Team code:L

Before the Hon'ble Supreme Court of India

UNDER ARTICLE 133 (1) OF THE CONSTITUTION OF INDIA

Foreign Banks	*Versus*	**Lifeline Ltd.**
	Civil Appeal ……/2014	

with

Lifeline Ltd.	*Versus*	**Promoters of Jeevani Ltd.**
	Civil appeal …../2014	

with

Swasth Ltd. and ors.	*Versus*	**Lifeline Ltd.**
	Civil Appeal …../2014	

Civil Appellate Jurisdiction case no…../2014

Memorial on behalf of the Respondents

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BOOKS REFERRED:

1. C.R. Dutta, *The Company Law* (Vol. 2, 6th ed., Wadhwa Nagpur, 2008).
2. *Company Law Digest 1913-2009* (Vol. 2, 3rd ed., Taxmann Publisher Pvt. Ltd., 2009).
3. K. Sekhar, *S.E.B.I. Capital Issues Debentures And Listing* (Vol. 2, 3rd ed., Wadhwa Nagpur, 2003).

STATEMENT OF JURISDICTION

The Appellants in the present case have come before the Hon'ble Supreme Court of India under *Article 133(1)* of the Constitution of India, 1950 after obtaining a certificate of Appeal from the Hon'ble High Court of Delhi under *Article 134A* of the Constitution of India.

STATEMENT OF FACTS

I. Jeevani is a listed public company and one of the leading players in the pharmaceutical manufacturing industry. On 27th January, 2012 it was decided that Jeevani would completely merge into Lifeline, which was another listed public company manufacturing food products. A Scheme was prepared to this effect containing agreements of sale of stake, disclosure of information and transfer of all assets and liabilities including intangible properties from Jeevani to Lifeline. On 5th March, the Scheme was finalized and sent for approval to the Bombay Stock Exchange, which did not provide its approval.

II. Thereafter, Jeevani filed an application for initiating the process of approval of the Scheme in the Delhi High Court on March 30, 2012. The Company Judge ordered for a meeting of creditors to be convened, in pursuance of which Jeevani issued a notice through advertisements in the local newspapers. On 5th July, 2013 the Scheme was approved by the Delhi High Court and the Bombay High Court. In August 2013, certain foreign lenders of Jeevani approached the Delhi High Court against the approval of the Scheme, contending that they were a separate class of creditors. The Hon'ble Company Judge rejected their contention and on appeal the Division Bench also refused to set aside the Scheme. This order was then challenged before the Supreme Court. Before the announcement of the Scheme, the foreign lenders had invoked arbitration proceedings against Jeevani, in lieu of certain payments which they were entitled to. On 27th July, 2010 an arbitral award was passed in favour of the foreign lenders which they did not enforce.

III. Meanwhile, the newly merged Lifeline received notices from the US FDA for providing drugs of below par quality. It was discovered that these investigations by the FDA had been going on much before the merger. Thus, Lifeline filed a suit for breach of contract against the Promoters of Jeevani, alleging concealment of information with malafide intention. The

Promoters contended that the Delhi High Court had no jurisdiction as the disputed agreement had an arbitration clause. The Hon'ble Single Judge held that there was no arbitration clause and on appeal, the Division Bench reversed this finding and held that clause 2 of the Share Sale Agreement dated 23rd March 2013 was an arbitration clause. Thereby, Lifeline filed an appeal to the Supreme Court against this order.

IV. After the merger, Lifeline decided to introduce a new life saving drug in the market called "Novel", which was expected to be considerably cheaper than the premier drug available in the market called "Inventive". This drug was being manufactured by a company called "Swasth" which was a sister concern of the Promoters of the erstwhile Jeevani. Before, Lifeline could launch its new drug in the market; Swasth obtained an interim injunction against them claiming that the new drug "Novel" was similar to its drug "Inventive". Consequently, Swasth launched a similar new cost effective drug in the market, after which it withdrew the case and vacated the injunction.

