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

2014

NLIU, BHOPAL

K

IN THE HON'BLE SUPREME COURT OF INDIA

MEMORANDUM

For

RESPONDENT

FOREIGN LENDERS (APPELLANT)

v.

LIFELINE (RESPONDENT)

WITH

LIFELINE (APPELLANT)

v.

PROMOTERS OF JEEVANI (RESPONDENT)

WITH

LIFELINE AND CCI (APPELLANT)

v.

SWASTH (RESPONDENT)

LIST OF ABBREVIATION

AIR…….All India Report
All……Allahabad
AP……...…….Andhra Pradesh
Bom…….....……..…….…..Bombay
Cal…….……..……Calcutta
CCI……Competition Commission of India
Co……...….. Company
CompCas……...……Company Case
CompLJ……Company Law Journal
CompLR……..Company Law Review
C.W.N…….Calcutta Weekly Notes
Del……...….Delhi
DG……..…Director General
ECR……..…..Excise and Custom Report
FDA…….….Food And Drug Administration
HC……..High Court
IPRs……..…Intellectual Property Rights
Kar…….……..Karnataka
P & H……...……...Punjab & Haryana
SC…..……Supreme Court
SCC…...…….Supreme Court Cases
SCL……..……SEBI and Corporate Laws
SCR…….……Supreme Court Reporter
SLP……...Special Leave Petition
u/s.. …….……..Under Section
UOI……..…..……Union of India

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Visa International Ltd. vs. Continental Resources (USA) ltd	*(2009) 2 SCC 55* *Pg. -xx ; para- 24.*

LIST OF BOOKS:

1. A Ramaiya *Guide to companies act 2013*, 16 edition, Reprint 2006, Part 3
2. A.K Majumdar, G.K Kapoor *Company law and practice*, Taxman, 15th edition
3. Bharat's *corporate mergers amalgamation and takeover*, 5th edition 2008
4. Compition law by avtar singh
5. Handbook *on Merger, amalgamation and takeover* 5th edition CCH a wolter kluwer businss
6. Jack S. Levin, Martin D. Ginsburg *Merger, Acquisition and buyouts*, vol.1 chapter1-5 january 2008
7. J. Fred Weston and Samuel C. Weaver *Merger and acquisition*
8. S. Ramanujam *Mergers ETAL* wadhwa Nagpur 2nd edition Reprint 2007
9. Taxman's *company law digest* (1931-2009) vol.1
10. Taxman's *corporate law* 19th edition 2009
11. Taxman's *master guide to companies act* 2013

WEBSITES REFERRED:

1. www.maupatra.com
2. www.scconline.com
3. www.rbi.org

STATUES AND BILLS:

1. Arbitration and conciliation act, 1996
2. Companies Actct 1956
3. Companies Act 2013
4. Competition Act 2002
5. SEBI (Substantial Acquisition of Shares And Takeovers) Regulation, 2011

STATEMENT OF JURISDICTION

THE RESPONDENT HAVE THE HONOR TO SUBMIT BEFORE THE HON'BLE SUPREME COURT OF INDIA, THE MEMORANDUM FOR THE RESPONDENT UNDER ARTICLE 132 (REGULAR APPEAL) OF THE CONSTITUTION OF INDIA, 1950.

THE PRESENT MEMORANDUM SETS FORTH THE FACT, CONTENTIONS AND ARGUMENTS IN THE PRESENT CASE

STATEMENT OF FACTS

Lifeline a major producer of food products approached Jeevani, a pharmaceutical manufacturing industry for a possible partnership. Both companies on 27th January 2012 decided to merge and it was decided that Jeevani would completely merge into Lifeline and all assets and liabilities of Jeevani would be transferred to Lifeline. It was also decided that the three promoters of Jeevani who are also majority shareholders in the company would sell their entire promoter shareholding i.e.18% of their stake in Jeevani to Lifeline. The sale of stake was affected on 23rd March 2012 vide a separate sale agreement between Lifeline and the Promoters which contained specific representations as regards disclosure of information, by either of the parties, which may be vital to the transaction in which the parties were entering into. The agreement also specifically provided that all intangible properties including the active R & D and IPRs of Jeevani would become the property of Lifeline and all rights accruing from it would vest with Lifeline.

