**TEAM CODE:** R

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**BEFORE THE HON'BLE SUPREME COURT OF INDIA**

*Special Leave Petitions under Article 136 of Constitution of India*

*SLP No. ___/2014 with SLP No. ___/2014 with SLP No. ___/2014*

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**FOREIGN LENDERS** ……...**PETITIONERS**

*VERSUS*

**JEEVANI LIMITED** ……...**RESPONDENT**

**&**

**LIFELINE LIMITED** ……...**PETITIONER**

*VERSUS*

**PROMOTERS OF JEEVANI** ……...**RESPONDENTS**

**&**

**SWASTH LIFE LIMITED** ……...**PETITIONER**

*VERSUS*

**COMPETITION COMMISSION OF INDIA & LIFELINE LIMITED……...RESPONDENTS**

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**MEMORIAL FOR THE RESPONDENTS**

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

## TABLE OF CONTENTS

## INDEX OF AUTHORITIES

**List of Cases**

- *National Aviation Co. of India* v. *Dy. Commissioner of Income Tax,* [2010] 8 TAXMAN 106 (Mum)
- *Nissan Motors India Pvt. Ltd.* v. *(CCI),* (2014)5MLJ267
- *Noy Vallesina Engineering SPA* v. *Jindal Drugs Ltd*., (2006) 5 Bom CR 155
- *Owner and Occupants Welfare Association* v. *M/s DLF Commercial Developers Ltd & Ors.,* MANU CO 0072 2012
- *Produce Brokers Co. Ltd.* v. *Olympia Oil & Cake Co. Ltd.*, [1916] AC 314
- *Punjab State v Dina Nath*, (2007) 5 SCC 27
- *Ram Lal Jagan Nath* v. *Punjab State though Collector, Hissar and Anr*., AIR 1986 P&H 436
- *Ramesh Chander* v. *Jagdish Chander & Ors*., 98 (2001) DLT 374
- *Re Tea Corporation Ltd. Sorsbie* v. *Tea Corporation Ltd*., (1904) 1 Ch 12 (CA)
- *Reliance Communications Ltd*. In Re., (2010) 153 Comp Cases 233 (Bom)
- *Renusagar Power Co. Ltd*. v. *General Electric Co. & Anr*., AIR 1985 SC 1156
- *Rukmanibai Gupta* v *The Collector, Jabalpur & Ors,* AIR 1981 SC 479
- *S.B.I* v. *Alstom Power Boilers Ltd,* (2003) 116 Comp Cases 1 (Bom)
- *Sh. Surinder Singh Barmi* v. *Board for Control of Cricket in India (BCCI),* [2013]113CLA579(CCI)
- *Sovereign Life Assurance Co*. v. *Dodd*, (1892) 2 QB 573 (CA)
- *State of Bihar and Anr.* v. *PP Sharma, IAS and Anr.*, (1992) Supp (1) SCC 222
- *State of West Bengal* v. *Haripada Santra*, AIR 1990 Cal 83
- *Stebbing* v. *Liverpool & London & Globe Insurance Co. Ltd*., (1917) 2 KB 433
- *Tetra Pak v Commission*, 1990 ECR II – 1021
- *Thorburn* v. *Barnes,* (1867) LR 2 CP 384
- *Toepfer International Asia Pvt. Ltd.* v. *Thapar Ispat Ltd*., AIR 1999 Bom 417
- *Tropic Shipping Co.* v. *Kothari Global,* (2002) 2 Arb LR 560 (Bom)
- *Union of India* v. *Janki Prasad Agarwal*, AIR 1976 All 15
- *United Brands Company and United Brands Continental BV* v. *Commission of the European Countries* [1978] ECR 207
- *United Brands* v. *Commission*, 1978 E.C.R. 207
- *Uttam Wires and Machines Pvt. Ltd.* v. *State of Rajasthan,* 1989 (2) Arb LR 314 (Del)

- *Vasant Investment Corp. Ltd.* v. *Official Liquidator (Bombay),* (1981) 51 Comp Cases 20 (Bom)
- *Vikrant Tyres Ltd. In Re*., (2003) 47 SCL 613: (2004) CLC 185 Kant
- *YL e-Services Pvt. Ltd.* v. *Silverline Business & Tech Park Pvt. Ltd*., AIR 2008 Kant 127
- *Zee Interactive Multimedia Ltd.* v. *Siti Cable Network Ltd.*, (2002) 111 Comp Cases 733 (Bom)

**List of Statutes**

- Article 82, European Community Treaty
- Article 102, Treaty on the Functioning of the European Union
- Civil Procedure Code, 1908
- Indian Contract Act, 1872
- The Arbitration and Conciliation Act, 1996
- The Companies Act, 1956
- The Companies Act, 2013
- The Competition Act, 2002
- The Constitution of India, 1950

**List of Books**

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## STATEMENT OF JURISDICTION

