'Team I'

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

ON BEHALF OF

SUPREME COURT OF INDIA

CASE CONCERNING ON CORPORATE LAWS

SWASTH LIMITED & Ors
APPELLANT

V.

LIFELINE LTD & Anr
RESPONDENT

ON SUBMISSION TO HON'BLE SUPREME COURT OF INDIA

MEMORIAL *for the RESPONDENT*

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CASES

- Chemidye Mfg.Co.(P) Ltd in Re.2006 (69) SCL 10 (Bom)
- In Re.Vast Text Limited (2006 Indlaw RAJ 76); Compact Power sources Pvt Ltd, In Re./ HBL Nife Power Systems Ltd., In Re 2005 (125) cc 2891 (AP)
- Pentamedia Graphics Limited.v. The Bombay Stock Exchange , 2006 Indlaw MAD 2227;[2008] 145 Comp Cas 327
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- Jupiter Gaming Solutions Pvt Ltd v. Govt of Goa & Ors 2011 Indlaw CCI 22
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- Neeraj Malhothra Advocate .v. North Delhi Power & Ors CCI 06/2009
- Kanal 5 Ltd v.Foreningen Svedska Tonsattares Internationella Musikbyra [2009] 5 C.M..R. 18
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LIST OF ABBREVIATIONS

° AIR	-	All India Reporter
° Anr	-	Another
° AP	-	Indian Law Report Andhrapradesh Series
° Bom	-	Indian Law Report Bombay Series
° BSE	-	Bombay Stock Exchange
° CC	-	Company Cases
° CCI	-	Competition Commission of India
° Co	-	Company
° ELT	-	Excise Law Times
° FDA	-	Food and Drug Administration
° US	-	United States

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STATEMENT OF JURISDICTION

By virtue of Article 139A, of the Indian Constitution, 1950 the Respondent, Lifeline Ltd & Anr, humbly submits to the jurisdiction of Hon'ble Supreme court exercising its inherent powers.

STATEMENT OF FACTS

- Jeevani Ltd having its registered office in new Delhi was incorporated in 1990 under the Companies Act 1956 is listed in the Bombay stock exchange is one of the leading players in the pharmaceutical manufacturing industry has its global presence by selling its products in some countries of Asia Europe, United States of America and Brazil announced its expectations to expand its market and maximizing the profitability.
- Life line Ltd is another listed company registered & incorporated under the Companies Act, 2013 having its registered office in Mumbai is very popular as a major producer of food products and is known for its quality and variety of food products.
- Both Companies decided to merge. A scheme of agreement was made on that behalf and the promoters will sell their entire stake of 18% vide separate sale agreement entered into on 23rd march 2012.
- This agreement contained specific representations and also specified that all tangible properties including the active R&D and IPR of Jeevani and all properties and rights accruing from it would vest with the lifeline Ltd. The scheme was finalized on 5th march 2012 and the same was not approved by the BSE. On 30th march 2012 Jeevani Ltd and lifeline Ltd filed an application U/s 391 of the companies act, 1956 before the Hon'ble Delhi High Court. The court ordered for a meeting of creditors to be convened.

- Jeevani after issuing notice to creditors published an advertisement in a local English newspaper and a local language newspaper conducted a meeting of the creditors and a resolution supporting the scheme was passed by a vote of majority. The scheme was approved on 5th July 2013.All other relevant approvals were taken by Jeevani. In the mean time Life line Ltd had also got approval of Mumbai High court under relevant provisions of the companies act.
- Certain creditors of Jeevani mainly foreign lenders had invoked arbitration proceedings for non payments before an arbitral tribunal in hong kong for nonpayment under a consortium agreement for financial assistance provided and a foreign arbitral award was passed against Jeevani on 27th July 2010 and the foreign lenders had not proceeded till date for the enforcement of this award.
- In early august 2013 the foreign lenders made an application before the Hon'ble company judge to recall the order of approving the scheme for non intimation of notice to them and for not considering them as a separate class of creditors, a scheme formed without taking the opinion of them should be set aside.
- The company contented that the foreign lenders are not creditors and no notice was required to be sent to them. The Hon'ble judge dismissed the application filed by the foreign lenders and refused to set aside the scheme and is now pending before the supreme court
- After the merger the newly formed lifeline Ltd continued with the business of the Jeevani Ltd including supplying generic drugs to USA has received a notice from the US Food and Drug Administration for providing drugs of below par quality and in violation of the requisite production parameters set out by the FDA.

