CRITICAL ANALYSIS OF AGREEMENTS IN RESTRAINT OF TRADE AND POST-EMPLOYMENT CONVENANTS

MANYA PAHWA

STUDENT

LAW

SVKM-NMIMS, BANGALORE, INDIA

Abstract: *This research paper is written on the topic to under and define the critical analysis of agreements in restraint of trade and post-employment.*
The importance of this paper is to define the Sections related to the topic mentioned under the Indian Contract Act,1872. The problems faced to do the research analysis was to understand the judiciary opinions given by different learned judges for the same case. Courts have repeatedly reviewed and interpreted such limits and restrictive covenants, and in some cases affirmed such restrictions based on the specific events and circumstances of the particular case. The purpose of the given article is to examine the legality of the present restrictive covenants from the perspectives of the several ways in which courts have interpreted them.
The methodology used in doing the research paper included descriptive and analytical legal research. This paper has also used conceptual legal research to write the analysis of the cited cases. The term "contract" is defined in Section 2{h) of the Indian Contract Act, 1872, as follows: "An agreement enforceable by law is a contract. "Thus for the formation of a contract there must be—(1) an agreement, and (2) the agreement should be enforceable by law.
Judiciary opinion on whether certain covenants or agreements constitute restriction of commerce under Section 27 has developed over time. Although the Indian Constitution does give every person the right to engage in "any lawful business, trade, or profession," this freedom is not without limits. Constraints on these freedoms may be imposed when necessary to protect the general good.

KEYWORDS: restraint of trade, post-employment, Indian contract Act,1872, Section 2(h), Section 27

• Introduction

The term "contract" is defined in Section 2{h) of the Indian Contract Act, 1872, as follows: "An agreement enforceable by law is a contract. "Thus, for the formation of a contract there must be— (1) an agreement, and (2) the agreement should be enforceable by law.[1]

[1] Singh Avtar. 2019. *Law of Contract (a Study of the Contract Act 1872) and Specific Relief*. Lucknow: Eastern Book Company.

Under Section 27[2] bare act 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. "The relationship that exists between an employer and an employee is the primary focus of employment law.

★ The essentials of a valid Contract

Under Section 10 of the Indian Contract Act of 1872

1. Agreement
2. Free Consent
3. Competency of Parties
4. Lawful Consideration
5. Legal Object
6. Not declared void

Not Under Section 10 of the Indian Contract Act of 1872

1. Two parties
2. Intention to create legal relationship
3. Legal Formalities
4. Certainty of meaning
5. Possibility of performance

★ The exceptions to agreement in restraint of trade

1. Sale of Goodwill
2. Partnership Act
3. Restraint upon employes

<u>Post-employment covenants</u>

Under Indian law, any agreement that restricts the parties' ability to engage in their chosen profession or trade is void and of no force or effect. The use of "void ab initio" in reference to such agreements demonstrates that the company has ignored the in question non-compete clauses. After an employee's employment has ended, restrictions prohibiting them from working in a similar or competitive field to the employers are no longer enforceable. The law of contracts recognizes non-compete clauses as standard provisions in all employment agreements. By signing this non-compete agreement, you, the employee, promise and agree to the terms set forth by your employer that you will not engage in any activity that is competitive with the business you were hired to work for, either during or after your employment with them. Globally, the non-compete clause is a standard component of legal documents and business contracts. Non-compete clauses are prohibited by the Indian Contract Act of 1872.

[2] The Indian Contracts Act, 1872

● Literature Review

A literature review gathers key sources on a subject and discusses them in conversation.

➢ **Articles**

1. Post-Employment Restraint Agreements: A Reassessment[3]

● At the time of hiring an employee, they are generally given access to confidential and privileged information related to business

● This is because of which the employers generally get included in the employment agreement which is a set provision featuring the power to curtails the staff member's rights to expose or use confidential information upon revocation of employment duty ("post-employment restraint agreements").

● Even though employees have an implicit legal obligation to protect their employers' confidential information, employers often use explicit agreements to put workers on notice of the necessity and of exactly what information is off-limits.

● A non-compete clause requires an employee to make a promise not to work for a rival company or to start a competing business, or to make a promise to keep certain information confidential if he continues to work in the industry.

2. Reconstructing Restraint of Trade[4]

● This is called the concept of restriction of commerce is a strange beast.

● It is customarily thought to play the role of invalidating contracts that unfairly restrict the freedom of any or both of the parties to the contract. This is one of its primary functions.

● It would seem that the theory imposes non-procedural restrictions on the freedom of contracts, and moreover, that it imposes these restrictions out of concern for the freedom of the parties to the contracts. It would seem that concerns about freedom are being utilized as an excuse to restrict freedom.

● In this light, it is not completely unexpected that restraint of trade law has been, as one judge phrased it gently, "the subject of remarks which are by no means simple to reconcile." When seen in this perspective, it is not entirely unexpected that restraint of trade law has been.

