

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **Date of decision: 14th October, 2019**

+ **CS(COMM) 89/2019, IAs No.2499/2019 (u/O XXXIX R-1&2 CPC) & 9149/2019 (u/OVII R-11 CPC)**

SATISH KUMAR

..... Plaintiff

Through: Mr. Lokesh Kumar Mishra, Adv.

Versus

KHUSHBOO SINGH & ORS.

..... Defendants

Through: Mr. Mukesh Gupta, Adv. with Mr.
P.S. Rana & Ms. Disha Passi, Advs.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. The plaintiff Satish Kumar has instituted this suit against (a) Khushboo Singh; (b) Abhishek Chauhan; and (c) Aarya Fashion through its proprietor Khushboo Singh, for

“(i) permanent injunction in favour of the plaintiff and against the defendants, thereby restraining the defendants and their agents, servants, relatives, associates, attorney, etc. from logging in, accessing and using the official email ids of the plaintiff including merchant3@plasmaimpex.inc.and export@plasmaimpexinc.com and further disseminating, reproducing, uploading, publishing, circulating, broadcasting, distributing, selling, offering for sale the complete or part of any email part of official email ids of the plaintiff including merchant3@plasmaimpex.inc.and export@plasmaimpexinc.com including eleven emails dated 31.11.2017, 01.11.2017 and 08.11.2017, in the interest of justice.

(ii) permanent injunction in favour of plaintiff and against the defendants, thereby restraining the defendants and their agents, servants, relatives, associates, attorney, etc. from using trade

secrets, privilege information and poached clientage including MOA based in France, TS 14+based in Australia, Frag Commercio Internacional based in Spain, Ropanes.I. based in Spain, Lovisa based in Australia, SferaJoven S.A. based in Spain, DCK Concession based in United Kingdom, Vaibheave Global Ltd. based in India, H.Versteegh Amsterdam B.V. based in Netherlands, ModaJavenSfera Mexico S.A.DE C.V. based in Mexico, Pipol's Bazaar AB based in Sweden, Zoda based in Australia, Atoll Palme based in France, Stella Forest based in France, Ha Sh Fashion Accessories House Ltd. based in Israel, Alibey Accessories based in Spain, IntresesComunes SL based in Spain, Natasha Accessories based in USA, Virginia Pozo Castro Coosy based in Spain, DG Diffusion/ExodifZac de la masquere based in France, M/s Ikat and Casemire based in Australia, PT.Lakra based in Indonesia and PFG of Sweden AB based in Sweden of the Plaintiff, in the interest of justice

(iii) permanent injunction in favour of plaintiff and against the defendants, thereby restraining the defendants and their agents, servants, relatives, associates, attorney, etc. from further accessing the clientage of the plaintiff including Stephen & Co. based in USA, Shalom International based in USA, Kappahl based in Sweden, Inditex Group based in Spain, Pull & Bear based in Spain, Bershka based in Spain, Lefties based in Spain, EncuentroModa based in Spain, Roman Habermann based in Germany, Fun Accessories based in Australia, SarinaAccessories based in USA, Myriad Sourcingbased in India, Puntoroma based in Spain, Misakobased in Spain, NES Group based in USA, Eziybuybased in Australia, Ronald A/S based in Denmark, House Docter Aps based in Denmark, Barata&Ramilo S.A. (Parfoise) based in Portugal, Monnari Trade S.A.based in Poland, Bijou Brigitte Modische Accessories AG based in Germany, Mitzsche International based in Germany, International Inspiration Ltdbased in USA, Ballet Group

Inc. based in USA, Vision 101 S.A. based in Argentina, Shanghai Yepai E.Commerce Co.Ltd. based in China, LPP S.A. based in Poland, White Stuff Limited based in United Kindgdom and WWG Limited based in United Kingdom, in the interest of justice.

(iv) mandatory injunction in the favour of plaintiff and against the defendants and their agents, servants, relatives, associates, attorney, etc. thereby directing the defendants to handover the trade secrets, privilege information and clientage of the plaintiff to the plaintiff company and stop dealing with the clientage of the plaintiff company, in the interest of justice.

(v) amount of Rs.2,02,00,000/- as damages in addition to further damages as may be determined by this Hon'ble Court, in the interest of justice.

(vi) cost of the proceedings be also passed in favour of the plaintiff and against the defendants, in the interest of justice.”

2. It is the case of the plaintiff in the plaint, (i) that the plaintiff is the sole proprietor of Plasma Impex Inc. and is engaged in business of supplying, importing, exporting, manufacturing and production of all kind of merchandise and handicrafts, gifts, imitation jewellery, fashion accessories, carpets, durries, mats, rugs, linen, flannels, etc.; (ii) that the defendant no.1 Khushboo Singh was working as the General Manager of Plasma Impex Inc. since 19th March, 2012, until her termination on 31st October, 2017; (iii) that the defendant no.2 Abhishek Chauhan is the husband of defendant no.1 and was the Co-Director of another venture of the plaintiff in the name and style of Kraftstreet Fashion India Pvt. Ltd. and who also parted away from the plaintiff in October, 2017, stealing computer database, trade secrets and

clientage of Kraftstreet Fashion India Pvt. Ltd.; (iv) that the defendant no. 2 has set up new proprietary in the name of defendant no.3 Aarya Fashion, dealing in similar business as the plaintiff; (v) the plaintiff has developed and maintained various confidential data and information regarding internal processes, specific client profile, client details, business strategy and methods, finances, client budget, pricing structure, upcoming projects, etc.; all this confidential information has been developed over a period of several years by putting in extensive efforts; (vi) that the defendant no.1, as an employee of the plaintiff, had access to some of its secret and confidential data during the course of her employment with the plaintiff; (vii) that the defendant no. 1, on termination of her employment, took wrongful possession of various important and confidential files, documents, records and the defendants are now using the same for their business in the name and style of defendant no.3; (viii) that the defendants, by accessing merchant3@plasmaimpex.inc and export@plasmaimpexinc.com, which are the official e-mail IDs of the plaintiff, have further taken the privileged information, customer database and other confidential data of the plaintiff and have procured certain emails of the plaintiff and produced the same before this Court in CS(OS) 668/2017; (ix) that the defendants were defaming the plaintiff and in which respect CS(OS) 668/2017 has been filed by the plaintiff against the defendants; (x) that on complaint of the plaintiff, FIR No.755/2017 was also registered against the defendants on 16th December, 2017 at police station New Ashok Nagar and defendants have stolen the clientage of the plaintiff by accessing the customer database of the plaintiff; (xi) the defendants, with the use of such privileged information has started dealing with the clientage of the plaintiff and are causing loss to the

