

**BEFORE THE HON'BLE
SUPREME COURT OF INDIA**

SPECIAL LEAVE PETITION

UNDER ARTICLE 136 OF THE CONSTITUTION OF INDIA

FOREIGN LENDERS.....APPELLANT

V.

JEEVANI LIMITED.....RESPONDENT

LIFELINE LIMITED.....APPELLANT

V.

PROMOTERS OF JEEVANI LIMITED.....RESPONDENT

SWASTH LIFE LIMITED..... APPELLANT

V.

COMPETITION COMMISSION OF INDIA..... RESPONDENT NO.1

LIFELINE LIMITED..... RESPONDENT NO.2

UPON SUBMISSION TO THE HON'BLE CHIEF JUSTICE AND HIS COMPANION
JUSTICES OF THE SUPREME COURT OF INDIA

MEMORANDUM ON BEHALF OF APPELLANTS

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4. Jagdish C. v. Ramesh Chander (2007) 5 SCC 719
5. Raj Prakash v. Mangat Ram AIR 1978 DEL 1
6. Registrar, Agricultural Science v. G.G.Hosamath [2004] 13 SCC 2795
7. Re T&N Ltd [2007] 1 All ER 851 and Re Castle Holdco 4 Limited (Countrywide) [2009] (Unreported)
8. Satyendra Kumar v. Hind Constructions Ltd. AIR 1952 BOM.227
9. State of Rajasthan v. Nava Bharat Constructions Co, AIR 2005 SC 2795
10. Sovereign Life Assurance Company v. Dodd [1892] 2 QB 573
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LEGISLATION

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2. Circular by Ministry Of Corporate Affairs on Scheme of Arrangement
3. The Company's Act, 1956
4. The Company's Act, 2013
5. Competition Act, 2002
6. Indian Contract Act, 1872
7. The Patents Act, 1970
8. The Patents and Designs Act, 1970

BOOKS

1. Avtar Singh, Competition Law, Eastern Book Company
2. Taxmann's, Competition Law Manual, Taxmann Publications
3. Avtar Singh, Contract and Specific Relief, Eastern Book Company
4. Ratanlal and Dhirajlal, The Indian Penal Code, 33rd Edition, Lexis Nexis, Butterworths Wadhwa Publication Nagpur

5. Siddharth Bawa, Law of Intellectual Property, Allahabad Law Agency
6. Dr. N.V.Paranjape, Law Relating To Arbitration And Conciliation In India,
Central Law Agency
7. Dr. N.V.Paranjape, The New Company Law, Central Law Agency

LEGAL DATABASES:

1. Manupatra
2. SCC online

LEXICONS:

1. Black's law Dictionary, 2nd edition, 1910
2. Black's Law Dictionary, 6th Edition 1990

STATEMENT OF JURISDICTION

The Hon'ble Supreme Court has the jurisdiction in this matter under

Article 136 of the Constitution of India reads as follows:

“136. Special leave to appeal by the Supreme Court

- (1) Notwithstanding anything in this Chapter, the Supreme Court may, in its discretion, grant special leave to appeal from any judgement, decree, determination, sentence or order in any cause or any cause or matter passed or made by any court or tribunal in the territory of India.
- (2) Nothing in clause (1) shall apply to any judgement, determination, sentence or order passed or made by any court or tribunal constituted by or under any law relating to armed forces.

