TEAM CODE: T

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

THE SUPREME COURT OF INDIA

Lifeline Ltd.……...Appellants

V/S

Promoters of Jeevani……..Respondents

CLUBBED WITH

Foreign Banks (Foreign Lenders)……Appellants

V/S

Lifeline Ltd.……. Respondents

AND

Swasth Ltd.……..Appellants

V/S

Lifeline Ltd. & CCI……...Respondents

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List of Abbreviations

Sec.	Section
Ors	Others
vs.	Versus
Ltd.	Limited
Art.	Article
SC	Supreme Court
HC	High Court
SCC	Supreme Court Cases
AIR	All India Reporter
Edn.	Edition
Co.	Company
Pvt.	Private
&	And
US	United States
FDA	Food and Drugs Administration
R&D	Research and Development
IPR	Intellectual Property Right
CCI	Competition Commission of India
ILR	Indian Law Reports
MLJ	Madras Law Journal
SCL	Sebi and Corporate Laws
DRJ	Delhi Reported Judgments

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STATEMENT OF JURISDICTION

The Respondents in the instant case have the honor to submit this Memorial before The Supreme Court of India, in pursuance of; Sec. 10 of the Companies Act, 2013; Sec. 53T of the Competition Act, 2002 and Art.136 of the Constitution of India.

STATEMENT OF FACTS

• **Jeevani Ltd.** is a pharmaceutical company incorporated in the year 1990 under the Companies Act, 2013 and its registered office is in New Delhi. It is a listed public company with its equity shares listed on the Bombay Stock Exchange. In July, 2011 Jeevani issued a statement announcing that the company was looking forward for expansion in the market.

• **Lifeline Ltd.** is also a listed public company registered & incorporated under the Companies Act, 2013 with its registered office in Mumbai. After establishing itself in the food products market, Lifeline decided to foray into the pharmaceutical sector. Lifeline approached Jeevani for a possible partnership to venture into pharmaceutical sector.

• **Swasth Life Ltd.** (Swasth) is a sister concern of the Promoters of the erstwhile Jeevani in the pharmaceutical sector. The drug 'Inventive' was being manufactured and sold by Swasth. In 2010, Swasth got assigned the absolute rights of the few developed and completed R&D projects of the Jeevani.

Foreign Banks (Foreign lenders) were certain creditors of Jeevani. A consortium agreement was made between the foreign lenders and Jeevani for providing financial assistance to the latter.

Background of the Case:

1. **Scheme**: Around November, 2011, both companies initiated negotiations for a possible merger, and decided to merge in a way that Jeevani would completely merge into Lifeline. An agreement was made between the three promoters of Jeevani and Lifeline stating that all intangible properties including the active R & D and IPRs of Jeevani would become the property of Lifeline. A scheme of arrangement was prepared. An agreement was made between the three promoters of Jeevani and Lifeline stating that all intangible properties including the active R & D and IPRs of Jeevani would become the property of Lifeline The Scheme was finalized on 5th march 2012 and filed before Bombay stock and was not approved. An application u/s 391of Companies Act 1956 was filed by Jeevani and Lifeline for approval of Scheme by Hon'ble Delhi High Court and Judge ordered the meeting of creditors and the meeting of the creditors to whom notice was sent was accordingly held and the Scheme was passed. The Scheme was also approved by Hon'ble Delhi High Court and Bombay High court.
2. Foreign lenders had jointly, invoked arbitration proceedings before a foreign arbitral tribunal constituted in Hong Kong, against Jeevani and foreign arbitral award was passed in favor of

foreign lenders on 27th July 2010. Under the award, Jeevani was required to pay the amounts. In August 2013, foreign lenders filed an application against the Scheme, contending that they constituted a separate class of creditors and they had not received the notice of the Scheme and hence, the Scheme should be set aside. The company strived that the foreign lenders are not the creditors of the company and whether the foreign lenders even constitute a class of creditors is disputed. The application was dismissed and the Judge refused to set aside the Scheme. Against this, the foreign lenders went in appeal to the Division Bench of Delhi High Court, which was also dismissed and now in appeal before the SC of India.

