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

2014

TEAM CODE: J

IN THE SUPREME COURT OF INDIA

FOREIGN LENDERS	**V.**	**JEEVANI LIMITED**
APPELLANT		RESPONDENT
	CLUBBED WITH	
LIFELINE LIMITED	**V.**	**PROMOTORS OF JEEVANI**
APPELLANT		RESPONDENT
	CLUBBED WITH	
SWASTH LIFE LIMITED	**V.**	**COMPETITION COMMISSION OF INDIA**
		LIFELINE LIMITED
APPELLANT		RESPONDENTS

CIVIL APPEALS UNDER ARTICLE 133(1) OF THE CONSTITUTION OF INDIA AGAINST ORDERS OF THE DELHI HIGH COURT

MEMORANDUM FOR THE RESPONDENTS

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STATEMENT OF JURISDICTION

The appellants have approached the Hon'ble Supreme Court of India under Article 133(1) of the Constitution of India and Section 109 of the Civil Procedure Code, 1908 challenging separate orders passed by the High Court of Delhi. In the exercise of its inherent powers under Section 151 of the Civil Procedure Code, 1908, the Hon'ble Court has consolidated different appeals given that the disputes arise out of the same transaction.[1] The Respondents humbly submit to the appellate jurisdiction of the Hon'ble Supreme Court of India under the aforementioned provisions.

[1] *Chittivalasa Jute Mills v. Jaypu Rewa* AIR 2004 SC 1687; *Indian Bank v. Maharshtra* AIR 1998 SC 1952; *Surat Goods Transport Pvt Ltd Co v. Asharam* AIR 1983 Guj 147

STATEMENT OF FACTS

Background

1. Jeevani Limited (**Jeevani**) and Lifeline Limited (**Lifeline**), two public listed companies, decided that Jeevani would completely merge into Lifeline and all its assets and liabilities would be transferred to Lifeline. A **scheme** of arrangement was prepared keeping for the purpose along with a share transfer agreement with the **Promoters**. The agreement provided, *inter alia,* specific representations as regards to disclosure of information and for a complete transfer of all intangible properties of Jeevani to Lifeline.

Case 1: Foreign Lenders v. Jeevani Ltd

2. On 30th March 2012, Jeevani and Lifeline filed an application under Section 391 of the Companies Act, 1956 for initiating the process of approval of the Scheme by the Delhi High Court. Jeevani issued a notice of meeting to its creditors by publishing an advertisement and accordingly, the meeting was held and passed by a vote of majority after which the High Court approved did also.
3. Certain **Foreign Lenders** who had won an arbitral award against Jeevani but had not filed enforcement proceedings, made an application for recall of order of the Delhi High Court approving the Scheme as that they had not received notice for the meeting despite being a separate class of creditors. The Single and Division bench of the High Court dismissed the application of the Foreign Lenders.

Case 2: Lifeline Ltd v. Promoters of Jeevani

4. Lifeline received notices from the US FDA for providing drugs of below par quality and in violation of the requisite production parameters by them. On further scrutiny by Lifeline, it was unearthed that the investigation on drugs produced by Jeevani at its plants in India was commenced much before the merger of Jeevani and Lifeline took place.

5. Lifeline filed a suit against the Promoters before the Delhi High Court for breach of the contract for concealing the fact of the pending investigations with malafide intention resulting in unjust enrichment. The Promoters, on the other hand, contended that the Court had no jurisdiction as the agreement between the parties had a clause for arbitration in case of a dispute. While the Single judge in the Delhi High Court dismissed the argument of the Promoters, the Division bench upheld the validity of the arbitration clause.

Case 3: Swasth Life Ltd v. Competition Commission of India & Lifeline Ltd

6. Soon after the merger, Lifeline decided to introduce a life saving drug "Novel" in the market using its newly-acquired R&D. The new drug Novel was awaited in the market as it was considered to be cheaper than other life saving drugs in the market, including the premier drug "Inventive", sold by **Swasth** Life Limited. Before Lifeline could launch 'Novel', Swasth filed a suit for infringement of its IPRs in and were able to obtain an interim injunction against the launch of the new drug 'Novel'. In the meanwhile, Swasth launched a similar cost effective drug in the market, cornering a large chunk of the market, after which it withdrew the case against Lifeline and the interim injunction was vacated.
7. Based on the above Lifeline filed an application before the Competition Commission of India (**CCI**) alleging that Swasth was abusing its dominant position by indulging in bad faith litigation. The CCI based on the allegations made by Lifeline passed an Order directing the DG to investigate on the information provided. Swasth being aggrieved by the Order of the CCI filed a writ petition before the Delhi High Court submitting that CCI's Order for directing investigation was bad in law as Swasth in its endeavour to protect its IPRs cannot be held, even *prima facie*, to be abusing its dominance. The Single and Division Bench of the Court dismissed the writ petition. **All the three cases have come before the Supreme Court.**

