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

BEFORE THE

THE HON'BLE SUPREME COURT OF INDIA

FOREIGN LENDERS **(APPELLANT)**

V.

JEEVANI **(RESPONDENT)**

AND

LIFELINE **(APPELLANT)**

V.

PROMOTERS **(RESPONDENT)**

AND

SWASTH **(APPELLANT)**

V.

LIFELINE **(RESPONDENT 1)**

CCI **(RESPONDENT 2)**

ON SUBMISSION TO THE SUPREME COURT OF INDIA WRITTEN SUBMISSION FOR THE RESPONDENT

UNDER THE ARTICLE 136 OF CONSTITUTION OF INDIA, 1950

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LIST OF ABBREVATIONS

AIR	All India Reporter
All	Allahabad High Court
Cal	Calcutta High Court
Cri LJ / Cr LJ	Criminal Law Journal
CCI	Competition Commission of India
ILR	Indian Law Reporter
UOI	Union of India
Ed.	Edition
Guj	Gujarat High Court
Corp.	Corporation
IC	Indian Cases
Mad	Madras High Court
n.	Foot Note no.
Ori	Orissa High Court
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P&H	Punjab and Haryana High Court
Pat	Patna High Court
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Raj	Rajasthan High Court
SC	Supreme Court
SCC	Supreme Court Cases
SCJ	Supreme Court Journal
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Sec.	Section
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INDEX OF AUTHORITY

STATUES:

- The Companies Act, 1956
- Arbitration and Conciliation Act, 1996
- The Competition Act,2002
- Indian Constitution, 1950

CASES:

- Jaypee Cement Ltd. Re, (2004) 122 Com Cases 854 : (2004) 2 Comp LJ 105 (ALL)
- Mohan Singh v. H.P State Forest Corporation, 1998 (4) CCC 325
- M. Vijaya Narayanan v. Prabhakaran, AIR 2006 Ker 373
- Maneckchowk & Ahemdabad Mfg Co. Ltd., Re, (1940) 40 Com Cases 819 (Guj)
- Miheer H. Mafatlal v. Mafatlal Industries Ltd. (1996) 87 Com Cases 792 at 833 (SC)
- Nordic Bank Plc v. International Harvester Australia Ltd., (1983) 2 VR 298 at 303
- P. Anand Gajapathi Raju v P.V.G Raju (2000) 4 SCC 1886 at p 1887
- Re EITA India ltd.(1997) 24 CLA 37 (Cal.), Indian Cresent Bank ltd. Re,(1949) 53 CWN183 ,Bhagat Ram Kohli v. Angel's Insurance co. ltd., (1937) 7 Com cases 161
- Re Vikrant Tyres ltd. (2003) 47 SCI 613
- Sukanya Holdings Pvt. Ltd. v. Jayesh H. Pandya, AIR 2003 SC 2252 (2255)

Books:

- *The Companies Act,*(17th edn Lexis Nexis Butterworth Wadhwa Nagpur 2011)
- A.M Chakraborti, *Company Botices Meetings and Resolutions*, (5th edn Taxamann Publications (P.) Ltd.)
- MP Jain, *Principles of Administrative law*, (6th edn 2007)
- Justice S.B Malik, *The Arbitration and Conciliation* Act, (4th edn Universal Law Publishings Co.)
- Justice R.P Sethi, *Law of Arbitration And Conciliation*, (Ashoke Law House)
- D.P Mittal, Competition Law and Practise, (3rd edn Taxamann Publications (P.) Ltd 2012)

STATEMENT OF JURISDICTION

The Appellant has the honour to submit memorandum of appeal under Article 136 of the Constitution 1950 read with Order 55 Rule 5 of Supreme Court Rules, 2013

136. Special leave to appeal by the Supreme Court

(1) Notwithstanding anything in this Ch., the Supreme Court, may in any discretion, grant special leave to appeal from any judgment, decree, determination, sentence or order in any cause or matter passed or made by any court or tribunal in the territory of India.

(2) Nothing in clause (1) shall apply to any judgment, determination, sentence, or order passed or made by any court or tribunal constituted by or under any law relating to Armed force.

The Order 55 Rule 5 reads as:

Where there are two or more appeals arising out of the same matter, the Court may at any time either on its own motion or on the application of any party, order that the appeals be consolidated. Unless otherwise ordered by this Court the liability of the parties to pay separate Court-fees shall not be affected by any order for consolidation.

