

## **Rp Partners vs Kumarpal on 23 April, 2012**

**Author: Vinod K.Sharma**

**Bench: Vinod K.Sharma**

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 23/04/2012

CORAM

THE HON'BLE MR.JUSTICE VINOD K.SHARMA

O.A.Nos.321, 322 and 326 of 2012

FINANCIAL SOFTWARE AND SYSTEMS

VS

MUDASSIR NAIK

FOR PETITIONER : RP PARTNERS

FOR RESPONDENT : KUMARPAL

ORDER:

VINOD K.SHARMA,J., This judgment shall dispose of O.A.Nos.321, 322 and 326 of 2012, as the common question of law and facts are involved in these cases. For the sake of brevity, facts are being taken from O.A.No.321 of 2012.

O.A.No.321 of 2012: The application has been filed for grant of ad-interim injunction, restraining the respondents from disclosing, divulging and misusing the confidential and proprietary information of the applicant either directly and indirectly or in any manner whatsoever to any person and / or entity at all times without the prior written consent of the applicant.

2. In support of the prayer, it is pleaded as under:

1. I am the Head HR of the Applicant Company and as such I am well acquainted with the facts of the case.

2. The Applicant is a private limited company incorporated under the Companies Act 1956. The Applicant carries on business, inter alia, of providing Online, Real time, electronic transaction processing and switching for financial and non-financial transactions from/to multiple delivery channels and payment systems and co-networks including Automated Teller Machines (ATMs), Point of Sale terminals (PoS), ATM deployment and management, ATM sharing between banks, International and Domestic interchanges such as MasterCard, Visa and others. The Applicant also provides Value Added Services viz., Mobile top-up, Utilities Bills payments etc. as an Application Service Provider (ASP) to various banks and financial institutions. The Applicant would not only license the software products but also provide support services like customization and production support. The Applicant had to offer the software products of the Applicant and other licensed third party software, as a comprehensive package comprising not only of software license and maintenance but also other value additions like on site technical support, customization, production support, etc. As a consequence, the Applicant has employed numerous technical people, trained them on the software, the customer environment, which includes customers hardware, software, system architecture etc., and other technical and/or non technical aspects of the Applicant, which by its very nature confidential and thus created a good knowledge base for providing various services to its customers like on site technical support, customization, production support, etc. Therefore it was necessary that the Applicant had to enter into a Confidentiality and Invention Assignment Agreement with its employees to protect the confidential and proprietary information of the Applicant, licensed third party software products and that of its customers, which mainly includes banks and other companies.

3. The Applicant is a pioneer in the implementation of payment solutions in India. Most of the contracts were / are won by competitive process (Request for Proposal / Expression of Interest / Tender) with strict stipulations for qualification criteria in terms of domain, technical expertise and support capabilities. All the contracts between the Applicant Company and its customers have very stringent confidentiality clauses. If the employees misuse the confidential informations obtained by them during their employment would result in irreparable harm caused not only to the Applicant but also of its customers and other third parties, who have licensed their software products to the Applicant and its customers.

4. Further implementation of the software and provision of the required support services requires detailed understanding of not only the products and services of the Applicant and other third party licensed software products, but also the customer environment including the existing customizations provided by FSS to the customer, system architecture of the customer, and other confidential information of the

customers, which the Applicant was legally bound to protect under various agreements entered into with the customers and other third parties for their software products. This required the Applicant to provide the confidential information about the third party software products, its customer banks, personal data, and customer environment to the employees on a need-to-know basis to enable the employees to provide the deliverables to the Applicant's customers.

5. The Applicant offers the software products as a comprehensive package consisting of its software license, other third party software products, maintenance and other value additions as part of the sub-license and other related agreements with its customers. Therefore in order to meet the customer requirements for an integrated end-to-end payments solutions system, the Applicant was required to make significant and substantial investments in people and infrastructure, which investments have been actually made by the Applicant to train its people, do continuous research in fine tuning the software products, in customizations, etc.