3. After the merger, Lifeline received notices from the US FDA for providing drugs of below par quality. The investigation by the FDA on drugs produced by Jeevani was commenced much before the merger. A suit was filed by the Lifeline against the promoters of Jeevani for damaged of breach of contract contending that the pending investigations were concealed by promoters to get inflated prices for their shares. The promoters strived that the Delhi High Court had no jurisdiction as the contract had an arbitration clause. However, Lifeline contended that there is no such clause. The Single Judge held the above couldn't be an arbitration clause. This order was challenged by Promoters to the Division Bench and was held that the Single judge had erred in its decision and an arbitration clause was constituted and the disputes were to be decided by the Empowered group. Against the order, Lifeline has approached the SC of India.
4. After the merger, Lifeline decided to introduce a drug ' Novel'. This drug was published to be considerably cheaper than other drugs present in the market including ' Inventive'. Swasth filed a suit for infringement of its IPRs and was able to obtain interim injunction against Lifeline. While, Swasth launched a new cost effective drug and captures a large chunk of market and withdrew its injunction. Lifeline filed an application before Competition Commission of India alleging that Swasth abused dominant position and indulged in bad faith litigation. The CCI *prima facie* viewed that the Swasth may have abused its position and directed the DG CCI to investigation submit its report. Swasth filed a writ petition against the order and made Lifeline and CCI a party in Delhi High Court, submitting that the Swasth while protecting its IPR cannot be held even *prima facie*, to be abusing its dominance. The court held that CCI has made prima facie finding and directing an investigation on vague allegations. Although no adverse effect is caused to Swasth and it found no reason to interfere with the investigation and dismissed the petition. On appeal, the Division bench also found no reason to interfere with the order and accordingly, Lifeline has come before SC against the order of the Division Bench.

STATEMENT OF ISSUES

The following questions have been presented before the SC of India:

1. Whether the foreign lenders constitute a separate class of creditors?

2. Whether the Delhi High Court had the jurisdiction to resolve the disputes upon the subject matter of the agreement?

3. Whether the Swasth Ltd. abused its dominance by obtaining an interim injunction against Lifeline Ltd. and whether the investigation ordered by CCI was *prima facie*?

SUMMARY OF ARGUMENTS

1. Whether the foreign lenders constitute a separate class of creditors?

It is humbly submitted before the Hon'ble Court that foreign lenders not constitutes separate class of creditors of Jeevani. The argument is *twofold; firstly,* the foreign lenders cannot be considered as a class of creditors u/s 230 of companies act and, it was not mandatory to give notice of meeting and *thirdly,* the foreign arbitral award was not enforced in India.

2. Whether the Delhi High Court had the jurisdiction to resolve the disputes upon the subject matter of the agreement? It is submitted before the Hon'ble Court that the Delhi High Court has no jurisdiction to resolve the disputes upon the subject- matter of the agreement. The argument is *threefold; firstly,* the arbitration clause fulfills all the requisites of Arbitration agreement, *secondly,* the Delhi High court had no jurisdiction to resolve the disputes between the parties of the arbitration agreement, *thirdly,* the suit filed against Promoters for damages arising out of breach of contract is untenable.

3. Whether the Swasth Ltd. abused its dominance by obtaining an interim injunction against Lifeline Ltd. and whether the investigation ordered by CCI was *prima facie*?

It is submitted before the Hon'ble Court that the Swath ltd. obtained an interim injunction against lifeline which was not valid and the investigation ordered by CCI against Swasth Ltd. was justified .The argument is *threefold; firstly* the drug inventive sold by Swasth ltd was not patentable under Sec.3(d) Patents Act 1970,*Secondly* the court erred in its decision by providing an interim injunction against lifeline, restraining it from launching the new drug, *thirdly* the investigation ordered by CCI was made on view that swasth may have abused its dominance.

ARGUMENT ADVANCED

1. Whether the foreign lenders constitute a separate class of creditors?

It is humbly submitted before the Hon'ble Court that foreign lenders not constitutes separate class of creditors of Jeevani. The argument is *twofold; firstly,* the foreign lenders cannot be considered as a class of creditors u/s 230 of companies act and, it was not mandatory to give notice of meeting and *thirdly,* the foreign arbitral award was not enforced in India.

A. Foreign lenders are not class of creditors of Jeevani: It is humbly submitted before the Hon'ble Court that the foreign lenders do not constitute a separate class of creditors of Jeevani. As per sec. 230 (1) where a compromise or an arrangement is proposed, - *between a company and its creditors or any class of them or between a company and its members or any class of them.* The court may on the application of the company or any creditor or member or of the class involved or liquidator order that a meeting of the creditors or members or any class of them to be called and held in the manner directed by the court. It is contented that sec. 230(1) a clearly states that arrangement is proposed between a company and its creditors or any class of them.