The scheme was finalized on 5th march 2012 after which it was sent to Bombay stock exchange for approval but BSE did not approve the scheme. On 30th march 2012 Jeevani filed a case in Delhi High Court u/s 391 of Companies act 1956, now 231 of the Companies act 2013, for initiating the procedure for approval of the scheme. The court passed an order under chapter 5 of companies act for meeting of the creditors to be convened. Jeevani issued a notice of meeting to its creditors by publishing an advertisement in a local English language newspaper and local language newspaper containing the terms of the proposal and explaining its effect. A meeting of the creditors to whom notice was sent, was accordingly held and resolutions supporting the Scheme were passed by a vote of majority. On 5th july 2013 Delhi High Court sanctioned the scheme. Lifeline also approached the Bompaby High Court for approval of the scheme of arrangement under the relevant section of the Companies act which also got approved.

In August 2013 the foreign creditors filed an application before the company judge recalling the order passed on 5th July 2013 sanctioning the scheme. The said creditors are foreign lenders who prior to this arrangement had jointly invoked arbitration proceedings against Jeevani before a foreign arbitral tribunal constituted in Hong Kong and a foreign arbitral

award was passed on 27th July 2010 in favor of the foreign lenders in which Jeevani was to pay the amounts as stated in the award but till date no proceeding has been initiated to enforce the award. The foreign lenders contended that they had not received notice of the Scheme and were not able to attend the meeting of creditors. They further contended that they constituted a separate class of creditors and in view of the fact that there was no meeting convened for them, the Scheme should be set aside. The company contended that the foreign creditors are not the creditors of the company so they should not be any notice. The company judge dismissed the application filed by the foreign creditors and refused to set aside the scheme. The appeal went to the division bench of Delhi High Court who after consideration of facts dismissed the appeal of the foreign creditors and therefore the present appeal arises.

When the newly merged lifeline continued the business of Jeevani of supplying generic drugs to the USA it received notices from the US Food and Drug Administration (the FDA) for providing below par quality of drugs and in violation of the requisite production parameters set out by the FDA. On further scrutiny, it was unearthed that the investigation by FDA on drugs produced by Jeevani at its plants in India was commenced much before the merger took place. Lifeline filed a suit against promoters before Delhi High Court regarding the damages arising out of breach of contract on 23 March 2012, for compensation of wrongful gain and unjust enrichment of promoters by way of defrauding and misrepresenting Lifeline. The Promoters contended that the Delhi High Court has no jurisdiction as the agreement dated 23rd March, 2012 between the parties had an arbitration clause and any dispute arising between them should be referred to arbitration.

The single judge bench of Delhi High Court held that this could not be a ground of arbitration clause and therefore the court has the jurisdiction to look into the matter. This order was appealed by the promoters in Division Bench and the Division Bench held that the single bench judge erred in its decision and those clauses constitutes an arbitration clause and the dispute to be decided by the Empowered Group in terms of the agreement. The Lifeline aggrieved with the decision of the Division Bench of Delhi High Court and has approached the SC.

Lifeline filed an application before Competition Commission of India against Swasth alleging that Swasth was abusing the dominant position by indulging in bad faith litigation. The CCI based on the litigation filed by lifeline on the prima facie of the case believed that Swasth

might have abused the dominance and passed an order under sec 26(1) of competition act to the DG to investigate on the information given and submit its report within 45 days and the report is still awaited. Swasth was aggrieved by the order of the CCI filed a writ petition making Lifeline and CCI a party in Delhi High Court. Swasth submitted that CCI's Order for directing investigation was bad in law as Swasth in its endeavor to protect its IPRs cannot be held, even prima facie, to be abusing its dominance .on hearing the arguments from both the party the Delhi High Court held that CCI on prima facie finding ordered for investigation and as such no adverse effect is found on Swasth and there is no reason to interfere with in investigation of DG CCI and dismissed the writ petition filed by Swasth. The division bench did not find any reason to interfere with the order of the single bench judge of Delhi High Court.