3. Agreements in Restraint of Trade[5]

● Recent court rulings on this topic could be of interest. Some agreements or commitments that fetter a man's talent or power into the finest market are invalid and unenforceable because they constitute an "undue" constraint of commerce, while others that impose some limitations are legitimate and enforceable.

● It seems that the common law has, at least for a long time, left its judges with an undefined residuary discretion that is continuously being defined and defied. The Chancellor's equity authority would have increased this residuary power.

● The Chancellor freed his court colleagues of one of their most nuanced and difficult jobs by handling "conscience" cases and becoming an expert in what a conscientious man should or should not do.

---

[3] Callahan, Maureen B. "Post-Employment Restraint Agreements: A Reassessment." *The University of Chicago Law Review* 52, no. 3 (1985): 703–28. https://doi.org/10.2307/1599633

[4] Smith, Stephen A. "Reconstructing Restraint of Trade." *Oxford Journal of Legal Studies* 15, no. 4 (1995): 565–95. http://www.jstor.org/stable/764564

[5] McNair, Arnold D. "Agreements in Restraint of Trade." *Economica*, no. 11 (1924): 176–85. https://doi.org/10.2307/2548168

- The Chancellor and Legislature could not completely relieve common law magistrates of the need for "slack rope" or residuary discretion in circumstances where they were not constrained by legislation or precedent.
- However, the power to withhold contract execution on the grounds of "public policy" is not arbitrary, and Selden's statement about Equity, that it is "a roguish thing" and "according to the Conscience of him that is Chancellor, and as that is bigger or narrower, so is Equity," does not apply.

4. Developing Trends in Non-Compete Agreements and Other Restrictive Covenants[6]

- The use of non-compete clauses is a frequent strategy for the protection of a business and the interests of the corporation.
- As seen from the point of view of the employer, a corporation may suffer losses if its staff, customer lists, pricing lists, customers, private or proprietary knowledge, or trade secrets are revealed to competitors.
- From the point of view of the employee, non-compete agreements might restrict the individual's capacity to obtain future employment or make use of the different pieces of knowledge or connections earned during their time working for the company.
- Courts often reach an agreement between the employer's need for safety and an employee's rights to work for a new company when dealing with these types of difficulties.
- In this article, growing legal patterns in restrictive covenants, as well as best practices for drafting restrictive covenants, are discussed as well as objections to the implementation of restrictive covenants.

5. Protection of Trade Secrets and Undisclosed Information[7]

- The rights to intellectual property play a crucial role in the growth of commerce and industry.
- The penalties include not only the payment of reimbursement for loss, but also an injunction against the unlawful use of a trade secret.
- In India, the protection of trade secrets is still in its infancy, with no specific statute codifying the foundations of copyright law.
- In addition to defining trade secrets and their prerequisites, the codified law must identify the offense of misappropriation, which may be perpetrated by unlawful methods or breach of trust.
- It seems that the common law has, at least for a long time, left its judges with an undefined residuary discretion that is continuously being defined and defied.

➢ **Books**

1. Avtar Singh 2017, Law of Contract and Special Relief Act[8]

- *protection of economic and commercial liberty-*
- The Indian Constitution safeguards the freedom of commerce and trade.
- Individuals cannot agree to give up their trading freedom, and neither can the state senate take it away.
- The law states that every man should have unrestricted freedom to use his power, influence, and abilities for his own and society's benefit.

---

[6] Davis, Angie, Eric D. Reicin, and Marisa Warren. "Developing Trends in Non-Compete Agreements and Other Restrictive Covenants." *ABA Journal of Labor & Employment Law* 30, no. 2 (2015): 255–72. https://www.jstor.org/stable/26410764

[7] "PROTECTION OF TRADE SECRETS AND UNDISCLOSED INFORMATION: LAW AND LITIGATION"
D.S. Sengar
Journal of the Indian Law Institute b, Vol. 53, No. 2 (APRIL-JUNE 2011), pp. 254-274 (21 pages)
https://www.jstor.org/stable/43953505

[8] Avtar Singh, 2017, Indian Contract & Specific Relief Act, published by - Lucknow: Eastern Book Company, 12th Edition, ISBN-10: 9351454533 ISBN-13: 978935145453.

- "According to public policy, everyone must be free to work independently and must not be able to deprive themselves or the state of their labour, skill, or talent."
- Consequently, Section 27 expressly states: "Every agreement by which a person is restrained from engaging in any lawful profession, trade, or business of any kind is void to the extent of such a restriction."

2. Contracts in Restraint of Trade[9]

- A contract that restricts a party's ability to engage in a particular profession or trade with third parties who are not participants in the agreement is known as a restraint of trade.
- The latter party must give his or her express consent in the manner of his or her choosing. Incorporating restrictions on employment, such as confidentiality clauses or prohibitions against working for competitors, into employee employment contracts has become standard practice.
- Such covenants are occasionally included in agreements relating to the sale of the goodwill of a business or professional practice, the termination of an employee's employment, arrangements, in addition to the standard employment agreements.

