TEAM CODE: P

IN THE HON'BLE SUPREME COURT OF INDIA

IN THE MATTER BETWEEN

Foreign Lenders of erstwhile Jeevani..……..……Appellant

V/s

Lifeline Limited……Respondent

AND

Lifeline Limited……...……..……..Appellant

V/s

Promoters of Jeevani Limited……..……Respondent

AND

Swasth Limited……..…….……..Appellant

V/s

Lifeline Limited and Competition Commission of India……Respondent

TABLE OF CONTENTS

INDEX OF AUTHORITIES

CASES REFERRED

NATIONAL CASE LAWS

- Bayer Corporation and Ors v. Union of India & Ors., ILR (2009) Supp. (2) Delhi 145
- Bharat Bhushan Bansal v. U.P. Small Industries Corporation Ltd., [1999] 1 SCR 181
- Bhaurao Dagdu paralkar v. State of Maharashtra, AIR 2005 SC 3330
- Bihar State Mineral Development Corporation and Anr. v. Encon Builders (I) (P) Limited, (2003) 7 SCC 418
- D.G.I.R. v. UB-Mec Batteries Ltd., [1996] 87 Comp Cas 891 (MRTPC)
- Ghaziabad Development Authority v. Unique construction, Lucknow, AIR 1997 All 341
- G.V. Films Ltd. v. Metage Special Emerging Market Fund Ltd, (2010) 154 Com Cases 252
- Indian Crescent Bank Ltd, In re, (1949) ILR 1 Cal 53
- Indian Oil Corporation Ltd. and Ors. v. Raja Transport Pvt. Ltd., (2009) 8 SCC 520
- Indowind Energy Ltd. v. Wescare (I) Ltd. and Anr., AIR 2010 SC 1793
- Kaveri Entertainment Ltd. Re, (2003) 45 SCL 294
- Kishan lal v. Kashmiro, AIR 1916 PC 172
- K.K. Modi v. K.N. Modi & Ors., AIR 1998 SC 1297
- Komal Plastic Industries v. Roxy Enterprises Pvt. Ltd., 72 Com Cases 61 (Delhi)
- K. Ramu v. Adyar Ananda Bhavan and Muthulakshmi Bhavan, O.A. Nos. 535 and 536 of 2006 in C.S. No. 495 of 2006 (Madras High Court)
- LG Electronics System India Ltd., In re, (2003) 42 SCL 554 (559) (Del)
- Miheer H. Mafatlal v. Mafatlal Industries Ltd., (1995) 5 Comp LJ 38 (Guj)
- Maneck Chowk and Ahmedabad Mfg Co. Ltd., In re, (1970) 2 Comp LJ 300 (Guj)

- Mysore Construction Co. v. Karnataka Power Corporation Limited, ILR 2000 KAR 4953
- Polymat India P. Ltd. and Anr. v National Insurance Co. Ltd. and Ors., AIR 2005 SC 286
- Sakarmari Steel and Alloys Ltd., In re, (1981) 51 Com Cases 266 (Bom)
- Sher Khan v. Akhtar Din, AIR1937 LAH 598
- State of Orissa and Anr. v. Damodar Das, AIR 1996 SC 942
- State of Punjab v. Shri Jagan Nath Vig, F. A. O. No. 47 of 1957
- State of UP v. Tipper Chand, AIR 1980 SC 1522
- Swamy (DA) v. India Meters Ltd, (1994) 79 Comp Cas 27 (Mad)
- Ujjwal Services Pvt. Ltd. v. Coal India Ltd., 2005 (3) RAJ 187
- Vikrant Tyres Ltd. Re, (2003) 47 SCL 613

FOREIGN CASE LAWS

- Carus Wilson and Greene, Re, (1886) 18 QBD 7
- Hawk Insurance Co. Ltd. Re, (2001) 2 BCLC 480
- Hoffmann-La Roche & Co. Ag, Basle v. Commission of The European Communities in Brussels, (1979) 3CMLR 211
- Imperial Pressing Company v. British Crown Assurance Corporation, (1914) ILR 14 Cal 581
- Monarch Steamship Co Ltd v. A/B Karlshamns Oljefabriker, [1949] AC 196
- Neath Bicon Railway Case, (1982) 1 Ch 349
- Sovereign Life Assurance Co. v. Dodd, (1892) 2 QB 573 (CA)
- Tritonia Ltd., Re, (1948) SLT Notes 5
- United States v. United Shoe Machinery Company, 247 US 32 (1918)

