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5. <http://www.judis.nic.in>
6. <http://www.lawsofindia.org>
7. <http://www.manupatra.com>
8. <http://www.scconline.com>
9. <http://www.supremecourtcaselaw.com>

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## LIST OF ABBREVIATIONS

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|                 |                                      |
|-----------------|--------------------------------------|
| <b>A.I.R.</b>   | <i>ALL INDIA REPORTER</i>            |
| <b>All</b>      | <i>ALLAHABAD</i>                     |
| <b>All E.R.</b> | <i>ALL ENGLAND REPORTER</i>          |
| <b>AP</b>       | <i>ANDHRA PRADESH</i>                |
| <b>Bom</b>      | <i>BOMBAY</i>                        |
| <b>C.L.R.</b>   | <i>COMMONWEALTH LAW REPORTER</i>     |
| <b>Cal</b>      | <i>CALCUTTA</i>                      |
| <b>Co.</b>      | <i>COMPANY</i>                       |
| <b>Comm.</b>    | <i>COMMISSIONER</i>                  |
| <b>CWN</b>      | <i>CALCUTTA WEEKLY NOTES</i>         |
| <b>Del</b>      | <i>DELHI</i>                         |
| <b>Edn.</b>     | <i>EDITION</i>                       |
| <b>e.g.</b>     | <i>EXEMPLUM GRATIA (FOR EXAMPLE)</i> |
| <b>K.B.</b>     | <i>KINGS BENCH</i>                   |
| <b>Lah</b>      | <i>LAHORE</i>                        |
| <b>LR</b>       | <i>LAW REPORTER</i>                  |
| <b>Mad</b>      | <i>MADRAS</i>                        |
| <b>MANU</b>     | <i>MANUPATRA</i>                     |
| <b>M.P.</b>     | <i>MADHYA PRADESH</i>                |
| <b>Pat</b>      | <i>PATNA</i>                         |
| <b>PC</b>       | <i>PRIVY COUNCIL</i>                 |

|               |                                       |
|---------------|---------------------------------------|
| <b>p.</b>     | <i>PAGE</i>                           |
| <b>Para.</b>  | <i>PARAGRAPH</i>                      |
| <b>Pun</b>    | <i>PUNJAB AND HARYANA</i>             |
| <b>SC</b>     | <i>SUPREME COURT</i>                  |
| <b>SCC</b>    | <i>SUPREME COURT CASES</i>            |
| <b>SCN</b>    | <i>SHOW CAUSE NOTICE</i>              |
| <b>SUESS</b>  | <i>PERSUESS INC.</i>                  |
| <b>U.P.</b>   | <i>UTTAR PRADESH</i>                  |
| <b>VEX</b>    | <i>VECULA EXCLUSIVE CONSULTANCIES</i> |
| <b>W.L.R.</b> | <i>WEEKLY LAW REPORTS</i>             |

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## STATEMENT OF JURISDICTION

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THE APPELLANTS HAVE APPROACHED THE HON'BLE SUPREME COURT OF INDIA UNDER ARTICLE 136 OF THE CONSTITUTION OF INDIA. LEAVE HAS BEEN GRANTED BY THIS HON'BLE COURT AND THE MATTER HAS NOW BEEN POSTED FOR FINAL HEARING. ARTICLE 136 OF THE CONSTITUTION OF INDIA READS AS HEREUNDER:

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**“136. SPECIAL LEAVE TO APPEAL BY THE SUPREME COURT.**

*(1) NOTWITHSTANDING ANYTHING IN THIS CHAPTER, THE SUPREME COURT MAY, IN ITS DISCRETION, GRANT SPECIAL LEAVE TO APPEAL FROM ANY JUDGMENT, DECREE, DETERMINATION, SENTENCE OR ORDER IN ANY CAUSE OR MATTER PASSED OR MADE BY ANY COURT OR TRIBUNAL IN THE TERRITORY OF INDIA.*

*(2) NOTHING IN CLAUSE (1) SHALL APPLY TO ANY JUDGMENT, DETERMINATION, SENTENCE OR ORDER PASSED OR MADE BY ANY COURT OR TRIBUNAL CONSTITUTED BY OR UNDER ANY LAW RELATING TO THE ARMED FORCES.”*