*IT IS HUMBLY SUBMITTED THAT THE RESPONDENTS HAVE APPROACHED THE HON'BLE SUPREME COURT OF INDIA IN RESPONSE TO THE SPECIAL LEAVE PETITIONS FILED BY THE PETITIONERS UNDER ARTICLE 136 OF THE CONSTITUTION OF INDIA.*

*THE SPECIAL LEAVE PETITIONS HAVE BEEN CLUBBED TOGETHER BY THE HON'BLE COURT FOR THEIR JOINT HEARING AND DISPOSAL. THE RESPONDENTS VERY HUMBLY SUBMIT TO THE JURISDICTION OF THIS HON'BLE COURT.*

*THE PRESENT MEMORIAL SETS FORTH THE FACTS, CONTENTIONS AND ARGUMENTS IN THE PRESENT CASE.*

## STATEMENT OF FACTS

1. Jeevani Limited incorporated in the year 1990 under the Companies Act, 2013 with its registered office in New Delhi and Lifeline Limited incorporated under the Companies Act, 2013 having its registered office in Mumbai in and around November, 2011, both companies initiated negotiations for a possible merger. A scheme of arrangement was prepared and Jeevani completely merged into Lifeline. All assets and liabilities of Jeevani were transferred to Lifeline. Three promoters of Jeevani sold their entire promoter shareholding of their stake in Jeevani to Lifeline. This sale of stake was affected vide a separate sale agreement between Lifeline and the Promoters.
2. Jeevani and Lifeline filed an application u/s 391 of Companies Act, 1956 in the Delhi High Court for approval of the Scheme. The court ordered a meeting of the creditors to be convened. Jeevani issued a public notice in a local English newspaper and a local language newspaper and also sent notices to the creditors informing about the meeting. The scheme was passed by a vote of majority thereafter the Delhi High Court sanctioned the scheme.
3. Prior to the public announcement of the merger made by it, certain foreign lenders of Jeevani had invoked arbitration proceedings against it and on 27th July, 2010 had obtained a foreign arbitral award. Till date no proceedings for enforcement of this foreign award has been filed by the foreign lenders. The foreign lenders made an application before the Delhi High Court for recall of the order approving the scheme of amalgamation. They contended that they were not sent notice despite being creditors of Jeevani. Infact, they constituted a separate class of creditors. The Company Judge dismissed their application and refused to set aside the scheme. They went into appeal to the D.B of the Delhi High Court, which also dismissed the appeal of the foreign lenders. Against this order the foreign lenders have approached the Supreme Court of India.
4. The newly merged Lifeline received notices from the US Food & Drug Administration for providing drugs of below par quality and in violation of the requisite production parameters set out by the FDA. Lifeline filed a suit against the Promoters before the Delhi High Court for damages arising out of breach of the share sale agreement, for compensation for wrongful gain and unjust enrichment of Promoters by way of defrauding and misrepresenting to Lifeline. Lifeline alleged that the fact of the pending investigations was concealed by the Promoters with mala fide intention to ensure that

they get an inflated price for their shares. The Promoters contended that the Delhi High Court has no jurisdiction between the parties and must be referred to arbitration. Lifeline contended that there is no arbitration clause in the agreement. Single judge of the Delhi High Court held that the relevant clause did not constitute an arbitration clause whereas upon appeal the D.B. reversed the order. Hence, aggrieved by the order Lifeline has approached the Supreme Court.

5. Lifelines decided to introduce a new cost effective drug in the market by the name of "Novel" by further developing the active IPR & R&D of erstwhile Jeevani which would be even cheaper than the leading drug in the market "Inventive" produced by Swasth Life Ltd- a sister concern of Promoters of Jeevani. Swasth filed a suit for infringement of its IPRs in the Delhi High Court alleging that the new drug "Novel" was substantially similar to its drug "Inventive" and was based on certain IPRs which have been assigned to Swasth by Jeevani. Swasth was able to obtain an interim injunction against Lifeline who was restrained from launching the new drug "Novel". Swasth launched a similar cost effective drug in the market, cornering a large chunk of the market, after which it withdrew the case against Lifeline and the interim injunction was vacated.
6. The Competition Commission of India upon an application filed by Lifeline 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. Aggrieved by the order of the CCI, Swasth filed a writ petition in the Delhi High Court contending that it was merely protecting its IPR. The court held that the CCI had only made a *prima facie* view and no adverse effect is cause to Swasth by directing an investigation against Swasth. The writ petition was accordingly dismissed. On appeal the D.B. did not find any reason to interfere with the order of the single judge of Delhi High Court and so Swasth has now approached to the Supreme Court.

## STATEMENT OF ISSUES

THE FOLLOWING ISSUES ARE PRESENTED BEFORE THE HON'BLE COURT IN THE PRESENT MATTER:

1. WHETHER THE ORDER SANCTIONING THE SCHEME OF AMALGAMATION BE RECALLED?
2. WHETHER THE DISPUTE BETWEEN THE PROMOTERS OF JEEVANI AND LIFELINE LTD BE REFERRED TO ARBITRATION?
3. WHETHER THE PRIMA FACIE VIEW OF THE COMPETITION COMMISSION OF INDIA IS BAD IN LAW?