plaintiff; (xii) the customer database of the plaintiff is protected by copyright as an original literary work and being a compilation is a literary work within the meaning of Section 2(o) of the Copyright Act, 1957 and the plaintiff is the owner of copyright therein; (xiii) the said clientage of the plaintiff has been built over the years by making several foreign visits in different countries; (xiv) the defendants have caused injury to the plaintiff; (xv) on 6th December, 2018, an undertaking was recorded that the parties will not pursue any case against each other until the mediation proceedings are pending and it was due to this that the plaintiff could not file the suit immediately; and, (xvi) on 16th January, 2019, the plaintiff discovered that the defendants have again accessed the emails of the plaintiff; the defendants by doing so, got to know the latest client of the plaintiff in Sweden.

3. The suit came up first before this Court on 18th February, 2019, when attention of the senior counsel then appearing for the plaintiff was drawn to the dicta of this Court in *Navigators Logistics Ltd. Vs. Kashif Qureshi* 2018 SCC OnLine Del 11321 and it was enquired as to how the suit claim was within time.

4. On adjournment being sought by counsel for the plaintiff on 18th February, 2019, for the sake of expediency, summons were also issued though no *ex parte* relief sought granted.

5. The plaintiff preferred FAO(OS) 45/2019 against non-grant of *ex parte* relief and which was disposed of vide order dated 26th February, 2019 with liberty to the plaintiff to make its contentions before this Bench.

6. The suit came up before this Bench on 14th March, 2019 when it was yet again enquired from the senior counsel for the plaintiff, whether not the

claim with respect to customers list was covered by *Navigators Logistics Ltd.* supra; yet again adjournment was sought on behalf of the plaintiff, stating that further arguments would be addressed only after written statement is filed by the defendants.

7. On 28th March, 2019, the aspect of constituting the confidentiality club was debated and a confidentiality club was created with respect to the documents qua which the plaintiff claimed confidentiality.

8. The defendants have filed IA No.9149/2019 under Order VII Rule 11 CPC for rejection of the plaint. The said application came up before the Court on 10th July, 2019 when it was adjourned to 22nd July, 2019, observing that the same, though did not disclose a case for rejection of the plaint, did disclose a ground for summary judgment against the plaintiff.

9. The counsel for the defendants, on 22nd July, 2019 contended that the suit is squarely covered by *Navigators Logistics Ltd.* supra and liable to be dismissed. The counsel for the plaintiff, on 22nd July, 2019 yet again sought an adjournment to address on the said aspect though attention of the counsel for plaintiff had been drawn to the said aspect even five months prior thereto on 18th February, 2019. However, on request of counsel for the plaintiff, adjournment was granted subject to the plaintiff paying costs to the counsel for the defendants.

10. The counsel for the plaintiff has today paid the costs but again seeks adjournment stating that certified copies have been applied of documents filed by the police pursuant to the prosecution in FIR aforesaid, but have not been obtained and are required to be obtained. On further enquiry, it is stated that the documents are the documents of exports made by the defendants to customers of the plaintiff by hacking the emails.

11. I have enquired from the counsel for the plaintiff, whether not the question for adjudication is, the right, if any, of the plaintiff as an ex-employee of the defendant no.1, to restrain the defendant no.1 from competing with the plaintiff by dealing with the same set of persons with whom the plaintiff was dealing in during the course of employment of the defendant no.1 with the plaintiff.

12. No response is forthcoming from counsel for the plaintiff.

13. The plaintiff, after filing a commercial suit, cannot when enquired about the very maintainability thereof in view of pleaded facts and law, seek adjournment after adjournment, as is being done in the present case.

14. No ground for granting adjournment to file certified copies of the documents is also made out. The plaintiff, as aforesaid, since 18th February, 2019 is aware of what was required from it and/or what was being enquired into and if has not filed the documents till date in spite of eight months having elapsed since then, cannot be permitted to keep the suit pending in this fashion.

15. On enquiry of the date when the certified copies, on the ground of need for filing whereof adjournment has been sought today, were applied for, it is stated that they were applied for on various dates, with the first date being 11th September, 2019. The counsel for the plaintiff states that in fact the police filed the documents of which certified copies have been applied for 'later on', but is unable to give any date.

16. The counsel for the plaintiff, during the course of hearing has shown photocopies of the said documents, demonstrating that the plaintiff is possessed of photocopies and if felt the said documents to be relevant, could have also placed the photocopies on record under Order XI Rule 1 as

applicable to commercial suits. The documents of exports affected by the defendants would even otherwise have no bearing on the aspect on which the plaintiff was required to address this Court.

17. The averments in the plaint do not disclose the plaintiff to be having any copyright in any original literary work within the meaning of Section 2(o) of the Copyright Act, 1957 and in fact the documents in which copyright is claimed are not even before this Court till now, in spite of being enquired into since 18th February, 2019. A plaintiff, when filing a suit, specially a commercial suit, ought to take care to plead its case properly in the plaint and produce all documents sought to be relied on along with the plaint. In this context it has been observed in ***Zee Entertainment Enterprises Vs. Saregama India Ltd.*** 2019 SCC OnLine Del 10215 as under:-

*“13. The changes brought about by the Commercial Courts Act, 2015 in respect of filing of documents having already been discussed in **Nitin Gupta Vs. Texmaco Infrastructure and Holding Limited** 2019 SCC OnLine Del 8367 and **Societe Des Produits Nestle S.A. Vs. Essar Industries** 2016 SCC OnLine Del 42, need to reiterate the same is not felt. Suffice it is to state that:*

(a) while

Order VII Rule 14 of the CPC, applicable to ordinary suits, requires a plaintiff, when suing upon a document or relying upon documents in his possession or power in support of his claim, to enter such documents in a list and to produce it in the Court when the plaint is presented by him,

