IN THE SUPREME COURT OF INDIA

AT NEW DELHI

(Civil appellate Jurisdiction)

Civil Appeal No. 8176 of 2015

(Article 136 of the Constitution of India, 1950 read with Order XV Rule 1 of the Supreme Court Rules, 1966)

Dr. Jack Miliband …Appellant

v.

Health Solutions Ltd. …Respondent

Civil Appeal No. 8177/2015

(Article 136 of the Constitution of India, 1950 read with Order XV Rule 1 of the Supreme Court Rules, 1966)

Dr. Jack Miliband …Appellant

v.

Vikram Bhatia …Respondent

Civil Appeal No. 8178/2015

(Article 136 of the Constitution of India, 1950 read with Order XV Rule 1 of the Supreme Court Rules, 1966)

Health Solutions Ltd. …Appellants

v.

Dr. Jack Miliband …Respondent

Written Submissions on behalf of

The Appellant/Respondent

$A_{90,}$

Counsel for Dr. Jack Miliband.

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TABLE OF AUTHORITIES

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- Civil Jurisdiction and Justice act, 1982 (UK).
- Companies act, 1956.
- Companies Act, 2013.
- Indian Contract Act, 1872
- The Code of Civil Procedure, 1908.

STATEMENT OF JURISDICTION

I. CIVIL APPEAL NO. 8176 of 2015

The Appellant has approached this Honourable Court under Article 136 of the Constitution of India, 1950. Read with Order XV Rule 1 of the Supreme Court Rules, 1966.

II. Civil Appeal No. 8177 of 2015

The Appellant has approached this Honourable Court under Article 136 of the Constitution of India, 1950, read with Order XV Rule 1 of the Supreme Court Rules, 1966.

III. CIVIL APPEAL NO. 8178 of 2015

The Appellant has approached this Honourable Court under Article 136 of the Constitution of India, 1950, read with Order XV Rule 1 of the Supreme Court Rules, 1966. Respondent submits to the jurisdiction of this court.

STATEMENT OF FACTS

THE PARTIES

Dr. Jack Miliband is a highly renowned expert in tropical diseases, and citizen of Frugalia. He has worked in the pharmaceutical business for over 20 years, and been resident in Frugalia for over 12.

Health Services Ltd ("HSL") is the largest pharmaceutical company in India. It is a public company, registered in New Delhi. HSL has two wholly-owned subsidies, HS Holdings Corporation ("HSC") and Frugalian Health Products Ltd ("FHPL"). HSC is registered in Vaduz, and FHPL is registered in Frugalia City.

Vikram Bhatia is the long-standing CEO of HSL. He owns a significant stake as equity in HSL.

THE INTERFACE BETWEEN HSL, HSC AND FHPL

HSC and FHPL were incorporated solely with the object of avoiding tax and evading the jurisdiction of Frugalian courts. HSC, in cooperated in the tax-haven of Liechtenstein, served as a shell company, and had no other function besides channeling money between FHPL and HSL. This was done to shield HSL from direct international with HSL, and thereby keep them out of their jurisdiction. FHPL ran no other business but that of HSL. All the board of directors were appointed by HSL (through the shell HSC). Funds for rent and other capital expenses were paid in their *entirety* by HSL, through HSC, and under various guises. A nominal 0.1% was given to FHPL as commission from HSL. FHPL did not have any other income. HSL exercised "*effective control*" over FHPL.

THE AGREEMENTS

HSL obtained an exclusive contract to market certain drugs in Frugalia, in late 2010.

With a view to strengthen their R&D department to meet the needs of this new market, they approached Dr. Miliband. Miliband was willing to work for HSL if two specific conditions were met: *First*, that he was offered an equity package in HSL, and *Second*, that he obtained a pension facility with equaling amount of protection as the one he currently possessed, under birth law. Mr. Bhatia agreed to the first term, and falsely represented that there was an identical pension scheme under Indian law,

which Dr Miliband could avail of. Based on these assurances, two contacts were formed:

i) An employment contract between HSL and Dr. Miliband. ("EA")

ii) A Share Purchase Agreement between Mr. Bhatia and Dr. Miliband. ("SPA)

Both these contracts were struck on the same day. *Notably:*

The employment contract had a termination clause stating that HSL may terminate Dr. Miliband *either* by giving him a 12-month notice, *or* by paying him £1 million.

The Share Purchase Agreement was for purchase of an 8% stake in HSL, worth £4.5 million. However, they were sold to Mr. Miliband for £5 million. The SPA also has a proviso (clause 7) giving Mr. Bhatia the *right to first refusal*. This clause is suspect under the Companies act.

THE DISPUTES

After a period of increasing disharmony, on September 30, 2015, Mr. Bhatia called Dr. Miliband into his office and *summarily dismissed* him. However, the accounts department, unfortunately, missed out the payment required for such a dismissal. This led to Dr. Miliband believing wrongly that he had not, in fact, been terminated. Due to this belief, Dr. Miliband refused another job he was offered soon after. On 19th December, however, an ordinance was enacted, barring the continued employment of certain foreign citizens in Indian pharmaceutical companies. When Mr. Bhatia heard of this, he sought to take advantage of the situation. He instructed the accounts department to withhold the £1 million payment meant for Dr. Milibands summary dismissal *on the 30th of September*. Instead, Mr. Bhatia sent Dr. Miliband a letter claiming that the contract had never been terminated, but had now become frustrated by a government ordinance. HSL, he regretfully stated, would therefore not make any payment to him. ["*wrongful termination dispute*"]

