Mr. Diljeet Titus, Advocate vs Mr. Alfred A. Adebare And Ors. on 8 May, 2006

Equivalent citations: 130(2006)DLT330, 2006(32)PTC609(DEL)

Author: Sanjay Kishan Kaul

Bench: Sanjay Kishan Kaul

JUDGMENT

Sanjay Kishan Kaul, J.

Page 1879 IA No. 6695/2004 (under Order 39 R 1 and 2 CPC) in CS (OS) No. 1109/2004 IA No. 7477/2004 (under Order 39 R 1 and 2 CPC) in CS (OS) No. 1257/2004

1. The nature of legal practice has changed especially over the last few years. The traditional concept of learning law at the feet of your senior has given way to an environment of more cutthroat competition where everyone is looking to their self-interest. Such change is naturally at the cost of the traditional norms. There has been a growth of law firms where advocates specializing in different fields are under one roof. This requires a greater degree of understanding in the definition of relationships between the advocates.

2. The present dispute is a saga of broken relationships which was started with all good intentions. Since the matter was one between advocates and their associates every endeavor was made to find an amicable settlement to the dispute but to no avail. The order sheet itself bears a testimony to such endeavor.

Page 1880

3. There are two counter suits filed by the two set of parties aggrieved by the conduct of each other. In a nutshell their controversy revolves around the nature of relationship with which the parties got together to carry on their profession as advocates. The plaintiff in suit No. 1109/2004 claims that the defendants were only working for him and were paid remuneration in the form of fee while he remained in control of the professional business of the organization. On the other hand the defendants in the said suit, in the new organization set up by them, claim to have worked more in the nature of partnership with Mr. Diljeet Titus, the plaintiff in CS (OS) No. 1109/2004

4. The defendants decided to part with Mr. Titus and the parting has not been very amicable. Mr. Titus claims that the defendants, who were associates in his law firm, M/s. Titus and Company, left and at that stage took away privileged information of the law firm the use of which other than by Mr.

Titus, can make him liable to his clients. There is grievance of infringement of copyright and apart from the injunction suit filed in this Court even criminal complaints were filed. The data continues to be in possession of the defendants and it is in view thereof that interim reliefs have been claimed.

5. The defendants claim to be the owners of the copyright in what they have created and it is their contention that the creation was independent and the same was so created by advising and counseling the clients and the computer generated data was lying in the computer system of the plaintiff. In the counter suits thus the parting associates numbering four being Ms. Seema Ahluwalia Jhingan, Mr. Alishan Naqvee, Mr. Dimpy Mohanty and Mr. Alfred A. Adebare have sought a decree of declaration that they are the owners of the copyrights in what they have created and consequently they have sought a permanent injunction against Mr. Titus and his firm from using and parting with the same. The question thus arises as to whether there is exclusive right of any of the parties in what they have created or is it a joint right.

6. Mr. Arun Jaitley, learned senior counsel appearing for Mr. Titus emphasized on the essence of copyright: 'thou shalt not steal'. It was thus pleaded that there was an implicit term of confidentiality in any such relationship between advocates and the defendants were thus alleged to have breached this implicit term. The nature of information stated to have been taken away by the defendants was primarily of a two-fold nature, i.e., (i) the list of clients and law firms; and ('i) opinions and advises in respect of which the plaintiff itself had an obligation to maintain confidentiality.

7. Learned senior counsel referred to the principles of damnum sine injuria conceding that some injury is inevitable where a junior leaves the office of a senior associate. This was, however, contended not to include a legal injury on the principles of damnum sine injuria. The sub-stratum of submissions were based on the nature of relationship between the parties as the same is of prime importance in determination of the rights of the parties. Learned senior counsel emphasized that the manner how you pay would not make a difference so long as the nature of relationship could be deciphered from various antecedents' factors. In this behalf learned senior counsel referred to the averments made in the plaint and the stand taken in the written statement.

Page 1881

8. The plaintiff, Mr. Titus claims to be practicing since the year 1989 being associated with various prestigious bodies and organizations and had set up M/s. Titus and Company as a Sole Proprietorship firm in April 1997 retaining 27 full time lawyers as associates/junior advocates to look after his substantial national and international practice. Mr. Titus claims to have invested substantial amount of money in training skills, computer network, specialized and customized software, law library, office infrastructure, etc. Interestingly prior to 1997, Mr. Titus himself is stated to be part of M/s. Singhania and Company another advocates' concern. Two of the four defendants were also part of M/s. Singhania and Company and apparently decided to part collectively from M/s. Singhania and Company when M/s. Titus and Company was set up.

9. The role of Mr. Adebare is slightly different since he is stated to be a Nigerian national without any authorization or license to practice law in India. The plaint avers and emphasized that all the

defendants were in full time employment of the plaintiff and the billing to the clients was in the name of the plaintiff. The defendants were paid performance linked remuneration and were under the discipline and regime of the plaintiff which inter alia included maintaining daily time sheets and adhering to the disciplines of the plaintiff's law firm. There is stated to be no separate clientele of the defendants and the defendants provided professional services only to the plaintiff and never independently represented any client of the plaintiff. The assignment of the work is stated to have been done by the plaintiff at his sole discretion and the productivity of the defendants was determined by actual number of billable hours they had worked on a particular matter for a client of the plaintiff. The plaintiff claims that under his guidance, direction, supervision and control defendants and other associates using the plaintiff's knowledge, skill, experience, resources and investment, developed and created various extremely confidential, crucial and vital electronic records, documents, data and information utilizing the computer system at the office of the plaintiff. Such record is stated to comprise of various proprietary drafts of precedents, agreements, forms, presentation, petitions, confidential documents, legal opinions, legal action plans, computerized database containing client information, proprietary client list, proprietary potential client list and other related information. The termination of relationship between the parties occurred in March 2004 except for Mr. Naqvi who left in November 2003. These defendants then set up their own law firm with which the plaintiff does not and cannot have any grievance. The grievance arises from what is alleged to be an infringement of copyright the details of which have been given hereinabove. Just a couple of days before leaving the plaintiff, the defendant No. 1 is stated to have visited the office of the plaintiff after office hours and requested the security guard to allow him to enter the office on the pretext of downloading some information from the computer for a project handled by him. The guard had no reason not to permit defendant No. 1 to enter the plaintiff's office, who brought a CD-Writer with him and connected the same to the computer in the plaintiff's office, which was inter connected with the plaintiff's Local Area Network (LAN) with Windows Server having 7.2 GB of data. Thus, all the confidential information was copied using the CD-Writer. Not only that defendant No. 1 is stated to have stolen the hard copy Page 1882 precedents comprising over 10 proprietary drafts of the plaintiff. Defendant No. 1 is also stated to have E-mailed the same by using the Internet access installed on the computer of the plaintiff being utilized by defendant No. 1, being the original literary works of the plaintiff to himself and to other persons including the other three defendants. Defendant No. 1 is stated to have taken away with him licensed CDs of all foreign judgments, precedents, conveyances and forms that were actually licensed in the name of the plaintiff and further is alleged to have stolen over 3,000 visiting cards belonging to the plaintiff's law firms given by different clients and contact persons. The aforesaid action of defendant No. 1 resulted in criminal complaints on account of the failure of defendant No. 1 to agree to the plaintiff's request to refrain from using the material. The police raided the residence-cum-office of defendant No. 1 in September 2004 and found four computers. The hard disk of all the four computers was, thus, taken by the Delhi Police and after making two copies of the same, one copy was given back to the defendants and the other copy was taken by the police for investigation purposes. The defendants are stated to have admitted in their possession all the documents of the plaintiff's law firm in the proceedings filed before the High Court by the defendants but the claim of the defendants is that the same was prepared by them. This admission is made and recorded in the order dated 14.9.2004 in Criminal Misc. No. 2264/2004 which is relied upon by the plaintiff to show that the defendants are in possession of the material of the plaintiff.

10. The documentation is stated to be governed strictly by the principles of confidentiality and by the requirements of the client-attorney privilege. The plaintiff's case is that his associates and advocates are not permitted to disclose confidential client related documentation specially in view of the Bar Council of India Rules (hereinafter referred to as the said Rules). In this behalf a reference has been made to the Rules framed by the Bar Council of India under Section 49(1)(c) of the Advocates Act, 1961 (hereinafter referred to as the Advocates Act). Section 49(1) deals with the general power of the Bar Council of India to make rules and discharging its functions under the Act and Clause (c) relates to the standard of professional conduct and etiquette to be observed by the advocates. Rule 17 falls in Section (II) dealing with duty to clients and provides 'an advocate shall not, directly or indirectly commit, a breach of the obligations imposed by Section 126 of the Evidence Act'. Since the documents generated by the plaintiff during rendering of professional services to its clients are privileged and confidential and only the plaintiff is entitled to possession, use and retention thereof, the copying and misuse of the same by the defendants is stated to have exposed the plaintiff to grave risk and consequence from his clients. The plaintiff is stated to be duty bound to maintain the confidentiality of its clients and the defendants are stated to be in breach of their implicit legal obligation. Section 126 of the Evidence Act reads as under:

> Professional communications. - No barrister, attorney, pleader or vakil shall at any time be permitted, unless with his client's express consent, to disclose any communication made to him in the course and for the purpose of his employment as such barrister, pleader, attorney or vakil, Page 1883 by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment:
>
> Provided that nothing in this section shall protect from disclosure -
>
> (1)Any such communication made in furtherance of any [illegal] purpose;
>
> (2)Any fact observed by any barrister, pleader, attorney or vakil, in the course of his employment as such, showing that any crime or fraud has been committed since the commencement of his employment.