STATEMENT OF ISSUES

1. **WHETHER IN THE FACTS AND CIRCUMSTANCES OF THE CASE, JEEVANI WAS LIABLE TO PROVIDE A NOTICE TO THE FOREIGN LENDERS WHEN CONVENING A MEETING OF VARIOUS CLASSES OF CREDITORS UNDER SECTION 391 OF THE COMPANIES ACT, 1956.**

2. **WHETHER ON THE ALLEGATION OF FRAUD OR ANY DISPUTE ARISING FROM THE SHARE TRANSFER AGREEMENT, THE PARTIES CAN INVOKE ARBITRATION PROCEEDINGS UNDER CLAUSE 2 OF THE AGREEMENT OR DOES THE COURT HAVE JURISDICTION OVER THE MATTER.**

3. **WHETHER THE COMPETITION COMMISSION OF INDIA WAS CORRECT IN ORDERING THE DIRECTOR GENERAL TO INVESTIGATE INTO THE ALLEGATIONS OF ANTICOMPETITIVE BEHAVIOUR ALLEGED BY LIFELINE AGAINST SWASTH UNDER SECTION 26(1) OF THE COMPETITION ACT, 2002.**

SUMMARY OF ARGUMENTS

1. **The Foreign Lenders did not constitute a class of creditors so as to have been given a notice Of the scheme under Section 391 of the Companies Act, 1956**

   The Respondents submit that the scheme cannot be set aside as no notice was required to be sent to the foreign lenders under Section 393 of Companies Act, 1956. The respondents submit the following arguments: *first*, the foreign lenders are not creditors of Jeevani and *second*, the foreign lenders do not constitute a separate 'class' of creditors.

2. **Clause 2 of the Share Transfer Agreement is an Arbitration Clause for the purpose of any dispute in relation to the agreement**

   The Respondents submit that Clause 2 of the Agreement is an arbitration clause because: *first,* it satisfies the essential elements of an arbitration clause; *two* the arbitration clause would subsist even after if the contract has been held void, i.e., even if the fraud were to be said to have taken place, the arbitration clause would still be in force and the appointed arbitrator would have the authority to look into the matter

3. **The Order passed by the Competition Commission of India is good in law and the writ petition against the order is *ultra vires***

   The Respondents furhter submit that the investigation ordered by the CCI under Section 26(1) of the Competition Act, 2002 is not bad in law. The order is within the scope of the Respondent Commission's powers and in accordance with the law. The Respondents submit the following twofold argument: *firstly*, that there exists a prima facie case against Swasth to allow the CCI to order an investigation into the matter and *secondly*, the order does not affect the rights of the parties and therefore, cannot be challenged under before the Court.

ARGUMENTS ADVANCED

1. THE FOREIGN LENDERS DID NOT CONSTITUTE A CLASS OF CREDITORS SO AS TO HAVE BEEN GIVEN A NOTICE OF THE SCHEME UNDER SECTION 391 OF THE COMPANIES ACT, 1956

The respondents humbly submit that the scheme cannot be set aside as no notice was required to be sent to the foreign lenders under Section 393 of Companies Act, 1956. The respondents submit the following arguments: *first***,** the foreign lenders are not creditors of Jeevani and *second*, the foreign lenders do not constitute a separate 'class' of creditors.

A. That the Foreign lenders are not creditors of Jeevani

The Foreign lenders cannot be called creditors of Jeevani for the purpose of Section 391 of the Companies Act, 1956 for the following reasons (i) no real claim lies against Jeevani and (ii) the Foreign Lenders do not feature as 'creditors' in any financial statements.

i. No Actual claim lies against Jeevani

The term "creditor" includes every person who has an actual or contingent claim against the company[2]. In the present case, there exists no such actual claim against the company as no application has been filed for the foreign award to be recognized and enforced in India.[3]

ii. Foreign lenders do not appear in the books of the company.