STATEMENT OF FACTS

1. 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. It is one of the leading market players in the pharmaceutical manufacturing industry.
2. Lifeline Limited (Lifeline) is another listed public company registered and incorporated under the Companies Act, 2013 having its registered office in Mumbai. It is a popular company in the Indian market as a major producer of food products.
3. Lifeline decided to foray into the pharmaceutical sector. Lifeline approached Jeevani for a possible partnership to venture into this sector. In and around November, 2011, both companies had initiated negotiations for a possible merger.
4. The companies decided to merge on 27th January, 2012. The three promoters of Jeevani who were also the majority shareholders in the company sold their entire shareholding (which is 18% in Jeevani) to Lifeline.
5. It was also specifically provided in the agreement that all 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 with Lifeline.
6. The scheme was finalized on 5th March 2012 and filed before the Bombay Stock Exchange for its approval. But the Bombay Stock Exchange did not approve the scheme.
7. On 30th March 2012, Jeevani and Lifeline filed an application under section 391 of the companies act for initiating the process of approval of the scheme by the Hon'ble Delhi High Court. The Hon'ble Company Judge in accordance with the mandate of chapter V of the companies act ordered for a meeting of the creditors to be convened.
8. Jeevani issued a notice for meeting of its creditors by publishing an advertisement in a local English newspaper and local language newspaper and accordingly a meeting of the creditors was held and the scheme was passed by them. It was also approved by the Hon'ble Delhi High Court on 5th July 2013. Around the same time Lifeline, under the relevant provisions of the companies act, got the scheme approved by the Bombay High Court.
9. Foreign lenders had jointly, invoked arbitration proceedings before a foreign arbitral tribunal constituted in Hong Kong, against Jeevani. The arbitration was initiated for

payments to be made under a consortium agreement. On 27th July 2010 a foreign arbitral award was passed in favor of the foreign lenders.

10. In early August 2013 the foreign lenders of Jeevani had made an application before the Hon'ble company judge for recall of order dated 5th July 2013 . The foreign lenders contended that they had not received notice of the scheme and were not able to attend the meeting.
11. The company however contended that the foreign lenders were not the creditors of the company and no notice was required to be sent and the fact that whether they even constitute a class of creditors was disputed.
12. The Hon'ble Company Judge dismissed the application filed by the foreign lenders, against which foreign lenders went in appeal to the Division Bench of the Delhi High Court. This order is now under challenge in the Hon'ble Supreme Court.
13. After the merger, the newly merged Lifeline had continued with the operations of the erstwhile Jeevani, which included its operations of supplying generic drugs to the United States of America. Soon after, Lifeline received notices from the US Food and Drug Administration (FDA) for providing drugs of below par quality.
14. Lifeline on further scrutiny, found out that the investigation had commenced much before the merger took place. On this basis Lifeline filed a suit against the promoters before the Delhi High Court for damages arising out of breach of the contract dated 23rd March, 2012.
15. The Promoters contended that the Delhi High Court had no jurisdiction in the matter as the agreement between the parties included an arbitration clause for settlement of disputes. However, Lifeline contended that there was no arbitration clause.
16. Sale agreement between the parties stated that dispute resolution proceedings were to be carried out by an Empowered Committee comprising of three executive level personnel of the company.
17. The Hon'ble Single Judge of Delhi High Court held that the stated clause in the agreement could not be held as an arbitration clause and that the jurisdiction to settles disputes lies with the Court.
18. The promoters of Jeevani challenged the order of Single Judge by an appeal to the Division Bench of Delhi High Court and the Division Bench held that the clause constituted an arbitration clause and referred the dispute to be decided by the

Empowered Committee. Aggrieved by this Order of the Division Bench of Delhi High Court, Lifeline has come before the Hon'ble Supreme Court in appeal.

