Team Code: M

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

IN THE HON'BLE SUPREME COURT OF INDIA AT NEW DELHI

APPEAL NO. _____ OF 2014

IN MATTER OF ARTICLES 32,226, SECTIONS 390, 391 OF COMPANIES ACT, 1956, SECTIONS 7, 46, 47, 48, 49 OF ARBITRATION AND CONCILIATION ACT, 1996 AND SECTIONS 2, 4, 19, 26 OF THE COMPETITION ACT, 2002

COMPANY APPEAL NO. ____ OF 2014

FOREIGN LENDERS & ORS……...APPELLANT

v.

JEEVANI LTD & ORS……RESPONDENTS

CIVIL APPEAL NO. ____ OF 2014

LIFELINE LTD……APPELLANT

v.

PROMOTERS…….…….RESPONDENT

WRIT APPEAL NO. ____ OF 2014

SWASTH LIFE LTD.....……..……...APPELLANT

v.

LIFELINE LTD & COMPETITION COMMISSION OF INDIA……..RESPONDENTS

UPON SUBMISSION TO THE HON'BLE CHIEF JUSTICE AND HIS COMPANION JUSTICES OF THE SUPREME COURT OF INDIA

MEMORANDUM ON BEHALF OF RESPONDENTS

TABLE OF CONTENTS

INDEX OF AUTHORITIES

[A]. **CASES**

[B]. **BOOKS**

1. SRIDHARAN & PANDIAN, GUIDE TO TAKEOVERS AND MERGERS, 2nd Ed., Lexis Nexis Butterworths Wadhwa, 2006.

2. SARMA RAMA, *COMMENTARY ON INTELLECTUAL PROPERTY LAWS,* Edn. 2009, Lexis Nexis Butterworths Wadhwa.

3. JUSTICE SARAF B.P., JUSTICE JHUNJHUNUWALA, S.M., LAW OF ARBITRATION AND CONCILIATION, 5th Ed., Snow white, 2009.

4. BASU, DURGA DAS, *COMMENTARY ON THE CONSTITUTION OF INDIA*, 8th Ed., Lexis Nexis Butterworths Wadhwa ,2009

5. BASU, N.D., LAW OF ARBITRATION AND CONCILIATION, 10th Ed., Orient Publishing Company, 2003.

6. A RAMAIYA, GUIDE TO THE COMPANIES ACT, 17th Edition 2010, Part 1, LexisNexis Butterworths Wadhwa,

8. JUSTICE NARAYANA P.S., INTELLECTUAL PROPERTY LAW IN INDIA, 5th Ed., Gogia Law Agency, 2010.

9. JUSTICE NARAYANA P.S., THE COMPANIES ACT, 1956, Ed. 2006, ALT Publications.

[C]. **LEGAL DATABASE**

1. Manupatra
2. SCC Online
3. Westlaw International

[D]. **LEGISLATIONS**

1. Constitution of India, 1950
2. The Companies Act, 1956
3. The Companies Act, 2013
4. The Competition Act, 2002.
5. Indian Contract Act, 1872
6. The Arbitration and Conciliation Act, 1996.

STATEMENT OF JURISDICTION

The Hon'ble Supreme Court of India has the jurisdiction to hear the instant matter.

Article 132 of the Constitution of India, 1950 reads as follows:

Appellate jurisdiction of Supreme Court in appeals from High Courts in certain cases:

(1) An appeal shall lie to the Supreme Court from any judgment, decree or final order of a High Court in the territory of India, whether in a civil, criminal or other proceeding, if the High Court certifies under Article 134A that the case involves a substantial question of law as to the interpretation of this Constitution.

Further, the Hon'ble Supreme Court of India can invoke its inherent powers and tag matters. The Hand book of Information about Practice & Procedure, 3rd Edition 2011 at Chapter VI (A)(2)(f), page 35, states:

(f) The fresh matters involving cross parties are tagged and heard together.

