TEAM CODE: S

BEFORE THE HON'BLE SUPREME COURT OF INDIA

IN THE MATTERS OF:

FOREIGN CREDITORS **... APPELLANT**

v.

LIFELINE LIMITED **... RESPONDENT**

AND

PROMOTERS (JEEVANI LIMITED) **… APPELLANT**

v.

LIFELINE LIMITED **… RESPONDENT**

AND

SWASTH LIFE LIMITED **…APPELLANT**

v.

LIFELINE LIMITED AND CCI **… RESPONDENT**

APPEAL NOS. ___/2014, ___/2014

ON SUBMISSION TO THE HON'BLE SUPREME COURT OF INDIA

WRITTEN SUBMISSIONS ON BEHALF OF THE RESPONDENTS

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

Contents

TABLE OF AUTHORITIES

Cases

INDEX OF ABBREVIATION

S.	:	S.
AC	:	Appeals cases
A.P.	:	Andhra Pradesh
ADR	:	Alternative Dispute Resolution.
AIR	:	All India Reporter
ArbLR	:	Arbitration Law Report
Bom	:	Bombay
CCI	:	Competition Commission of India
2002, Act	:	Competition Act, 2002 as amended by 'The

		Competition (Amendment) Act, 2007
CDSCO	:	Central Drug Standard Control Organization
ILR	:	Indian Law Reports
IPR	:	Intellectual Property Right
R&D	:	Research and Development
Ors.	:	Others
QBD	:	Queen's Bench
SCC	:	Supreme Court Cases
Sd/-	:	Signed
CAT	:	Competition Appellate Tribunal
CLA	:	Corporate Law Adviser
SCL	:	Sebi and Corporate Laws
US	:	United States
ECR	:	European Court Reporters
Cal.	:	Calcutta

STATEMENT OF JURISDICTION

THE HON'BLE SUPREME COURT DERIVES ITS JURISDICTION AS REGARDS THE APPEALS FROM THE HIGH COURT UNDER ARTICLE 136 OF THE CONSTITUTION OF INDIA. THE APPEALS HAVE BEEN CLUBBED TOGETHER BY THE HON'BLE COURT FOR JOINT HEARING AND DISPOSAL. THE APPELLANTS 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 and Lifeline Limited are both listed public companies both seeking to expand their business by venturing into different sectors. Lifeline wanted to enter into pharmaceutical sector and as Jeevani was already in that sector so Lifeline approached Jeevani for a possible partnership and after deliberations, both companies decided that Jeevani would merge completely into Lifeline and all assets and liabilities of Jeevani would be transferred to Lifeline.

2 They obtained all the necessary sanctions but before the public announcement, foreign lenders of Jeevani wanted to recall the scheme claiming that they were not served a notice of the scheme and being a separate class of creditors a meeting should be convened for them. The company claimed that they were not creditors and thus, no notice was required to be sent to them. This matter is now in Supreme Court.

3 Prior to the merger, certain promoters of Jeevani holding 18% of share capital entered into a share sale agreement with Lifeline and sold their shares to Lifeline. After the merger, Lifeline received a notice from US FDA that the quality of drugs they are producing are below par quality and in violation of the requisite production parameters set out by the FDA. And after further scrutiny by lifeline, it came out that FDA had been

conducting investigations on Jeevani's plants in India long before it merged with Lifeline. Aggrieved by this, Lifeline filed a suit against the promoters of Jeevani claiming damages for breach of contract dated 23rd March, '12.

4 Lifeline went to Delhi High Court to claim damages and Promoters contended that Delhi High Court does not have jurisdiction as there was an arbitration clause in the agreement. Lifeline said that there is no arbitration clause in the agreement. The matter is now in Supreme Court.