The Respondent humbly submits that because the Foreign Lenders are not recognized by the financial statements of the company, they were not creditors for the purpose of Section 391 under which the meetings of creditors were called. According to the legally-mandated Accounting Standards followed by the company, the term 'contingent' is used for liabilities

[2] *Re: T&N Ltd* [2007] 1 All ER 851

[3] The Arbitration and Conciliation Act 1996, § 47

that are not recognized because their existence will be confirmed only by the occurrence or non-occurrence of one or more uncertain future events not within the control of the enterprise.[4] In the present case, since the arbitral award against the company has not been enforced according to the mandatory conditions[5], the respondent submits that there arises liability towards the Foreign Lenders on paper. The enforcement and its consequent validity is uncertain and the liability can, at best, be termed as contingent.

As per the Accounting Standards, contingent liabilities are not recognized by an enterprise.[6] The liability, in the present case, will not be recognized because, "A provision should only be recognized when an enterprise has a present obligation as a result of a past event".[7] But as no proceedings for enforcement of the award have been filed, there is no present obligation towards the company and therefore is not to be required to be recognized by the enterprise.[8] Therefore, Foreign Lenders are not creditors of the company as only Creditors whose interests appear in the books of the company should be considered as creditors.[9]

B. The foreign lenders do not constitute a separate class of creditors.

The constitution of class is primarily determined by what the scheme purports to achieve.[10] Class differentiation becomes a necessity when the scheme proposes different terms to all creditors.[11] There exists nothing in the facts to suggest that the scheme offered different terms to its creditors. Classification of members or creditors in a scheme is necessary only when

[4] Ministry of Corporate Affairs, Companies (Accounting Standards) Rules 2006, AS- 29, ¶ 13

[5] Arbitration and Conciliation Act 1996, §48

[6] Ministry of Corporate Affairs, Companies (Accounting Standards) Rules 2006, AS- 29, ¶ 26

[7] Ministry of Corporate Affairs, Companies (Accounting Standards) Rules 2006, AS- 29, ¶ 14(a)

[8] ibid

[9] *Mahaluxmi Cotton Mills Ltd* AIR 1950 Cal 399

[10] Palmer, Francis Beaufort, *Palmer's Company Law* (24th edn, Sweet & Maxwell 1992)

[11] *Re: Arvind Mills ltd* (2002) 111 Com Cases 118 (Guj)

different members or creditors would be affected under the scheme differently.[12] It is pertinent to find out whether the rights that are being varied or released under the scheme are so distinct that the scheme has to be treated as a compromise with separate classes.[13] The test to be applied hence is 'with whom is the arrangement being made?'[14] It is argued that scheme in the present case is not being made specifically in any relation to the foreign lenders and therefore, no separation of classes is required. Their rights and interests have remained unaffected by the Scheme as their claim against the company can still lie against the new enterprise, Lifeline. As a result, their rights are sufficiently similar to other creditors (provided they are creditors) as not to require such separation.[15] Therefore, Jeevani was not bound to issue a notice to them for the purpose of obtaining their approval of the scheme and the scheme should not be set aside.

2. CLAUSE 2 OF THE SHARE TRANSFER AGREEMENT IS AN ARBITRATION CLAUSE FOR THE PURPOSE OF ANY DISPUTE IN RELATION TO THE AGREEMENT

The Respondents submit that Clause 2 of the Agreement is an arbitration clause as it satisfies the essential elements of an arbitration clause. The Respondents further submit that the arbitration clause would subsist even after if the contract is held void, i.e., even if the fraud is said to have taken place, the arbitration clause would still be in force and the appointed arbitrator would have the authority to look into the dispute.

[12] *Re: Jaypee Cement Ltd* (2004) 2 Comp LJ 105 (All)

[13] *Re Hawk Insurance Co Ltd* [2001] ECWA Civ 241; *Re BTR plc* [1999] 2 BCLC 675; *Re Industrial Equity (Pacific) Ltd* (1991) 2 HKLR 614

[14] *Re Hawk Insurance Co Ltd* [2001] ECWA Civ 241; *Sovereign Life Assurance Co v. Dodd* [1892] 2 QB 573; *Re Equitable Life Assurance Society* [2002] EWHC 140 (Ch); *Re Telewest Communications plc*[2004] EWHC 924 (Ch); *Re MyTravel Group plc* [2005] 1 WLR 2365

[15] *Re UDL Holdings Ltd* [2002] 1 HKC 172

A. Clause 2 is an arbitration clause

The respondents submit that the Clause 2 of the share transfer agreement is an arbitration clause on the basis of the following twofold argument: *one,* the clause satisfies all the essentials of a valid arbitration clause and *two,* there is no particular form required of an arbitration clause for the purpose of gauging its validity.