It is material whether the attention of such barrister, [pleader], attorney or vakil was or was not directed to such fact by or no behalf of his client.

11. The principal defense of the defendants as set out in the written statement is that the defendants and the plaintiff stood at par with each other in the firm and the plaintiff does not enjoy a better status inter se or that of a Sole Proprietor. The defendants claim that there cannot be an employment of any legal practitioner for services of the clients and the plaintiff alone was not rendering the legal services. The arrangement is stated to be a camouflage as right from the inception, the firm consisted of a group of lawyers, consultants, professionals, who were only for the sake of convenience christened as M/s. Titus and Company, which is alleged to be a mere

nomenclature to identify the group. All the parties to the suit, being associates of M/s. Singhania and Company are stated to have disassociated themselves to form M/s. Titus and Company and thus the defendants were stated to have fee sharing arrangement including Mr. Adebare. The defendants are stated to have independently exercised their professional skills and knowledge and were at sole discretion to advice and serve clients without any supervision including that of the plaintiff. It is stated that there was no daily supervision. There were no minimum pre-determined hours provided for professional services. In fact, the plaintiff's interaction on a daily basis with the clients was stated to be minimal and insignificant. The time sheets were stated to be maintained for billing purposes. There was no fixed salary or remuneration. The payments made to parties including Mr. Adebare was dependent on receipt of payment from the clients and Mr. Adebare is stated to have raised bills independently in his name.

12. The pleadings of the parties in both the suits show that while the plaintiff claims that the defendants were under a contract of service of working under the direction, supervision and control of the plaintiff as per the normal practice in the legal profession in India, the defendants claim to be on an equal footing to the plaintiff and to have created material independently. The plea of the defendants is really in the alternative that either they have exclusive rights having independently created the material or in the alternative what is created belongs to all and not exclusively to the plaintiff.

13. The fee sharing arrangement is stated to have been worked out in a manner whereby the defendants were calculated and paid their share of the Page 1884 professional fee after deducting 20 per cent of the gross professional fee paid by all the clients which went towards a separate common pool for the purpose of meeting client development and other related expenses of the group and for payment of referral fee to any person within or outside the firm responsible for introducing a new client to it. Thus, the said referral fee was on a reducing percentage basis. The plaintiff is stated to have concerned himself with organizational and accounts related functions and the legal work was discharged by the defendants.

14. Learned senior counsel for the plaintiff referred to the provisions of the Copyright Act, 1957 (hereinafter referred to as the said Act). Section 2(o) defines a literary work to include a computer database while Section 13(1)(a) defines an original literary work. Section 17(c) refers to the first owner of the Copyright and in case of an author's employment it is the employer who is the first owner of the copyright. The said provision of the said Act reads as under:

> 17(c). in the case of a work made in the course of the author's employment under a contract of service or apprenticeship, to which clause (a) or clause (b) does not apply, the employer shall, in the absence of any agreement to the contrary, be the first owner of the copyright therein;

15. Learned senior counsel contended that the defendants have not been able to show that they have worked independently on any document and when they left the organization admittedly they never claimed a share in the infrastructure. If the defendants had been contributing towards the infrastructure, the natural consequence of the same would have been a division of such

infrastructure.

16. Insofar as provisions of Section 126 of the Evidence Act are concerned learned Counsel emphasized the fact that the contract for rendering professional services was between the plaintiff and his clients and if the defendants misused such information, they would not be bound by the provisions of Section 126 of the Evidence Act but it would be the plaintiff who would be in breach of Rule 17 of the Bar Council of India Rules. The information included due diligence carried out for companies to come into India and advice as to how to structure their investments, etc. This was an extremely confidential nature of information. learned Counsel also referred to the documents filed on record to substantiate the plea and in this behalf referred to the petition filed by the defendants under Section 482 Cr.P.C. before this Court where the defendants admitted that they had disassociated themselves from the professional association of Mr. Titus in his firm. It was submitted that it was, thus, the defendants' own case that the firm was of Mr. Titus. Reference was also made to the methodology of billing in pursuance to the billing sheet, which showed that for each of the clients for which the associates did work, a bill used to be raised for total amount. The particular associate used to specify the number of hours and hourly rate billed to determine the personal billing and a percentage used to be paid to him after deducting the referral. In some of the cases fixed sums have been paid to the defendants for the work done in a particular month for professional services rendered to the firm. learned Counsel also referred to the status report filed by the ACP concerned in the proceedings filed by the defendants under Section 482 of the Cr.P.C. to show Page 1885 that it was, in fact, found that there were a large number of documents in the hard disk of the defendants, which were identical to those in the hard disk of the plaintiff. It is also recorded that the investigations had revealed that the defendants had converted the data and put it to their use and utility and prima facie committed offences under Section 381/385/386 IPC and Section 66 of the IT Act though investigations were still continuing as per the report.

17. learned Counsel also referred to the TDS Certificate issued by the plaintiff to the defendants to show that the payments were made by the plaintiff to the defendants for the services rendered. The confidential documents found included the Disclosure Agreements relating to the clients of the plaintiff, Joint Venture Agreement, Loan Agreements, Hire Agreements, Lawyer list from different parts of the world, list of clients. Learned senior counsel could not seriously dispute the proposition that there would be some amount of information which could be retained in the memory of an advocate parting ways which may be utilized but that was stated to be a natural corollary of such separation. This would, in the submission of the learned senior counsel, not include such deliberate copying and transmission of the data for the own use of the defendants.

18. Learned senior counsel referred to various pronouncements to establish the nature of the rights of the plaintiff which have been infringed.

19. Learned senior counsel referred to the judgment of the Apex Court in Mr. S.D. Gupta v. Dasuram Murzamull to advance the proposition that there was no material placed on record to establish a relationship of what may be called a partnership between the plaintiff and the defendants. In this behalf learned Counsel referred to Section 6 of the Indian Partnership Act, 1932 which provides for a mode of determining existence of partnership and reads as under:

> 6. Mode of determining existence of partnership ' In determining whether a group of persons is or is not a firm or whether a person is or is not a partner in a firm, regard shall be had to the real relation between the parties, as shown by all relevant facts taken together.

20. The Apex Court took the view that where there was no written down partnership contract and no records of terms and conditions of oral partnership, no account of partnership is maintained for use by partners nor any bank account of partnership, an inference cannot be drawn as to the existence of partnership. learned Counsel submitted that the parties in the present case are advocates who would like their relationship to be governed by clear stipulations. Admittedly there was no contract whereby the parties had a profit sharing arrangement in pursuance to the arrangement of partnership. All the work done was in the name of the plaintiff firm and tax return also showed that the same was a proprietorship of the plaintiff. The defendants were only paid remuneration for the services rendered which could take any shape. It could thus be a fixed emolument or emolument dependent upon the work done or on the basis of a portion of the billing for the work done. The billed amount always came to the plaintiff.

Page 1886

21. learned Counsel thus submitted that if the aforesaid factual matrics is applied it cannot be said that the defendants were independent of the plaintiff and in this behalf judgment of the Apex Court in Ram Singh and Ors. v. U.T. Chandigarh and Ors. has been referred to, where in para 15 while dealing with the requirements of a relationship of an employer and employee it was observed as under:

> 15. In determining the relationship of employer and employee, no doubt, 'control' is one of the most important tests but is not to be taken as the sole test. In determining the relationship of employer and employee, all other relevant facts and circumstances are required to be considered including the terms and conditions of the contract. It is necessary to take a multiple pragmatic approach weighing up all the factors for and against an employment instead of going by the sole 'test of control'. An integrated approach is needed. 'Integration' test is one of the relevant tests. It is applied by examining whether the person was fully integrated into the employer's concern or remained apart from and independent of it. The other factors which may be relevant are - who has the power to select and dismiss, to pay remuneration, deduct insurance contributions, organise the work, supply tools and materials and what are the 'mutual obligations' between them.