The above sec. 230[1]has been interpreted by SC of India in *Miheer H. Mafatlal v Mafatlal*[2] – *'When such a scheme is put forward by a company for the sanction of the court in the first instance the court has to direct the holding of meetings of creditors or any class of creditors or members or class of members who are concerned with the scheme and once the majority in number representing three fourth in value of creditors or class of creditors or members or class of members as the case may be present or voting either in person or by proxy at such a meeting.*'

In the present case foreign creditors are not that class of credtiors who are concerned with the scheme. It is contented that the foreign lenders are the banks that merely had provided finance to

[1]391 (1) The Companies Act , 1956

[2]*Miheer H. Mafatlaal vs. Mafatlaal Industries Ltd. (1997) 1 SCC 57*

Jeevani on the basis of consortium agreement i.e. foreign creditors are the liabilities of Jeevani. In *Areva T. and D. India Ltd.* [3]it was held that-'*Merger is a form of amalgamation where all the properties and liabilities of the transferor company get merged with the properties and liabilities of the transferee company leaving behind nothing with the transferor company except its name, which also gets removed through the process of law .In reality, companies do not merge only the assets and liabilities merge. The concept of merger as explained in Areva T. and D. Ltd is in conformity with the concept given in accounting standard 14 issued by the ICAI and adopted as one of the national so standard.'* Thus being the liability of Jeevani the foreign lenders are being transferred to lifeline and no rights of them are affected. Also as regards the service of notice is concerned a conjoint reading of rule 63, 69(1) and 73 of Company Court Rules 1960 specifies that the notice of such meetings is required to be served to those creditors, class of creditors, members or class of members who are concerned with the scheme. From the contentions presented above it was clear that foreign lenders does not constitute that class of creditors who are concerned with the scheme and hence no notice is required to be send to them.

B. <u>Foreign Arbitral Award not enforceable in India:</u> It is submitted before the Hon'ble Court that the foreign arbitral award which was passed in July 2010 in favor of appellants in Hong Kong was neither enforceable nor any application for enforcement of the award was filed as per the procedural law in India . Definition clause of The Foreign Awards (Recognition and Enforcement Act) defines foreign award- *" means an award on differences between persons arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India, made on or after the 11th day of October, 1960 -*

<u>(a)</u> In pursuance of an agreement in writing for arbitration to which the Convention set forth in the Schedule applies, and (b) In one of such territories as the Central Government, being

[3]*Areva T. and D. India Ltd*

satisfied that reciprocal provisions have been made, may, by notification in the Official Gazette, declare to be territories to which they said Convention applies. It is contended on behalf of the respondents that the foreign award passed in July 2010 in Hong Kong is not enforceable in India as Hong Kong is not under the list of notified country in New York Convention till 2012 which means that the award passed in 2010 was not valid till 2012 as this notification only had a prospective effect under the New York Convention and no earlier arbitral awards will have any benefit from this notification. The SC in decision of *Bharat Aluminum Co v Kaiser Aluminum Technical Service*[4] clearly stated that their judgment in *Bharat Aluminum* only has prospective effect and applies to arbitration agreements executed after 6 September 2012.The decision of SC in the above case ruled that Indian courts will no longer have the jurisdiction to intervene in a foreign seated arbitration, however it only has a prospective effect and applies to arbitration agreement executed after 6th September 2012.While this may be seen as a dampener for existing arbitration award passed in favor of appellants in Hong Kong which will not be able to benefit from this change in the law. In the present case, it can be understood that the Indian procedural laws were applicable on the enforcement of the award. Further, it is contended that the appellant had no filed any application for the enforcement of the foreign award in India till date which is mandatory for the validity of the award in the Indian Territory. Sec. 49 of Arbitration Act states about the Enforcement of the Foreign Awards that –*'A foreign arbitral award is enforceable in India when on application to the Indian court is made at appropriate jurisdiction and where the court is satisfied that the foreign award is enforceable under chapter 1 of part II of the Arbitration and Conciliation Act, 1996, the award shall be deemed to be a decree of that court'*. Also, it is submitted that for the enforcement of the award some of the necessary conditions must be fulfilled, in absence of which, the foreign award is not valid under Sec. 47 of the Act. Sec. 47