i. Clause 2 satisfies all the essentials of a valid arbitration agreement

An 'arbitration agreement' is an agreement by the parties to submit to arbitration on all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.[16] The essential elements of an arbitration agreement are, *firstly*, there must be a present or future difference in connection with some contemplated affairs. *Secondly*, there must be common intention or *consensus ad idem* of the parties to settle such differences by a private tribunal and *thirdly*, the parties must agree in writing to be bound by the decision of such a tribunal.[17]

Observing the above elements, the first element is *prima facie* satisfied as in the due to the allegation of fraud on the Share Sale Agreement. The second element is satisfied as because the parties had formulated the arbitration clause for the sole purpose of arriving at an amicable resolution of dispute arising between them.[18] In fact, they had also decided on an Empowered Committee and its composition to refer disputes to in case of a disagreement. Thus evinced is their intention and the fact that they were ad idem with regard to the arbitration clause

[16] Arbitration and Conciliation Act 1996, §7

[17] *Bihar State Mineral Dev Corpn & Anr v. Encon Builders Pvt Ltd* AIR 2003 SC 3688; *State Of Orissa & Ors v. Bhagyadhar Dash* (2011) 7 SCC 406; *Jagdish Chander v. Ramesh Chander & Ors* Civil Appeal No. 4467 of 2002; *Karnataka Power Transmission Corporation Ltd & Anr v. Deepak Cables (India) Ltd* AIR 2014 SC 1626

[18] *Bihar State Mineral Dev Corpn & Anr v. Encon Builders (I) Pvt Ltd* AIR 2003 SC 3688; *Visa International Ltd v. Continental Resources (USA) Ltd* AIR 2009 SC 1366

The third element requires an intention in writing to be bound by an arbitral tribunal in a quasi judicial manner.[19] The parties had agreed in writing to be bound by the decision made by the Empowered Committee. Clause 2.1 revolves around the resolution of disputes and hence shows the required intent. In the present case, the words 'final, binding, and conclusive' show the intention on part of both the parties to be bound by the decision arrived upon by the arbitrators appointed.[20] Therefore, the respondents Clause 2 of the Share Sale Agreement indeed formulated an arbitration clause.

ii. An Arbitration Clause is not required to have a particular form

The Respondents plead that the presence of the term 'arbitration' is not required for an agreement to be termed as an arbitration agreement.[21] Moreover, there is no requirement of a person having been named therein.[22] As a result, an arbitration agreement is not required to be in any particular form.[23] What is required to be ascertained is whether the parties have agreed that if disputes arise between them in respect of the subject matter of contract such dispute shall be referred to arbitration.[24] Thus the lack of a fixed, definite clause structure unlike general arbitration agreements cannot invalidate the clause.

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[19] *Bharat Bhushan Bansal v. U.P. Small Industries Corporation Ltd.* AIR 1999 SC 899; *Gulbarga University v. Mallikarjun S Kodagali & Anr* AIR 2009 SC (Supp) 1281; *State Of Orissa & Ors v. Bhagyadhar Dash* (2011) 7 SCC 406; See also *Vishnu (D)By Lrs vs State Of Maharashtra & Ors* (2014) 1 SCC 516

[20] *State Of Orissa & Ors v. Bhagyadhar Dash* (2011) 7 SCC 406; *Patitapaban Mohapatra & Ors v. SE Eastern Circle & Ors* AIR 2008 Ori 80

[21] *Bihar State Mineral Dev Co & Anr v. Encon Builders (I) Pvt. Ltd.* AIR 2003 SC 3688; *Jagdish Chander v. Ramesh Chander & Ors* Civil Appeal No. 4467 of 2002

[22] *Smt Rukmanibai Gupta v. Collector Jabalpur and Ors* AIR 1981 SC 479

[23] *M/S Linde Heavy Truck Division Limited v. Container Corporation of India Limited & Anr* 2012 (195) DLT 366; *Bihar State Mineral Dev Co & Anr v. Encon Builders (I) Pvt. Ltd.* AIR 2003 SC 3688; *Chitram Company Pvt Ltd v. Madhya Pradesh Electricity Board* AIR 1984 MP 88

[24] ibid

B. Clause 2 remains valid even if Fraud invalidates the other Clauses

The respondents argue that if *arguendo* there were to be a *prima facie* fraud, the arbitration clause would still remain valid. This is because (i) the arbitration clause is severable from the rest of the agreement and (ii) the interpretation of the clause, if in question, should favour its existence.