22. Learned senior counsel referred to the treaties of David Bainbridge on Software Copyright Law (fourth edition) to emphasise that what the defendants had taken away was something in which the plaintiff had a copyright as list of clients and their addresses or full text of various documents or set of co- ordinates would fall within the same. In chapter 6 dealing with databases it was observed as under:

> INTRODUCTION A computer database is a collection of information stored on computer media. The information may be a list of clients and their addresses or the full text of various documents or a set of co-ordinates relation to a three- dimensional building structure or a collection of representations of pre- Raphaelite paintings. The range of things which may be included in a computer database is enormous. The information contained in the database may be confidential and protected by the law of breach of confidence but what is the copyright position' The simplest way of looking at a computer database is to consider the work it represents, for example, a printed listing of names and addresses, a printed set of documents or drawings of buildings or a collection of paintings. Those works may be protected individually by copyright as literary or artistic works as appropriate but the collection of works may also be protected additionally and separately by copyright and/or the database right, notwithstanding the separate copyrights subsisting in the individual works. This is an important point. In terms of databases, copyright can exist at two levels, at the level of the individual works contained in the database and at the level of the database itself as a form of work in its own right. The database Page 1887 may have protection by the database right which came into existence on 1 January 1998.

23. learned Counsel next referred to the judgment of the learned single Judge of this Court (as he then was) in Burlington Home Shopping Pvt. Ltd. v. Rajnish Chibber and Anr. 61 (1996) DLT 6. After referring to the provisions of Section 17(c) of the Copyright Act which provides that if a work is made in the course of other's employment under a contract of service, apprenticeship it is the employer who is the first owner of the copyright therein in the absence of any agreement to the contrary, a reference has been made as to what can be compilations to be included in literary works and such information would include a list of clients and their addresses. The relevant passages are reproduced as under:

> 7. Copinger and Skone James on Copyright (1991 Edn.) deal with law in the context of compilation and state that 'compilations' are included in 'literary work'. They further state:
>
> Trade catalogues are generally compilations, and as such are capable of protection as literary works. On similar principles, a computer database, stored on tape, disk or by other electronic means, would also generally be a compilation and capable of protection as a literary work
>
> 8. David Bainbridge has in SOFTWARE COPYRIGHT LAW (at p.48) dealt with computer database in the following terms:
>
> A computer database is a collection of information stored on computer media. The information may be a list of clients and their addresses or it may be the full text of various documents or it may be a set of co-ordinates relating to a three-dimensional building structure. The range of things which may be included in a computer database is enormous. The information contained in the database may, itself, be

confidential and protected by the law of breach of confidence but what of the copyright position The simplest way of looking at a computer database is to consider the work it represents, for example a printed listing of names and addresses, a printed set of documents or a drawing of a building. Those works are protected by copyright as literary or artistic works. It does not matter if the work is never produced on paper and only ever exists on computer storage media.

Example: XYZ Supplies Ltd. has a computer database containing names, addresses, telephone and fax numbers of customers. This database has been developed over a couple of years and it is usual for a new customer's details to be entered directly into the computer by XYZ's telesales' staff without a written record being made.

The customer database is protected by copyright as an original literary work (assuming a modicum of skill and judgment is involved in compiling the database, for example, if the telesales staff have to exercise judgment in deciding whether to accept a new customer). Being a compilation, it is a literary work. By storing the information in a database, it has been recorded in 'writing or otherwise' as required by the Act ('Writing' is Page 1888 defined widely and includes any form of notation or code regardless of the method or medium of storage). Even if the database is never printed out on paper, it will be protected by copyright.

9. What is confidentiality or secret information has been dealt with by McComas, Davison and Gonski in THE PROTECTION OF TRADE SECRETS - A in General Guide (1981 Ed). The authors have stated that it is not possible to provide an exhaustive list of all that a Court may regard as confidential or a trade secret. However, some examples of what has been held to constitute the subject matter of an action to protect confidential information or a trade secret include (amongst others) customers lists and information concerning the proposed contents of a mail order catalogue.

12. From the above statement of the authorities and the trend of judicial opinion it is clear that a compilation of addresses developed by any one by devoting time, money, labour and skill though the sources may be commonly situated amounts to a 'literary work' wherein the author has a copyright.

24. In the conclusion the Court found that on comparison of the database made available by the plaintiff with the database on the floppy seized in the custody of the defendants it was found that substantial number of entries are comparable word by word, line by line and even space by space. An interim order was passed against the defendants from carrying on any business including mail order business by utilizing the list of clients/customers including in the database exclusively owned by the plaintiff. learned Counsel contended that the position was same in the present case where indisputably the data is the same as the defendants do not even seriously challenge it but on the other hand claims that they have equal right to the same.

25. learned Counsel also referred to the treaty of P. Narayan on Copyright and Industrial Designs (third edition) wherein para 6.28 deals with employees in solicitor firm and observed as under:

> 6.28 Employee in solicitor's firm ' legal draft Whenever an employee of a solicitor's firm drafts a document (an agreement, sale deed etc.) in the course of his employment the employer is the first owner of the copyright in that document.

26. learned Counsel has laid emphasis on the principles laid down by the Court of Appeal in Robb v. Green 1895 2 QB 1, where it was held that it was an implied term of contract of service that the defendant would not use to the detriment of the plaintiff, information to which he had access in the course of service. It was observed on page 17 as under:

> ...I think it right to say, lest it should be thought that the judges countenanced such acts, that it must not be assumed that such conduct was honest or legal; nor could I sit by and allow it to go forth to the world that I countenance the doctrine that the confidential information received by a servant to advance his master's business may be used afterwards by him to advance his own business to the injury of his master's interests. It is part of the implied contract between the master and the servant that such confidential information is not to be used to the master's disadvantage.
>
> Page 1889

27. A reference was also made to the judgment of Universal Thermosensors Ltd. v. Hibben and Ors. 1992 3 All England Law Reports 257. The duty of a servant in case of confidential information during the course of employment was dealt with and it was held that where an employee leaves to set up a competing business it was not permissible to take confidential information and when the documents are taken away for the purposes of a new business dishonestly the same constitutes theft.

28. learned Counsel referred to the judgment in Market Investigations Limited v. Minister of Social Security 1968 3 All England Law Reports 732 to expound the principles of service contract. A four fold test of control, ownership of tool, chance of profit and risk of loss was discussed with the observation that the control in itself is not always conclusive. The basic question to be posed was whether a person was carrying on the business for himself or on his own behalf and not merely for a superior. It was observed as under:

> If control is not a decisive test, what then are the other considerations which are relevant' No comprehensive answer has been given to this question, but assistance is to be found in a number of cases.
>
> In Montreal Locomotive Works, Ltd. v. Montreal and A.G. For Canada, LORD WRITE said this:
>
> In earlier cases a single test, such as the presence or absence of control, was often relied on to determine whether the case was one of master and servant, mostly in

order to decide issues of tortious liability on the part of the master or superior. In the more complex conditions of modern industry, more complicated tests have often to be applied. It has been suggested that a fourfold test would in some cases be more appropriate, a complex involving (i) control; (ii) ownership of the tools; (iii) chance of profit; (iv) risk of loss. Control in itself is not always conclusive. Thus the master of a chartered vessel is generally the employee of the shipowner though the charterer can direct the employment of the vessel. Again the law often limits the employer's right to interfere with the employee's conduct, as also do trade union regulations. In many cases the question can only be settled by examining the whole of the various elements which constitute the relationship between the parties. In this way it is in some cases possible to decide the issue by raising as the crucial question whose business is it, or in other words by asking whether the party is carrying on the business, in the sense of carrying it on for himself or on his own behalf and not merely for a superior.

In Bank voor Handel en Scheepvaart N.V. v. Slatford, DENNING, L.J., said:

...the test of being a servant does not rest nowadays on submission to orders. It depends on whether the person is part and parcel of the organisation...

In U.S. v. Silk the question was whether certain mean were 'employees' within the meaning of that word in the Social Security Act, 1935. The judges of the Supreme Court decided that the test to be applied was not 'power of control, whether exercised or not, over the manner of performing Page 1890 service to the undertaking', but whether the men were employees 'as a matter of economic reality'.

The observation of LORD WRIGHT, of DENNING, L.J., and of the judges of the Supreme Court in the U.S.A. suggest that the fundamental test to be applied is this: 'Is the person who has engaged himself to perform these services performing them as a person in business on his own account'' If the answer to that question is 'yes', then the contract is a contract for services. If the answer is 'no' then the contract is a contract of service.

29. On the same principle for contract of service in Nora Beloff v. Pressdram Limited and Anr. 1973 RPC 765, the aforesaid judgment in Market Investigation Limited case (Supra) was cited with approval and it was observed as under:

It thus appears, and rightly in my respectful view, that, the greater the skill required for an employee's work, the less significant is control in determining whether the employee is under a contract of service. Control is just one of many factors whose influence varies according to circumstances. In such highly skilled work as that of the plaintiff it seems of no substantial significance.

