TEAM CODE: W

Before

THE HON'BLE SUPREME COURT OF INDIA

AT DELHI

IN MATTERS BETWEEN:

FOREIGN LENDERS … APPELLANT

V.

JEEVANI LTD. …RESPONDENT

LIFELINE LTD. …APPELLANT

V.

PROMOTERS OF JEEVANI LTD. …RESPONDENT

SWASTH LIFE LTD. …APPELLANT

V.

LIFELINE LTD. & OTHERS …RESPONDENTS

A SPECIAL LEAVE PETITION UNDER ARTICLE 136 OF THE CONSTITUTION OF INDIA

MEMORANDUM ON BEHALF OF THE RESPONDENTS

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STATEMENT OF JURISDICTION

THE APPELLANTS HAVE FILED THE SPECIAL LEAVE PETITION UNDER ARTICLE 136 OF THE CONSTITUTION OF INDIA. THE APPELLANTS RAISES NO SUBSTANTIAL QUESTION OF LAW IN THIS APPEAL. THEREFORE THE APPEAL IS LIABLE TO BE DISMISSED.

"136. Special leave to appeal by the Supreme Court

(1) Notwithstanding anything in this Chapter, the Supreme Court may, in its 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."

STATEMENT OF FACTS

1. Jeevani Limited ("Jeevani"), a listed public company incorporated in the year 1990 under the Companies Act, 2013 with its registered office in New Delhi is a leading player in the pharmaceutical manufacturing sector holding considerable market share in India and few other countries. Lifeline Limited ("Lifeline") is another listed public company registered and incorporated under the Companies Act, 2013 having its registered office at Mumbai. Lifeline is major producer of food product in India and is well established in that industry. Realizing the huge potential in the pharmaceutical sector and as Jeevani Ltd. wanted to expand its market, the two companies discussed a possible partnership.

2. Thereafter, on 27th January, 2010 both companies decided to merge, whereby it was agreed that Jeevani Ltd. was to completely merge with Lifeline Ltd and all assets and liabilities of the former company would be transferred to Lifeline Ltd.

3. Three promoters of Jeevani Ltd. holding 18% shareholding in Jeevani Ltd. sold their entire holding under a share-sale agreement effected on 23rd March, 2012. The agreement contained specific representations as to disclosure of material facts by both parties

4. The scheme was finalized on 5th March, 2012 and soon after, the scheme was filed before the BSE for its approval which in turn was denied. On 30th March, 2012, both the companies filed an application under S. 391 of the Companies Act, 1956 seeking approval of the Hon'ble Delhi High Court. The Court ordered a meeting of the creditors to be convened and Jeevani Ltd. called for a meeting by publishing advertisement in a local English newspaper and a local language newspaper containing the terms of the proposal. Thereafter, a meeting of the creditors was held and the scheme was approved by a vote of majority. The scheme was later approved by the Hon'ble Delhi High court on 5th July, 2013. Around the

same time, the Hon'ble Bombay High Court approved the Scheme which had been applied by Lifeline separately.

5. Prior to the scheme, foreign lenders of Jeevani Ltd. had invoked arbitration proceedings for payment of amounts due to them. On 27th July, 2010, a foreign arbitral award was passed in favour of the foreign lenders requiring Jeevani Ltd. to pay them amount stated in the award. The foreign lenders filed an application before the Hon'ble High court of Delhi recalling the scheme as they were creditors of the company and the company had not issued a notice to them. Further, they contended that they formed a separate class of creditors. Jeevani Ltd. refuted both the claims. The Hon'ble Judge dismissed the application, as did the Division Bench on an appeal. This order has been challenged in the Hon'ble Supreme Court and is pending arguments.

6. After merger, Lifeline Ltd. continued operations of Jeevani Ltd. which included supplying of genetic drugs to USA. Lifeline Ltd. was served with notices from FDA for providing drugs at below par quality. It was found out that the FDA investigation at Jeevani's plants in India commenced much before the merger. Lifeline Ltd. filed a suit against the Promoters before the Hon'ble Delhi High Court for damages arising out of breach of contract, claiming compensation for wrongful gain and unjust enrichment by way of defrauding and misrepresenting to Lifeline Ltd. by concealing the pending investigations. The Promoters challenged the jurisdiction of the Hon'ble Delhi High Court contending that the share-sale agreement contained an arbitration clause, which Lifeline Ltd. refuted. The Hon'ble Single Judge of the Delhi High Court held that the clause did not constitute an arbitration clause, which the Hon'ble Division Bench on an appeal reversed. Aggrieved by this, Lifeline Ltd. has approached this Hon'ble Supreme Court and is pending arguments.