The parties shall accept any judgment of the court as final and binding upon them and shall execute it in its entirety and in good faith.

STATEMENT OF FACTS

CASE 1

Jeevani Limited ("Jeevani") and Lifeline Limited, ("Lifeline") are listed public companies registered and incorporated under the Companies Act. After a lot of deliberations and negotiations, both companies decided to merge. Jeevani completely merged into Lifeline and all assets and liabilities of Jeevani was transferred to Lifeline. A scheme of arrangement, for Jeevani, (the "Scheme") was prepared. It was decided that three promoters of Jeevani would sell their entire promoter shareholding to Lifeline and this sale of stake was affected vide a separate sale agreement, along with all intangible properties including the active R & D and IPRs of Jeevani.

The Scheme was finalized and was filled before Bombay Stock Exchange for approval, approval was not given. Jeevani and Lifeline filed an application under Section 391 of the Companies Act, 1956 for approval of the Scheme before Delhi High Court. The Hon'ble Company Judge ordered for a meeting of the creditors to be convened. A meeting of the creditors was accordingly held and the Scheme was passed by a vote of majority. Thereafter the Scheme was also approved by the Hon'ble Delhi High Court on 5th July 2013. Certain creditors of Jeevani, mainly foreign banks ("foreign lenders") invoked arbitration proceedings before a foreign arbitral tribunal and award was passed in favor of the foreign lenders.

The foreign lenders of Jeevani made an application before the Hon'ble Company Judge contending that they constituted a separate class of creditors and no meeting was convened for them, the Scheme should be set aside. Both the Hon'ble Company Judge and Division bench of

Delhi High Court dismissed the appeal of foreign lenders. The matter is now pending before Supreme Court.

CASE 2

Lifeline continued with the operations of the erstwhile Jeevani, of supplying generic drugs to the USA. Soon after, Lifeline received notices from the US Food and Drug Administration for providing drugs of below par quality and in violation of parameters set out by the FDA. It was unearthed in investigation by FDA on drugs produced by Jeevani at its plants in India was commenced much before the merger of Jeevani and Lifeline.

Lifeline filed a suit against the Promoters before the Delhi High Court for damages arising out of breach of the contract before Delhi High Court. The Promoters contended that the Delhi High Court has no jurisdiction as the agreement between the parties had an arbitration clause and any dispute arising between them should be referred to arbitration. The Hon'ble Single Judge of the Delhi High Court held that the above clause is not an arbitration clause. The Division Bench held that the Single Judge had erred in its decision and that the clause constitutes an arbitration clause. Lifeline has approached the Supreme Court of India and the matter is pending.

CASE 3

Lifeline decided to introduce a new life saving drug "Novel" into the market. This new drug was manufactured after further developing the active R & D which became the property of Lifeline after its merger with Jeevani. The new drug Novel was eagerly awaited in the market. The drug "Inventive" was manufactured and sold by Swasth Life Limited ("Swasth"), a sister concern of the Promoters, of the erstwhile Jeevani and had in year 2010 got assigned absolute rights of few

R & D projects and IPRs of Jeevani. Before Lifeline could launch drug 'Novel', Swasth filed a suit for infringement of its IPRs and obtain an interim injunction on launching "Novel".

In the meanwhile, Swasth launched a similar cost effective drug and after it withdrew the case against Lifeline and the interim injunction was vacated. Lifeline filed an application before the "CCI" alleging that Swasth was abusing its dominant position by indulging in bad faith litigation. The CCI based on the allegations made by Lifeline was of the prima facie view that Swasth may have abused its dominance and passed an order to DG CCI to investigate. Swasth being aggrieved by the Order of the CCI filed a writ petition making Lifeline and the CCI a party in the Delhi High Court and the writ petition was dismissed. On appeal, the Division Bench also did not find any reason to interfere with the order of Hon'ble Single Judge and accordingly Swasth has come before the Supreme Court.

ISSUES INVOLVED

ISSUE 1:

Whether the Foreign Lenders constitute a "Separate class of creditors" and whether the scheme is liable to be set aside on this account?

ISSUE 2:

Whether the clause from "the Sale Agreement" constitutes an "arbitration clause" and whether the jurisdiction of the court is barred?

