. The Foreign Lenders objected to this scheme and the matter is now before the Supreme Court.

2. After the merger, Lifeline received notices from the US FDA for providing drugs of below par quality. Lifeline filed a suit against the Promoters before the Delhi HC seeking damages and compensation due to fraud and misrepresentation. The Promoters contended that the agreement between the parties had an arbitration clause. The Hon'ble Single Judge held that the clause could not be regarded as an arbitration clause. The order was challenged and the Division Bench held vice-versa. Aggrieved by this order, Lifeline has approached the SC.

3. Lifeline decided to introduce a new cheap life-saving drug "Novel" after further developing the active R&D which became its property after the merger. Before Lifeline could launch 'Novel', Swasth filed a suit in the Delhi HC for infringement of its IPRs alleging that it was substantially similar to "Inventive". An interim injunction was passed against Lifeline restraining it from launching 'Novel'. Swasth launched a similar cost effective drug in the market, withdrew the case against Lifeline and the interim injunction was vacated. Lifeline filed an application before the CCI alleging that Swasth was abusing its dominant position. CCI passed an order directing the DG to investigate. Swasth filed a writ in the Delhi HC submitting that CCI's order was bad in law as it cannot be held to be abusing its dominance. The HC dismissed the writ. The Division Bench also did not interfere with the order. Swasth has thus come before the SC. The matters are tagged together for hearing.

STATEMENT OF ISSUES

I. Whether there exists an arbitration clause in the Share Sale Agreement between Lifeline and the Promoters of Jeevani?

II. Whether order of the Company Judge of the Hon'ble Delhi HC approving the Scheme of arrangement for Jeevani is liable to be set aside?

III. Whether the Competition Commission of India was justified in directing the DG to investigate on the allegations by Lifeline against Swasth?

SUMMARY OF ARGUMENTS

I. Whether there exists an arbitration clause in the Share Sale Agreement between Lifeline and the Promoters of Jeevani?

Cl.2.1 of the Share Sale Agreement constitutes an arbitration clause as per S.7 of the Arbitration & Conciliation Act, 1996. When there exists an arbitration clause, matters are supposed to be adjudicated by the tribunal appointed. Nomenclature used by the parties may not be conclusive. One must examine the true intent and purport of the agreement. The wording of the Agreement herein is consistent with the view that the process is intended to be arbitration. The mere fact that there are allegations of fraud and misrepresentation shall not destroy the very purpose for which the parties had entered into arbitration.

II. Whether order of the Company Judge of the Hon'ble Delhi HC approving the Scheme of arrangement for Jeevani is liable to be set aside?

The foreign lenders are not creditors as the foreign arbitral award has not been enforced, and thus have no locus standi. There was no infirmity in sending the notice as the Company has published them as per the directions of the court. The lenders do not form a 'class' as it is not established how their interests are homogeneous, and separate from that of others w.r.t.to the terms of the Scheme. Hence, there is no reason to set the Scheme aside.

III. Whether the Competition Commission of India was justified in directing the DG to investigate on the allegations by Lifeline against Swasth?

Swasth was in a position of dominance in the market and abused it by indulging in bad faith litigation. Swasth obtained an interim injunction against Lifeline from launching its new drug, and subsequently came out with its own similar drug. This can be classified as a pure case of bad faith litigation as Swasth denied market access to Lifeline's drug. The CCI was justified in forming such a *prima facie* view and hence directing the DG to investigate on the allegations against Swasth. No adverse effect has been caused to Swasth by such an order.

ARGUMENTS ADVANCED

I. Whether there exists an arbitration clause in the Share Sale Agreement between Lifeline and the Promoters of Jeevani?

It is humbly submitted that Cl.2.1 of the Share Sale Agreement (hereinafter the "Agreement") entered into between Lifeline and the Promoters of Jeevani constitutes an arbitration clause as per S.7 of the Arbitration & Conciliation Act, 1996 (hereinafter the "Act").