19. After its merger Lifeline decided to introduce a new life saving drug by the name of 'Novel' which was published to be considerably cheaper than other life saving drugs including 'Inventive' which was being manufactured by Swasth Life Limited (Swasth).
20. This drug was manufactured after further developing the active Research & Development (R&D) projects which had become the property of Lifeline after its merger with Jeevani. .
21. Swasth was a sister concern of the promoters of erstwhile Jeevani. Sometime, in the year 2010 they were assigned absolute rights to a few of the developed and completed R&D projects and intellectual property rights of Jeevani.
22. Before the new drug was launched, Swasth filed a suit for infringement of intellectual property rights alleging that the drug Novel was substantially similar to their patented drug Inventive and was granted an interim injunction for the same by the Delhi High Court restraining Lifeline from launching Novel.
23. A similar cost effective drug was launched by Swasth after which it withdrew its case against Lifeline and the interim injunction was vacated.
24. An application was filed by Lifeline before the Competition Commission of India (CCI) alleging that Swasth had abused its dominant position. The CCI had made an order to the Director General to investigate into the matter and provide its report regarding the same within a period of 45 days. The report is still awaited.
25. Swasth being aggrieved by the Order of CCI filed a writ petition at the Delhi High Court making Lifeline Limited and CCI a party to it. The Delhi High Court held that the CCI had made a prima facie finding and had only directed for investigation. The writ petition filed by Swasth Life Limited was dismissed by the Delhi High Court.
26. On appeal, the Division Bench also did not find any reason to interfere with the order of the Hon'ble Single Judge and accordingly Swasth has come before the Supreme Court against the order of the Division Bench.

STATEMENT OF ISSUES

ISSUE I:

Whether the Scheme of Arrangement should be set aside.

ISSUE II:

Whether an Arbitration clause exists in the Sale Agreement.

ISSUE III:

Whether there has been an Abuse of Dominant Position.

SUMMARY OF ARGUMENTS

Issue I

Whether the scheme of arrangement should be set aside.

It is humbly submitted before the Hon'ble Supreme Court of India, that this Special Leave Petition is maintainable against Jeevani Limited, as they have not acknowledged the rights of the Foreign Lenders as creditors, and have initiated a scheme of arrangement without convening the Foreign Lenders for the class meeting held for approval of the Scheme, for the creditors of Jeevani Limited.

Issue II

Whether an arbitration clause exists in the sale agreement.

It is humbly submitted before the Hon'ble Supreme Court of India, that this Special Leave Petition is maintainable against the Promoters of Jeevani Limited, as they have breached the contract between them and Lifeline Limited through misrepresentation of vital facts for their wrongful gains. Also, the sale agreement does not contain an arbitration clause but merely a reference and the jurisdiction to settle any disputes arising out of the subject matter of the sale agreement lies with the High Court of Delhi.

Issue III

Whether there has been an abuse of dominant position.

It is humbly submitted before the Hon'ble Supreme Court of India, that this Special Leave Petition is maintainable against the Competition Commission of India and Lifeline Limited, as the Competition commission of India is wrong to give a prima facie view that an abuse of dominant position has been done by Swasth Life Limited. Also, Lifeline Limited has infringed the Intellectual property Rights of Swasth Life Limited by manufacturing a drug which is substantially similar to the lifesaving drug being manufactured by Swasth Life Limited, who has absolute rights to manufacture this drug.

ARGUMENTS ADVANCED

**I. WHETHER THE SCHEME OF ARRANGEMENT SHOULD BE SET
ASIDE.**

It is humbly submitted that the appeal is maintainable under article 136 of the Constitution of India. Article 136 is the residuary power of SC to do justice where the court is satisfied that there is injustice.

I.1 Foreign lenders are creditors of Jeevani Limited.

Banks which have their branch in a country which is beyond the geographical borders of India are considered as foreign banks and any lending made by them to an Indian company makes them the company's foreign creditor.

Thus, foreign banks are creditors of Jeevani Limited. The term creditor is to include every person who has a quantifiable claim against the company, whether actual, contingent, unliquidated or prospective¹.

Creditors comprising different classes have different interests and, therefore, if we find a different state of facts existing among different creditors which may differently affect their minds and judgements, they must be divided into different classes².

Moreover, the proposition clearly states that the foreign lenders are creditors of Jeevani Limited. Respondent's claim is wrong that the foreign lenders are creditors because an arbitration proceeding was invoked by the foreign lenders and the arbitral award was made in favor proving the fact that foreign lenders are the creditors of the company.