5 Lifeline wanted to launch a new life saving drug in the market but another company (Swasth) had already been producing a life saving drug called 'Inventive' and Swasth had obtained IPRs of that drug from Jeevani in the year 2010. Swasth filed a suit in Delhi High Court for violation of its IPRs alleging that the drug 'Novel' which Lifeline wanted to introduce was very similar to the drug 'Inventive'. Swasth was able to obtain an interim injunction, it then introduced another drug in the market and then withdrew the case.

Lifeline approached CCI alleging that Swasth has abused its dominant position in the market. CCI ordered an investigation against Swasth and while the DG's order was still awaited, Swasth went ahead and made CCI and Lifeline, both a party in Delhi High Court contending that CCI's order for directing investigation was bad in law as Swasth was only trying to protect its IPRs and not abusing its dominance. Delhi High Court's Single Judge said that CCI's investigation has not caused any adverse effect on Swasth and dismissed the writ petition. The Division Bench upheld the decision. Swasth approached Supreme Court against this order and the matter is pending.

STATEMENT OF ISSUES

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

1. WHETHER THE FOREIGN LENDERS WERE CREDITORS OF THE COMPANY AND WAS IT REQUIRED TO GIVE THEM A NOTICE OF THE SCHEME.
2. WHETHER THERE WAS AN ARBITRATION CLAUSE PRESENT IN THE AGREEMENT SIGNED BY PROMOTERS AND LIFELINE.
3. WHETHER CCI 'S ORDER OF FINDING SWASTH ABUSING ITS DOMINANT POSITION IS BAD IN LAW.

SUMMARY OF ARGUMENTS

1. FOREIGN CREDITORS DID NOT MAKE A SEPARATE CLASS OF CREDITORS

Foreign Lenders are not the creditors of the company so they cannot be said to be a separate class of creditors as to form the separate class of creditor it is pre-requisite to be a creditor. Even if it is considered that they are creditors of the company, there cannot be a sub-class under a class; thus it is not possible to form a separate class under the class of creditors. Therefore, it is humbly submitted that Foreign Lender does not form the separate class of creditors

2. THERE IS AN ARBITRATION CLAUSE IN THE AGREEMENT DATED 23RD MARCH 2013

The Relevant Clause in the Share Sale Agreement constitutes an arbitration clause. Firstly, the said clause possesses all the essential ingredients for an arbitration clause reflecting intention of the parties to arbitrate. Hence the said clause cannot be construed as expert determination. Therefore, it is humbly submitted that Dispute Resolution clause is an arbitration clause.

3. CCI'S PRIMA-FACIE OPINION OF SWASTH'S INDULGENCE IN ANTI-COMPETATIVE PRACTISE IN NOT BAD IN LAW

Novel and Inventive form the same relevant product market. Swasth's Inventive holds the dominant position in the relevant market and on *prima facie* opinion was found abusing its dominant position by stifling competition through bad-faith litigation. This involves indulgence in practice of resulting in denial of market access, which lies within the jurisdiction of CCI to decide. Therefore it is humbly submitted that CCI's order to investigate Sawsth was not bad in law.

ARGUMENTS ADVANCED

1. THAT THE FOREIGN CREDITORS DID NOT MAKE A SEPARATE CLASS OF CREDITORS

It is contended that foreign lenders in the instant case are not creditors of the company. In arguendo if they are assumed to be creditors of the company, they do not constitute a separate class of creditors. Hence there was no notice required to be sent to them, nor any meeting convened for them.

1.1 FOREIGN LENDERS ARE NOT SEPARATE CLASS OF CREDITORS

According to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958[1] an Arbitral award shall be recognized by each contracting state as binding and award shall be enforced in accordance with the rules of the territory where award is relied upon. [2]

The period of limitation in India for enforcement of an arbitral award is 3 years.[3] Arbitration in India is governed by IACA, 1996 and Limitation Act applies to IACA, 1958. Thus, the period of enforcement of a foreign arbitral award is 3 years and in the present matter, award was passed on 27th July 2010 and foreign lenders have not enforced the award till date[4].