ISSUE 3:

Whether the "Swasth" abused its dominant position by indulging in "bad faith litigation" and whether the order of CCI for directing investigation is tenable in law?

SUMMARY OF ARGUMENTS

CONTENTION 1: THAT THE FOREIGN LENDERS DO NOT CONSTITUTE A "SEPARATE CLASS OF CREDITORS" AND THE SCHEME IS NOT LIABLE TO BE SET ASIDE ON THIS ACCOUNT

The appellant humbly contented that the creditors do not constitute separate class of creditors as they do not fulfill the requisites to form a separate class and the company was not duty bound to send them a separate notice for the meeting. It is the Company to decide the class of creditors, in accordance with what the scheme purports.

CONTENTION 2: THAT THE CLAUSE FROM "THE SALE AGREEMENT" CONSTITUTES AN "ARBITRATION CLAUSE" AND THE JURISDICTION OF THE COURT IS BARRED.

It is humbly submitted that the word **'a matter'** indicates entire subject matter of the suit should be subject to arbitration agreement. Where an agreement between the parties contains an arbitration clause, and dispute has arisen between the parties, matter has to be referred to the arbitrator, and reference cannot be refused.

CONTENTION 3: THAT THE "SWASTH" HAS ABUSED ITS DOMINANT POSITION BY INDULGING IN BAD FAITH LITIGATION AND THE ORDER OF CCI FOR DIRECTING INVESTIGATION IS TENABLE IN LAW.

It is humbly contended before the Hon'ble Supreme court that Swasth was abusing his dominant position by indulging into bad faith litigation and obtaining interim injunction against Lifeline and restraining Lifeline from launching the Drug "Novel

CONTENTION 1: THAT THE FOREIGN LENDERS DO NOT CONSTITUTE A "SEPARATE CLASS OF CREDITORS" AND THE SCHEME IS NOT LIABLE TO BE SET ASIDE ON THIS ACCOUNT

It is humbly contented before the Hon'ble Supreme Court of India that the creditors do not constitute separate class of creditors as they do not fulfill the requisites to form a separate class and the company was not duty bound to send them a separate notice for the meeting. It is the Company to decide the class of creditors, in accordance with what the scheme purports.

1.1 REQUISITES TO CONSTITUE A SEPARATE CLASS OF CREDITIOR

A Group of persons would constitute one class when it is shown that they have conveyed all the interests and their claims are capable of being ascertained by any common system of valuation. The group styled as a class should ordinarily be:-

- Homogenous
- Commonality of interest
- The compromise offered to them must be identical

"What constitutes a class?: The court does not itself consider at a point what class of creditors or members should be made parties to the scheme. This is the Company to decide, in accordance with what the Scheme purports to achieve.[1]

It is a formidable difficulty to say what constitutes a "class" of creditors. The creditors composing the different classes must have different interest.[2]Classification of members or of the

[1] Nordic Bank Plc v. International Harvester Australia Ltd., (1983) 2 VR 298 at 303
[2] BUCKLEY ON THE COMPANIES ACT, 13th Edition, page 406

creditors in a scheme is necessary only when different member or creditors would be affected under the scheme differently.[3]

In Maneckchowk & Ahemdabad Mfg[4], the Gujarat High Court observed that "**It is always a moot question what constitute a class**". The creditors composing the different classes must have different interest. When one finds a different state of fact existing among different creditors which may differently affect their minds and judgment, they must be divided into different classes. In order to constitute a separate class, members belonging to the class must form a homogenous group with commonality of interest.

In light of the aforementioned judgment, it is clear that the Foreign Lenders neither have a separate interest nor the scheme is affecting them in a different way. The Scheme contained same provisions for all the creditors.

1.2 THAT THE FOREIGN LENDERS DOES NOT FULFILL THE REQUISITES FOR A SEPARATE CLASS

A separate meeting of a class of members or of creditors has to be convened, where a different scheme of compromise or arrangement is proposed to different class of creditors or a class must form a homogenous group with the commonality of interest. However in the in case at hand the foreign lenders does not constitute a separate class as neither they have different interest as that from rest of the class of creditors nor a separate scheme of compromise is being offered to them.