The test which emerges from the authorities seems to me, as Lord Denning said, whether on the one hand the employee is employed as part of the business and his

> work is an integral part of the business, or whether his work is not integrated into the business but is only accessory to it, or, as Cooke, J. expressed it, the work is done by him in business on his own account.

30. In Coco v. A.N. Clark (Engineers) Ltd. 1969 RPC 41 an order for a breach of contract case all three elements were specified as under:

> In my judgment, three elements are normally required if, apart from contract, a case of breach of confidence is to succeed. First, the information itself, in the words of Lord Greene, M.R. in the Saltman case on page 215, must 'have the necessary quality of confidence about it.' Secondly, that information must have been imparted in circumstances importing an obligation of confidence. Thirdly, there must be an unauthorised use of that information to the detriment of the party communicating it. I must briefly examine each of these requirements in turn.

31. On the same aspect in Margaret, Duchess of Argyll (Feme Sole) v. Duke of Argyll and Ors. (1965) 1 All England Law Reports 611 it was observed as under:

> These cases, in my view, indicate (i) that a contract or obligation of confidence need not be expressed but can be implied (which, I confess somewhat to my surprise, I understood to be disputed at one stage at any rate of the argument); (ii) that a breach of confidence or trust or faith can arise independently of any right of property or contract other, of course, than any contract which the imparting of the confidence in the relevant circumstances may itself create; (iii) that the court in the exercise of its equitable jurisdiction will restrain a breach of confidence independently of any right at law.

32. learned Counsel referred to Copinger on Copyright where it has been observed that the express or implied confidentiality includes a list of customers to be used after employment ends. The judgment in Llandundo Urban Council v. Woods Page 1891 1895-9 All England Law Reports 895, was relied upon to put forth the issue of confidentiality in a solicitor's job. It was held that a process serving was part of solicitor's job which required the maintenance of registers and index of documents served. In case of use of the list of details recorded therein by an employee injunction and damages would be an appropriate remedy. Similarly on the issue of breach of confidentiality Seager v. Copydex, Ltd. 1967 2 All England Law Reports has been referred to.

33. Mr. V.P. Singh, learned senior counsel for the defendants strongly refuted the propositions and submissions advanced on behalf of the learned Counsel for the plaintiff. It was the submission of the learned senior counsel that assuming that breach of confidentiality is not disputed the important issue is as to in whom the copyright vests. learned Counsel contended that Copyright infringement cannot be on an assumption. The documents of which the copyright were infringed are required to be produced. In this behalf learned Counsel referred to the provisions of Order 7 Rule 14 of the Code of Civil Procedure 1908 (hereinafter referred to as the said Code) to advance the proposition that when a plaintiff sues upon the documents in his power and possession he can produce the same in

Court when the plaint is presented. learned Counsel thus submitted that the plaintiff has failed to produce these specific documents of which infringement of copyright is alleged. learned Counsel referred to the documents filed by the plaintiff to point out that only a list of the privilege documents claimed by the plaintiff and proprietary/confidential/electronic records as per the list is given and thus the plaintiff has failed to produce the documents themselves. learned Counsel referred to the provisions of Section 17 of the Copyright Act to contend that the author was the first owner. The exceptions to this were as per the proviso. Section 2(d), which defines the author is as under:

> Section 2(d) 'author' means, -
>
> i. in relation to a literary or dramatic work, the author of the work;
>
> ii. in relation to a musical work, the composer;
>
> iii. in relation to an artistic work other than a photograph, the artist;
>
> iv. in relation to a photograph, the person taking the photograph;
>
> v. in relation to a cinematograph film or sound recording, the producer; and vi. in relation to any literary, dramatic, musical or artistic work which is computer-generated, the person who causes the work to be created;

34. The provisions of Section 17 with the proviso read as under:

> '17. First owner of copyright. ' Subject to the provisions of this Act, the author of a work shall be the first owner of the copyright therein:
>
> Provided that
>
> (a)in the case of a literary, dramatic or artistic work made by the author in the course of his employment by the proprietor of a newspaper, magazine or similar periodical under a contract of service or apprenticeship, for the purpose of publication in a newspaper, magazine or similar periodical, the said proprietor shall, in the absence of any agreement to the contrary, be the first owner Page 1892 of the copyright in the work in so far as the copyright relates to the publication of the work in any newspaper, magazine or similar periodical, or to the reproduction of the work for the purpose of its being so published, but in all other respects the author shall be the first owner of the copyright in the work;
>
> (b)subject to the provisions of clause (a), in the case of a photograph taken, or a painting or portrait drawn, or an engraving or a cinematograph film made, for valuable consideration at the instance of any person, such person shall, in the absence of any agreement to the contrary, be the first owner of the copyright therein;

(c)in the case of a work made in the course of the author's employment under a contract of service or apprenticeship, to which clause (a) or clause (b) does not apply, the employer shall, in the absence of any agreement to the contrary, be the first owner of the copyright therein;

(d)in the case of a Government work, Government shall, in the absence of any agreement to the contrary, be the first owner of the copyright therein;

(e)in the case of a work to which the provisions of section 41 apply, the international organization concerned shall be the first owner of the copyright therein.

35. learned Counsel submitted that insofar as proviso (a) is concerned the same is only in the context of a newspaper or periodical publication. There is thus a partial loss of copyright for the author but articles published in a newspaper can still be compiled in the form of a book and published. Thus learned Counsel contended that the plaintiff's claim is actually under Clause (c) of the proviso for which employer-employee relationship has to be proved. In order for the said proviso to come into play the service has to be spelled out and it cannot be on the basis of an oral contract or assumption. The plaintiff has failed to file any documents giving the relationship between the parties.

36. Learned senior counsel referred to the averments in the plaint that on the one hand the plaintiff is claiming authorship and on the other hand there are averments in the plaint that the documents were created by the plaintiff 'with associates'. It was contended by the learned Counsel that the kind of relationship the plaintiff is propounding with the defendants would be barred under the Bar Council of Indian Rules Section VII dealing with other employment contains Rules 47 and 49, which are as under.

Section VII ' Section on other Employments

47. An advocate shall not personally engage in any business, but he may be a sleeping partner in a firm doing business provided that, in the opinion of the appropriate State Bar Council, the nature of the business is not inconsistent with the dignity of the profession.

49. An advocate shall not be a full-time salaried employee of any person, government, firm, corporation or concern, so long as he continues to practice, and shall, on taking up any employment, intimate the fact to the Bar Council on whose roll his name appears, and shall thereupon Page1893 cease to practice as an advocate so long as he continues in such employment.

37. learned Counsel contended by reference to the aforesaid Rule 49 that there cannot be an employer-employee relationship in case of an advocate as an advocate, cannot be a full-time salaried employee of any person. Thus, the principles applicable to an employer-employee relationship would not apply to the legal profession.

38. learned Counsel pointed out that the defendants 2 and 3 were recruited for the first time with the plaintiff and had worked for a period of five years with the plaintiff before their relationship came to an end. Defendants 1 and 4 had worked for a period of seven years with the plaintiff and prior too, defendant No. 1 had an association of two years and defendant No. 4 of three years with Singhania and Company. In such a situation the relationship of the parties must be established through a written contract and mere averments in the plaint would not suffice. The use of the plaintiff's name was only for the purposes of convenience and it was contended that the plaintiff was, in fact, estopped by virtue of Section 115 of the Evidence Act from denying the relationship of defendants as partners since to third parties these defendants were represented as partners. To illustrate this aspect certain documents filed by the defendants were referred to. For example M/s. Reid and Priest had written a letter to Titus and Radhakrishnan, another firm stated to have been formed wherein it was mentioned that each firm will have a designated partner or a group of partners. In a certificate dated 31.10.2002, Mr. Diljeet Titus referred to Mr. Adebare as a founding member of M/s. Titus and Company. Similarly in another document, Mr. Titus has referred to himself as the Managing Partner in Titus and Company, while Mr. Adebare was referred to as 'Mr. Adebare is associated with M/s. Titus and Company'. In another compilation Mr. Adebare is referred to as a Consultant of M/s. Titus and Company and Ms. Seema Ahluwalia is referred to as a partner in M/s. Titus and Company. In a profile published in Asia Law, Titus and Company is referred to as a full service independent commercial law firm with five partners and nine associates.

39. In my considered view this aspect can be dealt with at this stage itself as the present suit is not by a third party alleging a particular representation made to it which representation ought not to be permitted to be altered. It is not as if a third party has sued Titus and Company alleging that somebody has been represented as its partner while Titus and Company subsequently seeks to resile from the same. Thus this aspect, in my considered view, is of little relevance other than to note that possibly to advance the business in some lawyers' directories it is stated that defendants were partners.