STATEMENT OF FACTS

Jeevani is a listed public company with its shares listed on the Bombay Stock Exchange. Lifeline is another listed public company which is a major producer of food products in the Indian Market. Negotiations began between Lifeline and Jeevani in November 2011 and both companies decided to merge on 27th January 2012. It was decided that Jeevani would completely merge into Lifeline and all its assets and liabilities would be transferred to Lifeline. It was also decided that the "Promoters" of Jeevani, who were majority shareholders, would sell 18% of their stake in Jeevani to Lifeline through a separate sale agreement entered into on 23rd March 2012 between Lifeline and Promoters. This agreement contained specific representations as regards disclosure of information which may be vital to the transaction and also that all intangible properties including the active R & D and IPRs of Jeevani would become the property of Lifeline. On 30th March 2012, Jeevani and Lifeline filed an application under S. 391 of Companies act and after following the provisions of Part V, on 5th July 2013, the Delhi High Court approved the scheme.

Prior to the Public Announcement made by Jeevani, certain creditors of Jeevani which included foreign banks, had jointly invoked arbitration proceedings against Jeevani at a foreign arbitral tribunal in Hong Kong against which they received a Foreign Arbitral award on 27th July 2010, under which Jeevani was to pay to the foreign lenders under a consortium agreement. No proceedings for the enforcement of the same have been initiated till date.

In august 2013, these foreign lenders of Jeevani made an application before the Delhi High Court for recall of approval of the scheme and contended that they had not received the notice of the scheme and were not able to attend the meeting of creditors and that they constituted a separate class of creditors and therefore the scheme should be set aside. The appeal now lies at the Hon'ble Supreme Court.

Soon after merger, Lifeline received notices from US Food and Drug administration for providing drugs of below par quality as a result of investigation by FDA on Drugs produced by Jeevani was commenced much before the Merger took place. Lifeline filed a suit against the Promoters before the Delhi High Court for damages arising out of a breach of contract and for compensation for wrongful gain by way of defrauding and misrepresenting to a bonafide purchaser on 23rd March 2013. The Promoters contended that the Delhi High Court has no Jurisdiction as the agreement had an arbitration clause and dispute should be referred to arbitration. An appeal lies from the Division Bench of the Hon'ble High Court to the Hon'ble Supreme Court in the instant matter.

In the meanwhile, Lifeline decided to introduce a new life saving drug 'Novel' which was manufactured after further developing the active R & D which became property of Lifeline after the merger. The new drug was considerably cheaper than other drugs including 'Inventive' which was the premier drug in the market manufactured and sold by Swasth Life Limited (herein after referred to as Swasth) which was a sister concern of the promoters of the erstwhile Jeevani. Before 'Novel' could be launched, Swasth filed a suit for infringement of IPRs in the Delhi High Court alleging that 'Novel' was similar to its drug 'Inventive'. Swasth was able to obtain an interim injunction and in the meantime, launched a similar cost effective drug in the market and withdrew the case against Lifeline after cornering a major chunk of the market.

Lifeline filed an application before the Competition Commission of India alleging that Swasth was abusing its dominant position by indulging in bad faith litigation and CCI based on the allegations Prima Facie found that Swasth may have abused its dominance and passed an order directing the DG CCI to investigate.. Swasth has now approached the Hon'ble High Court in an appeal from the Division Bench of the Hon'ble Delhi High Court alleging that the order of CCI is bad in law.

STATEMENT OF ISSUES

ISSUE 1

WHETHER THE ORDER PASSED BY HON'BLE COMPANY JUDGE OF DELHI HIGH COURT APPROVING THE SCHEME OF ARRANGEMENT MUST BE RECALLED.

ISSUE 2

WHETHER THE SHARE SALE AGREEMENT BETWEEN THE PROMOTERS AND LIFELINE CONTAINS AN ARBITRATION CLAUSE.

ISSUE 3

WHETHER THE PRIMA FACIE ORDER PASSED BY CCI FOR INVESTIGATION SHOULD BE QUASHED.

SUMMARY OF ARGUMENTS

ISSUE 1: WHETHER THE ORDER PASSED BY HON'BLE COMPANY JUDGE OF DELHI HIGH COURT APPROVING THE SCHEME OF ARRANGEMENT MUST BE RECALLED.

The contentions raised on behalf of the respondent is that the meetings held in pursuance of the merger scheme (hereinafter mentioned as the scheme) between Jeevani and Lifeline and classification of creditors in the scheme was done in accordance with Sec. 391 of the Companies Act, 1956 since the appellants are not creditors of Jeevani and arguendo, appellants do not constitute a separate class.