The appellants claim to recall the scheme on the basis that that they form a special class of creditors of the company but the Award which has been passed recognising has not

[1] *Hereinafter* referred as NY Convention, 1958.

[2] NY Convention, 1958, Article 3.

[3] Limitation Act, 1963, S. 20.

[4] Factsheet, ¶ 6.

been enforced till date. In such circumstances the award becomes infructutous. Moreover, the award unless and until recognized does not have any binding value.[5]

Thus, it is humbly submitted that they are not creditors to the company.

In *arguendo*, they do not form a separate class of creditors. Classification of members or creditors is necessary only when different members or creditors are affected differently under the scheme.[6] In order to identify such a class it is important to understand the meaning of the term class under sections 391-394 of the Companies Act, 1956 and what constitutes a separate class of creditors.

1.1.1 Meaning of the term 'Class' under section 391-394 of the Companies Act, 1956 and forming a separate class of creditors.

To constitute a separate class, people with similar rights must form a homogenous group which has common interest as the base of the homogeneity of the group and collective interest as the aim.[7] The meaning of class has to be confined to those people whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest.[8] Thus, all creditors will be constituted as one class no matter in which common law country their debts arose.[9] Furthermore, classes of creditors are to be made on the basis of terms offered to them in the scheme and not on any other basis.[10] The facts indicate that the terms offered to foreign creditors in the scheme are not different from the terms offered to any other class and thus they do not form a separate class. Hence, The

[5]Bhatia International v. Bulk Trading SA [2002] 4 SCC 105.

[6]*In re*, Jaypee Cement Ltd, (2004) 122 Comp Cas 854 All.

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

[8] *Supra* note. 8.

[9] *In Re* English Scottish and Australian Chartered Bank [1893] 3 Ch 385.

[10]Core Health Re Care Ltd *Re*, (2007)138 Com Cases 202.

Petitioner submits that the foreign currency lenders stand on the same ground as other creditors and their interest are aligned with the other creditors and thus, they cannot be considered to be forming a separate class of creditors.

1.2 THEY WERE NOT REQUIRED TO BE SENT A NOTICE ABOUT THE SCHEME OF MERGER.

Under the company rules, a notice is required to be sent to all the creditors and members of the company before a merger, amalgamation takes place.[11]There was no requirement of a notice to be sent in this case. The Petitioner submits that since the foreign lenders are not creditors of the company by virtue of the arbitral award not being enforced, there is no obligation of the Petitioner to serve a notice on the foreign money lenders. In Arguendo, no notice was required as the foreign currency lenders were not affected.

Assuming but not conceding that the foreign money lenders are the creditors of the company, a notice is still not required to be sent to them as the Company's Act, 1956 only mandates a notice to be sent to those shareholders or members who are affected by the scheme[12]. The purpose behind this is to enable such shareholders or members to give voice to their apprehensions or consent to the scheme.[13] In the instant matter, not serving the notice would not affect the foreign lenders in any manner. Therefore, the appellants submits that based on the reasoning developed above on the position of law, no notice was required to be sent by Lifeline or Jeevani to the foreign currency creditors.

1.3 ALL THE STATUTORY REQUIREMENTS WERE FOLLOWED, THE SCHEME WAS RIGHTLY SANCTIONED AND THUS IT SHOULD NOT BE RECALLED.

Section 391 to 394(a) of Companies Act, 1956 talk about the statutory requirements which have to be followed when a scheme is filed for sanction in High Court. When a scheme

[11] Companies Act, 1956, S. 393 (1) (a).

[12] *In re* Tea Corprn. Ltd. v. Tea Corprn. Ltd., (1904) 1 Ch 12 (CA).

