Tech Plus Media Private Ltd vs Jyoti Janda & Ors on 29 September, 2014

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Bench: Rajiv Sahai Endlaw

*IN THE HIGH COURT OF DELHI AT NEW DELHI

% Date of decision: 29th September, 2014

+ CS(OS) 119/2010 & IA No.920/2010 (of the plaintiff u/O-39 R1&2 CPC) and IA No.924/2010 (of the plaintiff u/S 79 of the Information Technology Act, 2000)

TECH PLUS MEDIA PRIVATE LTD ..... Plaintiff

Through: Ms. Maninder Acharya, Sr. Adv. with Mr. Vikas Sethi & Mr. Yashish Chandra, Advs.

versus

JYOTI JANDA & ORS ..... Defendants

Through: Mr. Mithilesh Kumar & Mr. Mallika Arjun, Advs.

CORAM :-
HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW
RAJIV SAHAI ENDLAW, J

1. The plaintiff has instituted this suit for permanent injunction restraining infringement of copyright, passing off, unfair competition and for ancillary reliefs of rendition of accounts, delivery and damages, pleading:-

(a) that the plaintiff is a leading industry publication house in the sphere of Information Technology having a print media publication called IT Price Var and online news portal called ITVARNEWS.NET dedicated to Information Technology channels and professionals;

(b) the said publication deals with latest developments, trends and news in the area of Information Technology including interviews of industry leaders, analysis of existing and future

trends;

(c) the plaintiff, over a period of time has developed its detailed confidential electronic databases not just of existing clients and customers of the plaintiff but also containing their contact points; the plaintiff has also developed detailed database of entities which could be targeted for subscription of its magazine;

(d) the aforesaid databases have been developed over a period of nine years and constitute confidential data and information of the plaintiff constituting its trade secrets;

(e) the plaintiff has also developed a unique system of information processing of Release Orders tailored to the requirements of publishing information technology journals;

(f) the plaintiff has also a evolved very distinctive, detailed and comprehensive data, information and databases pertaining to

running of business of information technology publications and websites in India;

(g) the plaintiff has also created databases pertaining to its website including details of general comments, dates of such comments/posts along with details of last post and internet protocol addresses;

(h) that the aforesaid confidential data and information are the original literary and artistic works of the plaintiff and are stored on computers and computer systems and communication

devices of the plaintiff;

(i) the plaintiff has copyright in the said information being the expression of the plaintiff s original and inventive thoughts and the plaintiff has expended immense original skill, thought process, imagination in the same;

(j) that the defendant no.1 was employed as Management Information Systems Executive with the plaintiff on 22 nd August, 2008, to assist the Director of the plaintiff and to keep on regularly checking out all online activities and back office electronic activities of the plaintiff Company and was

interacting with the major clients of the plaintiff and owing to the nature of her job was given access to all the aforesaid data;

(k) that as per the policy of the plaintiff Company, the defendant and also all other employees were not to engage themselves with any other media organization employer and were required to maintain confidentiality qua all the aforesaid data;

(l) that the defendant no.2 Mr. Rajeev Ranjan Jha was recruited to the post of Correspondent with the plaintiff w.e.f. 1st April, 2008 and the letter of his employment also prohibited him from engaging in any other business and required him to maintain confidentiality qua all copyrights of the plaintiff;

(m) that in the third week of October, 2009 the plaintiff observed a new website in the name of www.thenewsxpress.com (impleaded as defendant no.3) with a parallel business model to that of the plaintiff, for supplying exactly similar kind of content/services as that supplied by the plaintiff s publications;

(n) that the plaintiff in October, 2009 installed surveillance devices in its premises and which was objected to by the defendants

no.1&2 and who resigned and were relieved on 31 st October, 2009;

(o). that subsequently the plaintiff found the competitive website www.thenewsxpress.com impleaded as defendant no.3 to have become very aggressive and selling its services at 50% of the rate at which the plaintiff was offering similar services and which led to the plaintiff s publication declining;

(p). that the plaintiff on making enquiries learnt that the defendant no.3 was being run by the defendants no.1&2;

(q). that subsequent investigations revealed that the defendants no.1&2 had copied the confidential information and databases constituting the trade secrets of the plaintiff on pen drive and sent them through e-mail to their personal e-mail IDs;

(r). that the defendants have thus infringed copyright of the plaintiff;

2. Though the plaint was accompanied with an application for interim relief but no ex parte relief was granted to the plaintiff and has not been granted till 11th April, 2013, inspite of the suit having been pending for the last over three years. The senior counsel for the plaintiff on 11th April, 2013,

stated that she is not pressing for interim relief. IA No.920/2010 is accordingly dismissed as not pressed.