ISSUE 2: WHETHER THE SHARE SALE AGREEMENT BETWEEN THE PROMOTERS AND LIFELINE CONTAINS AN ARBITRATION CLAUSE.

It is humbly contended on behalf of the Respondents that the Clause 2 of the share sale agreement between the promoters and Lifeline is an Arbitration Clause as it fulfills the pre-requisites of a valid arbitration agreement. Further, Clause 3 is not applicable and it cannot be said that presence of clause 3 that provides for the jurisdiction of Delhi Court to decide matters touching the subject matter of the agreement negates the arbitration clause of the agreement.

ISSUE 3: WHETHER THE PRIMA FACIE ORDER PASSED BY CCI FOR INVESTIGATION SHOULD BE QUASHED.

It is humbly contended before the Hon'ble Supreme Court of India that the appellant, Swasth, which manufactured a leading drug in the market, has prima facie abused its dominant position. It triggered a malicious litigation against Lifeline, preventing it from entering into the market. The prima facie order passed by CCI should not be quashed because there was a prima facie abuse of dominance by Swasth and there was no adverse effect caused to Swasth by directing the investigation.

ARGUMENTS ADVANCED

ISSUE 1

WHETHER THE ORDER PASSED BY HON'BLE COMPANY JUDGE OF DELHI HIGH COURT APPROVING THE SCHEME OF ARRANGEMENT MUST BE RECALLED.

The contentions raised on behalf of the respondent is that the meetings held in pursuance of the merger scheme (hereinafter mentioned as the scheme) between Jeevani and Lifeline and classification of creditors in the scheme was done in accordance with Sec. 391 of the Companies Act, 1956[1].

1.1 FOREIGN LENDERS ARE NOT CREDITORS OF JEEVANI.

It is humbly contended before this Hon'ble court that the appellants are not the creditors of Jeevani. A person who is entitled to receive a sum in present or in future due to obligation imposed by law on the other party would be considered as creditor.[2] Both prospective and present liabilities of the company must be taken into consideration while determining its creditors.[3] A claim for unliquidated damage does not give rise to a debt until the liability is adjudicated and damages assessed by a decree or order of a Court or other adjudicator authority.[4]

[1] Companies Act, 1956 (Act No. 1 of 1956)

[2] *Webb* v. *Stanton* (1883) 11 QBD 518

[3] *Union of India* v. *Raman Iron Foundry* [1974]3SCR556; *Registrar Of Companies, Gujarat* v. *Kavita Benefits Pvt . Ltd.* (1978) 48 Comp Cas; *Kesoram Industries and Cotton Mills Ltd.* v. *Commissioner of Wealth Tax* [1966] 59 ITR 767 (SC)

[4] *Union of India* v. *Raman Iron Foundry* [1974] 3 SCR 556

In the instant matter a foreign arbitration award was granted against Jeevani in favour of the appellants. However the proceedings for enforcement of the same was never filed by the appellants.[5]

Section 44[6] of the Arbitration and Conciliation Act (hereinafter referred to as 'the arbitration act') defines the words 'foreign award' which mean an arbitral award given on differences between the persons, arising out of legal relationship considered as commercial under the law in force in India.[7]

According to Section 46[8] any foreign award, which would be enforceable under Part II of Arbitration and Conciliation Act, 1996[9], would be treated as binding for all purposes on the persons as between whom it was made and may accordingly be relied upon by any of those persons by way of defense, set off or otherwise in any legal proceeding in India.

The expression 'recognition' is to be used as a shield against an attempt to raise in a fresh proceeding same issues that have already been adjudicated upon and decided in an earlier arbitration proceeding only.[10]

An arbitral award is unenforceable until it is made a rule of the court and a judgment and decree are passed by competent court. A foreign award is not considered to be binding in India on the parties to that award immediately after that award is made.[11]

---

[5] Factual Matrix, Para. 6

[6] Section 44, Arbitration and Conciliation Act, 1996, Act no. 26 of 1996

[7] *Marina World Shipping Corporation Ltd.* v. *Jindal Exports (P) Limited* 2004 Comp. LJ 50 (Del)