QUESTIONS PRESENTED

I. WHETHER THE FOREIGN LENDERS WHO OBTAINED DECREES AGAINST THE COMPANY FORMED A SEPARATE CLASS OF CREDITORS FORM THE OTHERS WHO HAD NOT OBTAINED DECREES, AND WAS IT NECESSARY TO CONVENE A MEETING OF THE DECREE HOLDER CREDITORS BEFORE THE SCHEME COULD BE MADE BINDING ON THEM?

II. WHETHER CLAUSE 2.1 CONSTITUTES AN ARBITRATION CLAUSE AND ACCORDINGLY SHOULD BE REFERRED TO THE EMPOWERED GROUP COMMITTEE COMPRISING OF THREE EXECUTIVE LEVEL PERSONNEL OF THE COMPANY?

III. WHETHER A DIRECTION PASSED BY THE COMMISSION U/S 26 (1) OF THE ACT WHILE FORMING PRIMA FACIE OPINION WOULD BE APPEALABLE U/S 53 (A) (1) OF THE ACT?

SUMMARY OF ARGUMENTS

I. WHETHER THE FOREIGN LENDERS WHO OBTAINED DECREES AGAINST THE COMPANY FORMED A SEPARATE CLASS OF CREDITORS FORM THE OTHERS WHO HAD NOT OBTAINED DECREES, AND IT WAS NECESSARY TO CONVENE A MEETING OF THE DECREE HOLDER CREDITORS BEFORE THE SCHEME COULD BE MADE BINDING ON THEM ?

Foreign lenders do not constitute a separate class of creditors and are included in the ambit of secured creditors. If due to inadvertent omission or a bona fide mistake, a creditor of the company is not issued notice under section 391, it would not be fatal to the resolutions passed in such a meeting, held without notice to the creditor. All the requirements of section 391 of the Companies act 1956 have been duly complied by the company and all the necessary approvals have been obtained. And the company further states that the scheme does not harm the interest of the creditors in any manner whatsoever. As already being mentioned in the scheme that all the assets and liabilities of the company Jeevani would stand transferred to company Lifeline after the merger. Therefore all the litigations, suits, appeals, proceedings, etc. initiated by or against the transferor-company shall be substituted with the name of transferee-company on the scheme being sanctioned.

II. WHETHER CLAUSE 2.1 CONSTITUTES AN ARBITRATION CLAUSE AND ACCORDINGLY SHOULD BE REFERRED TO THE EMPOWERED GROUP COMMITTEE COMPRISING OF THREE EXECUTIVE LEVEL PERSONNEL OF THE COMPANY?

There is no merit in the submission that the impugned clause is not an arbitration clause. The mere absence of the word 'arbitration' does not make any difference. The substance of the clause clearly is that all questions and issues relating to the contract between the parties will be referred to the empowered committee comprising of three executive personnel of the company and their decision shall be final and legally binding on the parties. It is the substance and not the form of an arbitration clause which is material. One must examine the true intent and purport of the agreement. The courts have laid emphasis on (1) existence of disputes as against intention to avoid future disputes; (2) the tribunal or forum so chosen is intended to act judicially after taking

into account relevant evidence before it and the submissions made by the parties before it; and (3) the decision is intended to bind the parties.

III. WHETHER A DIRECTION PASSED BY THE COMMISSION U/S 26 (1) OF THE ACT WHILE FORMING PRIMA FACIE OPINION WOULD BE APPEALABLE U/S 53 (A) (1) OF THE ACT?

It can be appealed if it can be proved that the expression 'any direction can' include the direction given by the CCI to DG to investigate the matter under section 26(1) of the competition Act 2002. Therefore the expression `any direction issued' should be read disjunctive and that gives a complete right to a party to prefer an appeal under Section 53A, against a direction for investigation, as that itself is an appealable right independent of any decision or order which may be made or passed by the Commission. Moreover the direction issued by the CCI to DG to make investigation does not adhere the principles of natural which makes it improper and arbitrary.

