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

Before

THE HON'BLE SUPREME COURT OF INDIA AT NEW DELHI

(**CIVIL APPELLATE JURISDICTION u/Art. 133**)

CIVIL APPEAL NO. ____

FOREIGN LENDERS … APPELLANT

V.

LIFELINE LIMITED …RESPONDENT

WITH

CIVIL APPEAL NO. ____

LIFELINE LIMITED … APPELLANT

V.

PROMOTERS OF JEEVANI …RESPONDENT

WITH

CIVIL APPEAL NO. ____

SWASTH LIFE LIMITED …APPELLANT

V.

CCI & LIFELINE LIMITED …RESPONDENT

MEMORIAL *for* THE RESPONDENT

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STATEMENT OF JURISDICTION

The Respondent has the honour to submit before the Honourable Supreme Court of India, the memorandum of the present case in the Civil Appeals filed under Article 133 of the Constitution of India. It sets forth the Facts, Contentions and Law in support of Respondent's case.

STATEMENT OF FACTS

I

"Jeevani", is a listed company incorporated 1990 registered under the Companies Act (2013), having its registered office in New Delhi is listed on the Bombay Stock Exchange. It is a leading pharmaceutical giant with a market presence. In July, 2011 it was announced that Jeevani sought to expand its market reach. "Lifeline" is another company that is listed under the Companies Act, 2013 registered in Bombay. It is a popular food company in India that is traded internationally. They decided to foray into the Pharmaceutical sector.

II

In November, 2011 negotiations for a merger commenced and on 27th January, 2012 said decision was made. As per the decision, Jeevani was due to merge with Lifeline with all assets and liabilities being transferred. There are three shareholders who are the promoters of Jeevani, were due to sell their stakes to Lifeline. However, the sale of stake was impacted by a separate sale agreement that was agreed on 23rd March, 2012 between Lifeline and Promoters. The agreement had provisions regarding disclosure of information by either of the concerned parties.

III

It explicitly states that the R&D's and IPR's of Jeevani became property of Lifeline and all associated rights. The Scheme was finalised on 5th March, 2012 but unfortunately the application was rejected by Bombay Stock Exchange. On 30th May, 2012 the two companies filed an application under Section 391, of the Companies Act, 1956 at the Delhi HC. The Companies Judge ordered for a meeting of the creditors as per Chapter V. A majority resolution in support of the Scheme was passed.

IV

Prior to public announcement being made by Jeevani, several foreign lenders initiated arbitration proceedings at a tribunal in Hong Kong, due to payments arrears to be made under a Consortium agreement for financial assistance to Jeevani. On 27th July, 2010, an arbitral award was given in favour of the foreign lender. Till date proceedings for enforcement has

been initiated. In early August, 2013 there was an application before the Company Judge to recall order dated 5th July, 2013.

V

The Company Judge dismissed the application of the foreign lenders. The Division Bench of the Delhi HC dismissed the appeal of the foreign lenders. It has now been challenged at the Supreme Court.

VI

After the merger, Lifeline was involved in various sectors that Jeevani had a presence in, which includes supply of generic drugs in the United States. They soon received notices from the FDA for low quality of production of drugs. On further internal investigation, that the plants in question were grown much before the above mentioned merger took place.

VII

Lifeline filed a suit against Promoters at Delhi HC for damages due to breach of contract dated March 23rd, 2013 for compensation for wrongful gain and unjust enrichment of Promoters by way of defrauding and misrepresenting to a bonafide purchaser. Lifeline have also alleged that non declaration of impending proceedings amounts to malafide intention to avail best possible share price. The Promoters claim that the Delhi HC does not have jurisdiction as the agreement's dispute resolution clause has an arbitration clause. However, Lifeline contended that no such clause was present.