- **Nature of the Clause**

S.7(1) of the Act states, *""Arbitration agreement" means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not."*

In the present case, the Agreement certainly does not use the term "arbitration" expressly. However, mere absence of such words is not determinative.[1] Cl.2.1 qualifies as an arbitration agreement due to its very nature. In *Rukmani Bai Gupta v. Collector Jabalpur*[2], the Hon'ble SC ruled that an arbitration clause is not required to be stated in any particular form. If the intention of parties to refer to the dispute to arbitration can be clearly ascertained from the terms of the agreement[3] it is immaterial whether or not the expression "arbitration" or "arbitrator" is used.[4]

- **Intention of the parties**

  a. ***Obligation to refer future disputes***

In *Bihar State Mineral Development Corp & Anr. v. Encon Builders Ltd.*[5] the Court stated that there must be a present or a future difference in connection with some contemplated

[1]State of U.P. v. Sardul Sinh Kulwant Singh, AIR 1985 RLR 351(Del).

[2]Rukmani Bai Gupta v. Collector Jabalpur, AIR 1981 SC 479.

[3]Punjab State & Ors. v. Dina Nath, (2007) 5 SCC 28.

[4]Bihar State Mineral Development Corporation v. Encon Building, (2003) 7 SCC 418.

[5]Ibid.

affair. Further, it was stated that there cannot be any doubt whatsoever that an arbitration agreement must contain broad consensus between the parties that the disputes and differences should be referred to a tribunal. While there is no specific form of an arbitration agreement, the words used should disclose a determination and obligation to go to arbitration[6] in the event of a dispute. When there is merely a possibility of the parties agreeing to arbitration in future, as contrasted from an obligation to refer disputes to arbitration, there is no valid and binding arbitration agreement. Herein, Clause 2.1 states impliedly that any dispute arising would be decided by the 'empowered committee'. There is nothing in the Agreement that suggests that such decision by 'committee' is contingent in nature.

b. Referral to a private tribunal

The Hon'ble SC[7] has also ruled that S. 7 conveys that there has to be an intention, expressing the consensual acceptance of the parties to refer the disputes to an arbitrator for adjudication. It is necessary that the parties should intend that the dispute should be determined in a quasi-judicial manner.[8] From a bare reading of Cl.2.1 it is clear that the parties intend to refer their disputes to the 'Empowered Committee'. The agreement contemplates that the committee shall determine substantive rights of parties as the clause encompasses all varieties of disputes[9] that may arise between the parties and does not restrict the jurisdiction of the committee to specific issues only.

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[6]Jagdish Chander v. Ramesh Chander, (2007) 3 SCC 719.

[7]Karnataka Power Transmission Corporation Limited & Anr. v. Deepak Cables (India) Ltd., AIR 2014 SC 1626.

[8] RUSSELL, RUSSELL ON ARBITRATION 59 (19th ed. Sweet & Maxwell 1979).

[9]Punjab State & Ors. v. Dina Nath, (2007) 5 SCC 28.

c. ***Binding decision of arbitration tribunal***

The Apex Court has laid down that there must be a willingness of the parties to be bound by the decision of the tribunal.[10] In the present case, there is clearly a similar intention of the parties. This proves that submission to final decision is not a tentative arrangement to merely explore arbitration as a mode of settlement but rather the real intention to be bound by it. Substantive rights[11]of parties will be decided by the tribunal and it is intended to be enforceable in law[12]. Even in the case of *Mallikarjun v. Gulbarga University*[13], it was held that a clause is an arbitration agreement if it answers the test of reference of dispute for decision and made the decision of the authority final and binding.

- **Jurisdiction of court in Delhi**

Cl.3 of the Agreement intends that in case an award is passed by the arbitration tribunal, all other proceedings under any of the provisions of the Act have to be instituted at the competent court at Delhi.

As per S.8 of the Act, if there exists an arbitration clause, adjudication of disputes must be by arbitration.[14] Thus, the Division Bench of the Hon'ble Delhi HC has rightly concluded that the disputes between the Promoters and Lifeline should be referred to the Empowered Group.

- **Arbitrability of allegations of fraud**

S.5 of the Act provides that the Court shall not intervene in the arbitration process except in accordance with the provisions contained in Part I of the Act. This policy of least interference recognises that the function of the courts is to support arbitration process. As held in *Swiss Timing Ltd. v. Organising Committee, Commonwealth Games 2010, Delhi*, it was held that a

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[10]Jagdish Chander v. Ramesh Chander, (2007) 3 SCC 719.

[11]K.K. Modi v. K.N. Modi & Ors. (1998) 3 SCC 573.

[12]Punjab State & Ors. v. Dina Nath, (2007) 5 SCC 28.

[13]Mallikarjun v. Gulbarga University, 2004 (1) SCC 372.

