Team code -X

BEFORE THE HON'BLE

SUPREME COURT OF INDIA

IN THE MATTER OF:

Lifeline Limited And Others ……**APPLICANTS**

VERSUS

Jeevani Limited And Others……...**RESPONDENTS**

ON SUBMISSION TO THE HON'BLE SUPREME COURT OF INDIA

MOST RESPECTFULY SIBMITTED

MEMORANDUM ON BEHALF OF THE RESPONDENTS

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A. LIST OF ABBREVIATIONS

1. AIR – All India Reporter
2. SCC – Supreme Court Cases
3. Comp Cas – Company Cases
4. Bom–Bombay
5. Del – Delhi
6. C.C.I- Competition Commission of India
7. Hon'ble - Honorable
8. Pg. – Page.
9. V – Versus
10. L.R. – law reports
11. D.G - Director General
12. SC – Supreme Court
13. Vol – Volume
14. r/w - Read with
15. edn - Edition

B. BOOKS REFERRED

1. Anson's: Law of Contract, 25th edn , Oxford
2. Avtar Singh: *Contract & Specific Relief*. 10th edn, EBC
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4. Surendra Malik : S.C Words and Phrases,3rd edn
5. H.K Saharay : Words and Phrases under the Const.,2nd edn

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1. http://manupatra.com/

2. http://lexisnexis.in/lexisindia/

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STATEMENT OF JURISDICTION

The Appellantss have approached this Honourable Court under Article 136 of the Constitution of India, by way of special leave to appeal. Leave has been granted for filing appeal. The Appellants submits to the Jurisdiction of this Honourable Court.

STATEMENT OF FACTS

1. Jeevani Limited, herein after referred to as the 1st Respondent , is a listed public company incorporated in the year 1990 under the C.A,2013 with its registered office in New Delhi and it's equity shares are listed on the B.S.E. The 1st Respondent is one of the leading market players in the pharmaceutical manufacturing industry. In addition to holding a considerable market share in this sector in India, the 1st Respondent also had a global presence with its products being sold to many countries. Later in a statement made by the 1st Respondent in July, 2011 it was announced that in effort to meet the growing global demands of industry standards , increasing challenges of the oncoming competition in the market and reaching maximum profitability, the 1st Respondent was looking forward to opportunities for expansion in the market.

2.Lifeline Limited, hereinafter referred to as the 2nd Appellant , is another listed public company registered and incorporated under the C.A, 2013 having it's registered office in Mumbai. The 2nd Appellant , is a popular company in the Indian market as a major producer of food products and is known for its quality and variety of food products in India, they are also amongst the few Indian companies whose products are traded internationally. Realizing the huge potential in the pharmaceutical sector and only after establishing itself in the abovementioned market, the 2nd Appellant decided to foray into the pharmaceutical sector. The 2nd Appellant , approached the 1st Respondent for a possible partnership to venture into this sector. In and around November, 2011 both companies initiated negotiations for a possible merger.

3.After a lot of deliberations and negotiations , both companies on 27th, January 2012 decided to merge. It was decided that the 1st Respondent , would completely merge into the 2nd Appellant and all assets and liabilities of the 1st Respondent would be transferred to the 2nd Appellant . A scheme of arrangement (the "Scheme") ,for the 1st Respondent was prepared keeping this in mind. It was also decided that the three Promoters, herein after collectively referred to as the 2nd

Respondent, who are also majority shareholders in the company would sell their entire promoter shareholding (18 percent) of their stake in the 1st Respondent to the 2nd Appellant . However this sale of stake was affected vide a separate sale agreement entered into on 23rd March 2012 between the 2nd Appellant and the 2nd Respondent. This agreement, inter alia , contained specific representations regards disclosure of information, by either of the parties, which may be vital to the transaction which the parties were entering into. It was specifically provided in this agreement that all the intangible properties including the active R&D and IPRs of the 1st Respondent would become the property of the 2nd Appellant and all rights accruing from it would vest wirlevant th the 1st Respondent.

4.The Scheme was finalized on 5th March 2012 and immediately thereafter the Scheme was filed before the B.S.E for its approval. However, the B.S.E did not approve it.