VIII

The Single Judge of the Delhi High Court held that the clause could not be regarded as an arbitration clause. Consequently, the court had jurisdiction to look into the issues involved and the matter was kept for completion of pleadings and arguments on a later date. This Order was challenged in appeal by the Promoters to the Division Bench of the Delhi High Court. It held that Single Judge had erred in its decision and that the clause indeed constitutes an arbitration clause.Accordingly, disputes were referred to the Empowered Group pursuant to the terms of the agreement. Aggrieved by said Order of the Division Bench, Lifeline approached the Supreme Court of India, with the matter remaining pendig for argument.

IX

Meanwhile, Lifeline introduced a new drug called 'Novel' into the market. 'Novel' was considerably cheaper than other life saving drugs in the market, including the drug "Inventive". Inventive was manufactured and sold by Swasth Life Limited ("Swasth"), a sister concern of the Promoters, of the erstwhile Jeevani. In 2010, Swasth got assigned absolute rights to a few of the developed and completed R & D projects and IPRs of Jeevani. A suit for infringement of its IPRs was filed by Swasth in the Delhi High Court alleging that Novel' was substantially similar to its drug "Inventive" and was based on certain IPRs which have been assigned to Swasth. This was done prior to the launch of the drug 'Novel' by Lifeline. Interim injunction was obtained by Swasth against Lifeline who was restrained from launching 'Novel' until further orders of the Court. Meanwhile, Swasth launched a similar cost effective drug in the market, cornering a large chunk of the same. Subsequently, it withdrew it's case against Lifeline and the interim injunction was vacated.

X

Consequently, an application was filed before the Competition Commission of India (the "CCI") on behalf of Lifeline. Swasth was accused of abusing its dominant position by indulging in bad faith litigation. The CCI was of the prima facie view that Swasth may have abused its dominance and passed an Order directing the DG CCI to investigate on the information provided by Lifeline and submit its report within 45 days. Said report is awaited.

XI

Aggrieved by the Order of the CCI, Swasth filed a writ petition making Lifeline and the CCI a party in the Delhi High Court. It was submitted that the CCI's Order for directing investigation was bad in law as Swasth, in its endeavor to protect its IPRs could not be held, even prima facie, to be abusing its dominance. Upon arguments, the Delhi High Court held that CCI has made prima facie finding, and has only directed for an investigation on the allegations made against Swasth. Consequently, it was held that no adverse effect is caused to Swasth in pursuance of which the writ petiiton filed by it was dismissed. On appeal, the Division Bench also did not find any reason to interfere with the order of Hon'ble Single Judge and accordingly Lifeline has come before the Supreme Court against the order of the Division Bench.

STATEMENT OF ISSUES

The following questions are presented before the Hon'ble Supreme Court of India for its consideration:

1. Whether the Scheme of arrangement should be set aside?
2. Whether the **Dispute Resolution** clause is an arbitration agreement?
3. Whether the investigation by the CCI is bad in law?

SUMMARY OF ARGUMENTS

1. THE SCHEME OF ARRANGEMENT [SCHEME] SHOULD NOT BE SET ASIDE.

It is submitted on behalf of the Respondent Company that the scheme of arrangement should not be set aside as the approval of the BSE is not required; notice to the foreign lenders was not required as the foreign lenders are not creditors and the foreign lenders do not constitute a separate class of creditors.

2. THE DISPUTE RESOLUTION CLAUSE IN THE SHARE SALE AGREEMENT IS NOT AN ARBITRATION AGREEMENT.

It is plead by the Respondent that the **Dispute Resolution** clause does not amount to an arbitration agreement as there is no intention between the parties to arbitrate and the Jurisdiction clause overrides the **Dispute Resolution** clause.

3. THE APPEAL FILED THE INVESTIGATION ORDERED BY THE COMPETITION COMMISSION OF INDIA (HEREON FORTH CCI) IS BAD IN LAW

It is humbly submitted that the investigation ordered by CCI is bad in law as the CCI does not have jurisdiction, and the argument that Section 26(1) of the Act is merely a "direction *simpliciter*" is not valid

ARGUMENTS ADVANCED

1. THE SCHEME OF ARRANGEMENT [SCHEME] SHOULD NOT BE SET ASIDE.

It is submitted on behalf of the Respondent Company that the scheme of arrangement should not be set aside as [1] the approval of the BSE is not required; [2] notice to the foreign lenders was not required as the foreign lenders are not creditors and [3] the foreign lenders do not constitute a separate class of creditors.

