TEAM CODE: P

IN THE HON'BLE SUPREME COURT OF INDIA

IN THE MATTER BETWEEN

Foreign Lenders of Erstwhile Jeevani…....……..……Appellant

V/s

Lifeline Limited…….……..……..…..……Respondent

AND

Lifeline Limited…..…….……...……..Appellant

V/s

Promoters of Jeevani Limited……..……Respondent

AND

Swasth Limited……..…….……..Appellant

V/s

Lifeline Limited and CCI…….……Respondent

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STATEMENT OF JURISDICTION

The appellants, Foreign lenders, Lifeline Ltd. and Swasth Ltd., have approached the Hon'ble Supreme Court of India under Article 132[1] of the Constitution of India.

STATEMENT OF FACTS

[1] 132. 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.
(2) Omitted.
(3) Where such a certificate is given, any party in the case may appeal to the Supreme Court on the ground that any such question as aforesaid has been wrongly decided Explanation For the purposes of this article, the expression final order includes an order declaring an issue which, if decided in favour of the appellant, would be sufficient for the final disposal of the case.

- Jeevani Ltd. and Lifeline Ltd. decided to merge. A Scheme of arrangement, for Jeevani, was prepared according to which Jeevani would completely merge into Lifeline. The Scheme was approved by the Delhi High Court after resolutions supporting the Scheme were passed by a vote of majority by the Creditors.
- The Foreign Lenders of Jeevani filed an application in the Delhi High Court which was dismissed. The Division Bench also dismissed the application on appeal and the Foreign Lenders have come before the Supreme Court against the order.
- The sale agreement entered into between the parties contained an arbitration clause but Lifeline filed a suit against the Promoters before the Delhi High Court. The Delhi High Court held that the Court had jurisdiction to look into the issues involved to which the Promoters appealed to the Division bench. The Division Bench held that the clause constitutes an arbitration clause. Aggrieved by this Order of the Division Bench of the Delhi High Court, Lifeline has approached the Supreme Court of India.
- After the merger, Lifeline decided to introduce a new life saving drug, "Novel" into the market which was substantially similar to the drug inventive manufactured by Swasth Ltd. Swasth filed a suit for infringement of its IPRs in the Delhi High Court and was able to obtain an interim injunction against Lifeline who was restrained from launching the new drug 'Novel'. Lifeline filed an application before the CCI against Swasth. The CCI passed an Order directing the DG CCI to investigate on the information and submit its report within 45 days.
- Swasth filed a writ petition making Lifeline and the CCI a party in the Delhi High Court. Delhi High Court dismissed the writ petition filed by Swasth. On appeal, the Division Bench also dismissed the writ petition and accordingly Swasth has come before the Supreme Court against the order of the Division Bench.

STATEMENT OF ISSUES

I. **WHETHER THE ORDER PASSED BY THE HON'BLE DELHI HIGH COURT APPROVING THE SCHEME OF ARRANGEMENT CAN BE RECALLED?**

II. **WHETHER THE HON'BLE DELHI HIGH COURT HAS THE JURISDICTION OVER THE DISPUTE BETWEEN LIFELINE THE PROMOTERS OF JEEVANI?**

III. **WHETHER THE INVESTIGATION CONDUCTED BY CCI AGAINST SWASTH IS BAD IN LAW?**

SUMMARY OF ARGUMENTS

I. It is for the company to decide which Creditor would be a separate Class of Creditor in accordance with the purport of the Scheme. The Classification of members or Creditors can be founded on the basis of difference in the terms offered under the Scheme. The

difference in terms of the Scheme can only be the criterion for identifying the separate Class for the purpose of convening separate meeting for such Class and no separate notice is required to be sent to every Class of Creditor. The Order passed by Hon'ble Delhi High Court sanctioning the Scheme cannot be recalled.

II. The Clause 2.1 of the Share Sale Agreement is an Arbitration Clause as per The Arbitration and Conciliation Act, 1996 and as per the settled laws. The inclusion of the words 'Arbitrator' or 'Arbitration Agreement' is not necessary to be included as the agreement of arbitration must be given a flexible approach and the intention of the parties must be seen while interpreting the clause.