[8] Section 46, Arbitration and Conciliation Act, 1996, Act no. 26 of 1996

[9] Arbitration and Conciliation Act, 1996, Act no. 26 of 1996

[10] *Brace Transport Corporation Of Monrovia, Bermuda* v. *Orient Middle East Lines Limited, Saudi Arabia,* AIR 1994 SC 1715

[11] *Noy Vallesina Engineering Spa* v. *Jindal Drugs Ltd.* 2006 (3) ARB LR 510 (Bom)

In the matter at hand the appellants have not filed any proceedings for the enforcement of arbitration award and therefore they only have the right of recognition and not enforcement.[12]

A foreign award can be enforced under Part-II provided two basic norms are satisfied, namely, the parties have submitted to the arbitration by an agreement which is valid under its governing laws and the award is valid and final according to the law which governs the arbitration proceeding. The application for enforcement can be filed only by a party seeking enforcement of a foreign award and not by a party which is resisting enforcement of the foreign award and therefore the opportunity to raise objections can only be availed by party resisting enforcement upon application by other party.[13] Merely because a foreign award has not been set aside by a competent Court/authority, it does not mean that the foreign award becomes automatically and immediately enforceable.[14]

An award could be enforced and also executed in the same proceeding. There is no need to take out separate proceeding. Therefore, although the adjudication process for enforcement and execution could be done in one single process but before ordering for execution, the Court has to examine whether or not the foreign award is enforceable.[15]

Without first ascertaining and giving a decision as to whether or not the foreign award is enforceable, it cannot be said that the same is a debt due and payable.[16] It is also not

[12] Factual Matrix, Para. 6

[13] *Talwar Brothers (P) Ltd.* v. *Punjab State Industrial Development Corporation Limited* (1999) 4 Comp LJ 310 (P & H)

[14] *Marina World Shipping Corporation Ltd.* v. *Jindal Exports (P) Limited* 2004 Comp. LJ 50 (Del)

[15] *Fuerst Day Lawson Limited* v. *Jindal Export* [2001] 3 SCR 479

[16] *Manipal Finance Corporation Limited* v. *CRC Carrier Limited* (2002) 1 Comp. LJ 71 (Bom)

considered to be binding on the parties to the award in India, till the competent court finds it to be enforceable.[17]

Enforcement means obedience of law and obedience due to law.[18] Therefore unless the appellants file for enforcement of arbitral award they are not entitled to receive any sum due to imposition by law.

In order to become a subject matter of winding up, it must be a debt ascertained and payable in accordance with law but so long the debt although ascertained is not payable in accordance with law, the same cannot be a subject matter of a company petition, for a debt which is barred by limitation although is ascertained but is not payable in view of application of the provisions of the Limitation Act. Similarly, a debt although ascertained but is held to be not enforceable, cannot be said to be binding between the parties and, therefore, cannot be the subject matter of a company petition.[19]

In the light of the above cases, it can therefore be said that in terms of the foreign award that the sum is not ascertained and due and payable immediately by the respondent to the appellant.

1.2 ARGUENDO: APPELLANTS DO NOT FORM A SEPARATE CLASS OF CREDITOR.

Assuming but not admitting that the appellants are creditors of Jeevani, even then they do not form a separate class of creditors. In order to constitute a class, the rights of the creditors must not be so dissimilar so as to make it impossible for them to consult together a view to

[17] *Noy Vallesina Engineering Spa* v. *Jindal Drugs Ltd.* 2006 (3) ARB LR 510 (Bom)

[18] *S.N.D. Kiran Prabha* v. *Government of Andhra Pradesh and Others (1990)1SCC328*

[19] *Marina World Shipping Corporation Ltd.* v. *Jindal Exports (P) Limited* 2004 Comp. LJ 50 (Del)

their common interest.[20] Classification of creditors in a scheme is necessary when different creditors would be affected under the scheme differently.[21]

In the matter at hand appellants are a group of creditors who gave financial assistance to Jeevani under a consortium agreement. The appellants are basically financial institutions.

A Syndicate of lenders is when more than one lender come together and issue loans by virtue of one single agreement between the parties.[22] The interest of the syndicate of foreign lenders is similar to that of the interest of the Indian lenders.[23] Banks and financial institutions normally form a single class, unless there are circumstances and interests that they must be treated differently, i.e. when they have different interests which may come into conflict.[24]

In the matter at hand the creditors, mainly foreign banks had come together and issued loan to Jeevani by way of a single consortium agreement. Therefore they would qualify as syndicate of lenders and the interest of the same is not so dissimilar so as to make it impossible to come to a consensus view. The interest of appellants are not in any way different from that of the other banks and financial institutions and therefore do not constitute a separate class.