6. To fulfill the needs and expectations of the customers, the Applicant had employed numerous persons including the Respondent herein. The Respondent was appointed in the services of the Applicant as a TRAINEE TECHNICAL ASSOCIATE vide appointment letter dated 12th February 2007. The appointment letter clearly stipulates that QUOTE Confidentiality Undertaking At all times, both during employment and after, you will not disclose any of the company's trade secrets or use any confidential information unless previously authorized by your manager to do so. Any information relating to the company's business, dealings, methods, appointments, practices, transactions, designs and processes or affairs, or any other matter that comes into your possession or to your attention by reasons of your employment, shall be treated as confidential, whether or not it is individually identified as confidential. UNQUOTE Therefore, the Respondent was to maintain utmost confidentiality of the trade secrets, including but not limited to computer software programs/codes, customer environment, etc., and the Respondent had also agreed not to disclose/divulge or misuse the confidential information of the Applicant.

7. At the time of joining the Applicant, the Respondent had also entered into an Invention Assignment and Confidentiality / Non-Disclosure and Specific Use Agreement dated 19th February 2007 ( Said Agreement ). Clauses 2 & 3 of this Agreement reads as follows:-

QUOTE 2. The Company seeks an invention assignment in its favour as well as a confidentiality / non-disclosure and specific use agreement to be executed by the employee in consideration of the employee:

a. joining the company b. continuing in the services of the company c. having been employed by the company and having received the emoluments until the date of

termination of the employment. The employee has agreed to do so by signing this agreement.

3. The Company also seeks that the employee shall not take employment directly or indirectly, with a Customer or Business partner of the Company during his employment with the Company and also for a period of ONE year from the date of leaving the company. The employee in consideration of;

a. joining the company b. continuing in the services of the company c. having been employed by the company and having received the emoluments until the date of termination of the employment\ has agreed to do so by signing this agreement. UNQUOTE Further, Clauses 10, 11 & 12 of this Agreement reads as follows:

QUOTE o. The disclosing of Confidential Information for purposes other than those set forth in the present Agreement shall be deemed to be a violation of this Agreement and in such event, apart from seeking damages, the Company shall also be entitled to obtain an exparte injunction against the Employee from divulging the same especially in the event of the Employee joining any Customer of Business Partner of the Company.

1. The Employee recognizes the competitive value of the Confidential information that has been received from the Company, as well as the damage that the Company could suffer if such confidential information was disclosed to third parties, including the Company's Customers or Business Partners without the previous consent of the Company and for these reasons, the Employee hereby agrees to indemnify the Company for any and all damages that the Company may suffer on account of an unauthorized disclosure to third parties including the Company's Customers and Business Partners of any such confidential information.

2. The Company seeks that the employee may not take employment directly or indirectly, with a Customer or Business partner of the Company during his tenure with the Company, and also for a period of ONE year from the date of leaving the Company.

If the Employee takes up employment, or attempts to take up employment during his tenure with the Company or within a period of ONE (1) year from the date of leaving the Company, with any Customer or Business Partner of the Company, the Employee shall be deemed to have violated this agreement and the Company shall be entitled, in addition to damages, exparte injunctive relief from an appropriate Court without reference to Arbitration as herein after provided.

The term CUSTOMER for the purpose of this agreement shall be deemed to include Company's Customer and its holding company, subsidiaries, associates, affiliates, nominees, representatives, and any entity in which customer has an equity interest.

The term Business Partner for the purpose of this agreement shall be deemed to include Company s Business Partners and its holding company, subsidiaries, associates, affiliates, nominees, representatives, and any entity in which Business partner has an equity interest.  
UNQUOTE

8. The Applicant had a subcontract with one Hewlett-Packard India Sales (P) Limited ( HP ), acting on behalf of Bank of Baroda, by which the Applicant had licensed some of its own software products along with other third party software products, for which the Applicant was providing support services to the Applicant s customers. Pursuant to this, the Respondent was provided specialized training by the Applicant on the software products of the Applicant and other licensed third party software products and the Applicant for this purpose had disclosed the source code of the Applicant s software products and other licensed third party software products and the computer software programs developed by the Applicant to customize these software products in the customer environment, including the software and hardware used by the customer, more specifically, Bank of Baroda, and the Respondent was posted as Project Associate, on-site in Bank of Baroda for providing on-site technical support from December 1, 2008 his resignation from the services of the Applicant.

9. The Respondent had thereafter submitted his resignation on 23rd November 2011 and was relieved from the services of the Applicant on 20th February 2012. Further, the Respondent also gave a specific undertaking that the Respondent will not disclose and/or divulge the confidential and proprietary information of the Applicant and that the Respondent will not join business partners and/or customers of the Applicant. Therefore, it was the clear understanding between the Applicant and the Respondent that any confidential information provided to the Respondent was to be kept confidential in perpetuity and it is also the legal obligation in terms of the Said Agreement that the Respondent maintains such confidentiality at all times whether during the course of his employment and all times thereafter.