Order XI Rules 1 to 3 of the CPC as applicable to commercial suits requires a plaintiff to file a list of all documents and photocopies of all documents in its power, possession, control or custody, pertaining to the suit,

along with the plaint including documents relating to any matter in question in the proceedings, in the power, possession, control or custody of the plaintiff, as on the date of filing the plaint, irrespective of whether the same is in support of or adverse to the plaintiff's case and to, in the said list also specify whether the documents in the power, possession, control or custody of the plaintiff are originals, office copies or photocopies and the list to also set out in brief, details of parties to each document, mode of execution, issuance or receipt and line of custody of each document; the plaint is also required to contain a declaration on oath from the plaintiff that all documents in the power, possession, control or custody of the plaintiff, pertaining to the facts and circumstances of the proceedings initiated by him have been disclosed and copies thereof annexed with the plaint, and that the plaintiff does not have any other documents in its power, possession, control or custody;

(b) while

Order VII Rule 14(3) of the CPC pertaining to ordinary suits provides that a document which ought to be produced in Court by the plaintiff when the plaint is presented, or to be entered in the list to be added or annexed to the plaint, but is not produced or entered accordingly, such document, without the leave of the Court, shall not be received in evidence on behalf of the plaintiff at the hearing of the suit,

Order XI Rule 1(5) pertaining to commercial suits, bars the Court from allowing the plaintiff to rely on documents which were in the plaintiff's power, possession, control or custody and not disclosed along with the plaint, save and except by leave of the Court and which leave shall be granted only upon the plaintiff establishing requisite cause for non-disclosure along with the plaint.

It would thus be seen that the requirement for filing of documents along with the plaint is much more detailed, precise and specific in a commercial suit than in an

ordinary suit. The plaintiff in an ordinary suit is required to produce along with the plaint only such documents on which he is suing or on which he intends to rely in support of his claim. On the contrary, in a commercial suit, the plaintiff along with the plaint is required to file all documents pertaining to the suit irrespective of, whether the same are in support of or adverse to the claim of the plaintiff. The list of documents required to be filed by a plaintiff in an ordinary suit is only required to have an entry of the document. On the contrary, the list of documents required to be filed by a plaintiff in a commercial suit is required to specify, whether the documents are originals or office copies or photocopies and also contain details of parties to each document, mode of execution and line of custody of each document. The plaint in a commercial suit is also required to contain a declaration on oath from the plaintiff with respect to the documents, as aforesaid. There is no such requirement in the ordinary suit.

14. What emerges is, that the plaintiff in a commercial suit, before instituting the suit, is required to go through all the documents in his power, possession, control or custody pertaining to the subject matter of the suit, whether in support of or adverse to his case and make a declaration with respect thereto on oath. The requirement in a commercial suit of declaration on oath qua the documents is not an empty formality. The form of list of documents and the particulars/specifications to be contained therein, coupled with declaration on oath with respect thereto, in a commercial suit, requires a plaintiff to, at the time of institution of suit, rather than stating only the title and date of the document, which alone is required to be filled in the list of documents in an ordinary suit, peruse each document and only then fill the particulars/specifications required to be filled in the list of documents. The requirement of such contents being declared to be correct on oath, places a more heavy onus on the plaintiff.

15. Preparation of such a list of documents as aforesaid, leaves no scope of 'inadvertent errors' as is pleaded by the plaintiff.

16. A plaintiff in an ordinary suit, if desirous of producing a document required to be produced along with the plaint at a subsequent stage, is only required to obtain the leave of the Court. The Legislature has not laid down the grounds on which such leave is to be granted. I have however in **Nitin Gupta** supra held that grant of such leave by the Court is not a ministerial function and the Court has to be satisfied qua the reasons for non-production of the documents along with the plaint. The same however places no restriction on the power of the Court to grant such leave. As distinct therefrom, under Order XI Rule 1(5) as applicable to commercial suits, there is an embargo on the Court, not to allow the plaintiff to rely on any document which was in plaintiff's power, possession, control or custody and not disclosed along with the plaint. The disclosure under Rules 1(1) & (2) has to be accompanied with listing and filing of the documents. The said embargo placed on the Court can be lifted only upon the plaintiff establishing reasonable cause for non-disclosure along with the plaint. The use of the word 'establishing' conveys that there should be something more than a mere explanation for non-production along with plaint, amounting to proof of the explanation."

18. It has been held in **Navigators Logistics Ltd.** supra as under:-

"16. Reliefs claimed in the suit may be grouped as, (i) for permanent injunction restraining infringement of copyright and for recovery, purportedly of damages, for infringing copyright of the plaintiff; (ii) for permanent injunction enforcing the clauses, in the claimed employment contracts, whereunder the defendants no.1 to 8 had agreed not to divulge, during employment with the plaintiff or even after leaving the employment of the plaintiff, any trade secrets, research process, financial/administrative and/or organizational matters or any transactions or affairs of the plaintiff to anyone else and/or damages for breach thereof; and, (iii) for permanent injunction enforcing the clauses, in the claimed employment contracts,

whereunder the defendants no.1 to 8 had agreed not to compete with the plaintiff for a period of one year after leaving employment of the plaintiff, either by carrying on the same business themselves or by joining employment of any competitor of the plaintiff and/or damages for breach thereof.

17. What has to be seen at this stage is, whether in the event of the plaintiff proving the averments in the plaint and the documents filed therewith (and without noticing any of the defences of the defendants save legal ones) the suit can succeed. If it is found that even if the plaintiff were to prove what is pleaded in the plaint, the plaintiff still has no chance of succeeding in the suit, a case for rejection of plaint at this stage only will be made out. The Division Bench of this Court in **Dr. Zubair Ul Abidin Vs. Sameena Abidin @ Sameena Khan** (2014) 214 DLT 340 (DB) (SLP(C) No.369-370/2015 preferred whereagainst was dismissed on 16th January, 2015) has, referring to various earlier judgments held that if on a meaningful, not formal, reading of the plaint, it is found to be not disclosing a right to sue or the claim therein is found to be barred by any law or it is found that there is absolutely no chance of success on such averments, the Court should exercise its power and should not allow it to create an illusion and should not permit it to go to trial and such docket which are deadwood should not be permitted to burden the Court. Reference in this regard context may also be made to **Geodis Overseas Pvt. Ltd. Vs. Punjab National Bank** 2016 SCC OnLine Del 1037.