V. Lifeline filed an application in the Competition Commission of India alleging that Swasth was abusing its dominance by indulging in bad faith litigation. The CCI was of the view that there was a *prima facie* case against Swasth and ordered for an investigation. Swasth filed a suit in the Delhi High Court against the DG investigation which was dismissed by the Single Judge as well as the Division Bench. Swasth then appealed to the Supreme Court. All the three matters were clubbed together for hearing.

STATEMENT OF ISSUES

I.) Whether foreign lenders were required to be called at the meeting of creditors for scheme of arrangement under section 391 of Companies Act, 1956?

I.i) Whether foreign lenders are creditors of Jeevani?

I.ii) Whether foreign lenders constitute a separate class?

I.iii) Whether non-approval by Bombay Stock Exchange can make the scheme redundant?

II.) Whether Clause 2 of the Agreement (Scheme) between Lifeline and Promoters is an Arbitration Clause?

III.i) Whether the investigation under Section 26(1) is liable to be set aside.

III.ii) Whether the CCI had a *prima facie* case of abuse of dominance under Section 4 of the Competition Act against Swasth?

SUMMARY OF ARGUMENTS

I.) Whether foreign lenders were required to be called at the meeting of creditors for scheme of arrangement under section 391 of Companies Act, 1956?

Foreign lenders are not creditors of the company as far as the scheme is concerned. Even if foreign lenders are regarded as creditors, there is no requirement of their presence in the meeting as their interests are safeguarded and that they do not constitute a separate class.

I.i) Whether foreign lenders are creditors of Jeevani?

Foreign lenders are not creditors of the company as far as the scheme is concerned. When there is a serious dispute about the objector being a creditor and the objector is not in a position to substantiate his claim he should not be treated as a creditor.

I.ii) Whether foreign lenders constitute a separate class?

From the provisions contained in Section 391 that, it is only where different terms are offered to different class of creditors under the proposed compromise or arrangement, separate class would-be required to be constituted. Similar terms were offered in the scheme of arrangement to all the creditors, hence, foreign lenders do not form a separate class.

I.iii)Whether non- approval by Bombay Stock Exchange can make the scheme redundant?

There is nothing in the Listing Agreement which indicates that non-compliance of the terms and conditions of the Listing Agreement would bar a company from making an application under Section 391 and 394 for merger would entail an automatic dismissal of such petition

II.) Whether Clause 2 of the Agreement (Scheme) between Lifeline and Promoters is an Arbitration Clause?

The clause in the agreement is in fact an arbitration clause as per the interpretation by Supreme Court of Section 7 of Arbitration and Conciliation Act, 1996. The clause needs not mention the term "arbitration" per se but the intention of parties while signing the agreement is relevant. The heading "dispute resolution" in case of claims under agreement per se clarifies that the parties agreed to solve the issue amicably outside the court.

III.i) Whether the preliminary investigation by CCI was liable to be set aside.

The preliminary investigation of the CCI by the DG cannot be stayed as this direction of the CCI is not appealable under Section 53A (1) of the Competition Act. Also, as the Delhi Court observed, the investigation is not affecting any rights of the appellants nor is it causing any adverse effect to them. Therefore, such appeal is not maintainable.

III.ii) Whether the CCI had a *prima facie* case of abuse of dominance under Section 4 of the Competition Act against Swasth?

Before, Lifeline decided to launch its drug "Novel" in the market, "Inventive" manufactured by Swasth was the premier drug in the market. Thereby, Swasth abused judicial process by obtaining an interim injunction against Lifeline and launching a similar drug, before vacating the injunction and withdrawing the case. Hence, there was a *prima facie* case of abuse of dominance against Swasth under Section 4 of the Competition Act.

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ARGUMENTS ADVANCED

I.) Whether foreign lenders were required to be called at the meeting of creditors for scheme of arrangement under section 391 of Companies Act, 1956?

I.i) Whether foreign lenders are creditors of Jeevani?

It is humbly submitted before the honourable bench that foreign lenders are not creditors of the company as far as the scheme is concerned. It is for the company to decide as to who are its creditors and as to what class of creditors or members should be made parties to a scheme[1]. *The creditors whose name appears in the books of the company should be considered as creditors and their votes would be taken into account for the purposes of an application for the sanction of scheme*[2]. Since company has contended that foreign lenders are not their creditors[3] as has been upheld by Hon'ble Delhi High Court[4], therefore their name must not be there in the books of company.