On test that can be applied with reasonable certainty is as to the nature of offer to different groups or classes. At any rate those who are offered substantially different compromises will

[3] Jaypee Cement Ltd. Re, (2004) 122 Com Cases 854 : (2004) 2 Comp LJ 105 (ALL)

[4] Maneckchowk & Ahemdabad Mfg Co. Ltd., Re, (1940) 40 Com Cases 819 (Guj)

form a separate class. Even if there are different groups within a class, the interest of which are different from the rest of the class or who are to be treated differently in the scheme, such groups must be treated a separate class for the purpose of the scheme.[5]

In **Miheer H. Mafatlal**[6] case the Supreme Court found no basis for classification of members into different classes. The court said "It is obvious that unless a separate and different type of scheme of compromise is offered to a sub-class of creditors or shareholders otherwise equally circumscribed by the class, no separate meeting of such sub- class of the main class of members or creditors are required to be convened, so no question of holding a separate meeting of such a sub class is required."

In **Arvind Mills Ltd**[7]. Case: The court said that such classes must be determined on the basis of the term offered to them in the Scheme. ***The Foreign currency lenders claimed to be treated as a separate class. The court did not permit it because there was no question of forming a class within a class.***

It is the company to indicate classes. One of the classes was that of syndicate of lenders in foreign currency. Where the classes are not properly formed, the company runs the risk of the Court refusing its sanction. *The Court said that on the face of things their interest was similar to that of lenders in Indian Currency and therefore, they were entitled to raise their concern at the meeting or before the court at the stage of sanctioning*.[8]

[5] Supra note.4

[6] Miheer H. Mafatlal v. Mafatlal Industries Ltd. (1996) 87 Com Cases 792 at 833 (SC)

[7] Arvind Mills Ltd. Re, (2002) 111 Com Cases 118 (Guj) : (2002) 37 SCL 660: (2002) 50 CLA 88: 2002 CLC 1319

[8] Commerz Bank AG v. Arvind Mills Ltd., (2002) 110 Com Cases 539 (Guj)

In the light of the aforementioned judgment, it is clear that mere they are foreign creditors does not fall them in a separate class of creditors. As they have the same interest as that of the Indian Creditors so that cannot be considered as a separate class of creditors mere on the basis of difference in currency.

In determining whether creditors fell into separate classes, it is necessary first to determine whether the rights to be released or varied under the scheme were so distinct that the scheme has to be treated as a compromise or arrangement with more than one class of creditors; and secondly, whether the new rights which the scheme gave to those whose rights are too be released or varied led to such a conclusion.[9]

1.3 THAT THE SCHEME IS NOT LIABLE TO BE SET ASIDE

It is humbly contented that the scheme is not liable to be set aside as they do not fulfill all the requisites to form a separate class of creditors.

In the case at hand it was contended by the foreign lenders that they had not received any notice of the scheme and no meeting was convened for them, the scheme should be set aside.

It is humbly contented that the scheme should not be liable to be set aside since in case of **Bhagat Ram Kohli v. Angel's Insurance co. ltd**[10], it was held that a meeting could not be invalidated merely because notice was not served on an individual creditor. Non – receipt of notice by any creditor would not invalidate the proceedings of the meeting.[11]

[9] Hawk Insurance Co. Ltd., Re, (2001) 2 BCLC 480
[10] (1957) 7 Com Cases 161.
[11] Re EITA India ltd.(1997) 24 CLA 37 (Cal.), Indian Cresent Bank ltd. Re,(1949) 53 CWN183 ,Bhagat Ram Kohli v. Angel's Insurance co. ltd., (1937) 7 Com cases 161

A meeting conducted in accordance with the provisions of sec. 391(2) and also with the permission of the court was not to be invalidated only on the ground that the creditor was not served with the notice.[12]

Thus in the instant matter the scheme is not liable to be set aside as neither they form a separate class of creditors and the scheme should not be set aside on the ground that the notice was not served to them. Such observation has been made by Hon'ble Company Judge and the Division Bench of the Delhi High Court in the instant matter and accordingly the petition of the foreign lenders was dismissed.

The Respondent humbly prays that the scheme should not be set aside as the foreign lenders do not constitute a separate class of creditors.

[12] Re Vikrant Tyres ltd. (2003) 47 SCI 613

CONTENTION 2: THAT THE CLAUSE FROM "THE SALE AGREEMENT" CONSTITUTES AN "ARBITRATION CLAUSE" AND THE JURISDICTION OF THE COURT IS BARRED.