40. Learned senior counsel for the defendants contended that an employee is not concerned with the profitability of an enterprise and where payment is dependent on the receipt of payment from the client there can be no employer-employee relationship. It was contended that the concept of fee sharing applied in respect of remuneration cannot be disputed in view of the documents placed on record. In this behalf even the TDS certificates have been referred to, to advance the proposition that the same have been issued for professional Page 1894 consultancy. The extracts of time sheets are stated to in fact prove that there was independent work being done though it is not disputed that time sheets are of Titus and Company. The Vakalatnama also contained the names of the defendants.

41. The replication filed by the plaintiff was also referred to inasmuch as in para 7 the plaintiff has stated that it is not its case that the defendants were employees under his employment in terms of the Labour Law or Bar Council Rules or were paid a salary in terms of Income Tax Rules but that they were engaged and employed by the plaintiff under a contract of service in the sense that they have worked under his directions, supervision and control doing exclusive work for the plaintiff law firm.

42. The principal contention of the learned senior counsel for the defendants was that the confidentiality was not present since it is the defendants who have the Copyright. There was no master-servant relationship and the apprehensions of the plaintiff were misconceived about their liability to the clients as the attorney-client privilege was enjoyed by all the lawyers and that issue could be raised only by the clients. It was the submission of the learned senior counsel that the author and the employer cannot be same. The plaintiff has alleged in the plaint that the entire work was done by the defendants for the plaintiff and that the documents are his original literary work. In such a situation Section 17(c) should have no application. In this behalf learned Counsel referred to the judgment of the learned single Judge in V.T. Thomas and Ors. v. Malayala Manorama Co. Ltd. where it was observed that the understanding regarding provisions of Section 17(a) and 17(c) is that an employer has a statutory recognized copyright in the productions made during his employment. There are two different entities visualized in the sub-Section being the author and the employer and it is impossible to imagine that in relation to any artistic work the same person would be an author and the employer.

43. The averments made in para 16 of the plaint were referred to, to contend that the defendants are stated to be the authors of the original literary works and that is why the plaintiff goes on to state that there is a contract of service so as to invite the provisions of Section 17(b) of the Copyright Act. Since the plaintiff has been alleging the existence of relationship of employer and employee the burden was on him to establish the relationship. In the absence of written contract the same could not be established especially since the plaintiff's own case is that the defendants were not employees of the plaintiff in the strict sense of the terms.

44. learned Counsel contended that the relationship between the parties was one of contract for service and not contract of service.

45. learned Counsel referred to the judgment of the Supreme Court in State of UP and Ors. v. UP State Law Officers Association and Ors. AIR 1994, Supreme Court 1654 to bring forth the nature of legal profession and the services Page 1895 provided in that behalf. Legal profession was held to be essentially a service oriented profession. This case dealt with the issue of engagement of law officers by the State Government to conduct cases on its behalf and the termination of their appointment. It was observed in para 6 as under:

> 6. The appointment of lawyers by the Government and the public bodies to conduct work on their behalf, and their subsequent removal from such appointment have to be examined from three different angles viz., the nature of the legal profession, the interests of the public and the modes of the appointment and removal.

Legal profession is essentially a service-oriented profession. The ancestor of today's lawyer was no more than a spokesman who rendered his services to the needy members of the society by articulating their case before the authorities that be. The services were rendered without regard to the remuneration received or to be received. With the growth of litigation, lawyering became a full-time occupation and most of the lawyers came to depend upon it as the sole source of livelihood. The nature of the service rendered by the lawyers was private till the government and the public

bodies started engaging them to conduct cases on their behalf. The government and the public bodies engaged the services of the lawyers purely on a contractual basis either to a specified case or for a specified or an unspecified period. Although the contract in some cases prohibited the lawyers from accepting private briefs, the nature of the contract did not alter from one of professional engagement to that of employment. The lawyer of the Government or a public body was not its employee but was a professional practitioner engaged to do the specified work. This is so even today, though the lawyers on the full-time rolls of the government and the public bodies are described as their law officers. It is precisely for officers, the saving clause of Rule 49 of the Bar Council of India Rules, waives the prohibition imposed by the said rule against the acceptance by a lawyer of a full-time employment.

The relationship between the lawyer and his client is one of trust and confidence. The client engages a lawyer for personal reasons and is at liberty to leave him also, for the same reasons. He is under no obligation to give reasons for withdrawing his brief from his lawyer. The lawyer in turn is not an agent of his client but his dignified, responsible spokesman. He is not bound to tell the court every fact or urge every proposition of law which his client wants him to do, however irrelevant it may be. He is essentially an advisor to his client and is rightly called a counsel in some jurisdictions. Once acquainted with the facts of the case, it is the lawyer's discretion to choose the facts and the points of law which he would advance. Being a responsible officer of the court and an important adjunct of the administration of justice, the lawyer also owes a duty to the court as well as to the opposite side. He has to be fair to ensure that justice is done. He demeans himself if he acts merely as a mouthpiece of his client. This relationship between the lawyer and the private client is equally valid between him and the public bodies.

46. learned Counsel also referred to a judgment of the National Consumer Disputes Redressal Commission reported in DRJ 1992 (24) 310 Page 1896 in M/s. Cosmopolitan Hospital and Anr. v. Vasantha P. Nair. A discussion of what constitute a contract for service as distinguished from contract of service is recorded therein. The observations of Fletcher Moulton, L.J. in Simmons v. Health Laundry Company 1910 1 KB 543 at pp.549,550 were reproduced:

> In my opinion it is impossible to lay down any rule of law distinguishing the one from the other. It is a question of fact to be decided by all the circumstances of the case. The greater amount of direct control exercised over the person rendering the services by the person contracting for them the stronger the grounds for holding it to be a contract of service and similarly the greater the degree of independence of such control the greater the probability that the services rendered are of the nature of professional services and that the contract is not one of service.

47. A reference was also made by the National Forum to the judgment of the Supreme Court in Executive Committee of Vaish Degree College v. Laxmi Narain and Ors. AIR 1976 Supreme Court 888 observing that it would be incorrect and even crude to call professional and technical service as personal service. It was thus held that personal service stems from a master and servant relationship which is totally different from a lawyer-client relationship or other professional or technical relationship. The judgment on which great reliance was placed by learned senior counsel is of Indian

Medical Association v. V.P. Shantha , where it was observed as under:

> 20. While expressing his reluctance to propound a comprehensive definition of a 'profession' Scruttom L.J. has said "profession in the present use of language involves the idea of an occupation requiring either purely intellectual skill, or of manual skill controlled, as in painting and sculpture, or surgery, by the intellectual skill of the operator, as distinguished from an occupation which is substantially the production or sale or arrangement for the production or sale of commodities. The line of demarcation may vary from time to time. The word 'profession' used to be confined to the three learned professions, the Church, Medicine and Law. It has now, I think a wider meaning'. [See: Commissioner of Inland Revenue v. Maxse. 1919 1 KB 647 at p.657].
>
> 21. According to Rupert M. Jackson and John L. Powell the occupations which are regarded as professions have four characteristics, viz.,
>
> i)the nature of the work which is skilled and specialised and a substantial part is mental rather than manual;

ii)commitment to moral principles which go beyond the general duty of honesty and a wider duty to community which may transcend the duty to a particular client or patient;

iii)professional association which regulates admission and seeks to uphold the standards of the profession through professional codes on matters of conduct and ethics; and

iv)high status in the community.

Page 1897

22. the learned authors have stated that during the twentieth century an increasing number of occupations have been seeking and achieving 'professional' status and that this has led inevitably to some blurring of the features which traditionally distinguish the professions from other occupations. In the context of the law relating to Professional Negligence the learned authors have accorded professional status to seven specific occupations, namely, (i) architects, engineers and quantity surveyors, (ii) surveyors, (iii) accountants, (iv) solicitors, (v) barristers, (vi) medical practitioners and (vii) insurance brokers. [See : Jackson and Powell on Professional Negligence, paras 1-01 and 1-03, 3rd Ed.,].

48. The aforesaid observations were made in view of the distinction that was sought to be carved out between the profession and an occupation in the context that a person engaged in occupation rendered services as envisaged under Section 210 of the Consumer Protection Act 1986. The service rendered by a person belonging to a profession does not fall within the ambit of the said provision.

49. learned Counsel also referred to the judgment of the Supreme Court in Superintendence Company of India v. Sh. Krishan Murgai where it was observed that the Indian Laws would prevail and it was thus contended that the judgment referred to by the learned Counsel for the plaintiff in the context of Laws in England would not apply in the present case. It was observed in para 25 as under:

> 25. While the Contract Act, 1872, does not profess to be a complete code dealing with the law relating to contracts, we emphasize that to the extent the Act deals with a particular subject, it is exhaustive upon the same and it is not permissible to import the principles of English law de hors the statutory provision, unless the statute is such that it cannot be understood without the aid of the English law. The provisions of Section 27 of the Act were lifted from Hom. David D. Field's Draft Code for New York based upon the old English doctrine of restraint of trade, as prevailing in ancient times. When a rule of English law receives statutory recognition by the Indian legislature, it is the language of the Act which determines the scope, uninfluenced by the manner in which the analogous provision comes to be construed narrowly, or, otherwise modified, in order to bring the construction with the scope and limitations of the rule governing the English doctrine of restraint of trade.