3. The defendants are contesting the suit by filing the written statement,

pleading:-

(i). that the plaintiff itself has copied the concept of M/s. Kalinga Digital Media (P) Ltd. who has filed a suit against the plaintiff and in which the plaintiff who is the defendant in that suit has been restrained from passing off the Trademark "VAR" along with the distinctive expression "VALUE ADDED RESELLER" on any publication and/or from using, selling, offering for sale, printing or marketing or advertising the magazine or journal being identical, phonetically or visually, or deceptively similarly to the said Kalinga Digital Media (P) Ltd. s publication;

(ii). that as of the day of filing of the written statement, there was no magazine by the name of IT Price Var in the market;

(iii). that the plaintiff was incorporated only in the year 2005 and thus the plea, of having collected the data over nine years, is false;

(iv). that the defendant no.1 was working as P.A. to the Director of the plaintiff and maintaining the field staff s daily report and the defendant no.2 was working as Correspondent, only to collect the information from the market and to hand it over to the Publication Division;

(v). the information or databases do not constitute trade secrets and are openly available in the market;

(vi). that the defendants have not signed any agreement of confidentiality and else denying the claim of the plaintiff;

(vii) that the defendant no.2 is a MA in Mass Communication and

has established himself as a Journalist and the defendant no.3 www.thenewsxpress.com is no way similar either deceptively or identical as that of the plaintiff; and,

(viii) that the defendants have purchased the data/Pro email marketing account from M/s. Swiftpage E 383, Englewood CO 80112 and have also subscribed Software licence from Sage Software SB Inc.;

4. The plaintiff has filed a replication to the written statement aforesaid though not denying the filing of the suit against it by Kalinga Digital Media

(P) Ltd. but averring the same to be bad and pleading that IT Price Var is a registered publication since 2001 and it is only the online publication "itVARnews" which came into being in 2005 and IT Price Var is a proprietorship organization of the Director of the plaintiff registered in 2001 and the databases of the plaintiff are unique.

5. The suit, being ripe for framing of issues, was listed on 7th February, 2013 when it was enquired from the counsel for the plaintiff as to what is the proprietary right of the plaintiff in the databases and how can the same be said to be the copyright of the plaintiff. Attention of the counsel for the plaintiff on that date was invited to Percept D' Mark (India) (P). Ltd. Vs. Zaheer Khan (2006) 4 SCC 227 laying down that in the absence of any proprietary rights being shown, such competition cannot be restrained. On the request of the counsel for the plaintiff, the matter was adjourned to 11th April, 2013.

6. The senior counsel for the plaintiff on 11th April, 2013 argued that the data of the plaintiff in which copyright is claimed comprises of prospective customers/clients and their particulars, and attention in this regard is invited

to Section 2(o) of the Copyright Act, 1957. On further enquiry as to how the plaintiff can be said to have any proprietary rights in the same, it was argued

that the said data has been collected since the year 2001 i.e. since much prior to the time when the defendants joined the employment of the plaintiff and the defendants cannot thus have any right in the same. Reliance in this regard was placed on paras 68 & 72 of Diljeet Titus Vs. Mr. Alfred A. Adebare 130 (2006) DLT 330 and on paras 30 & 31 of BLB Institute of Financial Markets Ltd. Vs. Ramakar Jha 154 (2008) DLT 121. It was further contended that Percept D' Mark (India) (P). Ltd. was not concerned with the situation as has arisen here. Reliance lastly is placed on Alka Gupta Vs Narender Kumar Gupta (2010) 10 SCC 141 laying down that Civil Suits have to be proceeded with, in according with the provisions of CPC and not on the whims of the Court and to be decided only after framing of issues and trial, permitting parties to lead evidence.

7. Per contra, the counsel for the defendants has drawn attention to Sections 2(d) & 17 of the Copyright Act and contended that the plaint nowhere discloses as to who is the author of the alleged copyright. It is contended that the plaintiff, which is a juristic person, cannot be the owner of the copyright in the databases alleged. It is argued that the defendants as Journalists would have copyright in what is published by them and the plaintiff has not pleaded any agreement to the contrary; that though the

plaintiff had also filed a complaint against the defendants, but after investigation, no FIR was registered.