## SUMMARY OF ARGUMENTS

1. WHETHER THE ORDER SANCTIONING THE SCHEME OF AMALGAMATION BE RECALLED
   - 1.1. THE FOREIGN LENDERS ARE NOT CREDITORS OF JEEVANI
   - 1.2. THE FOREIGN ARBITRAL AWARD DOES NOT AUTOMATICALLY AND IMMEDIATELY BECOME ENFORCEABLE
   - 1.3. JEEVANI DOESNT OWE AY DEBT TOWARDS FOREIGN LENDERS UNTIL PROCEEDING FOR ENFORCEMENT OF FOREIGN ARBITRAL AWARD IS INITIATED
   - 1.4. THERE WAS NO REQUIREMENT OF CONDUCTING A SEPERATE CLASS MEETING FOR THE FOREIGN LENDERS
2. WHETHER THE DISPUTE BETWEEN THE PROMOTERS OF JEEVANI AND LIFELINE LTD BE REFERRED TO ARBITRATION
   - 2.1. THE RELEVANT CLAUSE SPELLS OUT AN ARBITRATION AGREEMENT
   - 2.2. EXISTENSE OF DISPUTE IS A PRE-REQUISITE FOR INVOCATION OF ARBITRATION
3. WHETHER THE PRIMA FACIE VIEW OF THE COMPETITION COMMISSION OF INDIA IS BAD IN LAW
   - 3.1. THE PETITIONER COMPANY INDULDGED IN BAD FAITH LITIGATION
   - 3.2. THE PETITIONER COMPANY IS IN CONTRAVENTION OF SECTION 4(2)(c) OF THE COMPETITION ACT, 2002
   - 3.3. CCI WAS *PRIMA FACIE* CORRECT IN ITS VIEW THAT SWASTH MAY HAVE ABUSED ITS DOMINANT POSITION

## ARGUMENTS ADVANCED

1. THE ORDER SANCTIONING THE SCHEME OF AMALGAMATION MUST NOT BE RECALLED

1.1. THE FOREIGN LENDERS ARE NOT CREDITORS OF JEEVANI

*1.1.1. A foreign arbitral award does not automatically & immediately become enforceable.*[1]

A foreign award cannot be executed as a decree unless and until an application for enforcement thereof is made and the court is satisfied that the foreign award is enforceable.[2] For that purpose, the party which seeks its enforcement has to make an application to the court as contemplated u/s 47 of The Arbitration & Conciliation Act, 1996 and has to satisfy the court about its enforceability.[3] U/s 49 The Arbitration & Conciliation Act, 1996 once the court is satisfied that the award can be enforced, it is deemed to be a "decree".[4] The satisfaction of the court as contemplated u/s 49 can be arrived at only after the court is satisfied that none of the grounds as mentioned in Sec. 48(2) of the Arbitration & Conciliation Act, 1996 exist and that if an objection is filed as contemplated under Sec. 48(1) is dismissed. Thereafter only, u/s 49 The Arbitration & Conciliation Act, 1996, the Court is empowered to declare that the foreign award is enforceable. The moment such a declaration is granted, an award shall be deemed to be a decree of the Court.[5]

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[1] Justice R.S. Bachawat (2010), *Law of Arbitration & Conciliation,* Vol. 2, Edn. 5, LexisNexis, p. 1095

[2] *Gold Crest Exports* v. *Swissoen N.V.*, 2005 (4) Bom CR 225

[3] *Noy Vallesina Engineering SPA* v. *Jindal Drugs Ltd.*, (2006) 5 Bom CR 155

[4] *Tropic Shipping Co.* v. *Kothari Global,* (2002) 2 Arb LR 560 (Bom)

[5] *Toepfer International Asia Pvt. Ltd.* v. *Thapar Ispat Ltd.*, AIR 1999 Bom 417

It is humbly submitted that the there is a possibility of the court refusing to enforce the foreign arbitral award. In such a situation it cannot be considered a decree.[6]

*1.1.2. Jeevani doesn't owe any debt towards foreign lenders until proceeding for enforcement of foreign arbitral award is initiated.*

In *Brace Transport Corp. of Monrovia, Bermuda* v. *Orient Middle East Lines Ltd*., *Saudi Arabia*[7], Supreme Court held that an award may be recognized, without being enforced; but if it is enforced, then it is necessarily recognized. Where a court is asked to enforce an award, it must recognize not only the legal effect of the award, but must use legal sanctions to ensure that it is carried out. Since an award is not enforceable till such time it is executed as a decree, which happens following the procedure specified in sections 47-49 of the Arbitration & Conciliation Act, 1996, it cannot be said that the parties against whom damages have been awarded by the arbitrator, owes the other party a "debt" at a stage prior to fulfilment of the requirements of sections 47-49 The Arbitration & Conciliation Act, 1996.[8] In *Marina World Shipping Corporation Ltd.* v. *Jindal Exports (Pvt) Ltd.*[9], the Delhi High Court was faced by the questions that whether the present foreign award constitutes a "debt" due as sought to be made out by the petitioner and whether the present winding up petition is maintainable in absence of an action by the petitioner for getting the aware enforced so as to make it binding on the parties? The court held that a winding up petition arising out of alleged "debt" owed to one party, will not be maintainable. The court held that it would not be proper for the winding up court to entertain a winding up petition on the basis of a foreign award without first having