[4] *Bharat Aluminum Co v Kaiser Aluminum, (2012) 9 SCC 552*

of the Arbitration Act provides the Evidence for the Enforcement of Foreign Award that- *'A party applying for enforcement of a foreign award is required to produce before the Court: (a) The original award or a copy thereof, duly authenticated in the manner required by the law of the country in which it was made; (b) The original agreement for arbitration or a duly certified copy thereof; and (c) Such evidence as may be necessary to prove that the award is a foreign award.'* In the present case, the appellants had not file any application for the enforcement of the foreign award the validity of which in the Indian Territory is disputed and no evidence compulsory for the enforcement are fulfilled by the appellants. It is further contended by the Respondents that there has been a time limitation of 3 years for the enforcement of the foreign award from the date of passing of the award. Articles of the New York Convention (The First Schedule to this Act) clearly go to show that the procedural laws of the country in which the award is relied upon would govern the procedural aspect of the filing of the foreign award and that would include the question of limitation, being a procedural one. Thus, it cannot be said that a foreign award can be enforced at any time, though a domestic award can be enforced only within a particular time. Sec. 43 of Arbitration Act provides Limitations- 1. *"The Limitation Act, 1963(36of 1963), shall apply to arbitrations as it applies to proceedings in court"*

Applicability of Limitation Act, 1963: Article 119 of the Limitation act, which deals with the award, has no application to foreign awards and the proceedings in relation to foreign awards would either be regulated by the residuary. Article 137 of the Limitation Act is applicable to arbitration cases. This article provides that- *'Any other application for which no period of limitation is provided elsewhere in this division, the period of limitation is 3 years when the right to apply accrues'* Perusal of this provision makes it clear that this provision clearly lays down that the provisions of the Limitation Act apply to the proceedings in the Court and they are made

applicable to arbitration also. The Law Commission[5] recommended: *'There should be a residuary article for application (including petitions) as in the case of suits and we consider that the period should be the same as present, namely 3 years from the date when the right to apply accrues.'* The Gujarat HC in *Orient Middle East Lines Ltd. vs. Brace Transport Corporation of Monrovia*[6] held that- '*The right to apply would accrue when the award is received by the applicant. The period of limitation would be governed by the residual provision under the Limitation Act 1963 (No 36 of 1963), i.e. the period would be three years from the date when the right to apply for enforcement accrues.'* In the light of the above argument it is concluded on behalf of Respondents that the Foreign Arbitral Award passed in favor of foreign lenders was neither enforced nor enforceable in India. Thus, the foreign lenders are not separate class creditors of Jeevani and had no say in the merger of Jeevani and Lifeline.

2. Whether the Delhi High Court had the jurisdiction to resolve the disputes upon the subject matter of the agreement?

It is submitted before the Hon'ble Court that the Delhi High Court has no jurisdiction to resolve the disputes upon the subject- matter of the agreement. The argument is *threefold; firstly,* the arbitration clause fulfills all the requisites of Arbitration agreement, *secondly,* the Delhi High court had no jurisdiction to resolve the disputes between the parties of the arbitration agreement, *thirdly,* the suit filed against Promoters for damages arising out of breach of contract is untenable.

A. **Agreement fulfills the requisites of an Arbitration Agreement:** As per sec. 7 of Arbitration and Conciliation act the essential elements of an arbitration agreement are:

[5] 3rd Law Commission Report, 1956
[6] *Orient Middle East Lines Ltd. Vs. Brace Transport Corporation of Monrovia, AIR 1986 Guj 62*

(1) There must be a present or future difference in connection with some contemplated affairs.

(2) There must be intention of the parties to settle such differences by a private tribunal

(3) The parties must agree in writing to be bound by the decision of such tribunal.

(4) The parties must be ad idem.

The above referred essentials were accepted as essentials of arbitration by SC in number of cases: In *K K-Modi vs. K N Modi*[7] the SC enumerated the following attributes of a valid Arbitration agreement: (1) The arbitration agreement must contemplate that the decision of the Tribunal will be binding on the parties to the agreement, (2) That the jurisdiction of the Tribunal to decide the rights of parties must derive either from the consent of the parties or from an order of the Court or from a statute, the terms of which make it clear that the process is to be an arbitration, (3) The agreement must contemplate that substantive rights of parties will be determined by the agreed Tribunal, (4) That the tribunal will determine the rights of the parties in an impartial and judicial manner, with the Tribunal owing an equal obligation of fairness towards both sides, (5) that the agreement of the parties to refer their disputes to the decision of the Tribunal must be intended to be enforceable in law, and lastly,(6) The agreement must contemplate that the tribunal will make a decision upon a dispute which is already formulated at the time when a reference is made to the Tribunal." The SC in the light of essentials given in *K K Modi vs. K N Modi* decided *State of Orissa &Ors vs. Bhagyadhar Dash*[8] that the agreement constitutes to be the arbitration agreement. In the present case arbitration clause of the agreement fulfills all the essentials of arbitration agreement due to the reasons as mentioned below: Given in the facts of the case that both the parties were agreed to submit "upon all questions and issues relating to meaning, scope, instructions, claims, right or matters of interpretation of and under this agreement."[9] i.e. they were agreed to submit their present or future disputes regarding the above mentioned matters for