8. The senior counsel for the plaintiff in rejoinder argued that summons in a suit are issued for framing of issues and thus issues have to be necessarily framed and the suit put to trial and this Court at this stage, even

prior to the framing of issues cannot conduct the enquiry as is being done.

9. I repeatedly asked the senior counsel for the plaintiff as to what data of the plaintiff has been taken away by the defendants in as much as the use of the word „database without specifying as to what is in that database is not found to be sufficient. The senior counsel for the plaintiff first contended that the said data comprises of list of consumers of the plaintiff with particulars of their contact points. However it was enquired as to who are the consumers in as much as the plaintiff claims to be only a publisher of a news magazine which is distributed free of cost (the cost thereof is pleaded at Rs.15/- but the senior counsel on instructions stated that the magazine is mailed free of costs to the persons identified as interested therein) and is not in the business of selling any goods.

10. The senior counsel for the plaintiff then contended that depending upon the circulation and publication of the news magazine, advertisers of various products advertise in the magazine published/news portal of the plaintiff.

11. It is however enquired as to what can be the copyright in the particulars of the said advertisers, who would be evident from the advertisements on the news portal and in the newsmagazine of the plaintiff.

12. The senior counsel for the plaintiff then contended that database consist of visitors to the website/news portal of the plaintiff and to whom the news magazine is mailed.

13. It was enquired whether the news magazines of the plaintiff and the defendants are registered with the Registrar of Newspapers for India and any returns indicating the circulations of the respective magazines are filed.

14. Neither counsels could respond to the same and stated that they will

obtain instructions.

15. The senior counsel for the plaintiff then contended that the database qua which the suit is filed and which the defendants have taken away is of the visitors of the website/news portal of the plaintiff.

16. However on a perusal of the plaint, I do not find the same to be pleaded. The plaintiff, save for repeatedly referring to databases has not specified as to what those databases pertain to and what is the contribution

of the plaintiff thereto. From what has been argued, the said databases are nothing but a collection of the e-mail addresses of the visitors to the website/news portal of the plaintiff. The plaintiff cannot be said to be the author or composer or having any contribution in the same. On the contrary the pleadings in para 31 are of the publication of the news magazine of the plaintiff having declined and which is inconsistent with the argument raised, of the news magazine being mailed free of costs to persons interested in the same.

17. The plaintiff, in para 10 of the plaint, has pleaded that it has evolved distinctive, detailed and comprehensive data information and databases pertaining to running the business of information technology publication and website in India and has created unique databases pertaining to the website including details of general comments, the dates of making such comments/posts along with details of last post and internet protocol addresses.

18. I repeatedly enquired from the senior counsel for the plaintiff as to how, in a collection of the names and addresses of the visitors to the news portal of the plaintiff or their comments, the plaintiff can claim copyright within the meaning of Section 14 of the Act and how the same can be called

literary, dramatic or musical work or even a computer programme. It is not the plea of the plaintiff that it has got written from anyone a computer programme for maintaining such contents or for shifting the same into various categories etc.

19. No merit is found in the contention of the plaintiff that because summons are issued in a suit, issues are necessarily to be framed. Issues are to be framed only on material propositions of fact or law affirmed by one party and denied by other and material proposition are those proposition of law or fact which a plaintiff must allege in order to show a right to sue or a defendant must allege in order to constitute his defence. Had the plaintiff pleaded anything which would show vesting of a copyright in a plaintiff, would an issue have arisen. I have in judgment dated 7th November, 2012 in CS(OS) No.2695/2011 titled Satya Gupta Vs. Guneet Singh dealt in detail in this regard and need is thus not felt to reiterate the same.

20. If the Court, on a reading of the plaint seeking injunction and ancillary reliefs on the basis of a copyright finds no sufficient pleading of the existence of a copyright in favour of the plaintiff, I am not willing to accept that the matter still has to go through the rigmarole of trial. It is the settled position in law that evidence beyond pleadings cannot be led. The plaintiff is

a juristic person and is incapable of being the author of any work in which copyright may exist. However the plaintiff can be the owner of a copyright under an agreement with the author of the said work. For the plaintiff to maintain the present suit, it is incumbent upon the plaintiff to disclose the said work and the author thereof and the agreement under which the author has made the plaintiff the owner of the copyright in the said work. The

plaintiff has not done so. I cannot read the judgment of the Supreme Court in Alka Gupta (supra) also to be laying down that merely because a suit has been filed, it has to go through the entire gamut of trial. The Supreme Court in Alka Gupta (the judgment of dismissal of suit in which case also was of the undersigned and appeal whereagainst had been dismissed by the Division Bench of this Court) was concerned with the questions of fact having been decided on the basis of the statement recorded under Order X of the Code of Civil Procedure and not with a case with which we are faced herein, of the material facts required to be pleaded in an action for infringement of copyright to show a right to sue, lacking in the plaint.