[6] *National Aviation Co. of India* v. *Dy. Commissioner of Income Tax,* [2010] 8 TAXMAN 106 (Mum)

[7] AIR 1994 SC 1715

[8] *Supra* note 1, p. 2359

[9] MANU/DE/0015/2004

the remedy exhausted under sections 47- 49 of the Arbitration & Conciliation Act, 1996. Only once the enforceability of the award is established then winding up proceeding could be maintained.

It is humbly submitted that the court, before whom such action is brought, would first venture to find out whether the said award is enforceable in law and if it is satisfied only then it would proceed to execute it.[10]

*1.1.3. Enforcement of the foreign arbitral award against Jeevani is barred by Limitation Act.*

A foreign award does not become a decree of the court till such time the stages contemplated under Sections 47 & 48 The Arbitration & Conciliation Act, 1996 is completed. Hence, the provision of the Limitation Act that applies to the enforcement of decrees (Article 136) does not apply to enforcement of foreign award till such time. Enforcement of foreign award would be governed by the residual provision of the Limitation Act (Article 137).[11] Thus, the period would be three years from the date when the right to apply for enforcement accrues. The right to apply would accrue when the award is received by the applicant.

It is humbly submitted that for the purposes of an application for sanction of a scheme of arrangement the creditors whose names appear in the books of the company should be considered as creditors and their votes should be taken into account.[12] An intervener who is neither a shareholder nor a creditor of any company has no *locus standi* to raise any objection to the scheme.[13]

[10] *Feurst Day Lawson Ltd.* v. *Jindal Exports,* AIR 2001 SC 2293

[11] *Noy Vallesina Engineering SPA* v. *Jindal Drugs Ltd*., (2006) 5 Bom CR 155

[12] *Mahaluxmi Cotton Mills Ltd.* In Re., AIR 1950 Cal 399

[13] *Reliance Communications Ltd.* In Re., (2010) 153 Comp Cases 233 (Bom)

Thus the foreign arbitral award is not automatically and immediately enforceable on its own. Moreover, till date no proceeding for enforcement of this foreign award has been filed by the foreign lenders.[14] The requisite period of three years has already elapsed since the date of passing of the award in their favour and as such, the enforcement of the foreign arbitral award is time barred. Thus, the foreign lenders are not creditors of Jeevani.

Moreover, in the present context, where the company is financially sound and had not admitted the alleged "debt", it was held that the provisions of these sections were not available for to enable a creditor to recover the disputed claim.[15]

### 1.2. WHETHER FOREIGN LENDERS CONSTITUTE A SEPARATE CLASS OF CREDITORS OF JEEVANI IS DISPUTED

#### *1.2.1. Arguendo, even if foreign lenders constitute a separate class of creditors, their interest is secured.*

Where a scheme is sanctioned almost unanimously by the shareholders, debenture holders, secured creditors, unsecured creditors and preference shareholders of both the companies, there must existing very strong reasons for withholding sanction to such scheme. In fact in the present context, withholding of sanction in such a case may turn out to be disastrous for shareholders and employees. The objecting creditor must show to the Court that the scheme is *mala fide* or fraudulently is likely to adversely affect him or interest of creditors or any class of them are likely to be affected by the scheme of sanctioning the amalgamation.[16] Unless it is shown by the foreign lenders that there is some illegality or fraud involved in the scheme, the court cannot decline to sanction a scheme of amalgamation.

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[14] Factsheet, ¶ 6

[15] (2004) 122 Comp Cases 754

[16] *Zee Interactive Multimedia Ltd.* v. *Siti Cable Network Ltd.*, (2002) 111 Comp Cases 733 (Bom)

The interest of the foreign lenders is no way affected in any manner whatsoever. The award which they have obtained could be enforced against the transferee company and the amounts ultimately held to be due under the same is recoverable under the transferee company.

It is therefore, humbly submitted that even in the event of the objectors (foreign lenders) succeeding in establishing that they are creditors, the scheme of arrangement and amalgamation provides for full protection of the interest of the creditors. The scheme clearly spells out that Jeevani would completely merge into Lifeline and all assets, debt and liabilities of Jeevani would be transferred to Lifeline.[17] As such the interest of the said objectors is also taken care of. Therefore, there is no substance in the objection and it is to be overruled.