i. The arbitration clause is severable from the rest of the agreement

If *arguendo,* the contract by its essence was invalidated by the alleged fraud, the mandate of the arbitration clause would not be invalidated. This is since an arbitration clause of an agreement is considered to be an agreement independent of the other terms of the agreement,[25] the invalidity of the other terms of the agreement would in no manner affect the arbitration clause.[26]

The general rule is that "*where you cannot sever the illegal from the legal part of a covenant, the contract is altogether void; but, where you can sever them, whether the illegality be created by statute or by the common law, you may reject the bad part and retain the good.*"[27] Given the fact that an arbitration clause is a collateral term of a contract distinguished from its substantive terms,[28] the respondents contend that they remain valid even if the other parts of the contract are invalidated because of an alleged fraud.[29] Thus, even if the agreement was

[25] Arbitration and Conciliation Act 1996, §16(1)(a); See also *World Sport Group (Mauritius) Ltd v. MSM Satellite (Singapore) Pte Ltd* AIR 2014 SC 968; *Reva Electric Car Company Pvt Ltd v. Green Mobil* AIR 2012 SC 739

[26] *M/S Sms Tea Estates Pvt Ltd v. M/S Chandmari Tea Co Pvt Ltd* (2011) 14 SCC 66; *Enercon (India) Ltd & Ors v. Enercon GMBH & Anr* (2014) 5 SCC 1; *Swiss Timing Ltd v. Organising Committee, Commonwealth Games 2010, Delhi* (2014) 6 SCC 677

[27] Hugh Beale, *Chitty on Contracts* (29th ed., Sweet & Maxwell, 2004)

[28] *National Insurance Co Ltd v. Boghara Polyfab Pvt Ltd* (2009) 1 SCC 267

[29] *World Sport Group (Mauritius) Ltd v. MSM Satellite (Singapore) Pte Ltd* AIR 2014 SC 968; *Southern Structurals Ltd v. KSE Board* 2008 (1) CTC 612; *Satish Chander Gupta & Sons v Union of India & Ors* 2003 (50) ARBLR 589

invalidated the arbitrator under the Arbitration and Conciliation Act would still have jurisdiction over deciding whether the fraud exists or not.[30]

Moreover, as the arbitrator has been granted the authorization to look into the existence and validity of the arbitration agreement under the *Arbitration and Conciliation Act, 1996*,[31] any decision of the arbitral tribunal entailing the invalidation of the agreement, would not lead to an *ipso jure* invalidity of the arbitration clause.[32] Thus, even if a contract having an arbitration clause framed having wide and general terms were to reach its termination, the clause survives in respect of the contract.[33]

ii. The interpretation of a clause should favour existence of arbitration

Whenever circumstances are such that two contradictory, delineated fabrications are possible, the one which gives validation to the arbitration agreement should be given preference.[34] Contract, being a commercial document must be interpreted in a manner which gives efficacy to the contract rather than invalidates it.[35] Moreover it is important to note that, "*no party can be allowed to take advantage of inartistic drafting of arbitration clause in any agreement as long as clear intention of parties to go for arbitration in case of any future disputes is evident from the agreement and the material on record, including surrounding circumstances*."[36]

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[30] *Brawn Laboratories Ltd v. Fittydent International GmbH & Ors* 2000 (2) ARBLR 64

[31] Arbitration And Conciliation Act 1996, §16; See also *Tamil Nadu Water Supply v. Aban Constructions* (2001) 3 MLJ 820

[32] Arbitration And Conciliation Act 1996, §16(1)(b); *Shri Pinaki Das Gupta v. Publicis (India) Communications* (2005) 139 PLR 26; *Swiss Timing Ltd v. Organizing Committee Commonwealth Games 2010* (2014) 6 SCC 677

[33] *Magma Leasing & Finance Ltd., Branch Manager, v. Potluri Madhavilata* 2009(4) RAJ 330 (SC); See also *Union Of India v. Kishorilal Gupta & Bros* 1959 AIR 1362

[34] *Oil and Natural Gas Commission v. Sohanlal Sharma* ILR 1969 (2) Cal 392

[35] *Union of India v. DM Revri & Co* AIR 1976 SC 2257

[36] *VISA International Ltd v. Continental Resources (USA) Ltd.* (2009) 2 SCC 55; *Powertech World Wide Ltd v. Delvin International General Trading LLC* (2012) 1 SCC 361

Therefore, certain vagueness in the wording of the contract should not be used to oppose the validity of the clause.