21. Judicial notice can be taken of the practice which has evolved, of employers filing suits as the present one against the employees quitting employment. The judicial stream is today inundated with such suits. Judicial

notice can also be taken of the fact that such suits are often vehemently pressed only till the stage of interim injunction and rarely succeed after trial. Today when the entire judicial system reels under the burden of arrears, and when it is found that suits are being filed not to vindicate any violation of rights but to teach a lesson to an employee wanting to move to greener pastures and/or to curb competition, the Courts would be doing a disservice if do not take cognizance of such developments in the passage of time and turns a blind eye thereto, mechanically frame issues and put the suit to trial (See Kawal Sachdeva v. Madhu Bala Rana MANU/DE/1050/2013). The principle behind Section 27 of the Indian Contract Act, 1872 making agreements in restraint of trade void, is to prevent anti-competitive practices. With the same intent the legislation in the form of Competition Act, 2002 has been brought. When the pleas of copyright are found to be non-existent

and the intent and motive in institution of the suit is to curb and prevent competition, the Courts should not hesitate in curbing such an action, which is contrary to the public policy of India, at the threshold. In my opinion, allowing such suits to go through the gamut of trial itself has tendency to curb competition, irrespective of the outcome of the suits.

22. A Single Judge of this Court in American Express Bank Ltd. Vs. Priya Puri MANU/DE/2106/2006, dealing with an application for interim relief in a suit for injunction against an ex-employee, restraining her from using or disclosing any information and trade secrets relating to the business and operations of the plaintiff Bank and from breaching the confidentiality term as per letter of appointment / code of conduct including customers privacy principles / policies held:

(i) that the plaintiff Bank in the garb of confidentiality was trying to contend that once the customer of plaintiff, always a customer of plaintiff; a competitor Bank cannot be restrained from dealing with the customers of the plaintiff Bank on the ground that the bank maintains written record of its customers and their financial portfolios which has been acquired by the competitor Bank and so the competitor bank should be restrained even to contact those customers; a competitor Bank even after acquiring information that a particular person is banking with the plaintiff Bank, is free to approach that person and canvass about themselves; it is for the customers to decide with which Bank to bank and a Bank cannot arrogate to itself

the rights to deal with a customer exclusively on the ground that it has created a data base of its customers and their financial portfolios; no Bank should be allowed to create monopolies on the ground that they have developed exhaustive data of their clients/customers;

(ii) creating a database of the clients/customers and then claiming confidentiality about it, will not permit such Bank to create a monopoly about such customers that such customers cannot be approached even;

(iii) the details of customers are not trade secrets nor they are the property.

23. I must also refer to Burlington Home Shopping Pvt. Ltd. Vs. Rajnish Chibber 61 (1996) DLT 6 in which a Single Judge of this Court, dealing again with an application for interim relief in a suit by a mail order service company against its employee for injunction restraining breach of copyright and confidentiality held that compilation of addresses developed 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. Finding that the data base available with the defendant therein was substantially a

copy of the data base available with the plaintiff therein and compiled by the plaintiff interim injunction was granted. Similarly another Single Judge of this Court in Diljeet Titus (supra) held in the context of an advocate / law firm that a list containing details about the particular persons such law firm is handling and the nature of work or the contact person in the client s company and specially designed by an advocate of his Court matters, copyright exists therein. It was also held that the Court must step in Court

must step in to restrain a breach of confidence independent of any right under law. I may however further notice that both the said judgments are of a date prior to the pronouncement of the Supreme Court in Eastern Book Company Vs. D.B. Modak (2008) 1 SCC 1 laying down that to claim copyright in a compilation, the author must produce the material with exercise of his skill and judgment which may not be creativity in the sense that it is novel or non-obvious but at the same time it is not a product of merely labour and capital. It was however clarified that the exercise of skill and judgment required to produce the work must not be so trivial that it could be characterized as a purely mec hanical exercise. Accordingly, it was held that copy edited judgments would not satisfy the copyright merely by establishing amount of skill,

labour and capital put in the inputs of the copy edited judgments as the original or innovative thoughts for the creativity are completely excluded.