Dejected, Dr. Miliband had to no choice but to leave the country, and therefore sought to sell his shares in HSL. Since his purchase, HSL share prices had plummeted, and his share was now only worth £700,000 in the market. However, Dr. Miliband was offered £1 million by a London Bank, for a limited period of 24 hours. Not wanting to miss such a chance, and believing his relations with HSL and Mr. Bhatia to be over, Dr. Miliband went ahead and sold the shares. HSL contends that their competitor, Bruton, brought these shares and consequently, HSL's partners in a government

consortium (Medicamento and Versus) opted to invoke a specific clause in the consortium agreement, which allowed them to remove HSL in such instances
(When a rival acquired a 10% or greater stake in one of the companies). Due to this removal, HSL is said to have suffered losses of £2 million. HSL demanded the sum be paid for by Mr. Miliband. ["*SPA Dispute*"]

Mr. Miliband's solicitors discovered, while analyzing his disputes, that Mr. Bhatia had made a false representation regarding pension schemes in India, when Dr. Miliband first agreed to work with him. ["*Dispute arising from* misrepresentation"]

Keeping this in mind, Dr. Bhatia instituted proceedings in the Frugalian Commercial Court ["FCC"]

SUITS

Dr. Bhatia filed two suits before the FCC:

i) Against HSL- Claiming the £1 million as agreed sum/ damages for breach of contract, along with unpaid salary for 3 months;

ii) Against Mr. Bhatia- Claiming damages for negligent misrepresentation.

Both of these suits were served on Mr. Bhatia *in person*, while he was in Frugalia due to a faulty aircraft. Mr. Bhatia as well as a representative of HSL made an appearance before the FCC in the matter, albeit only to contest jurisdiction. The court upheld its own jurisdiction, applying its civil procedure rules under the principle of "*lex fori*". Further, the court extensively examined evidence on either side, and finally concluded as follows:

i) HSL liable to pay £ 1 million as an agreed sum/ as damages, and unpaid salary for period between 30th September and 19th December

ii) Mr. Bhatia liable to pay £4.5 million as damages for negligent misrepresentation, with the amount being calculated as of the date of dismissal.

These Judgments attained finality under Frugalian law. Next, Dr. Miliband filed suits before the Delhi High Court, seeking enforcement of *Forrest I & II* under section 13 of the Civil Procedure Code, or alternatively, on merits. Meanwhile, HSL instituted a Civil Suit for breach of the SPA against Dr. Miliband. In the first instance, a single judge heard all three suits. He produced the following findings:

i) Forrest I is conclusive. *Alternatively*, Dr. Miliband is entitled to the termination payment or unpaid salary.

ii) Forrest II is conclusive. *Alternatively*, Dr. Miliband is entitled to £4 million as damages.

iii) Clause 7 of the SPA is enforceable; Dr. Miliband is therefore liable for its breach.

All these decisions were appealed before the Division bench, which pronounced the following:

i) Forrest I is not conclusive as, among other reasons, the FCC was not a court of competent jurisdiction with regard to HSL; The EA was frustrated on 19th December and therefore Dr. Miliband is not entitled to any damages.

ii) Forrest II is not conclusive *as* the FCC was not a court of competent jurisdiction with regard to Mr. Bhatia; The measure of damages being £500,000 need not be awarded as Mr. Bhatia's misrepresentation did not materialize into any real loss.

iii) Clause 7 of the SPA is not enforceable as, *First*, it was not incorporated in the articles of Association, and *Second* because HSL is a public company. *In any case*, the damages are too remote and therefore not recoverable.

Both parties sought leave under Article 136 of the Indian constitution to appeal to the Supreme Court. The honourable Court at the admission hearing granted leave.

ISSUES RAISED

APPEAL I

i) Whether Forrest 1 is conclusive.

ii) If not, is Dr. Miliband entitled to £1 million as debt *or* damages; *and/or* unpaid salary for the period between September 30th and December 19th, 2013.

APPEAL II

i) Whether Forrest 2 is conclusive.

ii) If not, what is the correct measure of damages?

APPEAL III

i) Whether clause 7 of the SPA is enforceable.

ii) If so, is the loss for which HSL seeks damages too remote?

SUMMARY OF ARGUMENTS

APPEAL - 1

I- Forrest 1 is conclusive

HSL can be considered "*present*" in Frugalia as a *representative* (FHPL) carries out its business in Frugalia, from a fixed place. Despite of not having contractual authority, FHPL in reality, is under complete control of HSL and acts as its *agent* in Frugalia. Further, the jurisdiction clause does not have any effect on the *competence* of the court. *In any case*, the fact that the contract was one between an employer and an employee exempts the application of the jurisdiction clause.

II- Dr. Miliband is entitled to £ 1 million *as well as* unpaid salary

The employment contract was terminated on September 30th when Mr. Bhatia dismissed Dr. Miliband. However, due to non-receipt of the termination payment that he was entitled to under the contract (£1 million), Dr Miliband remained uncertain as to his state of employment. As a result of this, he squandered an alternative employment opportunity. Since these losses were the direct consequence of the mistake by HSL, they are liable to i) pay the debt owed under the contract and ii) pay a sum equivalent to Milibands salary for the period upto December 19, as *damages* for loss suffered.

APPEAL - 2

I- Forrest 2 is Conclusive

Mr. Bhatia was *present* in Frugalia at the relevant time, i.e. time of service of suit. Therefore, The Frugalian Commercial Court had jurisdiction over him *in personam*.
Bhatia's presence in Frugalia cannot be considered involuntary, as he willingly accepted the visa and ventured into Frugalia when he had the choice not to. *In any case*, the exception for involuntary presence is inapplicable in India, in light of the *MV Elizabeth* case.

II – Dr. Miliband is entitled to £4 million as damages

This situation is identical to that of the *Smiths* case, where it was held that when the good sold was *inherently problematic* and *pregnant with disaster*, a special method of

computing damages may be adopted, that of actual loss in terms of buying price and selling price. Applying this, Dr. Miliband lost £4 million on the share transaction and therefore is entitled to that sum as *damages*.