[14]Hindustan Petroleum Corpn. Ltd. v. M/s. Pinkcity Midway Petroleums, AIR 2003 SC 2881.

conjoint reading of S.5 and S.16 makes it clear that all matters including the issue as to whether the main contract was void/voidable including allegations of fraud and misrepresentation, can be referred to arbitration. To shut out arbitration at the initial stage would destroy the very purpose for which the parties had entered into arbitration.[15]

In *P. Anand Gajapathi Raju & Ors. v. P.V.G. Raju*[16], the Apex Court observed that an arbitration agreement covers all the disputes between the parties in the proceedings and even more than that. The language of S.8 is peremptory. It is, therefore, obligatory for the Court to refer the parties to arbitration in terms of their agreement.

S.16 provides that the arbitral tribunal is competent to rule on its own jurisdiction including ruling on any objection with regard to validity of the arbitration agreement. [17] An arbitration clause which forms part of a contract shall be treated as an independent agreement[18] and the fact that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.[19]

As reiterated in the *Swiss timing* case, that the concept of separability of the arbitration clause provides that for resolution of disputes through arbitration, parties cannot be permitted to avoid arbitration, without satisfying the Court that it will be just and in the interest of all the parties not to proceed with the arbitration. A contention that allegations of fraud and misrepresentation cannot be referred to arbitration cannot be paid heed to as it would be a handy tool available to the unscrupulous parties to avoid arbitration. The Court may decline reference to arbitration only where the Court can reach the conclusion that the contract is

[15]Swiss Timing Limited v. Organising Committee, Commonwealth Games 2010, Delhi, (2014) 6 *SCC* 677.

[16]P. Anand Gajapathi Raju & Ors. v. P.V.G. Raju*,* AIR 1961 Madras 504.

[17]Today Homes & Infrastructure Pvt. Ltd. v. Ludhiana Improvement Trust & Anr., (2014) 5 SCC 68.

[18] Arbitration and Conciliation Act, 1996, §16(1)(a).

[19] Arbitration and Conciliation Act, 1996, §16(1)(b).

void on a meaningful reading of the document itself without the requirement of any further proof. It is humbly submitted that no such conclusion can be drawn in the present case.

An arbitration agreement does not become "inoperative or incapable of being performed" simply because the dispute may involve allegations of fraud, hence the courts cannot refuse to refer the parties to arbitration on the ground that allegations of fraud have been made by one party. It is not only the courts which can decide issues of allegations of fraud and serious malpractice; such issues can also properly be dealt with by arbitrators.[20]

Moreover, in the *Swiss Timing*[21]case, the Hon'ble SC held *N. Radhakrishnan v. M/S. Mastero Engieers*[22] per incuriam and hence it cannot be relied upon the issue of arbitrability of fraud.

Therefore, the Division Bench has correctly referred the parties to arbitration as per the terms of the Share Sale Agreement.

[20]World Sports Group (Mauritius) Ltd v MSM Satellite (Singapore) Ltd, Civil Appeal No. 895 of 2014, Supreme Court.

[21]Swiss Timing Limited v. Organising Committee, Commonwealth Games 2010, Delhi, (2014) 6 SCC 677.

[22]N. Radhakrishnan v. M/S. Mastero Engineers, 2009 (13) SCALE 403.

II. Whether order of the Company Judge of the Hon'ble Delhi HC approving the Scheme of arrangement for Jeevani is liable to be set aside?

It is humbly submitted that the Division Bench of the Hon'ble Delhi HC was correct in dismissing the appeal of the foreign banks for setting aside the Scheme of arrangement ("Scheme") for Jeevani.

- **No locus standi**

a. Foreign arbitral award not enforced

Enforcement proceedings can be brought wherever the property of the losing party may be situated.[23] To ensure compliance with an award, legal proceedings are necessary to obtain title to the assets seized or their proceeds of sale.[24] *In India, once the court is satisfied that the foreign award is enforceable, the award becomes a decree of the court*[25] *and becomes binding on the parties.*[26] *It is submitted that no such enforcement proceedings have been initiated by the foreign lenders in India, and hence they are not creditors.*

b. Enforcement hit by Limitation Act

A foreign award shall be enforced conforming to the procedure provided for in the Act and procedural laws of the country wherein an action is brought[27]. Thus the application has to be made within the period prescribed as per the Limitation Act i.e. within three years from the date when the right to apply for enforcement accrues (award is passed)[28]. The foreign arbitral award was passed on 27th July 2010 and the lenders made an application to the Hon'ble

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[23] Brace Transport Corp of Monrovia v. Orient Middle East Lines Ltd., 1995 Supp (2) SCC 280.