5.On 30th March, the 1st Respondent and the 2nd Appellant filed an application under s.391 of the C.A, 1956, for initiating the process of approval of the Scheme by the Hon'ble Delhi H.C . The Hon'ble Company Judge in accordance with the mandate of chapter V of the C.A, ordered for a meeting of creditors to be convened. The 1st Respondent issued a notice for meeting of its creditors to by publishing an advertisement in a local English language newspaper and local language newspaper containing the terms of the proposal and explaining its effect. A meeting of the creditors to whom notice was sent, was accordingly held and resolution supporting the Scheme were also passed by a vote of majority. Thereafter the Scheme was also approved by the Hon'ble Delhi H.C on 5th July 2013. All other relevant approvals were taken by the 1st Respondent. Around the same time the 1st Appellant, had approached the Bombay H.C under the relevant provisions of the C.A to get the Scheme approved and got the approval of the Bombay H.C.

6.Prior to the P.A being made by the 1st Respondent , certain creditors of the 1st Respondent mainly foreign banks ("foreign lenders") had jointly, invoked arbitration proceedings before a foreign arbitral tribunal constituted Hong Kong, against the 1st Respondent. The arbitration was initiated for payments to be made under a consortium agreement providing financial assistance to 1st Respondent entered into between the foreign lenders, herein after collectively referred to as

the 1st Appellant, and the 1st Respondent. On 27th July 2010, a foreign arbitral award was passed in favour of the 1st Appellant against the 1st Respondent. Under this award the 1st Respondent was to pay the 1st Appellant the amounts as stated in the arbitral award. Till date no proceedings for enforcement of this foreign award has been filed by the 1st Appellant.

7.In early August 2013 the 1st Appellant, of the 1st Respondent made an application before the Hon'ble Company Judge for recall of order dated 5th July 2013, passed by the Hon'ble Company Judge of the Delhi H.C approving the Scheme. The 1st Appellant contended that they had not received notice of the Scheme and were not able to attend the meeting of creditors. The 1st Appellant, further contended that they constituted a separate class of creditors and since there was no separate meeting held for them the Scheme must be set aside. The Company however contended that the 1st Appellant, are not creditors of the company and no notice was required to be sent to them and the fact they are even separate class of creditors is disputed. The Hon'ble Company Judge dismissed the application and refused to set aside the Scheme. Against this order the 1st Appellant went in appeal to the Division Bench of the Delhi H.C, which also dismissed the appeal after due consideration of facts. Now this order is under challenge before the S.C of India and is pending arguments.

8.After the merger, the newly merged 2nd Appellant, continued with the operation of the erstwhile 1st Respondent, which included its operations of supplying generic drugs to the U.S.A. However soon after, the 2nd Appellant, received notices from the U.S F.D.A for providing drugs of below par quality and in violation of the requisite production parameters set out by the F.D.A. On further scrutiny by the 2nd Appellant, it was found out that the investigations by F.D.A on drugs produced by the 1st Respondent, at its plants in India was commenced much before the merger of the 1st Respondent and the 2nd Appellant. The 2nd Appellant filed a suit against the 2nd Respondents before the Delhi H.C for damages arising out of breach of contract dated 23rd March 2013, for compensation for wrongful gain and unjust enrichment of the 2nd Respondent by way of defrauding and misrepresenting to the 2nd Appellant further the 2nd Appellant also alleged that the fact of the pending investigations was concealed by the 2nd Respondents with malafide intention to ensure that they get an inflated price for their shares. The

2nd Respondents contended that the Delhi H.C has no jurisdiction as the agreement dated, 23rd March 2013, between the parties had an arbitration clause and any dispute arising between them should be referred to arbitration. However, the 2nd Appellant contended that there is no arbitration clause in the agreement.

9.

The extract of relevant clause from the Share Sale Agreement that was relied upon by the 2nd Respondents are stated below:-

1. **Governing Law**

1.1. This Agreement shall be interpreted and construed in accordance with the laws of India.

2. **Dispute Resolution**

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.