III. The investigation conducted by CCI is *bona fide* and is in interest of justice and the appellant is nowhere aggrieved by the investigation. The investigation is only for the purpose of collection of evidence. The purpose of investigation is only to know if Swasth has abused its dominant position and to collect evidence regarding the same. Also, no adverse effect has been caused to Swasth by the investigation and the CCI has full authority to conduct such investigation.

ARGUMENTS ADVANCED

[I] THE ORDER PASSED BY THE HON'BLE DELHI HIGH COURT APPROVING THE SCHEME CANNOT BE RECALLED.

[I.A] FOREIGN LENDERS OF JEEVANI DID NOT CONSTITUTE A SEPARATE CLASS OF CREDITORS.

It is always a moot question as to what constitutes a Class. However, speaking broadly, when it is shown that a group of persons would constitute a "Class" that they have conveyed all interest, and their claims are capable of being ascertained by a common system of valuation. The group who are styled as 'Class' must have 'Commonality of interest' and ordinarily be homogeneous and must be offered identical compromise. This will provide a rationale for determination of practical boundaries of Classification.[2] The test in regard to a "Class" that can be applied with reasonable certainty is as to the nature of compromise offered to different groups or Classes. The company is ordinarily expected to offer an identical compromise to persons belonging to one Class otherwise it may be discriminatory.[3] The question of convening different meetings arises only if different Schemes are offered to different Creditors.[4]

PALMER'S COMPANY LAW (24th Ed.) discusses the issue as to what constitutes a Class. In this context it is stated that the Court does not itself consider at this point what Class of Creditors or members should be made parties to a Scheme. This is for the company to decide in accordance with the purport of the Scheme.[5]

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[2] *Maneck Chowk and Ahmedabad Mfg Co. Ltd., In re*, (1970) 2 CompLJ 300 (Guj).

[3] *State Bank of India v. Engg. Majdoor Majdoor Sangh*, (2000) 27 SCL 103 (Guj).

[4] *Modern Denim Ltd., In Re*, (2009) (148) Com Cases 884 (Raj)

[5] *Nordic Bank Plc. v. International Harvester Australia Ltd.*, (1983) 2 VR 298 at 303.

In *Arvind Mills Limited, In re.*[6]Court held that all secured Creditors whether lenders in foreign currency and lenders in Indian Rupees constitute one single Class of Creditors. The Classification of members or Creditors can be founded on the basis of difference in the terms offered under the Scheme. The difference in terms of the Scheme can only be the criterion for identifying the separate Class for the purpose of convening separate meeting for such Class.

In view of the Hon'ble Supreme Court's view on the Classification of Classes in *Miheer H. Mafatlal v. Mafatlal Industries Ltd*[7]at the stage of meeting it is for the company to decide what Classes of Creditors or members should be made parties to the Scheme. It is a settled law that the interest of the individual shareholder or a group under his control does not entitle him to separate or distinct treatment if his legal rights are not in any way distinct from the rights of the entire Class of the shareholders.[8]

PALMER relies on the observation made in *Neath Bicon Railway*[9], to state that the Court has no power to usurp the Classes of members or Creditors to decide whether they have approved the Scheme.

The object of holding meetings of Creditors is to ascertain whether the sums payable to them may be jeopardized in any manner by the Court giving sanction to the proposed Scheme of amalgamation. Once that amount is secure the erstwhile Creditor losses *locus standi* to participate any further in a matter which does not affect its interest.[10]

Re, English, Scottish and Australian Chartered Bank[11], Creditors were treated as a single Class whether their debts arose in Australia or in England.

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[6] (2002) 37 SCL Guj 660.

[7] (1996) 87 Com Cases 792 (at page 833).

[8] *Miheer H. Mafatlal v. Mafatlal Industries Ltd.*, (1995) 5 Comp LJ 38 (Guj).

[9] (1982) 1 Ch 349.

[10] *LG Electronics System India Ltd., In re*, (2003) 42 SCL 554 (559) (Del).

[11] (1893) 3 Ch 385.

[I.B] SEPARATE NOTICE WAS NOT REQUIRED TO BE SENT TO THE FOREIGN LENDERS OF JEEVANI.

Non receipt of notice by any member/Creditor will not invalidate proceedings of the meeting[12]. Notice of the meeting should be given to all the members of the company or all the Creditors, though in the case of Creditors it has been held that a meeting could not be invalidated merely because notice was not served on an individual Creditor[13].