[24] ALAN REDFERN & M. HUNTER, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION (Sweet & Maxwell, 1st ed. 1986).

[25] Arbitration & Conciliation Act 1996, § 49.

[26] Arbitration & Conciliation Act 1996, § 46.

[27] DICEY AND MORRIS, CONFLICT OF LAWS (9th ed., 1973).

[28] Noy Vallesina Engineering Spa v. Jindal Drugs Ltd. (2006) 3 Arb LR 510.

Company Judge in August 2013. This means that more than 3 years have passed since the passing of the award and thus Limitation Act is attracted. There has also been no application filed by the foreign lenders in the appropriate court to condone such delay.

c. Time to raise objections is past

Objections to classification should be made known to the company in the first instance as soon as notice of meeting showing the classification is received. On one's failure to attend the meeting and object, the court will not entertain his challenge to classification.[29]

d. Not correct forum

Since the lenders have not initiated enforcement proceedings, the present suit is premature. SC is not the appropriate platform to decide whether the banks are creditors or not.

Assuming, but not conceding that they are creditors

- **No infirmity in the sending of notice**

a. Statutory provisions followed

As per R.74 of the Companies (Court) Rules, 1959 the notice of the meeting shall be advertised in such newspapers and in such manner as the Judge may direct. Jeevani acted as directed and hence has followed the statutory procedure.

b. Personal notice not compulsory to be sent

Without prejudice to the above argument, in the case of *In re ICICI Ltd.*[30], it was held that the court is not bound to call a meeting of the creditors where the proposed arrangement is such that the interest of the creditors is not going to be affected. Their consent is not necessary and this shall not affect the process of sanctioning the scheme.[31] The foreign lenders have not established how the Scheme has adversely affected them. It has to be also pointed out that the

[29] Alstan Power Boilers Ltd. v. State Bank of India, (2002) 112 Com Cases 674 (Bom).

[30] In re ICICI Ltd, (2002) 36 SCL 682 (Bom).

[31] Phlox Pharmaceuticals Ltd, Re, (2008) 144 Com Cases 133.

Scheme was prepared keeping in mind that all the assets and liabilities of Jeevani would be transferred to Lifeline. Therefore, pecuniary claims of the banks, if any, are not dissolved.

c. Irrelevant consideration

In the case of *DCM Financial Services Ltd. v. NEMO*[32], the court dismissed a contention saying, "*There are also some creditors who live outside of Delhi, where these newspapers are perhaps not circulated. Some creditors may be living abroad while some may be illiterate so they cannot even read a notice or an advertisement. One cannot go on taking notice of each such objection because they can be infinite. The legislature has prescribed a manner of service, which has been adhered to. The manner of service prescribed is neither irrational nor illogical."* Herein, a meeting of the creditors was accordingly held after the notices were sent. Therefore, a meeting conducted in accordance with S.391[33] cannot be invalidated only on the ground that a creditor was not served with notice.[34]

- **Not a 'class of creditors'**

a. Domicile not a factor in classification

In the case of *In Re: Arvind Mills Ltd.*[35], the foreign currency lenders were not treated as a distinct class and hence the Scheme was objected to. The court observed that difference in terms of the scheme can be the only criterion for identifying separate class for the purpose of convening a separate meeting for such class, and held that the objectors would not be entitled to be treated as a different class as there is no conflict of commercial interest with others. In another significant case[36], a contention that the order requires to be recalled was raised on the basis that the applicant banks being lenders in foreign currency were likely to be prejudiced

[32] DCM Financial Services Ltd. v. NEMO, In the High Court of Delhi, C.P. No. 48 of 2001.

[33] Miheer H. Mafatlal v. Mafatlal Industries Ltd. (1997) 1 S.C.C. 579.

[34] In Re Vikrant Tyres Ltd, (2003) 47 SCL 613.

[35] In Re: Arvind Mills Ltd., 2002 111 CompCas 118 Guj.