3. The Indian Contract Act and Specific Relief Act, Pollock and Mulla[10]

- Initially, all restraint-of-trade agreements, whether general or specific, in England were invalid.
- The strictness of this principle was gradually relaxed. A reasonable partial restraint may be advantageous, but a general one is ineligible by definition.
- In light of the subsequent rejection of the distinction between general and partial restraints, the rule now stipulates that restrictions on the freedom of contract must be justified as being necessary for the sake of trade freedom.
- India's situation differs from England's. In our country, the law regarding post-contractual covenants and restrictions has been firmly established, unchanging, and unalterable.

4. Law of Contract and Specific Relief Act, Moitra[11]

- The employer has the right to enforce the restrictive covenants during the term of the contract, but they lose that right after the contract expires.
- A clause that states a former employee is not allowed to look for work in a similar industry for a period of five years is invalid and cannot be enforced.
- Any provision in an agreement that prohibits an employee from beginning new employment within three months of their previous employment being terminated is null and void and has no force or effect.

5. The Law of Contract with special emphasis on the law relating Government Contracts, Tenders and Blacklist[12]

- A contract that restricts commerce is ostensibly invalid.
- There is no way to circumvent the prohibition unless a particular contract clearly falls under exception1 of this section.

---

[9] Contracts in Restraint of Trade [microform]. United States: Creative Media Partners, LLC, 2021.

[10] Volume 1, R Yashod Vardhan & Chitra Narayan, The Indian Contract Act and Specific Relief Act, Pollock and Mulla, pp.630, LexisNexis

[11] Volume 1, Law of Contract and Specific Relief, Moitra, pp 449, Universal Law Publishing

[12] Volume 1, The Law of Contract, P C Markanda, pp 689, Dr. PC Markanda, Naresh Markanda, Rajesh Markanda Fourth Edition, LexisNexis

- This rule does not apply when a person is restrained for a brief period of time or restricted to a specific location.
- If an agreement recognizes a party's exclusive right to perform religious services for the entire village, then only then can a restriction of trade, profession, or calling be enforced.
- The agreement is null and void if it is understood to prohibit the opposing party from ever practicing his profession in the entire village.

Statement of Problem

The primary points of contention revolve on these four issues. The first problem is determining which agreements, if any, must be exempt from examination in accordance with the theory. Lord Pearce reportedly said that this question could not be addressed "on any rational foundation," therefore this is the first obstacle. The second issue is how to define those interests that parties to a contract may legitimately use restraints to protect. The relevance of substantive and procedural fairness, or more broadly, "inequality of bargaining power," is the third and most significant factor to consider when evaluating restraint. This factor is also the most crucial one.
Nonetheless, some judgements make reference to the public interest, while others completely disregard it, and at least one ruling claim that the public interest has never played a role in cases involving trade restraints.

Rationale of Study

More significantly, it is not desirable to examine every contractual term for 'reasonability' in principle. In order to understand why this is the research paper, we need to retreat for a second and think about the various reasons why the theory of restriction of trade even exists in the first place.
Every single person who is employed engages in some kind of commerce and is subject to limitations. Both the employers and the workforce want to rescue and save themselves.
Every case has unique facts and a unique business model, thus the judgment rendered varies greatly in every way. Each judge approaches the matter from a different angle, leading to various conclusions. This is a significant challenge for the study effort with conflicting and inconsistent results of the same instance.
This essay examines the challenges, relevant case law, and offers a critical evaluation of post-employment covenants and agreements in restraint of commerce. This paper likewise emphasizes offering a unified conclusion and offers advice for both parties.

Research Objectives

1. To understand the regulatory framework presented in the aspect of restraint of trade.
2. To critically analyze the various types of restraint, present in trade.
3. To critically analyze the agreements of post-employment covenants.
4. To understand the meaning and implications of post-employment covenants.
5. To understand the safeguarding factor balance between the employers and employees related to employment.

Research Questions

1. Are the current laws enough to protect the employees?
2. Is the non-competence law favoring only one party?
3. Are both the employee and employer benefited from the norms set by the society?
4. Are there any more other measures to protect the employees' interests?

5. Do the countries also follow the same method?

● Research Methodology

In this research paper different types of methodologies are used to reach the conclusion for the topic of critical analysis of agreements in restraint of trade and post-employment covenants. This paper has used mixed methods of observational research method and derived research method. The main and primary source used to conclude the research includes The Indian Contract Act, 1872 and Avatar Singh's Contract & Specific Relief.
The secondary source used is various articles, journals, and published books from different established and valid sites.

● Chapter 1: MEANING NATURE AND SCOPE

Meaning

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.[13]
The Constitution of India recognizes and upholds the freedom to free trade and unrestricted commercial activity. In the same manner that the government cannot restrict a person's ability to engage in free commerce, that freedom cannot be bargained away by the individual either " "Every man should have unfettered liberty to exercise his powers and capacities for his own benefit and the benefit of the community," is a fundamental legal principle that states: "Public policy requires that every man shall be at liberty to work for himself, and shall not be at liberty to deprive himself or the State of his labor, skill, or talent, by any contract that he enters into. In light of this, Section 27[14] makes it very clear that "any agreement by which any one is restricted from conducting a legitimate profession, trade, or business of any type, is, to that degree, invalid."