In the case of *Ferro Alloys Corporation v National Steel and General Mills (P.) Ltd*[5], meetings of the unsecured creditors as well as shareholders were held, as scheduled, on 4th August 2001 and both the secured creditors and the shareholders unanimously approved the Scheme. There were only two secured creditors, namely, UPFC and Allahabad bank and meeting of the secured creditors was adjourned from time to time as matter could not be

[1] *Commerzbank A.G. v. Arvind Mills,* [2002] 39 S.C.L. 9 (India).

[2] *In Re. Mahaluxmi Cotton Mills Ltd.,* [1950] Comp. Cas. 164 (Cal.) (India).

[3] *Moot Proposition* at 7.

[4] *Moot Proposition* at 5.

[5] *Ferro Alloys Corporation v. National Steel and General Mills (P.) Ltd.*, [2005] 62 S.C.L. 406 (India).

settled with them. Their claim was ultimately settled in the year 2003. The objections were filed in July 2004 for the alleged payment of Rs. 50 lakhs. Court held that during all these years the objector did not come forward and made the claim that he was also one of the creditors and, therefore, entitled to participate in the meetings. Thus, *when there is a serious dispute about the objector being a creditor and the objector is not in a position to substantiate his claim as a creditor, it would be difficult to treat him as a creditor for the purpose of these proceedings.* In the present case, Jeevani and Lifeline filed an application under section 391 of the Companies Act, 1956 on 30th March 2012 for approval of scheme before the High Court[6]. The scheme was approved on 5th July 2013. Foreign lenders did not raise any objection during the time period between the filing and approval of scheme. They raised objections in early August 2013[7]i.e. after the scheme was approved. If foreign lenders had a claim against the company then they should have made such a claim earlier. Even the foreign arbitral award that was passed in favour of foreign lenders on 27th July 2010[8] was not enforced. If Jeevani had to make payments under consortium agreement, then it could have been claimed as early as 2010. However, the objector did not raise any such claim. Therefore, foreign lenders cannot be regarded as creditors especially when they are not in a position to substantiate their claim as creditors.

Arguendo, even if foreign lenders are regarded as creditors, there is no requirement as to their presence in the meeting. Where the interests of the creditors are safeguarded, it is not necessary to refer scheme to creditors[9]. The scheme of arrangement was prepared keeping in mind that Jeevani would completely merge in Lifeline and that all the assets and liabilities of

[6] *Moot Proposition* at 5.

[7] *Moot Proposition* at 7.

[8] *Moot Proposition* at 6.

[9] *In Re. Kamala Sugar Mills Ltd.,* [1984] 55 Comp. Cas. 308 (Mad.) (India).

Jeevani would be transferred to lifeline. So, if at all Jeevani had to make any payment to foreign lenders, it would be taken care of by lifeline. *Court is duty bound to consider the interest of all creditors, however, nothing would bind court to convene a meeting of creditors where arrangement is purely between company and its members and does not adversely affect creditors or any class of them*[10]. The meeting of the transferee company in respect of the creditors is not required especially when the transferee company itself is a profit making unit[11]. Both lifeline and Jeevani are profit making companies; even the merger will be profitable in respect of both the companies, therefore the meeting of foreign lenders can be done away with. The rights of foreign lenders are not affected by the scheme of arrangement and therefore, it is not required to call their meeting.

I.ii) Whether foreign lenders constitute a separate class?

Section 391 of Companies Act, 1956 provides:-

"391. Power to compromise or make arrangements with creditors and members - (1) Where a compromise or arrangement is proposed -

(a) between a company and its creditors or any class of them; or

(b) between a company and its members or any class of them;"

It is suggested from the provisions contained in Section 391 that, it is only where different terms are offered to different class of creditors under the proposed compromise or arrangement, separate class" would-be required to be constituted in respect of each class of creditors or shareholders for whom either compromise or arrangement has been offered[12].