[36] Commerzbank Ag. & Anr. v. Arvind Mills Ltd., [2002] 110 CompCas 539 (Guj).

with the proceedings and the out-come. The court held that they were to be quoted at par with others as their interest is similar to that of the lenders in Indian currency. Also, in *In re English, Scottish and Australian bank*[37] creditors were treated as a single class whether their debts arose in Australia or in England. Therefore, classification cannot be made on the basis of mere domicile. The court rejecting the contentions of foreign banks in *Core Health Care Ltd., In re*[38], observed, "*a lender cannot be grouped on various factors like- different amount of loan, rate of interest, repayment period. If this objection is accepted, then, a scheme of compromise or arrangement would never be approved, because each lender would be a different entity and a class in itself. Such is not the intention of the Legislature."*

b. Classification as per terms of the Scheme

The court does not itself consider what classes of creditors or members should be made parties to the scheme. This is for the company to decide, in accordance with what the scheme purports to achieve.[39] *"Before adverting to the question whether the appellant-objector constitutes a separate class or not, it has to be seen whether any different terms have been offered to different classes. The difference in terms of the scheme can be the only criterion for identifying the separate class for the purpose of convening a separate meeting for such class."*[40] The Appellants have not established how they are a homogenous group, different from others, w.r.t. the Scheme. Had the terms offered varied, they could contend a separate classification, but if the term offered is common to all, they will not form a separate class.[41]

c. General principle of classification

[37] In re English, Scottish and Australian bank, (1893) 3 Ch 385.

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

[39] Nordic Bank Plc v. International Harvester Australia Ltd, (1983) 2 VR 298.

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

[41] In Re: Modiluft Ltd., 106 (2003) DLT 217.

It will depend upon the facts and circumstances of each case whether there would be any need for further sub-classification even amongst the creditors but the general principle would be the whether the interests of the creditors who claim to belong to a different class are so dissimilar to the interests of the other creditors that it would be impossible for them to sit and consult together and take a common view.[42] No such divergent interests appear presently.

- **Scheme must not be set aside**

As per *Unique Delta Force Security P. Ltd.,*[43] S.392 is a complete code w.r.t the power of the Court to deal with a scheme after it has been sanctioned. Though the court is empowered to give directions and allow modifications of an arrangement, no powers have been conferred on the Court to recall/ rescind/cancel an order sanctioning the compromise or arrangement. It is the preferable view that the court should not withdraw its sanction if it emerges that there was some defect or irregularity in the proceedings leading up to the order.[44]Moreover, the scheme can be set aside only on very limited grounds, for eg, if the consent has been obtained by fraud.[45]The Court will have no further jurisdiction to sit in appeal over the commercial wisdom of the majority of the class of persons who have given their approval to the scheme[46] Even; the Hon'ble SC[47] has observed that due to passage of time it would not be equitable at a belated stage to set aside the scheme in its entirety.

In light of the above, order of the Company Judge of the Hon'ble Delhi HC approving the Scheme of arrangement for Jeevani is not liable to be set aside.

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[42] State Bank of India v. Alstom Power Boilers Ltd, (2003) 116 CC 1 Bom.

[43] Unique Delta Force Security P. Ltd., (2012) 175 CompCas 318 (Bom).

[44] Sovereign Life Assurance Co. v. Dodd, [1892] 2 QB 573.

[45] Fletcher v. Royal Automobile Club Ltd., [2000] 1 BCLC 331.

[46] Hindustan Liver & Anr. v. State of Maharashtra & Anr.,(2004) 9 SCC 438.

[47] Central Bank of India v. Ambalal Sarabhai Enterprises Ltd., (1999) 3 Comp. LJ 98 (Guj).

III. Whether the Competition Commission of India was justified in directing the DG to investigate on the allegations by Lifeline against Swasth?

- **Existence of *prima facie* case**

Lifeline filed an application before the Competition Commission alleging that Swasth had abused its dominant position. Under S. 19(1)(a)[48] the CCI may inquire into any alleged contravention of the provisions contained in S.4[49] on receipt of information from any person. As per S. 26(1)[50], if the CCI is of the opinion that there exists a *prima facie* case, it shall direct the DG to cause an investigation to be made into the matter. "'*Opinion' means something more than a mere retailing of hearsay; it means judgment or belief, resulting from what one thinks on a particular question."*[51] Further, "'*Prima facie case' means a case which requires investigation, not based on erroneous/vexatious grounds."*[52]The relevant consideration here is whether on the evidence led it *was possible* to arrive at the conclusion in question and not whether that was *the only* conclusion which could be arrived at.[53] Allegations against Swasth were not based on vexatious grounds but were based on the fact that Swasth was indulging in bad faith litigation in order to launch 'Novel'. Thus a *prima facie* view that S.4(2) was attracted, was justified.

a) Swasth was in a position of dominance.