3. THE ORDER PASSED BY THE COMPETITION COMMISSION OF INDIA IS GOOD IN LAW AND THE WRIT PETITION AGAINST THE ORDER IS *ULTRA VIRES*

The Respondents humbly submit that the investigation ordered by the Competition Commission of India (CCI) under Section 26(1) of the Competition Act, 2002 is not bad in law. The order is within the scope of the Respondent Commission's powers and in accordance with the law. The Respondents submit the following twofold argument: *firstly*, that there exists a *prima facie* case against Swasth to allow the CCI to order an investigation into the matter and *secondly*, the order does not affect the rights of the parties and therefore, cannot be challenged under before the Court.

A. There exists a *prima facie* case against Swasth to allow the CCI to order an investigation into the matter under section 26(1) of the Competition Act, 2002.

Under the Competition Act, upon the receipt of any information alleging a practice of abuse of dominant position in a market[37], the CCI may order the Director General to inquire into the alleged contraventions on a *prima facie* case.[38] In the present case, the Respondents contend that there existed a *prima facie* case to direct the Director General to investigate further into the alleged contraventions by Swasth. The Respondents offer the following argument for the same: *one*, the party had a dominant position in the relevant market and *two*, an abuse of the

[37] Competition Act 2002, § 19(1)

[38] Competition Act 2002, § 26(1). See also Competition Commission of India (General) Regulations 2009, r. 18; *Arshiya Rail Infrastructure Ltd v. Ministry of Railways & Container Corporation of India Ltd* [2013] 112 CLA 297; *Competition Commission of India v. Steel Authority of Indian Ltd & Anr* (2010) 10 SCC 744

dominant position by indulging in practices enumerated in section 4(2) of the Competition Act[39] and *three*, the order for investigation was in keeping with the public policy of India.

i. Swasth is a dominant player in the market for life saving drugs

The assessment of a firm's dominance in a market is done by reading section 4 with 19(4) of the Competition Act.[40] As such, the elements that determine a dominant position are: (i) a position in the relevant market and (ii) a position that enables a firm to operate and influence competitive forces in the relevant market.[41]

Novel and Inventive fall within the same relevant market

While determining the relevant market at the pre-investigation stage, the CCI is not required to conclusively establish the relevant geographic, product or even the relevant market to prove dominance of an alleged offender.[42] Only a *prima facie* view of the relevant market was needed to be taken.

The Respondents contend that Novel and Inventive fall within the relevant market on application of the SSNIP test.[43] According to the facts of the case, Swasth's life saving drug "Inventive" was the 'premier' drug available in the market before Lifeline's 'considerably

39 *Kingfisher Airlines Limited, Dr Vijay Mallya v. Competition Commission of India & Ors* (2010) 4 Comp LJ 557; *Sanwar Mal Agarwal, Prop Jupiter Industries, Rajasthan v. Punjab National Bank & Anr* Case No. 08/2010 (CCI); *Sumit Sahni & Anr v. Sumel Heights Pvt Ltd* 2013 Comp LR 0673

40 *Magnolia Flat Owners Association & Anr v. DLF Universal Ltd & Ors* 2012 Comp LR 94; *Prints India v. Springer India Pvt Ltd & Ors* [2012] 109 CLA 411

41 Competition Act 2002, § 4 Explanation (a); T Ramappa, *Competition Law in India* (3rd edn, Oxford University Press 2014) 159; *United States v. EI du Pont de Nemours & Co* 351 US 377

42 *Kingfisher Airlines Limited, Dr Vijay Mallya v. Competition Commission of India & Ors* (2010) 4 Comp LJ 557; *Grasim Industries Ltd v. Competition Commission of India* 2014 (206) DLT 42

43 *MCX Stack Exchange v. National Stock Exchange of India Ltd* 2011 Comp LR 129; Øystein Daljord, Lars Sørgard & Øyvind Thomassen, 'The SSNIP Test and Market Definition with the Aggregate Diversion Ratio' (2009) 5(3) JCLE 563

cheaper' failed launch of "Novel" into the market.[44] The launch of Novel was 'eagerly awaited' in the market, ostensibly as a viable, cheaper alternative to the dominant Inventive; thus it was a part of the 'life saving drug' product market.[45] So, if Inventive's price were to increase in a small but significant non-transitory (SSNIP) manner, consumers would shift to the cheaper Novel (assuming its existence in the market) due to its similarity in use.