18. I will first take up the claim of the plaintiff on the basis of copyright.

19. The plaintiff, in para 5 of the plaint, claims copyright, as under:-

“5. That the plaintiff has developed and evolved very distinctive, detailed and comprehensive data, information and databases pertaining to running its business. This includes all the confidential data, customer database, accounts information, airway drawings, airway bills templates, plans, reports, taxes and other financial

information, process, financial/administrative and/or organizational information as well as transactions based templates and internal notings and trade secrets of the plaintiff company. The plaintiff has collated all its experiences together not only from India but from around the world pertaining specifically to the operation of its business and has documented the same in the form of confidential data and information as also confidential databases, including data and information in the electronic form.”

and in para 7 of the plaint, further pleaded as under:-

“7. That the said information, data and other related materials are original artistic and literary works of the plaintiff within the meaning of Section 2(c) and (o) respectively of the Copyright Act, 1957. The plaintiff has got copyright in the said information, data and other related materials under Section 13 of the Copyright Act, 1957. The plaintiff is the first owner of the copyright in the said information, data and other related materials under Section 17 of the Copyright Act.”

20. It is the case of the defendants that there can be no copyright in customer database, accounts information, airway drawings, airway bills templates etc.

21. The plaintiff, save for the aforesaid description, has not given any other description of the works in which it claims copyright and no document also has been filed in this regard. As per the reports of the commissions issued at the instance of the plaintiff also, what has been found in possession of the defendants is the list of customers and clients serviced by the plaintiff and their contact persons. Though the Commissioners have reported also finding e-mails/skype chats inter se the defendants while working with the plaintiff and/or e-mails between the defendants and present employee of the plaintiff, but there can possibly be no copyright therein.

22. What is thus for adjudication is, whether there can be any copyright in a list of customers/clients with their contact persons/numbers maintained by the service provider. Though the plaintiff has in the plaint generally pleaded database

pertaining to, running of business accounts information, airway drawings, airway bills templates, plans, reports, taxes and other financial information, process, financial/administrative and/or organizational information as well as transactions based templates and internal notings and trade secrets of the plaintiff company, but the said words/phrases, though high-sounding, are vague and do not constitute a plea in law within the meaning of Order VI Rules 2,4,9 and Order VII Rules 1(e) and 7 of the Code of Civil Procedure, 1908 (CPC). In this context, it may be also mentioned that using such high-sounding/phrases which in fact have no content or meaning, a large number of suits are filed in this Court against the ex-employees and it has often been found that interim injunctions issued restraining the ex-employees from divulging the same to any other person remain unenforceable in the absence of particulars and with applications under Order XXXIX Rule 2A of the CPC being filed with respect to all communications made by such employees with others and with it being absolutely impossible for the Court to determine whether the communication is in violation of the interim order. It is for this reason only that Section 41(f) of the Specific Relief Act, 1963, and principles whereof are applicable to temporary injunctions also, prohibits grant of injunction to prevent, on the ground of nuisance, an act of which it is not reasonably clear that it will be a nuisance. Similarly, without specifying the information, disclosure of which is sought to be restrained, an injunction cannot be granted; rather I have wondered the purport of the interim order dated 3rd June, 2016 in this suit, restraining the defendants from utilizing, exploiting, copying, transmitting, publishing or releasing any confidential information and trade secrets of the plaintiff to any entity for any purpose whatsoever, without specifying as to which is that confidential information and trade secret. It is for this reason that I have hereinabove observed that what is for adjudication is, whether list of customers/clients with their contact numbers prepared/drawn up by a service provider can be said to be a work in which such service provider can have copyright.

23. Copyright, as distinct from a trademark, is a statutory and not a common law right or a natural right. Reference if any in this regard can be made to **Time Warner Entertainment Company L.P. Vs. RPG Netcom** (2007) 140 DLT 758, **Entertainment Network (India) Ltd. Vs. Super Cassette Industries Ltd.** (2008) 13 SCC 30 and **Krishika Lulla Vs. Shyam Vithalrao Devkatta** (2016) 2 SCC 521. Thus unless it can be found that a copyright vests in such a list under the Copyright Act, the plaintiff cannot have any right in the list maintained/prepared/compiled by the plaintiff of its customers/clients with their contact persons/numbers.

24. Per Section 13(1) of the Copyright Act, copyright subsists in the following classes of works, that is to say:-

- “(a) original literary, dramatic, musical and artistic works;
- (b) cinematograph films; and ,
- (c) sound recording”.

25. The list aforesaid is not a cinematograph film or a sound recording. The first question to be thus determined is, whether the said list qualifies as an original literary, dramatic, musical and artistic work.

26. The list does not fall in the definition of artistic work or dramatic work or musical work, as defined in Section 2(c),(h) & (p) respectively. Literary work is defined in Section 2(o) as including computer programmes, tables and compilations including computer databases. The definition of literary work is inclusive and the inclusion contains compilations.

27. The question which thus arises is, whether all compilations are literary work in which copyright can subsist.

28. As practicing Advocate, the list/compilation of my clients and their phone numbers was generated by my smartphone by entering the list of contacts in my phone. I never considered the same as a literary work or myself as the author of the said list/compilation.

29. In **Burlington Home Shopping Pvt. Ltd.** *supra*, a single Judge of this Court was concerned, with an application for interim relief in a suit by mail order service company against its ex-employee for injunction restraining breach of copyright and confidentiality, pleading that compilation of addresses was developed by devoting time, money, labour and skill, though the sources may be commonly situated, amounted to a 'literary work' wherein an author has a copyright. Finding, that the database available with defendant therein was substantially a copy of the database available with the plaintiff therein and compiled by the plaintiff therein, interim injunction was granted. Similarly, in **Diljeet Titus, Advocate** *supra*, another single Judge held in the context of an Advocate/law firm that copyright subsists in a list containing details about the particular persons such law firm is handling and the nature of the work or the contact person in the client's company and especially designed by an Advocate of his Court matters. The third judgment cited by counsel for plaintiff, viz. **Mayar (H.K.) Ltd.** *supra* is not on the aspect of copyright but on Order VII Rule 11 of the CPC.