[7] *K K-Modi vs. K N Modi , 1998 (3) SCC 573*

[8] *State of Orissa &Ors. vs. Bhagyadhar Dash, (2011)7 SCC 406*

[9] Para 9, Moot Problem

arbitration. Both the parties were agreed to submit their certain issues to the empowered committee comprising of three executive persons of the company i.e. there is an independent private tribunal to solve the disputes. Both the parties were agreed to submit their certain issues to the empowered committee comprising of three executive persons of the company i.e. there is an independent private tribunal to solve the disputes. The essence of arbitration is that the arbitrator decides the case and his award is in the nature of a judgment. Where the parties intended to refer the matter to a person for his final binding decision than that person is an arbitrator and merely the absence of 'Arbitrator' and 'Arbitration' in the agreement would not make the agreement to be unworkable. In *Jagdish Chander vs. Ram Chandra*[10], SC sets out the following principles in regard to what constitutes an arbitration agreement: *If the words 'arbitration' and 'arbitral tribunal (or arbitrator)' is not used with reference to the process of settlement or with reference to the private tribunal which has to adjudicate upon the disputes, in a clause relating to settlement of disputes, it does not detract the clause from being an arbitration agreement if it has the attributes or elements of an arbitration agreement.*

- It was provided in the clause that the decision of the empowered committee shall be final, binding and conclusive on the parties to this agreement[11], i.e. the committee will act as Arbitrator
- Both the parties consented to the agreement as no objection regarding the validity of the agreement was raised by the parties to the agreement, i.e. the parties have the intention to submit their disputes to arbitration.

B. **Delhi High Court had no jurisdiction in the matter:** It is humbly submitted before the Hon'ble Court that the Delhi court had no jurisdiction in the matter. It is provided that sec.5 of arbitration and conciliation act 1996 states "*notwithstanding anything contained in any other law for the time being in force in matters governed by this part, no judicial authority shall intervene except where so provided*

[10] *Jagdish Chander vs. Ram Chandra (2007) (5) SCC 719*

[11] Para 9 (2), Moot Problem

*in this part."*As per the sec, the court is not empowered to interfere in the arbitral proceedings except where it was specifically provided under the Act. By the virtue of the provision of sec.5 all other statutes have been excluded from the operation in so far as they relate to intervention by any judicial authority in matters covered by sec. 1 to 43 of the act. However the courts shall have power to intervene if so permitted specifically by any of the provision contained in part 1 of the act. In BHEL *vs. CN Garg & Ors.*[12] , the court drew the conclusion that- *'sec. 5 of Arbitration & Conciliation Act was inserted to discourage judicial intervention. In view of sec. 5 the civil court would not be competent to restrain the arbitrator from proceeding the arbitration. The court also held that the new act deals with situation even when there is a challenge to the constitution of the arbitral tribunal; it is left to the arbitrator to decide the same.'* Thus it is the Empowered Committee; which was appointed as an Arbitrator in the agreement to decide upon the subject matter disputes, not the Delhi Court. In *United India assurance co. ltd v/s Kumar Texturisers*[13]*,* it was held that under the act of Arbitration & conciliation 1996, there are only three Sections which basically confer power on the court to intervene in the matter. A conjoint reading of Sections 5, 34, 37 and 14(2) will show that the court can intervene only in cases covered by Sections 14(2), 34 and 37.However the sec 14(2), 34 and 37 which provides the jurisdiction to the court to intervene in the matter are not applicable in the present case. The facts of the present case interpreted with sec .5 exclude the jurisdiction of Delhi High Court because it was already proved in the above argument that the agreement constitutes an arbitration agreement. Also as it was held in *Nicholas Piramal India Ltd v Zenith drugs &Allied Agencies Pvt Ltd*[14] that- *'Where the existence of arbitration clause in the agreement is proved between the parties, the question as to whether arbitration agreement is attracted to the facts of given case, it is not decided by the civil court*

[12] *BHEL vs. CN Garg & Ors. (2001) (57) DRJ 154 (DB)*

[13] *United India assurance co. ltd v/s Kumar Texturisers ,1999 (2)ARBLR*

[14] *Nicholas Piramal India Ltd v Zenith drugs & Allied Agencies Pvt Ltd*, AIR 2007 NOC 1897

and only the arbitrator has jurisdiction in this regard.' As all the essential elements of Arbitration agreement as provided under sec. 7 of Arbitration & Conciliation Act and enunciated by SC in various case are present in this case it is clear that the clause constitutes an arbitration clause and hence lifeline has no right to approach the Delhi HC as the Hon'ble court has no jurisdiction in the matter.