It was held that a meeting conducted in accordance with the provisions of s. 391(2) and also under the permission of the Court was not to be invalidated only on the ground that a Creditor was not served with notice.[14].

Where there are several Classes of Creditors or contributories, and the Scheme does not affect the rights of some particular Class, it is not necessary for notice of any meeting to be sent to the members of that Class[15].

[I.C] THE ORDER PASSED BY THE HON'BLE DELHI HIGH COURT APPROVING THE SCHEME OF ARRANGEMENT CAN BE RECALLED.

In *Indian Metals and Ferro Alloys Ltd.,Re,*[16]it was held that an individual who is neither the member nor Creditor of the transferor company has no right to present any objections. It gives him no standing to show that he is holding shares in the financial institutions and banks which extended financial support to the company.

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[12] *EITA India Ltd, in Re* (2000)99 CompCas 276(Cal); *Maknam Investments Ltd, in re* (1996) 87 CompCas 689(Cal.).

[13] *Indian Cresent Bank Ltd., Re*, (1949) 53 CWN 183; *Bhagat Ram Kohli v. Angel's Insurance Co. Ltd.*,(1937) 7 Com Cases 161.

[14] *Vikrant Tyres Ltd. Re*, (2003) 47 SCL 613.

[15] *Re Tea Corpn. Ltd., Sorsbie v. Tea Corpn. Ltd.*, (1904) 1 Ch 12(CA).

[16] (2007) 77 CLA 247.

In *N.A.P. Alagiri Raja & Co. v. N. Guruswamy*[17]it was held that there can be no doubt, therefore, that an order under section 391(1) has to be made only after the Court considers the feasibility or otherwise of the proposed Scheme or settlement and the *bona fides* of the applicant and the application.

In *Union of India v. Asia Udyog (P.) Ltd.*[18] it was held that in a case where a transferor-company is proposed to be amalgamated with a transferee-company, the Creditors are not entitled as of right to participate in the process of consideration of the sanction of the Scheme of arrangement between the company and its members. The Court observed: "*An anomaly appears to exist in the Act in as much as Creditors of the transferor-company which is being amalgamated were not entitled as of a right at any stage to participate in the process of consideration or sanction of any compromise or arrangement proposed between the company and its members which may eventually result in amalgamation of the company by its absorption in the other or by merger of the two creating third. There is no provision of the notice to the Creditors' of any such proceedings at any stage either prior to the making of the order or subsequent thereto.*"

In *Gujarat Lease Financing Ltd. In re*[19]*,* issue raised was whether a Scheme of Arrangement can cover only one group of Creditors? The Gujarat High Court held that the debenture holders form a particular Class and the objecting consortium of banks form a separate Class. The banks are not affected by the Scheme proposed, as none of the legal rights of the objecting banks was sought to be waived. The Court reiterated the view that the debenture holders who are offered substantially compromises will form a different Class other than the banks.

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[17] (1989) 65 Com Cases 758 (Mad).

[18] (1974) 44 Comp Cas 359 (Del).

[19] (2002) 6 Comp LJ 263 (Guj).

In *Shyam S. Rastogi v. Nona Sona Exports Pvt. Ltd.*[20]the Court is not a mere conduit pipe or stamping authority to whatever Scheme that may be laid before it. Not unoften, motivations in the moving of such Schemes are oblique. It is in fact for the Court to first look at the Scheme whether it has any strength or merits of its own and is financially viable or a mere attempt to take back affairs and the assets of the company which had been earlier perforce taken over at the time of the winding up.

The requirement of a "no objection certificate" from the stock exchange is not mandatory for granting sanction to the Scheme.[21] The absence of a no objection certificate from the stock exchange would not prevent the sanctioning of a Scheme or arrangement.[22] Non Compliance with the provisions clause 24(f), 24(g), 24(h) & 24(i) of listing agreement does not, by itself, bar a company from seeking sanction of the Scheme of amalgamation under Section 391 to 394, nor does it entail an automatic dismissal of such a petition.[23]

[II] DELHI HIGH COURT DOES NOT HAVE THE JURISDICTION TO THE DISPUTE BETWEEN THE PROMOTERS OF JEEVANI AND LIFELINE.