[13] H. Mafatlal v. Mafatlal Industries Ltd, AIR 1997 SC 506.

has been approved by majority shareholders and creditors and there is no merit in the objection raised by minority class,[14] scheme cannot be rejected. For a scheme to be rejected, it has to be prima facie unfair and illegal.[15]

Furthermore, if a scheme is filed under section 391 and is passed by requisite majority then it will be binding on every creditor and shareholder.[16] The majority class has to exercise its power in good faith for the benefit of the class as a whole.[17] Thus, the court sanctions a scheme after being satisfied about the fact that creditors have acted bona fide and in good faith and haven't coerced the minority in order to promote any interests which are adverse to that of latter.[18] Hence, under section 391 of the companies act, it is not necessary for the court to ascertain whether all the members of a company have expressly consented to a scheme.

In the instant case, sanctions by Delhi High Court and Bombay High Court were obtained.[19] Furthermore, proper notice was served to members and shareholders.[20] The notice was served in the method described in Company Act'56.[21] Everyone was given a chance to raise their apprehensions and scheme was passed by a lot of deliberation and consultancy. By virtue of the scheme being just a document which all the creditors, members and shareholders can interpret in their own way, A scheme cannot recalled be for a particular group of lenders who are grieved because they are under an impression that they belong to a separate class as

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[14] *In re*, Tony Electronics Ltd..,[2013] 29 taxmann.com292 (Delhi).

[15] Gujarai Kamdar and Ors. v. Ramkrishna Mills Ltd., 1998 (92) Comp. Cases 692.

[16] Companies Act, 1956 S. 391.

[17] Allen v. Gold Reef of West Africa, [1900] 1 Ch 656, 67.

[18] *Supra* note. 14.

[19] Factsheet ¶ 5.

[20] *Ibid.*

[21] Companies Act, 1956 S. 393 (1a).

they have provided for monetary sum in a different currency.[22] Furthermore, unless a fraudulent intention can be gathered in the face of the scheme, court will not investigate the bonafides of the scheme.[23]

Moreover, the point raised by foreign lenders is devoid of merit. It was observed that since there was no other objection to scheme which was already sanctioned by majority and thus, objection raised by applicant being devoid of merit, the same was to be dismissed.[24] Hence, the Petitioner submits that in the instant case, all the statutory requirements for a scheme of merger were properly followed and thus the scheme cannot be recalled.

[22] *Supra* note. 19.

[23] *In re* Suri & Nayar Ltd., (1983) 54 Com Cases 868 (Kar).

[24] *Supra* note. 15.

2. THERE IS AN ARBITRATION CLAUSE IN THE AGREEMENT DATED 23RD MARCH 2013

S. 7(1) of the Indian Arbitration and Conciliation Act, l996 lists out three crucial ingredients for an arbitration agreement namely; Intention to arbitrate from both of the parties, presence of dispute/s. and the Existence of a legal relationship (contractual or otherwise) between the parties.[25] In the Enercon (India) v Enercon Gmbh.[26], the essential elements of an arbitration agreement have been discussed. These are: Intention to arbitrate; Intention to settle by Arbitration after failure of ADR; Some law to settle the Disputes; The extent of the arbitration clause (all disputes or a specific dispute); Substantive Law to Arbitrate.[27] Relevant Clause in the Share sale agreement dated 23rd March 2013 fulfils all the essentials of an arbitration clause constitutes an arbitration clause.

2.1 THE RELEVANT CLAUSE FULFILS THE ESSENTIALS OF AN ARBITRATION CLAUSE

2.1.1 There is an intention to arbitrate

It has been held that in order to ascertain the existence of intention to arbitrate the court has to analyze whether there was a consensus ad idem between the parties with relation to the arbitration from the language of the arbitration agreement.[28]*In Rukmanibai Gupta* v. *Collector, Jabalpur*, it was held that if there is an agreement between the parties to refer disputes arising out of the subject matter of a contract to arbitration then such an agreement is an arbitration agreement.[29] An agreement involving all disputes to be referred to the lessor for final and binding decisions was held to be an arbitration agreement.[30] Similarly

[25] IACA, l996, S. 7(1).