10. Contrary to the terms and conditions of the Said Agreement, which specifically contain clauses necessitating maintenance of confidentiality of the Applicant s proprietary and confidential information, the Respondent has grossly violated and continues to violate the terms and conditions of the Said Agreement by disclosing and/or divulging the confidential and proprietary information and trade secrets of the Applicant s business, software, technical know-how and confidential customer information, by joining a business partner company, namely mPhasis . Respondent has been posted on-site at Bank of Baroda by mPhasis, by virtue of which, the Respondent is disclosing and/or divulging the confidential and proprietary information of the Applicant, including but not limited to the source codes, computer software programs of the Applicant, that were disclosed on a need-to-know basis to the Respondent during training and for providing customization and support services to the Applicant s customer, while the Respondent was in the employment of the Applicant, resulting in misuse of the same by third parties, thereby causing irreparable harm to the Applicant. These acts of the Respondent in not only joining a customer/business partner of the Applicant but also in disclosing and/or divulging the confidential and proprietary information of the Applicant is in clear violation and breach of the Said Agreement.

11. The Respondent had also facilitated the poaching / solicitation of other employees of the Applicant, who were his team members at Bank of Baroda, inducing them to join mPhasis. It is pertinent to mention that these employees have also been posted at Bank of Baroda, to provide maintenance and support services, by misusing the confidential and proprietary information of the Applicant, that were disclosed to these employees, while in the service of the Applicant. The Applicant is also contemplating appropriate legal action against the other employees and mPhasis to curtail such unfair trade practices and to protect its confidential and proprietary information.

12. It is pertinent to mention that the Respondent, while in employment of the Applicant, had access to confidential and proprietary information and trade secrets of the Applicant, third parties and Applicant's customers. It is submitted that the unlawful and unwarranted disclosure of Applicant's confidential and proprietary information and trade secrets have caused considerable / substantial repercussions and irreparable loss and damage to the business, goodwill and reputation of the Applicant. The Applicant submits that such loss and damage cannot be monetarily compensated. Therefore, it is just and necessary that the Respondent is restrained from disclosing, divulging and/or misusing the confidential and proprietary information and trade secrets of the Applicant, third parties and Applicant's customers.

13. It is submitted that the confidential and proprietary information of the Applicant, third parties and Applicant's customers is now being illegally disclosed, divulged and/or misused by the Respondent and the Respondent's current employer, contrary to the Said Agreement, with a view to unlawfully enrich themselves at the cost of and to the detriment of the Applicant.

14. It is submitted that the Applicant is legally permitted to prevent the misuse, divulgence and disclosure of the confidential and proprietary information of the Applicant by the Respondent in order to protect its business interests.

15. The Applicant submits that Clause 10 of the Said Agreement reads as follows:-

16. QUOTE:

The disclosing of Confidential Information for purposes other than those set forth in the present Agreement shall be deemed to be a violation of this Agreement and in such event, apart from seeking damages, the Company shall also be entitled to obtain an ex parte injunction against the Employee from divulging the same especially in the event of the Employee joining any Customer or Business Partner of the Company. UNQUOTE Therefore, the Applicant is entitled to an order of ex-parte injunction as against the Respondent and it is just and necessary that the Respondent be restrained forthwith, to prevent any further loss and/or damage to the Applicant.

17. Further in terms of Clause 15 of the Said Agreement, the Applicant is entitled to initiate arbitration proceedings as against the Respondent.

Clause 21 of the Said Agreement reads as follows:-

QUOTE Arbitration: Any dispute or difference whatsoever arising between the parties out of or relating to the construction, meaning, scope, operation or effect of this contract or the validity or the breach thereof shall be settled by arbitration in accordance with the Indian Arbitration & Conciliation Act, 1996 and the award made in pursuance thereof shall be binding on the parties. The Company shall nominate the Sole Arbitrator. The venue of the arbitration shall be at Chennai and the language for the arbitration shall be English. UNQUOTE On the basis of the said clause, the Applicant intends to initiate arbitration proceedings for violation of terms and conditions of the Said Agreement by the Respondent. The Applicant is approaching this Hon ble Court under Section 9 of the Arbitration & Conciliation Act, 1996 seeking interim relief, prior to initiating arbitration proceedings, to immediately protect its confidential and proprietary information from being disclosed, divulged or misused.