C. **<u>The suit filed against promoters for damages arising out of breach of contract is untenable</u>:** The contention of lifeline was that the promoters have concealed the fact regarding investigations of FDA was untenable due to the following reasons:

- The agreement between the promoters and lifeline is a part of merger between Jeevani and lifeline. Promoters owe no duty towards lifeline to disclose all the information as it is the duty of lifeline to carryout detail and proper due diligence.
- The investigation proceedings were initiated against Jeevani not against the promoters and hence it dilutes the liability of promoters. As regards the responsibility of Jeevani is concerned, it is contented that the Lifeline has to perform the *due diligence* concerning the scheme of merger between them. The term "due diligence not defined by statute, it is generally viewed as an assessment of the legal risk, evaluation of the viability of the target, and a review of disclosure obligation. Due diligence refers to the investigating effort made by an individual to gather all relevant facts and information that can influence his decision to enter into a transaction or not. Exercising due diligence is not a privilege but an unsaid duty of every party to the transaction. In mergers and amalgamation, Due Diligence helps individuals avoid legal hassles due to insufficient knowledge of important details. Due diligence is integral to business ethics. It is exercised in a simple over-the-counter transaction or a complicated merger and acquisition transaction. For instance, while acquiring a company, the buyer must do thorough research of the credentials of the company, its market valuation, status of accounts receivables, position in the debt market, past performance, legal hassle etc. Buyers who neglect the process of due diligence, or who are less than diligent in their investigations, may hope to rely on the seller's representations and warranties. Courts have found such reliance to be unreasonable, and

therefore denied a buyer's claim of harm as a result of a breach of those representations and warranties, where the buyer did not sufficiently investigate to discover the seller's problems. In the present case lifelines contention for breach of contract is unreasonable as its lacks on its part to perform due diligence. *IBP v. Tyson Foods*[15], the court noted that *caveat emptor* (buyer beware) was still the rule, especially when sophisticated business entities were involved. Because the court found no duty in the seller to disclose, buyers must be cautious and comprehensive in asking the relevant questions. From the above raised points it was concluded that it was the responsibility of lifeline to carry out the due diligence and as in this case since it had not performed such due diligence it could not blame promoters for concealing the investigations of FDA and for inflating the share price.

3. **Whether the Swasth Ltd. abused its dominance by obtaining an interim injunction against Lifeline Ltd. and whether the investigation ordered by CCI was *prima facie*?**

It is submitted before the Hon'ble Court that the Swath ltd. obtained an interim injunction against lifeline which was not valid and the investigation ordered by CCI against Swasth ltd. was justified .The argument is *threefold; firstly* the drug 'Inventive' sold by Swasth Ltd. was not patentable under Sec.3(d) Patents Act 1970,*secondly*, the court erred in its decision by providing an interim injunction against lifeline, restraining it from launching the new drug, *thirdly,* the investigation ordered by CCI was made on *prima facie* view that swasth may have abused its dominance.

A. **<u>The drug 'Inventive' was not patentable u/s. 3(d) of Patents Act, 1970:</u>** It is submitted before the Hon'ble court that the drug "Inventive" manufactured & sold by Swasth ltd. was based on certain IPRs which have been assigned by Jeevani. Sec. 2(j) of Patent Act 1970 defines "Invention"-'*invention means a new product or process involving an inventive step and capable of industrial application.'* Sec. 2(ja) defines "Inventive step"-*'Inventive step means a feature of an invention that involves technical advances as compared to the*

[15] *BP v. Tyson Foods* ,789 A.2d 14 (Del. Ch. 2001)

existing knowledge or having economic significance or both and that makes the invention not obvious to a person skilled in the art.' It is provided that the drug inventive was based on certain IPRs which have been assigned to Swasth. On a reading of Sec. 2(j) in context of Sec. 2(ja), it is contented by respondents that the drug inventive sold by Swasth was not patentable under Sec. 3(d) of the Patents Act. Sec. 3 states what are not inventions – the following are not inventions within the meaning of this act,-