¹ Re T&N Ltd [2007] 1 All ER 851 and Re Castle Holdco 4 Limited (Countrywide) [2009] (Unreported)

² Lord Esher MR, observation under section 206 of English Companies Act, 1948

I.2 Foreign Lenders were not convened for the meeting.

The class meetings are usually required to be held when it is proposed to alter, vary or affect the rights of a particular class of shares. For effecting such changes, it becomes necessary to call separate class meetings of holders of those shares and seek their approval.³

The scheme of arrangement was made without notifying the foreign lenders. A separate notice was required to be communicated to the foreign lenders as their interest was affected after the approval of the scheme of arrangement. Jeevani limited issued a notice of the meeting for its creditors in a local English language newspaper and a local language newspaper containing the terms of the proposal and explaining its effect and accordingly the meeting was held. This notice was not accessible to the foreign lender as they are from a different country.

Thus, the scheme directly affected the creditors as after the merger, their debtor party had changed, thus changing their position as creditors.⁴

The class of creditors must be confined to those persons whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest. It tends to treat all creditors as being capable of consulting together in a class unless it is possible to identify very significant differences between their rights.⁵

Therefore, as the foreign lenders constitute a separate class of creditors they do not have a pari passu claim to the domestic creditors, but have an interest in Jeevani Limited. Foreign lenders constitute a separate class of creditors and in view of that there was no meeting convened for them, the scheme should be set aside.

³ Section 48, Companies Act, 2013

⁴ Clause 5, moot proposition

⁵ Sovereign life assurance company vs Dodd [1892] 2 QB 573

II. WHETHER AN ARBITRATION CLAUSE EXISTS IN THE SALE AGREEMENT

II.1 Lifeline is a renowned company in the Indian market as a major producer of food products.

Lifeline Limited is a popular company in the Indian market known for the quality and variety of food products in India, which are traded internationally. Realizing the huge potential in pharmaceutical sector it decided to foray into the pharmaceutical sector, by initiating a merger with Jeevani Limited.

After the merger Lifeline Limited continued the operations of erstwhile Jeevani of supplying generic drugs to the United States of America. Unaware of any investigation being carried out before the merger, by the US Food and Drug Administration (hereinafter referred to as FDA) Lifeline Limited received notice from the United States FDA for providing drugs of below par quality and in violation of the requisite production parameters set out by the FDA.

On further scrutiny it was found that the investigation by FDA had commenced on drugs produced by Jeevani Limited much before the merger. The promoters of Jeevani Limited committed a breach of contract⁶, in order to get wrongful gains through misrepresentation of facts⁷ and fraudulent intentions⁸. By not disclosing such vital and material facts they succeed in getting higher prices for their shares.

Lifeline limited approached the Delhi High Court because Lifeline was defrauded by the Promoters making the sale agreement void. The Hon'ble single judge of the Delhi High Court held that the dispute resolution clause could not be held as an arbitration clause.

⁶ Section 73, Indian Contract Act, 1872

⁷ Section 18, Indian Contract Act, 1872

⁸ Section 25, Indian Penal Code, 1860

11.2 The agreement does not constitute an arbitration clause

Lifeline Limited argues that the arbitration clause does not exist because this is a clause of reference.⁹ A contract between two parties provided that the decision of the Estate Officer shall be final and binding on all the parties, upon all matters, held that the clause did not contemplate arbitration but only a reference¹⁰. Arbitration agreement is to be distinguished from an agreement of reference by an engineer or expert. Contracts may contain a clause that on certain questions the decision of an engineer or an expert shall be final. The decision given by them is not an award, and the procedure involved is not an arbitration as they only give their opinion on the reference made to them.¹¹ Arbitration may be in the form of an arbitration clause in a contract or in the form of a separate agreement.¹²

It must, however, be stated that the existence of a dispute is sine qua non for both, arbitration as well as reference but the difference between the two lies in the fact that in the case of former an arbitrator settles the dispute whereas in case of latter, the matter is referred to an expert as agreed to between the parties under the agreement. It involves no arbitration.