30. I have in **Tech Plus Media Private Ltd.**, relied upon by the counsel for the defendants and against which no appeal is found to have been preferred, in the context of a list of names and address of visitors to the new portals of the plaintiff in that case or the comments of such visitors, held that the plaintiff could not be said to be the author or composer or having contribution in the same. **Burlington Home Shopping Pvt. Ltd.** and **Diljeet Titus, Advocate** *supra* were noticed but it was further held (i) that both the said judgments are of a date prior to the pronouncement of the Supreme Court in **Eastern Book Company Vs. D.B. Modak** (2008) 1 SCC 1, laying down (i) that to claim copyright in a compilation, the author must produce the material with exercise of his skill and judgment which may not be creativity in the sense that it is novel or non-obvious but at the same time it is not a product merely of labour and capital; and, (ii) that the exercise of skill and judgment required to produce the work must not be so trivial that it could be characterized as a purely mechanical exercise. Accordingly, it

was held that copy edited judgments would not satisfy the copyright merely by establishing amount of skill, labour and capital put in the inputs of the copy edited judgments as the original or innovative thoughts for the creativity are completely excluded. Notice in **Tech Plus Media Private Ltd.** was also taken of **Emergent Genetics India Pvt. Ltd. Vs. Shailendra Shivam** 2011 (47) PTC 494. Reliance in **Tech Plus Media Private Ltd.** was also placed on **Dr. Reckeweg & Co. GMBH Vs. Adven Biotech Private Ltd.** 2008 (38) PTC 308 (Del), wherein, dealing with the issue of copyright in a compilation in a brochure, of nomenclature of drugs, the listing of the medicines in a particular fashion, the description and the curative effect, the principle of law enunciated by the Supreme Court in **Eastern Book Company** supra was applied. It was held that no copyright subsists therein in the absence of employment of any skill judgment and labour in compilation thereof. It was further held that without specifically averring as to the manner/technique/criteria employed in such sequencing/collection and the originality in the same, the plaintiff could not succeed in its claim. It was yet further held that the compilation in that case was a derivative work in the sense of being a collection of sequencing of already existing information and did not satisfy the standard of creativity required to qualify as a work in which copyright subsists. It was explained that the standard of creativity required in such derivative work is higher than the standard required in cases of primary works. Resultantly, the plaint in **Tech Plus Media Private Ltd.** was rejected.

31. I may state that the pleadings in the present suit are equally vague as in **Tech Plus Media Private Ltd.** There is no averment in the plaint of the technique/criteria in compiling the list of customers.

32. Further, Section 13(2) is as under:-

“Copyright shall not subsist in any work specified in sub-section (1), other than a work to which the provisions of section 40 or section 41 apply, unless,—

(i) in the case of a published work, the work is first published in India, or where the work is first published outside India, the author is at the date of such publication, or in a case where the author was dead at that date, was at the time of his death, a citizen of India;

(ii) in the case of an unpublished work other than a work of architecture, the author is at the date of the making of the work a citizen of India or domiciled in India; and

(iii) in the case of work of architecture, the work is located in India.

Explanation.— In the case of a work of joint authorship, the conditions conferring copyright specified in this subsection shall be satisfied by all the authors of the work.”

33. Thus, even if list compiled/prepared by the plaintiff of its customers/clients with contact persons/numbers were to qualify as a original literary, dramatic, musical and artistic works (it cannot possibly be a cinematographic film or a sound recording), copyright will not vest therein unless the said list has been published or unless the said list, if unpublished, is authored by a citizen of India or domiciled in India.

34. Section 3 of the Copyright Act defines ‘publication’ as, making a work available to the public by issue of copies or by communicating the work to the public. It is not the case of the plaintiff that it has published the said list, for clause (i) of Section 13(2) to apply. For clause (ii) of Section 13(2) to apply, the author of the list has to be citizen, of India or domiciled in India. The plaintiff claims ownership of copyright under Section 17 of the Act, presumably under clause (c) thereof. However, the plaintiff has not disclosed the name of the author, who was employed with the plaintiff. The plaintiff, which is a company, cannot be the author. This Court in **Rupendra Kashyap Vs. Jiwan Publishing House Pvt. Ltd.** 1994 (28) DRJ 286 held, in the context of question papers for an examination, that the author of the examination paper is a person who has compiled the questions; the person who does this compiling, is a natural

person, a human being, and not an artificial person; Central Board of Secondary Education is not a natural person—it would be entitled to claim copyright in the examination papers only if it establishes and proves that it has engaged persons specifically for purposes of preparation of compilation, known as question papers, with a contract that copyright therein will vest in Central Board of Secondary Education. I also, in **Tech Plus Media Private Ltd.** *supra* have held that a juristic person is incapable of being the author of any literary work in which a copyright may exist, though may be owner of copyright. The plaintiff has not disclosed the identity of author. The plaintiff does not claim any confidentiality about such identity. It was essential for the plaintiff to disclose identity of the author, to claim ownership of copyright.

35. In my opinion, for this reason alone, there can be no copyright in the plaintiff in the list aforesaid.

36. The reliefs claimed by the plaintiff on the basis of copyright thus have no chance of success in the suit and the plaint is liable to be rejected, insofar as on the premise of copyright.

37. That brings me to the second premise on which the plaintiff has claimed the reliefs i.e. enforcement of clauses in the employment contracts which prohibited the defendants No.1 to 8 from divulging confidential information of the plaintiff.

38. In fact, it is this part of this judgment which has led to the delay in pronouncement thereof as I was quite hazy and foggy about such rights of confidentiality, under the contract and otherwise and enforceability thereof.