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

3. **Jurisdiction**

3.1. All disputes touching upon the subject matter of the agreement shall be subject to the jurisdiction of Delhi courts."

10.The Hon'ble Single Judge of the Delhi H.C held that the above clause could not be regarded as an arbitration clause and therefore held that the Court had jurisdiction to look into the issues involved and kept the matter for completion of pleadings and arguments on a later date. This Order of the Single Judge was challenged in appeal by the 2nd Respondents to the Division Bench of the Delhi H.C. The Division Bench held that the Single Judge had erred in its decision and that the clause constitutes an arbitration clause and accordingly referred the disputes to be decided by the Empowered Group in terms of the agreement. Aggrieved by this Order of the Division Bench of the Delhi H.C, the 2nd Appellant has approached the Supreme Court of India and the matter is pending for arguments.

11. In the meanwhile, and soon after the merger, the 2nd Appellant to increase its profitability, decided to introduce a new life saving drug by the name of "Novel" into the market. This new drug was manufactured after further developing the active R & D which became the property the 2nd Appellant after its merger with 1st Respondent . The new drug Novel was eagerly awaited in the market as it was published to be considerably cheaper then other life saving drugs in the market, including the drug "Inventive" presently being the premier drug available in the market. The drug "Inventive" was being manufactured and sold by Swasth Life Limited ("**Swasth**"),herein after referred to as the 3rd Respondent, a sister concern of the 2nd Respondent, of the erstwhile 1st Respondent . The 3rd Respondent had sometime in the year 2010 got assigned absolute rights to a few of the developed and completed R & D projects and IPRs of the 1st Respondent . Before the 2nd Appellant could launch drug 'Novel', The 3rd Respondent filed a suit for infringement of its IPRs in the Delhi H.C alleging that the new drug 'Novel' was substantially similar to its drug "Inventive" and was based on certain IPRs which have been assigned to the 3rd Respondent. Based on its arguments, the 3rd Respondent was able to obtain an interim injunction against 2nd Appellant who was restrained from launching the new drug 'Novel' until further orders of the Court. In the meanwhile, the 3rd Respondent launched a similar cost effective drug in the market, cornering a large chunk of the market, after which it withdrew the case against 2nd Appellant and the interim injunction was vacated.

12.

Based on the above the 2nd Appellant filed an application before the CCI alleging that the 3rd Respondent was abusing its dominant position by indulging in bad faith litigation. The CCI based on the allegations made by the 2nd Appellant was of the *prima facie* view that the 3rd Respondent may have abused its dominance and passed an Order directing the DG, CCI to investigate on the information provided by the 2nd Appellant,and submit its report within 45 days. The report of the DG is still awaited.

13. The 3rd Responden being aggrieved by the Order of the CCI filed a writ petition making the 2nd Appellant and the CCI a party in the Delhi High Court. The 3rd Respondent submitted that CCI's Order for directing investigation was bad in law as the 3rd Respondent in its endeavor to protect its IPRs cannot be held, even prima facie, to be abusing its dominance. Upon hearing the arguments of the 3rd Respondent , the 2nd Appellant and the CCI, the Delhi High Court held that CCI has made *prima facie* finding, and has only directed for an investigation on the allegations made against the 3rd Respondent. As such no adverse effect is caused to the 3rd Respondent and therefore it found no reason to interfere with the investigation of the DG CCI and dismissed the writ petition filed by the 3rd Respondent. On appeal, the Division Bench also did not find any reason to interfere with the order of Hon'ble Single Judge and accordingly the 2nd Appellant has come before the Supreme Court against the order of the Division Bench.

14 Given the fact that these litigations involve the same parties and disputes arise out of the same transactions and also on the request of the Counsel's appearing in the matter, the Supreme Court exercising its inherent powers has tagged the matters together for hearing.

ISSUES RAISED

1. **Whether the foreign lenders constitute a separate class of creditors and Whether the Scheme should be set aside.**

2. Whether there exists a valid arbitration clause in the share sale agreement.

3. Whethere there was any breach of contract.

4. Whether the CCI's probe into Swasth is justifiable.

SUMMARY OF PLEADINGS

1.WHETHER THE FOREIGN LENDERS CONSTITUTE A SEPARATE CLASS OF CREDITORS AND WHETHER THE SCHEME SHOULD BE SET ASIDE.

It is humbly submitted by the Respondents before this Honourable Supreme Court that they are not a separate class of creditors and that the Scheme should be enforced.

It is the humble submission of the 1st Respondent that the foreign lenders along with other creditors formed a consortium agreement and the said consortium was present when the meeting of creditors was convened. Further it is also contended by the Respondents that the said consortium was present in the meeting and so it cannot be contended by the Appellants that the scheme is non existent due to the absence of a few creditors.

Further another point of contention for the Respondents is that since the Scheme has already been convened, the 1st Respondent ceases to exist and any suit against the 1st Respondent is not sustainable and it must be only against Lifeline. It is clearly a mis joinder of parties. The Respondents further contend that no company can be brought back after disappearance and no Honourable court can pass an order against a non - existent company.

It is also an important contention by the Respondents that s.392 of the Companies Act,1956, that no right has been given to any court to set aside or call back a scheme.

2.WHETHER THERE EXISTS A VALID ARBITARATION CLAUSE IN THE SHARE SALE AGREEMENT.

It is the humble submission of the Respondent that there does exist a valid arbitration clause in the share sale agreement. It is contended by the Respondents that the dispute resolution clause is a part of the Share sale agreement and the said agreement was thoroughly checked, consented and signed by both the parties. In this agreement, the committee which is empowered to resolve disputes among both the parties is also mentioned and so there is no other way of interpreting this clause than a " valid arbitration clause".

Therefore it is finally contended by the Respondent that both the parties should go for arbitration if a dispute arises between them and that going to court is not an option.

3) WHETHER THERE WAS ANY BREACH OF CONTRACT.

It is the humble submission of the Respondents that there was absolutely no breach of contract in accordance to the Share Sale Agreement by both the parties.The Respondents had no legal obligation to disclose any pending investigation to the Appellants.The Section 17 and Section 18 of the Indian Contract Act,1872 that is Fraud and Misrepresentation do not apply here and moreover Under S.17 it is clearly stated and easy to understand that concealing any information does not constitute Fraud.Further it is also contended by the Respondents that the 3 principles of Unjust Enrichment have not been fulfilled so it is clear that we ,the Respondents were not

Unjustly Enriched.

Therefore it is clear from the above mentioned points that the Appellants claim for a unjust enrichment is wrong and the Respondents are not liable to pay compensation.

4.WHETHER THE CCIS PROBE INTO SWASTH IS JUSTIFIABLE.

It is the humble submission of the Respondents that the probe into Swasth is Justifiable. It is also contended by the Respondents that the CCI by all means have all the rights to order an investigation into Swasth under the S.19 r/w 26 of the Competition Act,2002. The CCI can order the DG to cause an investigation when they have a Prima Facie opinion.Since CCI found a Prima Facie opinion in this case the CCI ordered the DG to investigate into this case. Therefore it is clear from the above mentioned points that there is absolutely no violation of any laws. Moreover it is also contended by the Respondents that when the Appellants have alternate remedies they are not supposed to file a writ petition.

PLEADINGS

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

It is our humble submission that we consider the appellants to be creditors of our company. **Paragraph 6** of the facts sheet reads as follows "*Prior to the public announcement made by the 1st Respondent, certain creditors of the 1st Respondent mainly foreign banks had jointly invoked arbitration proceedings before a foreign arbitral tribunal constituted in Hong Kong, against the 1st Respondent. The arbitration was initiated for payments to be made under a consortium agreement providing financial assistance to the 1st Respondent, entered into between the foreign lenders and the 1st Respondent"*. It is evident that there was a consortium signed by certain creditors of the company and also a part of the said consortium was present in the meeting convened for negotiation about the Scheme. The present creditors also voted in favor of the Scheme, therefore it cannot be said that the Scheme is non-existent because a few creditors were not present. Moreover, for a Scheme to be passed the main persons whose consent is required are the shareholders of the company and not the creditors, but just to respect the order of the learned Company Judge a meeting for the creditors was convened.

Paragraph 5 of the facts sheet elaborates on the notice of the meeting convened and it reads as follows *" the Hon'ble company judge in accordance with the mandate of chapter XV of the Companies Act, 1956 ordered for a meeting of the creditors to be convened. The 1st Respondent issued a notice of meeting to its creditors by publishing an advertisement in a local English language newspaper and local language newspapers containing the terms of the proposal and explaining its effect. A meeting of the creditors to whom the notice was sent, was accordingly held and resolutions supporting the Scheme were passed by a vote of majority*." As per form 38,

rule 67 and 69 of the Company Court rules, 1959, a notice in the form of advertisement was published in all the newspapers, there is nothing wrong on the part of the respondents if it was not brought to the knowledge of the appellants.

As per **Paragraph 7** of the facts sheet the learned Company Judge of the Delhi High Court approved the Scheme. After a Scheme has been consumed, the company ceases to exist (in this case The 1st Respondent). Therefore it is humbly submitted that the suit against the 1st Respondent is not sustainable and must be against lifeline only. It is clearly a misjoinder of parties. It would also be put forward that a company cannot be brought back from disappearance in this case, the merger. A court cannot pass an order against a non-existent company.

Sec. 392 of the Companies Act, 1956 states "Power of High Court to enforce compromises and arrangements". This section clearly explains that a court has the powers only to implement the Scheme in a better way but does not give any powers to the courts to set aside or call back an approved Scheme.

The foreign lenders have claimed that they are a separate class of creditors and that they have a foreign arbitral award in their favor. s.13 reads along with s.14 of the Code of Civil Procedure,1908 it says that an arbitral award has no validity unless it is enforced by way of proceedings. Therefore, we are not liable to pay the amount due to the appellants unless and until they enforce it in Indian courts.

2. **Whether there exists a valid arbitration clause in the share sale agreement.**

It is the humble submission of the respondents that the dispute resolution clause is a self-contained agreement. The dispute resolution clause reads as follows "*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"*. This clearly shows that a committee will be empowered in cases of solving disputes. The members of the committee are also mentioned in this clause, therefore there is no other way of looking at this clause rather than to construe it as an arbitration clause. In ***Visa International Ltd vs. Continental Resources Ltd***[1], the learned judge held *that "existence of valid arbitration agreement shall be determined from the facts and circumstances of the case including the intention of the parties gathered from the correspondence exchanged between them, surrounding circumstances and conduct of the parties. The agreement need not be in any particular form and use or absence of the words "arbitration", "arbitrators" or "reference" is immaterial". Therefore even if the clause does not contain the words "arbitration" or "arbitrator" this clause does not have an intention contrary for arbitration proceedings*. In ***ACC Ltd vs. Global Cements Ltd***[2]**,** the learned division bench held that *"an arbitration clause subsists so long as any question or dispute or difference between the parties exists despite death of named arbitrator(s) unless the language of the arbitration clause clearly expresses an intention to the contrary*".

[1] Visa International ltd vs. Continental Resources ltd (2009)2 SCC 55
[2] ACC ltd vs. Global Cements ltd (2012)7 SCC 71

In our case, there was a breach of contract with respect to the share sale agreement. Therefore the parties are to refer to the dispute resolution clause contained in the share sale agreement. The dispute resolution clause as explained before clearly points out that there exists a self-contained arbitration clause.**In *ITC ltd vs. George Joseph Fernandez*[3]** the learned judge held that "when the breach of contract is covered by the arbitration clause, then the arbitration clause is binding and valid between the parties".

Therefore it is the humble submission of the respondents that the parties are to refer to arbitration and the courts have no jurisdiction to entertain this matter.

3.***WHETHER THERE WAS A BREACH OF CONTRACT.***

The first question which we should take under consideration is whether there was a duty on part of the Promoters to disclose the pending investigation against the 1st Respondent.

No law says that they were obliged to disclose the fact that there is a pending investigation against them.