ARGUMENTS ADVANCED

I. WHETHER THE FOREIGN LENDERS WHO OBTAINED DECREES AGAINST THE COMPANY FORMED A SEPARATE CLASS OF CREDITORS FORM THE OTHERS WHO HAD NOT OBTAINED DECREES, AND IT WAS NECESSARY TO CONVENE A MEETING OF THE DECREE HOLDER CREDITORS BEFORE THE SCHEME COULD BE MADE BINDING ON THEM ?

The scheme of merger was formulated between Jeevani and Lifeline wherein it was decided that Jeevani would completely merge into Lifeline and all the assets and liabilities of Jeevani would be transferred to Lifeline. On 30th March 2012, Jeevani and Lifeline filed an application under Section 391 of the Companies Act, 1956 now section 231 of companies act, 2013 for initiating the process of approval of the Scheme by the Hon'ble Delhi High Court. The Hon'ble Company Judge in accordance ordered for a meeting of the creditors to be convened. Jeevani issued a notice of meeting to its creditors by publishing an advertisement in a local English language newspaper and local language newspaper containing the terms of the proposal and explaining its effect. A meeting of the creditors to whom notice was sent, was accordingly held and resolutions supporting the Scheme were passed by a vote of majority. Thereafter the Scheme was also approved by the Hon'ble Delhi High Court on 5th July 2013. Around the same time, Lifeline had separately approached the Bombay High court the same was approved.

The said creditors are foreign lenders mainly foreign banks who prior to this arrangement had jointly invoked arbitration proceedings against Jeevani, before a Foreign arbitral tribunal constituted in Hong Kong. And on 27th July 2010, a foreign arbitral award was passed in favour of the foreign lenders in which Jeevani was to pay the amounts as stated in the award. The said award is binding on the petitioner for all purposes as the same has not been set aside.

The contention raised by the foreign lenders in the lower courts was that they constitute a separate class of creditors and since there was no notice sent to them for the purpose of meeting under section 391 of the Companies act 1956, now section 231 of Companies act 2013, the sanctioned scheme should be set aside.

First of all the company would contend that the foreign lenders are not the creditors of the company and even if they succeed in establishing that they are the creditors, they certainly do not form a separate class of creditors and due to inadvertent omission or a bona fide mistake if some creditors of the company are not issued with notice under Section 391, it would not be fatal to the resolutions passed in such a meeting held without notice to such creditors and the approval of the majority of creditors to the scheme of arrangement should be given more preference. In the case of Bhagat Ram Kohli v. Angel's Insurance Co. Ltd. [1] while dealing with similar provision in Indian Companies Act of 1913, Section 153, the Lahore High Court held as under:

"Section 153 does not make it obligatory either upon the Court or the company to serve a notice of the creditors' meeting on each and every creditor of the company and we have not been referred to any law which would invalidate a decision arrived at by the creditors and the company in the absence of any individual creditor".

The leading judgment of the Supreme Court on the subject is in Miheer H. Mafatlal v. Mafatlal Industries Ltd. [2]The judgment of the Supreme Court is an authority for the proposition that a separate meeting of a class of members or a class of creditors is required to be convened where a compromise or arrangement is proposed between the Company and that class of members of creditors. Where the same terms of compromise are offered to a class of members or creditors, no separate meeting of a sub class among them is required.

In the case of Arvind Mills Limited In re[3].the Supreme court looked into the question whether foreign currency secured lenders constitute a separate class?