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## SYNOPSIS OF FACTS

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- **VEX**: India's leading Consultancy Company which provides services to corporate sector clients including advice on resource allocation, project finance, financial management, staff training and public relations management.
- **SEUSS**: A private limited company, they approached VEX to advise them on running their business.
- **Standard Form of Contract**: This contract contains several negative covenants including prohibition from disclosing any information during tenure of contract and for a period of 7 years after its termination. VEX also covenants with its clients to maintain client confidentiality for like term of 7 years.
- **Contract between VEX and SEUSS**: Both the parties executed the contract on 2<sup>nd</sup> August, 2007.
- **Clause 41**: This clause provided that in case of dispute or differences between the parties, it will be solely decided by Mr. Rohan Hair and his decision will be final and binding. The decision shall exclude all other remedies including redressal from any court.
- **Clause 42**: This clause provided that in case of breach of confidentiality SEUSS will be liable for liquidated damages.
- **Legal Notice**: SEUSS sends a legal notice to VEX on 16<sup>th</sup> Oct, 2010 that they have breached confidentiality covenant by putting their name and other credentials on their website under "Frequently Asked Questions" on 10<sup>th</sup> Oct, 2010.
- **Seeking Advice after sending Legal Notice**: SEUSS received advice from VEX of a circular letter to be written by SEUSS to all their retailers to salvage the situation and SEUSS acted on it.
- **Filing of the Suit**: SEUSS instituted suit for damages for breach of the covenant of confidentiality by VEX in Trial Court and Trial Court found in favour of SEUSS. High Court overturned the finding of the Trial Court, set aside the decree of damages and dismissed SEUSS's suit.
- **Special Leave Petition**: On filing the Special Leave Petition, leave is granted and the Civil Appeal has now been posted for final hearing by this Hon'ble Supreme Court.



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## **STATEMENT OF ISSUES**

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THE APPELLANTS RESPECTFULLY ASKS THE HON'BLE SUPREME COURT OF INDIA, THE FOLLOWING QUESTIONS:

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### **ISSUE – I**

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**WHETHER CLAUSE 41 OF THE CONTRACT DATED AUGUST 2, 2007 IS VALID?**

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### **ISSUE – 2**

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**WHETHER SEUSS IS ENTITLED TO INVOKE CLAUSE 42 OF THE CONTRACT DATED AUGUST 2, 2007, AND TO CLAIM DAMAGES?**

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## SUMMARY OF ARGUMENTS

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### VALIDITY OF CLAUSE 41 OF THE CONTRACT DATED AUGUST 2, 2007

It is humbly submitted that Section 28 of the Indian Contract Act, 1872 provides an exception for arbitration agreements. Since Clause 41 constitutes a valid arbitration agreement, it falls within the exception aforementioned exception. Further, Clause 41 acts as a partial restraint on legal remedy, which is allowed under section 28.

### APPLICABILITY OF CLAUSE 42 OF THE CONTRACT DATED AUGUST 2, 2007 AND THE RIGHT TO CLAIM DAMAGES.

It is humbly submitted that Persuess Inc. cannot invoke Clause 42 of the contract as the clause clearly states that liquidated damages mentioned therein may only be claimed by Vecula Exclusive Consultancies in case of breach of the covenant of confidentiality. Therefore as per the settled position of law, when the language of a clause is express and unambiguous the courts are not at liberty to imply terms not specifically included. Further, Persuess Inc. cannot claim damages from Vecula Exclusive Consultancies as the conduct of Persuess Inc. demonstrates that it has waived its right to claim damages. Many judicial pronouncements have upheld the act of drawing such and inference.

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## ARGUMENTS ADVANCED

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### I. WHETHER CLAUSE 41 OF THE CONTRACT DATED AUGUST 2, 2007 IS VALID?

#### A. THAT CLAUSE 41 IS A VALID ARBITRATION CLAUSE

1. It is humbly submitted that Section 28 of the Indian Contract Act, 1872 provides an exception for arbitration agreements. Since Clause 41 constitutes a valid arbitration agreement, it falls within the exception aforementioned exception. Further, Clause 41 acts as a partial restraint on legal remedy, which is allowed under section 28.
2. Section 7 of the Arbitration and Conciliation Act, 1996 ( hereinafter referred to as “Arbitration Act”) states that an ‘arbitration agreement’ is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.
3. The Honourable Supreme Court of India has laid down the essentials of a valid arbitration agreement in *K.K. Modi v. K.N. Modi*<sup>1</sup> and *Bihar State Mineral Development Corporation v. Encon Builders (I)(P) Ltd*<sup>2</sup> as follows: *firstly*, there must be a present or future difference in connection with contemplated affair; *secondly*, there must be an intention of the parties to settle such difference by a private tribunal; *thirdly*, parties must agree in writing to be bound by the decision of the tribunal; and *lastly* parties must be *ad idem*. It is humbly asseverated that Clause 41 satisfies all the four essentials mentioned above.
4. It is respectfully submitted that there is a difference between power of supervision and administrative control on one hand and adjudication of the dispute on the other hand. Clause 41 explicitly envisages the existence of a dispute and therefore cannot be construed to be a reference to an expert. In *Bharat Bhushan Bansal v. U.P Small Industries Corpn. Ltd., Kanpur*<sup>3</sup> it was held by the Hon’ble Supreme Court that a clause referring all disputes in respect of the contract to the chief engineer is essentially an arbitration clause despite the absence of the word arbitration.