- It was discovered that the investigation was commenced much before the merger. So the lifeline Ltd filed a suit against the promoters before the Hon'ble Delhi High Court for damages arising out of breach of contract by way of defraud and misrepresentation and also alleged that the fact of pending litigation was concealed with a malafide intention to get an inflated price for their shares.
- The promoters contended that the Delhi High Court has no jurisdiction as the agreement had an arbitration clause however the lifeline Ltd contented that there is no such clause in the agreement.
- The impugned clause is stated below:-

1.1. This Agreement shall be interpreted and construed in accordance with the Laws of India.

2. Dispute Resolution

2.1. Decision of an empowered committee comprising of (three) executive level Personnel of the Company shall be final, binding and conclusive on parties to This Agreement upon all questions and issues relating to the meaning, scope, Instructions, claims, right or matters of interpretation of and under this Agreement.

2.2. The parties shall endeavor to amicably resolve the above mentioned issues.

3. Jurisdiction

3.1. All disputes touching upon the subject matter of the agreement shall be Subject to the jurisdiction of Delhi courts."

- The Hon'ble single bench of the Delhi High Court held that the above clause couldn't be regarded as arbitration clause and held that the court had jurisdiction to decide the matter.
- But the division Bench held that clause constitutes an arbitration clause .Aggrieved by

this lifeline Ltd has approached the Supreme Court and the matter is pending for arguments.

- After the merger lifeline Ltd decided to introduce a new life saving drug 'novel' into the market by further developing the active R &D which became the property of lifeline after its merger with Jeevani Ltd which is considerably cheaper than similar drugs in the market including the drug 'inventive', which was being manufactured and sold by Swasth limited, a sister concern of the promoters of the erstwhile Jeevani Ltd.
- Swath Ltd assigned absolute rights to a few of the developed and completed R&D projects and IPRs of Jeevani Ltd in 2010.Swasth Ltd obtained an interim injunction against lifeline Ltd and restrained it from launching its new drug. In the meanwhile it launched a similar cost effective drug in the market after which it withdrew the case and vacated the injunction.
- Lifeline Ltd filed an application before the competition commission of India (CCI) alleging that the Swasth Ltd was abusing its dominant position by indulging in bad faith litigation. CCI was of the view that the Swasth Ltd had abused its dominant position and ordered the DG CCI to submit an investigation report within 45 days. The report is awaited. Swasth Ltd filed a writ petition against this in Hon'ble Delhi High court
- The Single bench and Division bench of Hon'ble Delhi High court upheld the order of CCI and Swasth Ltd approached the Supreme Court against the order of the Division Bench.
- As the litigations involve the same parties and disputes arise out of the same transactions and also on the request of the counsel's appearing in the matter, the Supreme Court exercising its inherent power has tagged the matters together for hearing.

STATEMENT OF ISSUES

1. **WHETHER THE IMPUGNED SCHEME OF ARRANGEMENT OF THE MERGER IS VALID ONE?**
2. **WHETHER THE DISPUTE RESOLUTION CLAUSE IN THE IMPUGNED SALE AGREEMENT COMPLIES WITH THE REQUIREMENTS OF SECTION 7 OF THE ARBITRATION & CONCILIATION ACT, 1996?**
3. **WHETHER THE SWASTH LIMITED CAN BE HELD LIABLE FOR THE (ABUSEMENT OF ITS DOMINANT POSITION) VIOLATION OF SECTION 4 OF THE COMPETITION ACT, 2002?**

SUMMARY OF ARGUMENTS

1. **Whether the impugned scheme of arrangement of the merger is a valid one?**

Financial assistance provided under a consortium agreement can be treated as a Lending. There is no necessity to send a notice to foreign banks who is not a creditor but only a lender. Provisions of Section 391 of the Companies Act, 1956 does not come into play in this case as the Appellant is was not a creditor as on the date of filing of the Scheme.

2. **Whether the dispute resolution clause in the impugned sale agreement complies with the requirements of section 7 of Arbitration & Conciliation act, 1996?**

It is clear from the Agreement that the subject matter of all disputes arising out of the agreement shall be under the jurisdiction of Delhi High Courts. The Hon'ble Court has to construe whether the Dispute Resolution Clause in the Share Sale Agreement constitutes an arbitration clause.

3. **Whether the Swasth Ltd can be held liable for the (abusement of its dominant position) violation of section 4 of the competition act, 2002?**

Dominance is not bad, but its abuse is treated as bad in Competition Law in India. The Appellant had abused its dominant position by restricting the scientific development obtained by the respondent on its own motion and also by indulging in a practice which results in the denial of the market access of the respondent which prejudicially affected the rights of the consumers.