The Court held that all secured creditors whether lenders in foreign currency and lenders in Indian rupees constitute one single class of creditors. The classification of members or creditors can be founded on the basis of difference in the terms offered under the Scheme. The difference in terms of the scheme can only be the criterion for identifying separate class for the purpose of convening separate meeting for such class. The inter se differences/disputes amongst some

[1] [1937] 7 Comp. Cas. 161
[2] 1996 (87) Comp. Cas 792
[3](2002) 37 SCL Guj 660

secured creditors could not be the criterion for constituting separate class of secured creditors in foreign currency. The foreign creditors were not entitled to be treated as a different class of secured creditors, a class within the class as there was no conflict of commercial interest between all of them especially when the same terms and conditions had been offered to all the secured creditors.

In Barisal Loan Office Ltd. V. Shasthi Charan Bhattacharya[4], it was held by Guha and Lodge JJ. that the scheme of composition was applicable to all creditor a, including those who had already obtained decrees, and it was not necessary that there should be a separate meeting of the decree-holder creditors. This decision was affirmed by Mitter J. in Serajganj Loan Office v. Nilkantha Lahiri[5].

In Vikrant Tyres Ltd., In re[6] the court held that if due to inadvertent omission of a bona fide mistake, a creditor of the company is not issued notice under section 391of the companies act 1956, it would not be fatal to the resolutions passed in such a meeting, held without notice to the creditor. The whole object behind this statutory requirement of issuing a notice to the shareholder and the creditor of the company is to hear all the affected persons, as the scheme proposed, if accepted by the High Court, would affect the right of such interested persons. The law requires not only personal service of notice to the creditors and shareholders' but also a public notice by way of paper publication. But section 391 does not make it obligatory either upon the court or the company to serve a notice of the creditors meeting on each and every creditor of the company, on failure of which the law does not declare that such a meeting held is invalid and any resolution passed in such a meeting is void.

All that has to be seen is by sanctioning of the scheme, whether the interest of the creditor is protected and the scheme provides for any reasonable mode in which provision is made for discharge of that liability and in case of merger whether the transferee-company is acknowledging the liability and able to discharge the said liability. When a statutory majority of creditors approve the scheme, a creditors or minority of creditors cannot be permitted to veto the

[4] (35) 39 C.W.N. 1198
[5] (35) 22 A.I.R. 1935 Cal. 777
[6] [2003] 47 SCL 613 / [2005] 126 Comp. Cas. 288 (Kar.)

majority view and block the approval of the scheme, as that is precisely the reason why the petition is filed before the court for sanction and once sanction is granted, the majority view is respected, and by the order of sanction, the majority is bound by such scheme. Therefore, the non-issue of notice to a creditor will not vitiate a meeting conveyed with the permission of the court under section 391 (2).

In the present case it is already mentioned that all the assets and liabilities of the company Jeevani would stand transferred to company Lifeline after the merger. Therefore all the litigations, suits, appeals, proceedings, etc. initiated by or against the transferor-company shall be substituted with the name of transferee-company on the scheme being sanctioned.

And it is also not correct to contend that the appellant has obtained an order from this Court by suppressing material facts since all the relevant information as required under the Act has been placed before this Court that so long as the securities were kept intact and also the liabilities were equally carried to the transferee company, no prejudice would be caused to the foreign lenders. In the light of this categorical statement in the scheme and the pleadings in the case, the interest of the aforesaid creditors is fully protected. Even otherwise, it is made clear, in the event those creditors ultimately succeed in the pending legal proceedings the transferee-company shall discharge the amounts due under the award. Thus, the interest of the aforesaid creditors is fully secured.

No scheme of merger can be put into effect without the sanction of the Court, even if it is unanimously passed by the creditors. If the Court is of the view that the interests of the creditors are adversely affected by the merger, it can insist on refusing to sanction the scheme unless the consent of the creditors has also been obtained. None of the provisions of the scheme offends any law. It is not against public interest. The Delhi high Court had sanctioned the scheme filed by the transferee-company. All the requirements of section 391 of the Companies act 1956 have been duly complied by the company and all the necessary approvals have been obtained. And the company further states that the scheme does not harm the interest of the creditors in any manner whatsoever.