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[10] *In Re. I.C.I.C.I. Ltd.,* [2002] 36 S.C.L. 682 (India).

[11] *In Re. Arcoy Overseas (P.) Ltd.,* [2006] S.C.L. 255 (India).

[12] *In Re. Arvind Mills Ltd.,* [2002] 37 S.C.L. 660 (India).

Similar terms were offered in the scheme of arrangement to all the creditors, hence, foreign lenders do not form a separate class. *One test that can be applied with reasonable certainty is as to the nature of compromise offered to different groups or classes. The company will ordinarily be expected to offer an identical compromise to persons belonging to one class, otherwise it may be discriminatory. At any rate, those who are offered substantially different compromises each will form a different class*[13].

The fact that the shareholders/members of the same class offered the same terms under the scheme perceive their interest differently and/or considered that their interest may be affected differently from others because of their inter-relationship or the interests other than as shareholder simpliciter, cannot sustain their claim to constitute a class distinct from others[14]. Therefore, even though foreign lenders perceive their interests differently that will not be criteria for constituting a separate class until different terms are offered to them from other creditors.

If the Scheme of Arrangement or Compromise is offered to the members as a class and no separate Scheme is offered to any sub-class of members which has a separate interest and a separate Scheme to consider, no question of holding a separate meeting of such a sub-class would at all survive[15]. Only one scheme of arrangement was offered by Jeevani and no separate scheme or terms were offered to any other creditors and hence there is no question of constituting a separate class for foreign creditors as different terms offered under a scheme of

[13] *Indequip Ltd. v. Maneckchowk & Ahmedabad Mfg. Co. Ltd.,* [1970] 2 C.L.J. 300 (India).

[14] *In Re. Mafatlal Industries Ltd.,* [1996] 87 Comp. Cas. 705 (India).

[15] *In Re. Arvind Mills Ltd.* [2002] 37 S.C.L. 660 (India).

compromise can only be criterion for identifying a class for purpose of convening a separate meeting of such class[16].

I.iii) Whether non- approval by Bombay Stock Exchange can make the scheme redundant?

Clause 24(f) of the Listing Agreement requires a company to file with the Stock Exchange(s), for approval, any scheme/petition proposed to be filed before any Court or Tribunal under sections 391, 394 and 101 of the Companies Act, 1956, at least one month before it is presented to the Court or Tribunal. The scheme was finalised on 5th March 2012 and immediately thereafter the scheme was filed before Bombay Stock Exchange, however, the BSE did not provide its approval[17].

It is nowhere stated in the said sub-clause that consent of the Stock Exchange is compulsorily required before preferring scheme/petition before the court or the tribunal by the company or such consent is mandatory for preferring scheme/petition before the court or the tribunal[18]. There is nothing in the Listing Agreement which indicates that non-compliance of the terms and conditions of the Listing Agreement would bar a company from making an application under Section 391 and 394 for merger would entail an automatic dismissal of such petition. If the legislature intended treating listed and unlisted companies differently for the purposes of Sections 391 and 394, it would have provided in the act[19].

Hence if the consent of Stock Exchange is not mandatory, then a listed company can file a scheme of arrangement before a court even before taking the permission of Stock Exchange.

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[16] *In Re. S.I.E.L. Ltd.,* [2003] 47 S.C.L. 631 (Delhi) (India).

[17] *Moot Proposition* at 4.

[18] *In Re. Compact Power Sources (P.) Ltd.,* [2004] 52 S.C.L. 139 (India).

[19] *In Re. Chemidye Mfg. Co. (P.) Ltd.,* [2006] 69 S.C.L. 10 (India).

Such scheme might also be permitted by the court. Therefore, non-approval by Stock Exchange does not make the scheme redundant.

SEBI Act, 1992 does not contemplate any right of appearance by the SEBI in proceedings before the court in its company jurisdiction including proceedings under Section 391[20]. The consequences of non-compliance with any of the provisions of listing agreement would entail action by the relevant exchange under the provisions of listing agreement. For example, BSE may initiate against a defaulting member by delisting the member.