Nature

What is trade, kinds of restraint that can occur, cite some cases.
Define the topics in your heading, from what has been discussed above, it is clear that there is no compelling argument for having courts make their own determinations about the reasonableness of post-employment restraint agreements.

THE ENFORCEMENT OF POST-EMPLOYMENT RESTRAINT AGREEMENTS ACCORDING TO GENERAL CONTRACT PRINCIPLES[15]

Absent such evidence, these contracts should be interpreted in accordance with the generally accepted principles that govern agreements between sophisticated parties. This is not to say that company misconduct should go unpunished; on the other hand, the doctrine of unconscionability offers a prudently constrained mechanism for safeguarding workers in those limited situations where judicial evaluation of contracts is warranted.
Sanctity of contract was a common legal principle in the nineteenth century, and it had to be upheld unless there was a legitimate reason not to.

---

[13] Avtar Singh, 2017, Indian Contract & Specific Relief Act, published by - Lucknow: Eastern Book Company, 12th Edition, ISBN-10: 9351454533 ISBN-13: 978935145453.
[14] Supra note 3
[15] Maureen B. Callahan, "Post-Employment Restraint Agreements: A Reassessment," University of Chicago Law Review 52, no. 3 (Summer 1985): 703-728

Traditional contract principles mandated that an employee abide by the terms of his bargain, no matter how unfavorable they might be, unless things like fraud, physical duress, infancy or mental incapacity, would be demonstrated.

The same difficulty in trying to conduct such a subjective inquiry also contributed to the lack of interest in examining the fairness of contracts, just as it did with the sufficiency of consideration.

But the freedom of contract idea was more foundational conceptually. The freedom to strike a bad bargain" is an often-cited consequence of the right to freely enter into contracts. An employer's abuse of convey post-employment restraints would go unchecked under such a system unless there was some kind of procedural irregularity.

While the nineteenth-century view of contract was conceptually elegant, courts ultimately began to examine the substantive terms of agreements. Defining what kinds of actions constitute unconscionable ones is made possible by these provisions and the decisions made under it. This worry about the unfairness of the contract's terms suggests that unconscionability could be a way to curb employer overreach within the bounds of standard contract law.

Scope

It was believed up until a relatively recent time that restraint of trade law could only apply to three different kinds of contractual provisions:

It was believed up until a relatively recent time that restraint of trade law could only apply to three different kinds of contractual provisions:

[16](1) post-employment covenants (such as a restriction on an employee using trade secrets in future employment);
(2) sale of business covenants (such as a restraint against seller of a business setting up business next door); and
(3) horizontal restraints (restraints operating between competitors, such as an agreement to divide up telecommunications spectrum).

Chapter 2: LEGISLATIVE FRAMEWORK, COMMITTEE REPORTS, LAW COMMISSION REPORTS, AMENDMENTS, STATISTICS

Restraint during employment - Service level agreements often include prohibitions on the employee taking a job with a competitor while the agreement is in effect. Contract duration, i.e., time frame. "Industry jargon, product names, and other trade secrets all those entities called by such names in respectable philosophical as facts—a servant is not permitted to share them;

are his owner's possessions and there is no principle of public interest that provides an outlet for those who have been transferred to servitude against their master's will ". Hence, a servant may be prohibited from engaging in business inside openly hostile to the interests of his current job.

Restraint after termination of employment - But the courts may not uphold an agreement that prevents a former employee from competing with his former company. Therefore, in ***Brahmaputra Tea Co Ltd v E. Scarth***,[17] the court stated: "Contracts by which persons are restrained from competing, after the term of their agreement is over, with their former employers within reasonable limits are well known in English law, and the omission to make

[16] Reconstructing Restraint of Trade Author(s): Stephen A. Smith Source: Oxford Journal of Legal Studies, Winter, 1995, Vol. 15, No. 4 (Winter, 1995), pp. 565-595 Published by: Oxford University Press Stable URL: https://www.jstor.org/stable/764564

[17] (1885) ILR 11 Cal 545

any such contract an exception to the general prohibition contained in Section 27[18] indicate that the legislature did not intend to make any such contract an exception to the general prohibition contained in Section 27[19]."

The petitioner is obligated to pay the respondent a predetermined quantity of money as compensation for the confessed breach and the events and circumstances that led to the petitioner's liability. Confidential information or data must have left the private domain and made its way to the domain of a rival through the petitioner, which constitutes an obvious infringement of the agreed upon provisions. Because of the confessed violation, compensation is owed to the victim. Loss of profits, reputational harm, and other forms of damage resulting from a violation of trust in the context of a private information relationship simply cannot be ignored. When there has been a legal wrong, reparation must be made.