Where all the assets and liabilities of one company are transferred to another and the creditors of one company are given the same rights against the transferee company which they would have had against the transferor company then their objection of merger is of very little substance.[25]

---

[20] *In Re Hawk Insurance Ltd.* [2001] 2 B.C.L.C 480, CA; *Sovereign Life Assurance Co. v. Dodd,* (1892) 2 QB 573; *Maneckchowk & Ahmedabad Mfg. Co. Ltd., Re.* [1970] 40 ComCas 819 (Guj.)

[21] *Jaypee Cement Ltd., Re* (2004) 122 ComCas 854

[22] *In Re: Arvind Mills Ltd.* (2003) 4 GLR 2968; *Commerzbank Ag. and Anr*. v. *Arvind Mills Ltd.* [2002] 110 Comp Cas 539 (Guj*)*

[23] *Commerzbank Ag. and Anr*. v. *Arvind Mills Ltd.* [2002] 110 CompCas 539 (Guj*)*

[24] *Spice Jet Ltd. & Ors.* v. *Malan Pur Steel Ltd. & Anr.* 2012 XAD (Delhi) 259

[25] *Bengal Tea Industries* v. *Union of India,* 1999 93 CWN 542

In the instant matter Jeevani completely merged into Lifeline without compromising with the rights of the creditors. Moreover it is humbly contended that the present petition is filed only to recover from Jeevani (now Lifeline) the arbitration award the enforcement of which is barred by time as per Article 113 of Part 10 Schedule 1 of Limitation Act.[26] Therefore it is humbly submitted that the order sanctioning the scheme need not be recalled.

ISSUE 2

WHETHER THE SHARE SALE AGREEMENT BETWEEN THE PROMOTERS AND LIFELINE CONTAINS AN ARBITRATION CLAUSE.

It is humbly contended on behalf of the Respondents that the Clause 2 of the share sale agreement between the promoters and Lifeline is an Arbitration Clause. Arbitration is the means by which parties settle their disputes through intervention of third person. An arbitration agreement is 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. It may be in the form of an arbitration clause in a contract or in the form of a separate agreement and it shall be in writing.[27]

2.1 THE CLAUSE 2 OF THE SHARE SALE AGREEMENT IS AN ARBITRATION CLAUSE.

It is humbly contended before the Hon'ble Supreme court that the Clause 2 of the Share Sale Agreement [hereinafter referred to as SSA] between the Promoters and Lifeline is an arbitration clause. In Clause 2 of the SSA, there is a clear mention of appointing a tribunal of three executive level personnel of the company who shall resolve the disputes between the parties whose decision "*Shall be final, binding and conclusive on parties to this agreement*"[28]

[26] The Limitation Act, 1963 (Act no. 36 of 1963)

[27] Sec. 7, Arbitration and Conciliation Act, 1996.

[28] Factual Matrix, Para. 9

There is no straight way to decide whether the agreement is an arbitration agreement and the only way to determine it is to check whether characteristics as enlisted by in *K. K. Modi* v. *K. N. Modi*[29], are fulfilled.

1. The arbitration agreement must contemplate that the decision of the tribunal must be binding on the parties to the agreement, and,
2. That the jurisdiction of the tribunal to decide the rights of parties must derive either from the consent of the parties or from an order of the court or from a statute, the terms of which make it clear that the process is to be an arbitration, and,
3. The agreement must contemplate that the substantive rights of the parties will be determined by the agreed tribunal, and,
4. That the tribunal will determine the rights of the parties in an impartial and judicial manner with the tribunal owing an equal obligations of fairness towards both sides,
5. And, that the agreement of the parties to refer their disputes to the decision of the tribunal must be intended to be enforceable in law.

All these Attributes are present in the Clause 2 of the Share Sale Agreement between the Promoters and Lifeline. The clause clearly lays down that the decision given by the Empowered Committee would be held to final, binding and conclusive on the parties. The agreement also contemplates that the committee shall answer upon all questions and issues relating to the rights or matters of interpretation of the parties of the agreement. Clause 2 of SSA clearly states that the decision of the empowered committee is binding on both the parties and that rights and liabilities shall be deemed to settled by virtue of decision of empowered committee.