APPEAL – 3

I- Clause 7 of the SPA is *not enforceable*.

The Companies requires shares of public companies, like HSL, to be *freely transferable.* By imposing restrictions in the form of a *right to first refusal*, this requirement is infringed. Therefore, agreement is void as per sec. 9. Further, any restrictions on the transfer of shares must be included in the Articles of association, otherwise they are *not binding*. Hence, *in any case*, Clause 7 of the SPA is not enforceable.

II- The loss is too remote

The loss was not *directly caused* by the breach. The intervening factors, including the actions of third parties, render the loss *remote*. *In any case*, the loss could not have been foreseen by Dr. Miliband had he considered the breach when he formed the contract. He had no knowledge of the consortium, and therefore could not have foreseen this occurrence.

ARGUMENTS ADVANCED

APPEAL - I

Forrest 1 is conclusive

As per Section 13 of The Civil Procedure Code[1] (henceforth "CPC"), a foreign judgment is considered "*conclusive*" unless it falls under one of six specific exceptions. The first of these exceptions excludes judgments given by foreign courts not of "*competent jurisdiction*".[2] For a foreign court to be one of *competent jurisdiction*, it must have jurisdiction "*in the international sense*"[3] and under the Indian "*Conflict of law rules*".[4] For such jurisdiction, either of the following conditions must be met: i) the defendant was *present* in the country when proceedings were instituted; or ii) the defendant submitted himself to the courts jurisdiction.[5] Nothing more is required.[6] Appellant submits that A] HSL was, in fact, "*present*" in Frugalia and therefore fell under its jurisdiction; B] The jurisdiction clause in the employment contract is inapplicable; *In any case*, C] The respondent fell under Frugalias' jurisdiction by virtue of the employment contract; and D] The judgment does not fall under any other exception specified in section 13.

A] HSL WAS "*PRESENT*" IN FRUGALIA

In the international law sense, a court can exercise jurisdiction over a person or corporation if they are "*present*" in the country at the time of initiation of proceedings.[7] A company is considered "*present*" if it, or its representative, *carries out business* in a country from a reasonably permanent place.[8] The appellant submits that HSL carried out business in Frugalia through its wholly owned subsidy, FHPL, which acted as its "*representative*".[9] This can be shown in the following manner:

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[1] The Code of Civil Procedure, 1908.
[2] Sec. 13(a), The Code of Civil Procedure, 1908.
[3] Chormal Balchand Firm, Chowrahat v Kasturi Chand Seraoji and Another, AIR 1938 CAL 511.
[4] R. Viswanathan v Rukn-Ul-Mulk Syed Abdul Wajid, AIR 1963 SC 1.
[5] As per the principles of international private law. M.V. Elisabeth And Ors. v Harwan Investment And Trading Pvt. Ltd., AIR 1993 SC 1014.
[6] Adrian Briggs, CIVIL JURISDICTION AND JUDGMENTS, 724, ¶7.44 (*edited by* Peter Rees, 5th edn., 2009).
[7] Adams v Cape Industries Plc, 1989 WL 651250**.**
[8] Adams v Cape Industries Plc, 1989 WL 651250**.**
[9] Adams v Cape Industries Plc, 1989 WL 651250**.**

Second, HSC paid for the rent and capital expenses of FHPL,[10] and was reimbursed for the same *in toto* under the guise of "*consultancy agreement*" and "*supplemental fee*". It is submitted that HSC was a mere shell established to transfer money, and for all effective purposes, HSL transacted directly with FHPL.[11] *Third*, the sole remuneration received by FHPL was a commission from HSL, which was a mere 0.1% of the total profits generated by HSL through FHPL. Clearly, FHPL did not have its own interests in mind, but instead acted as a puppet for HSL. *Fourth*, HSL exercised a high degree of *effective control* over FHPL. "*Effective control*" means control either directly or through subsidiaries.[12] In the *Vodafone* case,[13] the relevant questioned was framed as the "*difference between having power and having a persuasive control*."[14] It is submitted that in the instant case, *all 10* of FHPL's directors were directly appointed by HSL.[15] Further, HSL exercised control over the expenditure and borrowing of FHPL, besides being able to veto important resolutions.[16] Clearly, in this case HSL has actual *power* and not mere *persuasive control* over FHPL. For the abovementioned reasons, it is submitted that the presence of HSL in Frugalia through its representative is *prima facia* evident.

B] THE JURISDICTION CLAUSE IN THE EMPLOYMENT CONTRACT IS INAPPLICABLE.

Section 13(a) tests jurisdiction of the foreign court in the "*international sense*" only. Any other questions regarding jurisdiction must be brought forth before the foreign court *itself*; and their decision shall be binding if the judgment is found conclusive under section 13.[17] It is submitted that exclusive jurisdiction clauses bind the parties, but they cannot oust the inherent jurisdiction of courts of other countries. Respondent may contend that the ratio of the *Swastik* case[18] would be applicable here. However, that case dealt with jurisdiction of *domestic* courts, which it had power over. Therefore, its ratio would not be applicable in the present case. Further, respondent may submit that there is an exception to the presence rule in determining jurisdiction,

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[10] ¶5(b.) The Fact Sheet.
[11] The same reasoning was accepted with regard to "AMC" in *Adams v Cape Industries Pl*c, 1989 WL 651250**.**
[12] Companies act, 2013.
[13] Vodafone International Holdings B.V. v Union of India, 2012 INDLAW SC 20.
[14] Vodafone International Holdings B.V. v Union of India, 2012 INDLAW SC 20.
[15] Since HSC was just a corporate label, their actions can be taken to be those of HSL. HSC has no independent existence. *Supra* note 11.
[16] ¶5(i.) The Fact Sheet.
[17] R. Viswanathan v Rukn-Ul-Mulk Syed Abdul Wajid, AIR 1963 SC 1.
[18] Swastik Gases Private Limited v Indian Oil Corporation Limited, 2013 Indlaw SC 414

for judgments given in breach of jurisdiction.[19] This rule, however, is based on a British *statutory regulation*,[20] which is specifically stated to have *no basis in common law*.[21] Therefore appellant submits that this exception has no applicability in the present matter. Indeed, under international common law, a foreign court approached under breach of jurisdiction agreement can permit the case *at its discretion*.[22] Exercise of discretionary powers by a foreign court is not subject to challenge under section 13.[23] Therefore, it is submitted that the exclusive jurisdiction clause is not a material fact in determining whether the commercial court of Frugalia was one of "*competent jurisdiction*".