The restrictive covenant agreements are often signed with little discussion between both the employer and employee, outside of executive employment contracts and the sale of companies or professions. The signing of a formal and documented agreement in terms of employment or of the offer letter that includes covenants is typically required prior to starting work. Similarly, if the breadth and length of the restrictive covenant are fair and the agreement preserves a genuine business interest for the employer, a court is likely to sustain it. There are a few standard legal arguments that may be used to challenge the validity of a restrictive covenant; however, the specifics may vary by jurisdiction.

Why employers decline to use non- competence [20]

The argument that markets are likely to suffer from a collective-action issue that leads to wasteful usage of noncompete is undermined by the substantial variance in the use and execution of noncompete. It more closely resembles the traditional competitive market system in which firms compete for managerial and technical skills by providing varying bundles of price and nonprice conditions to prospective employees. Businesses in a competitive market may use non-compete clauses and other forms of employment contracts to entice the best and brightest workers.

It's understandable why a company would want to give a compensation package without the need for a noncompete clause. The reason for this is straightforward: non compete are expensive for businesses, and they aren't always worth it.

Noncompetes are viewed negatively by prospective employees because they limit the options available to workers after they leave their current employer. If an employee signs a noncompete, they may be unable to pursue higher paying opportunities elsewhere during the duration of the noncompete, limiting their leverage when negotiating future employment terms. Given the candidate's likely dearth of other work opportunities, they may also expect this. The company might keep the worker hostage and lower their working conditions without consulting them. With these assumptions in mind. The potential employee would expect either immediate payment or a more convincing guarantee that the company will provide incentives for exceptional performance internally that are comparable to those that would be provided in the external labor market. An employer may deteriorate to acquire a noncompete responsibility from an employee if it is unable to provide the necessary up-front compensation, cannot believably commit to rewarding employee's relative impact to the company's team product, or has other

[18] Supra Note 4
[19] Supra Note 5
[20] The Case for NoncompetesAuthor(s): Jonathan M. Barnet and Ted Sichelman Source: The University of Chicago Law Review, Vol. 87, No. 4 (June 2020), pp. 953-1050 Published by: The University of Chicago Law Review Stable URL: https://www.jstor.org/stable/10.2307/26916103

mechanisms to restrict human outflow or defend against understanding discharges in the event of an employee departure.

Post- employment restraint agreements: - [21]

When hiring employees with access to sensitive company information, employers often include a clause in employment contracts limiting their right to use or disclose private information after termination ("post-employment restraint agreements"). Written agreements inform employees of their legal duty to protect their employer's trade secrets and the types of information that are off-limits. An employee may sign such a clause to promise not to work for a competitor or start-up in the same field or to limit information sharing if he does.

Courts rarely investigate the provides a comprehensive set of contract terms after the fact due to the subjective nature of the decision. Post-employment restriction agreements are not presumed legitimate. For generations, courts have looked askance at such agreements, and now they'll only be upheld if a judge or jury finds them reasonable. If courts didn't decide post-employment restrictions' fairness, costs would drop significantly. Every reasonableness evaluation balances employer needs with employee preferences. An inaccurate assessment of either could negate an economically advantageous arrangement.

Due to doubts about the contracts' legality, workers are encouraged to break them, resulting in the loss of vital knowledge and more litigation. Employers will be less likely to use non-compete agreements and will instead demand a greater wage sacrifice from employees who have access to private information due to the risk of having to pay an employee back for signing an unenforceable one. If the reasonableness inquiry complicates court processes, litigation costs rise. Given these expenditures, a compensating reason for post-employment restraint agreement preference is necessary.

Courts have used three reasons to rule on post-employment restriction agreements. First, such agreements are anti-competitive because they restrict the movement of skilled workers and knowledge, which are essential to a healthy economy. Second, non-compete agreements are unjust because workers are often assumed to be too naive or powerless to negotiate for adequate compensation for work-related limitations. Finally, these agreements were thought to hurt the economy by driving productive people away. This reasoning is less used today.

Other Cases -

- ***Pepsi Food Ltd. and OR's v Bharat Coca-Cola Holding OR's. and OR's***[22]
- ***Federal Trade Commission v. Utah-Idaho Sugar 1927***[23]
- ***Percept D'Mark (India) (P) Ltd. v. Zaheer Khan 1872***[24]
- ***Nazir Maricar v Marshalls Sons & Co (India) Ltd, (2005)***[25]
- ***Numeric Power Systems Ltd v Mohd. Muzaffar, 2006*** [26]
- ***Navigators Logistics Ltd. v. Kashif Qureshi 2018***[27]

[21] https://www-tandfonline-com.svkm.mapmyaccess.com/doi/full/10.1080/09615768.2020.1741157#

[22] 1999 VAD Delhi 93, 81 (1999) DLT 122, 1999 (50) DRJ 656, ILR 1999 Delhi 193, (1999) IILLJ 1140 Del