[II.A] THERE IS NO BREACH OF CONTRACT BY THE PROMOTERS OF JEEVANI.

The Counsel humbly submits that there was no duty on the Promoters of Jeevani to speak about the investigation. As per the explanation to Section 17 "*mere silence as to facts likely to affect the willingness of a person to enter into a contract is not fraud, unless the circumstances of the case are such that, regard being had to them, it is the duty of the person*

[20] 59 Com Cases 832 (Del).

[21] *Pentamedia Graphics Ltd. v. The Bombay Stock Exchange*, (2008) 145 Com Cases 327 (Mad).

[22] *In re: Vast Textiles Ltd.*, (2007) 78 SCL (Raj).

[23] *In Re: Chemidye Manufacturing Company Pvt. Ltd.*, (2006) 69 SCL 10.

keeping silence to speak, or unless his silence is, in itself, equivalent to speech." It was the duty of Lifeline to have properly conducted due diligence before entering into the agreement as to make proper enquiries regarding the affairs of Jeevani as the principle of *Caveat Emptor* burdens the buyer to make proper enquiries before entering into an agreement with the other party. Had Lifeline conducted a proper due diligence, they would have known about the investigation by the FDA and would have made their decision accordingly to enter or not to enter into the agreement.

The exception to Section 19 of the Indian Contract Act, 1872 also states that "*if the consent was caused by misrepresentation or by silence, fraudulent within the meaning of Section 17, the contract, nevertheless, is not voidable, if the party whose consent was so caused had the means of discovering the truth with ordinary diligence.*" Where the innocent party might, with due diligence, had the means of so discovering the misrepresentation[24] before he entered into the contract; in such a case, he cannot claim that he was deceived by the misrepresentation.[25] The ordinary diligence of which the Exception speaks is such diligence as a prudent man would consider appropriate to the matter, having regard to the importance of the transaction in itself and of the representation in question as affecting its result.[26] Further, there is no duty upon parties to speak about facts likely to affect the other parties consent to the contract and mere silence does not amount to fraud, unless the circumstances of the case show that there is duty to speak, or silence is, in itself equivalent to speech[27]. The General principle is that there is no obligation to speak within the context of negotiations for

[24] *Dhulpudi Namayya v. Union of India*, AIR 1958 AP 533.

[25] (1881) ILR 5 Bom 92.

[26] Pollock and Mulla, *Indian Contract Act and Specific Acts*, Lexis Nexis Butterworth India (13th ed., 2006) p. 589.

[27] Ibid at p. 512.

an ordinary commercial contract[28] as there is no duty to disclose in every contract appears to rest on the view that each party must obtain the necessary information for himself and cannot expect it to be supplied by the other. In this case the promoters were under no obligation to disclose the matter relating to FDA investigation and could not be held liable for fraud as it was held in the case *Kamalkant Paliwal v. Prakash Devi Paliwal*[29] that if the party alleging fraud had the facts before it or had the means to know them, it could not be said to have been defrauded.

Further, only because the promoters have gained out of the agreement does not make it a case of defrauding as in such cases the Courts are 'concerned with the plaintiff's loss and not with the defendant's profit.[30] Moreover, Section 73 applies only where a contract has been broken and breach of contract must be proved before setting about the question of damages. No damages can be awarded by the Court without coming to any conclusion about breach, merely on the ground that the defendant has been profited by the contract.[31]

[II.B] THE DISPUTE RESOLUTION AGREEMENT AMOUNTS TO ARBITRATION.

The Respondent humbly submits that the dispute resolution agreement is an agreement of reference to arbitration as it satisfies the conditions mentioned in Section 7 of the Act. Even if the words "Arbitration" and "Arbitral Tribunal (or arbitrator)" are not used with reference to the process of settlement or with reference to the arbitral tribunal which has to adjudicate upon the disputes, in a clause relating to settlement of disputes, it does not detract from the clause being an arbitration agreement if it has the attributes or elements of an arbitration agreement. The essential attributes or elements of an arbitration agreement are: (a) the agreements should be in writing; (b) the parties should have agreed to refer any disputes

[28] *Banque Financiere de la cit Sa v Westgate Insurance Company ltd.*, (1989) 2 All ER 952.

[29] AIR 1976 Raj 79.