[29] *K. K. Modi* v. *K. N. Modi,* AIR 1998 SC 1297: (1998) 3 SCC 573; *Bharat Bhushan Bansal* v. *U.P. Small Industries Corporation Ltd.* (1999) 2 SCC 166

The Supreme Court has observed that the agreement to refer disputes to arbitration must be expressly or impliedly spelt out[30]. In the present case as well, the agreement impliedly spells out that the disputes shall be referred to arbitration.

Further, it is not imperative to specifically include the words 'reference', 'arbitration' and/or, 'arbitrator'. If the clause speaks of disputes and about agreement of parties as to they being decided by another person, whose decision is to be binding on all parties to the contract, then the clause can easily be said to be an arbitration agreement, even if the word, 'reference' or 'arbitration' may not have been actually used in the clause[31]. The present clause 2 of the SSA, though, does not use specific words makes it apparent from its wording that it was intended to be an arbitration clause since all the requirements of a valid arbitration agreement are fulfilled.

In *Chief Conservator of Forests* v. *Rattan Singh*, the Apex Court has held that if the conditions validating an arbitration agreement were satisfied, it was immaterial whether or not an arbitrator was named in the agreement, and whether or not the terms "arbitration" or "arbitrator" were used in it.[32] Thus even though the words "arbitration" or "arbitrator" are not used in the Clause 2 of the share sale agreement, it fulfils all the attributes of an arbitration clause and hence it is contended that the clause 2 of the share sale agreement is an arbitration clause.

2.2 CLAUSE 3 OF SSA IS NOT APPLICABLE.

[30] *State of Orissa* v. *Damodar Das,* AIR 1996 SC 942: (1996) 2 SCC 216;

[31] Justice Dr. B.P. Saraf & Justice S. M. Jhunjunuwala, *Law of Arbitration and Conciliation,* 5th Edn., 2009, Snow White Publications.

[32] *Chief Conservator of Forests* v. *Rattan Singh,* AIR 1967 SC 166; *Ramlal Jagannath* v. *State of Punjab*, AIR 1966 Punj 436.

The clause 2 of the SSA states that *"all questions and issues relating to the meaning, scope, instructions, claims, right or matters of interpretation of and under this agreement"*[33] will be decided by the empowered committee. When one of the clauses in agreement clearly mentions that all the disputes arising out of the agreement to be referred to the Chief Engineer it can be considered as an arbitration clause impliedly.[34] A Chief Engineer is a member of the same working committee and thus can be said to be equivalent to the empowered committee as envisaged under clause 2. In *Pressteels & fabrication P. Ltd.* v. *Chief Engineer, electricity projects*[35] where, in case of a government contract, a clause in standard general conditions of contract provided that any dispute arising from the contract will be decided by the courts or tribunals in Hyderabad and Secunderabad cities, the Andhra Pradesh high court held that it does not mean that only the civil court has jurisdiction to decide the dispute and not the arbitrator. Similarly, in the present case, it cannot be said that the Presence of clause 3 that provides for the Delhi courts the jurisdiction to decide matters touching the subject matter of the agreement negates the arbitration clause of the agreement.

The rights that arise out of a contract impose a duty of performance on the other party. In the instant matter there was a duty imposed on the promoters by virtue of the SSA to disclose all the material information in relation to the scheme therefore the disclosure is a right arising out of the contract and by the plain reading of clause 2.1 any dispute related to rights arising out of the contract are subject of 2.1 and not clause 3.

Thus it is humbly submitted before this Hon'ble court that the present clause 2 of the share sale agreement is an arbitration clause and therefore the Hon'ble Court should not interfere with the order given by the division bench of the Delhi High Court.

---

[33] Factual Matrix, Para. 9

[34] *Lanchamanna B. Horamani* v. *State of Karnataka*, AIR 1998 Kant 405

[35] *Pressteels & fabrication P. Ltd.* v. *Chief Engineer, electricity projects,* 1995 (5) ALT 429

ISSUE 3

WHETHER THE PRIMA FACIE ORDER PASSED BY CCI FOR INVESTIGATION SHOULD BE QUASHED.