1.1. The approval of the BSE is not required.

As per the listing agreement with the stock exchange, consent of the stock exchange is not compulsory.[1] It would suffice if the company files the scheme before the stock exchange a month before it presents the scheme to the court for approval.[2]

In the instant matter, the scheme was finalized on 5th March, 2012 and immediately reported to the Bombay Stock Exchange. The obligation of the merging entities was thus satisfied in accordance with the Listing Agreement. It is only after the Scheme was file before the BSE that the Respondent Company approached the Delhi High Court for initiating the process of approval under the Companies Act, 1956.

1.2. Notice to the foreign lenders was not required as the foreign lenders are not creditors.

It is submitted by the Respondent Company, that the provisions of the Limitation Act, 1963 are applicable to the foreign award. In Noy Vallesina Engineering Spa v Jindal Drugs Limited[3], the Bombay High Court has held that the application for execution of a foreign award is governed by Article 137 of the Limitation Act, 1963. Pursuant to Article 137 of the Limitation Act, 1963, the period of limitation is three years from the date the right to apply accrues.[4]

In the instant matter, the foreign award was passed in favour of the foreign lenders on 27th July, 2010. This implies that the right to apply for the execution of the foreign award was vested in the foreign lenders on this day. Thereafter, three years have elapsed and there has

[1] *Compact Power Sources (P) ltd, In re*, (2004) 52 SCL 139

[2] *Ibid.*

[3] 2006(3)ARBLR510(Bom)

[4] Article 137, Limitation Act, 1963.

still been no proceeding for the enforcement of the aforesaid award. Consequently, the execution of the award is barred by limitation.

In light of the aforementioned, the Respondent Company submits that foreign lenders are not creditors of the Company and therefore there was no requirement to provide notice.

1.3. *In arguendo*, the foreign lenders do not constitute a separate class of creditors.

The Respondent Company submits that in the case of *Life Assurance Corporation v. Dodd*,[5] the court highlighted the importance of distinguishing different classes to ensure that the interests of various stakeholders such as creditors and shareholders are considered prior to the grant of sanction. The court in the aforesaid case held that the definition of class must be done such that there is no dissimilarity between the parties so as to make it impossible for them to consult together with a view keeping in mind their common interest.[6] Moreover, it has been upheld that foreign lenders do not constitute a separate class to raise their concerns at the stage of meeting or before the court at the stage of sanctioning.[7]

In the case of Miheer H. Mafatlal v. Mafatlal Industries Limited,[8] the court clearly held that despite the existence of foreign investors, there was no need for the convening of any separate meeting of subclasses unless it could be shown that there is a separate scheme of compromise offered to that class. Additionally, in the case of Re English, Scottish and Australian Chartered Bank,[9] the creditors were treated as separate, whether or not their debts arose in England or Australia. Likewise, in D.A. Swamy and Ors. v. India Meters Ltd.[10] the position adopted was that a group of persons would constitute a separate class only when it can be shown that all their claims can be ascertained by a common system of evaluation. A group compromised as a class should be homogeneous and should have a commonality of interest and the compromise offered to them should be identical.[11]

In the instant factual matrix, it has been contended by the foreign lenders that as they constituted a separate class of creditors, a meeting should have been convened for approval of

[5] [1892] 2 QB 573 CA

[6] Brown LJ, *Life Assurance Corporation v. Dodd,* [1892] 2 QB 573 CA

[7] *Commerz Bank AG v Arvind mills Ltd* (2002)110 Com cases 539 (Guj)

[8] *Miheer H. Mafatlal v. Mafatlal Industries Limited*, 87 Comp. Cases 792.