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<sup>1</sup> (1998) 3 SCC 573

<sup>2</sup> (2003) 7 SCC 418

<sup>3</sup> AIR 1999 SC 899; Also see *Sushila Seth v. State of MP* AIR 1980 Delhi 244

**B. THAT THE CLAUSE DOES NOT PROVIDE FOR AN ABSOLUTE RESTRICTION.**

5. In a recent judgment of this Court in the case of *VISA International Ltd. v. Continental Resources (USA) Ltd.*<sup>4</sup> it held that, “No party can be allowed to take advantage of inartistic drafting of arbitration clause in any agreement as long as clear intention of parties to go for arbitration in case of any future disputes is evident from the agreement and the material on record, including surrounding circumstances.”
6. When two contradictory constructions are possible construction that gives effect to the arbitration agreement should be preferred.<sup>5</sup> Contract, being a commercial document must be interpreted in a manner which gives efficacy to the contract rather than invalidate it.<sup>6</sup> The narrow technical approach is improper.<sup>7</sup> Clause 41 does not oust the jurisdiction of courts; it is a mere condition precedent. Such a person exercises quasi-judicial function and his decision can be questioned in court.<sup>8</sup> Accepting but not conceding that an alternative unfavourable interpretation is also possible, this Hon’ble Court should still rule in favour of a valid arbitration clause.
7. An arbitration clause cannot be held to be vague only because the mode and manner of the arbitration is stated to be set out subsequently as per the agreement.<sup>9</sup> Thus, even though the procedural aspects of the arbitration may not have been laid down in Clause 41, the clause is still valid. Accepting but not conceding that Clause 41 acts as an absolute bar, it is still severable from the remaining clause about reference of the dispute to arbitration which is valid and enforceable.<sup>10</sup>

**C. THAT THE COURT IS UNDER AN OBLIGATION TO REFER THE MATTER TO THE ARBITRATOR.**

8. Section 8 of the Arbitration Act makes it obligatory on the court to refer parties to arbitration if the action brought before the court is covered by a valid arbitration agreement. It does not require that the subject matter under arbitration must be captured in an existing, complete

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<sup>4</sup> (2009) 2 SCC 55

<sup>5</sup> *Oil and Natural Gas Commission v. Sohanlal Sharma* ILR 1969 (2) Cal 392

<sup>6</sup> *Arbitration, Conciliation and Mediation Manupatra V.A. Mohta*, second edn, p. 128

<sup>7</sup> *Union of India v. M/s. D. N. Revri & Co.* AIR 1976 SC 2257

<sup>8</sup> *South India Railway Co. Ltd. v SM Bhashyam Naidu* AIR 1935 Mad 356

<sup>9</sup> *Mukund Limited v. Hindustan Petroleum Corporation Limited* 2005 (2) Bom CR 21

<sup>10</sup> *Shin Satellite Public Co. Ltd. v. Jain Studios Ltd* (2006) 2 SCC 628

agreement.<sup>11</sup> The intention behind this provision is to prevent the use of dilatory tactics by party interested in getting out of their commitment to arbitration.<sup>12</sup>

9. The main attribute of an arbitration agreement, is consensus ad idem to refer the disputes to arbitration.<sup>13</sup> This is clearly reflected in Clause 41. In course of the correspondence it is clear that the parties we ad idem to the terms relating to the arbitrator.<sup>14</sup> There is nothing in the factual matrix to suggest that the respondent had any problem with the appointment of Mr Rohan Hair. Thus, the respondent should not, at this stage, be allowed to retract on their commitment towards arbitration.
10. Section 16 of the Arbitration Act expressly authorizes the arbitrator to decide upon the existence or validity of arbitration agreement.<sup>15</sup> Hence, even the question of validity of Clause 41 should be decided upon by Mr. Rohan Hair. When frustration is alleged, the performance of a contract may have come to an end but the contract remains in existence for the purpose of resolution of disputes including the question whether the contract was discharged under the doctrine of frustration or by breach.<sup>16</sup> Thus an arbitration clause survives the termination of agreement.<sup>17</sup>

## **II. WHETHER SUESS IS ENTITLED TO INVOKE CLAUSE 42 OF THE CONTRACT DATED AUGUST 2, 2007, AND TO CLAIM DAMAGES?**

### **A. THAT SUESS CANNOT INVOKE CLAUSE 42 OF THE CONTRACT.**

11. It is submitted that the compromis<sup>18</sup> clearly enunciates that liquidated damages may be invoked only when a breach of confidentiality is committed by SUESS and the liquidated damages estimated will accrue to VEX when they are an innocent party to a breach of confidentiality.