The transferor-company was a profit-making company. Its amalgamation with the transferee-company, which held all its shares, would not adversely affect the creditors of the transferor-

company because they would now become creditors of the transferee-company and considering all these averments issuance of individual notice to creditors.[7]

And also the intention and the desire of a large number of creditors of a company could not be ignored in deciding whether the company should be wound up or not and merged with another company unless shown that the majority of the creditors have coerced the minority or intended to further their special interest at the cost of others, the desire of the majority should be favorably considered and it is always open to the banking companies to take steps for recovery of the money before the Recovery Tribunal.

The meeting of the creditors has not been convened since their rights are not affected and more particularly, the secured creditors and the scheme of arrangement/amalgamation is between the appellant and its shareholders and not between the appellant and its creditors; that nothing prevented the secured creditors themselves convening a meeting to discuss about the scheme of arrangement/amalgamation; that the secured creditors did not point out any defect in the scheme; that even assuming that there is a technical violation of the agreement signed by the appellant with secured creditors by its failure to obtain prior permission for the amalgamation/arrangement the same will not affect the interest of the secured creditors since their security are intact; that under such circumstances, the omission on the part of the appellant in not obtaining prior sanction from the secured creditors for the said arrangement/amalgamation did not affect the interest of the secured creditors.

In such cases, unless there is material before the Court to demonstrate that by a course of devious conduct, the Company has deliberately avoided to transmit individual notices, isolated instances cannot lead to the invalidation of a meeting held to consider a scheme propounded under Section 391 of the Companies' Act, 1956.

Clause (a) of Sub-section (1) contemplates a situation where a compromise or arrangement is sought between a Company on one hand and its creditors or a class of them on the other. Similarly, under Clause (b) a compromise or arrangement may take place between the Company

[7] Kaveri Entertainment Ltd., In re [2003] 117 Comp. Cas. 245/45 SCL 294 (Bom.)

on the one hand and its members or a class of them on the other. Sub-section (1) contemplates the holding of a meeting of the creditors or a class of creditors or of the members or class of members. The statute contemplates the holding of a meeting of a class of creditors or, as the case may be, a class of members where the compromise or arrangement is sought to be effected not with the creditors or members in general, but with a particular class among them. In such a case, the compromise or arrangement upon being sanctioned would affect the rights of a class of members or a class of creditors. Hence it is, that class whose rights are to be affected that is furnished with an opportunity of giving vent to its views at a meeting of the class

It is, therefore, obvious that unless a separate and different type of scheme of compromise is offered to a sub-class of a class of creditors or shareholders otherwise equally circumscribed by the class no separate meeting of such sub-class of the main class of members or creditors is required to be convened.

The Courts below had negatived this contention on the ground that the foreign lenders who obtained decrees against the company did not form a separate class from the others who had not obtained decrees and the scheme adopted by the majority of the creditors of the company was binding upon the appellant. In the background of these settled legal position, if we look into the scheme which is placed before court for sanction the material on record clearly discloses that the company has complied with all the statutory requirements as contemplated under Section 391 of the Companies Act.

II. WHETHER CLAUSE 2.1 CONSTITUTE AN ARBITRATION CLAUSE AND ACCORDINGLY SHOULD BE REFERRED TO THE EMPOWERED GROUP COMMITTEE COMPRISING OF THREE EXECUTIVE LEVEL PERSONNEL OF THE COMPANY?

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.

There is no merit in the submission that the aforesaid clause is not an arbitration clause. The mere absence of the word 'arbitration' does not make any difference. The substance of the clause clearly is that all questions and issues relating to the contract between the parties will be referred to the empowered committee comprising of three executive personnel of the company and their decision shall be final and legally binding on the parties. It is the substance and not the form of an arbitration clause which is material.

In Visa International Ltd. vs. Continental Resources (USA) ltd[8], and also in Rukmanibai Gupta v. Collector ,Jabalpur[9] the supreme court ruled that an arbitration clause is not required to be stated in any particular form. If the intention of the parties to refer the dispute to arbitration can be clearly ascertained from the terms of the agreement, or is otherwise clear it is immaterial whether or not the expression "arbitration" or "arbitrator" has been used. In this case Supreme Court dwelt upon the fact that disputes were referred to arbitration and the fact that the decision of the person to whom the disputes were referred was made final, as determinative of the nature of the agreement which the Court held was an arbitration agreement.