[9] (1893) 3 Ch 285

[10] *D.A. Swamy and Ors. v. India Meters Ltd.* [1994] 79 Comp Cas 27

[11] *Ibid.*

the scheme and as such a meeting was not convened the scheme should be set aside. However, given the fact that the courts have upheld that foreign lenders *prima facie* do not constitute a separate class of creditors, there was no need for a separate meeting to be held for the approval of the scheme. Moreover, the fact situation clearly indicates that they received no special terms of compromise and consequently they fail to comprise a different class of creditors.

2. THE DISPUTE RESOLUTION CLAUSE IN THE SHARE SALE AGREEMENT IS NOT AN ARBITRATION AGREEMENT.

It is plead by the Respondent that the **Dispute Resolution** clause does not amount to an arbitration agreement as [1] there is no intention between the parties to arbitrate and [2] The Jurisdiction clause overrides the **Dispute Resolution** clause.

2.1. There exists no intention to arbitrate between the parties.

It is submitted by the Respondent that there exist no intention to arbitrate between the parties as [1] there exists no agreement to 'refer' any 'dispute' for arbitration and [2] the Dispute Resolution clause envisages an expert determination and not a judicial determination.

2.1.1. There exists no agreement to 'refer' any 'dispute' for arbitration.

The Respondent submits that pursuant to section 7 of the Arbitration and Conciliation Act, 1996, an arbitration agreement is an agreement where the parties agree to refer certain disputes which have arisen or may arise in the course of their legal relation to arbitration.[12] In light of the aforesaid provision and in consonance with the opinion of the Supreme Court, a clause in a contract can be interpreted as an arbitration agreement only if such 'reference' to a 'dispute' is expressly or impliedly discerned from the clause.[13]

In *State of Uttar Pradesh v Tipper Chand*[14], although the impugned clause was binding upon the parties, the Supreme Court held that the agreement in question could not amount to an arbitration agreement as the clause conferred power on an individual to take decisions *suo moto* as opposed to a reference made by the parties to him.[15] Thus, an integral aspect of section 7 pertaining to the reference of a dispute was not satisfied invalidating the clause.

[12] Section 7, Arbitration & Conciliation Act, 1996

[13] *State of Orissa v Damodar* Das AIR1996SC942

[14] *State of Uttar Pradesh v Tipper Chand* AIR 1980 SC 1522

[15] *Ibid.*

In *Punjab State v Dina Nath*[16] however, the Supreme Court declared the arbitration agreement to be valid as the Clause in the agreement categorically mentioned the word "dispute" which was to be 'referred' to appointed individual.[17] Additionally, the Supreme Court distinguished the contractual stipulation in *State of Orissa v Damodar Das*[18]as the impugned clause limited the power of the adjudicator to "the questions relating to the meaning of the specifications; drawings and instructions, quality of workmanship or materials used on the work, or any other question, claim, right, matter, drawings specifications estimates, instructions, orders or these conditions, or otherwise concerning the works or the execution or failure to execute the same" which would not encompass disputes of any nature.[19]

In the instant matter, clause 2.1 i.e. the **Dispute Resolution** clause does not make any suggestion that the parties are permitted to 'refer' their 'disputes' to the empowered committee. It merely stipulates that the decision of the empowered committee in relation to 'all questions and issues relating to the meaning, scope, instructions, claims, right or matters of interpretation of and under' the share sale agreement is binding upon the parties. Therefore, pursuant to a reading of the clause it appears that the empowered committee can decide on any issue it deems fit and not just those issues which the parties refer to it.

Moreover, the clause limits the scope of the agreement solely to those questions envisaged therein and there is ambiguity as to whether the same includes questions of a judicial nature which are required to be determined. In light of the aforementioned, it is humbly submitted that the same does not amount to an arbitration agreement as there is no power vested in the parties to 'refer' a 'dispute' to the empowered committee.