### *1.2.2. There was no requirement of conducting a separate class meeting for the foreign lenders*

Creditors who have secured a decree were regarded not as a separate class form other creditors of the same category.[18] In another case under the scheme of compromise or arrangement with secured creditors, their meeting was ordered. A charge was created by a deed of hypothecation. The terms of deed were not complied with. The secured creditors later obtained an arbitration award. It was held that they did not cease to be secured creditors and remained bound by the terms of the scheme.[19]

A "class" must be confined to those persons whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest.[20] Speaking very generally, in order to constitute a class, members belonging to the class must form a

[17] Factsheet, ¶ 3

[18] *Hari Charan Karanjia* v. *Ulipur Bank Ltd*., (1942) 12 Comp Cases 110

[19] (2008) 144 Comp Cases 544

[20] *Sovereign Life Assurance Co*. v. *Dodd*, (1892) 2 QB 573 (CA)

homogenous group with commonality of interest. In *Commerz Bank AG* v. *Arvind Mills Ltd*.[21], the foreign currency lenders claimed to be treated as a separate and distinct class from that of the Indian banks. The Gujarat High Court did not permit it and held that there was no question of forming a class within a class. When one and the same scheme is offered to the entire class of creditors for their consideration, they would have a common cause with either to accept or reject the scheme from commercial point of view. There was no occasion for convening a separate class meeting of the minority shareholders or creditors. In *S.B.I* v. *Alstom Power Boilers Ltd*.[22], it has been held by the Bombay High Court that unless a separate and different type of scheme of compromise is offered to a sub class of a class of creditors otherwise equally circumscribed by the class, no separate meeting of such sub class in required to be convened. Under the Act, once a scheme is passed by the requisite majority, it would be binding to all.[23]

### 1.3. THERE WAS NO REQUIREMENT OF SERVING NOTICE UPON THE FOREIGN LENDERS

#### *1.3.1. Scheme of amalgamation does not affect the rights of the foreign lenders*

A meeting conducted in accordance with the provisions of Sec. 391(2) of the Companies Act, 1956 and also under the permission of the court would not be invalidated on the ground that some of the creditors were not served with a notice.[24] The courts have held that where there are several classes of creditors or contributories, and the scheme does not affect the rights of

[21] (2002) 110 Comp Cases 539 (Guj)

[22] (2003) 116 Comp Cases 1 (Bom)

[23] *Vasant Investment Corp. Ltd*. v. *Official Liquidator (Bombay),* (1981) 51 Comp Cases 20 (Bom)

[24] *Vikrant Tyres Ltd. In Re*., (2003) 47 SCL 613: (2004) CLC 185 Kant

some particular class, it is not necessary for notice of any meeting to be sent to the members of that class.[25]

Further, if a "debt" is disputed, non-issue of notice to such an intervener would not affect the meeting held or resolution approved in such a meeting. For the purpose of an application for sanctioning a scheme of arrangement the creditors whose names appear in the books of the company should be sent a notice.[26]

In the event a creditor is not served with a personal notice, he can appear in such a meeting by virtue of the said meeting having been made known to him by public notice.[27] Moreover, when the petitioner did not receive any notice of the said scheme; it was for the petitioner to move appropriate application before the said Company Judge, which it could do so even after the approval of the scheme.[28]

2. THAT DELHI HIGH COURT HAS JURISDICTION TO LOOK INTO THE ISSUES INVOLVED

2.1. IT IS THE INTENTION OF THE PARTIES TO ARBITRATE

It is humbly submitted that in order to determine the real nature of the clause, it is not even necessary that a formal word such as "arbitration" or "arbitrator" is used neither it is required to be in any particular form[29] but to ascertain that it was the intention of the parties when entering into that agreement to make a reference or submission and should be *ad idem* in this respect[30]and, therefore, for that specific purpose consideration must be given to the exact terms of the arbitration agreement.

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

[26] *Mahaluxmi Cotton Mills Ltd.* In Re., AIR 1950 Cal 399

[27] *Supra* note *25*

[28] *National Ability S.A.* v. *Tinna Oil & Chemical Ltd*., MANU/DE/0920/2008

[29] *Punjab State v Dina Nath*, (2007) 5 SCC 27

[30] *Delhi Development Authority v Jackson Engineers Pvt. Ltd*., 1996 (Supp) Arb LR 296 (Del)

Arbitration rests on mutual voluntary agreement of the parties to submit their matters of difference to selected persons whose determination is to be accepted as a substitute for the judgment of a court. The object of arbitration is the final determination of differences between parties in a comparatively quicker, less expensive, more expeditious and perhaps less formal manner than is available in ordinary court proceedings.[31]

In the present case the parties agreed to endevour to amicably resolve the *questions and issues relating to the meaning, scope, instructions, claims, right or matters of interpretation of and under this agreement*.[32]

In *Rukmanibai Gupta* v *The Collector, Jabalpur & Ors*[33], the Supreme Court held that the language of the following clause did not leave any room for doubt that the clause constituted an arbitration clause.

> "Whenever *any doubt, difference or dispute* shall hereafter arise touching the *construction of these presents or anything herein contained* or any matter or things *connected with* the said lands or the working or non-working thereof or the amount or payment of any rent or royalty reserved or made payable hereunder the *matter in difference* shall be *decided by the lesser whose decision shall be final."*

The Supreme Court reasoned that it appeared from the language of the relevant clause it could be inferred that it was the intention of the parties that the decision of the lessor was meant to be final and binding. It was the intention of the parties that the scope of the arbitration clause was extended to all doubts, to all disputes and to all differences that may arise between the parties.

