

# M/S Stellar Information Technology ... vs Mr Rakesh Kumar & Ors on 29 August, 2016

**Author: Vibhu Bakhru**

**Bench: Vibhu Bakhru**

IN THE HIGH COURT OF DELHI AT NEW DELHI  
% Judgment delivered on: 29.08.2016  
+ CS(COMM) 482/2016  
M/S STELLAR INFORMATION TECHNOLOGY  
PRIVATE LTD ..... Plaintiff  
Versus  
MR RAKESH KUMAR & ORS ..... Defendants  
Advocates who appeared in this case:  
For the Plaintiff : Mr Gagan Mathur, Advocate.  
For the Defendants : Mr Roshan Santhalia, Advocate for Defendant  
nos.1 to 7.  
Mr Kirtiman Singh, CGSC for UOI.  
CORAM  
HON'BLE MR JUSTICE VIBHU BAKHRU  
JUDGMENT

VIBHU BAKHRU, J

1. The Plaintiff has filed the present application, inter alia, praying as under:-

"a) Pass an ex-parte ad interim injunction order thereby restraining the defendant, his agent, servants, or any other person on behalf of defendants from using and utilizing the Confidential Information of the plaintiff company and from carrying out any activity including competitive activity in breach of the Confidentiality and Invention Assignment Agreement and Employee Confidentiality Agreement and from approaching the clients, customers and employees of the plaintiff company and further restrain them from bad-mouthing and indulging in vilification campaign against the plaintiff company and thereby cause harm to the reputation and goodwill of the plaintiff company;

b) Pass an ex-parte ad interim injunction order thereby directing the defendant no. 4 to render accounts before this Hon'ble Court;"

2. The Plaintiff is a private company and is, inter alia, engaged in the business of Data Recovery. The Plaintiff states that it has been providing a wide range of Data Recovery, Data Migration and Data

Erasure Solutions to its clients in India and abroad.

3. Defendant Nos. 1 to 3 are the erstwhile employees of the Plaintiff. Defendant Nos. 5 to 7 are the respective spouses of Defendant Nos. 1 to 3. Defendant no. 4 (hereafter 'Techchef') is a company promoted by Defendant nos. 5 to 7 and they are also the directors of the said company.

4. The Plaintiff alleges that although Defendant nos. 5 to 7 are shown as the promoters/directors of Techchef, in fact, its business is carried on by Defendant nos. 1 to 3, who are in de facto control and management of Techchef. It is further alleged that Techchef is also carrying on the same activities/business as is being carried on by the Plaintiff - that is, the business of providing services relating to data recovery, data migration and data erasure - and is directly competing with the Plaintiff.

5. It is the Plaintiff's case that Defendant nos. 1 to 3 - by virtue of their employment with the Plaintiff - had access to Plaintiff's confidential data, information, trade secrets and knowhow and they are now using the same for securing the business from the Plaintiff's clients. According to the Plaintiff, the same is breach of the "Confidentiality and Invention Assignment Agreement" and "Employee Confidentiality Agreement"

entered into by Defendant nos. 1 to 3 with the Plaintiff.

6. The Plaintiff claims that it became aware of an email forwarded by Defendant no.1 to Defendant no. 3 regarding a work order sent by M/s Rollatainers Limited, which the Plaintiff claims is an ancillary of M/s Amtek Group, which in turn is stated to be a customer of the Plaintiff. It is further claimed that the Defendants are continuing to approach the Plaintiff's customers and soliciting work from them. It is contended that the aforesaid action of the Defendants approaching the Plaintiff's customers is in violation of the aforesaid Agreements entered into by the Defendants with the Plaintiff.

7. Mr Mathur, the learned counsel for the Plaintiff submitted that the Defendants have stolen the Plaintiff's client list, which includes the phone numbers and contact details of the concerned persons, and are using the same for their business. He further stated that the Defendants had also not returned the laptop provided to them during their employment. It was earnestly contended that the client list prepared by the Plaintiff is its proprietary information and, therefore, the Defendants must be restrained from using the said list and/or approaching the Plaintiff's customers.