[26] Enercon (India) Ltd. v Enercon Gmbh and Anr., 2014(1)Arb LR257(SC).

[27] *Ibid.*

[28] Rickmers Verwaltung v. A.P. Industrial Infrastructure, AIR 1999 SC 504.

[29] Rukmanibai Gupta v. Collector, Jabalpur, AIR1981 SC479.

[30] *Ibid.*

an agreement postulating a private tribunal to give final and binding decisions on any dispute that may arise out of the contract was held to be an arbitration agreement with the parties at ad idem.[31]

Although there is no explicit mention of the words 'arbitration' or 'arbitrator' it is the intention of the parties that dictates the presence of the arbitration clause and mere absence of such words is of no relevance.[32] It has been held that it is not essential for the arbitration clause to be stated in any form as long as the intention to arbitrate is clear from the agreement itself.[33]

Here the intention to arbitrate can be clearly discerned from the language used in Clause 2. Sub clause 2.1 provides for setting up of an empowered committee of three executive level members of the company whose decisions shall be 'final binding and conclusive' on the parties with relation to all issue and questions under the contract. Here the empowered committee is supposed to arbitrate on the issues of dispute between the two parties. In the light of the above it is humbly submitted that the parties intended to engage in arbitration.

2.1.2 There is a presence of disputes

S. 7(1) of the Arbitration Act while defining an arbitration agreement refers to disputes which may have arisen or which may arise between the parties in relation to their legal relationship. The dispute here is the alleged 'breach of contract and unjust enrichment by the promoters' as claimed by Lifeline. It has been held that the presence of the word 'disputes' is crucial to the presence of the arbitration agreement.[34]

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[31] State of Rajasthan v. Nav Bharat Construction Co, AIR 2005 SC 2795.

[32] Ramlal Jagananth v. Punjab State, AIR 1996 Punjab 436.

[33] M Dayanand Reddy v. AP Industrial Infrastructure Limited and Anr, AIR 1993 SC 2268.

[34] State of UP v. Tipper Chand, AIR 1980 SC 1522.

Here Clause 2 of the agreement is titled as 'Dispute Resolution' and while there is no mention of the word 'dispute' in sub clause 2.1, it is submitted that the sub clause should be read as a part of the entire clause, and not separately. Moreover in a situation where two constructions of the agreement arise, the construction which favours agreement is preferred[35]. In State of Punjab v. Dina Nath[36], a similar clause having a wide ambit and was interpreted broadly. Hence a broad and not a narrow interpretation would suit the needs of the present situation.

2.1.3 There is an existence of a legal relationship between the parties.

Here, the relevant contract clearly is the Share Sale agreement dated 23rd March 2013. Both the parties i.e. Lifeline and the Promoters signed the agreement. Even if validity of the contractual relationship is challenged due to any reason, the arbitration clause is separate and independent from the underlying contract.[37] The conclusiveness of the contract does not affect the validity of the arbitration clause.[38]

2.1.4 There is an intention to settle by arbitration after failure of ADR.

Clause 2.2 suggests that the parties should endeavour to amicably resolve the issues. This clause suggests other alternative non binding forms of dispute resolutions such as negotiations, mediations or conciliation. Therefore clause 2.2 reflects intention of the parties to engage in arbitration after the failure of ADR. It is submitted that the intention to arbitrate in Clause 2.1 is clear and separate from the intention to use other forms of Alternative dispute resolution like mediation, conciliation or negotiations in 2.2.

2.1.5 There is some law available to settle the disputes.

[35]Oil & Natural Gas Commission v. Sohanlal Sharma, ILR 1969 (2) Cal 392.

[36] State of Punjab v. Dina Nath , AIR 2007 SC 2157.

[37]*Supra* note 26.

[38] Reva Electric Car Co. Private Limited v. Green Mobil, AIR 2012 SC 739.