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[31] *Ram Lal Jagan Nath* v. *Punjab State though Collector, Hissar and Anr*., AIR 1986 P&H 436

[32] Factsheet, ¶ 9

[33] AIR 1981 SC 479

## 2.2.THE RELEVANT CLAUSE SPELLS OUT AN ARBITRATION AGREEMENT

### *2.2.1. Critical attributes of an arbitration agreement between the parties are present in the relevant extract.*

The golden rule of construction is to ascertain the intention of the parties to the instrument after considering all the words in their ordinary, natural sense.[34] The relevant clause is clear and unambiguous. The arbitration agreement was set out in writing. The contract containing the arbitration agreement was signed by both the parties. Both the parties had the capacity to agree to arbitrate. The condition precedent provided for invoking the arbitration agreement was met i.e. a question/issue relating to the claims and rights of parties in relation to the share sale agreement had arisen.

The arbitration clause clearly names the arbitral tribunal i.e. the empowered committee comprising of three executive level officers of the company. The clause clearly states that the disputes shall be resolved by final binding and conclusive arbitration. It was also required to act judicially and decide the disputes after hearing both parties and after considering the material before him. It was, therefore, an arbitration agreement.[35]

In the case of *Bhinka & Ors* v. *Charan Singh*[36], the Supreme Court while dealing with the usefulness of a head note to a section held that if there is any ambiguity, it is dispelled by the heading given to the section. Thus, if there is any doubt in the interpretation of the words in the section, the heading certainly helps us to resolve that.[37]

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[34] *YL e-Services Pvt. Ltd.* v. *Silverline Business & Tech Park Pvt. Ltd*., AIR 2008 Kant 127

[35] *State of West Bengal* v. *Haripada Santra*, AIR 1990 Cal 83

[36] 1959 Cri LJ 1223

[37] *YL e-Services Pvt. Ltd.* v. *Silverline Business & Tech Park Pvt. Ltd*., AIR 2008 Kant 127

*2.2.2. Existence of Dispute: Pre-requisite for invocation of arbitration.*

In the present case at hand the arbitration clause clearly states that it applies to all *questions and issues in relation to* meaning, scope (effect), instructions, claims, rights or matters of interpretation *of and under* this agreement.[38] In *Renusagar Power Co. Ltd.* v. *General Electric Co. & Anr.*[39], the Supreme Court held that the expressions such as "arising out of or "in respect of" or "in connection with" or "in relation to" or "in consequence of" or "concerning" or "relating to" the contract are of the widest amplitude and content and include even questions as to the existence validity and effect (scope) of the arbitration agreement. The words embrace issues of frustration,[40] non-disclosure,[41] construction of contract,[42] disputes as to any state of circumstances which, if proved, would be relevant on any issue as to the true meaning and effect of the contract[43] and a claim for damages for breach of the agreement itself.[44]

It is humbly submitted that in the present case the use of the words "all questions and issues" must be inferred by the court as "formulated disputes". The decision of formulated dispute necessarily involves the hearing of the parties and would be final binding and conclusive upon the parties and this is the essence of arbitration.[45]

The Supreme Court in *A.M. Mair & Co.* v. *Gordhandas Sagarmull*[46] held that when the dispute is one which turns upon the true interpretation of the contract, so that one of the

[38] Factsheet, ¶ 9

[39] AIR 1985 SC 1156

[40] *Kruse* v. *Questier*, [1953] 1 Lloyd's Rep. 310

[41] *Stebbing* v. *Liverpool & London & Globe Insurance Co. Ltd.*, (1917) 2 KB 433

[42] *Thorburn* v. *Barnes,* (1867) LR 2 CP 384

[43] *Produce Brokers Co. Ltd.* v. *Olympia Oil & Cake Co. Ltd.*, [1916] AC 314

[44] *Mantovani* v. *Carapelli SPA*, [1980] 1 Llyod's Rep. 375

[45] *Bhagwan Devi* v. *Delhi Agricultural Marketing Board*, 2006 (3) RAJ 372 (Del)

[46] AIR 1951 SC 9

parties must have recourse to the contract to establish their claim, such a dispute, the determination of which turns on the true construction of the contract would be a dispute, under or arising out of or concerning the contract. In the present matter, the claims and rights of the parties arising under the agreement even those that of concerning non disclosure of information vital to the transaction fall upon the true construction and interpretation of the terms of the agreement. Hence, would constitute a dispute.