(d) the mere discovery of a new form of a known substance which does not result in the enhancement of the known efficacy of that substance or the mere discovery of any new property or new use for a known substance or of the mere use of a known process, machine or apparatus unless such known process results in a new product or employees at least one new reactant. In *F Hoffmann – la Roche Ltd. Vs. Cipla Ltd*[16]. It was held by Delhi HC that- '*on conjoint reading of the Sec. 64 read with Sec. 2 (ja), it is clearly discernible that there are certain essential ingredients of Sec. 2 (ja) in order to call any invention to qualify the threshold of inventive step. The said ingredients are - a) That the said invention involves a technical advancement as compared to existing knowledge or economic significance or both; and b) That makes the invention non obvious to the persons skilled in art. These are conjunctive requirements under Sec. 2 (ja) which means that not merely there should be a technical advancement in the invention but at the same time, it should not be obvious to the person skilled in art. Therefore, both the requirements are to be satisfied conjunctively.* 'In *Novartis AG vs. Union of India*[17], the Madras High court interpreted Sec. 3(d) in detail as follows: - *'the amended Sec. only declares that the very discovery of a new form of a known substance which does not results in the enhancement of the known efficacy of that substance, will not be treated as an invention. The position therefore is that if the discovery of a new form of a known substance must be treated as an invention, then the patent applicant should show that the*

[16] *F Hoffmann – la Roche Ltd. Vs. Cipla Ltd, (2008) 37 PTC 71 (Del)*
[17] *Novartis AG vs. Union of India (2007)4 MLJ 1153*

substance so discovered has a better therapeutic effect.' It is contented on behalf of the respondents that the drug 'inventive' manufactured and sold by Swasth ltd does not fulfill the requisites of the Sec. 2(ja) as the drug 'inventive' was so obvious , there could be no inventive step whatsoever. An inventive step which is a necessary ingredient in order to make an applicant eligible for patent right under the act. It is alleged that whether the Swasth Ltd. was assigned the IPRs of Jeevani under which an interim injunction was obtained. Further, it is disputed that whether any application for grant of patent on drug inventive was filed by Swasth ltd. or not. Also, the drug 'Inventive' neither define any feature of an invention that involves technical enhancement as compared to the existing IPRs of Jeevani nor was cost effective that makes it an inventive step. It is submitted on behalf of the respondents that the agreement dated 23rd march 2012, it was specifically provided that all intangible properties including the R & D and the IPRs of Jeevani would become property of lifeline and all rights accruing would vest with lifeline the drug 'Novel' which was manufactured after further developing the active R & D which became the property of lifeline after merger was considerably cheaper than the drug inventive which was the premier drug in the market. Also the drug novel fulfills all the requisites of Sec. 2(ja) 'Inventive step'. Lifeline has the right to launch the drug novel as Swasth ltd. did not obtain any grant of patent on drug inventive under the Act.

B. **<u>The Interim Injunction obtained against Lifeline was invalid:</u>** It is submitted by respondents before the Hon'ble Court that the interim injunction which was obtain by Swasth, restraining Lifeline from launching the drug 'Novel' in the market was invalid. It is provided that the right to sue for infringement belongs to the patentee. The Respondents also contends that under the Act only a Patentee or a person deriving the title in the patent can sue for infringement; the Appellant, who has not submitted any document that establishes its right in the present patent, cannot therefore sue for infringement. The Respondents submits that patent is a new one and as such no presumption of validity must be attached to it. Also. It is contended on behalf of

Respondents that the no infringement of any of the IPRs of Swasth was made by Lifeline. An infringer is a person who actually manufactures a patented article without authorization, or uses a patented process likewise. The drug 'Novel' which was manufactured after developing the IPRs which became the property of Lifeline. Lifeline cannot be said to have infringed any patent right. Further it is submitted that after restraining Lifeline, Swasth Ltd. launched a similar drug, cornering a large chunk of the market. In *Laxmi Dutt Roop Chand vs Nankau And Ors*[18] the HC held that- '*While the patents act no doubt offers the patentee the exclusive rights to enjoy the fruits of his registered invention, the same cannot be employed as a tool for exploitation to cripple business rivals without adducing any proof of their alleged infringement*.'