[23] Godfrey, Matthew C. "Restraint of Trade: Federal Trade Commission v. Utah-Idaho Sugar." *Religion, Politics, and Sugar: The LDS Church, the Federal Government, and the Utah-Idaho Sugar Company, 1907-1927*, University Press of Colorado, 2007, pp. 158–97. *JSTOR*, https://doi.org/10.2307/j.ctt4cgp45.9

[24] Percept D'Markr (India) Pvt. Ltd vs Zaheer Khan & Anr on 22 March, 2006

[25] Nazir Maricar vs M/S. Marshalls Sons & Co on 26 November, 2004

[26] Numeric Power Systems Ltd v Mohd Muzzafar, LAWS (MAD) 2006-8-301

[27] Navigators Logistics Ltd. vs Kashif Qureshi & Ors on 17 September, 2018

Chapter 3: JUDICIAL PRECEDENTS In 18th and 19th Century

➢ ***Madhub Chander v Raj Coomer*** [28]

Facts: - Both the defendant and the plaintiff were competitors in the retail trade in the same neighborhood of Calcutta. If the plaintiff would agree to shut his company in that area, the defendant would pay him a certain amount of money as part of their settlement agreement. The plaintiff complied with the court's order, however the defendant declined to pay the amount.

Issue: -The plaintiff filed a lawsuit against him for the money, arguing that the restraint in issue was only partial because he was prevented from practicing his profession in only one location, and that such constraints had been upheld in English law. In addition, the plaintiff argued that the restraint in question was only partial.

Judgment: -Couch J, on the other hand, ruled that the agreement was invalid and established the following: The phrase "restricted from practicing a legitimate profession, trade, or business" does not signify an absolute limitation; rather, it is meant to apply to a partial restriction, or a restriction that is confined to some location.
The experienced judge used the usage of the term "absolutely" in Section 28[29], that discusses the inhibition of judicial procedures, as a source of support for his position. As Section 27[30] does not include the term "restraint," he reasoned that the provision must have been written with the intention of prohibiting not only a complete but also a partial form of restraining. The previous difference between partial and whole trade prohibitions has been eliminated as a result of this provision. If the agreement is in the character of a restriction of commerce, then it does not matter whether the restraint is universal or partial, non-qualified or qualified; the agreement will be invalid any way.This case is the very first case where the Calcutta High Court has had the opportunity to evaluate the ramifications of the section's broad definition.

Critical analysis:-I concur with the decision made in this case because the agreement was invalid because it called for the imposition of a partial restraint without a legitimate justification and because both parties are active participants in a competitive market.

➢ [31]***Superintendence Company of India vs Krishan Murgai 1979***

Facts: -The petitioners measured, sampled, and inspected goods. Industry-respected quality control. Clients and methods were trade secrets. Petitioner appointed respondent New Delhi Branch Manager on March 27, 1971. Clause (10) of the employment terms required the responding party to serve no other competing firm or carry on a business similar to the appellant company for two years at his previous posting. Crucial. Petitioner corporation suspended respondent services on November 24, 1978, effective December 27, 1978. Like the appellant, the respondent founded "Superintendence and Surveillance Inspectorate of India" at B-22, South Extension, New Delhi. On April 19, 1979, the appellant business filed an action in the Delhi High Court on its Original Side, seeking Rs. 55,000/- in damages for breach of the negative covenant in cl. (10) and a perpetual injunction prohibiting the respondent, his servants, agents, or otherwise, from engaging in the said business or any other similar business, or associating with or representing any competitors of the appellant company before the

28 (1879) ILR 4 Cal 817
29 Supra Note 6
30 Supra Note 7
31 1980 AIR 1717, 1980 SCR (3)1278

injunction expires. The appellant company requested an interim injunction from a Delhi High Court Single Judge to enforce the negative contract after filing the civil case. He issued an interim injunction April 29, 1979. The learned Single Judge upheld the partial trade restraint negative covenant. Section 27 of the Indian Contract Act only lasted two years.

He claimed that the Judge misapplied reasonableness. He noted that the Law Commission has proposed amending Section 27[32] through legislation, in addition to recognizing High Court interpretations.

Issues: -1. Whether or not a post-service restrictive covenant that places a limitation on the parties' ability to engage in other types of business is invalid, even if it is lawful.

2. If it may be enforced, as required by Examples (c) and (d) to Section 57[33] of the Specific Relief Act of 1963.

Judgment: -A Delhi High Court judge used the test of reasonableness to evaluate if the agreement is defective under section 27[34] of the Contract Act. If the constraint is plausible, the negative covenant may be imposed as required by examples (c) and (d) to section 57[35] of the Specific Relief Act, 1963. Since New Delhi is the restriction, Clause 10 of the agreement is fair. It lasts two years from his retirement. He said that an unfavorable covenant in an employment contract is always enforced if it benefits the employer.Since clause 10's "leave" included termination of employment, he determined that the negative covenant was in existence. By decision dated May 25, 1979, he made his April 24, 1979 ex parte ad interim injunction absolute for New Delhi until December 27, 1980, or until the dispute was resolved, whichever was sooner.The lower court noted that employees and customers have different interests to protect, thus the degree of limitation allowed in each circumstance varies.The customer is able to defend him against his seller, but the company does not. A restrictive covenant added to a contract of employment is more likely to hurt an employee's ability to support himself plus his family than a seller's, who usually obtains appropriate remuneration for selling his business's goodwill.Thus, the Courts disfavor an employee's restrictive covenant not to work in a similar or competing firm following termination of his employment contract.The appeal was rejected without compensation.