Domination in common parlance means market power[54] and such power can ordinarily be inferred from the existence of the seller's possession of a predominate share of the market.

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[48] Competition Act 2002, § 19(1)(a).

[49] Competition Act 2002, § 4.

[50] Competition Act 2002, § 26(1)

[51] Dolgobinda Paricha v. Nimai Charan Misra, AIR 1959 SC 914.

[52] Nagraj v. Krishna, ILR 1996 KAR 753.

[53] Martin Burn Ltd. v. R.N. Banerjee AIR 1958 SC 79.

[54] REPORT OF THE HIGH LEVEL COMMITTEE ON COMPETITION POLICY AND LAW (CHAIRMAN S.V.S. RAGHAVAN) 2000, ¶ 4.4

Explanation to S.4 defines the expression "dominant position" as: "A position of strength enjoyed by an enterprise in the relevant market in India which enables it to (i) operate independently of competitive forces prevailing in the relevant market; (ii) affect its competitors or consumers or the relevant market in its favour."

The essence of a highly developed sales network is in itself a commercial advantage.[55] There are several other factors to adjudge domination.[56] Swasth is the manufacturer of the drug "Inventive" which is the premier drug available. Due to its predominate share of the market and highly developed sales network, Swasth is in a position of dominance as per S. 19(4)(a). Swasth could operate independently of competitive forces and affect its competitors or consumers through its conduct.

b) Existence of relevant market.

The relevant market is the area of effective competition[57] in which competitive relationships can be affected. As per S. 2(t), "*Relevant product market" means a market comprising all those products or services which are regarded as interchangeable or substitutable by the consumer, by reason of characteristics of the products or services, their prices and intended use."* Swasth and Lifeline both perform pharmaceutical operations and produce life-saving drugs. While the new drug of Lifeline was called 'Novel', Swasth also manufactured and launched a similar cost-effective drug 'Novel'. Undisputedly, both these drugs can be regarded as substitutes of each other as they possess similar physical characteristics (or technical qualities) and provide the same utility to the consumers enabling them to switch easily from one to another. Therefore, it is humbly submitted that there is an intersection between markets for the two drugs which constitutes the relevant product market.

[55] Hoffmann- La Roche & Co. v. Commission (1979) ECR 461.

[56] Competition Act 2002, § 19(4)

[57] Standard Oil Co. of California & Standard Stations Inc. v. United Sates 337 U.S. 293.

As per S.2(s), *""Relevant geographic market" means a market comprising 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 reflects heterogeneity in the conditions of competition with respect to the relevant product, it is assumed that the conditions of competition for supply of the product in question are homogenous throughout India.

c) Indulgence in bad faith litigation

As per S. 4(2)(c) "*There shall be an abuse of dominant position...if an 'enterprise'*[58]*or a group indulges in practice or practices resulting in denial of market access in any manner."* Further, S.2(e), "*There shall be an abuse of dominant position...if an 'enterprise'or a group uses its dominant position in one relevant market to enter into, or protect, other relevant market"*. It is humbly submitted that by indulging in bad faith litigation, Swasth not only restricts market access Lifeline but enters into the relevant market. In the case *Hoffmann- La Roche & Co.* v. *Commission*[59]**,** it was held that, *"recourse to methods different from those which condition normal competition, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of competition."*

Before the much-awaited launch of 'Novel' by Lifeline, Swasth obtained an injunction against Lifeline restraining the launch. Subsequently, Swasth launched a similar cost-effective drug and grabbed a large chunk of the market. It must be highlighted that after launch of its own drug, Swasth withdrew its case. This is a clear case of bad faith litigation. This view was also taken in the case of *M/s Bull Machines Pvt. Ltd.* v. *M/s JCB India Ltd. & Ors,*[60] where the CCI directed the DG to conduct investigation of an enterprise which launched its own product after obtaining injunction against its competitor, and observed that,

[58] Competition Act 2002, § 2(h)

[59] Hoffmann- La Roche & Co. v. Commission (1979) ECR 461

[60] M/s Bull Machines Pvt. Ltd. v. M/s JCB India Ltd. & Ors, Case No. 105 of 2013 (CCI)