[30] *Attorney General v. Blake*, [2000] 4 All ER 385 (HL).

[31] *Pulavarti Sitaramamurty v. Bangaru Sobhanadri*, (1950) 2 Mad LJ 505.

(present or future) between them to the decision of a private tribunal; (c) the private tribunal should be empowered to adjudicate upon the disputes in an impartial manner, giving due opportunity to the parties to put forth their cases before it; (d) the parties should have agreed that the decision of the private tribunal in respect of the disputes will be binding on them[32].

All the conditions above mentioned are being satisfied in the present case as the agreement was in writing; It was a contract at present time to refer the dispute arising out of the present contract; and there was a valid agreement to refer the dispute to the arbitration of the 'empowered committee comprising of (three) executive level personnel of the Company'.

It is well settled that in order to become an arbitration agreement it is not required that in the agreement between the parties the word 'arbitration' should be mentioned.[33] Arbitration agreement is not required to be in any particular form, what is required to be ascertained is whether the parties have agreed that if the disputes arise between them in respect of subject matter of the contract, such dispute shall be referred to arbitration, then such an arrangement would spell out an arbitration agreement[34]. Endeavor should always be made to find out the intention of the parties by reading the terms broadly and clearly.[35] The terms of the agreement clearly indicate an intention on the part of the parties to the agreement to refer their disputes to an "empowered committee comprising of (three) executive level personnel of the Company" for adjudication and willingness to be bound by the decision of such agreement. The intention of the partiers can be held to be clear and unambiguous. It is the substance and not the form of agreement which is material and relevant.[36]

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[32] *Jagdish Chander v. Ramesh Chander*, (2007) 5 SCC 719.

[33] *Indiana Conveyors Ltd. v. Indian Rare Earths Limited*, AIR 2007 Ori 162.

[34] *Punjab State v. Dina Nath*, (2007) 5 SCC 28.

[35] *Jammu and Kashmir State Forest Corporation v. Abdul Karim Wani and Ors.*, [1989] 2 SCR 380.

[36] *Pravinchandra Murarji Savla v. Meghji Murji Shah*, 1998(2) RAJ 273.

Further, In *Mallikarjun v. Gulbarga University*[37]it was held that for the purpose of constituting the valid arbitration agreement, it is not necessary that the conditions as regards adduction of evidence by the parties or giving an opportunity of hearing to them must specifically be mentioned therein. Such conditions, it is trite are implicit in the decision making process in the arbitration proceedings. Compliance of the principles of natural justice inheres in an arbitration process. They, irrespective of the fact as to whether recorded specifically in the arbitration agreement or not are required to be followed. Therefore, the arbitration clause does not necessitate spelling out of a duty on the part of the arbitrator to hear both parties before deciding the question before him. The expression decision' subsumes adjudicating of the disputes.

Moreover, clauses of contract must be given meaningful interpretation.[38] A contract that provides for arbitration is a commercial agreement inter-parties and has to be interpreted in such a matter as to give an efficacy to the agreement rather than to invalidate it. So for interpreting, such an agreement strict rules of construction should not be applied. The meaning of such an agreement must be gathered by commonsense and such construction must not be defeated by any pedantic and rule of strict interpretation.[39]

Further, In *Indian Oil Corporation Ltd. and Ors.* v. *Raja Transport Pvt. Ltd.*[40] it was held that the fact that the named arbitrator is an employee of one of the parties is not ipso facto a ground to raise a presumption of bias or partiality or lack of independence on his part. The Courts cannot interpose and interdict the appointment of an arbitrator whom the parties have

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[37] 2003 (3) ARB LR 579 (SC).

[38] *Sumitomo Heavy Industries Limited v. Oil and Natural Gas Commission of India*, AIR 2010 SC 3400.

[39] *The Union of India v. D.N. Ravri & Co. and Ors.*, [1977] 1 SCR 483.

[40] (2009) 8 SCC 520.

chosen under the terms of the contract, except in cases where it is pleaded and proved that such arbitrator is guilty of legal misconduct, fraud or is otherwise disqualified.[41]

Looking at the agreement it is clear that at the existence of an issue or question, the reference of the case to the 'committee' and the express unequivocal intention to attach finality to the order of the 'committee' are extremely significant factors, which seem to clothe the 'empowered committee' with a quasi-judicial character. Considering this clause rationally in its context, the conclusion seems to be almost irresistible that the parties intended the 'committee' to act as an arbitrator and in no other capacity as the language expressly provides that in the matter of dispute, the case shall be referred to the 'Empowered Committee comprising of (three) executive level personnel of the Company' whose order shall be final.