Critical Analysis: -As previously stated, the employee's ability to support his family is lost, so minimum compensation should have been provided to help the employer get back on his feet. In my opinion, the judgment was a bit harsh, and compensation of the minimum amount should have been provided.

➢ ***Niranjan Shankar Golibar v. Century Spg. and Mfg. Co. Ltd 1967***[36]

Facts: - A foreign producer made an offer of partnership to a domestic manufacturer of tyre cord yarn on the premise that the domestic manufacturer maintains the confidentiality of all of the technical knowledge and that the domestic manufacturer acquires equivalent secrecy agreements from its personnel. The appointment of the defendant was made for a term of five years, with the stipulation that during this time he shall never serve somewhere else, regardless of whether or not he had previously been in the service. The arrangement was upheld by ShelatJ as being legal.

[32] Supra Note 9
[33] Supra Note 10
[34] Supra Note 11
[35] Supra Note 12
[36] 1967 AIR 1098, 1967 SCR (2) 378

Issue: -As a result, the defendant was prohibited from serving in any other capacity during the time that the agreement was in effect.

Judgment: -"The evidence makes it abundantly evident that the appellant tore the agreement to shreds for no other reason than the fact that he was promised a substantial sum of money. Thus, it is impossible for him to be heard arguing that a negative covenant that does not violate public policy should not be enforced against him and that an injunction should not be issued against him. The injunction that was handed down against him was limited in terms of time, the type of work he could do, and the geographic area in which he could do it. As a result, it cannot be argued that the injunction was overly broad, unreasonable, or unnecessary for the safety of the respondent company's interests "

Critical analysis: -Regarding post-termination employment restrictions, it has been stated repeatedly that the burden of proof lies with the employer to establish that there has been actual theft of private and confidential information, that trade secrets have been lost, or that disclosing the trade secrets the employer. Thus, the judgment should be in favor of the employee.

➢ ***Gujarat Bottling Co. Ltd. v. Coca Cola Co. 1994***[37]

Facts: -An entity for sale of the goods of a German firm in India that carried a term constraining the Indian company from selling goods for five years that after termination of the contract had been held to be not enforceable by the court.

Issue: -The term in question restricted the sale of goods by the Indian company.
The Supreme Court has given its approval to this form of arrangement, albeit their ruling only applies to the monetary terms of the deal.

Judgment: - "Manufacturing, bottling, selling, dealing or otherwise being concerned with the products, beverages of any additional brands or register trademarks/ titles during the subsistence of this agreement such as the period o The negative criteria was added to boost business.
When the agreement ended, the clause was no longer legally binding. This case involved GBC's franchise to make, bottle, market, and distribute Coca-Cola-trademarked beverages. GBC did all this with the franchise. So, both sides agreed to meet specific conditions to promote worldwide drink commerce for their mutual benefit under a commercial agreement. A negative obligation in the agreement required GBC to promote and sell Coca-Cola-branded products. This would not be feasible if GBC produced, bottled, sold, dealt with, or otherwise linked with the goods, beverages, or other trademarks or trademarks/trade names
The negative stipulation's limitation is only in effect during the agreement's term; thus, it cannot be considered a restraint of commerce under Section 27[38] of the Contract Act. The limitation only applies while the agreement is in place.

Critical Analysis: - This showed the drinks industry's fierce competition and growth potential. Some Indian Contract Act provisions need extensive revisions and expansion. Trade restraint agreements must be defined and supported before signing. This will enable free trade and reduce business people's resentment. The decision

---

[37] 1995 AIR 2372, 1995 SCC (5) 545
[38] Supra Note 14

broadened trade restraints, trademarks, and interim injunctions and set a precedent that has been used in many disputes.

➢ ***Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd***[39]

Facts: -The Appellant and the Respondents have two contracts in place for the source and supply of gasoline. Respondents have agreed to a tie-in agreement that required them to not resell motor fuels at prices different than the appellants' retail schedule price levels, not run any kind of discount scheme, and keep their shops open during reasonable business hours. One garage had a lease term of four years and five months, while the other had a solus agreement lasting 21 years and a debt with such a tie covenant that prohibited redemption during that time.[40]

Issues: -After that, the appellants informed the respondents in writing that they wouldn't be demanding that the contracts' resale price maintenance guidelines be put into effect. The respondents explained that without these provisions, the agreements were void in their eyes. The respondents started stocking a different fuel brand. It was injunctions that the appellants were after. Initial proceedings resulted in a favorable ruling for the appellants. The Respondents Won Their Appeal in the appellate court.