In any case, C) THE RESPONDENT FELL UNDER FRUGALIAS' JURISDICTION BY VIRTUE OF THE EMPLOYMENT CONTRACT

As per *Dicey's conflict of Laws*, an individual contract of employment cannot have a clause that ousts the jurisdiction of the courts where the employee habitually works, unless such agreement is made after the dispute has arisen.[24] It is submitted that in the instant case, the contract was one of employment[25] and, the *"Governing law and jurisdiction"* clause was present in the contract from the initial time of contract signing. The fact that Millerand *"habitually worked"* in Frugaria is evident from the line, "*though employed by the Indian company, he spent much of his time in Frugaria."*[26] When an employee works in multiple countries, the balance of time can be used to determine the place of "*habitual work*".[27] In this instance, "*much of the time*" clearly indicates that he spent more time in Frugaria *in toto* than he did in India. Thus, to the extent that the jurisdiction agreement tends to oust the jurisdiction of Frugalian courts, it is void. The respondents may contend that the abovementioned rule is based on a number of European conventions that India is not party to, and thus it does not form a part of Indian conflict of law rules. However this is incorrect on three grounds: *First*, conventions may be used as principles of Indian common law, regardless of the fact that India is not a signatory, unless they contradict an applicable

[19] DICEY, MORRIS AND COLLINS ON THE CONFLICT OF LAWS, Rule 37, 608 (*edited by* Sir Lawrence Collins, 14th edn. 2006). ["*DICEY'S*"]
[20] Sec. 33, Civil Jurisdiction and Justice act, 1982 (UK).
[21] *DICEY'S*, Rule 15, 444.
[22] Black Sea Steamship v UOI, AIR 1976 AP 103.
[23] Chormal Balchand Firm, Chowrahat v Kasturi Chand Seraoji, AIR 1938 CAL 511.
[24] *DICEY'S*, Rule 15, 444.
[25] Annexure – 2, The Fact Sheet.
[26] ¶8, The Fact Sheet.
[27] Rutten v Cross, [1997] ICR 715.

Indian statute.[28] To quote the honorable judge *M.V. Elisabeth,* "*… the principles incorporated in the conventions are themselves derived from the common law of nations* **…** *are as such part of the common law of India."*[29] *Second*, in cases of an international *c*ontract, conflict of law rules need to be based on principles of "*international trade and practice*."[30] The abovementioned conventions have been held to "*embody the felt necessities of international trade*"[31] and thus become of vital importance in determining what constitutes "*international trade and practice*". *Third*, in principle, Indian law recognises the rationale for granting special status to certain contracts wherein parties are of unequal strength. This is evident from the fact that *insurance* and *consumer* contracts (the other two special categories under the abovementioned conventions) are also similarly protected under Indian *domestic* law. It is submitted that the abovementioned rule forms an integral part of international trade conventions as well as common law, and therefore must be considered a part of Indian Conflict of Law rules.

D] THE JUDGMENT DOES NOT FALL UNDER ANY OTHER EXCEPTION SPECIFIED IN SECTION 13.

Section 13 has five other exceptions. *First*, if the judgment was not given on *merits*. The validity of *ex-parte* decisions under this clause has been upheld time and again, as long as the court examined all evidence and the judgment wasn't given to the plaintiff *only because* of the absence of the defendant.[32] *Second*, if the judgment goes against the principles of natural justice. These principles have been interpreted to mean "*procedural justice*" only, i.e. if the court validly examines relevant evidence and follows proper procedure, the judgment cannot be opposed to natural justice.[33] In the instant case, evidence was examined[34] and there is no evidence of any lacunae in procedure followed. *Third*, the judgment must not be founded on an incorrect view of Indian or International law. Expert witnesses on Indian law were called, and *prima facia* there is no evidence of misapplication of either Indian or International law.

[28] Liverpool and London S. P. and I Association v M. V. Sea Success I, 2003 Indlaw SC 1446.
[29] M.V. Elisabeth And Ors. v Harwan Investment And Trading Pvt. Ltd., AIR 1993 SC 1014.
[30] Axios Navigation Company Limited v Indian Oil Corporation Limited, 2012 Indlaw MUM 1312.
[31] Islamic Republic of Iran v M. V. Mehrab and Others, AIR 2002 BOM 517.
[32] International Woollen Mills v Standard Wool (U. K.) Limited, AIR 2001 SC 2134.
[33] Society of Lloyds v Sauders, 2001 ILPr 18; Kolmar Group AG v Traxpo Enterprises Private Limited, 2015 Indlaw MUM 385.
[34] ¶16 The Fact Sheet.