The Clause 2 of the Share Sale Agreement is an Arbitration clause and therefore the court has the obligation to refer the matter to the arbitration panel as envisaged under the clause 2 of the share sale agreement.

2.1 THAT THE EMPLOYMENT OF THE TERM "MATTER" IN THE AGREEMENT INDICATES THE INTENTION OF THE PARTIES.

The language used in section 8 is **"in a matter which is subject of an arbitration agreement".** The court is required to refer the parties to arbitration. The suit should be in respect of **"a matter"** which the parties have agreed to refer and which comes within the ambit of arbitration agreement.

The word **'a matter'** indicates entire subject matter of the suit should be subject to arbitration agreement.[13]

The legislature after empowering the judicial authority to refer parties to arbitration where there is an arbitration agreement has properly used the word "matter" instead of suit or other judicial proceedings. The judicial authority under this section has no discretion and is legally obliged to make reference on proof of the existence of a valid arbitration agreement.

It is submitted that in the instant case, Clause 2 of the Sale agreement lays that:

[13] Sukanya Holdings Pvt. Ltd. v. Jayesh H. Pandya, AIR 2003 SC 2252 (2255)

2.1 ***Decision of an empowered committee comprising of (three) executive level personnel of the Company shall be final, binding and conclusive on parties to this Agreement upon all questions and issues relating to the meaning, scope, instructions, claims, right or matters of interpretation of and under this Agreement.***[14]

The first line of this clause makes it clear that committee comprising of three executive level personnel will decide matter arising, related to meaning, scope, instructions, claims, right or matters of interpretation of and under this Agreement, means they will be acting as an arbitration panel and the decision given by them on such matter will be final, binding and conclusive.

2.2 ***The parties shall endeavor to amicably resolve the above mentioned issues.***

The word "amicably" mentioned in the above sub-clause means that the parties should dissolve the matter (which is being mentioned in 2.1) outside the court. The intention behind the agreement has to be inferred from the terms used in the agreement and the inference that is collected from the terms of the present clause is that an attempt must be made to resolve the dispute as per some ADR (Alternate Dispute Resolution) mechanism.

2.2 THAT THE CONTRACT BETWEEN THE PARTIES CONTAINS THE ARBITRATION CLAUSE AND FULFILLS ALL THE MANDATES OF SECTION 8

Under section 8, a judicial authority is empowered to refer the parties to the dispute to arbitration, in the circumstances[15], namely where

- There must be an arbitration agreement.
- A party to the agreement brings an action in the court against the other party.

[14] ¶ 5, Factscript.
[15] P. Anand Gajapathi Raju v P.V.G Raju (2000) 4 SCC 1886 at p 1887

- The matter brought is same as the subject matter of an arbitration agreement.
- The other party moves the court for referring the parties to arbitration before submitting the first statement on the substance of the dispute.

The Supreme Court in case of **Jagdish Chander v. Ramesh Chander**[16] discussed the law while answering question whether a clause in partnership deed which require the party to mutually decide to refer the dispute to the arbitration, would be an arbitration agreement or not within the meaning of the act. The court set out the well- settled principles in regard to what constitutes an arbitration agreement as follows:

- The intention of the parties to enter into an arbitration agreement shall have to be gathered from the terms of the agreement. If the terms of the agreement clearly indicates an intention on the part of the parties to agreement clearly indicates an intention on the part of the parties to the agreement to refer their dispute to a private tribunal for adjudication and an unwillingness to be bound by the decision of such tribunal on such disputes, it is an arbitration agreement.
- Even if the words 'arbitration' or 'arbitrator' are not used with reference to the process of settlement, it does not detract from the clause being an arbitration agreement if it has the attributes or elements of an arbitration or element of an arbitration agreement.

In light of the aforementioned judgment, it is clear that the intention of the parties was to constitute an arbitral tribunal or an panel for arbitration in the form of an "*empowered committee comprising of three executive level members of the company*" and further the agreement suggests that finality is also given to the verdict of such an arbitration panel "*upon all questions and*

[16] 2007 (2) RAJ 683 (SC)

issues relating to the meaning, scope, instructions, claims, rights or matters of interpretation of and under the agreement". Such has been the observation of the Hon'ble Division Bench in the instant matter.