*2.2.3. Identity of arbitrator must be certain but naming of the arbitrator in the arbitration agreement is necessary.*

Mere non-mentioning of the name of the arbitrator in the space provided for it in the clause providing for arbitration would not make the agreement invalid or inoperative.[47] A clause in the agreement reading as follows "all disputes *arising out of* this agreement and *all questions relating to* the interpretation of the agreement of this agreement shall be decided by the government and the *decision* of the government and the decision of the government *shall be final and binding*." was considered to be an arbitration agreement. The word government was taken to mean a government appointed arbitrator[48]. An arbitration clause provided that in case of dispute the matter 'shall be referred to the sole arbitration of Major General I/C'. It was contended by the Government that the words 'Major General' were superfluous. It was however, held that the expression 'Major General' was not a surplus usage and the arbitrator to be appointed has to be a 'Major General'.[49]

Thus, effort should always be to see that disputes are settled through arbitration if in the documents executed between the parties; there is a reference of determination of disputes by

[47] *Union of India* v *Janki Prasad Agarwal*, AIR 1976 All 15

[48] *Uttam Wives and Machines Pvt. Ltd.* v. *State of Rajasthan,* 1989 (2) Arb LR 314 (Del)

[49] *Bharat Construction Co. Ltd.* v. *Union of India,* AIR 1954 Cal 606

way of arbitration.[50] Therefore, it is humbly submitted that the relevant extract is an arbitration clause.

## 3. THAT THE PRIMA FACIE VIEW OF THE COMPETITION COMMISSION OF INDIA IS NOT BAD IN LAW

### 3.1. SWASTH INDULGED IN BAD FAITH LITIGATION & THEREFORE ABUSED ITS DOMINANT POSITION IN THE COST- EFFECTIVE DRUG MARKET

#### *3.1.1. The petitioner did indulge in bad-faith litigation.*

Predation through abuse of judicial processes presents an increasingly threat to competition, particularly due to its relatively low anti-trust visibility.[51] In the present case, the petitioners had a *mala fide* intention by not letting Lifeline enter into the relevant market. If a court feels that these motives effectively abuse the law or the power or the court, it will generally deny eligibility for a legal remedy to which a party would otherwise be entitled.[52] In order to be able to determine the cases in which such legal proceedings as an abuse, it is necessary that the action cannot reasonably be considered as an attempt to establish the rights of the undertaking concerned and can therefore only serve to harass the opposite party and it is conceived in the framework of a plan whose goal is to eliminate competition.[53]

The determination of a plea of *mala fide* involves whether there is a personal bias or an oblique motive.[54]

It is humbly submitted that in the present case the petitioner by abusing its dominant position in the relevant market sought to stifle competition in the relevant market by denying

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[50] *Ramesh Chander* v. *Jagdish Chander & Ors*., 98 (2001) DLT 374

[51] *M/s. Bull Machines Pvt. Ltd.* v *M/s. JCB India Ltd. and M/s. J.C. Bamford Excavators Ltd*., MANU/CO/0032/2014

[52] *Ibid*

[53] *ITT Promedia NV v Commission of the European Communities* [1998] ECR II-2937

[54] *State of Bihar* v. *PP Sharma, IAS and Anr.,* (1992) Supp (1) SCC 222

market access and foreclosing entry of "Novel" in contravention of the provisions of Section 4(2)(c) of the Competition Act, 2002.

*3.1.2. The Petitioner is in Contravention of Section 4(2)(A) of The Competition Act, 2002*

"Dominance" has to be established first and then only seen whether it is abused.[55]The dominant position relates to a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, customers, and ultimately of its consumers.[56] In *Eurofix-Bauco* v. *HILTI*[57], the court observed that the "firm's behaviour as witnessed to its ability to act independently of, and without due regard to either comparative of customers is an indicator of dominance."[58]

In the light of the facts of the present case, the petitioner's product "Inventive" was the premier drug available in the market.[59]

Assessment of dominance is to be preceded by delineation of the correct relevant market in which dominance of the enterprise under consideration is to be assessed.[60] In the present case, the relevant market is cost-effective life -saving drugs.

In the case of *Konkurrensverket* v. *TeliaSonera Sverige*[61], it was observed by the Court that "it may be the case that the responsibility of the dominant firm becomes greater so that the

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[55] *Owner and Occupants Welfare Association* v. *M/s DLF Commercial Developers Ltd & Ors.,* MANU CO 007 2012

[56] *United Brands Company and United Brands Continental BV* v. *Commission of the European Countries* [1978] ECR 207

[57] (1989) 4 CMLR 677

[58] Ibid, ¶ 71

[59] Factsheet, ¶ 11

[60] *Sh. Surinder Singh Barmi* v. *Board for Control of Cricket in India (BCCI),* [2013] 113 CLA 579 (CCI)

finding of abuse becomes no likely, where the firm under investigation is not merely dominant, but rather "enjoys the position of dominance approaching monopoly"."