Fourth, the judgment must not be obtained by fraud. No part of the suit is indicative of fraud. *Fifth*, the judgment must not be in breach of any law in force in India. The verdict requiring monetary damages to be paid for breach of contract cannot be considered to be in breach of any law in force in India. The appellant submits that since none of the exceptions enumerated in section 13 have been met, the judgment of the Frugarian court ("*Forrest I*") in this matter must be regarded as *conclusive.*

Dr. Miliband is entitled to £1 million and unpaid salary

In any case, It is submitted that Dr. Miliband is entitled to A] £1 million as debt, or *alternatively* as damages for wrongful termination; and B] unpaid salary for the period between September 30th and December 19th, as compensation.

A] £1 MILLION AS DEBT FOR CONTRACTUAL OBLIGATION

Under Clauses 9.5 and 9.6,[35] Dr. Miliband is entitled to £1 million as the payment *in lieu* of his notice period, as he was summarily dismissed on September 30th, 2013. It is submitted that this is an outstanding *debt*, which the court must enforce. This is for the following reasons: *First*, the mode of dismissal is *irrelevant* and has no bearing on his contractual entitlements.[36] *Second*, it is submitted that the fact that the accountant forgot to pay his debt is also irrelevant with regard to determining his debt- this is because the contract provided the employer (HSL, represented by Mr. Bhatia) the *option* to *either* put Dr. Miliband on notice period, *or* dismiss him summarily.[37] It is clear from the line, "*Dr. Miliband was called to the office, summarily dismissed, and told to clear his desk by evening*"[38] that Mr. Bhatia opted for the *former*. It is submitted that from the moment Mr. Bhatia *summarily dismissed* Dr. Miliband, as per clause 6, a debt of £1 million became due to him, as per clause 9.6.[39] It is submitted that the fact that the accounts department made a mistake is *irrelevant* in this regard.

B] UNPAID SALARY FOR THE PERIOD BETWEEN SEPTEMBER 30TH AND DECEMBER 19TH

It is submitted that Dr. Miliband is *also* liable to be paid unpaid salary for the period between September 30th and December 19th, as *compensation*. This is because Dr. Miliband remained *uncertain* of his state of employment during this period, and thus failed to take advantage of earning opportunities that came his way. This *uncertainty* was

[35] ¶¶9.5, 9.6 Annexure – 2, The Fact Sheet.
[36] Abhrams
[37] ¶9.5 Annexure – 2, The Fact Sheet.
[38] ¶9 The Fact Sheet.
[39] ¶9.6 Annexure – 2, The Fact Sheet.

caused by the fact that he had been told that he was*, summarily dismissed*, however, the payment due for such termination was not paid to him. His confusion is evident from the repeated emails that he sent HSL, as well as his act in *turning down* a job offer with a *higher* pay. The resulting losses that Dr. Miliband suffered were a *direct consequence* of the failure of HSL to keep up to its contractual obligations. Indeed, it has been held that an employee dismissed without notice *or* payment in lieu, would be entitled to unpaid salary for the intervening period, besides the debt, if applicable.[40]

The fundamental doctrine on damages for breach of contract, states that they may be awarded to put the innocent party "… *so far as money will do it, in the position he would have been in if the contract had been performed*."[41] It is submitted that had the contract been performed, i) Dr. Miliband would have received his £1 million pounds, *or at least* information about the transaction being processed, upon dismissal. Further, ii) Dr. Miliband would have been clear as to the status of his employment, and therefore, could have accepted the job offer. Hence, to restore Dr. Miliband to the above position, the debt of £1 million, plus the damages for almost 3 months[42] of unemployment due to their mistake, i.e. money he *could* have earned in that time period (at £800,000 p.a.) must be paid to him. *In any case*, allowing for a period in which he searched for a job, *at the very least* the salary that he would have earned had he not been terminated (at £700,00 p.a.) must be given to him.[43]

THE DAMAGES *CANNOT* BE MITIGATED

Mitigation of damages is possible when the plaintiff had a chance to make good his loss by a reasonable act; however he failed to do so. In the present instance, it is submitted that the question of mitigation *does not arise* as due to his state of confusion, Dr. Miliband did not know if he was still employed- therefore, it would *not* have been reasonable for him to accept another employment while he was unsure that the present one still subsisted. Admittedly, the facts state that Dr. Miliband "…*turned them down*, *hoping that he could persuade HSL to reverse its decision*." However, it is submitted that Dr. Milibands hope that he could *persuade HSL* probably stemmed from the fact that he did not believe the dismissal to be final, even though it was, because he hadn't been paid

[40] Norton Tool Co Ltd v Tewson [1973] 1 W.L.R. 45.
[41] Owners of Cargo on Board Vessel Albacruz v Owners of Vessel Albazero (The Albazero) [1976] 3 All ER 129.
[42] September 20th to December 19th.
[43] Finnie v Top Hat Frozen Foods, [1985] I.C.R. 433

the sum *in lieu* of the notice period, nor was he allowed to serve a notice period. Thus, it is submitted that Dr. Miliband was under *no* duty to mitigate his damages.[44] Further, Appellant contends that Dr. Miliband's failure to take up the alternative job was *due to the mistake of the accounts department*, and the uncertainty they left Dr. Miliband with. *In fact*, Dr. Miliband is liable to be paid compensation for all these losses arising out of the breach of contract on the part of the Respondent, and do not fall under the scope of mitigation as they were *prevented* by the acts of the *defendant*.

APPEAL - II

Forrest 2 is Conclusive

As previously mentioned, a foreign judgment is *conclusive* unless it falls under any of the exceptions enumerated in section 13.That exceptions 2 to 6 are *not* met in the instant case, has been proved under the first appeal, wherein the material facts are the same. Jurisdiction in Forrest 2 can be established by the *presence test*, as is applicable to individuals. If the defendant is present at the time of institution of suit, his presence is sufficient to grant the court of that country jurisdiction, provided that such presence is *voluntary*.[45] This principle is based on the "*doctrine of obligation*"[46] and "*temporary allegiance*".[47] When a person is present in a country, he enjoys the protection of its laws. Consequently, he is under to obligation to abide by the laws of the country and submit to the jurisdiction of their courts, for any actions *in personam*.[48]This test has also been framed as "the power of the court to summon the defendant before itself". It is submitted that in the instant case, Mr. Bhatia's presence in Frugalia was a) not caused by force, compulsion, or fraud; and *in any case* b) Mr. Bhatia voluntarily entered Frugalia proper by accepting the visa.

a) MR. BHATIA'S PRESENCE WAS NOT CAUSED BY FORCE, COMPULSION, OR FRAUD.