8. Mr Mathur further submitted that the Defendants were only restrained from carrying on the competing business and that too for a limited period and therefore, the subject clause was reasonable and in terms of the Agreements, the Plaintiff was entitled to injunctive relief. He relied upon the decisions of this Court in Diljeet Titus, Advocate v. Alfred A. Adebare and Others: 2006 (32) PTC 609 (Delhi) and Vogueserv International Pvt. Ltd. v. Rajesh Gosain & Ors.: 203 (2013) DLT 613, in support of its contention that the Defendants are liable to be restrained from approaching the Plaintiff's customers.

9. Mr Santhalia, the learned counsel for the Defendants countered the arguments advanced on behalf of the Plaintiff. He submitted that the Defendants did not have any confidential information pertaining to the Plaintiff. He submitted that names of almost all large customers of the Plaintiff are advertised on its website and therefore, are in public domain. He further submitted that business market relating to data recovery and data migration is not very large and the names of almost all customers requiring such services are known in the market and can be found on the internet by using search engines such as google.com.

10. Insofar as the Plaintiff's allegation that the Defendants have not returned the laptop given to them during the course of their employment with the Plaintiff is concerned, he submitted that first of all, the machine was a tablet and not a laptop; and secondly, the Defendants had no objection in returning the same but had not done so as their dues had not been cleared. He submitted that there was no confidential or technical data available on the said tablet which, in fact, was no longer in a working condition. He further submitted that the software and other tools used by the Plaintiff for rendering services are not the proprietary software of the Plaintiff but are licensed software. He also denied that the Defendants had secreted or stolen any data relating to the remuneration package of other employees.

11. Mr Santhalia further submitted that the Defendants could not be restrained from carrying on their business or approaching the customers as any such restrictive covenant in the Agreements would be void by virtue of Section 27 of the Indian Contract Act, 1872. In support of its contention, he relied on the following decisions:

(i) The decision of the Madras High Court in *Lister Technologies Private Limited v Mukundhan Dakshinamurthi & Ors.*: 215(5) CTC 830.

(ii) The decision of a Coordinate Bench of this Court in *Ambiance India Pvt. Ltd. V. Shri Naveen Jain*: 122 (2005) DLT 421.

(iii) The decision of the Bombay High Court in *VFS Global Services Private Limited v. Mr Suprit Roy*: 2008 (118) FLR 419.

(iv) *American Express Bank Ltd. v. Ms. Priya Puri*: 2006 (110) FLR 1061.

#### Reasoning and conclusion

12. Before proceeding further, it would be necessary to refer to the relevant clauses of the Agreements, which are stated to have been breached by the Defendants. The Plaintiff claims to have entered into similarly worded "Employee Confidentiality Agreement" and "Confidentiality and Invention Assignment Agreement" with each of the Defendants. However, in terms of the Confidentiality and Invention Assignment Agreement, Defendant no.1 is restrained from carrying on the prohibited activity for a period of one year while Defendant nos.2 and 3 are proscribed from carrying on the prohibited activity for a period of two years.

13. The relevant clauses of the said agreements are set out as under:-

"Confidentiality and Invention Assignment Agreement for Employee Clause 2

2. Confidentiality

a) Definitions "Proprietary Information" is all information and any idea whatever form, tangible or intangible, pertaining in any manner to the business of the Company, or any of its Affiliates, or its employees, clients, consultants, or business associates, which was produced by any employee or consultant of the Company in the course of his or her employment or consulting relationship or otherwise produced or acquired by or on behalf of the Company. All Proprietary Information not generally known outside of the Company's organization, and all Proprietary Information so known only through improper means, shall be deemed "Confidential Information." By example and without limiting the foregoing definition, Proprietary and Confidential information shall include, but not be limited to:

(1) formulas, research and development techniques, processes, trade secrets, computer programs, software, electronic codes, mask works, inventions, innovations, patents, patent applications, discoveries, improvements, data, know-how, formats, test results, and research projects;

(2) information about costs, profits, markets, sales, contracts and lists of customers, and distributors; (3) business, marketing, and strategic plans; (4) forecasts, unpublished financial information, budgets, projections, and customer identities, characteristics and agreements; and (5) employee personnel files and compensation information.