Thus, the Respondents aver that non-approval by the BSE does not in any way render the scheme redundant.

II.) Whether Clause 2 of the Agreement (Scheme) between Lifeline and Promoters is an Arbitration Clause?

It is humbly submitted before the Hon'ble court that the said clause is an arbitration clause as contended by the respondents, Promoters. Arbitration agreements are defined under Section 7 of Arbitration and Conciliation Act, 1996 relevant provisions of which read as follows:

Arbitration agreement:-

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

(2) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(3) An arbitration agreement shall be in writing.

[20] *S.E.B.I. v. Sterlite Industries India Ltd.,* [2003] 45 S.C.L. 475 (India).

(5) The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract.

According to the definition given under this section arbitration agreement contains the following essentials:

- It should be in writing or should be agreed upon orally, clearly.
- The parties should have an intention to resolve the matter outside the court.

The Supreme Court in a recent judgment *Karnataka Power Corporation Limited And Another v M/S Deepak Cables (India) Ltd*[21] interpreted the above section and said that an arbitration agreement stipulates that the parties agree to submit all or certain disputes which have arisen or which may arise in respect of defined legal relationship, whether contractual or not, there cannot be a reference to an arbitrator. To elaborate, it conveys that there has to be ***intention,*** expressing the consensual acceptance to refer the disputes to an arbitrator.

It is therefore, most respectfully submitted before the Hon'ble Court that this contract which is a written agreement was signed by both the parties and that they agreed to all the terms and conditions of the agreement, this clause being one of them which says that the *all questions and issues relating to the meaning, scope, instructions, claims, right or matters of interpretation of and under this Agreement*[22]. This implies that *all claims arising under this agreement* should be referred to an empowered committee and the matters are resolved outside the court. Therefore, the intention of both parties was to solve the matter amicably outside the court. This implies that if the Appellants claim any right under the agreement it

[21] *Karnataka Power Corporation Limited And Another v. M./S. Deepak Cables (India) Ltd*., S.C. CIVIL APPEAL NO. 4424 OF 2014 (India).

[22] *Moot Proposition* at 9.

shall be governed by the dispute resolution clause[23] which is the arbitration clause as claimed by the respondents.

The clause as given in the moot proposition is clear. The heading is "dispute resolution" along with a relevant framework of the committee which shall be constituted in case of a dispute relating to the meaning, scope, instructions, claims, right or matters of interpretation of and under this Agreement [24]. The court in the cases of *Dewan Chand v. State of Jammu and Kashmir*[25] and *Tipper Chand*[26] observed that if the clause provides for a person or committee which must act as an arbitrator or in the nature of an arbitrator and also provides for the disputes which shall be resolved by the said committee then the clause is clearly an arbitration clause. In *Jagdish Chander*[27] the Court clearly mentioned that if the term "dispute" has been mentioned in the agreement and if both the parties agree to resolve the dispute by referring to a certain tribunal or committee, outside the court and also if both the parties agree to keep the decision of the committee or tribunal binding upon them, then the agreement shall be termed as an "arbitration agreement".

Moreover, the non usage of the term "arbitration" or "arbitrator" does not invalidate its nature as an arbitration clause. In *Jagdish Chander*[28], the Court, after referring to the earlier decisions, culled out certain principles with regard to the term "arbitration agreement". The said principles basically emphasize on certain core aspects, namely, (i) that though there is no specific form of an arbitration agreement, yet the intention of the parties which can be gathered from the terms of the agreement should disclose a determination and obligation to

[23] *Moot Proposition* at 9.

[24] *Moot Proposition* at 9.

[25] *Dewan Chand v. State of Jammu and Kashmir,* A.I.R. 1961 J. & K. 58 (India).

[26] *State of U.P. v. Tipper Chand,* A.I.R. 1980 S.C. 1522 (India).

[27] *Jagdish Chander v. Ramesh Chander and others,* (2007) 5 S.C.C. 719 (India).