50. Learned senior counsel for the plaintiff in rejoinder rebutted the submissions advanced by the learned Counsel for the defendants. In view of the submissions of the learned Counsel for the defendants, learned Counsel for the plaintiff submitted that in the given facts and circumstances of the case five aspects should be examined:

(i) the law applicable and the nature and content of relationship;

(ii) whether there was a like nature of relationship of a partner;

Page 1898

(iii) whether payment received from other firms in some cases by the defendants would affect the merits of the controversy;

(iv) whether the plea of breach of confidentiality has an independent cause of action;

(v) whether the defendants have been able to establish that they are the authors of any documents.

51. learned Counsel submitted that insofar as the nature and content of relationship is concerned the documents referred to clearly showed that the plaintiff was the Sole Proprietor of M/s. Titus and Company. The relationship of defendants could be defined in terminologies as an employee, a law associate, a point man, a member of the law firm. The third most important aspect in this context was that the defendants worked as part of the firm for the individual clients which clearly pointed towards a privity between only the plaintiff and the clients. The cheques were received by the plaintiff as the plaintiff alone had been retained by the clients. There was no direct relationship

between the defendants and the clients and the defendants did not perform any independent work as they were full time engaged with the plaintiff. In such a case, learned Counsel for the plaintiff submitted that it would not make any difference to the relationship by the manner of payment of remuneration and incentive linked relation system would not make the defendants, a partner in the firm.

52. Learned counsel, once again, emphasized the obligation of the plaintiff of confidentiality towards his clients under Section 126 of the Evidence Act. In order to determine as to whose obligations it was of confidentiality learned Counsel emphasized that it may be possible that while preparing the drafts of agreements, more than one person may have worked on the agreement but in such a situation it was the degree of control which would be material and in the present case that vested with the plaintiff. It is the plaintiff who would be responsible for assigning the work and as to which of the associate or employee would work on a particular matter. Thus the real test was the degree of employment control to determine whether it was a contract of service. There may not be employment in the strict sense of employment of a workman or a labourer but the degree of control would determine the obligations of the parties.

53. Learned senior counsel, once again, emphasized that the provisions of Sections 2(o), 14, 16 and 17 of the Copyright Act have to be read together. Thus only if the defendants were the owner of the copyright would it have the right to make it public in view of the provisions of Section 14 of the Copyright Act. learned Counsel drew the attention of this Court to the provisions of Section 16 of the Copyright Act, which are as under:

> 16. No copyright except as provided in this Act. ' No person shall be entitled to copyright or any similar right in any work, whether published or unpublished, otherwise than under an in accordance with the provisions of this Act or of any other law for the time being in force, but nothing in this section shall be construed as abrogating any right or jurisdiction to restrain a breach of trust or confidence.

Page 1899

54. learned Counsel thus emphasized that though no person was entitled to the copyright other than as per the provisions of this Act in terms of the said Section, it was clearly stipulated that nothing in the Section would be construed as abrogating any right or jurisdiction to restrain a breach of trust or confidence and in the present case it was alleged that what defendants were doing was clearly falling within the parameters of 'breach of trust or confidence'. It is in that context that the words employer and employee and a contract of service under proviso (c) to Section 17 had to be understood. If the services being rendered by the defendants were an integral part of service, then it was a contract of service. learned Counsel emphasized that the rules of contextual interpretation should be applied while determining the relationship of the parties. The object should be to further the provisions of the Copyright Act and thus while interpreting the provisions the rule of purposive construction should apply. The mischief rule would require that the mischief to be curbed is actually curbed and not perpetuated.

55. Insofar as the aspect of the relationship between the plaintiff and the defendants alleged to be akin to a partnership is concerned learned Counsel submitted that there was nothing on record to substantiate such a relationship. learned Counsel in this behalf referred to a judgment of the Supreme Court in M.P. Davis v. Commissioner Agricultural Income-tax . The Supreme Court emphasized in para 3 of the judgment that the sharing of profits or the provision for payment of remuneration contingent upon the making of profits or varying with the profits, does not itself create a partnership. Thus it is possible to provide for remuneration of a servant contingent upon the making of and varying with profits. In the particular case the instrument in question made no provisions as to how the losses are to be dealt with and it was observed that if it was intended to create a real partnership one would have thought that some provisions would have been made for sharing of the losses.

56. learned Counsel also referred to the judgment in P. Larue Simpson v. Ernst and Young 1996 FED App. 0356P (6th Cir.). In coming to the conclusion that the plaintiff was an employee rather than a partner in the newly created defendant firm the Court took into consideration the fact that the plaintiff had no authority to direct or participate in the admission or discharge of partners or other firm personnel; participate in determining partners or other personnel compensation calculated upon performance levels, responsibility and years of service with the firm including his own; participate in the veto of the Chairman and the Member of the Managing Committee or participate in the firm's profits and losses or shares in unbilled uncollected client accounts.

57. learned Counsel also emphasized that there was not even a pleading of the defendants about payments received from other firms directly.

58. learned Counsel also emphasized the fact that the documents were confidential in nature and there was no permission of his clients to put them on record in the present proceedings though the list of the same was available. There was, in fact, Non-Disclosure Agreements with his clients and it would Page 1900 not be proper to put in the public domain what was confidential between the plaintiff and his clients.

59. In the end the learned Counsel emphasized that though there may be certain standard formats of matters available including agreement, it was the treatment which was copyrightable. Thus, if a material is in common domain when a particular treatment is given to the same, then copyrights accrue. An illustration in this behalf given was of the film 'Gandhi' by Richard Attenborough or 'Ramayan' by Ramanand Sagar to contend that the life history of 'Gandhi' or 'Ramayan' were in public domain but the particular treatment would make what was produced copyrightable.

60. Before proceeding to discuss the ramifications of the submissions of the learned Counsel for the parties it has to be noticed that the oral submission were heard at length. The hearing went on for four days. The counsel for the parties had filed compilations of the judgments which were much larger in number but during the course of submissions the reference was confined to only certain judgments. It is only those judgments which have been referred to during the course of submissions of the learned senior counsels which have been discussed above. The defendants sought to make an attempt to supplement the submissions after the rejoinder was concluded by the learned senior

counsel for the plaintiff. This, in my considered view, was not permissible as this would have resulted in unending submissions. Similarly, it is not permissible at that stage for the defendants to just file any compilation of judgments or synopsis to say something which has not been argued during the course of oral hearing. I am constrained to say that the purpose of written synopsis, where oral hearing itself has been elaborate can only be to summarize what has been argued and not to add further material and submission. It would also not be fair to the opposite party who would have no opportunity to meet the judgments or the submissions. It is in view of large number of judgments, submissions placed on record that I have considered it appropriate to pen this paragraph to make it clear as to what is the material which can be relied upon for dealing with the contention of the parties.

61. In order to appreciate the rival contentions, the first aspect to be considered would be the real relationship between the parties as that would govern the rights and obligations of the parties. It is not in dispute that the plaintiff along with defendant Nos.1 and 4 themselves had left M/s. Singhania and Company to set up the law firm M/s. Titus and Company. Defendants 2 and 3 joined them later. The question, however, remains as to whether the parties had created a partnership firm ' albeit of a loose nature to govern their relationships as the obligations in such a case would be quite different from a position where the legal business is being run as a Sole Proprietorship concern.

62. There is no documentation placed by the defendants on record to substantiate any such written arrangement of partnership. This aspect is important as all the parties are advocates and engaged in the pursuit of the legal profession. The parties would be expected to define their relationship and scope of responsibilities clearly. If a group of lawyers together decide to work towards a common object of promoting the legal business, at least prima Page 1901 facie one would consider a written document essential for the same. There is absence of any such written document. On the contrary it is not even seriously disputed that the plaintiff has been running M/s. Titus and Company really in the nature of a sole proprietorship being obliged for its profits and losses as also the taxes to be paid on the earnings.

63. The nature of payment made to the defendants thus show that it is the plaintiff who has been making payments to the defendants after deducting TDS/advance tax on the same. Such payments have been made for services ostensibly rendered to the clients. There are also illustrations of the documents to show that for some period of time fixed remuneration has been paid to some of the defendants. Some stray incidents of direct payment to the defendants as a matter of convenience would not change this aspect as one has to see the general practice adopted for payment of remuneration.