2.3 THE JURISDICTION OF THE COURTS IS BARRED IN THIS MATTER AND THE COURT HAS AN OBLIGATION TO REFER THE MATTER TO ARBITRATION.

The situation contemplated by section 8, at the instance of the judicial authority arises when the judicial authority comes to know of the existence of an arbitration agreement. In that event, there is no question of the court under section 8 of the 1996 Act restraining the arbitral proceedings from commencing or continuing.[17] The arbitration agreement is a solemn agreement entered into between the parties for the resolution of the dispute. The provision regarding reference of the matter pending before the judicial authority to the arbitral tribunal has got to be strictly complied with.[18] Therefore in the case where there is an arbitration clause in the agreement, it is obligatory for the court to refer the parties to arbitration in term of their arbitration agreement and nothing remains to be decided in the original action after such an application is made except to refer the dispute to an arbitrator.[19]

Hence in the light of the precedents mentioned above the court in the case at hand has to refer the matter for arbitration as from the Sale Agreement it is clear that the dispute resolution clause is an Arbitration clause.

The courts are not left with any alternative but to refer the matter to arbitration when the provision of section 8 of the Act are invoked by any party when there exists an arbitration

[17] Ardy International (P) Ltd And Another v. Inspiration Clothes & U and Another 2006 (1) RAJ 110 (SC)
[18] Mohan Singh v. H.P State Forest Corporation, 1998 (4) CCC 325
[19] Hindustan Petroleum Corp. Ltd. v. Pinkcity Midway Peroleums, (2003) 6 SCC 503

agreement.[20] Filing of an application to the judicial authority, before which the matter covered by an arbitration agreement is pending, is in no way recognition that the judicial authority has jurisdiction to try the matter pending before it.[21]Where an agreement between the parties contains an arbitration clause, and dispute has arisen between the parties, matter has to be referred to the arbitrator, and reference cannot be refused merely because there are sufficient tribal issues of facts and laws, which can be decided in the civil suit.[22]Once it is found that subject-matter of the action before it is the subject-matter of an arbitration agreement and an order is passed referring the parties to arbitration, the proceedings of the suit has necessarily to end.[23]

In **M. Vijaya Narayanan v. Prabhakaran** the court held that: If in an agreement there is a dispute clause to be referred to arbitration and also there is a clause of civil court jurisdiction, then in such case, the clause of arbitration cannot be obliterated and refusal to refer matter to the arbitration is improper.[24]

In light of the aforementioned judgment, it is clear that in that the instant case, even there is jurisdiction of the Delhi Court but the presence the Arbitration Clause in Sale Agreement makes that is evident that the matter should be referred to arbitration and the same is intended by the parties.

Since there existed an arbitration clause in the Contract between Lifeline and Promoters, the Respondent most humbly pleads that the matter should be referred for Arbitration.

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[20] Harayana Prathmik Shikshan Pariyojana Parishad v. Century Coolers, 2008 (1) RAJ 364 (Bom)
[21] Bahrein Petroleum Co. Ltd. v. P,J Pappu, (1996) 1 SCR 461: AIR 1966 SC 634;
[22] Flat of India Pvt. Ltd. v. Rahul Udyog Viniog Ltd., AIR 2004 NOC 99 (Cal).
[23] M. Vijaya Narayanan v. Prabhakaran, AIR 2006 Ker 373.
[24] Contryside Builders and Develpoment v. Rajesh Kumar Bansal, AIR 2006 (NOC) 1023 (HP)

CONTENTION 3: THAT THE "SWASTH" HAS ABUSED ITS DOMINANT POSITION BY INDULGING IN BAD FAITH LITIGATION AND THE ORDER OF CCI FOR DIRECTING INVESTIGATION IS TENABLE IN LAW.

It is humbly contended before the Hon'ble Supreme court that Swasth was abusing his dominant position by indulging into bad faith litigation and obtaining interim injunction against Lifeline and restraining Lifeline from launching the Drug "Novel".

3.1 THAT THE SWASTH WAS ABUSING ITS DOMIANACE POWER BY ENTERING INTO BAD FAITH LITIGATION.

It is submitted that the Swasth has abuse its dominance power by violating Section 4 (2) (c) of the Competition Act, 2002 by restraining Life to enter into the market by indulging into bad faith litigation.