18. By the misuse, divulsion and disclosure of the confidential and proprietary information of the Applicant by the Respondent the Applicant has suffered and continues to suffer substantial financial loss and damage for which the Respondent is liable to compensate the Applicant. The Applicant is in the process of evaluating / estimating the damages caused by the illegal actions of the Respondent and intends to commence the arbitration proceedings after completion of such evaluation / estimation.

19. The Applicant is entitled to protect its confidential and proprietary information and its genuine business interest and therefore, if the ex-parte interim injunction is not granted by this Hon ble Court, the Applicant will be put to irreparable loss and hardship as the disclosure and misuse will continue unabated and the same cannot be compensated by monetary means alone. It is submitted that no hardship or loss will be caused to the Respondent if the Respondent is restrained from disclosing and misusing the confidential and proprietary information of the Applicant. It is pertinent to state that the confidential and proprietary information and trade secrets of the Applicant have been developed and conceived over a 20 year period spending huge sums of money and effort.

20. The Applicant submits that they have established a prima facie case for grant of injunction in their favour. The fundamental principle of law is that business must not only be honest but must not, even unintentionally, be unfair and the Respondent s actions militate against all commercial norms. The Applicant further submits that the balance of convenience lies in its favour and against the Respondent as the Respondent is bound to be aware of the Applicants rights in respect of the confidential and proprietary information and the trade secrets owned by the Applicant.

21. As per Clause 14 of the Said Agreement, the courts in Chennai have exclusive jurisdiction in respect of any suit / dispute arising under the Said Agreement. This Hon ble Court, therefore, has jurisdiction to hear and try this application in accordance with the provisions of Section 2 (1) (e) of the Arbitration & Conciliation Act 1996, read with Section 42 thereof.

The Application has not filed any other / similar applications / petition before this Hon ble Court or before any other court/s seeking the same relief.

22. The cause of action arose/s at Chennai on 12th February 2007, when the Applicant issued appointment letter to the Respondent, on 19th February 2007 when the Invention Assignment and Confidentiality / Non-Disclosure and Specific Use Agreement was entered in to between the Applicant and the Respondent, on 23rd November 2011, when the Respondent tendered his resignation, on 20th February 2012, when the Applicant issued reliving letter to the Respondent, and on various dates when the Applicant had disclosed and trained the Respondent on its Confidential and Proprietary information and the Respondent violated the terms and conditions of Invention Assignment and Confidentiality / Non-Disclosure and Specific Use Agreement by joining a customer company and being employed and posted at Bank of Baroda to provide maintenance and support services by misusing the confidential and proprietary information of the Applicant, etc.

23. The Applicant hereby pays court fee of Rs.5000/- under Schedule II read with Article 11 (1) (iii) of the Tamilnadu Court fees and Suit Valuation Act 1955.

3. The reading of the affidavit shows, that the stand of the applicant is that the respondent is guilty of violating the terms of agreement in disclosing and/or divulging the confidential and proprietary information and trade secrets of the Applicant s business, software, technical know-how and confidential customer information, by joining a business partner company, namely mPhasis .

4. The other submission is that the respondent, while in employment of the Applicant, had access to confidential and proprietary information and trade secrets of the Applicant, third parties and its customers. That the unlawful and unwarranted disclosure of this information will cause irreparable loss and damage to the business, goodwill and reputation of the Applicant. According to the applicant, this cannot be compensated in terms of money.

5. Therefore, on the basis of pleadings referred to above, it is submitted, that the applicant has prima facie case and the balance of convenience is in favour of the applicant and against the respondent and that it will suffer irreparable loss, if injunction is not granted.

6. Learned counsel for the respondent on the other hand vehemently contended, that the relief claimed by the applicant is barred under Section 27 of the Contract Act. That contract to restrain the trade / job of the applicant, would be void.

7. It is submitted, that the respondent has not disclosed any confidential information, though did not dispute the fact, that the respondent joined the service of other employer. The contention of the learned counsel for the respondent therefore was that no application for injunction is competent, as the contract itself is void.