7. Lifeline Ltd. decided to introduce a new life-saving drug by the name "Novel" which is considerably cheaper than the product "Inventive" manufactured by Swasth Life Ltd., a

sister concern of the erstwhile Jeevani Ltd. Swasth Life Ltd. filed an infringement suit against Lifeline alleging that "Novel" was substantially similar to "Inventive" and was developed based on the IPRs assigned to it by Jeevani Ltd. in the year 2010 and thereby got an interim injunction restraining the launch of the drug. In the meanwhile, Swasth Life Ltd. launched a cost-effective drug, cornered a huge chunk of the market and withdrew the case against Lifeline Ltd. Lifeline Ltd. filed an application before the CCI alleging Swasth Life Ltd. for abusing its dominant position by indulging in bad faith litigation. The CCI based on the allegations made was of the *prima face* view that Swasth Life Ltd. may have abused its dominant position and ordered the DG CCI to investigate the matter and submit a report within 45 days. The report of DG is still awaited. Being aggrieved, Swasth Life Ltd. filed a writ petition before the Hon'ble Delhi High Court submitting that the order for directing investigation was bad in law. The Hon'ble Single Judge upheld the order of the CCI and so did the Division Bench stating that only an investigation has been ordered on the allegations made Swasth Life Ltd. and as such no adverse effect is caused to it. This order has been challenged by Swasth Life Ltd. in the Hon'ble Supreme Court.

QUESTIONS PRESENTED

1. WHETHER FOREIGN LENDERS CONSTITUTE SEPARATE CLASS OF CREDITORS AND WOULD NON-ISSUANCE OF NOTICE TO CREDITORS INVALIDATE THE SCHEME?
2. WHETHER THE DISPUTE RESOLUTION CLAUSE IN THE SHARE SALE AGREEMENT CONSTITUTES AN ARBITRATION CLAUSE?
3. WHETHER THE ORDER OF THE CCI DIRECTING THE DG TO INVESTIGATE IS GOOD IN LAW?

SUMMARY OF PLEADINGS

1. Whether foreign lenders constitute separate class of creditors and would non-issuance of notice to creditors invalidate the scheme?

The Respondent submits that the claim of the Appellant to set aside the scheme cannot be sustained as their rights are secured under the scheme by virtue of the fact that all rights and liabilities of the Respondent would be transferred to Lifeline Ltd. The Respondent contends that Appellant does not constitute a separate class of creditors as the 'classes' are to be constituted depending upon the similarity or dissimilarity of the creditors' rights against the company. It is further submitted that non-issuance of notice does not invalidate the scheme.

2. Whether the dispute resolution clause in the share sale agreement constitutes an arbitration clause?

The Respondent respectfully submits that the dispute resolution clause in the agreement constitutes an arbitration clause. In order to constitute an arbitration clause, the words 'arbitration', 'arbitral tribunal' or 'reference' need not be expressed in the clause or in the heading. Further, an arbitration clause is not required to be stated in any particular form.

3. Whether the order of the CCI directing the DG to investigate is good in law?

The Respondent respectfully submits that the petition was premature and without merits. Issuance of such direction to investigate, at the face of it, is an administrative direction to one of its own wings departmentally and is without entering upon any adjudicatory process. It does not effectively determine any right or obligation of the parties to the litigation. Thus, the case shall be liable to be dismissed.

PLEADINGS

Foreign Lenders V. Jeevani Ltd.

A. THE SCHEME IS NOT LIABLE TO BE SET ASIDE.

A.1. The Respondent respectfully submits that the claim of the Appellant to set aside the scheme cannot be sustained as their rights are secured under the scheme by virtue of the fact that all rights and liabilities of the Respondent would be transferred to Lifeline Ltd.[1] Without prejudice to the contentions made, even if the arbitral award becomes enforceable, the Appellant would be entitled to enforce the claim against Lifeline Ltd. Therefore, the Respondent respectfully submits that since the rights of the Appellants are secured, the scheme is not liable to be set aside[2].