Confidential Information is to be broadly defined, and includes all information that has or could have commercial value or other utility in the business in which the Company is engaged or contemplates engaging, and all information of which the unauthorized disclosure could be detrimental to the interests of the Company, whether or not such information is identified as Confidential Information by the Company.

(b) Existence of Confidential Information The Company owns and has developed and compiled, and will develop and compile, certain trade secrets, proprietary techniques and other Confidential information which have great value to its business. This Confidential Information includes not only information disclosed by the Company to me, but also information developed or learned by me during the course of my employment with the Company.

(c) Protection of Confidential Information I will not, directly or indirectly, use, make available, sell, disclose or otherwise communicate to any third party, other than in my assigned duties and for the benefit of the Company, any of the Company's Confidential Information, either during or after my employment with the Company. In the event I desire to publish the results of my work for the

Company through literature or speeches, I will submit such literature or speeches to the Managing Director of the Company at least 10 days before dissemination of such information for a determination of whether such disclosure may alter trade secret status, may be highly prejudicial to the interests of the Company, or may constitute an invasion of its privacy. I agree not to publish, disclose or otherwise disseminate such information without prior written approval of the President of the Company. I acknowledge that I am aware that the unauthorized disclosure of Confidential Information of the Company may be highly prejudicial to its interests, an invasion of privacy, and an improper disclosure of trade secrets.

(d) Delivery of Confidential Information Upon request or when my employment with the Company terminates, I will immediately deliver to the Company all copies of any and all materials and writings received from, created for, or belonging to the Company including, but not limited to, those which relate to or contain Confidential Information.

(e) Location and Reproduction I shall maintain at my work station and/or any other place under my control only such Confidential Information as I have a current "need to know." I shall return to the appropriate person or location or otherwise properly dispose of Confidential Information once that need to know no longer exists. I shall not make copies of or otherwise reproduce Confidential Information unless there is a legitimate business need of the Company for reproduction.

(f) Prior Actions and Knowledge I represent and warrant that from the time of my first contact with the Company I held in strict confidence all Confidential Information and have not disclosed any Confidential Information, directly or indirectly, to anyone outside the Company, or used, copied, published, or summarized any Confidential information, except to the extent otherwise permitted in this Agreement.

(g) Third-Party Information I acknowledge that the Company has received and in the future will receive from third parties their confidential information subject to a duty on the Company's part to maintain the confidentiality of such information and to use it only for certain limited purposes. I agree that, during the Period of Employment and thereafter, I will hold all such confidential information in the strictest confidence and not to disclose or use it, except as necessary to perform my obligations hereunder and as is consistent with the Company's agreement with such third parties.

(h) Third Parties I represent that my employment with the Company does not and will not breach any agreements with or duties to a former employer or any other third party. I will not disclose to the Company or use on its behalf any confidential information belonging to others and I will not bring onto the premises of the Company any confidential information belonging to any such party unless consented to in writing by such party.

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Clause 4

4. Competitive Activity

(a) Acknowledgment I acknowledge that the pursuit of the activities forbidden by Section 4(b) below would necessarily involve the use, disclosure or misappropriation of Confidential Information.

(b) Prohibited Activity To prevent the above-described disclosure, misappropriation and breach, I agree that during my employment and for a period of one (I) year after termination of the Period of Employment, without the Company's express written consent, I shall not, directly or indirectly, (i) employ, solicit for employment, or recommend for employment any person employed by the Company (or any Affiliate); and (ii) engage in any present or contemplated business activity that is or may be competitive with the Company (or any Affiliate) in any state where the Company conducts its business, unless I can prove that any action taken in contravention of this subsection (ii) was done without the use in any way of Confidential Information.