LIST OF BOOKS

- A RAMAIYA, The Guide to Companies Act, Volumes I, II & III, 16th Edition, Wadhwa & Co., Nagpur, 2006
- Dr. PC Markanda, Law Relating to Arbitration and Conciliation, 8th Edition, Lexis Nexis Butterworths Wadhwa Nagpur 2013
- Pollock and Mulla, Indian Contract Act and Specific Acts, Volume I, 13th Edition, Lexis Nexis Butterworth India, 2006
- S.M. Dugar, Guide to competition law, Volume 1, 5th Edition, Lexis Nexis Butterworths Wadhwa Nagpur, 2010
- S. Ramanujam, Mergers et al Issues, Implications and Case Law in Corporate Restructuring, 3rd Edition, 2011

DICTIONARIES AND ENCYCLOPAEDIA

- Garner, Bryan A. Ed., Black's Law Dictionary, Seventh Edition (1999), West Group, St. Paul
- Judy Pearsall, Concise Oxford Dictionary, ed., 10th ed. Oxford University Press, 2002

STATUTORY & OTHER AUTORITIES

- Arbitration and Conciliation Act, 1996
- Companies Act, 1956
- Competition Act, 2002
- Constitution of India, 1950
- Indian Contract Act, 1872
- Patents Act, 1970
- SEBI Act, 1992

STATEMENT OF JURISDICTION

The appellants, Foreign lenders, Lifeline Ltd and Swasth Ltd. have approached the Hon'ble Supreme Court of India under Article 132[1] of the Constitution of India.

[1] 132. Appellate jurisdiction of Supreme Court in appeals from High Courts in certain cases (1) An appeal shall lie to the Supreme Court from any judgment, decree or final order of a High Court in the territory of India, whether in a civil, criminal or other proceeding, if the High Court certifies under Article 134A that the case involves a substantial question of law as to the interpretation of this Constitution

(2) Omitted

(3) Where such a certificate is given, any party in the case may appeal to the Supreme Court on the ground that any such question as aforesaid has been wrongly decided Explanation For the purposes of this article, the expression final order includes an order declaring an issue which, if decided in favour of the appellant, would be sufficient for the final disposal of the case.

STATEMENT OF FACTS

- Jeevani Ltd. and Lifeline Ltd. decided to merge together. A Scheme of arrangement, for Jeevani, was prepared according to which Jeevani would completely merge into Lifeline. The Scheme was not approved by the Bombay Stock Exchange but was approved by the Delhi High Court after resolutions supporting the Scheme were passed by a vote of majority by the Creditors to whom notice was sent which did not include the Foreign Lenders. The Foreign Lenders of erstwhile Jeevani filed an application for recall of order sanctioning the Scheme in the Delhi High Court which was dismissed. The Division Bench on appeal also dismissed the application and the Foreign Lenders have appealed to the Supreme Court against the order.
- Lifeline received notices from the USFDA for providing drugs of below par quality. The fact of investigation by FDA was concealed by the Promoters. Lifeline filed a suit against the Promoters before the Delhi High Court which accepted the petition. The Promoters appealed to the Division bench which adjudicated in the favor of appeal. Aggrieved by this Order, Lifeline has appealed to the Supreme Court of India.
- After the merger, Lifeline decided to introduce a new life saving drug, "Novel" into the market but Swasth Ltd. filed a suit for infringement of its IPRs in the Delhi High Court claiming it to be similar to its drug "Inventive" and was able to obtain an interim injunction against Lifeline who was restrained from launching the new drug 'Novel'.
- Swasth filed a writ petition making Lifeline and the CCI a party in the Delhi High Court against the Order passed by CCI directing the DG CCI to investigate on whether Swasth was abusing its dominant position by indulging in bad faith litigation Delhi High Court dismissed the writ petition filed by Swasth. On appeal, the Division Bench also dismissed the writ petition and accordingly Swasth has come before the Supreme Court against the order of the Division Bench.

STATEMENT OF ISSUES

I. WHETHER THE ORDER PASSED BY THE HON'BLE DELHI HIGH COURT APPROVING THE SCHEME OF ARRANGEMENT CAN BE RECALLED?

II. WHETHER THE HON'BLE DELHI HIGH COURT HAS THE JURISDICTION OVER THE DISPUTE BETWEEN LIFELNE AND PROMOTERS OF JEEVANI?

III. WHETHER THE INVESTIGATION CONDUCTED BY CCI AGAINST SWASTH IS BAD IN LAW?

SUMMARY OF ARGUMENTS

I. The Foreign Lenders of the erstwhile Jeevani constitute a separate Class of Creditors as they have commonality of interest and seek identical compromiseas their interests are different and should have been served a notice of the meeting. This having not done so the Order passed by the Delhi High Court sanctioning the Scheme of arrangement should be recalled.