39. Confidentiality and secrecy is claimed in the same works in which copyright is claimed viz. data, information and trade secrets residing in the electronic devices without again specifying the particulars thereof or secrecy thereof. Mere mention of research process, financial / administrative and / or organizational matter or transaction or affairs of the company or invention or discovery or patent protection does not satisfy the requirements of pleadings. The plaintiff as per its own admission is engaged in the business of providing logistics and

freight forwarding services and is not engaged in any research work, it was incumbent for the plaintiff to, in the plaint, plead how the data etc. in which confidentiality is claimed is different from data of any other entity engaged in such business and what is secret about the same and what steps besides the clause aforesaid in the letters of appointment of defendants no.1 to 8 have been taken by the plaintiff to maintain secrecy / confidentiality thereof. The plaint in this regard is vague and cannot be put to trial. The whole purpose of pleadings in a civil suit is to let the opponent know the case to be met and which crystallizes ultimately in issues on which the parties go to trial. If such rules of pleadings are not to be adhered to, it will result in a fishing and roving enquiry and enable a party to the suit to secure a victory by springing a surprise during the course of trial. Similarly, an injunction qua confidentiality as sought, even if granted would be vague and unenforceable as aforesaid. This Court cannot pass such unenforceable order, the meaning whereof is not clear. It cannot be known, neither to the Court nor to the defendant as to what the defendant is enjoined from doing.

40. *Specific mention in the plaint as aforesaid is only qua the list / compilation of customers with details of contact person / numbers. Copyright was also claimed in the same list and which has not been found. What troubled me was that the law having not protected such a list as a copyright, what could be right in law of the plaintiff to enforce confidentiality thereof. I then came across the article titled “The ‘Other IP Right’: Is It Time to Codify the Indian Law on Protection of Confidential Information” authored by Mr. Prashant Reddy T, Assistant Professor, NALSAR, Hyderabad published in Journal of National Law University, Delhi 5(1) 1-21, analysing the law with respect to confidential information and authoring (i) Article 39 of the Trade Related Aspects of Intellectual Property Rights (TRIPS) Agreement signed by India imposed an obligation on contracting states to provide means to protect secret information that has commercial value from disclosure without the consent of the persons who have maintained the secrecy of such information; (ii) however India did not enact*

any new laws on the issue of trade secret protection meaning that Indian government considered its existing laws sufficient to comply with the requirements of Article 39; (iii) confidential information under English law is protected under both common law and equity with remedies of injunction and damages; (iv) however English law does not equate information to property unlike some other jurisdictions, such as the United States where trade secrets are treated as property; (v) India's approach to confidential information has been the same as that of English Courts; (vi) Indian Courts, even in the absence of a contract have protected information received under a duty of confidence; reference is made to **John Richard Brady Vs. Chemical Process Equipments Pvt. Ltd.** AIR 1987 Del. 372; and, (vii) English Courts have implied a duty of fidelity into the arrangement between an employer and employee.

41. On facts as pleaded in plaint it appeared that there can be no confidentiality about such a list. Just like customers/clients of an Advocate practicing in the field of acquisition of land and determination of compensation therefor can comprise only of those whose land has been acquired and whose particulars are contained in the acquisition notification and/or award pronounced by the Land Acquisition Collector, similarly the list of customers/clients of the plaintiff, carrying on business in the field of logistic and freight forwarding, can only comprise of businesses/industry requiring carriage of goods and material and none else. Names and contact addresses of such businesses are easily available in public domain. Any competitor of the plaintiff worth its salt would also know of such businesses/industry and be free to market his services to them, even if presently employing the service of the plaintiff. I am thus unable to fathom the confidentiality therein and during the hearing also repeatedly enquired about the same and also enquired about the particulars of other works/databases and in which also copyright and confidentiality was claimed. No answer was forthcoming. Every customer list cannot qualify as confidential information or a trade secret unless the confidentiality around such a list is of economic value/business value/commercial value. A thought

also crossed my mind, whether not any employee of the plaintiff, dealing with the customers/clients of the plaintiff on behalf of the plaintiff, would have knowledge of the said customers/clients and their contact address even in the absence of a list and how could such an employee, when joining the employment of a competitor, be prevented from marketing the services of the competitor to the employees/clients at the address on which he was earlier servicing them under employment of the former employer and whether not it would amount to restraint of trade.

42. In fact today, trade/business directories are available of each trade/business and wherefrom names and addresses of all in a particular trade/business/industry can be known.

*43. In **Star India Pvt. Ltd. Vs. Laxmiraj Seetharam Nayak** 2003 SCC OnLine Bom 27 it was held that everyone in any employment for some period would know certain facts and would get to know some information without any special effort; all such persons cannot be said to know trade secrets or confidential information and that every opinion or general knowledge of facts cannot be labelled as trade secrets or confidential information. It was yet further held that if such items are called as trade secrets, or secret, would lose its meaning and significance. It was held that the basic nature of the business dealings of the plaintiff in that case with its advertisers would be openly known and cannot be called a trade secret or a confidential information; the rates of the advertisements are within the public domain and every businessman generally knows the rates of his rivals; the concerned people know the rates of the advertisements; unless they are told the rates and other conditions of the advertisements, no business transaction can be done; such matters are not even open secrets. Similarly it was held that fixation of rates etc. depends on a number of factors including the popularity, in that case of T.V. serial and the time-slots of the display of such T.V. serials and mere use of the words 'strategies', 'policy decisions' or 'crucial policies' repeatedly in all the items does not acquire the position or character of secrecy. It was held that there was nothing on record from*

which it could be inferred that the defendant had come to know any trade secrets or confidential information concerning the plaintiff company and its business especially when the trade secrets and the confidential information were not even spelled out.

44. This Court also, in **Ambiance India (Private) Ltd. Vs. Naveen Jain** 2005 SCC OnLine Del 367 held that written day to day affairs of employment which are in the knowledge of many and are commonly known to others cannot be called trade secrets. It was further held that trade secret can be a formulae, technical know-how or a peculiar mode or method of business adopted by an employer which is unknown to others. It was yet further held that in a business house, the employees discharging their duties come across so many matters but all these matters are not trade secrets or confidential matters or formulae, the divulgence of which may be injurious to the employer and if an employee on account of employment has learnt some business acumen or ways of dealing with the customers or clients, the same do not constitute trade secret or confidential information, divulgence or use of which should be prohibited.