A persons' presence in the country at the time of service of suit is sufficient to establish that countries' jurisdiction over the case, provided only that such presence is not caused by force, compulsion or fraud.[49] This provision is based on the "*doctrine*

[44] Darbishire v. Warran, 1963, WLR 1067
[45] Adams v Cape Industries Plc, 1989 WL 651250**.**
[46] Swiss life AG v Moses Kraus, 2015 WL 4401499.
[47] Adams v Cape Industries Plc, 1989 WL 651250**.**
[48] Adams v Cape Industries Plc, 1989 WL 651250**.**
[49] Adams v Cape Industries Plc, 1989 WL 651250**.**

of obligation" and envisages a limited exception in cases where the *plaintiff* might, by using unlawful means, induce the defendant to be present in the country.[50] Clearly, such was not the case here. Mr. Bhatia was present due to a faulty aircraft, and the plaintiff had no connection to it whatsoever. Further, it may be noted that the very applicability of this exception for involuntary presence is under doubt in the Indian context. In *MV Elizabeth,* it was held that the defendant's presence was sufficient to give the court jurisdiction over him, even though such presence was caused by duress i.e. because his property had been seized.[51]

In any case, B) MR. BHATIA WILLINGLY ACCEPTED THE VISA

When Mr. Bhatia inadvertently arrived at the Frugalian airport, he was told that his aircraft would take roughly 24 hours to get repaired.[52] By no means was their any compulsion for him to leave the airport, however, by accepting the visa and entering Frugalia proper, Mr. Bhatia *voluntarily* subjected himself to Frugalian laws, under no threat or force. Clearly, it satisfies the requirement for the applicability of the *doctrine of obligation*, namely that when a person voluntarily subjects himself to a countries law, he must take the good with the bad and for the period he is enjoying the benefit of such laws, he owes a temporary allegiance to the foreign sovereign. It is submitted that in the instant case, Mr. Bhatia cannot plead the defense of involuntary presence, as his *ultimate* decision to fully subject himself to Frugalian court was purely voluntary.

The appellant submits that the other exceptions under section 13 are not met in this instance, in the same manner as previously examined under Forrest 1. Therefore, the appellant further submits that Forrest II must be regarded to be *conclusive*.

In any case, Dr. Miliband is entitled to £ 4 million as Damages

The purpose of all damages is to compensate the victim for the loss caused to him by the plaintiff.[53] It may be noted that under the tort of misrepresentation, Damages are awarded to put the victim in the position he would have been *had he not entered* the contract.[54] The general rule for ascertaining such damages is the difference between the market price and purchase price on the date of acquisition. However, this rule is

[50] *Dicey's*, 593.
[51] M.V. Elisabeth And Ors. v Harwan Investment And Trading Pvt. Ltd., AIR 1993 SC 1014.

[53] Livingstone v. Rawyards Coal Co. (1880) 5 App.Cas. 25.
[54] Smith new court securities v Scrimgeour Vickers [1996] UKHL 3.

not a rigid one, and is often departed from in view of the circumstances, and with the aim of justly compensating the victim.[55] One such noted exception is the case where the plaintiff continued to hold an asset if it was "pregnant with disaster", based on a *continuing* misrepresentation.[56] In particular, with regard to shares, it is not relevant that the shares dropped in value, *unless* it can be shown that they were defective *at the time of allotment.*[57]It is submitted that a) the shares sold to Dr. Miliband were already "*pregnant with disaster*", and b) The loss suffered was as a direct consequence of the *continuing misrepresentation* of Mr. Bhatia.

A) THE SHARES SOLD TO DR. MILIBAND WERE ALREADY *PREGNANT WITH DISASTER*

It is submitted that the life-threatening drug released by HSL due to insufficient testing, is strong ground to contest that they made the HSL shares "*pregnant with disaster*". In other words, they were almost certain to collapse and thus had an *inherent defect.* The fact that this defect existed from before the sale of shares to Dr. Miliband, is evident from the line "… Dr Miliband had *not been in the picture* when the drug was released." And the line, "… Dr Miliband took the view that he should not have been asked to join a company potentially at *risk of enormous liability*." Clearly, then the release of the drug and the consequent danger to the HSL shares originated before Dr. Miliband was employed, and subsisted till September, 2013, or over a year and a half after Dr. Miliband was employed. It is submitted that during this period, the shares were "*pregnant with disaster*", however, he continued to hold them *based on the continuing misrepresentation of Mr. Bhatia.*

B) THE LOSS SUFFERED WAS AS A DIRECT CONSEQUENCE OF THE CONTINUING *MISREPRESENTATION* OF MR. BHATIA.