Section (4) (2) (c) of the Competition Act, 2002 lays that: "***Practice(s) resulting in denial of market access as abuse of dominant position".***

A dominant enterprise shall not indulge in any practice or practices resulting in denial of market access in any manner. Any practice by the dominant enterprise which forecloses the market access to other market players or deter entry to new players shall be considered as abuse of dominant position by the Commission. Abuse of dominance has to be differentiated from normal competition, even if it contributes to the elimination of competitors. What are deterred are exclusionary abuses, i.e. those practices which seek to harm the competitive position of the

dominant company's competitors, or to exclude them from the market altogether, ultimately causing harm to the consumers[25].

In the light of above mentioned provision, it is clear that the Swasth has abused its dominance of power by restraining Life line to enter into the market. Firstly it obtained an *interim injunction against Lifeline* from launching the new drug 'Novel' from Court and in the meantime launched a *similar cost effective drug* in market and after withdrew the case against Lifeline. This shows that the mere intention of Swasth was to restrain the drug "Novel" into the matter which is dominance abuse of the power. Such has been the observation of the CCI in the instant matter.

ESSENTIAL FACILITIES DOCTRINE (EFD)

The so-called **"essential facilities doctrine"** imposes such an obligation on a dominant firm to deal with its competitors if it controls an indispensable facility that makes it impossible or extremely difficult for an actual or potential competitor to compete with the incumbent firm without access to its facility. The language of the provisions suggests that the concept of EFD can be conveniently applied by the Commission under Section 4(c) as it includes a practice or practices by a dominant firm which results in denial of market access in any manner. The phrase "in any manner" would definitely include unjustified denial of access to an "essential facility" by a dominant firm.

In **Consumer Guidance Society v. Hindustan Coco- Cola Beverages**[26]: As per DG report since HCCBPL has been conferred a status of 'preferred beverage provider' by virtue of its agreement with ILPL, it results in complete foreclosure of competition due to marketing entry barrier for the

[25] Jonathan Faull and Ali Nikpay, The EC Law of Competition, 2nd Edn., Oxford University Press, 2007, at p. 348
[26] Consumer Guidance Society v. Hindustan Coco- Cola Beverages Pvt. Ltd. Opposite Parties and INOX Leisure Pvt. Ltd.

competitors. Therefore, HCCBPL has violated the provisions of section 4(2)(c) of the Act by indulging into a practice which has resulted in denial of market access to its competitors in the relevant market and thus abusing its dominant position. The European Union Competition Commissioner found Microsoft, was guilty of abusing its dominant position in the market for the personal computer operating system, and violating, the EU Treaty's Competition Rules[27]

In the case in hand Swasth has denied market access to Lifeline by indulging in bad faith litigation.

3.2 THAT THE CCI WAS FUNCTIONING WITHIN ITS POWER AND THE INVESTIGATION WAS NOT BAD IN LAW

It is humbly submitted that CCI was functioning as per the provisions laid down in the Competition Act and thus it is not bad in law.According to *Section 18* of the Act *"Subject to the provisions of this Act, it shall be the duty of the Commission to eliminate practices having adverse effect on competition, promote and sustain competition, protect the interest of consumers and ensure freedom of trade carried on by other participants, in markets in India."*

Accordingly, under the Act, the Commission is to take action against anti-competitive agreements and abuse of dominant position. Thus abuse of dominant position by an enterprise is a serious violation under the Indian Competition Act. Section 4 of the Act specifically states that ***"no enterprise shall abuse its dominant position".***In the light of the aforementioned clause it clear that the CCI's order for directing investigation was not bad in law and such has been the observations made by the Single Bench and the Divisional Bench of the Delhi High Court in the instant matter.

[27] European Commision vs Microsoft on 24th May, 2011

PRAYER

Wherefore in the light of issues involved, arguments advanced, reasons given and the authorities cited this Hon'ble court may be pleased:

To hold:

- That the Foreign Lenders does not constitutes a separate class of creditors and the scheme should not be set aside.
- That there is an Arbitration clause in the separate sale- agreement between Lifeline and Promoters.
- That the Swasth was abusing his dominant position and the CCI order for directing investigation is not bad in law.

Miscellaneous:

Any other relief which this Hon'ble court may deem fit to grant in the interests of *Justice, Equity and Good Conscience.* All of which is respectfully submitted.

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

Sd/-

(Counsels *for* the Respondents)