45. This Court again in **American Express Bank Ltd. Vs. Priya Puri** 2006 SCC OnLine Del 638 held that the plaintiff in that case, in the garb of confidentiality, was trying to contend that that once the customer of the plaintiff, always a customer of the plaintiff. It was further held that the plaintiff, a bank in that case, could not restrain its competitor banks from dealing with the customers of the plaintiff bank on the ground that the plaintiff bank maintained written record of its customers and their financial portfolios which had been acquired by the competitor bank and so the competitor bank should be restrained even to contact those customers. It was reasoned, that if the competitor bank without acquiring any information as to with whom a particular person or company is banking, can approach him and canvass about themselves, even after acquiring information that a particular person of company is banking with a bank is still entitled to approach him and canvass about themselves and it is for the customers to decide with which bank to bank. It was further held that creating a

database of the clients/customers and then claiming confidentiality about it, will not permit creation of a monopoly about such customers. It was yet further reasoned that without impleading the customers in the suit, the competitor could not be restrained from dealing with the customers. It was thus held that details of customers are not trade secrets or property. The argument, on the basis of copyright therein, was also negated.

46. The High Court of Bombay again in **Bombay Dyeing and Manufacturing Co. Ltd. Vs. Mehar Karan Singh** 2010 SCC OnLine Bom 1243, relying on the judgments of the United States of America, Court of Appeals, Tenth Circuit in **Rivendell Forest Products Ltd. Vs. Georgia Pacific Corporation and Timothy L. Cornwell** 31 USPQ 2d1472 and **Kodekay Electronics Inc. Vs. Mechanex Corp.** 486 F. 2d 449 (10th Cir. 1973) and held that something which is known outside the business or to those inside the business i.e. the employees and for guarding which no steps have been taken and for developing which no effort or money has been extended, cannot be a trade secret. Accordingly, it was held that information relating to 'strategic business plans', 'product mix', 'square footage of construction', 'capital expenditure' or 'revenue budgets' could not be claimed to be of any confidential nature which no other competitor would know. Relying on **Star India Private Limited** supra it was held that a salesman leaving a company and heart surgeon leaving a hospital cannot be prevented from negotiating with the customers or performing a surgery on the premise that they acquired the skill by experience and those skills can be carried with the employee. It was yet further held that though the defendant in that case, on amassing information and knowledge with regard to the plaintiff's plan of operation, could not be enjoined from disclosing those plans to the competitor if he carried them in his head and the competitor in the market, could not be taken to be driven by the defendant's disclosure alone.

47. This Court, even in **Stellar Information Technology Private Ltd. Vs. Rakesh Kumar** (2016) 234 DLT 114 held that the names of the customers seeking data recovery services of the plaintiff in that case were well known and in public domain

and the defendants could not be restrained from approaching the customers only on the allegation that the defendants are aware of the names of the plaintiff's customers. It was reasoned that the plaintiff, in the name of confidentiality, was seeking a restraint on trade. FAO(OS) (Com.) No.104/2016 preferred thereagainst was dismissed on 11th November, 2016.

48. The plaintiff, on a reading of the plaint, is thus found to have not made out a case for permanent injunction restraining the defendants from divulging any trade secrets, research process, financial, administrative and / or organizational matters or any transactions or affairs of the plaintiff to anyone else and / or for recovery of damages therefor for the reason of the plaintiff having not pleaded that the defendants were privy to any such trade secrets or other such matters. ”

19. I have also had occasion to consider the said aspect in the context of claim on the basis of tort of unlawful interference in business by enticing customers of the plaintiff to commit breach of contract with plaintiff, recently in **Modicare Ltd. Vs. Gautam Bali** MANU/DE/3270/2019 and in which it has *inter alia* been held as under:-

“29. Section 27 of the Contract Act makes void i.e. unenforceable, every agreement by which anyone is restrained from exercising a lawful profession, trade or business of any kind. Thus, even if the defendants or any of them, under their agreement with the plaintiff, had undertaken not to carry on or be involved in any capacity in any business competing with the business of the plaintiff, even after leaving employment with/association of the plaintiff, the said agreement, owing to Section 27 supra, would be void and unenforceable and the plaintiff on the basis thereof could not have restrained any of the defendants from carrying on any business or vocation, even if the one which the defendant had agreed not to carry on. I find it incongruous that the law, on the one hand would disable a plaintiff from enforcing a contract where the defendant had voluntarily agreed not to do something, by going to the extent of declaring such contract void, but on the other hand, enable the

same plaintiff to the same relief under the law of tort. To hold so, would make the law look like an ass.

30. Section 27, in **Taprogge Gesellschaft MBH Vs. IAEC India Ltd.** AIR 1988 Bom 157, **Sharp Business System Vs. The Commissioner of Income Tax** 2012 SCC OnLine Del 5639, and **Pepsi Foods Ltd.** *supra* has been held to have been enacted as a matter of public policy of India, and does not create any personal right, which can be waived. If it is the public policy of India that there can be no restraint on any one exercising a lawful profession, trade or business, not even when such person has voluntarily agreed not to, it belies logic that such public policy would not apply when the mischief sought to be prevented is sought to be practiced invoking law of torts. It is not as if different reliefs are being claimed, in enforcement of contract on the one hand and invoking the law of torts on the other hand. The reliefs are the same. In my opinion, what is not contractually enforceable is also not enforceable invoking law of torts.

31. In spite of specific query, whether there is equivalent in UK, of Section 27 of the Contract Act, no response has come. I find Supreme Court in **Gujarat Bottling Co. Ltd.** *supra* to have held that while under the common law in England, restraints of trade, whether general or partial, may be good if they are reasonable or reasonably necessary with reference to public policy or for protection of interest of covenantee, in India, agreements in restraint of trade are governed by Section 27 and the question of reasonableness of restraint is outside the purview of Section 27. This explains, the law of tort of unlawful interference in business, in UK. However the same, in my view, has no place in India, at least in the context of present facts. I find the Supreme Court, in **Superintendence Company of India (P) Ltd.** *supra*, to have also held that principles of English Law cannot be imported once the Parliament has codified the said principles in the Contract Act; it is the language of the statute which alone has to be considered to ascertain its true meaning and scope.