It is humbly contended before the Hon'ble Supreme Court of India that the appellant, Swasth, which manufactured a leading drug in the market, has prima facie abused its dominant position. It triggered a malicious litigation against Lifeline, preventing it from entering into the market. The prima facie order passed by CCI should not be quashed because [3.1] There was a prima facie abuse of dominance by Swasth and [3.2] There was no adverse effect caused to Swasth by directing the investigation.

3. 1 THERE WAS A PRIMA FACIE ABUSE OF DOMINANCE BY SWASTH.

It is humbly contended that Swasth has created barriers to market entry for lifeline by indulging in bad faith litigation, thus, clearly making out a prima facie case of abuse of dominant position[36]. As per Section 4(2)(c), any enterprise will be said to have abused its dominant position, if it indulges in practice or practices which result in denial of market access, in any manner. The essentials to be established can be spelled out as follows[37]:

a. The said act must be done by an enterprise; b. The said enterprise must be exercising/ enjoying a dominant position; c. The said act done by the dominant enterprise must be resulting in denial of market access to the other, leading to appreciable adverse effect on the market.

The relevant product market in the instant matter is life saving drugs which are used for the similar end use and by virtue of which they are regarded as interchangeable or substitutable

[36] Section 4(2)(c) of the Competition Act, 2002

[37] Section 4(2)(c) of the Competition Act, 2002

by consumer.[38] As nothing has been brought on record or can otherwise be deduced regarding the heterogeneity in the conditions of competition with respect to the relevant product, it is to be assumed that the conditions of competition for supply of the product in question are homogenous throughout India. Hence, the relevant geographic market in the present case may be taken as whole of India[39]. Thus, the 'market for dealing with life saving drugs in India' can be considered as the relevant market in the present case.

As per Section 2(h) of the Competition Act, an enterprise means a person who or which, is or has been involved in production, distribution or control of goods or services. Section 2(l) of the Competition Act defines person to include a company. Pharmaceutical companies are included in this definition of enterprise and thus, Section 4 of the Competition Act is applicable in the instant matter[40].

The dominant position of an enterprise can be ascertained in two ways; Firstly, by establishing that the enterprise can operate independently of competitive forces prevailing in the relevant market; or affect its competitors or consumers or the relevant market in its favour[41]. Secondly, by taking into consideration the various factors enlisted under Section 19(4) of the Competition Act.

In the case of *M/s. ESYS Information Technologies Pvt. Ltd.* v. *Intel Corporation & Ors.*[42], it was noted that there existed strong entry barriers in relevant markets on account of the significant Intellectual Property Rights of Intel. Also, similar observations were made in

[38] Supra Note 1, Section 2(t)

[39] *Bull Machines* v. *JCB,* Case No. 105 of 2013.

[40] *Sankuta Associates Pvt. Ltd., Cuttack* v. *Indian Drug Manufacturer's Association & Ors.*, Case No. 20/2011.

[41] Supra Note 1, Explanation to Section 4

[42] *M/s. ESYS Information Technologies Pvt. Ltd.* v. *Intel Corporation & Ors,* Case No. 48 of 2011

Tetra Pak 1 (BTG License)[43]**.** In the instant matter, Swasth by way of the legal monopoly conferred upon it by the Indian Patent Act[44], was in a position to influence the competitors, consumers and the relevant market. Moreover, dominant position has been exercised by creating technical barriers through bad faith litigation[45]. Large market shares in themselves could be an evidence of a dominant position[46].

Swasth instituted a suit against Lifeline to prevent it from launching a life saving drug which posed a threat to its existing drug, Inventive. Furthermore, after obtaining the injunction from the Hon'ble Delhi High Court, Swasth launched another drug which was similar to Novel, which was originally proposed to be launched by Lifeline. The new drug launched by Swasth captured the market and Swasth made huge profits. After this, Swasth withdrew the litigation instituted by it at the High Court of Delhi. The entire factual matrix directs towards the fact that the intention of Swasth was to create barriers to entry to Lifeline, and within the available time, reap as many profits as possible. A parallel can be drawn between the instant case and the case of *Bull Machines* v. *JCB* [47]. In this case, the CCI reached the prima facie view that JCB had abused its dominant position in the relevant market and sought to stifle competition by denying market access and foreclosing entry of Bull Machines' equipment in contravention of the provisions of Section 4 of the Competition Act.