B. THE FOREIGN LENDERS ARE NOT CREDITORS.

B.1. The Respondent respectfully submits creditors whose names appear in the books of the company should be considered as creditors. Relying upon the definition of creditor as given in Halsbury's Laws of England[3], a creditor is any person who has a pecuniary claim which is capable of an estimate. In order to constitute creditors of a company, the claim may be either present or contingent; however it is indispensable for the claim to be enforceable. It is a well settled proposition of law that foreign arbitral award has to be enforced in India in order to assert any claim under the award. Applying the principle of *Lex Fori*, since the award is to be executed in India, the laws of India governing the execution will be applicable. The Appellants holding a foreign arbitral award are statutorily required to enforce the same in India. Article 137 of the Limitation Act, 1963 states that any other

[1] ¶3 of Moot proposition.

[2] In re Vikrant Tyres Ltd., [2003] 47 SCL 613 (KAR.)

[3] Vol. 7(3), Edn. 4.

application for which no period of limitation is provided elsewhere in this Division, a limitation of 3 years applies. The Appellants received the foreign arbitral award on 27th July, 2010. By virtue of Limitation Act, the Appellants ought to have applied for recognition period of three years of the right to apply accruing to them[4] i.e., by 27th July, 2013. Prior to enforcing the award as a decree, the court records satisfaction contemplated by Section 49 of the Arbitration and Conciliation Act, 1996. In the instant case, the Appellants have failed to apply for recognition of the arbitral award in India beyond the limitation period as provided under the Limitation Act. Therefore, the arbitral award cannot be enforced in India and the claim for payment of amount mentioned in the award becomes unenforceable. As ruled by the Honk Kong Court of Appeal in the matter of ***Grand pacific holdings limited v. Pacific china holdings limited***[5], the holder of an unenforceable arbitral award is not, therefore, a creditor[6]. As a practice of accounting, the Company writes back an unenforceable debt, and the names of the creditors are removed from the books of accounts, ceasing their position as creditors. It is the humble submission of the Respondent that as laid down by the Calcutta High Court ***In re Mahaluxmi Cotton Mills Ltd.[7],*** only the creditors whose names appear in the books of the company should be considered as creditors.

B.2. Without prejudice to the submissions already made, the Respondent humbly submits that the inordinate delay in filing a petition for enforcement of the award by the Appellants constitutes a waiver of the claim. Relying upon the definition given in Halsbury's Law of England[8], the primary meaning of the expression 'waiver' has been said to be the

[4] Noy Vallesina Engineering SpA vs Jindal Drugs Limited. 2006 (3) ARBLR 510 Bom

[5] Claim No: BVIHCV 2009/389

[6] Minmetals Germany GmbH v. Ferco Steel [1999] 1 All ER 315.

[7] AIR 1950 Cal. 399

[8] Volume 16 (2), 4th Edn., para 907

abandonment of a right in such a way that the other party is entitled to plead abandonment by way of confession and avoidance if the right is thereafter asserted, and is either expressed or implied from conduct. In the instant case, it can be reasonably inferred from the conduct of the Appellants in not enforcing the arbitral award that they have waived their right arising under it. Therefore, it is the humble submission of the Respondent that the Appellants are not creditors of the company.

B.3. Without prejudice to the previous submissions, the Respondent submits that the claim of the Appellant as a creditor was valid at the time the scheme was passed. However, as on date of filing application for setting aside the scheme, the enforcement of arbitral award of the Appellant is barred by limitation, thereby making the claim of the Appellant an infructuous one. Therefore, it is the submission of the respondent that since the claim of the Appellant is an infructuous one, the scheme is not liable to be set aside.

C. FOREIGN LENDERS DO NOT CONSTITUTE SEPARATE CLASS OF CREDITORS.

C.1. Without prejudice to the previous submissions, the Respondent humbly submits that even if the Appellants are creditors of the company, they do not constitute a separate class of creditors. The 'classes' are to be constituted depending upon the similarity or dissimilarity of the creditors' rights against the company and the way in which those rights are affected by the scheme and not upon the similarity or dissimilarity of their private interests arising from matters extraneous to such rights[9]. The classes must be determined on the basis of terms offered in the scheme[10]. Further, just because a creditor has an additional interest or motive

[9] UDL Argos Engineering & Heavy Industries Co Limited v Li Oi Lin [2001] 3 HKLRD 634, as referred to in HIH Casualty and General Insurance Limited, at 809

[10] Arvind Mills Ltd., Re (2002 111 Company Cases 118 [Guj.])