The European Court of Justice in *Michelin* v. *Commission*[62] stated that a firm in dominant position has a "special responsibility not to allow its conduct to impair undistorted competition" on the internal market. In the present case, the petitioner company abused its dominant position by restraining Lifeline Ltd. from launching their product until their new drug was launched. This was done in order to avoid competition from Lifeline by indulging in practices resulting in denial of market access to Lifeline.[63]

The petitioner fulfils many of the consideration provided under Section 19(4) of the said Act. The product was eagerly awaited in the market as it was published to be considerably cheaper than Inventive.[64]

In *Microsoft* v. *Commission*[65], the Commission decided that Microsoft was guilty of trying the provision of its Windows Media Player through its operating software only after demonstrating that the time would restrict competition. This also means that when the first market entrant is able to maintain its pioneer position for a period long enough to attract both consumers and software developers, he will find himself in a comfortable position vis-à-vis later market entrants. Furthermore, the feedback mechanism thus created, causes larger networks to grow further and smaller networks to shrink and eventually disappear.[66]

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[61] (2011) ECR 1-000, ¶ 78

[62] (1985) 1 CMLR 280

[63] Section 4 (2) (c), Competition Act, 2002

[64] Factsheet, ¶ 11

[65] (2007) 5 CMLR 846

[66] Gregory J. Werden, *Network Effects and Conditions of Entry: Lessons from the Microsoft Case*, 69 Antitrust L.J. 87 (2001).

A firm in a dominant position has the special responsibility not to engage in conduct that may distort competition.[67] This responsibility does not imply that a dominant firm cannot protect its own business, it only restricts the means of protection by establishing a proportionality criterion; any conduct to safeguard the firm's interests must be proportionate to the threat of its competitors.[68]

The acquisition of an exclusive patent licence constitutes an abuse of a dominant position where (i) that acquisition has the effect of strengthening the undertaking's dominance, (ii) very little competition is to be found and (iii) the acquisition of the right has the effect of precluding all competition in the relevant market.[69] In the present case, since the petitioner had absolute rights to few of the developed R&D and IPRs of the drugs through which it was able to launch a similar cost-effective drug within the period of grant of injunction of it by Delhi High Court.[70]

But when dealing with dominance in Section 4 of the said act, the Commission is not required to establish appreciable adverse effect on competition. The possession and exercise of those intellectual property rights may be relevant evidence of the dominant position, it should be recalled that such a position is not prohibited *per se*; only the abuse of such a position is so proscribed.[71] Hence, it is humbly submitted that the petitioner company has abused its dominant position in the relevant market.

[67] *Michelin* v. *Commission*, 1983 E.C.R. 346

[68] *United Brands* v. *Commission*, 1978 E.C.R. 207

[69] *Tetra Pak* v. *Commission,* 1990 ECR II - 1021

[70] Factsheet, ¶ 11

[71] *Astrazeneca AB* v. *Commission*, (2010) 5 CMLR 1585

*3.1.3. CCI was correct in its view that Swasth may have abused its dominance.*

The investigation by CCI is only for the purpose of collection of evidence. Information alleging abuse of dominant position is to be filed u/s 19(1) (a) of The Competition Act, 2002. Upon the receipt of the information and on prima facie findings, CCI gives order u/s 26(1) of the said Act directing DG to initiate the investigation into the allegations made under Section 3 or 4 of the Act The investigation starts only after there is prima facie proof of commission of cognizable offence. The position of the Competition Act, 2002 appears to be almost identical with those of Cr. P.C. 1973.[72]

It is, therefore, clear to us that the question as to whether there is a breach of provisions of Sections 3 and 4 is finally considered u/s 19, 26 and 27(8). Sec. 19 and 26(1) of the said act, speak of existence of *prima facie* case only. Therefore, at the prima facie stage, it is never concluded whether there is breach or otherwise. Therefore, at preliminary stage, it is only to be seen if there is reason to believe that there is a breach of Sec. 3 and 4 of the said act. In dealing with such cases, the High Court has to bear in mind that the judicial intervention at the threshold of the legal process initiated against a person accused of committing offence is highly detrimental to the larger public and social interest.[73] It is humbly submitted that CCI was prima facie correct in directing investigation against petitioner for abuse of its dominant position. It is further submitted that the High Court of Delhi was correct in its view in not interfering with the investigation of the DG CCI.

## PRAYER

*WHEREFORE, in the light of arguments advanced and authorities cited, the respondents humbly submit that the Hon'ble Court be pleased to:*

[72] *Nissan Motors India Pvt. Ltd.* v. *CCI,* (2014) 5 MLJ 267

[73] *Maheedhar Seshagiri & Anr* v. *State of Andhra Pradesh*, 2007 (13) SCC 165

a. Dismiss the Special Leave Petition filed by the Foreign Lenders calling for recall of order of the Hon'ble Delhi High Court dated 5th July, 2013.

b. Dismiss the Special Leave Petition filed by Lifeline Ltd. & refer the matter back to the Delhi High Court for further proceedings.

c. Dismiss the Special Leave Petition filed by Swasth Life Ltd. holding that the *prima facie* view of CCI was not bad in law and hence, the order of CCI directing investigation shall not be recalled.

d. Award costs to the Respondents.

*And pass any other order that the court may deem fit in the larger interest of justice.*

*For this act of kindness, the Respondents shall duty bound forever pray.*

*Dated this..... Day of September, 2014*

*SD/-*
(Counsels for the Respondents)