In the instant matter as well, the dominant position, has been abused by Swasth by creating barriers to entry. The market access to Lifeline was denied by the malicious litigation initiated by Swasth. Thus, a prima facie case of abuse can be made against Swasth.

---

[43] *Tetra Pak 1 (BTG License),* OJ [1988] L272/27

[44] Supra Note 1, Section 19(4)(g)

[45] Supra Note 1, Section 19(4)(h)

[46] *Hoffman-La Roche* v. *Commission*, [1979] ECR 461

[47] *Bull Machines* v. *JCB,* Case No. 105 of 2013

3.2 THERE WAS NO ADVERSE EFFECT CAUSED TO SWASTH BY DIRECTING THE INVESTIGATION.

It is humbly contended by the respondents that there has been no adverse effect what so ever caused to Swasth by the investigation. The Courts have considered the adverse effects of investigations to companies and have devised certain considerations for quashing of investigation.

Emphasising on the necessity for adequate provision for inspection and investigation, the Company Law Committee observed:--

> *"It is, therefore, necessary that the investigation provisions of the Act should be so conceived as to reduce the threat to the credit of companies to a minimum. This risk should not, however, deter us from considering the desirability of conferring adequate powers on an appropriate authority to investigate the affairs of a company where such investigation is prima facie called for. On the contrary, we consider it to be in the long-term interest of the trade and industry of this country that such powers should be vested in a competent authority and exercised energetically, albeit with due caution and fairness in all cases which require investigation*[48]."

In *Panther Fincap and Management Services Ltd*. v. *Union of India,* [49] it was held that respondents have made out a prima-facie case for investigation and thus, irrespective of any reason whatsoever, whether it is a running concern or about to close down subsequently, the investigation shall proceed.

In the instant matter, there is a prima facie case made out against Swasth which abused its dominant position and the CCI has passed an order under Section 26(1) directing the DG for

[48] Report of the Company Law Committee, 1952, p. 133

[49] *Panther Fincap and Management Services Ltd*. v. *Union of India,* 2005 (4) Bom CR 84

investigation. The DG is supposed to apply his own discretion and submit the report[50]. There is no interference of CCI in that investigation. Swasth has been a leading player in the market since the beginning and the recent life saving drug it launched was also a hit. People are well aware of the company and are well associated with it. In such a case, it is not really probable that mere investigation will take away the consumer base from the company. If they are found guilty after the investigation, then they will be held liable or otherwise, they shall be sent with clean hands.

In *New Central Jute Mills Co. Ltd.* v. *Deputy Secretary, Ministry of Finance and Ors.,* [51] it was observed :

> *"An investigation against a public company tends to shake its credit and adversely affects its competitive position in the business world, even though, in the end, it may be completely exonerated and given a character certificate. Such an investigation may be justified only as a necessary evil. As such, it must be carried out quickly and in such a manner as may reduce the threat to the credit of the company to the minimum. Any investigation sought to be carried on oblivious of this aspect of the matter may tend to become unreasonably burdensome and may invite oppositionism."*

Thus, it is humbly submitted that there is an abuse of dominant position by Swasth by creating barriers to entry to Lifeline. The prima facie order of the CCI for investigation should not be quashed also because there is no adverse effect caused to Swasth.

[50] Section 26(2), 26(3), 26(4) of the Competition Act, 2002.

[51] *New Central Jute Mills Co. Ltd.* v. *Deputy Secretary, Ministry of Finance and Ors.,* AIR 1996 Cal 151

PRAYER

In the light of the issues raised, arguments advanced and authorities cited, may the Hon'ble Supreme Court of India be pleased to:

1. Declare that the scheme of arrangement between Lifeline Ltd. and Jeevani Ltd. is valid.

2. Declare that the Share Sale agreement between the Promoters and Lifeline Ltd. contains an arbitration clause.

3. Dismiss the petition and not quash the order of CCI for investigation against Swasth.

And / Or

Pass any order that the Hon'ble Court deem fits in the interest of justice, equity and good conscience.

For this, the Respondents shall forever humbly pray.

Counsel on behalf of the Respondents