For damages to be awarded under misrepresentation in general, an untrue statement must be made, the maker of the statement must reasonably have expected the other party to rely on the statement; the other party must have *actually* relied on the statement and suffered damage as a result.[58] In the instant case, it is clear that a misstatement was made. Since Dr. Miliband expressed his concern over the pension *at a negotiation for employment*, his intention to rely on it in entering the employment

[55] McElroy Milne v Commercial Electronics Ltd [1993] 1 NZLR 39.
[56] Smith new court securities v Scrimgeour Vickers [1996] UKHL 3.
[57] McConnel v. Wright -(1903) 1 Ch 546.

contract and the interlinked SPA must have been *reasonably foreseeable* to Mr. Bhatia. Dr Miliband then went on to accept the EA and the associated SPA *based on* this representation of Mr. Bhatia. We know from the facts that Dr. Miliband did not find out the truth about the matter till much after he quit HSL- therefore clearly he was placing reliance on Mr. Bhatia's statement. That it was reasonable for him to do so is evident from the fact that he was a resident of a foreign nation, and to the best of our knowledge, had little knowledge about India. *Further*, Mr. Bhatia had been the managing director of the largest pharmaceutical firm in India for about 10 year, therefore it was only natural for Dr. Miliband to rely on him for information on the industry as well as general law practices and policies in India. *Moreover*, the information was divulged during an *employment negotiation*, thus, intent to rely on it in making contractual decisions is *prima facia* very evident. *Therefore*, it is submitted that all the loss suffered was both *direct* and *caused by a reliance on the misrepresentation*, which was *foreseeable.* Thus, Dr. Miliband is entitled to damages. The *quantum* of damages in this case may be best determined by rule of *actual damage suffered*, or the buying price minus the selling price, since this case falls under the exception enumerated in *Smith*.[59]

[59] Smith new court securities v Scrimgeour Vickers [1996] UKHL 3.

APPEAL III

Clause 7 of the SPA in *not* enforceable

With regard to the Clause 7 of the Share-purchase agreement (SPA), the Respondent makes the following submissions: i) The Companies' act, 1956 governs the agreement; ii) That restrictions on share transfer are void as HSL is a *public company*; and *in any case* iii) Clause 7 is not enforceable as it was not incorporated in the articles of association.

i) THE COMPANIES' ACT, 1956 GOVERNS THE AGREEMENT

The SPA was concluded between Dr. Miliband and Mr. Bhatia on January 10th, 2012.[60] However, the relevant section of the companies act, 2013 (sec. 58(2)) was enacted on September 13th, 2013.[61] Therefore, for the 2013 act to be applicable to actions governed by this contract, it would have to act *retrospectively*. However, unless otherwise stated, the *presumption* is that the statute is *not* applicable retrospectively.[62] There is no express provision in the companies act, 2013, enabling *retrospective* application of sec. 58(2). *Further*, statutes that creates the *rights, obligations* or *duties* of a party under contract, are typically *not* to be applied retrospectively.[63]In the instant case, the rights of the parties are affected in the following manner: The old provision, 111A, provided that a contract, which placed restrictions on the transferability of shares, would not be enforceable. Since 58(2) effectively create a new right to enforce a contract relating to transfer of shares, it cannot be applied retrospectively. Indeed, in *Bai Achuba*,[64] the apex court noted, with regard to *transfers* that "*A new law which enacts that transfers shall not be invalid will not apply to transfers which were already declared.*"[65] The Respondent submits that in this case, section 58(2) declares that agreements relating to share *transfer* shall *not be invalid*; and thus the precedent of the abovementioned case is *highly relevant*. Using the same reasoning, sec. 58(2) *would not apply* to agreements *already declared*. For these reasons, the Respondent submits that the companies act, 1956, will, indeed, govern this contract.

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[60] Annexure – I, The Fact Sheet.
[61] Ministry of Corporate Affairs circular no. 16/2013, *available at:* http://mca.gov.in/Ministry/pdf/General_Circular_16_2013.pdf.pdf
[62] Mithilesh Kumari and another, vs. Prem Behari Khare, AIR 1989 SC 1247.
[63] Mithilesh Kumari and another, vs. Prem Behari Khare, AIR 1989 SC 1247.
[64] Bai Achhuba v. Kalidas, AIR 1967 SC 651.
[65] Bai Achhuba v. Kalidas, AIR 1967 SC 651.

ii) THAT RESTRICTIONS ON SHARE TRANSFER ARE VOID AS HSL IS A *PUBLIC COMPANY*;

Under Sec. 111A of the Companies Act,[66] shares of a public company must be *freely transferable*. Courts have interpreted this to mean that restrictions *may not* be placed on transferability of shares, *even* in the form of *pre-emption rights*.[67] Indeed, courts have upheld the *free transferability* of shares very strongly, such as, "*there could be no fetters on the right of a shareholder to transfer his/her shares*."[68]Further, agreements with clauses repugnant of the provisions of the act[69] shall be void to that extent.[70]*Therefore*, Respondent submits that clause 7 of the SPA was in direct contravention to sec. 111A,[71]as it placed a *restriction* on the *free transferability* of shares, in the form of a *right to first* refusal.[72] Hence, as per the provisions of sec. 9,[73] the said clause must be considered void. Since no rights arise out of a void contract, Dr. Miliband *cannot* therefore be held liable for breach of contract.

Even if the 2013 act[74] were to be considered applicable to this contract, it is submitted that clause 7 would *still* be void. This is because the relevant amended portion[75] of the new acts provides an exception to the applicability of sec. 111A[76] in cases of "*agreements regarding transfer of shares*." Respondent submits that the part of the SPA[77] relating to the actual transfer of shares from Mr. Bhatia to Dr. Miliband (omitted, but assumed from facts[78]) would be protected under this new act, and *not* the provision providing for *restrictions* in the contract.[79] *Further*, the clause makes no mention of what happens when the "seller" *does not accept* the sale proposed by the "buyer". Applying the principle of *Contra proferentem*,[80] this can interpreted to be an *absolute restriction* on the capacity of the "buyer" to transfer shares, in case the "seller" refuses. Such a clause