Judgment: -Both garages, in the opinion of the House of Lords, were acting in a manner that was unlawfully restrictive of trade. The fact that there was a mortgage on the property was used as evidence that the doctrine of restraint of trade could still be applicable. The shorter time frame of between four and five months was the duration during which the tie-in agreement was in effect. However, the agreement was invalidated on the grounds that its duration of 21 years was excessively long and that the appellants did not demonstrate any benefit that could be achieved in a period of time that was shorter.

Critical Analysis: -This case exemplified illegal restraint and restriction in pursuing the desired trade. The decision expanded trade restraints, trademarks, and interim injunctions, and it established a precedent that has been used in numerous cases.

Chapter 4: Judicial Precedents in 20th Century

➢ [41]***Modicare Limited v Gautam Bali and Ors.***

Facts: -As this is a strictly legal problem, it is not necessary to go into great length about the facts; enough to say that the plaintiff is the only document that addresses the issue at hand. The complaint alleges that I the plaintiff is in the retail business of direct marketing and selling to customers, where the products are sold on a "principal to principal basis" by one person to the other; (ii) the plaintiff uses employees called "consultants," who in turn promote a line of independent consultants who contract to sell the plaintiff's goods by using their connections; (iii) each consultant is provided bonuses and incentives based on the results and sale; and (iv) that in exchange for selling the plaintiff's

[39] Avtar singh

[40] [1967] UKHL 1, [1968] AC 269, [1967] 1 All ER 699, [1967] 2 WLR 871, 201 Estates Gazette 1043

[41] Modicare Limited vs Gautam Bali & Ors on 23 September, 2019

Issues: -This case involves a ruling on whether or not "Section 27[42] of the Contract Act, 1872 does not apply to a claim predicated on tort of illegal interference with business, as different from a claim based upon a contract." To what degree, if any, and from whom of the defendants in the aforesaid claim the client is entitled to damages and whether the plaintiff has any copyrights in customer and consultant databases. Any of the respondents broke their agreement with the plaintiff? If so, who and how much should pay the plaintiff for this breach? If so, which defendants and how much? (iii) Did CS(COMM.) No. 764/2016 defendants disparage the plaintiff? If the plaintiff wins, (iv) are the defendants' defamatory words true and in the public interest, and if so, to what effect? OPD.

Judgment: -The former employer, if any, would have only the option of suing for contract violation and not of restraining the employee, in my view. If a contract may be terminated because of its very nature, even with responsibility for the damages, the contracted can't be tied down by the contract, and the same, it seems, would also violate the freedom of trade and commerce. To the best of my recollection, rights under Section 27[43] of the Contract Act have also been found to be within the jurisdiction of Article 21 of the Constitution of India, and as such, would have a stronger claim for enforcement than of a tort of disruption with contractual relations. Founded on the argument of being exempt from obligation as intermediaries. Neither defendant in this case is asserting that they are an intermediary within the meaning of the Information Technology Act of 2000; rather, the sole issue to be resolved is whether or not the defendants have a right to provide more favorable terms to the plaintiff's customers and workers. It is important to think about where the boundary between incentive and competition should be placed.

- [44]***Nazir Maricar v Marshalls Sons & Co (India) Ltd, (2005)***

Facts: -Nazir Maricar, the defendant in the litigation, filed this appeal contesting the judgment and decree in favor of M/s. Marshall Sons and Company (India) Ltd, Calcutta, the plaintiff, the respondent herein, requiring the defendant/appellant to pay the damages of Rs.30,000/-.
The plaintiff Corporation made complex construction and road-making machines. The defendant was a Production Engineer in 1978. As the Corporation was producing advanced machinery of unique design with international cooperation, it sent several staff to West Germany for retraining. On 18.9.1982, the Business agreed to cover the defendant's overseas training costs and hire him for five years. If he quits before five years, the defendant must pay Rs.30,000. The Firm transported the defendant abroad and paid his charges as promised. After 25 days of training, the defendant began work in India on 23.10.1982. Promoted. Defendant resigned 9.4.1985. He wrote on 13.5.1985 that he had quit and couldn't work on 14.5.1985. Plaintiff informed him of the deal. 14.5.1985, the defendant missed work. According to the 18.9.1982 agreement, the plaintiff requested damages from the defendant on 30.7.1985. He replied unfeasibly on 13.8.1985. Travel cost Rs.10,874 and training overseas Rs.24,022. This was done solely on the idea that the defendant will utilize his skills and training for the Company and serve the client for five years after training. After training, he worked 23.10.1982–13.5.1985. He worked till 22.10.1987. After quitting, the defendant is applying to the plaintiff's competitor to leverage his Company training. Plaintiff sought Rs.30,000 damages and perpetual injunction.

[42] Supra Note 16
[43] Supra Note 17
[44]Nazir Maricar vs M/S. Marshalls Sons & Co on 26 November, 2004

Issues: -(1) The agreement dated 18.9.1982 that restricts the defendant's right to legitimate profession is unlawful under Section 27[45] of the Indian Contract Act, 1872. