

BEFORE
THE HON'BLE SUPREME COURT OF INDIA

[S.C.R, ORDER XXI RULE 3(1)(a)]
CIVIL APPELLATE JURISDICTION
SPECIAL LEAVE PETITION
(UNDER ARTICLE 136 OF THE CONSTITUTION OF INDIA)

FOREIGN LENDERS	(APPELLANT)
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V.

PROMOTERS OF ERSTWHILE JEEVANI	(RESPONDENT)
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AND

LIFELINE	(APPELLANT)
----------	-------------

V.

PROMOTERS OF ERSTWHILE JEEVANI	(RESPONDENT)
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AND

SWASTH	(APPELLANT)
--------	-------------

V.

LIFELINE AND CCI	(RESPONDENT)
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**[THE SUPREME COURT EXERCISING ITS INHERENT POWER UNDER ORDER LV
RULE 5 OF THE SUPREME COURT RULES, 2013 HAS TAGGED THE MATTER
TOGETHER FOR HEARING]**

PROMOTERS, FOREIGN LENDERS AND SWASTH.....APPELLANT

LIFELINE AND CCI.....RESPONDENT

Memorial Submitted on behalf of RESPONDENTS

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STATEMENT OF JURISDICTION

The Respondent most humbly approaches the Hon’ble Supreme Court of India in pursuance of a Special Leave Petition filed by the Appellants in accordance with Article 136 of the *Constitution of India, 1950*

THE PRESENT MEMORANDUM SETS FORTH THE FACTS, CONTENTIONS AND ARGUMENTS IN THE PRESENT CASE

STATEMENT OF FACTS

Jeevani Limited (“**Jeevani**”) is a listed public company incorporated in the year 1990 under the Companies Act, 2013 with its registered office in New Delhi. Its equity shares are listed on the Bombay Stock Exchange. *Jeevani* is one of the leading market players in the pharmaceutical manufacturing industry. Limited, (“**Lifeline**”) is another listed public company registered & incorporated under the Companies Act, 2013 having its registered office in Mumbai. *Lifeline* is a popular company in the Indian market as a major producer of food products and is known for the quality and variety of food products in India. *Lifeline* approached *Jeevani* for a possible partnership to venture into this sector.

After a lot of deliberations and negotiations, both companies on 27th January 2012 decided to merge. A scheme of arrangement, for *Jeevani*, (the “**Scheme**”) was prepared keeping this in mind. It was also decided that the three promoters of *Jeevani* (the “**Promoters**”) who are also majority shareholders in the company would sell their entire promoter shareholding i.e.18% of

their stake in *Jeevani* to *Lifeline*. The Scheme was finalized on 5th March 2012 and immediately thereafter the Scheme was filed before the Bombay Stock exchange for its approval. However, the Bombay Stock Exchange did not provide its approval.

On 30th March 2012, *Jeevani* and *Lifeline* filed an application under Section 391 of the Companies Act, 1956 (the “**Companies Act**”) for initiating the process of approval of the Scheme by the Hon’ble Delhi High Court. Thereafter the Scheme was also approved by the Hon’ble Delhi High Court on 5th July 2013 and subsequently by the Bombay High Court.

Prior to the public announcement being made by *Jeevani*, certain creditors of *Jeevani*, mainly foreign banks (“**foreign lenders**”) had jointly, invoked arbitration proceedings before a foreign arbitral tribunal constituted in Hong Kong, against *Jeevani*. On 27th July 2010 a foreign arbitral award was passed in favour of the foreign lenders against *Jeevani*. Under the foreign arbitral award *Jeevani* was to pay to the foreign lenders the amounts as stated in the arbitral award. Till date no proceeding for enforcement of this foreign award has been filed by the foreign lenders. In early August 2013 the foreign lenders of *Jeevani* 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 High Court approving the Scheme. The foreign lenders contended that they had not received notice of the Scheme and were not able to attend the meeting of creditors. The foreign lenders, further contended that they constituted a separate class of creditors and in view of the fact that there was no meeting convened for them, the Scheme should be set aside. The Company however contended that the foreign lenders are not creditors. The Hon’ble Company Judge however dismissed application filed by the foreign lenders and refused to set aside the Scheme. Against this order the foreign lenders went in appeal to the Division Bench of the Delhi High Court, which also after due consideration of facts dismissed the appeal of the foreign lenders.

After the merger, the newly merged *Lifeline* continued with the operations of the erstwhile *Jeevani*, which included its operations of supplying generic drugs to the United States of America. However soon after, *Lifeline* received notices from the US Food and Drug Administration (the “**FDA**”) for providing drugs of below par quality was unearthed that the investigation by FDA on drugs produced by *Jeevani* at its plants in India was commenced much before the merger of *Jeevani* and *Lifeline* took place. *Lifeline* filed a suit against the Promoters before the Delhi High Court for damages arising out of breach of the contract dated 23rd March 2013 , for compensation for wrongful gain and unjust enrichment of Promoters by way of defrauding and misrepresenting to a bonafide purchaser i.e. *Lifeline*. *Lifeline* has approached the Supreme Court of India and the matter is pending for arguments.

In the meanwhile, and soon after the merger, *Lifeline* to increase its profitability, decided to introduce a new life saving drug by the name of “Novel” into the market. The new drug Novel was eagerly awaited in the market as it was published to be considerably cheaper than 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**”), a sister concern of the Promoters, of the erstwhile *Jeevani*. *Swasth* had sometime in the year 2010 got assigned absolute rights to a few of the developed and completed R & D projects and IPRs of *Jeevani*. Before *Lifeline* could launch drug ‘Novel’, *Swasth* filed a suit for infringement of its IPRs in the Delhi High Court and was able to obtain an interim injunction against *Lifeline* and in the meanwhile, *Swasth* launched a similar cost effective drug in the market.

Lifeline filed an application before the Competition Commission of India (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. *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. Upon hearing the arguments of *Swasth*, *Lifeline* 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 *Swasth*. As such no adverse effect is caused to *Swasth* and therefore it found no reason to interfere with the investigation of the DG CCI and dismissed the writ petition filed by *Swasth*. On appeal, the Division Bench also did not find any reason to interfere with the order of Hon'ble Single Judge and accordingly *Lifeline* has come before the Supreme Court against the order of the Division Bench and the Supreme Court exercising its inherent powers has tagged the matters together for hearing.

STATEMENT OF ISSUES

1. Whether the Special Leave Petition in the consolidated appeal is maintainable?
2. Whether the 'Scheme' approved by the Delhi High Court is liable to be set aside?
3. Whether the clause 2 of Share Sale Agreement fulfils all the requisites of an arbitration agreement and is there any element of fraud?
4. Whether *Swasth* is involved in Anti-Competitive practices and Abuse of Dominance in the pharmaceutical industry?

SUMMARY OF PLEADINGS

ISSUE I: WHETHER THE SPECIAL LEAVE PETITION IN THE CONSOLIDATED APPEAL IS MAINTAINABLE?

1. It is humbly submitted before the Hon'ble Supreme Court that the special leave petition filed by *Swasth* is not maintainable as a substantial question of law is not involved in the present case and the power under Article 136 can only be invoked when a question of law of general public importance arises. The High Court had duly appreciated all the facts and evidence before dismissing the appeal of *Swasth* against the order of the CCI and the present case doesn't have any elements of miscarriage of justice.
2. Hence, the present case does not warrant a special stature as it is not pervaded by errors and injustice.

ISSUE II: WHETHER THE 'SCHEME' APPROVED BY THE DELHI HIGH COURT IS LIABLE TO BE SET ASIDE?

1. It is submitted before this Hon'ble Court that the 'Scheme' approved by the Delhi High Court is valid and hence, not liable to be set aside as the 'Foreign Lenders' do not come within the ambit of 'Creditors'. Since the foreign lenders are not creditors, hence they are not entitled to contend the scheme of arrangement. It is also submitted that the requisites of the Act of 1956 related to Mergers and Amalgamation were complied with by *Jeevani*.
2. The notice of the meeting was proper and valid., the scheme was approved by three fourth majorities and the merger is not in contravention of SEBI guidelines

**ISSUE III: WHETHER THE CLAUSE 2 OF SHARE SALE AGREEMENT FULFILS
ALL THE REQUISITES OF AN ARBITRATION AGREEMENT AND IS THERE ANY
ELEMENT OF FRAUD?**

1. It is submitted that on perusal of the Share Sale Agreement there is no presence of any arbitration agreement between the parties to enter into an arbitration agreement.
2. Clause 2, when read in its entirety is only for amicable settlement measures. Clause 2.1 is an expert determination clause and does not contemplate arbitration as a means of dispute resolution. The Promoters have committed defrauding and misrepresenting to a bona-fide purchaser i.e. Lifeline and the pendency of investigations of US FDA was concealed by the Promoters with mala-fide intention to ensure that they get an inflated price for their shares.

**ISSUE 1V: WHETHER SWASTH IS INVOLVED IN ANTI-COMPETITIVE
PRACTICES AND ABUSE OF DOMINANCE IN THE PHARMACEUTICAL
INDUSTRY?**

1. It is submitted that the existing IPRs of *Jeevani* were transferred to *Lifeline* vide the merger and constituted a valid assignment. The Delhi High Court had erred in its decision to grant interim injunction to *Swasth* and prevent *Lifeline* from launching the drug “Novel”
2. It is submitted that the acts of *Swasth* is pervaded by elements of abuse of dominance as *Swasth* was engaged in practices resulting in denial of market access to *Lifeline*. Predatory pricing used as a weapon by *Swasth* to drive *Lifeline* out of the market. Hence, the suit for interim injunction is indicative of malicious prosecution and bad faith litigation.

ARGUMENTS ADVANCED

ISSUE I: WHETHER THE SPECIAL LEAVE PETITION IN THE CONSOLIDATED

APPEAL IS MAINTAINABLE?

It is humbly submitted that the Hon'ble Supreme Court, exercising its inherent powers under Order LV, Rule 5; and on the request of the parties appearing in the matter, have tagged the matter together for hearing and the special leave petition filed by the foreign lenders against the order of the Delhi High Court making the erstwhile *Jeevani* as respondents¹, and the special leave petition filed by *Swasth* against the order of Delhi High Court making *Lifeline* and CCI respondents,² now consolidated by the Supreme Court, is not maintainable. It can be substantiated through the following enunciated reasons:

1.1 Substantial question of law is not involved in the present case

It is submitted that the jurisdiction of Supreme Court under Article 136 can only be invoked when a question of law of general public importance arises. It is contended that the appellant must show that exceptional and special circumstances exists and that if there is no interference, substantial and grave injustice will result and the case has features of sufficient gravity to warrant review of the decision appealed against on merits.³ In this present case, the question is whether the foreign lenders can be construed to be creditors or not. The present case draws inference from a pure question of fact and hence not maintainable.⁴

The test to determine “substantial question of law” are as follows:

¹ Paragraph 7 of moot proposition

² Paragraph 13 of moot proposition

³ *Kunhayammed v. State of Kerala*, AIR 2000 SC 2587

⁴ *M. Janardhana Rao v Joint Commissioner of Income Tax* (2005) 193 CTR 58 (SC)

- (1) Whether directly or indirectly it affects substantial rights of the parties, or
- (2) The question is of general-public importance, or
- (3) Whether it is an open question in the sense that there is no scope for interference by the High Court with a finding recorded when such finding could be treated to be a finding of fact⁵

1.1.1 The present case does not warrant a special stature as no procedural errors have been committed at any stage of proceeding

In general, the Court will not grant special leave, unless it is shown that exceptional and special circumstances exist, that substantial and grave injustice has been done and that the case in question presents features of sufficient gravity to warrant a review of the decision appealed against.⁶ In the present case, proper inquiries were conducted before the Delhi High Court pronounced its judgment against *Swasth*, substantiated by the fact that they launched a similar cost effective drug in the market, cornering a large chunk of the market, after which it withdrew the case against Lifeline and the interim injunction was vacated⁷, which amounts to malicious prosecution and hence culpable. The CCI based on the allegations made by Lifeline was of the *prima facie* view that *Swasth* may have abused its dominance. It would be open to the Supreme Court to interfere with the concurrent findings of fact if there is infirmity of excluding, ignoring and overlooking the abundant materials and evidence.⁸ But in the present case, the lower courts have acted legally,⁹ and the order is not erroneous.¹⁰ There was a proper application of the

⁵ *Chunilal Mehta & Sons Ltd. v Century Spinning & Mfg. Co. Ltd* (1962) AIR 1314 (SC).

⁶ *Fokatlal Prabhulal Bhatt v. State of Gujarat*, (2004) 3 SCC 447

⁷ Paragraph 3 of moot proposition.

⁸ *Dubaria v. Har Prasad*, (2009) 9 SCC 346

⁹ *Sangram Singh v. Election Tribunal* AIR 1955 SC 425

¹⁰ *Bhikaji Keshao v. Brij Lal Nandlal*, AIR 1955 SC 610

fundamental principle of law¹¹ in the present case as the Delhi High Court after appreciating the facts and evidence, pronounced its judgment, after due consideration of all the principles of natural justice.

1.2. Special Leave is granted when substantial justice has not been done an exceptional or special circumstances exist, both the elements being absent in the present case

The power under Article 136 is to be exercised sparingly and in exceptional cases only. Whenever there is an injustice done to a party in a proceeding before a court or tribunal, or there is a miscarriage of justice, or when a question of law of general public importance arises, or a decision shocks the conscience of the Court, the power can be exercised.¹² The Supreme Court is not only a court of law but also a court of equity,¹³ and the power has to be exercised sparingly.¹⁴ Article 136 does not give a right to a party to appeal to the Supreme Court; rather it confers a wide discretionary power on the SC to interfere in suitable cases.¹⁵ The purpose of Article 136 is to determine substantial question of law and not to determine whether injustice has been done from case to case.¹⁶ Where the appellants lost their total credibility because of their own conduct, they are not entitled to any indulgence under the extraordinary jurisdiction under Article 136.¹⁷

1.2.1. No requisite ambiguity in the law to warrant special stature under Article 136

¹¹ *Municipal Board v. State Transport Authority*, AIR 1965 SC 458

¹² *Dhakeswari Cotton Mills Ltd. v. CIT*, AIR 1955 SC 65

¹³ *Kunhayammed v. State of Kerala*, AIR 2000 SC 2587

¹⁴ *DhirajLaal GirdhariLaal v. CIT*, AIR 1955 SC 271

¹⁵ *Dhakeswari Cotton Mills Ltd. v CIT West Bengal* (1955) AIR 65 (SC)

¹⁶ *Jamshed Hormusji Wadia v. Board of Trustees, Port of Mumbai*, (2004) 3 SCC 214

¹⁷ *Southern Steel Limited v. Jindal Vijaynagar Steel Limited* (2008) 5 SCC 762

It is held that when it appears *prima facie* that the order in question cannot be justified by any judicial standard, the ends of justice and the need to maintain judicial discipline requires the Supreme Court to intervene,¹⁸ and that this Power can be exercised when there is uncertainty of law.¹⁹ In this present case, the Delhi High Court pronounced its judgment after giving due consideration to relevant provisions and held that *Swasth* was abusing its dominance.²⁰ Except that where there has been an illegality or an irregularity of procedure or a violation of principles of natural justice resulting in gross miscarriage of justice, the Supreme Court does not permit a third review of evidence with regard to question of fact in cases in which two court have appreciated and assessed the evidence with regard to such questions.²¹ Hence, the petition should be dismissed as it is pervaded by defective presentation²², and the conduct of the petitioner disentitles him to any indulgence by the Court.²³

**ISSUE II: WHETHER THE ‘SCHEME’ APPROVED BY THE DELHI HIGH COURT IS
LIABLE TO BE SET ASIDE?**

It is submitted before this Hon’ble Court that the ‘Scheme’ approved by the Delhi High Court is valid and hence, not liable to be set aside.

2.1.The ‘Foreign Lenders’ do not come within the ambit of ‘Creditors’.

It is submitted that the foreign lenders mainly foreign banks, do not fall within the ambit of creditors of the company Jeevani merely on the ground that they have a claim of substantial

¹⁸ *Spencer & Co v. Vishwadarshan Distributors (Pvt.) Ltd.*, (1995) 1 SCC 259

¹⁹ *Commr., Central Excise & Customs v. M/s. Venus Castings (P) Ltd.*, AIR 2000 SC 1568

²⁰ Read in accordance with S. 4(2)(c) of *The Competition Act, 2002*

²¹ *Chikkaranga Gowda v. State of Mysore* AIR 1956 SC 751

²² *State of Punjab v. Ashok Singh Garcha*, (2009) 2 SCC 399

²³ *Prestige Lights Ltd. v. SBI*, (2007) 8 SCC 449

amount over the company. In *Tika Ram and Sons Pvt. Ltd. v. CIT*,²⁴ it was held that the income-tax department cannot be considered a creditor within the meaning of section 391 of the Companies Act, 1956 (*hereinafter* ‘the Act’) merely because a claim was pending for a substantial amount against the company.

S. 2(1)(zd) of *The Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act*, 2002 in unambiguous term defines a “secured creditor” as a bank or financial institution or consortium of banks. S. 2(1)(c)(i) of the said act states that a “bank” means a “banking company”, the definition of the latter is provided by S. 2(1)(d) which states "banking company" shall have the meaning assigned to it in clause (c) of section 5 of the *Banking Regulation Act*, 1949. S. 5 (c) of the said act defines "banking company" as any company which transacts the business of banking in India. Thus the foreign banks are excluded from the scope of creditors in general and secured creditors in particular and as such no notice was required to be relayed to them.

2.1.1. The Foreign Lenders are not entitled to contend the scheme of arrangement.

It is submitted that it is for the company to decide what classes of creditors or members should be made parties to the scheme in accordance with what the scheme purports to achieve. If rights of ordinary shareholders are to be altered, but those of preference shareholders are not touched, a meeting of ordinary shareholders will be necessary but not of preference shareholders.²⁵ If any class has no possible interest in the company, for example, where shareholders of company have no entitlement because all the assets are exhaustible by creditors, the court may sanction a scheme even if such a class objects. In *Inland Steam Navigation Workers’ Union v. Rivers Steam*

²⁴ 51 ITR 403

²⁵ S Ramanujam, *Mergers et al: Issues, Implications and Case Law in Corporate Restructuring* (3rd ed.), LexisNexis, (2011), p.g.20

Navigation Company Limited,²⁶ where the scheme did not touch or affect any salary or dues to any worker and the workers did not assert any claim with regard to any particular sum of money for any particular workers, but they claimed that, under an agreement arrived at between the company and the workers, the company had to pay substantial sum to the workers, it was held that the workers could not be considered to be creditors of the company and, hence, they are not entitled to oppose the scheme.

2.1.2. The requisites of the Act of 1956 related to Mergers and Amalgamation were complied with by Jeevani.

It is submitted before this Hon'ble Court that Jeevani had complied with all the requisites necessary for mergers specified under the Companies Act, 1956. Where a meeting of creditors or any class of creditors is called under section 391 of the Act, with every such notice calling the meeting, there shall be sent also a statement setting forth the terms of the compromise or arrangement and explaining its effect²⁷. *Jeevani* issued a notice of meeting to its creditors 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 resolutions supporting the Scheme were passed by a vote of majority. Thereafter the Scheme was also approved by the Hon'ble Delhi High Court on 5th July 2013²⁸.

2.1.3. Notice of the meeting was proper and valid.

²⁶ (1968) 38 Com Cases 99 (Cal)

²⁷ Section 393, Companies Act, 1956

²⁸ Paragraph 5 of Moot Proposition

Under Sec. 393 of the Act, in every notice calling the meeting which is given by advertisement, there shall be included the terms of the compromise or arrangement and explaining its effect. As referred under clause 1.2, *Jeevani* had complied with those requirements and hence, it can be inferred that the notice was proper.

2.1.4. The merger is not in contravention of SEBI guidelines

It is submitted that the merger in question between *Jeevani* and *Lifeline* is not in contravention of SEBI guidelines. In the case of a listed company, consent of the stock exchange has to be obtained before presenting the scheme for sanction of the court. One month before this, the scheme has to be filed before the stock exchange for its consent. Such filing is enough before its approval is not a mandatory requirement.²⁹ Hence, *Jeevani* already submitted the scheme for approval to the Bombay Stock Exchange thereby discharging its lawful duties.

ISSUE III: WHETHER THE CLAUSE 2 OF SHARE SALE AGREEMENT FULFILS ALL THE REQUISITES OF AN ARBITRATION AGREEMENT AND IS THERE ANY ELEMENT OF FRAUD?

It is submitted that on perusal of the Share Sale Agreement there is no presence of any arbitration agreement between the parties to enter into an arbitration agreement. This can be deduced from the subsequent arguments:

3.1. Clause 2, when read in its entirety is only for amicable settlement measures.

The clause 2.2 of share sale agreement with its usage of the words “amicable settlement” and “above mentioned issues” indicates that it is intimately connected to clause 2.1 of the share sale agreement and thereby it does not involve a judicial process for determination of right and

²⁹ *HBL Nift Power Systems Ltd.RE, (2005)125 Com cases 289 AP*

obligations which implies that it is not an Arbitration Clause. The parties are ready to amicably resolve whatever is mentioned in clause 2.1 of share sale agreement. Where the clause relating to settlement of disputes contains words which specifically exclude any of the attributes of an arbitration agreement or contains anything that detracts from an arbitration agreement, it will not be an arbitration agreement.³⁰ Here it would be noteworthy to look into the judgment by a two judge bench, *bharat bhushan bansal V. U.P. small industries Corp. Ltd.* Where the stipulation in the contract was “...the decision of the managing Director of U.P.S.I.C. shall be final, binding and conclusive on both the parties to the contract upon all questions relating to any claim, right or matters or thing in any way arising out of or relating to contract.” It was held that the stipulation was more in the nature of the managing director being an expert for deciding matters pertaining to the contract and the intention of the parties was to avoid disputes rather than to decide formulated disputes in quasi-judicial manner.³¹ Where parties agree to set up a private court to give final judgment it will not be seen as an agreement to refer disputes to arbitration. Similarly, a provision for amicable settlement through an association will not be an arbitration agreement.³² In the present case, empowered committee can be seen as an ‘association’ and nothing more than that.

3.1.1. Clause 2.1 is an expert determination clause and does not contemplate arbitration as a means of dispute resolution.

³⁰ P C Markanda, Law relating to Arbitration and Conciliation, Lexis Nexis Butterworths Wadhwa, (eight Edition 2013), Ibid p.172

³¹ *bharat bhushan bansal V. U.P. small industries Corp. Ltd*, AIR 1999 SC 899

³² P C Markanda, Law relating to Arbitration and Conciliation, Lexis Nexis Butterworths Wadhwa, (eight Edition 2013), p. 206, also *Rajdhani paper House v. R K jain sales*, 1986 (2) Arb LR 54 (del) DB

Apart from *Bharat Bhushan* case, there is plethora of case laws to determine which clause falls under category of arbitration or under expert determination clause. The clause which was interpreted in the *State of U.P. v. Tipper Chand* case was also materially similar to the clause before us. Clause 22 of the contract in that case provided;

".....decision of the Superintending Engineer for the time being shall be final, conclusive and binding on all parties to the contract upon all questions relating to the meaning of the specifications, designs,.....or as to any other question claim, right, matter or thing whatsoever in any way arising out of or relating to the contract, designs, drawings, specifications.....or other-wise concerning the works, or the execution or failure to execute the same.....shall also be final, conclusive and binding on the contractor".³³

And so the Court held that the clause did not contain an arbitration agreement either expressly or by implication. The intention was to vest the Superintending Engineer with supervision and administrative control over the work. Material similarity can be found in another case, *State Of Orissa And Anr v. Damodar Das*,³⁴ three judges bench, decided over a clause mentioned in the agreement as not being an arbitration clause.

3.2. There is no mention of any ‘dispute’, present or future, in any of the clause contended to be an arbitration clause

In the present case the Clause which is contended to be an arbitration clause do not in any sense of the word describe any ‘dispute’. Same could be assessed from the judgment in the case of *State of U.P. v. Tipper Chand*³⁵, where a clause provided that the decision of the Superintending Engineer shall be final, conclusive and binding on all parties to the contract upon

³³ *State of U.P. v. Tipper Chand*, (1980) 2 SCC 341

³⁴ *State Of Orissa And Anr vs Damodar Das* , Appeal (civil) 2987 of 1982

³⁵ *State of U.P. v. Tipper Chand*, [(1980) 2 SCC 341]

all questions relating to the meaning of the specifications, designs, drawings and instructions was contoured as not being an arbitration clause and just shows his administrative control. Where there is merely a possibility of the parties agreeing to arbitration in future, as contrasted from an obligation to refer disputes to arbitration, there is no valid and binding arbitration agreement.³⁶

3.3 Clause 3.1 emphasizes that the parties had agreed to try all disputes before court having jurisdiction

It is evident from facts that Clause 2 and clause 3.1 of the share sale agreement does not indicate any intention between the parties to refer the disputes and differences for adjudication in an arbitral proceeding rather the parties have already shown their intention to try all disputes before court having jurisdiction by virtue of clause 3. In a case where a clause in the charter party agreement provided that ‘all disputes subject to Mumbai jurisdiction under arbitration’, it was held that it was not a valid agreement for referring disputes to arbitration but was essentially a clause relating to jurisdiction.³⁷ In the case of *B.B. Verma & Co. v. The Chairman-cum-Managing Director South Eastern Coalfields Ltd, and Ors.*³⁸ The Clause 30 of the notice inviting tender in this case reads as under,

“Matters relating to any dispute or difference arising out of this tender and subsequent contracts awarded based on this tender shall be subject to the jurisdiction of District Court Bilaspur only.”

³⁶ P C Markanda, Law relating to Arbitration and Conciliation, Lexis Nexis Butterworths Wadhwa, (eight Edition 2013), p. 172

³⁷ *Reshamsingh and co. pvt ltd. V. Dharti Dredging and Infrastructure Ltd*, 2010 (4) Arb LR 235

³⁸ *B.B. Verma & Co. v. The Chairman-cum-Managing Director South Eastern Coalfields Ltd, and Ors*, 2001(2)MPJR159

Court was of the considered view that it only stipulates territorial jurisdiction of a particular Court for adjudication of disputes and differences and does not spell out an arbitration clause. In another case, the Ruby Construction v The State of Bihar And Ors,³⁹ Clause 24 of the NIT was also held not to be an arbitration Clause The object behind Clause 24 was to exclude the territorial jurisdiction of other courts except the one within whose territorial jurisdiction the work in question was located i.e. at Patna and cannot be read as an arbitration agreement”.

3.4. Promoters have committed defrauding and misrepresenting to a bona-fide purchaser i.e. Lifeline and the pendency of investigations of US FDA was concealed by the Promoters with mala-fide intention to ensure that they get an inflated price for their shares.

The promoters had concealed the fact of Investigation of US FDA on the drugs produced by their company at its plant in India before the merger between Jeevani and lifeline. This is a blatant case of Fraud to a bona-fide purchaser i.e. Lifeline. Hence Lifeline is liable for the Fraud under Section 17(2) of Indian Contract Act. There has been active concealment about the Fact of Investigation Done by The US FDA, which was necessary for the Lifeline to be aware of before entering the merger agreement since it is supplying generic drugs to the United States of America.⁴⁰ Merger was done, after a lot of deliberation and negotiation and so it was expected that all such necessary details would be shared with Lifeline but to the contrary it was concealed.⁴¹

3.4.1. Fact of Investigation was concealed by the Promoters with mala-fide intention to ensure that they get an inflated price for their shares.

³⁹ *The Ruby Construction v The State Of Bihar And Ors*, AIR 1993 Pat 14, 1991 (39) BLJR 1156

⁴⁰ Paragraph 8 of the factsheet

⁴¹ Paragraph 3 of the factsheet

Fact of the pending investigations was concealed by the Promoters with mala-fide intention to ensure that they get an inflated price for their shares and it is evident because a company on which investigation is done. Under Section 4(2) (a) and Section 4(2) (b) of Securities and Exchange Board of India (Prohibition of Fraudulent and Unfair Trade Practices Relating To Securities Market) Regulations, 2003 promoters have committed act of fraud by ensuring that they get an inflated price for their shares and deliberately concealed the ongoing Investigation of US FDA on its plant in India over production of drugs which were below par quality.

ISSUE 1V: WHETHER SWASTH IS INVOLVED IN ANTI-COMPETITIVE PRACTICES AND ABUSE OF DOMINANCE IN THE PHARMACEUTICAL INDUSTRY?

4.1 The existing IPRs of *Jeevani* were transferred to *Lifeline* vide the merger and constituted a valid assignment

It is submitted before the Hon'ble Court that the "acquisition agreement" specifically provided that all the intangible properties including the active R&D and IPRs of *Jeevani* would become the property of *Lifeline* and all rights accruing from it would vest on the latter.⁴²

It is further contended that amalgamation, in relation to companies, means the merger of one or more companies with another company or the merger of two or more companies to form one company, as the amalgamated company, in such a manner that all the properties⁴³ and liabilities⁴⁴ of the amalgamating company immediately before the amalgamation becomes the property of the amalgamated company by virtue of the amalgamation..

⁴² Paragraph 3 of Moot proposition

⁴³ S. 2 (IB)(i) of *The Income Tax Act, 1961*

⁴⁴ S. 2 (IB)(i) of *The Income Tax Act, 1961*

Hence, it is submitted that *Lifeline* had absolute rights over the IPRs of *Jeevani* and the drug “Novel” was the culmination of the further development of the R&D projects of *Jeevani* which became the property of *Lifeline* after the merger. To substantiate, in *Unarco Indus., Inc. v. Kelley Co., Inc.*⁴⁵ and *PPG Indus., Inc. v. Guardian Indus. Corp.*⁴⁶ it was held that transfer of patent that occurs by operation of law in a merger constitute an assignment. It is further submitted that after a merger which has resulted in transferring all the properties and liabilities of the transferor company to the transferee company, a contract previously existing between an individual and the transferor company does not automatically become a contract between the individual and the transferee company.⁴⁷ Hence, *Lifeline* is not bound by any assignment that existed between the erstwhile *Jeevani* and *Swasth*. Further under S. 394(4)(a) of the Act, “property” includes property rights and powers of all description; and “liabilities” include duties of all description. Therefore, all the active R&D and active IPRs of *jeevani* becomes the properties of *Lifeline* and the agreement between *Jeevani* and *Swasth* will not affect the rights of *Lifeline*, in any manner.

4.2 The Delhi High Court had erred in its decision to grant interim injunction to *Swasth* and prevent *Lifeline* from launching the drug “Novel”

The *Patent (Amendment) Act, 2005*, introduced product patents in India, invalidating Section 5 of the Indian Patent Act, which granted only process patents for food; medicines and other drug substances so that patents do not impede protection of public health.⁴⁸ It is submitted that the endeavour of *Lifeline* was to release the drug “Novel” which was considerably cheaper than

⁴⁵ 465 F.2d 1303, 175 U.S.P.Q. 199

⁴⁶ 597 F.2d 1090, 202 U.S.P.Q. 95 (6th Cir. 1979).

⁴⁷ *Nokes v. Doncaster Amalgamated Collieries Ltd*, (1941) 11 Com Cases 83 (HL)

⁴⁸ S. 83(d) of *The Patents Act, 1970*

other life saving drugs, and hence, the interim order passed by the Delhi High Court to prevent the launch of the aforementioned drug was in contravention of S.83(d) of *The Patents Act*, 1970.

It is further submitted that the object of patent law is to encourage scientific research, new technology and industrial progress. The purpose of an invention is to protect and encourage fair competition in the field of technology so as to transform inventions or creations into real productive forces as quickly as possible.⁴⁹ The drug was novel, it involved on inventive step and was capable of industrial application.⁵⁰ The decision of the Delhi High Court was bad in law.

3.3 The acts of *Swasth* is pervaded by elements of abuse of dominance

It is submitted that *Swasth* is liable of abusing its dominant position, which can be substantiated through the following contentions;

4.3.1 Swasth was engaged in practices resulting in denial of market access to Lifeline

It is submitted that the patent law does not award a patent holder the right to profit. Instead, it only grants the right to exclude others from using, making, selling, or offering to sell the patentee's invention.⁵¹ But *Swasth* was engaged in practices resulting in denial of market access to *Lifeline* which is in contravention of S. 4(2)(c) of *The Competition Act, 2002* by obtaining an injunction from the Delhi High Court restraining the launch of the drug "Novel" into the market. *Swasth* is also liable of abusing its dominant position in the relevant market in the context of section 4 read with section 2 (r), section 19 (5), section 19(6) and section 19(7) of the Act⁵²

⁴⁹ B.L Wadehra; *Law Relating to Intellectual Property*, 5th edition, Universal Law Publishing Co., New Delhi, 2012, at p. 6

⁵⁰ S. 2 (ta) of *The Patents Act, 1970*

⁵¹ *Re Farmland Irrigation case*, 113 U.S.P.Q. at 93

⁵² *Belaire Owner's Association vs. DLF Limited and HUDA*, Case No. 19 of 2010 , before the Competition Commission of India

4.3.2. Predatory pricing used as a weapon by Swasth to drive Lifeline out of the market.

It is submitted that there was a chain of blatant acts which corroborates the fact that *Swasth* was abusing its dominance. One such incident that is brought to the notice of the Hon'ble Court is that after obtaining an interim injunction, *Swasth* launched a "similar cost effective drug", cornering a large chunk of the market, after which it withdrew the case against *Lifeline* and the interim order was vacated.⁵³ It is submitted that the act of *Swasth*, i.e. launching of a cost effective drug after the period of injunction is indicative of the fact that the motive is to induce *Lifeline* to suspend its operations by means of "predatory pricing", so that the predatory pricing will eliminate the rival trader, in this case being *Lifeline*.⁵⁴

4.3.3. The suit for interim injunction is indicative of malicious prosecution

It is submitted that *Swasth* can be implicated for malicious prosecution and bad faith litigation as the litigation was not a valid point of law but to obtain unjust enrichment and as such involved a vexatious claim and fraudulent litigation.⁵⁵ It is also submitted that though the reasonable use of intellectual property rights are excluded from the rigors of S.3 and S. 4 of *The Competition Act, 2002* but *Swasth* acting in pursuance of enriching its profit by manipulating the relevant market.⁵⁶ There was also an unwarranted restriction to entry of a new drug resulting in denial of market access to *Lifeline*, in contravention of S.4(2)(c) of *The Competition Act, 2002*.

⁵³ Paragraph 11 of moot proposition

⁵⁴ *Re Modern Food Industries (India) Ltd.*, RTP Enquiry No. 78/1992, decided on 7-2-1996

⁵⁵ *Sova Rani Dutta v. Debabrata Dutta* AIR 1991 Cal 185

⁵⁶ *Re Johnson and Johnson Limited case*, RTP Enquiry No. 8/78, Order dated 16-1-1980

PRAYER

Wherefore it is prayed, in light of the issues raised, arguments advanced, and authorities cited, that this Hon'ble Court may be pleased to:

- 1. Declare that the Special Leave Petition is not maintainable under Article 136 of the constitution of India, 1950.*
- 2. Declare that the Hon'ble High Court of Delhi didn't err in dismissing the appeal of Foreign Lenders for disapproving the scheme of merger u/s 391-394 of the Companies Act, 1953.*
- 3. Declare that the order passed by the Hon'ble High Court of Delhi against Swasth making it liable for acts construing to amount to abuse of dominance was not perverse and hence is not liable to be quashed.*
- 4. Declare that the said clause of the Share Sale Agreement between the promoters and Lifeline is not an arbitration clause and that the Supreme Court adjudicates the said matter.*

And Pass any other Order, Direction, or Relief that it may deem fit in the Best Interests of Justice, Fairness, Equity and Good Conscience.

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

Sd/-

(Counsel for the Appellant)