8. In support of this contention, learned counsel for the respondent placed reliance on the judgment of the Hon'ble Supreme Court in Percept D'Mark (India) Pvt. Ltd., vs. Zaheer Khan and another, 2006 (3) SCALE 324, wherein the Hon'ble Supreme Court was pleased to lay down as under:



"26. He would further submit that the term of the contract was expressly limited to 3 years from 30.10.2000 to 29.10.2003, unless extended by mutual agreement and all obligations and services under the contract were to be performed during the term. It was further submitted that assuming without admitting that the negative covenant in Clause 31(b) is not void and is enforceable, it was nevertheless inappropriate, if not impermissible, for the Single Judge to grant an injunction to enforce it at the interim stage, for the following reasons:-

(i) Firstly, grant of this injunction resulted in compelling specific performance of a contract of personal, confidential and fiduciary service, which is barred by Clauses (b) and (d) of Section 14(1) of the Specific Relief Act, 1963;

(ii) Secondly, it is not only barred by Clause (a) of Section 14(1) of the Specific Relief Act, but this Court has consistently held that there shall be no specific performance of contracts for personal services;

(iii) Thirdly, this amounted to granting the whole or entire relief which may be claimed at the conclusion of trial, which is impermissible;

(iv) Fourthly, the Single Judge's order completely overlooked the principles of balance of convenience and irreparable injury. Whereas Percept could be fully compensated in monetary terms if they finally succeeded at trial, respondent No.1 could never be compensated for being forced to enter into a contract with a party he did not desire to deal with, if the trial results in rejection of Percept's claim."

27. It was further contended that the appellant's failure to even invoke arbitration between 04.12.2003 and 02.03.2006 is fatal to their claim for an injunction under Section 9 of the Arbitration and Conciliation Act, 1996. In any event, the entire petition under Section 9 was not maintainable, as the agreement dated 20.11.2003 was already entered into and in force from 01.12.2003 when the petition was filed, and this agreement constituted the cause of action for the appellant. This agreement being with a third party who is outside the scope of the arbitration agreement in Clause 31(g) of the present contract, Section 9 could not be invoked.

32. We have perused the judgment of the Division Bench which is a detailed and well-reasoned judgment which more than adequately deals with the issues for the limited purposes of interim reliefs under Section 9 of the Arbitration & Conciliation Act. According to learned senior counsel for the respondents, the appellant has no intention of invoking or pursuing arbitration proceedings. In this context, the judgment relied on by learned counsel for the first respondent in *Firm Ashok Traders vs. Gurumukh Das Saluja*, MANU/SC/0026/20004: air 2004 SC 1433 may be referred. The said judgment says that commencement of arbitration proceedings is not dependent on the grant or refusal of interim reliefs, and that if arbitral proceedings are not commenced post haste after making an application under Section 9, such interlocutory proceedings would cease to be maintainable."

9. In this case, it may also be noticed, that it is the case of the applicant itself, that the applicant is in the process of evaluating / estimating the damages caused by the illegal actions of the Respondent and intends to commence the arbitration proceedings after completion of such evaluation / estimation. If that is so, as mentioned in para-18 of the affidavit, it is not understood how the applicant can seek injunction to restrain the respondent to take employment with any other company, after he resigned from the company of the applicant. Such a stipulation being contrary to Section 27 of the Contract Act, is not enforceable in law.

10. It is well settled law, that no injunction can be granted, when breach of contract can be compensated in terms of money. It is admitted, that applicant is working out the damages to initiate arbitration proceedings, which have not yet been commenced. The application for injunction is not maintainable on this ground alone.

11. This Court in the case of R.Babu and another vs. TTK LIG Ltd., formerly London Rubber Co.(India) Ltd., 2004 (2) CTC 684, has been pleased to lay down as under:

"6. Even though a contention is urged by the learned counsel for the appellants to the effect that there is no privity of contract by the first appellant with the plaintiff, more emphasis is made with regard to the next submission viz., violation of Section 27 of the Indian Contract Act with regard to the negative covenants of the agreement dated 1.5.1990. Even though the learned counsel for the respondent has contended that the relevant portion in Krishan Murgai's case relating to the violation of Section 27 of the Indian Contract Act was delivered by the learned single Judge, viz., His Lordship A.P.SEN, J., who according to him dissented with the majority of the two other learned Judges of the Bench and as such, the same is not applicable, we do not agree with the said argument. A perusal of the said judgment discloses that no injunction can be granted against an employee after the termination of his employment, restraining him from carrying on a competitive trade. In fact, even though the above proposition of law was laid down by the learned Judge, finally all the three learned Judges held that the judgment of the Delhi Bench was correct and dismissed the appeal. Hence, the judgment of His Lordship A.P.SEN, J., cannot be construed as a dissenting judgment. It is a case in which two learned Judges of the Bench did not deal with the question while the third learned Judge dealt with and also declared the law. The dictum of His Lordship A.P.SEN, J., is undoubtedly the law declared by the Supreme Court as contemplated by Article 141 of the Constitution of India and it shall be binding on all Courts within the territory of India and there is no escape from that conclusion. Unfortunately, the learned single Judge has erroneously held that the above said judgment is not applicable to the case on hand. The learned single Judge has proceeded on the footing that the judgment of the Supreme Court reported in N.S.Golikari v. Century Spinning and Manufacturing Company Ltd (AIR 1967 SC 1098) and other judgments relied on by the learned counsel for the plaintiff supports the claim of the plaintiff.

12. The Hon'ble Delhi High Court in the case of American Express Bank Ltd., vs. Ms. Priya Puri, (2006) III LLJ 540 Del., held as under:

45. The plaintiff is claiming rights in respect of names, addresses and financial details of customers which are already with the plaintiff. In order to claim right in the derivative work containing the original material, the plaintiff is to show adaptation, abridgement, arrangement, dramatization or translation in his work entitling him to have certain rights. In order to qualify for independent right in derivative of collective work, the additional matter injected in a prior work on the matter of Page 2130 rearranging or otherwise transforming a prior work must constitute more than the minimal contribution which can be ascertained only if the prior work and the work done by the plaintiff is produced. In (DB), Eastern Book Company and Ors. v. D.B. Modak and Ors. it was held that the copyright can be claimed in derivative work only in the following manner:

34. Copyright can be claimed only in derivative work. A derivative work consists of a contribution of original material to a pre-existing work so as to recast, transform or adapt the pre-existing work. This would include a new version of a work in the public domain and abridgement adaptation, arrangement, dramatization or translation. A collective work will qualify for copyright by reason of the original effort expended in the process of compilation, even if no new matter is added. In determining whether a work based upon a prior work is separately copyrightable as a derivative or collective work, the Courts may not properly consider whether the new work is a qualitative improvement over the prior work. However, in order to qualify for a separate copyright as a derivative or collective work, the additional matter injected in a prior work or the matter of rearranging or otherwise transforming a prior work, must constitute more than a minimal contribution. Applying this test we will have to examine as to which aspect of the reported judgment in SCC, the appellant can claim copyright.

The plaintiff has not produced anything which would show that they have done something with the material which is available in public domain so as to claim exclusive rights in that.

46. The details of customers are not trade secrets nor they are the property was held in 140 Wash.381, 249 P.782, City Ice and Cold Storage Co. v. Kinnee. In this matter the Supreme Court of Washington had held that customers are not necessarily trade secrets, nor are they property. In this matter the customers were fixed and settled in a known district, and the fact of their being patrons of the appellant was in no way covered up, but capable of ascertainment on behalf of respondent's new employer or anyone else, by an independent canvass at a small expense and in a very limited period of time. The Court had held and emphasized that such a thing can hardly be said to be a secret, in the sense that it should be guarded by a Court of equity, which is susceptible of discovery by observation and little effort. Similarly in 174 Ark, 104,

294 S.W.393, El. Dorado Laundry Co. v. Ford the name of patrons learned by a driver employed on laundry route were held not to be trade secrets. It was held that any person of ordinary intelligence would become familiar with the customers whom he might serve along a laundry route during a period of five months. The Supreme Court of Arkansas had held that freedom of employment must not be unreasonably abridged, and a contract in restraint of employment, without some reasonable limitation, is like a similar contract in restraint of trade, contrary to public policy and unenforceable.