II. The Clause 2.1 of the Share Sale Agreement is not an Arbitration Clause as per The Arbitration and Conciliation Act, 1996 and as per the settled laws. There is no mentioning of the words 'Arbitrator' or 'Arbitration Agreement' in the agreement which is necessary for the existence of an arbitration agreement. Also the reference of any issue or question to the empowered committee makes it more of an expert determination rather than an arbitration agreement.

III. The investigation conducted by CCI is *mala fide* and is not in the interest of justice as there is no *prima facie* case against Swasth and the CCI without making proper enquiries into the case appointed the DG CCI to investigate. There is a threat of causing negative publicity because of that which may adversely affect Swasth.

ARGUMENTS ADVANCED

[I] THE ORDER PASSED BY THE HON'BLE DELHI HIGH COURT APPROVING THE SCHEME CAN BE RECALLED.

[I.A] FOREIGN LENDERS OF JEEVANI CONSTITUTE A SEPARATE CLASS OF CREDITORS.

The word 'Creditor' in Section 391 is used in the widest sense so as to include all persons having pecuniary claims against the company.[2] Halsbury's laws of England interpret the expression 'Creditor' to include every person having a pecuniary claim against the company. Such pecuniary claim can be actual or even contingent.[3]

It is always a moot question as to what constitutes a Class. "BUCKLEY ON THE COMPANY ACT" makes an observation about the formidable difficulties involved in saying what constitutes a Class of Creditors. The Creditors comprising the different Classes must have different interest. When one files a different state of fact existing among different Creditors which may differently affect their minds and their judgment, they must be divided into different Classes. 'Class' must be confined to those persons whose rights are not so dissimilar so as to make it impossible for them to consult together with a view to their common interest (vide *Sovereign Life Assurance Co. v. Dodd*[4]). Speaking very generally, in order to constitute a Class, members belonging to the Class must form a homogeneous group with communality of interest. One test that can be applied with reasonable certainty is as to the nature of compromise offered to different groups or Classes. Those who are offered substantially different compromises each will form a different Class. Even if there are

---

[2] Sridharan & Pandian, *Guide to Takeovers and Mergers*, Wadhwa Nagpur (2nd ed., 2006) p. 101.

[3] *Halsbury's Laws of England*, Volume 7 (4th ed.) para. 1530 at p. 848.

[4] (1892) 2 QB 573 (CA).

different groups within a Class the interests of which are different from the rest of the Class or who are to be treated differently in the Scheme, such groups must be treated as separate Classes for the purpose of the Scheme. Broadly speaking, a group of persons would constitute one Class when it is shown that they have conveyed all interest and their claims are capable of being ascertained by any common system of valuation. The group styled as a Class should ordinarily be homogeneous and must have commonality of interest and the compromise offered to them must be identical. This will provide rational indicia for determining the peripheral boundaries of Classification.[5]

In the case of *Tritonia Ltd., In Re*[6], it was held that where there are different groups within a Class which are themselves different from the rest of the Class such groups must be treated as a separate Class for the purposes of Scheme under consideration. It is humbly submitted that the interests of foreign lenders as determined by the foreign arbitral tribunal are distinct than those of other Indian secured lenders and hence they should be treated as a separate Class.

Further, in the case of *Hawk Insurance Co. Ltd., In Re*[7] it was said that Creditors with competing rights should be treated as different Classes. Such Scheme should be approved by separate Class meeting accordingly. This having not been done, the Scheme was not sanctioned.

The object of holding meetings of Creditors is to ascertain whether the sums payable to them may be jeopardized in any manner by the Court giving sanction to the proposed Scheme of amalgamation.[8] If there is no representation of the Foreign Lenders their interests would not be protected and this would not be in the interest of justice.

---

[5] *Maneck Chowk and Ahmedabad Mfg Co. Ltd., In re*, (1970) 2 Comp LJ 300 (Guj).

[6] (1948) SLT Notes 5.

[7] (2001) 2 BCLC 480.

[8] *LG Electronics System India Ltd., In re*, (2003) 42 SCL 554 (559) (Del).

It is humbly submitted by the appellants that the claims of the foreign lenders are to be ascertained by the arbitral award passed by the foreign arbitral tribunal constituted in Hong Kong in their favor. Hence, the foreign lenders have commonality of interest, are homogeneous, seeking identical compromise and the claim can be ascertained by a common system of valuation. Hence the appellants should be treated as a Separate Class of Creditors.