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 then such an arrangement would spell out an arbitration agreement.

One must examine the true intent and purport of the agreement. The courts have laid emphasis on (1) existence of disputes as against intention to avoid future disputes; (2) the tribunal or forum so chosen is intended to act judicially after taking into account relevant evidence before it and the submissions made by the parties before it; and (3) the decision is intended to bind the parties.

A passage from Russel on Arbitration [10]may be referred to with advantage:

If it appears from the terms of the agreement by which a matter is submitted to a person's decision that the intention of the parties was that he should hold an inquiry in the nature of a judicial inquiry and hear the respective cases of the parties and decide upon evidence laid before him, then the case is one of an arbitration.

---

[8] *(2009)2 SCC 55*
[9] AIR 1981 SC 479: (1980) 4 SCC 556
[10] 19th Edn., p. 59

Clause 2.1 as constituted to be a valid arbitration agreement it would necessarily follow that the decision of the Arbitrator named therein would be rendered only upon allowing the parties to adduce evidence in support of their respective claims and counter claims as also upon hearing the parties to the dispute. For the purpose of constituting the valid arbitration agreement, it is not necessary that the conditions as regards adduction of evidence by the parties or giving an opportunity of hearing to them must specifically be mentioned therein. The expression 'decision' subsumes adjudicating of the disputes. Here in the instant case, it will bear repetition to state, that the disputes between the parties arise out of a contract and in relation to matters specified therein and, thus, were required to be decided and such decisions are not only final and binding on the parties, but they are conclusive which clearly spells out the finality of such decisions as also its binding nature.

The very fact that Clause 2.1 has been inserted by the parties despite the clauses for prevention of dispute is itself a pointer to the fact that the parties to the contract were ad idem that the dispute and differences arising out of or under the contract should be determined by a domestic tribunal chosen by them.

In the case of K.K. Modi v. K.N. Modi & Ors[11] this court enumerated the essential attributes of a valid arbitration agreement:

"1. The arbitration agreement must contemplate that the decision of the tribunal will be binding on the parties to the agreement,

2. That the jurisdiction of the tribunal to decide the rights of parties must be derived either from the consent of the parties or from an order of the Court or from a statute, the terms of which qmake it clear that the process is to be an arbitration,

3. The agreement must contemplate that substantive rights of parties will be determined by the agreed tribunal,

4. That the tribunal will determine the rights of the parties in an impartial and judicial manner with the tribunal owing an equal obligation of fairness towards both sides,

[11] [(1998) 3 SCC 573],

5. That the agreement of the parties to refer their disputes to the decision of the tribunal must be intended to be enforceable in law and lastly,

6. The agreement must contemplate that the tribunal will make a decision upon a dispute which is already formulated at the time when a reference is made to the tribunal."

Arbitration rests on mutual voluntary agreement of the parties to submit their matters of difference to selected persons whose determination is to be accepted as a substitute for the judgment of a Court. The essential requirement is that the parties should intend to make a reference, a submission to arbitration and should be ad idem in this respect.

In the case of J & K State Forest Corpn. v. Abdul Karim Wani[12] (para 24) Supreme Court considered the agreement as an agreement of reference to arbitration. It has emphasized that (1) the agreement was in writing , (2) it was a contract at the present time to refer the dispute arising out of the present contract and (3) there was a valid agreement to refer the dispute to arbitration of the Managing Director, Jammu and Kashmir State Forest Corporation. The Court observed that endeavor should always be made to find out the intention of the parties, and that intention has to be found out by reading the terms broadly and clearly without being circumscribed.

III. WHETHER A DIRECTION PASSED BY THE COMMISSION U/S 26 (1) OF THE ACT WHILE FORMING PRIMA FACIE OPINION WOULD BE APPEALABLE U/S 53 (A) (1) OF THE ACT?