24. Post the aforesaid judgment of the Supreme Court, a Single Judge of this Court in Emergent Genetics India Pvt. Ltd. Vs. Shailendra Shivam 2011 (47) PTC 494 again dealing with an application for interim relief held:

(a) sequences obtained from nature (e.g., the sequence for a gene) cannot per se, be original. The microbiologist or scientist involved in gene sequencing discovers facts; there is no independent creation of a work, essential for matching the originality requirement; such a scientist merely copies from nature-genetic sequence that contains codes for proteins; therefore there is no minimum creativity;

(b) there is no copyright protection for any idea; that when the use of an idea or procedure requires copying of the plaintiff s

expression, there is no copyright infringement;

(c) that since there could be no copyright of ideas, the merged expression / idea is incapable of copyright; granting copyright protection of the sole or limited way of expression of an idea,

would mean no one can practice the idea or procedure expressed without being guilty of copyright infringement;

(d) pleadings of the nature and quality of information which is confidential are crucial and in the absence thereof there is no question of confidentiality;

(e) granting injunctions under the umbrella of trade secret or confidential information carry the danger of imperiling the right to occupation guaranteed by Article 19(1)(g) of the Constitution and right to livelihood held to be an intrinsic part of Article 21.

25. The same learned Judge reiterated the said position in Dr. Reckeweg & Co. GMBH Vs. Adven Biotech Private Ltd. 2008 (38) PTC 308 (Del) dealing with the issue of copyright in relation to the nomenclature of drugs, the listing of the medicines in a particular fashion, the description and the curative effect compilation in a brochure. Finding the plaintiff to have failed to demonstrate how they had employed any skill, judgment and labour in describing the curative elements, let alone any creativity and in the absence of any averment as to the uniqueness of such description or intellectual creativity, it was prima facie held that no copyright can subsist therein. It

was further held that a catalogue / brochure being a derivative work being a

collection or sequencing of already existing information, the standard of creativity required to qualify as a work in which copyright subsists is higher than the standard required in cases of primary works and finding the plaintiffs to have not specifically averred as to the manner in which the sequencing was done and the technique or criteria employed to place the medicines in that particular sequence, the application for interim relief was dismissed observing that the document in which copyright was claimed was merely a compilation.

26. The same learned Single Judge sitting for the Division Bench of this Court in Akuate Internet Services Pvt. Ltd. Vs. Star India Pvt. Ltd. MANU/DE/2768/2013 held that the Copyright Act having granted protection only qua material in which copyright could be held, injunction on the ground of the broadcast rights having been violated could not be granted. It is however learnt that appeal against the said judgment is pending before the Supreme Court. It was also held that creating property (or quasi-property) rights in information stands to upset the statutory balance carefully created by the legislature through the Copyright Act and no injunction in the absence of copyright on equitable grounds can be granted. It was yet further

held that the doctrine of unfair competition prohibits the misappropriation of match information and would amount to holding that misappropriation under the common law can supplant the Copyright Act.

27. Order VII Rule 11 of the CPC enables the Court to, when finds the plaint to be not disclosing any cause of action or when finds the suits from the statements in the plaint to be barred by any law, to reject the plaint at the threshold. Similarly Order XV of the CPC also empowers the Court to, when finds the parties to be not at issue on any question of law or facts, at once

pronounce judgment. Order XV in my opinion applies equally to the plaintiff as to the judgment. The judgment referred to herein is not to be necessarily against the defendants and can be against the plaintiff as well. The Court, even if summons ought not to have been issued in the suit and have been issued, at the stage of framing of issues finds the plaintiff to be not pleading the material propositions of law essential for succeeding in the suit, is empowered to pronounce judgment against the plaintiff.

28. During the hearing it was repeatedly asked to the senior counsel for the plaintiffs as to what purpose would be served by granting an opportunity to the plaintiff to lead evidence as was repeatedly argued. No answer was forthcoming.

29. Before parting, I must record that after hearing arguments on 11 th April, 2013, this judgment was intended to be dictated and pronounced in chamber on the same date. The judgment though was dictated on the same day but remained to be corrected and went on the back burner and has accordingly been listed for pronouncement. I must further record that neither party mentioned the matter in the last nearly one and a half year.

30. I therefore find the plaintiff to have not pleaded the material propositions of fact essential to succeed in an action for infringement of copyright and thus pronounce judgment forthwith against the plaintiff dismissing the suit. However in the facts, no order as to costs.

31. Decree sheet be drawn up.

RAJIV SAHAI ENDLAW, J.

SEPTEMBER 29, 2014 „pp/gsr