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Clause 6

6. Termination Obligations

(a) Upon the termination of my relationship with the Company or promptly upon the Company's request, I shall surrender to the Company all equipment, tangible Proprietary Information, documents, books, notebooks, records, reports, notes, memoranda, drawings, sketches, models, maps, contracts, lists, computer disks (and other computer-generated files and data), any other data and records of any kind, and copies thereof (collectively, "Company Records"), created on any medium and furnished to, obtained by, or prepared by myself in the course of or incident to my employment, that are in my possession or under my control.

(b) My representations, warranties, and obligations contained in this Agreement shall survive the termination of the Period of Employment.

(c) Following any termination of the Period of Employment, I will fully cooperate with the Company in all matters relating to my continuing obligations under this Agreement.

(d) In the event that I leave the employment of the Company I hereby grant consent to notification by the Company to my new employer about my rights and obligations under this Agreement.

(e) Upon termination of the Period of Employment, I will execute a Certificate acknowledging compliance with this Agreement in the form reasonably provided by the Company.

Clause 7

7. Injunctive Relief I acknowledge that my failure to carry out any obligation under this Agreement, or a breach by me of any provision herein, will constitute immediate and irreparable damage to the Company, which cannot be fully and adequately compensated in money damages and which will warrant preliminary and other injunctive relief, an order for specific performance, and other equitable relief. I further agree that no bond or other security shall be required in obtaining such equitable relief, and I hereby consent to the issuance of such injunction and to the ordering of specific performance. I also understand that other action may be taken and remedies enforced against me.

#### Employee Confidentiality Agreement

1. Confidential Information I agree that during and after my term of employment with the company:

1.1 I shall keep secret all confidential and proprietary information and not reveal or disclose it to anyone outside of the Company, except with the Company's prior written consent;

1.2 I shall not make use of any of such confidential and proprietary information for my own purposes or the benefit of anyone other than the Company; and 1.3 I shall deliver promptly to the Company, upon the termination of my employment and at any time the Company may so request, all memoranda, notes, records and other documents (and all copies thereof) constituting or relating to such confidential and proprietary information which I may then possess.

2. Enforcement I agree that if I commit a breach of any of the provisions of paragraph 1, the Company shall have the right to enforce this Agreement in any court having equity jurisdiction, I acknowledge and agree that any such breach of this Agreement by me will cause irreparable injury to the Company and that money damages will not provide an adequate remedy to the Company, In addition, the Company shall have any other rights and remedies available at law or in equity.

3. Non-Disclosure I understand that this Agreement does not and will not prevent me from working for any other employer subsequent to the termination of my employment with the Company as long as I DO NOT use or disclose any such confidential and proprietary information."

14. The expression 'Confidential Information' and 'Proprietary Information' is defined in very wide terms in the Confidentiality and Invention Assignment Agreement. However, information which is otherwise available in public domain cannot be considered as confidential information and no injunction restraining the use of such information can be issued.

15. Although, the Plaintiff has made allegations that the Defendants have copied the data base of the Plaintiff, there is no evidence to remotely indicate that any particular

data base of the Plaintiff has been removed or has been copied by the Defendants. The only grievance of the Plaintiff appears to be that the Defendants have approached the Plaintiff's customers. In this regard, Mr Santhalia, the learned counsel for the Defendants submitted that the names of customers requiring data recovery services or other services relating to data are in public domain and can also be found from using search engines on the net. This contention was not countered by the learned counsel for the Plaintiff. However, he submitted that even though the names of the customers and/or persons looking for services may be available in public domain, the contact details of the concerned persons would not be easily ascertainable. Even assuming the same to be true, the Defendants cannot be restrained from approaching the customers since the identity of the customers is known. Indisputably, the Defendants could on their own also find out the details of the relevant persons. In such a situation, an injunction interdicting use of a client list -

the existence of which is also in dispute - would be an exercise in futility and enforcement of which would be impossible.