In the present case, CCI based on the allegations made by Lifeline formed the opinion that prima facie case existed against Swasth (a sister concern of erstwhile Jeevani) , and resultantly directed the Director General, appointed under Section 16(1) of the Act, to make investigation into the matter in terms of Section 26(1) of the Act. And therefore Swasth being aggrieved by the Order of the CCI filed a writ petition making Lifeline and the CCI a party in the Delhi High Court. Swasth submitted that CCI's Order for directing investigation was bad in law as Swasth in its endeavor to protect its IPRs cannot be held, even prima facie, to be abusing its dominance. The Delhi High Court held that CCI has made *prima facie* finding, and has only directed for an

[12] (1989) 2 SCC 701

investigation on the allegations made against Swasth. On appeal, the Division Bench also agreed with the Delhi High Court and did not interfere with the proceedings of CCI.

The moot question before us whether the order given by the CCI under section 26(1) of the act directing the Director General to investigate into the matter is appealable or not.

It can be appealed if it can be proved that the expression 'any direction can' include the direction given by the CCI to DG to investigate the matter under section 26(1) of the competition Act 2002. Thus looking into the provisions-

Section 26-Procedure for inquiry under section 19- (1)On receipt of a reference from the Central Government or a State Government or a statutory authority or on its own knowledge or information received under section 19, if the Commission is of the opinion that there exists a prima facie case, it *shall direct the Director General to cause an investigation to be made into the matter*: Provided that if the subject matter of an information received is, in the opinion of the Commission, substantially the same as or has been covered by any previous information received, then the new information may be clubbed with the previous information.

Section 53 A(1)(a) specifies what are appealable. It states appeals against any direction issued or decision made or order passed by the commission under sub-section (2) and (6) of section 26, section 27, section 28, section 31, section 32, section 33, section 38, section 39, section 43, section 44, section 45 or section 46 of this Act are appealable. No other direction, decision or order of the Commission is appealable except those expressly stated can be appealed against though a person may be aggrieved by it.

The provisions of Section 53A(1)(a) use the expression `any direction issued or decision made or order passed by the Commission'. The the word `or' is normally disjunctive and `and' is normally conjunctive, but at the same time they can be read vice versa. Therefore the expression `any direction issued' should be read disjunctive and that gives a complete right to a party to prefer an appeal under Section 53A, against a direction for investigation, as that itself is an appealable right independent of any decision or order which may be made or passed by the Commission.

One more contention with respect to direction of CCI that it did not adhere to the principle of natural justice while directing the DG to investigate in the matter.

The applicability of principles of natural justice is not dependent upon any statutory provision. The principle has to be mandatorily applied irrespective of the fact as to whether there is any such statutory provision or not. In one of the very old cases of early part of this Century, Lapointe v. L'Association[13] it has been observed, "The rule (Audl alteram partem) is not confined to the conduct of strictly legal tribunals, but is applicable to every tribunal or body of persons invested with authority to adjudicate upon matters involving civil consequences to individuals." There is thus no reason to doubt that the administrative actions are as much under the strains of principles of natural Justice as judicial or quasi-judicial decisions. So therefore the clause does constitute an arbitral clause and the matter should be referred to the empowered committee

[13] (1906) AC 535(539)

PRAYER

PRAYER FOR RELIEF

In light of the facts stated, arguments advanced and authorities cited, the Respondent, humbly prays before the Honorable Court, to adjudge and declare that:

[A]. To declare that the scheme of merger is binding upon the foreign lenders and dismiss the appeal.

[B]. To declare that clause 2.1 in the share sale agreement does constitute an arbitration agreement and refer the matter to arbitration.

[C]. To declare that the appeal is maintainable under section 53A(1) and admit the appeal.

The Court may also be pleased to pass any other order, which the court may deem fit in light of justice equity and good conscience. ***All of which is most humbly prayed!*** **RESPECTFULLY SUBMITTED,**

COUNSEL FOR RESPONDENT