from other creditors does not make it impossible for those creditors to consult together in one meeting. In the instant case, the fact that the Appellants are resident outside India is an interest extraneous to the legal rights purported to be assigned under the scheme. Relying upon the ruling of the Chancery Division In Re, English, Scottish And Australian Chartered Bank[11], creditors are to be treated as single class whether their debts arose in India or elsewhere. It is not because of the different treatment given to the Appellants that they constitute a separate class of creditors, and it is not the say of the Appellants that the terms offered to them under the scheme are different. There is no dissimilarity of interest vis-a-vis the scheme. As far as Appellants are concerned all the creditors under the scheme are offered the same terms but the Appellants being foreign currency lenders perceive their interest differently or consider that their interest may be affected differently from other creditors. The inter se differences amongst some creditors cannot be the criterion for constituting separate class of creditors in foreign currency. It is not sensible to contend that the company has to enter into a separate arrangement with every person or group of persons taking into consideration his or their own private motives or extraneous interests. It is submitted that creditors with different and potentially conflicting interests arising from circumstances unconnected with their interests as members of the class are not precluded from attending and voting at a meeting of the class.

C.2. Creditors with different sorts of rights can still constitute the same class provided that their rights receive the same treatment under the Scheme. The issue is whether the rights which are to be released or varied under the Scheme or the new rights which the Scheme gives in their place are so different that the Scheme must be treated as a compromise or arrangement with more than one class. Following the view of Bowen LJ in Sovereign Life

[11] 1893 3 Ch 385

assurance co. vs Dodd[12], the Court of Final Appeal in Hong Kong confirmed that **the test for determining a "class" is based on similarity or dissimilarity of legal rights against the company**. The court held that class must be confined to those persons whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest. The emphasis here is on rights, which are not dissimilar, and the rights in question must surely be rights against the company in respect to the debts in question. It is submitted that 'class' should be constituted on the basis of commonality of interest[13] and extraneous interests should surely be disregarded[14]. The fact that individuals may hold divergent views based on their private interests not derived from their legal rights against the company is not a ground for calling separate meetings. It is, therefore, obvious that unless a separate and different type of Scheme of Compromise is offered to a sub-class of a 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 is required to be convened[15]. Further fragmenting creditors into different classes gives each class the power to veto the Scheme and would deprive a beneficent procedure much of its value. The former danger is averted by requiring those whose rights are so dissimilar that they cannot consult together with a view to their common interest to have their own separate meetings; the latter by requiring those whose rights are sufficiently similar that they can properly consult together to do so. Therefore, the test is based on similarity or dissimilarity of legal rights against the company, not on similarity or dissimilarity of interests not derived from such legal rights. It

[12] (1892) 2 QB 573

[13] Commerz Bank Ag Vs. Arvind Mills Ltd. (2002 110 Comp. Cases 539 [Guj.])

[14] Rosen v. Bruyns N.O 1973 (1) S.A. 815 (T), 820

[15] Miheer H. Mafatlal V. Mafatlal Industries Ltd. (1996) 87 Comp. cases 792 at 834

is humbly submitted by the Respondents that the contention of the Appellants that they form separate class of creditors cannot be maintained.

D. NOTICE NEED NOT BE ISSUED TO THE FOREIGN LENDERSs.

D.1. The Respondents respectfully submit that notice of meeting has to be issued only to parties whose interests are to be affected under a scheme. In the case under consideration, it is the interests of the creditors that are to be affected. In such circumstances, the basic question is whether the person complaining of want of notice, is a creditor in the strict sense[16]. Since the Appellants do not constitute creditors of the company, the Respondent is not required to serve a notice on them.

D.2. Without prejudice to the submissions made, even if the Appellants are creditors of the company, the non-issuance of notice to the Appellants will not vitiate the scheme as the Respondent was under a bonafide belief that the Appellants do not constitute creditors of the company[17]. Relying upon the decision of Lahore High Court in the matter of ***Bhagat Ram Kohli v. Angel's Insurance Co. Ltd***[18]., while dealing with similar provision in Indian Companies Act of 1913, section 153, the court held, "Moreover as we interpret the law, the only safeguard intended to protect the interest of the creditors is that provided in sub-section (2) of section 153. In other words, if a majority in number representing three-fourths in value of the creditors or class of creditors or members or class of members, as the case may, present either in person or by proxy at the meeting, agree to any compromise or arrangement, the compromise, or arrangement, if sanctioned by the court, is binding both on the creditors or members and the company". Further, S.391 does not make it obligatory either upon the court or the company to serve notice of the creditors meeting on each and every creditor of the

[16] In re Vikrant Tyres Ltd., [2003] 47 SCL 613 (KAR.)