16. The fact that the Defendants have approached some of the Plaintiff's customers does not in the given facts establish that the Defendants are using any proprietary information of the Plaintiff. The Defendants also cannot be prevented from using the experience and knowledge which is gained by them during the course of employment with the Plaintiff. Although, the Plaintiff had alleged that the Defendants have removed the laptop, it was clarified by the learned counsel for the Defendants that the Defendants had not returned the tablet (and not laptop as claimed by the Plaintiff) provided by the Plaintiff to them for the reason that the dues of the Defendants had not been settled by the Plaintiff. It was further pointed out that the Defendants have filed two suits titled Rakesh Kumar v. Stellar Information Technology Pvt. Ltd: Suit No.219 of 2016 and Anish Kumar v. Stellar Information Technology Pvt. Ltd: Suit No. 68 of 2016 in the District Courts at Tis Hazari for claiming their dues and had already indicated that they were willing to return the tablet in question provided the dues of the Defendants were settled.

17. It is also not disputed by the learned counsel for the Plaintiff that the Defendants are not technically qualified and/or were not involved in the technical operations. In these circumstances, it would be difficult to accept that the Defendants secreted any technical process and/or would have removed or copied any information relating to any technical process. In any event, the Plaintiff has not been able to establish or indicate its proprietary right on any software or technical process which is being used by the Defendants. On the contrary, it is not disputed that the software used by the Plaintiff was licensed software and not the proprietary software of the Plaintiff.

18. It is thus, seen that the Plaintiff's case is essentially not one of infringement of copyright but one for enforcement of a non-compete clause. The Plaintiff claims that the Defendants are obliged not to carry on competing activity for the specified period after termination of their employment (one year in case of Defendant no.1 and two years in case of Defendant nos. 2 & 3). The aforesaid contention is premised on the basis of clause 4 of the Confidentiality and Invention Assignment Agreement. However, a closer examination of the aforesaid clause indicates that there is an inbuilt exception to



the restriction to not to carry on any competitive activity; and that exception is where an employee can prove that he has carried on the business activity without using of any confidential information.

19. In the present case, it is not disputed that the names of the customers seeking data recovery services are well-known and in public domain. Therefore, the Defendants cannot be restrained from approaching the customers only on the allegation that the Defendants are aware of the names of the Plaintiff's customers.

20. The learned counsel for the Plaintiff had submitted that the expression 'confidential information' is very wide and thus, it would not be practically impossible for the Defendant to establish that they were not using the confidential information in the context of their business. Consequently, the Defendants could not be permitted to carry on any competing business. In my view, this contention is also bereft of any merit as by expanding the width of the expression 'confidential information' to include information which is in public domain, the Plaintiff is not seeking protection of proprietary or confidential information, but is essentially seeking a restraint on trade. Plainly, if the expression of 'confidential information' is read in the manner as suggested by the Plaintiff, clause 4(b)(ii) of the Confidentiality and Invention Assignment Agreement for the Employee would in effect work as a covenant in restraint of trade and, therefore, would be void by virtue of Section 27 of the Indian Contract Act, 1872.

21. The decision in the case of Diljeet Titus (*supra*) is wholly inapplicable in the facts of this case. In that case the issue was whether the copyright in the database - which included a client list and was admittedly copied by the defendants - vested with the defendants as they had worked on it or whether the same belonged to the plaintiff. The court held that "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" and therefore, restrained the defendants from using the same. Even so, the court clarified that "it is possible that 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.". The decision in *Vogueserv International Pvt. Ltd. (supra)* also turned on the issue of copyright. There is no dispute that the Defendants could be restrained from using the copyright material, but clearly, they cannot be restrained from using the material which is in public domain and from carrying on competing business after their employment with the Plaintiff has ceased.