[I.B] SEPARATE NOTICE WAS REQUIRED TO BE SENT TO THE FOREIGN LENDERS OF JEEVANI.

It is most respectfully submitted by the appellants that the Foreign Lenders had not received notice of the Scheme and were not able to attend the meeting of Creditors. Where a Scheme of arrangement is proposed, the notice of the Scheme should go to all Creditors wherever they may be to enable them to participate in the Scheme.[9] The notice of meeting to be given to the Creditors or to the Creditors of any Class, as the case may be, shall be sent to them individually by the chairman appointed for the meeting, or, if the Court so directs, by the company (or its liquidator), or any other person as the Court may direct, by post under certificate of posting to their last known address and not less 21 clear days before the date fixed for the meeting. It shall be accompanied by a copy of the proposed compromise or arrangement and of the statement required to be furnished under section 393.[10]

In the case of *Vikrant Tyres Ltd., In Re*[11], where a large percentage of Creditors were not given the notice of the meeting, the Court refused to agree that there was three-fourth majority approval. The Court would attach no sanctity to a Scheme when all the Creditors have not been notified.[12]

---

[9] *Indian Crescent Bank Ltd, In re*, (1949) ILR 1 Cal 53.

[10] Verma J.C. Dr., *Corporate Mergers Amalgamations & Takeovers (Concept, practices & procedure)*, (5th ed., 2008) p. 452.

[11] (2003) 47 SCL 613.

[12] *Kaveri Entertainment Ltd. Re*, (2003) 45 SCL 294.

It is further contended by the appeallants that the notice of meeting published by Jeevani in a local English language newspaper and local language newspaper covered only a small region. In *G.V. Films Ltd. v. Metage Special Emerging Market Fund Ltd*[13], the Court while considering the Scheme of arrangement found that the shareholders of the company were spread all over India. The notice published covered only a small region. The Court order did not require publication of notice in editions of the new paper covering the whole country. It was held the company ought to have asked the directors for convening effective information to all the shareholders.

[I.C] THE ORDER PASSED BY THE HON'BLE DELHI HIGH COURT APPROVING THE SCHEME OF ARRANGEMENT CAN BE RECALLED.

The checks and balances to prevent the majority from abusing their position by suppressing the minority is contained in the said sub-section of Sec. 391[14]. They are:

(a) The required majority for approving a compromise or arrangement which is stipulated as under: Three-fourths in the value of the Creditors or Class of Creditors or members or Class of members present and voting in favour either in person or by proxy.

(b) The Scheme of compromise or arrangement should be further approved by the Court.

Unless both the conditions are satisfied a Scheme cannot be implemented.[15]

Section 391(1) is not a sign post but a check post where at it is the duty of the Court to examine the Scheme for itself. The obligation is greater because such application is ex-parte and it is not practical to give notice to the numerous Creditors or members of the company. A mere casual look is not enough[16]. When a large percentage of Creditors were not given notice

[13] (2010) 154 Com Cases 252.

[14] Sec 391, Companies Act 1956

[15] Ramanujam S., *Mergers et al Issues, Implications and Case Laws in Corporate Restructuring*, LexisNexis Butterworths Wadhwa Nagpur (3rd ed., 2011) p. 24.

[16] *Sakarmari Steel and Alloys Ltd., In re*, (1981) 51 Com Cases 266 (Bom).

of the meeting with a *mala fide* intention and by their exclusion the meeting was held, if such Creditors were to appear before the Court and request the Court to take note of the conduct of the company, the Court would decline to grant sanction to the Scheme not on the ground that the meeting was conducted without issue of notice to those Creditors is invalid but on the ground that the Court is not satisfied about the conduct of the company as well as the fairness of the company.

In *Swamy (DA) v. India Meters Ltd*[17] it was held that if Creditors and members are not properly classified and if the meeting of the proper Creditors and members are not separately held, the Scheme approved at such meeting cannot be sanctioned. Where the necessary meeting of the Class of Creditors has not been called, the Court should not sanction the Scheme as it would vitiate the resolution passed by requisite statutory majority.[18]

In *komal Plastic Industries v. Roxy Enterprises Pvt. Ltd.*[19] it was held that the provisions of Section 391 (2) are clear and unambiguous. The Company Court has no jurisdiction to sanction a Scheme if it is not approved by a three-fourth majority of the Creditors or Class of Creditors. The question of the Court considering the sanctioning of the Scheme would arise only if the Scheme has been approved by the statutory majority provided for under section 391(2).