[28] *Id.*

go to arbitration; (ii) non-use of the words "arbitration" and "arbitral tribunal" or "arbitrator" would not detract from a clause being interpreted as an arbitration agreement if the attributes or elements of arbitration agreement are established. Also in the case of *Smt Rukmanibai Gupta*[29], the division bench clarified the status of a clause which does not contain the term "arbitration" itself: -

"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"

Both these judgments again lay emphasis on the *intention* of parties to solve disputes outside the courts and that this intention is clearly mentioned in the agreement without any scope for ambiguity.

Furthermore, the counsel for Responndents humbly submits that Delhi High Court cannot have jurisdiction over the matter in relation to claims under the agreement as it has been already given in the clause that such disputes shall be handled by the empowered committee and shall be resolved outside the court. The provision 3.1[30] clarifies the jurisdiction of court if in case any dispute arises which is outside the scope of arbitration.

Therefore, in the light of cases and authorities cited above, it is most humbly submitted before this Hon'ble Court that the concerned clause is an arbitration clause and the disputed matter should be allowed to resolve under the said provision of the agreement.

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[29] *Smt. Rukmanibai Gupta v. Collector, Jabalpur and others,* (1980) 4 S.C.C. 556 (India).

[30] *Moot Proposition* at 9.

III.i) Whether the preliminary investigation by CCI was liable to be set aside.

It is humbly submitted that the preliminary investigation of the CCI by the DG cannot be stayed as this direction of the CCI is not appealable under Section 53A (1) of the Competition Act. Therefore, such appeal is not maintainable.

It is submitted that Section 26 of the Competition Act lays down the procedure for enquiry under Section 19. Clause 1 of Section 26 provides for an investigation to be made into the matter by the DG, if the Commission is of the opinion that there exists a *prima facie* case. Clause 7 of Section 26 provides for any further investigations the Commission may want to hold. Section 53A (1) mandates the establishment of the Appellate Tribunal to hear appeals on several enumerated sections of the Act. This Section does not include Section 26(1) or 26(7), thereby making them non-appealable.

This issue has already been decided by the Supreme Court in the case of *Competition Commission of India v SAIL.*[31] In this case, SAIL had entered into an exclusive supply agreement with the Indian Railways for the supply of rails. Jindal Steel Ltd. invoked proceedings under Section 19 alleging abuse of dominant position by entering into anti-competitive agreements. The CCI found a *prima facie* case against SAIL and directed the DG to conduct a preliminary investigation into the matter. SAIL appealed to the COMPAT who ordered for a stay on the investigation by the DG.

The matter finally went in appeal to the Supreme Court which reversed the order of COMPAT and held that Section 53A(1) of the Act expressly provides decisions or orders or directions may be appealed before COMPAT, and this does not include a direction of CCI under Section 26(1) or even 26(7) of the Act. The Court noted that right to appeal is a

[31] *Competition Commission of India v. S.A.I.L.*, (2010) 10 S.C.C. 744 (India).

statutory right and if the statute does not provide for an appeal, the Court cannot presume such right.[32]

"…the direction under Section 26(1) after forming a prima facie *opinion is a direction simpliciter to cause an investigation into the matter. It does not effectively determine any right or obligation of the parties to the lis. Wherever in course, of the proceedings before the Commission, the Commission passes a direction or interim order which is at the preliminary stage and of preparatory nature without recording findings which will bind the parties and where such order will only pave the way for final decision, it would not make that direction as an order or decision which affects the rights of the parties and therefore, is not appealable."*[33]

In the present factual scenario, Swasth appealed against the order of the CCI alleging that CCI's order for directing an investigation was bad in law and that there was no *prima facie* case of abuse of dominance against them.[34]

It is humbly submitted that this contention of the opposition is without cause as the power of the CCI to direct a preliminary investigation under Section 26(1) is not appealable under Section 53A (1). Moreover, as the Delhi Court observed, the investigation is not affecting any rights of the appellants nor is it causing any adverse effect to them.[35] Therefore, it is prayed before the Hon'ble Supreme Court to dismiss this petition at the outset as it is not maintainable.

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[32] *Id.*

[33] *Id.*

[34] *Moot Proposition* at 13.

[35] *Moot Proposition* at 13.