[III] THE INVESTIGATION CONDUCTED BY CCI AGAINST SWASTH IS NOT BAD IN LAW.

The respondents humbly submit before this Hon'ble Court that the investigation conducted by CCI is *bona fide* and is in interest of justice and the appellant is nowhere aggrieved by the investigation. The report of DG is neither a decision nor an administrative order which affects judicially the rights of the concerned parties[42]. In the Case of *Kingfisher Airlines Limited v. CCI*[43] it was held that "The investigation is only for the purpose of collection of evidence. The investigation starts only after there is a *prima facie* proof of commission of cognizable offence". The purpose of investigation is only to know if Swasth has abused its dominant position and to collect evidence regarding the same. Therefore, it is clear that the investigation would reveal if there is sufficient evidence available to take further action".

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[41] Denel (Pty) Limited v Bharat Electronics Limited, JT 2010 (5) SC 344.

[42]Dugar S.M., *Guide to competition law*, Volume 1 (5th ed., 2010), Lexis Nexis Butterworths Wadhwa Nagpur, p. 984.

[43] Writ Petition No. 1785 OF 2009.

Further, in *Competition Commission of India v. Steel Authority of India Ltd. and Anr.*[44] the Supreme Court said that *"Direction under Section 26(1) of Competition Act, 2002 after formation of a prima facie opinion is a direction simpliciter to cause an investigation into the matter and does not effectively determine any right or obligation of the parties to the lis and does not entail civil consequences for any person and therefore, is not appealable."* Thus, in the present context of the case, CCI was of the prima facie view that the appellants may have abused its dominant position and subsequently the matter was referred to the Director General for conducting enquiry under section 26(1) of Competition act, 2002; which is not appealable. It also cannot be said that there is a lack of inherent jurisdiction on the Commission to investigate. The Competition Commission of India has a power to enquire and investigate into every complaint received under the Act[45].

[III.A] SWASTH LTD. HAS ABUSED ITS DOMINANT POSITION.

The respondents humbly submits that Swasth Ltd. has abused its dominant position being the holder of patents under its name. In order to determine whether an undertaking is in a dominant position on the relevant market it is necessary first of all to examine its structure and then the situation on that market as far as competition is concerned. In doing so it may be advisable to take account if need be of the facts put forward as acts amounting to abuses without necessarily having to acknowledge that they are abusing.[46] The basic feature of the definition is that the dominant firm is able to control the "relevant market" in which it operates, which is achieved when it is able to fix prices and conditions of sales without being challenged by its competitors. It is the price leader in the relevant market.

Discriminatory behavior and any other exercise of market power leading to prevention, restriction or distortion of competition would obviously be included in Dominance. A greater

[44] (2010) 10 SCC 744.

[45] *Kingfisher Airlines Limited v. CCI*, Writ Petition No. 1785 OF 2009.

[46] *United Brand Co. v. Commission* (1978) ECR 207.

threat to competition is from the actions of dominant firms that are inimical to future competition. It includes actions that make it difficult for potential entrants to enter (exclusionary/ anti-competitive behavior)[47].

Further, in the case of *M/s Bull Machines Pvt. Ltd. v. M/s JCB India Ltd.*[48], the facts of which were quite similar to the present issue at hand, CCI was of the view that "*the Commission is of prima facie opinion that JCB by abusing their dominant position in the relevant market sought to stifle competition in the relevant market by denying market access and foreclosing entry of 'Bull Smart' in contravention of the provisions of Section 4 of the Act*".

The Respondents submits that Swasth has been selling the drug Inventive at much higher a price than its original prices and sensing threat to its product by Respondent's drug "Novel", which is much cheaper and effective a drug than the respondent's product has resorted to bad faith litigation. The petitioners within the garb of its patent, has involved in arbitrary and unreasonable pricing of the product "Inventive", thereby being against interest of public as the said Drug is a Life Saving Drug. The said Predatory Pricing policy was against public welfare and interest of poor which were bound to pay a higher price for the product which could have been sold at much cheaper price by the respondents herein. Thus, balance of convenience lies in favour of respondents.