11.3 Empowered committee does not constitute an arbitration tribunal.

.An arbitrator may be defined as a person to whom the matter in dispute are submitted by the parties and those functions are more or less judicial i.e. to decide the law and facts involved in the matter referred to him and settle the dispute or difference thus dispensing equal justice to all the parties while discharging his quasi-judicial decision, such person is called an arbitrator and is expected to act with utmost impartiality and honesty without any bias towards any party.¹³

The Empowered Committee comprises of 3 executive level officers of the company. This clause cannot be an arbitration as the 3 executive level members of the company are not neutral parties and secondly they cannot make any decision with a judicial mind. An empowered committee does not constitute arbitration, as the decisions of an empowered

⁹ State of Rajasthan v. Nava bharat constructions co., AIR 2005 SC 2795

¹⁰ Registrar, Agricultural Science v. G.G. Hosamath (2004) 13 SCC 542

¹¹ Food corporation of India v. Sreekanth Transport AIR 1999 SC 2184

¹² Section 7(2), Arbitration and Conciliation Act, 1996

¹³ Satyendra kumar v. Hind constructions Ltd. AIR 1952 Bom. 227.

committee are not enforceable, but merely binding, and also they work under the directions of the courts and are empowered to issue orders to their respective companies¹⁴.

The Supreme Court reiterated that while there is no specific form of an arbitration agreement, the words used must disclose a determination and obligation to go to arbitration and not merely contemplate the possibility thereof.¹⁵

Therefore, the sale agreement does not constitute an arbitration clause and jurisdiction to settle any disputes arising out of the subject matter of the agreement lies with the Delhi High Court.

¹⁴ T.N. Godavarman Thirumulpad v. Union Of India (2001) 10 S.C.C. 645

¹⁵ Jagdish C. v. Ramesh Chander (2007) 5 SCC 719

III. WHETHER THERE HAS BEEN AN ABUSE OF DOMINANT POSITION

In the year 2010, Jeevani Limited gave Swasth Life Limited (Swasth) absolute rights to a few of its developed and completed R&D projects and intellectual property rights. By further developing these R&D projects Swasth launched a lifesaving drug by the name “Inventive”. Lifeline Limited launched a substantially similar drug in the market, causing Swasth to obtain an interim injunction against Lifeline for the protection of its intellectual property rights.

III.1 Intellectual Property rights given to Swasth were absolute in nature.

Assigning of absolute rights to Intellectual Property Rights is similar to transfer of property and after such transfer is done the interest and rights of the transferor in the respective property are revoked. John Locke’s arguments about a right to property apply to intellectual property. It is based on the idea that a person who labors upon resources adds value to the finished product by virtue of their labor and has a natural property right to the result of their labor, which the state has a duty to enforce. This can be applied to Intellectual Property as they are a result of a person’s intellectual labor.¹⁶

Since Swasth were assigned absolute rights and created an innovator drug they successfully established a monopoly in the market. The mere discovery of a new form of a new substance which does not result in the enhancement of the known efficacy of that substance or the mere discovery of any new or new use for a known substance or of the mere use of a known process, machine or apparatus unless such known process results in a new product or employs at least one new reactant, is not an invention.¹⁷ A ‘Patent Right’ has been defined as “a right secured by patent usually meaning a right to the exclusive manufacture, use and sale of an invention or a patented article. Thus, emphasizing the fact that the manufacturing of a substantially similar drug, is an infringement of the patent holder’s intellectual property rights.¹⁸

The generic drug manufactured by Lifeline Limited was substantially similar to the drug Inventive, a fact which was accepted by the Delhi High Court who ruled in favor of Swasth