[17] Bhagat Ram Kohli v. Angel's Insurance Co. Ltd. [1937] 7 Comp. Cas. 161

[18] [1937] 7 Comp. Cas. 161

company, failure of which the law does not declare that such a meeting held is invalid and any resolution passed in such a meeting is void. In the event such a creditor is not served with personal notice, he can appear in such a meeting by virtue of the said meeting having been made known to him by public notice[19]. Therefore, an omission to serve notice due to a bonafide belief will not be fatal to the approval of the scheme.

D.3. Without prejudice to the submissions made, even if the Appellants are creditors of the company, they do not constitute a separate class of creditors. Since the scheme is approved by the requisite majority representing the class, non issuance of notice to the Appellants does not cause a prejudice to their interest. Therefore, it is the humble submission of the respondent that they are not required to send a notice to the Appellants.

Lifeline Ltd. V. Promoters of Jeevani Ltd.

E. THE DISPUTE RESOLUTION CLAUSE CONSTITUTES AN ARBITRATION CLAUSE.

E.1. The Respondent respectfully submits that the dispute resolution clause in the agreement constitutes an arbitration clause. In order to constitute an arbitration clause, the words 'arbitration', 'arbitral tribunal' or 'reference' need not be expressed in the clause[20] or in the heading[21]. As held by the Supreme Court in ***Jagdish Chander vs Ramesh Chander***[22], "Even if the words 'arbitration' and arbitral tribunal (or arbitrator) are not used with reference to the process of settlement or with reference to the private tribunal which has to

[19] In re Vikrant Tyres Ltd., [2003] 47 SCL 613 (KAR.)

[20] Mohan Singh Vs. HP state Forest Corporation 1999(3)RAJ73

[21] Sri Swaminathan Construction vs. Thirunavukkarasu Dhanalakshmi Education 2007 (Supp) Arb LR 374, 382

[22] *(2007) 5 SCC 719*

adjudicate upon the disputes, in a clause relating to settlement of disputes, it does not detract from the clause being an arbitration agreement if it has the attributes or elements of an arbitration agreement. They are: (a) The agreement should be in writing (b) The parties should have agreed to refer any disputes (present or future) between them to the decision of a private tribunal. (c) The private tribunal should be empowered to adjudicate upon the disputes in an impartial manner, giving due opportunity to the parties to put forth their case before it. (d) The parties should have agreed that the decision of the private tribunal in respect of the disputes will be binding on them. Further, it is the intention of the parties which is to be gathered from the working of the clause and in certain cases, even if the word 'arbitrator' is missing, it has to be inferred in between the lines used by the parties[23]. The agreement should, in substance, amount to an arbitration agreement and the intention of the parties at the time of execution of the agreement would be the deciding factor.

Relying upon the ruling of the Supreme Court in the matter of ***Rukmanibai Gupta vs. Collector, Jabalpur***[24], an arbitration clause is not required to be stated in any particular form. If the intention of the parties to refer the dispute to arbitration can clearly be ascertained from the terms of the agreement, or is otherwise clear it is immaterial whether or not the expression "arbitration" or "arbitrator" has been used.[25] Further, in order to arrive at the conclusion that a clause in an agreement is an arbitration clause, it is necessary that the parties should intend that the dispute should be determined in a quasi-judicial manner. The dispute resolution clause in the share sale agreement contains the necessary elements to constitute an arbitration agreement. It is palpable that the intention of the parties was to

[23]Mohan Singh Vs. HP state Forest Corporation 1999(3)RAJ73

[24] AIR 1981 SC 479

[25] Punjab State vs Dina Nath (2007) 2 Arb LR 345,351: AIR 2007 SC 2157

subject to arbitration as they had agreed to subject the dispute to a quasi-judicial process and for the award passed to be binding on them. It is further submitted that in ***Ujwal Services Pvt. Ltd vs. Coal India Ltd***[26] parties agreed that any dispute or difference arising out of the agreement (for sale of coal) would be referred to the Chief of Marketing whose decision would be "final and binding" upon the parties. It was held that the clause constituted an arbitration agreement[27]. Relying upon the ruling of the Allahabad High Court in the matter of ***State of UP vs Sardul Singh Kulwant Singh***[28], a clause in an agreement that all disputes arising under the agreement will be put up to the Empowered Committee and decision shall be final and conclusively binding on both the parties is an arbitration clause. The mere absence of word 'arbitration' does not make a difference.[29] Relying upon the ruling of the Karnataka High Court in the matter of ***Lachmanna. B. Horamani Vs. State Of Karnataka***, the dispute resolution clause in the share sale agreement can be considered as an arbitration clause impliedly. Further, it is submitted that ambiguities as to the scope of the arbitration clause itself must be resolved in favor of arbitration[30]. Therefore, it is the humble submission of the Respondent that the dispute resolution clause constitutes an arbitration clause.