It is provided that 'Right to Health' has been recognized as a fundamental right in India even though it is not recognized as a fundamental right expressively, the judiciary has recognize the same as a fundamental right under Art. 21 of the constitution which guarantees Right to life and Personal liberty. Therefore the right for health care at affordable prices has become universally recognized fundamental right. Even Art. 27(2) of the TRIPS agreement also recognizes that the member countries may exclude from patentability, inventions, and prevention within their territory of the exemption, exploitation of which it is necessary to protect public order and morality including to protect human, animal or plant life or health to avoid serious prejudice to environment. It is also provided that in the area of life saving drugs, it in the public interest of the general public and patients suffering from diseases like cancer that medicines are made available at cheap and affordable prices so long as the appellant is not a 'fly-by- night' operator. In such cases, an injunction ought not to be granted due to the overwhelming interest of society. It is contended that by Respondents that the appellant have failed to place on record the collaboration or licensing agreement with Jeevani. In order to file a suit for infringement, the title of the patent

[18] *Laxmi Dutt Roop Chand vs Nankau And Ors, AIR 1964 ALL 27*

has to be clearly established which the appellant has failed to do so. No documents have been placed on record to show as to how the original patent which has been filed in the name of Lifeline only and is now claiming to be owned by Swath. The result of the above discussion is that the plaintiff is not entitled to claim an interim injunction, in the terms sought. Thus, the court must held the injunction invalid against Lifeline.

C. Investigation ordered by CCI was on justified *prima facie* opinion:

It is humbly submitted before the Hon'ble court that the investigations ordered by CCI on view that Swasth abuse its dominant position by restraining Lifeline from launching the new life saving drug 'NOVEL'. It has been provided in the above two arguments that Swasth's drug inventive lacks an inventive step under Sec. 2(ja) of the patents act. Also the interim injunction restraining lifeline from launching the drug in the area of life saving drugs, it was in the violation in the public interest of the general public and the patient suffering from the respective disease as the new drug was to be made available at affordable price. Under such circumstance an injunction against such drug is in violation to the overwhelming interest of the society. It is contented that the investigation ordered by CCI against swasth ltd. On prima facie view that, Swasth abused its dominance by capturing a large chunk of the market and launching a similar cost effective drug. As per Sec. 19(1) of Competition Act, 2002- the commission may inquire into their contravention either on its own motion on the basis of his personal knowledge and information or on receipt of information from any person or consumer or their association or trade association or on a reference made by the central government or state government or a statutory authority. The ingredients of prohibition are:

1. An agreement which causes or likely to cause an appreciable adverse effect on competition, and
2. Abuse by an enterprise of its dominant position.

The commission on receipt of information starts the process of investigation. The commission directs an inquiry. it may do so on its own or on the information. Sec. 26 describes the procedure for inquiry. Sec. 26(1) - The commission shall direct the Director General to cause an investigation to be made into the matter, if it so of the opinion that there exist a *prima facie*.

The commission directs inquiry only if it is of the opinion that there exists a *prima facie* case. The expression "opinion" means something more than a mere relating of a gossip or hearsay; it means judgment or belief, that is a belief or conviction resulting from what one thinks on a particular question. In Nagraj v. Krishna[19] , it was held that '*the expression prima facie case means that there is a case which requires investigation and the case is not based on erroneous or vexatious grounds.'* In the present case, Lifeline approached to CCI on the ground that the Swasth abused its dominant position by:

- Obtaining invalid injunction against Lifeline
- Restraining Lifeline from launching new cost effective life saving drug
- Launching a similar cost effective drug during the same time and capturing the market.

The prima facie view of the case clearly states that the Swasth indulged in bad and unfair competition and thus, the CCI u/s. 26 of the Competition Act, 2002 had the right to investigate in matter. As far as the investigation was concerned, no adverse effect would cause to Swasth as Lifeline is the one which is badly affected by the scenario because its IPR rights have been infringed.

Thus, in the light of above argument, it is submitted that the Swasth abused the IPRs of Jeevani, now property of Lifeline and indulged in unfair competition by restraining Lifeline to launch a life saving cost effective drug.

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[19] *Nagraj v. Krishna, (1996)ILR Kar 753*

Prayer

In the light of facts and circumstances stated, issues raised, arguments advanced and authorities cited, it is most humbly submitted that this Hon'ble SC may be pleased to:

a. Declare the foreign lenders are not separate class of creditors.

b. Declare that there was an arbitration clause in the agreement and Delhi HC had no jurisdiction.

c. Declare the interim injunction invalid and the investigation against Swasth for infringement of IPR rights of Lifeline and for indulging in unfair competition should initiate.

d. Grant any other relief which this Hon'ble SC deems fit in the light of justice, equity and good conscience.

All of which is respectfully affirmed and submitted

Counsel for Respondents