¹⁶ Second treatise of Government, John Locke

¹⁷ Section 3 (d), Indian Patent Act, 1970

¹⁸ Black’s Law Dictionary, 6th edition (1990) Pg.1125 and Cl. 34 Hindustan Lever Limited v. Godrej Soaps Limited & others, 1996

and granted an interim injunction. In considering whether to grant an interlocutory injunction, the right course for a Judge is to look at the whole case. He must have regard not only to the strength of the claimant but also to the strength, of the defence, and then decide what is best to be done. Sometimes, it is best to grant an injunction so as to maintain the status quo until the trial.¹⁹ The fact that injunction was granted proved that Lifeline Limited, had infringed the intellectual property rights of Swasth by launching a substantially similar drug in the market.

Swasth life Limited revoked the interim injunction in public interest and to maintain its monopoly in the market as it successfully managed to create a more cost effective drug.

A patent has a quid pro quo effect²⁰. Quid is the knowledge disclosed to the public and quo is the monopoly granted for the term of the patent. A patent once granted confers on the patentee the exclusive privilege of making, selling and using the invention throughout India and of authorizing others so to do²¹. This is the quo. The quid is in compliance with the various provisions resulting in the grant of the patent.²²

A person is guilty of infringement if he makes what is in substance the equivalent of the patented article. Some trifling and unessential variation has to be ignored.²³

A generic drug is a pharmaceutical product usually intended to be interchangeable with a innovator product that is manufactured without a license from the innovator company and marketed after the expiry date of the patent on other exclusive rights²⁴. Lifeline limited was wrong to market their generic drug, as our intellectual property rights still exist.

Therefore, Lifeline Limited is wrong to launch a substantially similar drug and as a result has infringed the intellectual property rights of Swasth which shall cease to exist only after 20 years, from the date the rights have been assigned.²⁵

¹⁹ Hubbard v. Vosper, (1972) 1 all ER 1023; (1972) 2 QB 84 at 1029

²⁰ Section 6, Patents Act, 1970

²¹ Section 12, Patents and Designs Act, 1911

²² Raj Prakash v. Mangat Ram AIR 1978 Del 1

²³ Raj Prakash v. Mangat Ram, AIR 1978 Del 1

²⁴ WHO, 2013 b.

²⁵ Section 53, Indian Patents Act, 1970

III.2 Competition Commission's order for investigation was not required.

The Competition Commission of India was wrong in giving a prima facie view that Swasth has done an abuse of its dominant position. Also, an order for investigation was made in bad faith. Swasth had established its monopoly in the market by being an inventor of a life saving drug, implying the fact that it exercised a dominant position in the market. But initiating an interim injunction does not amount to abuse of dominant position if it was done in order to protect the intellectual property rights.

Justice Manmohan, observed that once an interlocutory application has been disposed, the Competition Commission of India does not have a jurisdiction to interfere. It was a consent order, the Court said referring to the withdrawal of the 2011 interim application, and added that instead of moving CCI, the petitioners should have filed a suit for restitution if they had felt aggrieved. Prima facie the Court was of the view that a substantial question of jurisdiction of Competition Commission of India arose in this petition.²⁶

Therefore, Competition Commission of India does not have a jurisdiction in this matter and also Lifeline Limited was wrong on its part to approach the Competition Commission of India, and no Abuse of Dominant position has been done by the Swasth limited.

²⁶ M/s Bull Machines Pvt. Ltd. vs. M/s JCB India Ltd. and others, Case No. 105 of 2013 in CCI

PRAYER

In the light of the issues raised, arguments advanced and authorities cited, may this Hon'ble Court be pleased to:

1. Order and direct the company, Jeevani Limited, that the foreign lenders constitute a different class of creditors.
2. Order and the direct the company to set aside the scheme of arrangement.
3. Hold that the sale agreement does not constitute an Arbitration clause.
4. Hold that no Abuse of Dominant position has been done.

AND/OR

Pass any other order that it deems fit in the interest of justice, equity and good conscience. And for this, Appellants as in duty bound, shall humbly pray.