F. THE DISPUTE RESOLUTION CLAUSE DOES NOT CONSTITUTE ANYTHING OTHER THAN ARBITRATION CLAUSE.

[26] [(2005) 2 Arb LR 465, 466]

[27] Deewan Chand vs state of J&K AIR 1961 J&K 59; STATE OF WEST BENGAL vs. HARI PRADA SANTRA (AIR 1990 Cal. 83)

[28] AIR 1985 All 67

[29], Shiv construction company vs state of rajasthan (2005) 3 Arb LR 620

[30] Volt Info. Sciences, Inc. v. Board of Trustees of Leland Stanford Jr. Univ., 489 U.S. 468, 476 (1989)

F.1. The Respondent respectfully submits that the dispute resolution clause cannot constitute anything by an arbitration clause. The use of the word 'amicably' in clause 2.2 of the agreement does not affect the character of the clause as an arbitration clause. Without prejudice to the previous submission, it is humbly submitted that clause 2.2 does not constitute an obligation to settle the dispute amicable before referring it to arbitration. In the context of a positive obligation to attempt to resolve a dispute or difference amicably before referring a matter to arbitration or bringing proceedings the test is whether the provision prescribes, without the need for further agreement: (a) a sufficiently certain and unequivocal commitment to commence a process; (b) from which may be discerned what steps each party is required to take to put the process in place; and which is (c) sufficiently clearly defined to enable the court to determine objectively (i) what under that process is the minimum required of the parties to the dispute in terms of their participation in it and (ii) when or how the process will be exhausted or properly terminable without breach[31]. In the instant case, clause 2.2 of the dispute resolution clause is 'equivocal' or 'nebulous' and therefore cannot be an enforceable condition precedent to arbitration. The Respondent respectfully submits that even if there are allegations of fraud, the dispute can be subject to arbitration[32].

G. ARBITRAL TRIBUNAL IS ALONE COMPETENT TO DECIDE THE EXISTENCE OF ARBITRATION AGREEMENT.

G.1. The Appellant respectfully submits that in terms of S. 16 of the Arbitration and Conciliation Act, 1996, the arbitral tribunal is the body empowered to decide the validity and existence of an arbitration agreement. The power of the Tribunal is not subject to an

[31] Wah (Aka Alan Tang) v Grant Thornton International Ltd [2012] EWHC 3198 (Ch),

[32] Russel V. Russel (1880) LR 14 Ch D 471, followed in Abdul Kadir Shamsuddin V. Madhav Prabhakar AIR 1962 SC 406 Swiss Timing Limited V. Organising Committee, Commonwealth Games 2010, Delhi. (2014)6SCC677

agreement between parties. The parties cannot by their own agreement exclude the power of the Tribunal to rule on its own jurisdiction. The arbitration clause in a contract is independent of other terms of the contract, and therefore, the power of the Tribunal to decide questions of its jurisdictions continues to exist even if the contract is otherwise in a state of breach . In the instant case, the issue of existence of the arbitration clause was subjected to the jurisdiction of the Hon'ble Delhi High Court. It is the humble submission of the Appellant that only the tribunal is empowered to decide the validity of the arbitration agreement and thus the said issue cannot be raised before the Hon'ble High Court of Delhi.

Swasth Life Ltd. V. Lifeline Ltd. and CCI

H. NO WRIT CAN BE SOUGHT AGAINST THE ORDER OF THE CCI DIRECTING THE DG TO CAUSE INVESTIGATION

H.1. The Respondent respectfully submits that the petition was premature and without merits. The Appellant cannot invoke the writ jurisdiction challenging the order of CCI directing the DG to cause investigation[33]. The direction under Section 26(1) after formation of a prima facie opinion is a direction simpliciter to cause an investigation into the matter. Issuance of such a direction, at the face of it, is an administrative direction to one of its own wings departmentally and is without entering upon any adjudicatory process. It does not effectively determine any right or obligation of the parties to the litigation. Closure of the case causes determination of rights and affects a party, i.e. the informant; resultantly, the said party has a right to appeal against such closure of case under Section 26(2) of the Act. On the other hand, mere direction for investigation to one of the wings of the Commission is akin to