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<sup>11</sup> *P. Anand Gajapati Raju v. PVG Raju* AIR 2000 SC 1886

<sup>12</sup> *State of UP v. Janki Saran Kailashchandra* AIR 1973 SC 2071

<sup>13</sup> *Jagdish Chander v. Ramesh Chander & Ors.* [(2007) 5 SCC 719]; *Bihar State Mineral Development Corporation v. Encon Builders* [(2003) 7 SCC 418]

<sup>14</sup> *Rickmers Verwaltung GMBH v. Indian Oil Corp. Ltd.* [(1999) 1 SCC 1]

<sup>15</sup> *Ruchi Strips & Alloys Ltd v. Tata South-East Asia Ltd* (2004) 13 SCC 510

<sup>16</sup> *Naihati Jute Mills Ltd v. Khyaliram Jagannath* AIR 1968 SC 522; *Khardah Co Ltd v. Raymon & Co Ltd.* AIR 1962 SC 1810 ( Mulla 1033)

<sup>17</sup> *Abraham Joseph v. Subodh Kumar Bahl* 2002 Supp Arb LR 577; *Indian Drugs & Pharmaceuticals Ltd. V. Indo Swiss Synthetic Gem Manufacturing Co. Ltd* AIR 1996 SC 543

<sup>18</sup> Refer *Compromis*, ¶ 7.

Events mentioned in Para 6 of *Compromis*<sup>19</sup> explain that the rationale behind the pre-estimation of damages is tailored to the needs of VEX. It can therefore be said that there is no ambiguity in the terms of Clause 42 of the contract especially keeping in mind the surrounding circumstances.

12. It is submitted that the principle is well settled that a stipulation not expressed in a written contract should not be implied merely because the Court thinks that it would be a reasonable thing to imply it.<sup>20</sup> This proposition has been reiterated in a plethora of Indian and foreign cases. In *Babulall Choukhani v. Caltex (India) Ltd.*<sup>21</sup>, the court cited with approval the views of Scrutton L.J. in *Comptoir Commercial Anversois v. Power Son and Co.*<sup>22</sup> cited by Lord Morton of Henryton in *Pragdas Mathuradas v. Jeewanlal*<sup>23</sup>, “The Court... ought not to imply a term merely because it would be a reasonable term to include if the parties had thought about the matter...” In *Trollope & Colls Ltd. v. N.W. Metropolitan Regional Hospital Board*<sup>24</sup>, the court held that “... If..., the terms of a contract are explicit and free from ambiguity, those terms will be applied even if the court considered that some other term would be more appropriate...” In *D. Vanjeeswara Aiyar v. The District Board of South Arcot*<sup>25</sup>, the court refused to imply a term inconsistent with the express terms of the contract and held that “...There is no room, however, for an implied contract where there is an express contract in existence...”
13. It is therefore averred that since Clause 42 expressly stipulated that any breach committed by SUESS of any covenants of confidentiality will hold SUESS liable for liquidated damages, the clause cannot possibly be extended to any alleged breach of confidentiality by VEX.

**B. THAT SUESS IS NOT ENTITLED TO CLAIM DAMAGES AS PER THE COVENANT OF CONFIDENTIALITY**

14. It is beseeched before this Hon’ble Court that in the instant case SUESS had asked VEX to advise them on the situation arising out of the breach of contract. Further, SUESS then went on

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<sup>19</sup> Refer *Compromis*, ¶ 6: “VEX replied that it was the pre-estimated loss, specific to the fashion industry if information regarding their business formulae or any of their computer programs and applications were leaked by SEUSS or otherwise misused by them for purposes not pre-approved by VEX.”

<sup>20</sup> *Denmark Production Ltd. v. Boseobal Production Ltd.*, (1968) 3 All ER 513 CW; (1968) 3 WLR 841; *Pragdas Mathuradas v. Jeewanlal*, AIR 1948 PC 217.

<sup>21</sup> AIR 1967 Cal 205

<sup>22</sup> (1920) 1 KB 868

<sup>23</sup> *Supra* note 20

<sup>24</sup> (1973) 2 All ER 260; (1973) 1 WLR 601 (HL).