III.ii) Whether the CCI had a *prima facie* case of abuse of dominance under Section 4 of the Competition Act against Swasth?

It is humbly submitted before the Hon'ble Supreme Court that the CCI had a prima facie case, as Swasth did in fact, abuse its dominance.

It is submitted that Section 4 of the Competition Act, 2002 prohibits the abuse of dominant position by an enterprise. In the case of *MCX Stock Exchange v National Stock Exhange of India Ltd*[36] , the CCI held that *"assessment of abuse of dominance under Section 4 requires establishment of dominant position".* In this case, the NSE held over 90 percent of the Stock Exchange Services, in view of the market share and its size and available resources, size and importance of NSE and its economic power and commercial advantage over MCX-SX and BSE. It was held that the NSE is a highly dominant player in the stock exchange services in accordance with Section 19(4) of the Act. *"NSE holds absolute dominance even if CD market is assessed in isolation of other segments on account of its incomparable economic power, size, resources, higher degree of vertical integration, absolute dependence of consumers and large degree of economics of scale in operating different segments with adequate scale in each of those segments."*

In the present factual scenario, the relevant product market as defined in Section 2 (t) of the Competition Act and with regard to Section 19(7) can be determined as life saving pharmaceutical drugs.[37] According to the given moot proposition, Swasth was in the business of manufacturing the life saving drug "Inventive" which was the premier drug available in the

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[36] *M.C.X. Stock Exchange v. National Stock Exhange of India Ltd.*, CASE NO. 13 of 2009 (India).

[37] *Moot Proposition* at 11.

market.[38] Therefore, it can be inferred that before Lifeline decided to introduce its comparatively cheaper life saving drug "Novel", Swasth enjoyed a dominant position in the market since 2010.[39]

Section 19(4) of the Competition Act enlists various factors which are used to determine the dominance in the market namely size and importance in market, size and importance of competitors and dominance acquired through entry barriers by denying market access. According to the moot proposition, Swasth obtained an injunction against Lifeline before it could launch its new cost effective drug in the market, and then vacated the injunction after launching a similar drug taking over a large chunk of the market.[40]

The CCI, in a similar complaint, in *M/s Bull Machines Pvt. Ltd. v. M/s JCB Ltd.*[41] held the JCB to be abusing its dominant position by misusing judicial process to curb competition. In this case, both the parties were in the business of manufacturing construction equipment. JCB, who held 75% market share and was in a dominant position, obtained an injunction against Bull Machines on grounds of infringing their registered designs and copyrights. This injunction restrained Bull Machines from exhibiting their new product in ExCon, India's primary machinery exhibition. After 10 months, JCB withdrew the case and vacated the injunction, causing irreparable damage to Bull Machines. The CCI observed that JCB indulged in bad faith litigation and abused judicial process to stifle competition.[42]

It is humbly submitted that in the present case as well, it can be reasonably inferred that Lifeline suffered losses due to the capricious, bad faith litigation undertaken by Swasth whilst

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[38] *Moot Proposition* at 11.

[39] *Moot Proposition* at 11.

[40] *Moot Proposition* at 11.

[41] *M./s. Bull Machines Pvt. Ltd. v. M./s. J.C.B. Ltd.*, CASE NO. 105 of 2013 (India).

[42] *Id.*

abusing its dominance, by creating an entry barrier for Lifeline via the interim injunction. Therefore, it can be conclusively established that the CCI was correct in establishing a *prima facie* opinion and directing an investigation against Swasth.[43]

[43] *Moot Proposition* at 12.

PRAYER

In the light of the arguments advanced and authorities cited, the Appellants humbly submit that the Hon'ble Court be pleased to adjudge and declare that:

1. Foreign lenders are not the creditors of the company and their meeting being held was not a necessary requirement under section 391 of Companies Act and hence the scheme between Jeevani and Lifeline is valid.

2. The clause in the agreement between lifeline and promoters is an arbitration agreement.

3. There was indeed a prima facie case of dominance against Swasth and the preliminary investigation by the CCI is not liable to be stayed.

All of which is respectfully affirmed and submitted

Counsels for Respondents

Sd/-