**A.No.7699 of 2019**
**in**
**C.S.No.896 of 2015**

**N.SATHISH KUMAR, J.**

This application has been filed to amend the suit by incorporating the following paragraphs :

Instead of para 35 substitute the following :

"35. The plaintiff has, as a result of the defendants' breaches and infringement suffered enormous losses and it continues to suffer losses on a daily basis. The willful infringement of the plaintiff's copyrighted work of the defendant Nos.1 to 5 has resulted in the loss of business to the plaintiff on account of solicitation of its customers by the defendant No.5 with the help of defendants 1 to 4 by using plaintiff's confidential information and copyrightable work such as use of client lists, productivity norms, trade secrets and information relating to manufacturing process among others. In order to arrive at the quantum of damages suffered by the plaintiff an independent financial and tax due diligence report dated 08.06.2012 by BSR & Associates ("Financial and Tax Due

Diligence Report") of Kiran (Plaintiff) contains critical information relating to profit margin for each of the product division and the person responsible for managing important customer relationships, ought to be relied upon. An excel sheet containing the data of then existing customer list of Kiran for the year 2015 ("2015 Customer List") was handed over by the defendant No.1 to his successor at the time of exit of defendant No.1 from the plaintiff company. When the 2015 Customer List is compared with the 2017 export date of defendant No.5, taken from the website htt;s:/www.infodriveindia.com/. It is evidence that plaintiff lost the business of four customers to defendant No.5 in Radiation Protection Apparel ("RPA") division namely Europrotex, Medblue, Controller and Xeikon Diagnostics generated a turnover of about 1,11,00,000/- (One Crore and Eleven Lakhs), 37,00,000/- (Thirty Seven Lakhs) and gross profit margin for RPA as per the Financial and Tax Due Diligence Report is 57.8%. Therefore, the gross loss margin incurred by the plaintiff is Rs.1,08,70,000/- (One Crore Eight Lakhs and Seventy Thousand) per annum. Furthermore, from a combined reading of the 2017 export date of the defendant No.5 and 2015 Customer List, it is evidence that the plaintiff lost the business of two of its major customers to defendant

No.5 in CR Screens ("CRS") namely Reina Imaging and Rochester cassette Sales and Services which generated a turnover of about Rs.1,96,000 (One Crore ninety six lakhs) and Rs.81,00,000/- (Eighty one lakhs) respectively for the year 2014. The gros profit margin for CRS as per the Financial and Tax Due Diligence Report is 22.5%. Therefore, the gross margin loss incurred by the plaintiff eut to loss of business in CRS amount to Rs.62,30,000/- (Sixty Two LakhsThirty Thousand) per annum. Therefore, the total loss of business in CRS and RPA per annum amounts to Rs.1,71,00,000/- (One Crore Seventy One Lakhs). Since, the Non-Disclosure Agreement covenants mandatory non-disclosure of confidential information for a period of 5 (five) years, the calculation of losses are estimated to a period of 5 (five) years. In this regard, the plaintiff estimates its losses to an extent of Rs.8,55,00,000/- (Eight Crores and Fifty Five Lakhs).



Plaintiff seeks to add the following paragraph after paragraph 10 in the in the plaint :

"10A. The plaintiff submits that while the non-disclosure agreements ("NDAS") of the defendant nos.1 – 5 are not traceable which were in the custody of the defendant Nos./1

– 4, who were at the helm of the affairs of Kiran during that period and could not found after their exit, there are other documents to prove that the NDAs were sent to the defendant Nos.1 – 4 for their signatures. A representative of the human resources department of the plaintiff had sent the template of the NDAs to the defendant Nos.1 to 4 vide email dated 19 May, 2012 requesting the key managerial personnel to execute the NDAs and submit the same with the plaintiff. Furthermore, via email dated 31. May, 2012, from Ramesh Modi to the plaintiff which encloses a letter from Mr.Ramesh Modi dated 30.05.2012 and the draft Non-disclosure Agreement. In the letter dated 30.05.2019, Mr.Ramesh Modi has confirmed that the key managerial personnel of Kiran (which included the defendant Nos.1 – 5) have signed the NDAs. The email dated 31 May, 2012 further carries the template of the NDAs which wee signed by the defendant Nos.1 – 4. It is submitted that, one Mr.Ravindra Kamat who was also a key managerial personal has signed the NDA and submitted the same with the plaintiff which can be corroborated with the emails dated 19, May 2012 and 31 May, 2012. These documents makes it abundantly clear that the defendants 1 – 4 were notified and aware of their confidentiality obligations under the NDAs and had in fact executed such NDAs which appear to have been removed from the plaintiff's records by defendant Nos.1 to 4.”.

Plaintiff seeks to add the following paragraph after paragraph 17 in the plaint :

“17A. The plaintiff placed a deep trust on the defendant Nos.1 – 4 considering their association with Kiran for a long period of time. The defendant No.1 was especially trusted with the core responsibilities of Kiran and it was based on that trust that the top management of the plaintiff did not interfere with the decisions taken by the defendants No.1. The top management of the plaintiff bestowed its utmost trust on the defendant No.1 that even during certain internal audits when the plaintiff was taking stock of its inventory and discovered a mismatch in the books, it immediately reached out to the defendant No.1 for his advisement. Thereafter, based on the confidence given by the defendant No.1 that there is no pilferage of the inventory of the plaintiff, the top management of the plaintiff decided to call off the internal investigation. It is quite interesting to note that when the top management of the Plaintiff suspected the defendant No.2 that he might be involved in the mismatch of the inventory of the Plaintiff and the same was highlighted to the defendant No.1, the defendant No.1 immediately jumped to the defence of the defendant No.2 stating the was a 'honest upright guy' who cannot be associated with any malpractice, while being fully aware that the defendant No.2 has joined the defendant No.5. The defendant No.1 played an integral role in ensuring that there no iota of doubt in the top management of the plaintiff with respect to the fraudulent activities of defendant Nos.2 to 4 within the premises of the plaintiff. Defendant No.1, thereby ensured smooth transition of defendant No.2 to 4 from the plaintiff to defendant No.5. Furthermore, via an email dated 25.01.2015, defendant No.1 informed the top management of the plaintiff that defendant No.1 was going to join a friend's company, which was quite different from the plaintiff. It was only later on after the exit of the defendant No.1 that the plaintiff realized that the inventory which was missing from the factory floor of the plaintiff was being sold disguised as a product of the defendant No.5 by the defendant nos.1 to 4 and that the defendant No.5 was set up by the defendant Nos.1 to 4 while in the employment of the plaintiff.