22. The contention that the restriction to carry on competing business is for a limited time and is therefore, reasonable and consequently, enforceable cannot be accepted. Once it is held that in the guise of a confidentiality clause, the Plaintiff is attempting to enforce a covenant in restraint of trade, the same must be held to be void. As explained by Justice A.P. Sen in his concurring judgement in *Superintendence Company of India (P) Ltd. vs Krishan Murgai*: (1981) 2 SCC 246, a covenant in restraint of trade, whether partial or not is void by virtue of section 27 of the Indian Contract Act, 1872; the question whether a restriction is reasonable or not is relevant only if the case falls within the exception to section 27. The relevant extract of the said judgement are reproduced below:

"26. Now, so far as the present case is concerned, the law is to be found in section 27 of the Contract Act 1872, which reads:

"27. Agreement in restraint of trade void-Every agreement by which any one is restrained from exercising a lawful profession, trade or business of any kind is to that extent void.

Exception: One who sells the goodwill of a business may agree with the buyer to refrain from carrying on a similar business, within specified local limits, so long as the buyer or any other person deriving title to the goodwill from him, carries on a like business therein, provided that such limits appear to the Court reasonable, regard being had to the nature of the business."

The section is general in terms, and declares all agreements in restraint void pro tanto, except in the case specified in the exception.

27. The question whether an agreement is void under section 27 must be decided upon the wording of that section. There is nothing in the wording of section 27 to suggest that the principle stated therein does not apply when the restraint is for a limited period only or is confined to a particular area. Such matters of partial restriction have effect only when the fact fall within the exception to the section.

28. A contract, which has for its object a restraint of trade, is prima facie, void. Section 27 of the Contract Act is general in terms and unless a particular contract can be distinctly brought within Exception 1 there is no escape from the prohibition. We have nothing to do with the policy of such a law. All we have to do is to take the words of the Contract Act and put upon the meaning which they appear plainly to bear. This view of the section was expressed by Sir Richard Couch C.J. in celebrated judgment in *Madhub Chunder v. Rajcoomar Doss* [1874] Beng L. R. 76 at pp. 85-86 laying down that whether the restraint was general or partial, unqualified or qualified, if it was in the nature of a restraint of trade, it was void."

23. In *Wipro Limited v. Beckman Coulter International S.A.*: 131 (2006) DLT 681, a Coordinate Bench of this Court, after referring to several judgements, summarised the law on the issue as under:

"47. After a review of all the decisions of the Supreme Court and the High Courts, including this Court, the following points become clear:

1) Negative covenants tied up with positive covenants during the subsistence of a contract be it of employment, partnership, commerce, Page 2704 agency or the like, would not normally be regarded as being in restraint of trade, business of profession unless the same are unconscionable or wholly one-sided;

2) Negative covenants between employer and employee contracts pertaining to the period post termination and restricting an employee's right to seek employment and/or to do business in the same field as the employer would be in restraint of trade and, therefore, a stipulation to this effect in the contract would be void. In other words, no employee can be confronted with the situation where he has to either work for the present employer or be forced to idleness;

3) While construing a restrictive or negative covenant and for determining whether such covenant is in restraint of trade, business or profession or not, the courts take a stricter view in employer-employee contracts than in other contracts, such as partnership contracts, collaboration contracts, franchise contracts, agency/distributorship contracts, commercial contracts. The reason being that in the latter kind of contracts, the parties are expected to have dealt with each other on more or less an equal footing, whereas in employer-employee contracts, the norm is that the employer has an advantage over the employee and it is quite often the case that employees have to sign standard form contracts or not be employed at all;

4) The question of reasonableness as also the question of whether the restraint is partial or complete is not required to be considered at all whenever an issue arises as to whether a particular term of a contract is or is not in restraint of trade, business or profession"

24. Similar views are also expressed in the decisions referred to by Mr Santhalia.

25. In view of the aforesaid, the application is dismissed and the interim order passed on 08.06.2016 is vacated.

VIBHU BAKHRU, J AUGUST 29, 2016 RK