32. Section 27, contained in a legislation of the year 1872, on promulgation of the Constitution of India in the year 1950, conferring the right to practice any profession or to carry on any occupation, trade or business, the status of a Fundamental Right, under Article 19(1)(g) thereof, today has a different connotation. Article 19(6) only clarifies that nothing contained in Clause (g) shall affect the operation of any existing law or prevent the State from making any law, imposing in the interest of general public, reasonable restrictions on the exercise of right conferred by the said clause. Thus, restrictions, in the interest of general public and if reasonable, to the Fundamental Right to practice any profession or to carry on any occupation, trade or business, can be imposed only by law. The law of tort of unreasonable interference in carrying on business, in view of Section 27 of the Contract Act in force since 1872, was not the existing law within the meaning of Article 19 (6) of the Constitution.

33. I have in **Independent News Service Pvt. Ltd. Vs. Sucherita Kukreti**(2019) 257 DLT 426, in the context of Section 27 of the Contract Act held the right saved thereby to be a facet of Article 21 of the Constitution of India. The judgment of the Division Bench of Allahabad High Court of the year 1930, after the right sought to be curtailed has been conferred the status of a Fundamental Right and a facet of Article 21 of the Constitution of India, does not persuade me to hold that such Fundamental Right of the defendants can be subject to the law of tort of enticement to commit breach of contract or of unlawful interference with business.

34. After the coming into force of the Constitution of India, the restriction if any on the fundamental right to carry on any trade or business or to practice any profession can be imposed only by making a law i.e. a law prohibiting unlawful interference in business and enticing another to commit breach of existing contractual obligations, and the constitutionality of which law if challenged would be tested on the anvil of Article 19(6) of the Constitution of India.

35. **Bholanath Shankar Das Vs. Lachmi Narain** AIR 1931 All 83 referred to by counsel for plaintiff is found to be in a different set of facts. The defendants therein, by forming an association, were preventing the others traders in the market from making supplies to the plaintiff therein of the goods which they had agreed to sell to the plaintiff. It was found as a matter of fact that the defendants were doing so to create a monopoly, to hike up the price. It was the plea of the plaintiff therein that the agreement forming an association for the said purpose offended the provisions of Sections 23 and 27 of the Contract Act. While negating the said contention, it was observed that the case of the plaintiff was founded upon tort and to which Sections 23 and 27 had no application. Reliance placed by the counsel for the plaintiff on the said judgement, without reference to the facts thereof, is thus misconceived.

36. Else, I find a Full Bench of the High Court of Hyderabad to have in **Holloor Gopal Rao Vs War Nasi Shiv Ramiah** AIR 1953 Hyd 1 held that a suit for establishing exclusive right to 'purohitgiri' in a village, axiomatically prohibiting others from acting as purohits, could no longer continue after coming into force on 26th January, 1950 of the Constitution of India. It was held that any order declaring the exclusive right of the plaintiff would amount to laying a restraint upon others to carry on the same profession in the village.

37. In fact, during the hearing on both days, I have also been asking the senior counsel for the plaintiff, that even if the argument of the senior counsel for the plaintiff were to be accepted, where should the Court draw the line, between what constitutes enticement to commit breach of contract and unlawful interference in business on the one hand and competition on the other hand. Any new entrant in the market, to be able to create a niche for itself, in spite of the existing players, has to compete with the existing players, by approaching the same customers and the same cache of employees who over the years have acquired expertise in that particular field. When launching the same product/service, the new entrant to the business cannot possibly create a new set of customers for that product or service. Thus, the consumers to

be approached by the new entrant would be the same who were earlier having contractual relationships with the existing players. Similarly, a new entrant cannot possibly compete if does not have the requisite expertise/finesse, required for launching a particular product or service and to be able to provide the same class or quality of service, has to necessarily have with it, hands which have been making the subject product and/or providing the said service in the past, may be under contract with the existing players. In my view, it is practically impossible to draw a line between such persons, on their own approaching the new entrant, and the new entrant approaching them. The process is quite complex and no precise rules can be made with respect thereto. The Courts would not lay down the law in the name of being a matter of evidence, in respect of matters which are incapable of determination by Courts.

38. Attention of the senior counsel for the plaintiff has also been drawn to the widespread business of headhunters and employment brokers, who sometimes are approached by employees/customers and sometimes by the new entrant and also sometimes on their own make the two meet. I have enquired from the senior counsel for the plaintiff, whether it will make any difference, that the new entrant in the market approaches a headhunter for hiring employees with the specialty and instead of the new entrant, it is the headhunter who approaches employees having contracts with existing players. It is virtually impossible, even if evidence were permitted to be led to draw a line, as to what caused the employee to breach an existing contract of employment and enter into a new contract i.e. whether it was on own violation or on being enticed by the new entrant in the market.

39. No line which can be drawn in this respect has been suggested.

40. A new entrant obviously has to offer better terms to employees having expertise and having contract with other players, to woo them to itself. I have wondered, whether offering such better terms would amount to the tort of enticement to commit breach of contract and unlawful

interference with the business of an existing player. Again no clarity has emerged.

41. I thus hold that a claim founded on unlawful interference with business or of enticement to commit a breach of contract with the plaintiff is not enforceable in a court of law, neither contractually nor invoking the law of tort. Such a claim is thus not required to be put to trial.”

20. Once, it is found that as per law declared in ***Navigators Logistics Ltd.*** supra and ***Modicare Ltd.*** supra the suit is not maintainable, the same ought not to consume the time of the Court and is liable to be summarily dismissed, if not under Order VII Rule 11 of the CPC, under Order XIII-A of the CPC as applicable to commercial suits which entitles the Court to summarily dismiss the suit if finds no real prospect of the plaintiff succeeding therein. The suits are not to be kept pending, with dates after dates given, to keep the Advocates and the Court busy.

21. Opportunity has been given to the counsel for the plaintiff to make any other argument, if so desires.

22. Mr. Lokesh Kr. Mishra, Advocate for the plaintiff states that he wants to withdraw the suit.

23. The counsel for the defendants states that though the plaintiff has withdrawn the suit, but the copyright claimed was only in the list of clients and in which no copyright subsists in terms of ***Navigators Logistics Ltd.*** supra.

24. The suit is dismissed as withdrawn.

25. Though, the plaintiff is liable for costs to the defendants but counsel for the plaintiff states that the plaintiff has already incurred costs in filing the suit. In the hope that the parties will not litigate further, no costs.

RAJIV SAHAI ENDLAW, J.

OCTOBER 14, 2019

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