[33] Kingfisher Airline V. CCI 2010 4 CompLJ 557 Bom (SLP withdrawn in light of ruling in the matter of Competition Commission Of India vs Steel Authority Of India & Anr Civil Appeal No.7779 Of 2010)

a departmental proceeding which does not entail civil 28 consequences for any person, particularly, in light of the strict confidentiality that is expected to be maintained by the Commission in terms of Section 57 of the Act and Regulation 35 of the Regulations. Wherever, in the course of the proceedings before the Commission, the Commission passes a direction or interim order which is at the preliminary stage and of preparatory nature without recording findings which will bind the parties and where such order will only pave the way for final decision, it would not make that direction as an order or decision which affects the rights of the parties and therefore, is not appealable. As held in ***Automec Srl v. Commission of the European Communities***[34], "In the case of acts or decisions adopted by a procedure involving several stages, in particular where they are the culmination of an internal procedure, an act is open to review only if it is a measure definitively laying down the position of the institution on the conclusion of that procedure, and not a provisional measure intended to pave the way for that final decision"[35].

I. THE APPELLANT ENJOYS A DOMINANT POSITION IN THE MARKET AND HAS ABUSED IT.

I.1. The Respondent respectfully submits that the Appellant enjoys a dominant position in the market. The drug 'inventive' of the Appellant is a premier life saving drug[36] in the market, from which it can be inferred that the Appellant enjoys a dominant position in the relevant market. Section 4 of the Competition Act, 2002 states that there shall be an abuse of dominant position by an enterprise if such enterprise indulges in practice or practices resulting in denial of market access in any manner. In the instant case, the filing of suit for interim injunction in bad faith has resulted in denial of access for the Respondent. Therefore,

[34] [(1990) ECR II-00367]

[35] Case 60/81 IBM v. Commission [1981] ECR 2639, at p. 2651, paragraph 8 et seq.

[36] ¶ 11 of the Moot proposition.

it is the humble submission of the Respondent that Appellant by abusing their dominant position in the relevant market sought to stifle competition in the relevant market by denying market access and foreclosing entry of the drug 'Novel' in contravention of the provisions of Section 4 of the Act[37].

J. THE APPELLANT HAS INDULGED IN BAD FAITH LITIGATION

J.1. The Respondent respectfully submits that the Appellant was assigned absolute rights to a few of the developed and completed IPRs of the erstwhile Jeevani Ltd. Upon merger, all active R and D and IPRs of the erstwhile Jeevani Ltd. were to become the property of the Respondent. It is the allegation of the Appellant that the IPRs assigned to it was infringed by the Respondent in creating the new life saving drug. It is the submission of the Respondent that the new life saving drug was invented by further developing the existing R and D of the erstwhile Jeevani Ltd and thus all rights accruing under the developed R and D would vest with the Respondent. Further, it is not the case that all IPRs of the erstwhile Jeevani Ltd. were assigned to the Appellant. Therefore, it is the humble submission of the Respondent that it cannot be contended that the new life saving drug was not invented by further developing an R and D which was not assigned to the Appellant.

J.2. The Respondent humble submits that the Court has erred in granting an interim against in favour of the Appellant. Preliminary injunctions promote opportunistic and anti-competitive suits by disrupting the defendant's business, raising the total cost of litigation, and causing financial distress[38]. In order to obtain a preliminary injunction, the Appellant

[37] M/s. Bull Machines Pvt. Ltd. V. M/s. JCB India Ltd. and M/s. J.C. Bamford Excavators Ltd. MANU/CO/0032/2014

[38] Jean O. Lanjouw & Josh Lerner, Tilting the Table? The Use of Preliminary Injunctions, 44 J.L. & Econ. 573, 591 (2001)

must show that granting the injunction will not disserve the public interest[39]. As held by the Bombay High Court in the matter of ***Novartis Ag Vs. Mehar Pharma***[40], "In case interim injunction is granted in favor of the plaintiffs, the manufacturing and marketing network of the defendants so far as the drug is concerned would be dismantled. If due to any problem, the plaintiffs cannot make available the drug in required quantity in India, it obviously will be disastrous for the patients. This consequence is foreseeable, therefore, in my opinion; the court should not pass any interim order which may possibly lead to such a situation". Another way of viewing it is that if the injunction in the case of a life saving drug were to be granted, the Court would in effect be stifling Article 21 so far as those would have or could have access to drug 'Novel' are concerned[41]. Further, the interim injunction caused financial hardships to the innocent Respondent as they were restrained from launching the new life saving drug. It is submitted that Judges should attend more closely to the financial distress imposed on defendants and show a greater inclination to refuse preliminary injunctions in cases in which the balance of hardships favors the defendants[42]. Therefore, it is the humble submission of the Respondent that the Court has erred in granting the preliminary injunction and thereby it is the contention of the Respondent that the Appellant does not have a prima facie case.