"*The predation through abuse of judicial processes presents an increasing threat to competition.*" Sham litigation is predatory/fraudulent litigation with anticompetitive effect, i.e., the improper use of the courts and other government adjudicative or granting processes against rivals to achieve anticompetitive ends.[61] It amounts to abuse[62] and has been recognised[63] even in Europe wherein litigation could be abusive if a dominant firm brings an action – (a) Which cannot reasonably be considered as an attempt to establish its rights and can therefore only serve to harass the opposite party; (b) Which is conceived in the frame-work of a plan whose goal is to eliminate competition. As regards the application of the first criterion, it is the situation existing when the action in question is brought which must be taken into account.[64]

Even in the US[65], defining 'sham litigation' for anti-competitive purposes, the Supreme Court established a two-part test- firstly, the lawsuit must be objectively baseless and secondly, only if the challenged litigation is objectively meritless may a court examine the litigant's subjective motivation. The subjective part is to find whether the reason for bringing the suit was to harm rivals through the *suit's process* rather than its outcome.[66] A court should focus on whether the baseless suit conceals "an attempt to interfere directly" with a competitor's business relationships.[67] Herein, the suit instituted was clearly devoid of any merits as Swasth

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[61] DENIS BORGES BARBOSA, STUDY ON THE ANTI-COMPETITIVE ENFORCEMENT OF INTELLECTUAL PROPERTY (IP) RIGHTS: SHAM LITIGATION 3 (2012).

[62] RICHARD WHISH AND DAVID BAILEY, COMPETITION LAW 713(7th ed. 2012).

[63] ITT Promedia v. Commission [1998] ECR II-2937.

[64] Ibid

[65] Professional Real Estate Investors v. Columbia Pictures Industries, 508 U.S. 49 (1993)

[66] M.S. Popofsky, *Defining Exclusionary Conduct: Section 2, the Rule of Reason, and the Unifying Principle Underlying Antitrust Rules*, ANTITRUST LAW JOURNAL 73, NO. 2, 461 (2006).

[67] E.R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961).

had acquired in 2010 the absolute IPRs to produce the drug from Jeevani. It is apparent that Swasth's intention was to distort competition[68] and harass Lifeline to fulfil its own commercial agenda.

- **Appointment of DG and his duties in accordance with law.**

It is the statutory duty[69]of the DG to assist CCI[70] to eliminate practices having adverse effect on competition and ensure freedom of trade. As per S.26(1), the CCI forms a *prima facie* view without entering into adjudicatory process and by recording minimum reasons substantiating the formation of such opinion.[71] *There has been an abuse of dominant position and hence CCI order is within the ambit of the law* [72] to direct investigation, which *is only a fact-finding measure, has no quasi-judicial character*[73]and hence, cannot adversely affect a party. Expeditious disposal of matters by CCI is an apparent legislative intent. If every direction or recording of an opinion were made appealable then certainly it would amount to abuse of the process of appeal. [74] The aim of Swasth herein is to delay and defeat the duly launched inquiry against their anti-competitive practices. Hence, the writ and subsequent appeals to interfere with the investigation were rightly dismissed and the CCI has acted within its jurisdiction.

[68] D.P. MITTAL, TAXMANN'S COMPETITION LAW & PRACTICE 301(3th ed. 2012).

[69] Competition Act 2002, § 41(1)

[70] Competition Act 2002, § 17

[71] Competition Commission of India v. Steel Authority of India (2010) 10 SCC 744

[72] Belaire Owners' Association v. DLF Limited, HUDA & Ors. (Case No. 19/2010)

[73] Ashoka Marketing v. Union of India [1997] 37 Comp. Cas. 341

[74] Competition Commission of India v. Steel Authority of India (2010) 10 SCC 744

PRAYER

Wherefore in the light of the issues raised, arguments advanced and authorities cited before this Hon'ble Court, the Counsel for Respondents most humbly prays to this Hon'ble Court to adjudge and declare the following:

1. The Division Bench of the Hon'ble Delhi High Court was correct in referring the matter to the Empowered Group.
2. The order of the Hon'ble Company Judge of the Delhi High Court dated 5th July 2013 must not be recalled.
3. The Competition Commission of India has correctly directed the Director General to investigate into the allegation of abuse of dominance by Swasth.

OR

May pass any order, decree or judgment in the light of justice, equity and good conscience, for which the counsel for Appellants shall pray duty bound to this Hon'ble Court.

RESPONDENTS

Dated: _/_/2014

THROUGH

COUNSEL