[66] Companies act, 1956.
[67] Mafatlal Industries Ltd. v. Gujarat Gas Company Ltd. and ors., 1997 Indlaw GUJ 126.
[68] Pushpa Katoch v. Manu Maharani Hotels Ltd. and ors., 2005 Indlaw DEL 402
[69] Sec. 9, Companies Act, 1956.
[70] Mafatlal Industries Ltd. v. Gujarat Gas Company Ltd. and ors., 1997 Indlaw GUJ 126.
[71] Companies Act, 1956.
[72] Annexure- I, The Fact Sheet.
[73] Companies Act, 1956.
[74] Companies Act, 2013.
[75] Sec. 58(2), Companies Act, 2013.
[76] Companies Act, 1956.
[77] Annexure- I, The Fact Sheet.
[78] ¶¶6,7 The Fact Sheet.
[79] ¶7 Annexure –I, The Fact Sheet.
[80] In an employer-employee contract, the contract can be assumed to have been drafter by the employer.

would be in direct and grave violation of sec. 111A, and therefore *cannot* be held to be valid.[81]

iii) CLAUSE 7 IS NOT ENFORCEABLE AS IT WAS NOT INCORPORATED IN THE ARTICLES OF ASSOCIATION.

In any case, Respondent submits that clause 7 *cannot* be considered enforceable, as it has not been included in HSL's articles of association.[82] The requirement of including *any* restrictions on transfer of shares in the Articles of Association is a *separate and independent* requirement to those imposed by sec. 111A. It has been held that, legally, the *only restrictions* on the transfer of shares that exist are the ones *incorporated in the Articles of Association.*[83]*Moreover*, any restriction not specified in the Articles is, *ipso facto*, not binding, either or shareholders nor on the company.[84] Indeed, *even for a private company*, agreements not incorporated in the articles are not enforceable.[85] In public companies, the inference is all the easier.[86] In the *Sadashiv Shankar* case,[87] it was held that *unless the Articles stated otherwise*, a shareholder would have the freedom to sell the shares to anyone he saw fit. *Further*, in that case, defendants were held liable under sec. 82 for *refusing to accept a transfer of shares* This additionally emphasizes that under the act, absolute restrictions of any form are disallowed, as previously mentioned. For these reasons, the Respondent submits that Clause 7 *cannot* be enforced.

In any case, Damages due to the breach of contract were too remote

Under the contracts act,[88] damages may be awarded as compensation for losses that i) naturally arise in the usual course of things; or ii) the parties knew, *at the time of contracting*, would be the likely outcome of a breach. *Further*, no damage is awarded for any remote or indirect loss.[89] Respondent submits the *neither* of the required conditions have been met; and the loss qualifies as *remote and indirect*.

The damage did not arise "*naturally in the usual course of things*"

[81] *Under* sec. 9, Companies Act, 1956 *or* 2013.
[82] ¶20(d.) The Fact Sheet.
[83] V.B. Rangaraj v. V.B. Gopalakrishnan, 1991 Indlaw SC 395.
[84] V.B. Rangaraj v. V.B. Gopalakrishnan, 1991 Indlaw SC 395.
[85] V.B. Rangaraj v. V.B. Gopalakrishnan, 1991 Indlaw SC 395.
[86] S.P. Jain v. Kalinga Tubes, 1965 Indlaw SC 86.
[87] Sadashiv Shankar Dandige v. Gandhi Sewa Samaj Ltd. and anr., AIR 1958 Bom 247.
[88] Sec. 73, Indian Contract Act, 1872
[89] Sec. 73, Indian Contract Act, 1872

Damages arising in the "*usual course of things*" refer to direct and unavoidable losses.[90] It is submitted that the damages in the instant case we *not* a direct consequence of Dr. Milibands breach; instead, *intervening acts* of third parties led to the actual damage. It is submitted that in general, a loss cannot be considered as "*arising naturally*" if it was, in fact the result of a *voluntary choice* of a third party which took place *after* the breach. It is submitted that the real, proximate cause of HSL's actions was the *decision* of Medicamento and Versus to invoke the clause that ousted HSL from the consortium.[91] Dr. Miliband cannot be held liable *merely* because he provided an *opportunity* for them to invoke the clause.

Dr. Miliband *could not have known*, at the time of contract, that the likely outcome of a breach.

It is essential to note that the act specifically requires *knowledge* of the likely damage from a breach *at the time of contract*. This is because a party cannot be bound by a duty *in personam* beyond what he has consented to. Alternatively, this has been described as the assumption-of risk theory, whereby each party to the contract agrees to be liable to any damages arising from a breach that *they could foresee then*. In the instant case, Dr. Miliband did not know about the consortium agreement that HSL was part of, for it didn't exist then. The fact that he became aware of it later is immaterial, as *belated knowledge* cannot be considered when determining liability of a person.[92] Without knowledge of the consortium, there is *no way* Dr. Miliband could have known that his breach was likely to result in such a kind of loss. *Therefore*, it is submitted that the damage caused in this instance was *remote and indirect*, and hence, no damages can be awarded.[93]

[90] Pannalal Jankidas v Mohanlal and Another, AIR 1951 SC 144.

[91] ¶13 The Fact Sheet.

[92] Karsandas H. Thacker v Messrs Saran Engineering Company Limited, 1965 Indlaw SC 513.

[93] Sec. 73, Indian Contract Act, 1872.

PRAYER

Wherefore, in light of the issues raised, arguments advanced and authorities cited, it is humbly prayed that this Honourable Court may be pleased to adjudge and declare that:

I. Forrest I is not conclusive; Dr. Miliband is not entitled to be paid any sum as debt or damages

II. Forrest II is not conclusive; Dr. Miliband is not entitled to be paid any sum as damages.

III. Clause 7 of the SPA is enforceable; damages arising out of the breach are not too remote.

And pass any other order that this Honourable Court may deem fit in the interests of justice, equity and good conscience.

All of which is humbly prayed,

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Counsel for the Respondents.