In *Neath Bicon Railway*[20] a Court cannot confirm a Scheme where a Class of Creditors are affected by a Scheme if they neither dissent nor approve the same at the meeting.

The appellants respectfully submit before the Court that the provisions of Sec 391 were not complied with and hence the the Order sanctioning the Scheme should be recalled.

---

[17] (1994) 79 Comp Cas 27 (Mad).

[18] *Miheer H. Mafatlal v. Mafatlal Industries Ltd.*, (1995) 5 Comp LJ 38 (Guj).

[19] 72 Com Cases 61 (Delhi)

[20] (1982) 1 Ch 349.

[II] DELHI HIGH COURT HAS THE JURISDICTION TO THE DISPUTE BETWEEN THE PROMOTERS OF JEEVANI AND LIFELINE.

[II.A] THERE IS ANY BREACH OF CONTRACT BY THE PROMOTERS OF JEEVANI.

The Appellant humbly submits that as per Section 17, Indian Contract Act, 1872, Fraud means and includes the active concealment of a fact by one having knowledge or belief of the fact with intent to deceive another party, or to induce him to enter into the contract.

The expression fraud involves two elements: deceit and injury to the person deceived[21]. As the Promoters of Jeevani at the time of entering in the agreement did not disclose the material fact regarding the investigation carried on by the FDA, they certainly made a deception to Lifeline and by that deception Lifeline has faced substantial injury by paying inflated price on shares and also the reputation of the company has been put on stake.

The duty referred to in the explanation to section 17 is a legal duty and not merely a moral duty to speak[22]. However, there are special duties of disclosure in particular Classes of contract[23], like in an agreement by a person standing in a fiduciary position to another and obtaining consent of the latter amounts to fraud[24] and a party can compel the defendant to pay damages if the injured party was seeking enforcement of a fiduciary obligation.[25] Lifeline can compel the promoters to disgorge the profits derived from the breach as Lifeline was seeking enforcement of a fiduciary obligation on the part of the promoters, who being in a fiduciary

[21] *Bhaurao Dagdu paralkar v. State of Maharashtra*, AIR 2005 SC 3330.

[22] *Sher Khan v. Akhtar Din*, AIR1937 LAH 598.

[23] *Imperial Pressing Company v. British Crown Assurance Corporation*, (1914) ILR 14 Cal 581.

[24] *Kishan lal v. Kashmiro*, AIR 1916 PC 172.

[25] Pollock and Mulla, *Indian Contract Act and Specific Acts*, Lexis Nexis Butterworth India (13th ed., 2006) p. 512.

position had the obligation to disclose each and every material aspect related to the transaction.

Further, It will be wrong to say that Lifeline should have been more aware while getting into the contract with the promoters of Jeevani as a possibility of discovering the truth by inquiries involving trouble or expense out of proportion to the value of the whole subject matter would not, it is conceived, be 'means of discovering the truth with ordinary diligence'[26] and it was the duty enshrined on the promoters by the 'Separate Sale Agreement' to disclose information which was vital to both the parties.

As stated by Lord Wright in *Monarch Steamship case,*[27]broad principle of the law of damages is that the party injured by the other party's breach of contract is entitled to such money compensation as will put him in the position he would have been but for the breach and therefore the promoters should pay the compensation to Lifeline for wrongful gain and unjust enrichment of Promoters by way of defrauding and misrepresenting to a bonafide purchaser i.e. Lifeline regarding the FDA investigation and for putting the reputation of Lifeline at stake.

[II.B] THE DISPUTE RESOLUTION AGREEMENT DOES NOT AMOUNT TO ARBITRATION.

The Appellant humbly submits before this Hon'ble Supreme Court that the DRA does not amount to arbitration. Under the Arbitration and Conciliation Act, 1996, Section 2(b) provides that an arbitration agreement means an arbitration agreement referred to in Section 7.

In *K.K. Modi v. K.N. Modi & Ors.*[28] The Supreme Court considered the essential ingredients of an arbitration clause. Among the ingredients which are described in the said judgment, two important ingredients are that the substantive rights between the parties will be determined in

[26] Ibid at p. 589.

[27] *Monarch Steamship Co Ltd v. A/B Karlshamns Oljefabriker*, [1949] AC 196.