64. No doubt the payments were linked to an element of receipt from the clients to whom the services were rendered. This itself would not make the defendants a partner in the firm. The legal position in this behalf has been clearly set forth in MP Davis case (supra). The important aspect is that the ultimate responsibility for the cost of the establishment and the losses, if any, were left to be borne by the plaintiff. The Supreme Court has emphasized in MP Davis case (supra) the importance of a profession for sharing of losses in case of a partnership. There is no such provision made or even alleged in the present case. At the stage when the defendants left their association with the

plaintiff there was no separation of the assets of the legal firm which took place. The defendants decided to leave M/s. Titus and Company for what they perceived to be their better carrier prospects and they had a right to do so.

65. Learned senior counsel for the defendants has sought to emphasise by reference to documents that a certain percentage from the receipts from the clients used to go towards the establishment and the defendants were paid on a particular percentage basis. This aspect, in my considered view, has to be understood in the context of the fact that the fees from the clients used to be received by the plaintiff. Naturally amounts would have to be spent for running a large law firm on the establishment cost and a part of the fee would go towards such cost. The defendants used to be paid a particular percentage of the amount for services rendered. The fact, however, remains that clients were of M/s. Titus and Company and not of the defendants. In some of the cases the defendants in their capacity as associates or as working for the plaintiff may have signed the Vakalatnama, but that itself will not imply that the clients became that of the defendants. The billing used to be raised in the name of the plaintiff and the payment used to come to the plaintiff.

66. In the present day and age the legal profession has seen a lot of change. In India too, the concept of law firms has emerged more prominently now. Such law firms can be either individual based with associates or having partners and some associates. This is also the international practice where Page 1902 initially persons join as associates and as they attain seniority in a firm and are found to be useful partnership is offered. The plaintiff may have left his earlier firm for his better career prospects. Some of the defendants thought it fit that their future lay with the plaintiff rather than in continuation with M/s. Singhania and Company. That was a matter of their judgment. This, however, would not imply that the said defendants left with the plaintiff to form a partnership firm or else an arrangement of partnership would have been penned down. It is in view of these matters that the Supreme Court in S.T. Gupta case (Supra) had observed that it was inconceivable that a partnership would have been entered into without retaining any records of its terms and conditions contrary to the normal course of business. In the present case this is more so since advocates are involved and the matter relates to their professional practice. As in that case nothing has been shown before this Court that there were any accounts being run in the name of the partnership firm or operated by the defendants.

67. The various practices followed by M/s. Titus and Company vis-à-vis the defendants further go to establish the control and supervision of the plaintiff over the functioning of M/s. Titus and Company. The time punch card system was to ensure and verify the time of entry and exit of the defendants in the office of the firm. Reception registers and security registers used to be maintained. An important aspect is the time sheets which have been maintained for billing purposes. The time sheets were made in the name of M/s. Titus and Company. It was not as if the defendants were in their own name making a time sheet. No doubt the defendants were contributing towards the work for the clients and it is that work which used to be entered in the time sheet for the purposes of billing. The important aspect is that the defendants worked for the clients of the plaintiff, the client engaged the plaintiff's services, the billing was done in the name of the plaintiff and the amount used to be remitted to the plaintiff. It is in the plaintiff that the clients had trust and faith and his services were engaged. It is possible that during the course of working the clients may have also

developed faith in the defendants. It is also possible that after the termination of the relationship between the plaintiff and the defendants some of the clients may of their own free will decided to engage the services of the defendants. There is nothing wrong in such a practice.

68. In a relationship of advocates working with other advocates one cannot retain the knowledge of another. An associate may over a period of time develop intellectually and may even surpass his senior. He develops skills and hones them while working on different assignments for clients. He will know case law, understand how to make agreements, learn the finer nuances of drafting and conveyancing and carry all that with him when he leaves a firm. His development of knowledge and skill cannot be retained and that is an exigency of the very nature of work being performed by him. The continuation of any such association or relationship is always based on an element of trust and faith. Sir W. Raleigh said: 'Take special care that thou never trust any friend or servant with any matter that may endanger thine estate; for so shalt thou make thyself a bondslave to him that thou trustest, and leave thyself always to his mercy.' In an association of legal professionals there is no option but to have such trust which apparently has been breached.

Page 1903

69. If there are certain aspects in common domain, it is open for all and sundry to utilise the same. It may not be disputed that there are books on conveyancing giving formats of agreements and checklists. These are available for use by all. What is, however, important is the treatment meted out to such standard format while applying it for assistance to any particular client. It is the expertise of a person or a firm in handling such matters which persuades a client to approach them in preference to others. If everything was in common domain and one had to only punch information, there would be no occasion for clients to engage services of advocates for such purposes and pay them large fees. There is a utility, and that too of great importance, of how a particular format is applied to the needs of a client which gives importance to the whole exercise.

70. If an associate or an advocate whatever be the terminology by which it is called works for another advocate and his clients he certainly owes a duty and obligation not only to maintain the confidentiality between the client and his advocate but also not to surreptitiously take away what is the final product of the effort put in to which he also may be a party. The report filed by the Investigating Officer in the criminal case thus show prima facie that there is complete copying by the defendants of the material of the plaintiff which has been taken away. Such an exercise has become easier because of the development of technology where most of such data is stored on computers and can be transmitted away were a person to misuse the trust and authority vested in him in being in control of utilization of such material.

71. I am in agreement with the submissions of the learned senior counsel for the plaintiff that in such matters great importance has to be attached to any breach of trust or confidence. This is not merely an ethical issue but also a legal matter. It is in furtherance of this that Section 16 of the Copyright Act while providing that no copyright would exist except as provided in the Act goes on to stipulate that nothing provided in the said Section would be construed as abrogating any right or jurisdiction to restrain a breach of trust or confidence. If an advocate permits his associate or

colleague to either assist him or handle the matter of his client there is an implicit obligation on such an associate to maintain the trust and confidence reposed on him by his superior. Thus any breach of the same must result in a legal remedy. In that sense it has been rightly urged that the essence of copyright is the age old principle 'thou shalt not steal'. The facts of the present case are apposite to the full saying of Arthur Hugh Clough 'Thou shalt not steal; an empty feat, when its so lucrative to cheat'.

72. The information about clients and solicitors also to some extent is in public domain where it appears in printed directories and everyone can use the same. However, as an advocate or a law firm develops its work and relationship with other law firms or clients, the details about the particular persons in such law firms handling certain nature of work or as to which officer in a client's company is material for getting the work becomes of great importance. Such a list is of great importance to an advocate or a law firm. The mere fact that defendants would have done work for such clients while being associated with the plaintiff would not give them the right to reproduce the list and take it away. It may again be emphasized that it is possible that Page 1904 a part of this information is retained in the memory of the defendants and if that is utilized no grievance can be made in this behalf. This would, however, be different from a copy made of the list.

73. It cannot be expected that the plaintiff would be doing the complete work himself. The plaintiff may be doing some work himself, may be assigning some work to the defendants as a part or as a whole. The work done by the defendants in such a case would be on behalf of the plaintiff for the clients of the plaintiff. There is also force in the contention of the learned senior counsel for the plaintiff that the protection made available under Section 126 of the Evidence Act would be applicable to the plaintiff and his clients and any misuse of the same could make the plaintiff liable if it is founded on confidential drafts being taken away by the defendants and being misutilised. An illustration of this can be where there are competing companies in the same nature of business and the work is handled for one of such companies as a client of the plaintiff. If such information was made available to a competing company the same could be misutilised to the detriment of the client of the plaintiff. Thus to say that the plaintiff would have no remedy against such a serious consequence is only stated to be rejected. In such a situation the defendants cannot insist that to prove its case the plaintiff must file all such material including opinions and agreement and put them in public domain. This would, in my considered view, be an attempt on the part of the defendants to take advantage of the wrong which they have done by spiriting away such confidential material. The comparison of the material found with the defendants was identical to that of the plaintiff as per the Investigating Officer. This itself would suffice for a prima facie view to be taken for determination of the applications in question.

74. learned Counsel for both the parties have argued at length as to whether the present arrangement be labeled as a contract of service or a contract for service. This is so since in the strict sense the relationship between the advocates is not akin to an employer workmen relationship or an employer- employee relationship. However the parameters for determining a contract of service and what can be loosely called employer-employee relationship in that context has to be tested on the touch tone of the parameters laid down in various judicial pronouncements to establish such a relationship. Thus an important aspect emphasized by the Supreme Court in Ram Singh and Others

case is the test of 'integration'. This test would imply that a determination has to take place as to whether a person was fully integrated into the concern or remained apart/independent of it. Applying that test to the present case one would find that defendants were in fact working for the plaintiff. The plaintiff ran the business, received the money, paid for the infrastructure though the defendants were paid on a performance or return linked basis. Suppose if no work would have come for a certain period of time and the infrastructure would be running, it is the plaintiff alone who would be responsible for the same and the defendants would not be required to contribute out of their pocket for maintenance of the infrastructure.