Further it is also contended by the Respondents that the learned Appellants have committed an error by alleging that the Respondents have committed Fraud

17. "fraud defined "

"Fraud" means and includes any of the following acts committed by a party to a contract, or with his connivance, or by his agents,[1] with intent to deceive another party thereto his agent, or to induce him to enter into the contract;

[3] ***ITC ltd vs. George Joseph Fernandez*** (2005)10 SCC 425

(1) the suggestion as a fact, of that which is not true, by one who does not believe it to be true;

(2) the active concealment of a fact by one having knowledge or belief of the fact;

(3) a promise made without any intention of performing it;

(4) any other act fitted to deceive;

(5) any such act or omission as the law specially declares to be fraudulent.

Neither of the provisions say we had a duty to disclose the ongoing investigation. Even under the provisions of misrepresentation this is not a wrong committed.

18. "Misrepresentation defined"

"Misrepresentation" means and includes -

(1) the positive assertion, in a manner not warranted by the information of the person making it, of that whichis not true, though he believes it to be true;

(2) any breach of duty which, without an intent to deceive, gains an advantage to the person committing it, or anyone claiming under him; by misleading another to his prejudice, or to the prejudice of any one claiming under him;

(3) causing, however innocently, a party to an agreement, to make a mistake as to the substance of the thing which is subject of the agreement

So it is clear that the Respondents did not misrepresent anything and that the Appellants have once again committed a grave error in alleging the Respondents .

Secondly it should be noted that Indian courts should not pass any kind of award in this case as the foreign investigation has not lead to any kind of award still. Keeping in mind that we are in such large scale of business and we trade internationally hence it is common that we try to meet different kind of standards so it is obvious sometimes that few products might need attention or of different standards might have been produced in other places hence such kind of investigations are very regular in field of business and its not new to any of the companies,which operate at such large scale.

Moreover if an Indian court awards a degree in this case until the foreign investigation is decided and there is an action against Lifeline until then they can't claim anything as it is their duty to convince the FDA authorities that their product is of the appropriate standards. If Indian courts pass any award before the foreign award is passed it would be illogical and ridiculous as later if the award is passed in the favor of Lifeline then what will be the answer of the Indian courts, which will lead to a situation where whole of Indian judiciary will have to look down as that award itself is a black mark on the Indian judiciary.

Most importantly their claim for unjust enrichment is not appropriate here as the promoters have not gained any kind financial profits on the expense of Lifeline.

This extract is taken from *Nagrik Upbhokta M. Manch v. Union of India*[4]

10. *" We have heard the learned Additional Solicitor General appearing for the Union of India, Advocates General/Standing Counsel for the States of Madhya Pradesh and Chhattisgarh and the learned counsel appearing for the several interveners. We do not find any merit in the claim of the traders. Whatever amount they have contributed to the funds generated by the State*

[4] *Nagrik Upbhokta M. Manch v. Union of India*, (2010) 15 SCC 476 at page 480

Governments in the name of rounding off, the burden thereof has been passed on to the hundreds and thousands of consumers. A refund to them would amount to their unjust enrichment and would not reach the ultimate consumers who have really parted with the amount."

Even in this case if there is a award passed saying that we need to pay compensation for that false unjust enrichment case then it will be them who will be unjustly enriched by that money. As the shares of the company have already been transferred at the old price then this compensation will not reach share holders but instead fill the pockets of the executives of Lifeline. Besides an other important detail that should be noted is that the working procedure of any Govt. organization is that they publish their investigation in all news dailies and their website so during such huge merger they will run a thorough back check on the company's record so it is obvious that the Appellants would have been aware of all the ongoing investigations..

4.***WHETHER CCI'S PROBE INTO SWASTH IS JUSTIFIABLE .***

It is the humble submission of the Respondents that the probe into Swasth is not at all justifiable.When the Petitioners have an alternate remedy, they should appear in front of that respected tribunal and then appeal in front of the Hon'ble S.C, So the Appellants cannot directly disobey the procedure set by law and therefore they cannot directly file a writ petition before this court.