[28] AIR 1998 SC 1297.

an impartial and judicial manner by the agreed and also that the agreement to refer the disputes to the decision of the Tribunal must be intended to be enforceable in law. The other factors which are relevant include, whether the agreement contemplates that the tribunal will receive evidence from both sides and give the parties an opportunity to put their contentions forward; Whether the wording of the agreement is consistent with the view that the process was intended to be an arbitration, and whether the agreement requires the tribunal to decide the dispute as per the law.

In *Carus Wilson and Greene, Re*[29] it was said that there are cases in which a person is appointed to ascertain some matters for purpose of preventing some differences from arising, not of settling them when they have arisen and then the case is one not of an arbitration but of mere valuation. In the present case the said agreement cannot be held to be an arbitration clause and is merely an expert determination as the intention of the parties was not to have any judicial determination on the basis of evidence nor the 'empowered committee comprising of (three) executive level personnel of the Company' were required to base their decision only on the material placed before them by the parties and their submissions. It merely conferred power on the committee to take decisions on their own and that it did not authorise the parties to refer any matter to their arbitration. The committee 'comprising of (three) executive level personnel of the Company was merely a committee of experts' who had to exert their expertise at the time of any issue relating to both the parties as the Committee was not required to make their own enquiries and could apply their own expertise to decide the matter on their expert opinion.[30] The fact that submissions were made before the said Committee would not turn the decision-making process into arbitration.

[29] (1886) 18 QBD 7.

[30] *Russell on Arbitration* (21st ed.) para. 2014 at p. 37.

Further, in the said dispute resolution agreement the words 'arbitration', 'arbitrator' or 'arbitration agreement' did not appear and there was nothing to suggest in it that the parties had agreed to submit their differences to arbitration. The clause in dispute in this case is to say the least extremely vague and the absence of these terms is regarded as of great significance[31] and is more in the nature of reference thereof. [32] The mention of the words 'arbitrator' or 'reference' are essential ingredients to bring in the provision of arbitration.[33] The agreement contained in Clause 2.1 did not indicate any *animus arbitrandi* and was more in the nature of a reference to the committee. Further, the clause did not envisage that any difference or dispute relating to the agreement should be referred to the arbitration of an arbitrator[34] and as a golden principle ambiguous words are to be left out and ignored while interpreting a given agreement clause[35] and hence it could not be treated as an arbitration clause.

Moreover, the Clause 2.1 of the agreement between the parties does not mention that the dispute would be referred to arbitration of the Empowered Committee. The expression occurring in Clause 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 does not mean that the parties agreed that such issue shall be referred to the Empowered Committee for arbitration.[36]

Further, the Empowered Committee could not be expected to make adjudication with an un-biased mind as it consisted of "Executive level personnel of the Company". There can be

---

[31] *State of Punjab v. Shri Jagan Nath Vig*, F. A. O. No. 47 of 1957.

[32] *State of UP v. Tipper Chand*, AIR 1980 SC 1522.

[33] *Ujjwal Services Pvt. Ltd. v. Coal India Ltd.*, 2005 (3) RAJ 187.

[34] *State of Orissa and Anr. v. Damodar Das*, AIR 1996 SC 942.

[35] *Ghaziabad Development Authority v. Unique construction, Lucknow*, AIR 1997 All 341.

[36] *Bharat Bhushan Bansal v. U.P. Small Industries Corporation Ltd.*, [1999] 1 SCR 181.

justifiable apprehension about the independence or impartiality of an employee-arbitrator if such person is the controlling authority in regard to the subject contract.[37] The domestic tribunal adjudicating must be an impartial one as it is a well-settled principle of law that a person cannot be a judge of his own cause. Actual bias would lead to an automatic disqualification where the decision-maker is shown to have an interest in the outcome of the case.[38] This gives an indication that the decision of that person is not intended to be an adjudication of the rights of the parties to the dispute, but intended to be a decision of one party in regard to the claim of the other party.[39]

Further, the terms of the contract have to be construed strictly without altering the nature of the contract as it may affect the interest of parties adversely.[40] If the terms of the agreement clearly indicate an intention on the part of the parties to the agreement to refer their disputes to a private tribunal for adjudication and a willingness to be bound by the decision of such tribunal agreement, the words used should disclose a determination and obligation to go to arbitration and not merely contemplate the possibility of going for selection arbitration. 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. [41] In the present case Clause 2.2 states that "The parties shall endeavor to amicably resolve the above mentioned issues" makes it more of a meditation clause which gives the parties option to amicably resolve the issue between themselves rather than taking it

---

[37] *Indian Oil Corporation Ltd. and Ors. v. Raja Transport Pvt. Ltd.*, (2009) 8 SCC 520.