J.3. The Respondent respectfully submits that anticompetitive litigation is the filing of baseless lawsuits not in order to prevail in those actions but to impede a competitor's ability to compete. The distinction between abusing the judicial process to restrain competition, and

[39] Am. Red Cross v. Palm Beach Blood Bank, Inc., 143 F.3d 1407, 1410 (11th Cir. 1998); New England Braiding Co., Inc. v. A.W. Chesterton Co., 970 F.2d 878, 882 (Fed. Cir. 1992).

[40] ([2005] 30 PTC 160 [Bom.])

[41] Roche V. Cipla 148 (2008) DLT 598

[42] Jaeger v. Am. Int'l Pictures, Inc., 330 F. Supp. 274, 275 (S.D.N.Y. 1971)

prosecuting a lawsuit that, if successful, will restrain competition, must guide any court's decision whether a particular filing, or series of filings, is a sham. The label "sham" is appropriately applied to a case, or series of cases, in which the plaintiff is indifferent to the outcome of the litigation itself, but has nevertheless sought to impose a collateral harm on the defendant by, for example, impairing his credit or abusing the discovery process. Litigation filed or pursued for such collateral purposes is fundamentally different from a case in which the relief sought in the litigation itself would give the plaintiff a competitive advantage or, perhaps, exclude a potential competitor from entering a market with a product that infringes the plaintiff's patent. It is not to say that litigation is actionable under the antitrust laws merely because the plaintiff is trying to get a monopoly. He is entitled to pursue such a goal through lawful means, including litigation against competitors. The line is crossed when his purpose is not to win a favourable judgment against a competitor but to harass him, and deter others, by the process itself--regardless of outcome--of litigating. In the case under consideration, the Appellant withdrew the case against the Respondent as soon as it launched a similar cost effective drug and conquered a large chunk of the market[43]. This act of the Appellant envinces the manifest intention of filing the suit i.e., to impede the Respondent from entering the market, being indifferent to the outcome of the judicial process.

J.4. The Respondent respectfully submits that the litigation to face antitrust liability "...must constitute the pursuit of claims so baseless that no reasonable litigant could realistically expect to secure favourable relief.[44] Sham could occur even if claims were filed

[43] ¶11 of Moot proposition

[44] Professional Real Estate Investors v. Columbia Pictures Indus., 508 US 49, 123 L. Ed. 611 at 625, 113 S
Ct 1920, (1993); in re independent serv. Orgs. Antitrust litig.,203 F.3d 1322,1326(Fed Cir. 2000)

with or without probable cause[45]. An action in court cannot be characterized as abuse unless a dominant firm filed an action (i) which cannot be reasonably considered an attempt to establish their rights, and can therefore only serve to reach the other party and (ii) that is conceived within a framework of a plan aimed at eliminating competition[46]. In the case under consideration, the Appellant withdrew the case upon launching its cost effective life saving drug. Therefore, it is the humble submission of the Respondent, that in the instant case, this act was enough to characterize that the Appellant could not reasonably expect to win the suit and therefore they were a sham aimed at excluding competitors by claiming false abuses of IPRs[47].

[45] California Motor Transport Co. v. Trucking Unlimited, 404 US 508 (1972), GRIP-PAK, INC., V. ILLINOIS TOOL WORKS, INC., 694 F.2d 466

[46] Case T-111/96, ITT Promedia NV v Commission of the European Communities

[47] The Brazilian decision on the Shop Tour case (PA 08012.004283/2000-40) taken on 15/12/2010

PRAYER

Wherefore, in the light of the facts presented, issues raised, argument advanced and authorities cited the Respondents humbly pray before the Hon'ble Supreme Court to graciously adjudge and declare that

1. The orders of the Hon'ble Delhi High Court are upheld;
2. The scheme should not be set aside;
3. There is an arbitration clause in the share-sale agreement;
4. The CCI's order directing the investigation is good in law;
5. The Appeals filed by Foreign lenders, Lifeline Ltd. and Swasth Life Ltd. are dismissed.

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

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

Sd/-

(Counsel for the Respondents)