75. The legal pronouncements also make it clear that the copyright exists not only in what is drafted and created but also in list of clients and addresses Page 1905 specially designed by an advocate or a law firm. The exposition in the commentary of David Bainbridge on Software Copyright Law leaves no manner of doubt where it is emphasized that copyright can exist at two levels including the level of the database itself as a form of work in its own right. This has been cited with approval in Berlington Hope Shopping Private Limited case (Supra) where it has been further emphasized that customers' list and information consisting of mail order, catalogues itself amounts to confidential information.

76. Interestingly in the commentary by an Indian author of P. Narayanan on Copyright and Industrial Designs there is a paragraph devoted to an employee in a solicitor firm where it is emphasized that where an employee in a solicitor's firm drafts a document or an agreement or sale deed it is the employer who is the first owner of copyright in that document. Here again it has to be emphasized that while referring to an employee, the reference naturally is to a lawyer and to the relationship which may exist between two lawyers where one lawyer works for the other.

77. I am unable to accept the contention of the learned senior counsel for the defendants that Rule 49 of Section VII of the Bar Council of India Rules which proscribes an advocate from being a full time salaried employee of any person, Government, Firm, corporation or concern implies no advocate can work for any other advocate as an employee to be governed by the principles of contract of service. The object of this Rule is to make distinction where an advocate instead of practicing professional law, decides to work for an organization or a person on a full time salary basis. It would have no application to the principle of an advocate being associated with any other advocate. Yet simultaneously it cannot be said that if this is the position there can be no contract of service in a relationship between two advocates. I consider it appropriate to emphasise that in such a relationship between advocates possibly even a greater trust and confidence element is involved than between two business people. This is so since the advocate is not really working for himself but for his client and is rendering services for remuneration. The essential ingredients of a contract of service thus cannot be breached in such a relationship which has been succinctly set out in Robb v. Green case (Supra). Thus it is an implied term of an arrangement between the advocates that the information received would not be used to the detriment of the client or the advocate carrying on practice.

78. Insofar as the tests for contract of service is concerned there is no doubt regarding them and even learned senior counsel for the defendants has emphasized the principles of control. However

that itself is not sufficient and thus the four fold test suggested in Marketing Investigation case (Supra) would be extremely apposite. This test is in fact adopted from the case of Montreal Locomotive case (Supra) referred to in the said judgment which includes control, ownership of tools, chance of profit and risk of loss. As rightly said the crucial question is as to whose business it is. In the present case the plaintiff owned the infrastructure and the tools and the defendants did not claim any share while parting. There is no risk of loss to the defendants and it is not as if the defendants have a share in the net profits though they are getting varying remuneration dependant upon receipts. The methodology Page 1906 of running of the organization show the control with the plaintiff. Thus it can be rightly said that the business is of the plaintiff. In fact in Nora Beloff case (Supra) it has been emphasized that where there is greater skill required for a work, which would be the case for an advocate, it is the significance of control in determining whether there is a contract of service.

79. In my considered view there cannot be really any doubt that the relationship between the plaintiff and the defendants is one of contract of service.

80. Now coming once again to the test of breach of confidentiality, significance of which has already been emphasized, there can be little doubt that the information between a client and his advocate has the necessary quality of confidence and when it is imparted there is an obligation of confidence. The defendants have not worked for the clients but for the plaintiff and thus when they take away the duplicate information, there is unauthorized use of information. The triple test laid down by Megarry J. in Coco v. A.N. Clark (Engineers) Ltd. case (Supra) would thus stand satisfied.

81. I am in full agreement with the views expressed in Margaret, Duchess of Argyll (Feme Sole) v. Duke of Argyll and Ors. (Supra) that a Court must step in to restrain a breach of confidence independent of any right under law. Such an obligation need not be expressed but be implied and the breach of such confidence is independent of any other right as stated above. The obligation of confidence between an advocate and the client can hardly be re-emphasised. Section 16 of the Copyright Act itself emphasizes the aspect of confidentiality de hors even the rights under the Copyright Act. If the defendants are permitted to do what they have done it would shake the very confidence of relationship between the advocates and the trust imposed by clients in their advocates. The actions of the defendants cause injury to the plaintiff and as observed by Aristotle: 'It makes no difference whether a good man defrauds a bad one, nor whether a man who commits an adultery be a good or a bad man; the law looks only to the difference created by the injury.

82. The reference by learned senior counsel for the defendants to the judgment of the Apex Court in State of UP and Ors. v. UP State Law Officers Association and Ors. case (Supra) would not, in my considered view, aid the defendants in the present case. There can be no doubt about the legal profession being service oriented profession. The historical perspective has been set out in the judgment. The case dealt with the appointment of Government pleaders. The arrangement in the present case is quite different and is based on a large legal organization rather than a simple relationship of an individual advocate to his client or one of the duties of the individual advocate to the Court.

83. I am unable to persuade myself to agree with the submissions of the learned senior counsel for the defendants that the present case is one of contract of service. No doubt some of the ingredients of a contract of service Page 1907 include professional or technical skills without detail directions. However even in the judgment of the National Consumer Redressal Commission in M/s. Cosmopolitan Hospital and Anr. case (Supra) relied upon by the learned senior counsel for the defendants, the observations of Fletcher Moulton, L.J. in Simmons v. Health Laundry Company 1910 1 KB 543 at pp.549,550, case have been relied upon to state that it is impossible to lay down any rule of law distinguishing the one from others and it is the facts and circumstances of the particular case, which are relevant. It is discussed above that control cannot be the sole criteria for determining relationship which has become more complex over a period of time. Thus though a lawyer client relationship may not be one for personal service, the services rendered by the advocate with the assistance of an associate may in turn be a contract of service, vis--vis such other associates.

84. There is no dispute that the work falls within the definition of literary work within the meaning of Section 2(o) of the Copyright Act as the definition include computer database. Section 17 provides that the first owner of the copyright is the owner but the same is subject to various proviso including proviso (c) which makes the work during a contract of service to subsist in the employer. Thus the work done by the defendants for the benefit of the clients of the plaintiff would fall within the definition of contract of service. This is of course apart from the fact that even if it was not so the same would not make a difference to the result in the present case as the element of breach of trust or confidence can hardly be a factor to be ignored specially in view of provisions of Section 16 of the Copyright Act.

85. The relationship between advocates associated together has become more complex in view of the change in the traditional nature of work. It has thus become necessary to define the rights and obligations of such persons and the occasion for the same has arisen in the present case. There may be cases where a partnership is made and yet certain rights stand exclusively in the hands of particular partners. There can be a mixed arrangement where there are partners and associates or there can be single person controlled entities where the others have status of associates whose job is to service clients of the controlling person. The present case falls in the third category. The defendants left for what they have perceived to be a betterment of their prospects but the unfortunate part is that to advance the same they decided to copy the material developed during the course of their work with the plaintiff for the benefit of the clients of the plaintiff and spirited the same away. This they could not have done. The defendants have not only resisted the injunction of the plaintiff but have even filed a counter suit claiming exclusive privilege to utilize what they claim to be material developed by them. This material is developed only during the course of their association with the plaintiff and the defendants are hardly entitled to such a relief. In giving such an interpretation, one may refer to John W. Gardner, who observed as under:

> All laws are an attempt to domesticate the natural ferocity of the species. We can't stop murder, but we can make it tougher to get away with it. We can't stop a banker from stealing the widow's money, but we can make it harder for him to steal it.
>
> Page 1908

86. The plaintiff has clearly established a prima facie case in respect of the rights in the material taken away by the defendants. In my considered view, the balance of convenience lies in favor of the plaintiff and against the defendants. The defendants are free to carry on their profession, utilize the skills and information they have mentally retained and they are being restrained only from using the copied material of the plaintiff in which the plaintiff alone has a right. In case the interim relief is not granted to the plaintiff, irreparable prejudice would cause to the plaintiff in more than one manner. The defendants would be entitled to utilize the material of the plaintiff to which the defendants had access in a confidential manner. Not only that the misuse of any such material could expose the plaintiff to liability towards his clients apart from a loss of face in such eventuality. The defendants having worked with the plaintiff cannot utilize the agreements, due diligence reports, list of clients and all such material which has come to their knowledge or has been developed during their relationship with the plaintiff and which is per se confidential.

87. The defendants are thus restrained either through themselves or their representative from utilizing the material of the plaintiff forming subject matter of the suit and from disseminating or otherwise exploiting the same including the data for their own benefit.

88. In view of the aforesaid IA No. 6695/2004 in CS (OS) No. 1109/2004 is accordingly allowed while IA No. 7477/2004 in CS (OS) No. 1257/2004 is dismissed.