ARGUMENTS ADVANCED

1. Whether the Impugned scheme of arrangement of the merger is valid one?

Lender means a person who lends money[1]. It is evident from the facts of the case that the foreign banks itself is Foreign lenders. Hence there is nothing to show that the financial assistance provided under the consortium agreement can be treated as creditor. In other words, the Petitioner continued to remain as Lenders.

Section 391 states that a notice of meeting is to be sent only to the creditors of the Company. Hence there is no necessity to send a notice to foreign banks who is a not a creditor but only a lender. But section 391 does not come into play in this case as the petitioner was not a creditor as on the date of filing the scheme.

The petitioner's assertion in the appeal is that the newspaper advertisement is not in compliance with Regulation 14 of the SEBI (Substantial Acquisition and Takeover Regulations) 2011. The matter shall be tested from another angle. The company through its erstwhile management had made an advertisement in the local English Language Newspaper and Local Language Newspaper. The company has its registered office at New Delhi i.e. the capital of India during the time of presentation of scheme to the Hon'ble Delhi High court.

1 . Explanation to clause (a) of Sub section 2 of Section 6 of Indian Partnership Act 1932.

It can be interpreted that If a daily newspaper have an edition outside of its home state; it can be claimed as national daily.

It is evident that the list of newspapers acknowledged by Hon'ble Delhi High court are in fact national daily having circulation in more than 3 states other than the home state. Thus without a doubt advertisement so given is adequate to fulfill Regulation 14 of SEBI (Substantial Shares and Takeover Regulations) 2011.

The Arguments raised on behalf of the petitioner in regard to the violation of clause 24(f) and Clause 24 (g) of Listing Agreement with BSE is not well founded. If this contention is accepted in the facts of the present case, then it would run contra to the principles stated by Hon'ble Bombay High court in the case of Chemidye Mfg.Co. (P.) Ltd.[2] observed as under :

"*There is nothing either in the Listing Agreement or in the SCR Act which indicates that non – compliance of the terms and conditions of the Listing Agreement would bar a company from making an application under Sections 391 and 394 of the Companies Act for merger or would entail an automatic dismissal of such a petition. Sections 23 and 24 of the SCR Act provide for penalties. These provisions also do not contain a bar of the nature suggested by the intervenor."*

"The consequence of non-compliance with any of the provisions of the Listing Agreement would entail action by the relevant exchange under the provision of the Listing Agreement and S CR Act. For instance, the B.S.E. may initiate action against a defaulting member including by delisting the member. Such non compliance does not ipso facto entail consequences under the Companies Act of the nature submitted by the Intervenor."

[2] . In. Re 2006 (69) SCL 10 (Bom)

"Thus non-compliance with the provisions of Clauses 24(f), (g) and (h) of the Listing Agreement does not by itself bar a company from seeking sanction of a scheme of amalgamation under Sections 391 to 394 of the Companies Act. Nor does it entail an automatic dismissal of such a petition.

The consent of the stock exchange is not compulsorily required to be obtained, and it would suffice if the company files the scheme/petition before the court or Tribunal for its approval, and more so when the company under Sub- clauses (g) and (h) of Clause (24) of the Listing Agreement, had agreed that the scheme of arrangement/amalgamation/merger/reconstruction/reduction of capital, etc., to be presented to any court or Tribunal does not violate, override or circumscribe the provisions of securities law.[3]

This takes us to question as to whether the No objection from the Stock Exchange is to be treated as a mandatory requirement. A perusal of the provisions relating to the sanction of the Scheme under the Companies Act shows that the Companies Act does not provide for any notice to be issued either SEBI or to a Stock Exchange prior to any order to be passed under Section 391 or 394 of the Companies Act. Section 394-A provides for issuance of notice to the Central Government only. On a report filed by the Central Government, the Court takes into consideration the representation, if any, made before passing an order. It may also be seen that when the Central Government places a report before the Court, the normal expectation is that it had taken note of every circumstance so that the interest of the investing public are protected, that the laws relating thereto or governing the affairs of the

3. In Re. Vast Text Limited (2006 Indlaw RAJ 76) in para 20 ; Compact Power Sources (P.) Ltd., In re/HBL Nife Power Systems Ltd.,In Re 2005 (125) cc 2891 (AP)

company involving the public money are not violated. Hence, when the Court grants the sanction, it must be noted that it is only on full satisfaction arrived as to the compliance of the procedural requirement as well as on the report of the Central Government as to the affairs of the Company. Given the constitution of a Stock Exchange, the requirement of a notice not being there under the provisions of the Companies Act or under the Rules, it stands to reason that the notice as such to a Stock Exchange is not a mandatory requirement while granting approval to the Scheme. Consequently, failure to give a notice or to wait for the No Objection from the Stock Exchange does not, per se, stand in the way of a Court granting approval to a Scheme.[4]

The sanctioning court has to see to it that all the requisite statutory procedure for supporting such a scheme has been complied with and that the requisite statutory procedure for supporting such a scheme has been complied with and that the requisite meetings as contemplated by section 391 (1) (a) have been held.