Plaintiff seeks to add the following paragraph after paragraph 27 in the plaint :

"27A. An IT audit was conducted by the plaintiff's team of IT experts with respect to the documents retrieved from the server of the plaintiff and an IT audit report dated 26.10.2015 ("IT Audit Report")was generated based on such findings. In order to further confirm that certain confidential information was stolen from the server of the plaintiff, an independent forensic IT audit dated 24.04.2019 ("Forensic Audit Report") was conducted by the renowned firm, Ernest and Yong. The Forensic Audit Report clearly establishes the date of creation, modification and last access of each of the retrieved documents and the person who has created the document, person modified the document and further substantiating the fact that defendant Nos.1 and 2 were responsible for creation of certain documents for incorporation and setting up the defendant No.5 while still being in employment with the plaintiff.



In the prayer Instead of 'D' the following paragraph to be added :

"D. Award damages in favour of the plaintiff to the tune of Rs.9,57,60,000 (Nine Crores Fifty Seven Thousand

and Sixty Lakhs) which includes a principal amount of Rs.8,55,00,000/- (Eight Crores and Fifty Five Lakhs) along with the interest of 12% per annum of Rs.1,02,60,000/- (One Corre Two lakhs and sixty thousand 01.10.2015 to 30.09.2019 on the principal amount) and further future interest at 12% until date of actual payment for the willful infringement of the plaintiff's copyrighted work and loss of business thereby."

2. It is the contention of the plaintiff that the loss incurred by the plaintiff was estimated at the time of filing of the suit and only in the Forensic Audit, the exact nature of damages has been found out. Therefore, the details of the Forensic Audit Report is necessary to be pleaded in the plaint. Hence, the amendment is very much necessary and the same will not change cause of action or nature of the suit.

3. Whereas, it is the contention of the defendant that the amendment is filed with 6 years of delay and if the amendment is allowed, new cause of action will be introduced in the suit. Hence, this application is liable to be dismissed.

4. The learned counsel appearing for the applicant mainly submitted that the amendment sought in the plaint is only the factual aspects.

The suit is filed with estimated loss of around two crores and only in the Forensic Audit certain aspects were unearthed and when the suit itself has been filed for infringement in the computer data, the defendants were asserted to be removed the data, even when they were in the service of the plaintiff. Hence, it is their contention that only when the Forensic Audit is conducted they could unearth the nature of the voluminous daa that has been taken away and used by the defendants. Therefore, it is their contention that mere bringing the factual aspects which were was estimated at the time of filing of the plaint will not change the nature of the suit and cause of action and no prejudice, whatsoever, shall be caused to the defendants.

5. The learned counsel for the respondents submitted that the application is taken out after six years of the filing of the suit and facts sought to be introduced are new facts, which are no way connected with the plaint pleadings and the conduct of the plaintiff is nothing but malafide and cannot be entertained at this stage. If such amendment is allowed, it will change the cause of action and the reliefs sought to be introduced by way of amendment is already barred by limitation. Hence, prayed for dismissal of the application.

6. Heard the learned counsel appearing for the applicant and the learned counsel appearing for the respondents. I have perused the records.

7. The suit has been filed for infringement of the plaintiff's copyrighted work. The plaint pleadings indicate that the defendants 1 to 4 were in employment with the plaintiff and they have also entered into an Agreement of Confidentiality not to disclose anything to outside world as to the data based business contracts of the plaintiff. It is the contention of the applicant that even during their employment, they colluded with fifth defendant and shared the confidential information. Therefore, the suit has been filed for damages on the estimated loss sustained by the plaintiff. Now it is the contention of the plaintiff that in the Forensic Audit they could retrieve only some of the data and now they have found out the actual damages caused to them. Only in order to bring out the real facts, the amendment is required.

8. It is to be noted that in para 35, the plaintiff has pleaded about loss estimated around Rs.2 crores. The amendment now sought to be introduced is to bring forth the facts leading to such infringement and selling of the data. Similarly, facts have been pleaded to show the nature of loss sustained by the defendants. It is the contention of the plaintiff that these materials can be culled out only during the Forensic Audit. Since, the entire issue relates to confidential data, I am of the view that collecting the materials in Forensic Audit and placing before this Court will not change the cause of action. The very suit itself is based on the alleged violation of confidentiality

agreement executed by the defendants 1 to 4 and sharing of the confidential information. Such being the position, placing on record the factual situation, violation of confidentiality agreement, will not in any way change the cause of action of the suit. Therefore, mere incorporating the allegations which are said to be against the defendant in the plaint will not amount to proof. Whatever the nature of the pleadings introduced later in the plaint is a matter of evidence. The parties have to prove the pleadings by letting in appropriate evidence.

9. Accordingly, this application is allowed. The applicant is directed to carryout the amendment and post the suit on 29.01.2020.

**28.11.2019**

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