47. Prima facie, the version of the plaintiff that the defendant had taken alleged confidential information and data of the plaintiff is not believable in the facts and circumstances. The injunction as prayed by the plaintiff will have direct impact on curtailing the freedom of the defendant in her future prospects and service. Rights of an employee to seek and search for better employment are Page 2131 not to be curbed by an injunction even on the ground that she has confidential data in the present facts and circumstances. Such an injunction will facilitate the plaintiff to create a situation such as 'Once a customer of American Express, always a customer of American Express'. In the garb of confidentiality the plaintiff can not be allowed to perpetuate forced employment with American Express. Freedom of changing employment for improving service conditions is a vital and important right of an employee which cannot be restricted or curtailed on the ground that the employee has employer's data and confidential information of customers which is capable of ascertainment on behalf of defendant or any one else, by an independent canvass at a small expense and in a very limited period of time. Such a restriction will be hit by Section 27 of the Contract Act and common law and equitable doctrine of English Law will not be applicable in the fact and circumstances. An injunction can be granted for protecting the rights of the plaintiff but at the same time cannot be granted to limit the legal rights of the defendant especially when the Court has a doubt about the veracity of plaintiff's version and as it appears that the injunction has been sought for extraneous reasons and oblique motives and by concealment of material document, statement of defendant recorded by the plaintiffs' officials on 4th October, 2005."

13. This Court again in the case of Polaris Software Lab. Limited vs. Suren Khiwadkar, (2003) 3 MLJ 557, was pleased to lay down as under:

"29. The interim order/Temporary injunction is of drastic character which has the great potential for mischief. Mere apprehension of interference with legal right does not entitle the applicant/plaintiff to an injunction. Mere inconvenience to a party is not enough to entitle the party to an injunction. Violation/ encroachment of right must be of a substantial character. No such violation of right of substantial character is made out by the applicant/plaintiff The terms of temporary injunction sought for are unclear. Granting temporary injunction would only be upsetting the normal professional life of the defendants, preventing them profitably being employed

anywhere. Further, the grant of temporary injunction would virtually amount to decreeing the suit. In conclusion, I am of the considered view that it shall not be proper to extend the discretionary power to grant interim injunction to the applicant/plaintiff.

30. In a well considered judgment Division Bench of this High Court held that the interlocutory injunction could be refused on ground of comparative convenience. Holding that if the Covenant is obscure and the breach doubtful, the Court would not interfere in AIR 1999 Mad 59 held thus:

"It is not in every case of breach of contract or covenant that the Court will interfere by way of injunction. In exercising its jurisdiction by way of an interlocutory injunction, the Court acts upon the principle of preventing irreparable injury. If a covenant is clear and serious injury is likely to arise from the breach, the Court will interfere before the hearing to restrain the breach, but if the covenant is obscure or the breach doubtful, and no irreparable damage can arise to the plaintiff/appellant, then the question resolves itself into a question of comparative injury, whether the defendant will be more damnified by the injunction being granted or the plaintiff by its being withheld. Mere interference with a legal right does not, however, ipso facto entitle a plaintiff to an injunction and mere inconvenience is not enough to entitle a party to an injunction. There must be violation of an enforceable right and the violation must be of a substantial character. An injunction will not be granted where the plaintiff has a remedy by way of damages. The injury must irreparable and it must be continuous. By the term irreparable injury is meant injury which is substantial and could never be adequately remedied or atoned for by damages, injury which cannot possibly be repaired. If, however, by the conduct of the appellant having regard to the nature of transaction being commercial and the injury complained of is one which may in some way be VINOD K.SHARMA,J., ar compensated by money, the Court may decline to grant the injunction".

The above principle squarely applies to the case in hand. Even if the defendants given any act against the interest of the Plaintiff Company, damages could be quantified at the later stage. Balance of convenience lies only in favour of the defendants.

31. As discussed earlier, the conduct of the applicant/plaintiff in approaching the Court on April 17, 2003 and obtaining the order of interim injunction restraining defendants from giving any confidential information to any third party and any adverse publicity to the media, is not appreciable. Learned counsel for the defendants insisted upon awarding of exemplary damages. I refrain from going into that aspect since the suit is yet pending and the parties are yet to go on trial. It is too premature to consider the issue of awarding exemplary damages to the defendants. Before concluding, it is made clear that any opinion expressed in this order is only tentative and only for the purpose of disposal of these applications. They do not in any way affect the rights of the parties while parties go on trial.

14. In view of the above settled proposition of law, all these applications are ordered to be dismissed.

15. No costs.

23.04.2013 Index: Yes Internet: Yes ar Pre-Delivery Order in O.A.Nos.321, 322 and 326 of 2012