Swasth had a dominant position in the market

The Respondents also submit that the possession of a patent in the relevant market, which allowed Swasth to have an exclusive legal monopoly over the said market, put Swasth in a position of dominance in the market. This is because possession of restricted domain over an area of the market by virtue of exclusive intellectual property rights gives a firm *prima facie* dominance over a market.[46] Thus, according to the SSNIP test, if there was a small but significant non-transitory increase in the price of Inventive, consumers could not have shifted to other products due to its exclusiveness, which implies Inventive was in a position of monopoly. This superior position in the relevant market displays a dominant position in parallel with section 19(4) of the Act.

ii. Swasth abused its dominant position in the market

The Respondents humbly contend that Swasth *prima facie* abused its dominance by indulging in practices specified as anti-competitive in section 4(2)(b)(ii) and 4(2)(c) of the Competition Act. The use of litigation as an abuse of dominant position can be established when the

[44] Factsheet at ¶ 11

[45] Competition Act 2002, § 2(r)

[46] *Schering Corporation & Ors v. Alkem Laboratories Limited & Anr* 2010 (42) PTC 772; *Intex Technologies (India) Ltd v. Telefonaktiebolaget LM Ericsson (Publ)* Case No. 76/2013 (CCI); Atul Patel, Aurobinda Panda, Akshay Deo, Siddhartha Khettry & Sujith Philip Mathew, 'Intellectual Property Law & Competition Law' (2011) 6(2) JICLT 120; Jae Hun Park, *Patents and Industry Standards* (1st edn, Edward Elgar Publishing 2010) 87; Floyd L Vaughan, *The United States Patent System* (1st edn, University of Oklahoma Press 1956) 65-67

cumulative criteria of competitive intent are met: (i) if the legal action was not to establish a legitimate right but to harass the competitor and (ii) if it was conceived as a plan to eliminate competition.[47] By using their IP rights as a tool to block the launch of prospective competition, Swasth's activities have fulfilled the cumulative criteria of anticompetitive intent and have consequently restricted scientific development to the detriment of consumers.[48] Moreover, the abuse of IPRs to deny market to Lifeline is within the scope of abuse in section 4(2)(c).[49] Thus the suit filed by Swasth was in abuse of its dominant position and hence, anti-competitive and in bad faith.

iii. The order for investigation was in keeping with the public policy of India

The primary reason for providing protections and rights to those possessing some form of special intellectual property is that such property is seen as benefitting the society by stimulating further competition and innovative activity, furthering public interest.[50] Indian Patent law, greatly influenced by the TRIPs agreement,[51] seeks to further the interest of consumers.[52] The Respondents argue that as any anti-competitive act is anti-consumer, and

[47] *ITT Promedia NV v. EC Commission* [1998] 5 CMLR 491

[48] Competition Act 2002, § 4(2)(b)(ii); TRIPS Agreement 1994, a. 8, 40; *Arshiya Rail Infrastructure Ltd v. Ministry of Railways & Anr* 2012 Comp LR 937; *Novartis AG & Ors v. Union of India & Ors* AIR 2013 SC 1311; Emanuela Arezzo, 'Intellectual Property Rights at the Crossroad Between Monopolization and Abuse of Dominant Position: American and European Approaches Compared' (2006) 24 JJCIL 455

[49] *GKB Hi Tech Lenses Pvt Ltd v. Transitions Optical India Pvt Ltd* Case No. 01/2010 (CCI); *California Motor Transport v. Trucking Unlimited* 404 US 508 (1972)

[50] *Entertainment Network (India) Ltd v. Super Cassette Industries Ltd* AIR 2009 SC (Supp) 1150; Kevin Garnett & Gillian Davies, *Copinger and Skone James on Copyright* (vol 1, 15th edn, Sweet & Maxwell 2005) 27

[51] *Novartis AG v. Union of India & Ors* AIR 2013 SC 1311; Jakkrit Kuanpoth, *Patent Rights in Pharmaceuticals in Developing Countries: Major Challenges for the Future* (1st edn, Edward Elgar Publishing 2010) 46-48

[52] *Bishwanath Radhey Shyam v. HM Industries* AIR 1982 SC 1444; Anil Suraj, 'Transfer of Technology in India: Interface of IPRs and Competition Policy' (2012) 8 Ind JL&T 25; See also *Novartis AG v. Union of India & Ors* AIR 2013 SC 1311

that the suit filed by the Appellants was anti-competitive, not investigating into the charge would be against public policy.[53]

The infringement suit filed in the Delhi High Court by the Appellants in order to obtain an injunction was in bad faith. This can be inferred from the facts and circumstances of the case.[54] After obtaining the interim injunction that prevented the launch of Novel, Swasth launched its own version of a similar cost effective drug that cornered a major portion of the market and then, withdrew the infringement case.[55] In such a case, where the intention of the suit is to block or to drive a competitor out of business, rather than assert a legitimate right, the suit is presumed to be baseless.[56] A well-timed suit such as the one under question that causes the competitor huge losses to the competitor and consumer points to an ulterior, anticompetitive intent establishes an antitrust violation.[57] This is because the judicial process has been used as an instrumentality to achieve a collateral objective, rather than to assert a legitimate right.[58]

B. The order does not affect the rights of any party and therefore cannot be challenged under Article 226 of the Constitution.