Keeping in mind the above circumstances, the scheme shall not be recalled merely for non compliance of Listing Agreement with BSE.

4. Pentamedia Graphics Limited.v. The Bombay Stock Exchange , 2006 Indlaw MAD 2227;[2008] 145 Comp Cas 327

2. **Whether the Dispute Resolution Clause in the Impugned Sale Agreement Comply with the requirements of Section7 of the Arbitration & Conciliation Act, 1996?**

In the instant case the enquiry concerning the quality of drugs and violation of requisite production parameters by US FDA was iniated in 2010 which is evident to prove that the Appellant had knowledge about such material facts and not disclosed the same. The Appellant had concealed such investigation reports to deceive a gain thereby they get an inflated price for their shares.

Suppression of such an important fact points out that the defendant's malicious intention to act for wrongful gain and unjust enrichment of promoters by the way of fraud section 17 sub section (2) i.e. the active concealment of a fact by one having knowledge or belief of the fact and misrepresentation under section 18 of Indian contract act. Which by the presence of these ingredients points without a doubt to the breach of contract and inevitable voidability of the contract.

Suppression of a material document would also amount to a fraud on the court[5]. `Fraud is proved when it is shown that a false representation has been made (i) knowingly, or (ii) without belief in its truth, or (iii) recklessly, careless whether it be true or false'.[6]

A "fraud" is an act of deliberate deception with the design of securing something by taking unfair advantage of another. It is a deception in order to gain by another's loss. It is a cheating intended to get an advantage.[7]

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5 . Gowrishankar v. Joshi Amba Shankar Family Trust 1996, 3 SCC 310

6 . Commissioner of Customs v. M/s Aafloat Textiles Pvt Ltd. 2009, Indlaw SC 798

7 . S.P. Changalvaraya Naidu v. Jagannath (1994 (1) SCC 1.

With respect to the aforementioned facts the ingredients of the voidability of contract namely fraud and misrepresentation is very much obvious.

As a matter of fact, it is clear that the Appellant had concealed the facts to receive an inflated price for their shares.Their objective is to procure high price for their shares by selling it to the Respondant through a Share Sale Agreement. Thus their suppression affected the agreement which is clearly deals with the sale of shares of the Appellant. It is very noticeable that the dispute is relates to the subject matter of the agreement. i.e. the fairness of sale of shares

Clause 3.1 of the Agreement clearly defines that only the Hon'ble Delhi High court has jurisdiction on the disputes relating to the subject matter of the agreement.

The main attribute of an arbitration agreement namely consensus ad idem to refer the disputes to subject matter of agreement, is missing in clause 2 relating to settlement of disputes. Therefore, it is not an arbitration agreement as defined under section 7 of the agreement.[8]

8 . Jagadish Chander v. Ramesh Chander & ors, 2007 5 SCC 719

3. **Whether the Swasth Limited can be held liable for the (abusement of its dominant position) violation of Section 4 of the Competition Act, 2002?**

The drug 'NOVEL' which is a life saving drug which is beneficial to all the humans is comparatively much cheaper than similar drugs in the market. But the appellant has restricted the access of the respondent to the market by obtaining an injunction on the contention of infringement of IP and R&Ds and thereby continued as a premier drug in the market. So the consumers will always prefer 'INVENTIVE' a premier drug rather than the other. This itself shows the dominance of the appellant in the market.

The appellant withdraw their suit against the Respondent when they invented a new drug which is relatively much more cost effective than the drug novel. It is clear from this that the object of the appellant is not to protect their absolute right but to eliminate the competition. They have continued their R&D to face the competition of NOVEL while maintaining their dominant position in the market and when they reattained monopoly they withdrew the suit.

This is evident to show that the appellant had abused its dominant position by restricting the scientific development obtained by the respondent on its own motion and also by indulging in a practice which results in the denial of market access of the respondent.