The relevant law here is the Indian Law as stated in Clause 1 titled 'Governing Law'. It states that the agreement would be 'construed and interpreted' according to Indian laws.

2.1.6 The agreement covers all disputes

An arbitration agreement can apply to some specific disputes or to all of them. An all encompassing arbitration agreement by virtue of being so does not become invalid.[39] The relevant clause clearly states that it covers "all questions and issues relating to the meaning, scope, instructions, claims, right or matters of interpretation of and under this Agreement".

2.1.7 There is a substantive law to arbitrate.

The substantive law here is the Indian Arbitrations and Conciliation Act, 1996.

2.1.8 The relevant clause in the agreement provides for arbitration and not for expert determination

While determining whether the dispute resolution process is an expert determination or arbitration, the process through which the decision is made by the adjudicator is analysed.. [40]If both the parties are heard fairly and the adjudicator decides upon the evidence laid before him, asserting that the nature of enquiry is judicial, then the clause will amount to arbitration clause.[41]

In State of Punjab v. Dina Nath, the Court emphasised on the wider ambit of the clause and found the clause in which all disputes were to be referred to a third party for a final and binding decision to be arbitration rather than expert determination.[42] Similarly Clause 2.2 provides for an empowered committee with three executive level commissions to

[39] *Supra* note 36.

[40] KK Modi v. KN Modi & Ors. (1998) 3 SCC 573.

[41] V.A. Mohta, Arbitration and Conciliation, 177(1st ed. 2001).

[42] *Supra* note 36.

decide on all questions and issues. Hence it is submitted that the relevant clause provides for arbitration and not expert determination.

2.2 THE ARBITRATION CLAUSE IS WORKABLE

2.2.1 The mechanism for arbitration mentioned in Clause 2 is feasible

An arbitral proceeding is the forum which the parties have themselves agreed to and that will resolve the dispute through a judicial process.[43] S. 10 of the Arbitrations Act provides for the number of arbitrators to be an uneven number.[44]. Here, the criteria is to have three executive level personnel of the company i.e. erstwhile Jeevani to be the arbitrators is compatible with the procedure mentioned under Sections 10 and 11.

.If all the essential requirements of the arbitration clause are present in the agreement than poor or clumsy drafting or wide wordiness would not make the arbitration unworkable.[45]

2.2.2 Even if the arbitration clause is unworkable, it does not become invalid

It has been held that a 'common sense approach' must be applied in order to effectively reinforce the intention of the parties to arbitrate.[46] *In Encore case* the Supreme Court supplied a missing line in the arbitration clause to make it workable. If detailed and systematic analyses of words used in commercial context go against the business common sense then such analysis should be subservient to the business common sense.[47]Hence it is submitted that even if the arbitration clause is found to be unworkable, it should not be held invalid but necessary changes and adjustments should be made to the extent as to make it workable.

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[43] Pride of Asian Flims v. Essel Vision, (2004)0 3 Arb LR 169,180(Bom).

[44] IACA, 1966, S. 10.

[45] *Supra* note 36.

[46] *Supra* note 26.

[47] The Antaios Compania Neviera SA v. Salen Rederierna AB(1985) 1 AC 191.

3. CCI'S PRIMA-FACIE OPINION OF SWASTH'S INDULGENCE IN ANTI-COMPETATIVE PRACTISE IN NOT BAD IN LAW

3.1 CCI HAD THE JURISDICTION TO LOOK INTO AFORESAID MATTER.

CCI has the specific mandate to promote competition, free trade and prevent anti-competitive behaviour[48]. It's the body that has been created to look into matter related to competition law including anti-competitive agreements[49], abuse of dominant position[50] and combinations[51]. Further, S. 60 of the 2002, Act is a *non obstante* clause providing an overriding effect to the provisions of the Act in case of inconsistency with any other law in force.[52]

After receiving the complaint as obliged under S. (19) (1) (a) of 2002, Act,[53] the Commission looked into the matter and found that issue concerning was with regard to stifling completion through vexatious litigation. This involves indulgence in practice of resulting in denial of market access,[54] which is very much within the jurisdiction of CCI.