[16] *Punjab State v Dina Nath* AIR2007SC2157

[17] *Ibid.*

[18] *State of Orissa v Damodar Das* AIR1996SC942

[19] *Ibid.*

2.1.2. The Dispute Resolution clause envisages an expert determination and not a judicial determination.

The Respondent submits that the **Dispute Resolution** clause should be interpreted in light of the intention of the parties. The same is required to be gathered from the terms of the agreement.[20]. In this context, it is important to take into account that in addition to arbitral tribunals, there are certain other persons entrusted to affect their legally enforceable rights by the consent, but applying a procedure which is not judicial in nature.[21]

When the wording is ambiguous, the court has prescribed certain guidelines which are required to be considered. A significant consideration in this regard is whether there is an 'issue' between the parties, in which case the procedure was held to be expert determination; or a 'formulated dispute' between the parties where defined positions had been taken, in which case the procedure was held to be an arbitration.[22]

In the instant matter, there is nothing on record to indicate that the empowered committee is required to act judicially. Additionally, the **Dispute Resolution** clause makes reference to ‘issues’ which are required to be determined as opposed to ‘disputes’ which are required to be adjudicated upon. Further still, an examination of the prevailing circumstances would indicate that the share sale agreement was created to give effect to a merger which entails several variables to be decided upon such as the price of each share. As a result, it is submitted that the **Dispute Settlement** clause envisages an expert determination as opposed to a judicial determination and hence there is no intention on part of the parties to arbitrate.

[20] *Jagdish Chander v Ramesh Chander* 2007GLH(27)377

[21] Mustill & Boyd, "Commercial Arbitration", 2nd Edition, 30.

[22] Russell on Arbitration, 21st Edition, 37, ¶ 2-014 as cited in *K.K. Modi v K.N. Modi* AIR1998SC1297

2.2. The Jurisdiction clause overrides the Dispute Resolution clause.

The Respondent pleads that if on an examination of a document it can be discerned that the parties had agreed to a particular set of terms, the onus is on the court to give effect to those terms.[23] As a result, it is imperative that the contract is read as a whole.[24]

In circumstances where the express intention of the parties to refer disputes to arbitration is absent, and, more so when there exist a specific clause which vests in a particular court the jurisdiction for settlement of disputes of all disputes arising out of the agreement or touching the subject-matter, the clause not only provides the territorial jurisdiction to the court but also overrides the alleged arbitration agreement.[25]

Moreover, in *YL eServices Pvt. Ltd v Silverline Business & Tech Park Pvt Ltd*[26], it was observed that despite the heading of the dispute settlement clause containing the term 'arbitration', no intention to replace the jurisdiction of courts could be discerned from the language of the contract which actually conferred jurisdiction on the Bangalore Courts.

In the instant factual matrix, Clause 3 or the **Jurisdiction** clause confers upon the Delhi courts all disputes touching upon the subject matter of the share sale agreement. In order to reconcile Clause 2 with Clause 3 of the Agreement and to read the Agreement holistically, the **Dispute Resolution** clause which constitutes an expert determination must be overridden by the **Jurisdiction** clause. In light of the aforesaid, it is submitted that all disputes arising out of the contract would be adjudicated upon by the competent court in Delhi.

[23] *Khardah Co. v Raymon & Co.* 1963 SCR (3) 183

[24] *Ibid.*

[25] *Karnataka Power Transmission Corporation Limited and Anr v Deepak Cables (India) Ltd.* AIR2014SC1626.

[26] *YL eServices Pvt. Ltd v Silverline Business & Tech Park Pvt Ltd* AIR 2008 Kant 127

3. THE APPEAL FILED THE INVESTIGATION ORDERED BY THE COMPETITION COMMISSION OF INDIA (HEREON FORTH CCI) IS BAD IN LAW

It is humbly submitted that the investigation ordered by CCI is bad in law as [1] the CCI does not have jurisdiction, and [2] the argument that Section 26(1) of the Act is merely a "direction *simpliciter*" is not valid

3.1 The CCI does not have jurisdiction

It is submitted that the CCI does not have jurisdiction as, [1] there are alternate remedies available, and [2] the investigation will interfere with the Delhi High Court's jurisdiction