<sup>25</sup> AIR 1941 Mad 887

to act on the advice so tendered by VEX. It is averred that such conduct on part of SUESS must be inferred as a waiver of their right to claim damages.

15. It is submitted that Section 63<sup>26</sup> of the Indian Contract Act, 1872 gives the promisee the power to dispense with or remit performance of a promise. This statutory provision enables a promisee to waive his rights under a contract; however, the statute is silent on the matter of what constitutes a waiver. According to *Halsbury's Laws of England*<sup>27</sup>, a waiver is a term used to describe a process whereby one party voluntarily grants a concession to the other party by not insisting upon the precise mode of performance. In *Craine v. Colonial Mutual Fire Insurance Co. Ltd.*<sup>28</sup>, the court laid down essentials to construe a waiver. First, some distinct action ought to be done to constitute waiver, next it must be intentional and lastly, it must be with knowledge. The waiver can either be oral, in writing or may be inferred from the conduct of the parties.<sup>29</sup> In *Bishwanath Balkrishna v. Rampeyari Devi*<sup>30</sup>, the court held that even though a tenant has the right to have future rent adjusted to the last, the intention to adjust had to be communicated or it should be capable of being inferred from the surrounding circumstances before the tenant becomes a defaulter. It is further submitted that in *Bhagwati Oxygen Ltd. v. Hindustan Copper Ltd.*<sup>31</sup>, the court inferred from the conduct of HCL where it continued to accept sub-standard gas from BOL to have waived its right to claim damages for the same.
16. In the instant case, it is averred, the act of asking of advice constituted the first essential of *Colonial Mutual Fire Insurance* case, intention is demonstrated by acting on the said advice and the fact that both these acts took place after sending the legal notice dated October 16, 2010<sup>32</sup> shows that SUESS had knowledge of its rights, thereby fulfilling the third essential. Therefore it was fairly inferred from the conduct of SUESS that by taking advice from the alleged perpetrator of the situation and then acting on it, SUESS had waived its right to claim damages from VEX.

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<sup>26</sup> **63. Promisee may dispense with or remit performance of promise.**- Every promisee may dispense with or remit, wholly or in part, the performance of the promise made to him, or may extend the time for such performance, or may accept instead of it any satisfaction which he thinks fit.

<sup>27</sup> Vol 9, 4<sup>th</sup> edn, ¶ 571

<sup>28</sup> (1920) 28 CLR 305

<sup>29</sup> *Bruner v. Moore* [1904] 1 Ch 305; See also: *T. A. Choudhary v. State of A.P. and Ors.*, 2004 (3) ALD 357; *M. Ganga Reddy v. State of A.P.* 1996 (3) ALD 434; *Chitty on Contracts*, twenty-fifth edn, ¶ 1495, ¶ 1498; *Law of Contract by Treitel*, eighth edn, p.102;

<sup>30</sup> AIR 1979 Pat 159.

<sup>31</sup> (2005) 6 SCC 462; The apex court had relied on its earlier decisions in *Associated Hotels of India Ltd. v. S.B. Sardar Ranjit Singh* [1968] 2 SCR 548 and *Brijendra Nath Bhargava and Anr. v. Harsh Vardhan and Ors.* [1988] 2 SCR 124.

<sup>32</sup> Refer *Compromis*, ¶ 9.

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**PRAYER**

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**W**HEREFORE IN THE LIGHT OF THE ISSUES RAISED, ARGUMENT ADVANCED, REASONS GIVEN AND  
AUTHORITIES CITED, THIS HON'BLE COURT MAY BE PLEASED TO:

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**TO HOLD**

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- THAT CLAUSE 41 OF THE CONTRACT DATED AUGUST 2, 2007 IS VALID.
- THAT PERSUESS INC. CANNOT INVOKE CLAUSE 42 OF THE CONTRACT DATED AUGUST 2, 2007.
- THAT PERSUESS INC. IS NOT ENTITLED TO CLAIM DAMAGES.

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**TO DIRECT**

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THE PARTIES TO SETTLE THE DISPUTE THROUGH ARBITRATION AS PER CLAUSE 41 OF THE CONTRACT  
DATED AUGUST 2, 2007.

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**TO SET ASIDE**

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THE ORDER PASSED BY THE HIGH COURT

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**MISCELLANEOUS**

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AND ANY OTHER RELIEF THAT THIS HON'BLE COURT MAY BE PLEASED TO GRANT IN THE INTERESTS  
OF JUSTICE, EQUITY AND GOOD CONSCIENCE

*ALL OF WHICH IS RESPECTFULLY SUBMITTED.*

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**COUNSELS FOR THE APPELLANTS**