[38] *Bihar State Mineral Development Corporation and Anr. v. Encon Builders (I) (P) Limited*, (2003) 7 SCC 418.

[39] *Mysore Construction Co. v. Karnataka Power Corporation Limited and Ors.*, ILR 2000 KAR 4953.

[40] *Polymat India P. Ltd. and Anr. v National Insurance Co. Ltd. and Ors.*, AIR 2005 SC 286.

[41] Markanda PC Dr., *Law Relating to Arbitration and Conciliation*, Lexis Nexis Butterworths Wadhwa Nagpur (8th ed., 2013) p. 171.

to the Empowered Committee. Therefore, in the absence of an arbitration agreement between the parties, no claim against any party or no dispute thereon can be the subject-matter of reference to an Arbitrator.[42]

[III] THE INVESTIGATION CONDUCTED BY CCI AGAINST SWASTH IS BAD IN LAW

The appellants submit that cognizance taken by the Competition Commission was one without jurisdiction and it cannot be contented, even prima facie that there has been abuse of dominant position by the petitioners. In its most humble submission, the petitioners contend that they have acted in *bona fide* manner and have taken steps in endeavor to protect its IPR's. A patentee under Indian Patent Act has, the untrammeled right to exclude anyone else from manufacturing, selling, importing or marketing that product, by virtue of Section 48 of Patents act[43].

Section 4(2) of Competition Act provides that imposition of unfair and discriminatory conditions in purchase or sale of goods or services amounts to an abuse of dominant position. Thus, the petitioners submit that in order to protect its IPR rights, it had obtained the injunction from the Delhi High Court against Infringement of petitioner's IPR by respondents; which cannot at any point of time, tantamount to abuse of dominant position by the respondent. Since, there was no abuse of dominant position by the petitioners and just a bonafide attempt to protect its property, the CCI should have refrained from any investigation.

[42] *Indowind Energy Ltd. v. Wescare (I) Ltd. and Anr.*, AIR 2010 SC 1793.

[43] *Bayer Corporation and Ors v. Union of India and Anr*, ILR (2009) Supp. (2) Delhi 145.

[III.A] SWASTH HAS NOT INDULGED IN BAD FAITH LITIGATION AND NOT ABUSED ITS DOMINANT POSITION.

It is the contention of the petitioners that they at no point of time can be said to be in a dominant position in the relevant market. The drug "Inventive" cannot be said to have be in dominant position, on the grounds of it being a premier drug.

The High level Committee (Popularly referred to as Raghavan Committee) recommends that "Dominance" and "Dominant Undertaking" may be appropriately defined in the Competition Law in terms of "the position of strength enjoyed by an undertaking which enables it to operate independently of competitive pressure in the relevant market and also to appreciably affect the relevant market, competitors and consumers by its action". The definition should also be in terms of "substantial impact on the market including creating barriers to new entrants"[44]It is to be understood that for the violation of law in terms of Section 4, the dominance has first to be established and then seen whether it is abused[45]. Only when dominance is established, its abuse could be alleged. Section 4 prohibits a dominant enterprises or group from eliminating a competitor and thereby strengthening its position by having recourse to means other than those which come within the scope of competition on merit and on the basis of equality[46]. The word "abuse" means "to put to bad or wrong use". It means an enterprise or a group enjoying a dominant position on a market cannot make use of that position for bad or wrong purposes[47].

"The concept of abuse is an objective concept relating to the behavior of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of

---

[44] Dugar S.M., *Guide to Competition Law*, Volume 1 (5th ed., 2010), Lexis Nexis Butterworths Wadhwa Nagpur, p. 820.

[45] *D.G.I.R. v. UB-Mec Batteries Ltd.*, [1996] 87 Comp Cas 891 (MRTPC).

[46] Mittal D.P., *Taxmann's Competition Law & Practice*, (2nd ed., 2008) p. 234.

[47] Supra, n.44, p. 235.

the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of competition[48]. Even if the dominance of the petitioners is proved, they have not taken any steps to influence the market or to weaken the degree of competition.

In its most humble submission, the appellants state that they have at no point of time abused their dominant position in the market and have acted in *Bona fide* intentions and for the cause of public welfare. It would have been an abuse of dominant position when the patent holder; i.e. the petitioners would have imposed unreasonable and arbitrary terms on the respondents.

[III.A.1] LIFELINE HAS INFRINGED THE IPR'S OF SWASTH.