In the light of above, it is humbly submitted that CCI had the jurisdiction to look into aforesaid matter.

3.2 SWASTH WAS INVOLVED IN ABUSE OF ITS DOMINANCE POSITION

Establishing abuse of dominance under S.4 of 2002, Act involves two stage assessments: first, identification of the relevant market and second, determine whether the

[48] Preamble, 2002, Act.

[49] 2002, Act, S. 3.

[50] 2002, Act, S. 4.

[51] 2002, Act, Ss. 5-6.

[52] 2002, Act, S. 60.

[53] MCX Stock Exchange Ltd. v. National Stock Exchange of India Ltd. & Anr., (2011) 109 SCL 109 (CCI).

[54] 2002, Act, S. 4(c).

firm enjoys a dominant position in the relevant market.[55] Similarly, the 2002, Act define relevant market as the market which can be determined by the Commission with reference to relevant product or relevant geography or with reference to both the market.[56]

3.2.1 Novel and Inventive form the same product market.

Relevant product market consists of product that has reasonable interchangeable or substitutability for one another.[57] S. 19 (7) of the 2002, Act have laid down factor few factors, of which any or all factor mention in the said section are to be given due regard in determining the relevant product market.

Inventive drug was the primer drug available in the market specializing in the life saving market, and the new drug Novel, which was eagerly waited in the market, specialized in the same segment of life saving drug and was published to be much cheaper drug in this market as compare to its competitor.[58] Further, pharmaceuticals is highly regulated with the quality standard maintain by department like CDSCO the two products working for same end 'life-saving' having same end use is reasonably substitutable or interchangeable.

In the light of above, it is humbly submitted that 'Novel' and 'Inventive' comprises same relevant product market in of the 'life saving drugs'.

3.2.2 Novel and Inventive form the same relevant geographic market.

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[55] Mallika Ramchandran, *Com¶tive Study: Law on Abuse of Dominant Position*, (August 18, 2014), http://cci.gov.in/images/media/ResearchReports/Com¶tiveStudyLaw_mallikaramachandran09022007_20080411100811.pdf.

[56] 2002, Act, S. 2 (r).

[57] United States v. Du Pont & Co., 351 U.S. 377 (1956).

[58] Factsheet ¶ 5.

Relevant geographical market consists of an area where competition is geographically confined[59] and where the condition of competition for provision of service or demand for service are distinctly homogeneous and can be distinguished from condition prevailing in the neighbouring area,[60]

CDSCO, is responsible for establishing quality standard of the drug and other State Drugs Authority is mainly responsible only for granting drug manufacturing and retailing licenses.[61] Therefore condition in relevant geography is homogeneous and nothing to reflect heterogeneity like trade barrier, whole of India is taken as the relevant geographical market.

In light of above, it is humbly submitted that 'the market for manufacture and sale of life saving drug in India' is the relevant market in present case.

3.2.3 Swasth holds dominance position in the relevant market.

The Dominant position is the position of economic strength enjoyed by an undertaking which *enable it to prevent effective competition* on relevant market, allowing it to behave appreciably extend independently of competitors, consumer.[62]

The word like 'leading', 'top ranking', 'highest' etc are the some of the word having similar meaning as word 'premier'.[63] So the drug 'Inventive' held the leading player in the relevant market. Further, there is no statutory requirement of particular market size to be a

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[59]Ilan Golan v. Pingel Enterprise Inc., 310 F.3d 1360 (2002).

[60] 2002, Act, S. 2(s).