According to the facts of the case, the Appellants filed a writ petition in the Delhi High Court against the order of the Respondent Commission to investigate a *prima facie* case under

[53] Competition Act 2002, Statement of Objects and Reasons; See also *Competition Commission of India v. Steel Authority of Indian Ltd & Anr* (2010) 10 SCC 744; *Hindustan Lever v. Director General (Investigation & Registration) & Anr* AIR 2001 SC 661; *In Re: Domestic Air Lines* 2012 Comp LR 154

[54] *Ayancheri Kovilakath Sankara Varma Raja v Ayancheri Kovilakath Cheria Rama Varma Raja & Ors* AIR 1939 Mad 902

[55] Factsheet at ¶11

[56] *California Motor Transport v.Trucking Unlimited* 404 US 508 (1972)

[57] *Otter Tail Power Co v. United States* 410 US 366 (1973); *California Motor Transport v.Trucking Unlimited* 404 US 508 (1972)

[58] *Kishore Samrite v State of Uttar Pradesh & Ors* AIR 2012 SC (Supp) 699; *V Chandrasekaran & Anr v. The Administrative Officer & Ors* (2012) 12 SCC 133

section 26(1) of the Competition Act, 2002.[59] A writ petition before a High Court can be filed under article 226 only to enforce a constitutional or legal right.[60] The Respondents contend that the order of the Competition Commission to investigate the informant's grievance was merely administrative in nature and therefore, did not affect any rights of the Appellants so as to be questioned in this Hon'ble Court through article 226.

On receipt of information of contravention of the provisions of the Competition Act, the Commission has the statutory power to order an investigation with the Director General if it finds a *prima facie* case.[61] In the case of *Competition Commission of India v. Steel Authority of India Ltd & Anr*[62] it was held that such an order under section 26(1) is merely a direction simpliciter to one of its own wings departmentally and is administrative in nature. The formation of such a *prima facie* opinion is thus without entering upon any adjudicatory process as no detailed reasons or principles of natural justice are needed to be observed.[63] Therefore, the function, being inquisitorial, neither effectively determines or affects the rights or obligations of any of the parties nor does it entail any civil proceedings.[64] In such a case, the order cannot be challenged by invoking the Hon'ble Court's writ jurisdiction.

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[59] Factsheet at ¶13

[60] *SP Gupta v. Union of India & Anr* AIR 1982 SC 149; *Kansing Kalusing Thakore & Ors v. Rabari Maganbhai Vashrambhai & Ors* (2006) 12 SCC 360; *G Bassi Reddy v. International Crops Research Institute & Anr* AIR 2003 SC 1764; See also *Bandhua Mukti Morcha v. Union of India & Ors* AIR 1984 SC 802

[61] Competition Act 2002, § 26(1)

[62] *Competition Commission of India v. Steel Authority of India Ltd & Anr* (2010) 10 SCC 744

[63] ibid; *South Asia LPG Company Pvt Ltd v. Competition Commission of India & Ors* 2013 Comp LR 691 (Delhi)

[64] *Competition Commission of India v. Steel Authority of India Ltd & Anr* (2010) 10 SCC 744; *Namrata Marketing Pvt Ltd v. Competition Commission of India & Ors* AIR 2014 All 11

PRAYER

In light of the questions raised, issues presented and authorities cited, the respondents most humbly and respectfully pray before the Hon'ble Supreme Court to dismiss the appeals and adjudge and declare:

1. That the Scheme of arrangement is not to be set aside in view of the Foreign Lenders not constituting a 'class of creditors' so as to be required to receive a notice to attend the meeting of creditors.
2. Clause 2 of the share sale agreement constitutes an arbitration clause and hence the disputes be referred to the Empowered Committee under the clause.
3. The order of the CCI under section 26(1) of the Competition Act, 2002 not to be set aside.

The Court may also be pleased to pass any such order as it may deem fit in terms of equity, justice and good conscience.

For this act of kindness, the Respondents shall duty bound forever pray.

Sd/-

(Counsel for the Respondents)