Also, the appellant after getting injunction against the respondent and thus, creating the entry barriers, launched a similar cheaper product with a *mala fide* intention to capture the whole market. It is categorically submitted that the respondents have approached this Hon'ble Court with unclean hands. Plan of conspiracy to control prices and distribution is not within the protection of patent monopoly[49].

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[47] Supra, n. 44, p. 822.

[48] Case No. 105 of 2013.

[49] *United States v. United States Gypsum Co.*, 333 US 364.

The respondents further submit that the appellant have exercised bad faith litigation by taking injunction on respondent's drug and subsequently vacating the injunction. By not allowing the respondent to launch the drug in the market, the respondent may at a further point of time demand excessive royalty from the respondent and may inflate the price of the newly cheaper good to an exorbitant level.

The respondents further contend that the Respondents have engaged in predatory pricing after taking injunction against the respondents with the sole motive of injuring the respondents and other competitors. Thus, subsequent of taking an interim injunction against the respondents, the respondents have conspired to sell a new drug relatively similar to "Inventive" at a much cheaper price. The Court should have not given away the injunction against lifeline. In the case of *F.Hoffman La Roche Ltd.*[50], the Court while taking into consideration public interest on priority over infringement of patents refused the injunction on account of infringement of the same and held "*The Court cannot be unmindful of the general access to life saving products and the possibility that such access would be denied if injunction was granted. If the Court was of the opinion that the public interest in granting an injunction in favour of the plaintiff during the pendency of an infringement action is outweighed by the public interest of ensuring easy and affordable access to a life saving drug, the balance should tilt in favour of the latter*".

[III.A.1] LIFELINE HAS NOT INFRINGED THE IPR'S OF SWASTH.

It is the prima facie case of the respondents that there is no similarity between the drugs manufactured by the respondents and Swasth Ltd. and that new drug was manufactured after further developing the active R & D which became the property of Lifeline after its merger with Jeevani. It has been laid down in *May & Baker Ltd v Ciba Ltd.*[51] that an invention

[50] (1979) ECR 461.

[51] (1948) 65 RPC 255.

consisting of the production of a substance from known materials and using known methods would be patentable if the final substance produced was truly new as well as useful, as opposed to being merely an additional member of a known series.

In the case of *Bayer Corporation and Ors v. Union of India & Ors.*[52], Under Section 104-A, subject to a patentee or a person deriving title or interest in the patent from him first proves that the product is identical to the product directly obtained by the patented process, (where the subject matter of patent is a process for obtaining a product), the Court may direct the defendant to prove that the process used by him to obtain the product, identical to the product of the patented process, is different from the patented process.

The respondents further submit that Swasth has misrepresented the whole case and misled the Hon'ble Delhi High Court to secure an *ad interim* injunction order in its favor. The defendant on the other hand counters this submission by submitting that pricing would indeed be a relevant consideration in determining whether the grant of an injunction would adversely affect the easy availability of a lifesaving drug[53].

In the most humble submission, it is the case of Lifeline ltd. that the "Novel" was a substantially cheaper product which was awaited in the market as opposed to the drug "Inventive".

CONCLUSION AND PRAYER FOR RELIEF

[52] ILR (2009) Supp. (2) Delhi 145.

[53] *Novartis AG v. Mehar Pharma*, 2005 (3) BomCR 191; *Franz Xaver Huemer v. New Yash Engineers*, AIR 1997 Delhi 79.

In light of the facts stated, issues raised, arguments advanced and authorities cited, it is submitted that the honorable Supreme Court of India be pleased -

1. To dismiss the appeal.

2. The order passed by the Hon'ble Delhi High Court approving the Scheme shall not be recalled.

3. The Hon'ble Delhi High Court does not have the Jurisdiction over the dispute.

4. The investigation conducted by CCI against Swasth is not bad in law.

5. Pass any other order or make any direction as the Court may deem fit to meet the interests of justice in the instant case.

All of which is respectfully prayed.

PLACE: NEW DELHI COUNSELS FOR RESPONDENTS

DATE: SEPTEMBER, 2014 X_____