[61]Ernst & Young, *B.5 Health Science,* Doing Business in India *Doing Business in India*, (June 15, 2011), http://www.ey.com/Publication/vwLUAssets/Doing_business_in_India_2011/$FILE/Doing_business_in_India_2011.pdf.(last seen August 24, 2014)

[62]United Brand v. Commission*,* (1978) ECR 461.

[63]Oxford Dictionaries, *Premier,* http://www.oxforddictionaries.com/definition/english-thesaurus/premier.(last seen August 24, 2014)

dominant position.[64]Hence we can consider Swasth's life saving drug hold the dominant position. Similarly, Swasth has vertical integration of sale and service[65] as its drug 'Inventive' is manufacture and sold by Swasth itself.[66] The price of drug 'Inventive' was relatively expensive despite being premier drug in market shows that it holds considerable dominant position in the said market share/size[67],

Considering aforesaid fact and giving due regard to some of the factor laid out in section S. 19(4) of 2002, Act, it is humbly submitted that Swasth holds the dominant position in the said relevant market.

3.2.4 Swasth was involved in abuse of its dominant position

An enterprise engaging in practices resulting in denial of market access in any manner shall be guilty of abusing its dominant position.[68] Abuse is an objective concept referring to behaviour of dominant undertaking such as to influence the structure of market as the very presence of undertaking in question weakens the market already through recourse different from the normal competition.[69] In *ITT Pomedia v. Commission,*[70] laid out two cumulative criteria to identify where legal proceeding is an abuse. *First,* where it cannot reasonably considered as an attempt to assert the right of undertaking, and is brought with intention to harass opposing party. Second criteria, is whether litigation is brought in framework to eliminate competition.

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[64]BPB Industries Plc v. Commission, (1993) ECR II-389, British Airways Plc v. Commission, (2003) ECR

[65] 2002, Act, S. 19(4)(e).

[66] Factsheet ¶ 5.

[67]2002, Act, S. 19(4) (a).

[68] 2002, Act, S. 4(3).

[69]ITT Pomedia v. Commission, (1998) ECR II 2937.

[70]*Ibid.*

In the instant matter, Swasth filed suit for IPR infringement and stopped launching of new drug 'Novel' and after it launched its own similar cost effective drug in the market cornering large chunk of market it took back the case of IPR infringement. Analyzing the fact in the whole framework along with fact that the drug Novel was manufacture after further developing active R&D where as Swasth was assigned only developed R&D, shows that litigation was brought with an attempt to delay the launch of drug 'Novel' and with the aim of elimination the competition. Consequently Swasth has indulge in practice or practices resulting in denial of market access;[71] therefore on prima facie opinion abuse of dominant position as envision by the S 4(2)(c) was found.

In the light of above, it's humbly submitted that Swasth was involved in abuse of dominance and the order passed by CCI was bad in law.

3.3 CCI HAS FULFILLED ALL THE PROCEDURE UNDER THE 2002, ACT

After looking into said matter CCI was of prima facie opinion satisfied that abuse of dominance had taken place; therefore directed the Director-General to investigate under the power vested upon the Commission under the S 26(1) of the 2002, Act. The Commission having fulfilled all requirements as envision by the 2002, Act and directing to do further investigation is not bad in law.

In the light of above, it is humbly submitted that Swasth was involved in abuse of dominance and the order passed by Commission is not bad in law.

[71] 2002, Act, S. 4(c).

4. PRAYERS

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

1. *The decision of Division bench of of Delhi High Court was correct in refusing to set aside Scheme*
2. *The decision of Division Bench Delhi High Court was correct to state that parties' contemplated submission of dispute to empowered committed said clause was an arbitration clause.*
3. *To abide by the order passed by Division bench of Delhi High court that Swasth have been involve in abuse of its dominant position, .and order passed by CCI was not bad in law.*

Any other order as it deems fit in the interest of equity, justice and good conscience.

For This Act of Kindness, the Respondent Shall Duty Bound Forever Pray.

Sd/-

(Counsel *for* the Respondent)