3.1.1. There are alternate remedies available

It is submitted that the CCI does not have jurisdiction to direct the Director General (hereon forth, DG) of the CCI to conduct an investigation with regard to abuse of dominant position by Swasth. In a recent case, *Telefonaktiebolaget LM Ericsson v Competition Commission of India*, the order being dated 21 January 2014, in the Delhi High Court, it was contended by the petitioners against the investigation started by the CCI against them with regard to alleged abuse to dominant position, that, "Competition Commission of India has no jurisdiction to investigate the action of the petitioner inasmuch as the Patent Act itself provides adequate mechanism to balance the rights of patentee and other stakeholders"[27]. The Court ruled that, "this Court is prima facie of the view that a substantial question of jurisdiction of respondent No. 1 to entertain respondent No. 2's petition arises in the present proceedings"[28]. The Court instructed the CCI to not give or publish any order/reports in lieu of its investigations, effectively rendering the investigation redundant: "no final order/report shall be passed either by the Competition Commission of India or by its Director General"[29].

[27] W.P.(C) 464/2014 in the Delhi High Court, on 21 Jan 2014
[28] *ibid*
[29] *ibid*

3.1.2. The investigation will interfere with the Delhi High Court's jurisdiction

It is submitted that the investigation directed by CCI will interfere with Delhi High Court's jurisdiction, as contended by the petitioner in another very recent case, *JCB India Ltd v Competition Commission of India*, dated 4 April 2014 in the Delhi High Court, "the aforesaid investigation interferes with the jurisdiction of this Court and would result in this Court being placed under the supervision of respondent – CCI"[30]. The facts of this case are very similar to the instant case, where JCB obtained an interim injunction against Bulls Smart, and withdrew the case ten months after the injunction was awarded. Bulls Smart went to the CCI and the CCI directed the DG to begin an investigation; aggrieved JCB filed a petition in the Delhi High Court, and the Court's judgement is as follows, "Having heard the learned counsel for parties and having perused the aforesaid judgment, this Court is prima facie of the view that a substantial question of jurisdiction of respondent no. 1 to entertain respondent No. 2's petition arises in the present proceedings. The judgement was the same as *Telefonaktiebolaget LM Ericsson v Competition Commission of India*[31], where the CCI was instructed not to give or publish any orders/results with regard to its investigation, once again, rendering the CCI investigation redundant.

3.2 The argument that Section 26(1) of the Act is merely a "*direction simpliciter*" is not valid

It is submitted that the argument that Section 26(1) of the Act is merely a "*direction simpliciter*" is not valid, as this very argument is proposed in both aforementioned cases, *Telefonaktiebolaget LM Ericsson v Competition Commission of India* and *JCB India Ltd v Competition Commission of India* by Respondent No. 1, CCI, by citing the landmark Supreme Court Case – *Competition Commission of India v Steel Authority of India*[32] – and is swiftly dismissed in both cases by Justice Manmohan:

"This Court is also prima facie of the view that the Commission has entered into an adjudicatory and determinative process by recording detailed and substantial reasoning at the

[30] W.P.(C) 2244/2014 and CM APPLs. 4706-4707/2014 in the Delhi High Court, on 04 April 2014
[31] *ibid*
[32] (2010) 10 SCC 744

Section 26(1) stage itself. In fact, by virtue of the impugned order, this Court is prima facie of the view that the petitioner's remedy under Section 26(7) has been rendered illusory"[33].

It is thus contended that simply stating that the CCI order does not reflect its position does not inherently give the investigation a purely administrative nature.

[33] W.P.(C) 2244/2014 and CM APPLs. 4706-4707/2014 in the Delhi High Court, on 04 April 2014

In the light of the arguments advanced and authorities cited, Respondents humbly submit that the Honourable Court may be pleased to adjudge and declare that:

1. *The appeal filed The investigation ordered by the Competition Commission of India (hereon forth CCI) is bad in law*

2. *The Dispute Resolution clause in the Share Sale Agreement is not an arbitration agreement.*

3. *The scheme of arrangement [Scheme] should not be set aside.*

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

Sd./-

(Counsel for Appellants)