It is pertinent to mention here that dominance per se is not bad, but its abuse is treated as bad in competition Law in India. Abuse is said to occur when an enterprise uses its dominant position in the relevant market in an exclusionary or / and or an exploitative manner. Section 4 of the Act gives an exhaustive list of practices that shall constitute abuse of dominant position and, therefore, are prohibited. Abuse of dominance is judged in terms of specified acts committed by a dominant enterprise. Such acts are prohibited

under the law. There is no need for any reference by the Commission to the adverse effect on Competition to the adverse effect on the Competition in Indian Markets. These practices are just prohibited, as an abuse of its dominant position and thereof, the Act does not envisage to explicitly prove such abuse of dominance only when it causes or likely to cause an appreciable adverse effect on competition in the relevant market within India. Rather, any abuse of the type specified in the Act by a dominant firm shall stand prohibited. Once the dominance is established then the commission shall look into the practices listed in Section 4(2) and if such practices the abuse of dominant position shall be established since such acts are prohibited under the Law.[9]

It is very clear from the above facts about the intention of the appellant to maintain their dominance in the market by restricting the entry of other competitors in the market had prejudicially affected the rights of the consumers.

The appellant has operated independently of competitive forces in the market. Also this helps the appellant to attract the consumers and to attain a supremacy over the competitors in its favour. By restraining the consumers from exercising their full choice or freedom to procure medicines they were deprived of their right to chose drugs of their choice as guaranteed under the act.

The swiss federal court in the case of chanel S.A. of Geneva of Geneva and chanel S.A. of Glaris v EPA AGA[10] observed:

9 . Jupiter gaming solutions pvt ltd v. govt of goa & ors. 2011 Indlaw CCI 22
10 . [1997] E.T.M.R. 352

Taking a functional approach, in making a distinction between fair and unfair competition one must take into account the results which one has a right to expect where an example of fair competition is functioning smoothly. Therefore, competition becomes dishonest where it threatens such use inasmuch as or where it thwarts the expected results.

A healthy and a competitive economy is imperative to safeguard consumer interests. Among others free choice, price and quality are central to the consumer interest. A Market is said to be competitive if consumers can chose between a range of substitutable products and suppliers face no obstacles to supply products or services. The choice available to the consumers must necessarily be a real and genuine choice and not a notional one.[11]

As per section 4(2) of the Act, there shall be an abuse of dominant position, if an enterprise *inter alia* directly or indirectly, imposes unfair or discriminatory conditions in purchase or sale of goods or services or indulges in practice or practices resulting in denial of market access in any manner. However, the said section does not contain an exhaustive list of the activities that would amount to a contravention of its provisions. The actions, practices and conduct of an enterprise in a dominant position have to be examined in view of the facts and circumstances of the each case to determine whether or not the same constitutes an abuse of dominance in terms of section 4 of the Act. In this regard it is relevant to quote the decision in the case of Kanal 5 Ltd v Foreningen

11 Neeraj Malhothra Advocate v North Delhi Power & ors CCI 06/2009

Svedska Tonsattares Internationella Musikbyra[12] where the court (fourth chamber) observed that an undertaking in a dominant positon is entitled to abuse to pursue its own interests. However, such an undertaking engages in abusive conduct when it makes use of the opportunities arising out of its dominant position in such a way as to reap trading benefits which it would not have reaped if there had been normal and sufficiently effective competition. This proposition of law was also noted in United Brands Continental b.v. v.Commission of the European Communities[13]

The opposite parties through their conduct restricted the entry of eligible competitors to the market. It may be noted that the neither the gain to the opposite parties is ascertainable nor has the damage to the consumers quantifiable on the basis of the available material on record. The opposite parties cannot be allowed to continue to abuse their dominant position and harm the consumer's interest to gain undue profits or to deny the consumers the right to exercise his choice as conferred by the sectoral laws.

It may be noted that the mandate of the Commission as enshrined in the preamble of the Act is to prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets, in India, and for matters connected therewith or incidental thereto.[14]

12 . [2009] 5 C.M.L.R. 18

13 . 1978.E.C.R. 207.

14 . CCI -06/2009

PRAYER

In the light of the issues raised arguments advanced and authorities cited the Appellant humbly prays that the Hon'ble Supreme Court may kindly adjudge and declare that:

1. Scheme approved by the Hon'ble Delhi High court on 05th July 2013 under section 391 of the Companies Act, 1956 shall not be recalled.
2. The Respondent shall be provided damages for breach of contract dated 23rd March 2012.
3. The investigation report should be submitted by the DG CCI about the abusement of dominant position by the appellant to the CCI.

And may kindly pass any order that this Hon'ble court may deem fit.

For this act of kindness the appellant in duty bound shall for ever pray

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All of which is most humbly prayed

Counsel for the "Respondent"