4) Establishment of Appellate Tribunal:

53A.(1) The Central Government shall, by notification, establish an Appellate Tribunal to be known as Competition Appellate Tribunal –

(a) to hear and dispose of appeals against any direction issued or decision made or order passed by the Commission under sub-sections (2) and (6) of section 26, section 27, section 28, section 31, section 32, section 33, section 38, section 39, section 43, section 43A, section 44, section 45 or section 46 of the Act;

In the cases of **Sheila Devi V. Jaspal Singh**[5], the Hon'ble Supreme Court Judge has quoted " No reason has been given by the respondent for not availing the remedy for division under Section 18 of the UP Urban Buildings(Regulation of letting, Rent and Eviction) Act, 1972. The Respondent straight away filed a writ petition before the High Court where the High Court had

[5] Sheila Devi V. Jaspal Singh (1999)1 SCC 209

reexamined the facts. The impugned order of the High Court is set aside. The Respondent will be a t liberty to avail of the alternate remedy of revision if he so desires."

There is a clear prima facie case wherein it's very clear that Swasth was definitely abusing its dominant position. The facts are too clear and serve as a primary proof that Swasth have first filed a case against Lifeline then later when they have cornered a large chunk of the market i.e gaining monopoly they withdrew their case .So since it is a Prima Facie case, CCI can order an investigation into this matter under s.26 of the Competition Act, 2002.

26. Procedure for inquiry under Section 19.—(1) On receipt of a reference from the Central Government or a State Government or a statutory authority or on its own knowledge or information received under Section 19, if the Commission is of the opinion that there exists a prima facie case, it shall direct the Director General to cause an investigation to be made into the matter :

Provided that if the subject matter of an information received is, in the opinion of the Commission, substantially the same as or has been covered by any previous information received, then the new information may be clubbed with the previous information.

under section 4 of the competition act they have defined dominant position as :-

(a) "dominant position" means a position of strength, enjoyed by an enterprise, in the

relevant market, in India, which enables it to—

(i) operate independently of competitive forces prevailing in the relevant

market; or

(ii) affect its competitors or consumers or the relevant market in its favour.

Here when they corner a large chunk of market it proves they have have the capacity to effect the consumers in their favor so it is for sure they hold a dominant position .

They have clearly indulged in practice resulting in denial of market access. Hence under section 26(1) of the competition Act, CCI has complete authority to order DG to cause an investigation into Swasth.

Section 4. [(1)No enterprise or group] shall abuse its dominant position.]

(2) There shall be an abuse of dominant position 4 [under sub-section (1), if an

enterprise or a group].—-

(a) directly or indirectly, imposes unfair or discriminatory—

(i) condition in purchase or sale of goods or service; or

(ii) price in purchase or sale (including predatory price) of goods or

service.

(b) limits or restricts—

(i) production of goods or provision of services or market therefor; or

(ii) technical or scientific development relating to goods or services to

the prejudice of consumers; or if an enterprise"

(c) indulges in practice or practices resulting in denial of market access [in any manner]; or

(d) makes conclusion of contracts subject to acceptance by other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts; or

(e) uses its dominant position in one relevant market to enter into, or protect, other relevant market.

It is also pertinent to note in the case of ***Competition Commission of India v. SAIL***[6]

31. *We would prefer to state our answers to the points of law argued before us at the very threshold. Upon pervasive analysis of the submissions made before us by the learned counsel appearing for the parties, we would provide our conclusions on the points noticed supra as follows:*

(1) In terms of Section 53-A(1)(a) of the Act appeal shall lie only against such directions, decisions or orders passed by the Commission before the Tribunal which have been specifically stated under the provisions of Section 53-A(1)(a). The orders, which have not

[6] *Competition Commission of India v. SAIL*, (2010) 10 SCC 744 at page 762

been specifically made appealable, cannot be treated appealable by implication. For example, taking a prima facie view and issuing a direction to the Director General for investigation would not be an order appealable under Section 53-A.

Similarly in this case to they are not supposed to file writ against CCI for the passing of orders to investigation and they have the liberty to file after the report is submitted by the DG.

PRAYER

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

1. *To dismiss all the Petitions.*

AND

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.