In most developing countries, few people have access to expensive medicines. Licenses or the production and distribution of the medicines themselves are likely to cost the pharmaceutical companies amounts that are unlikely to be affordable by most of the population. A duty to supply would almost certainly have to allow the holder of the IPRs to recover its average avoidable cost, or the pharmaceutical company would leave the country, where their competition is so important[49].

It is submitted that keeping in mind the fact that the Appellants have spent millions of dollars in research and development and the conduct by the defendants in public interest demands that it be protected.

---

[48] *Hoffmann-La Roche & Co. Ag, Basle v. Commission of The European Communities in Brussels*, (1979) 3CMLR 211.

[49] Dhall Vinod, *Competition Law Today, Concepts, Issues, and the Law in Practice*, Oxford University Press, p. 142.

The petitioners submit that realising that the respondents Lifeline had made a substantially similar good 'Novel', the petitioners were bound to seek injunction before the Honourable Delhi High Court. The petitioners further contend that at no point of time has the Interim Injunction of the Hon'ble Delhi High Court restraining lifeline from launching the product been challenged via appeal by them and the same is binding until further order of the Honourable Court in this regard are passed. It may be safely presumed that the respondents have accepted the said order in *Toto.* What stands challenged by the present issue is the investigation orders by CCI and the infringement of IPR of appellant have been accepted by the respondents.

In the case of K. Ramu v. Adyar Ananda Bhavan and Muthulakshmi Bhavan[50], it has been held that, "As per Section 48 of the Patents Act, if the subject matter of the patent is a process the patentee has the exclusive right to prevent 3rd parties from the act of using the process for sale, selling for those purpose the product obtained directly by that process in India.[51]

Patents are the result of inventive mind and their creation requires investment of money, time and patience. Exclusion of others from the use of invention, absolutely or upon terms is a right under the patent law and its exercise is not an offence against the competition law.[52]

For the commercial exploitation of an invention, a patent is granted to its inventor, under the Patents Act, 1970. It is a monopoly right.[53]

The Appellants most humbly submits before this Hon'able Court that Lifeline has infringed the IPR of the respondents. It is the case of the Respondents that the Drug "Novel" cannot be considered as an invention. It is contended that section 3(d) of the Act introduced in 2005 has made dramatic changes to the patent law regime, particularly, in the context of drugs and

[50] O.A. Nos. 535 and 536 of 2006 in C.S. No. 495 of 2006 (Madras High Court).

[51] Supra, n. 44, p. 215.

[52] *United States v. United Shoe Machinery Company*, 247 US 32 (1918).

[53] Supra, n. 44, p. 225.

medicines. Unless the drug or compound is proved to be of enhanced efficacy and is an inventive step, the patent is not granted. Where the compound is a new form of a known substance (evergreening), unless it is shown to demonstrate enhanced efficacy, the mere discovery of a new property or a new use would not entitle the applicant for the grant of a patent. The derivatives of the known substances would also be considered as the same substances unless they differ significantly in properties with regard to the efficacy[54].

In the case of *Bayer Corp. and Anr. v. Cipla Ltd.*[55], it has been held as that "Patent Law discourages evergreening and prevents such derivative or other forms of the already patented product being granted patent unless the derivatives or other forms differ significantly in properties in regard to efficacy."

The Appellants further submits that the around 2010, it had got assigned absolute right to some of the developed and completed R & D projects and IPR's of Jeevani. Thus, once the IPRs have been assigned in favour of the appellants, then Jeevani could not have transferred any portion of the assigned IPR's to Lifeline at the time of Merger. The appellants pray that the case regarding the infringement is *sub judice* before the Delhi High Court and an interim injunction was granted by it taking into consideration the prima facie case. The appellant thus, most respectfully submit that it would rather be an appropriate measure at this juncture not to venture into the said issue by this Hon'ble Court.

[54] ILR (2009) Supp. (2) Delhi 551

[55] Ibid at 52.

CONCLUSION AND PRAYER FOR RELIEF

In light of the facts stated, issues raised arguments advanced and authorities cited, it is submitted that the honorable Supreme Court of India be pleased -

1. To allow the appeal.

2. The order passed by the Hon'ble Delhi High Court approving the Scheme is recalled.

3. The Hon'ble Delhi High Court has the jurisdiction over the dispute.

4. The investigation conducted by CCI against Swasth is bad in law

5. Pass any other order or make any direction as the court may deem fit to meet the interest of justice in the instant case.

All of which is respectfully prayed

PLACE: NEW DELHI — COUNSELS FOR APPELLANTS

DATE: SEPTEMBER, 2014 — X_____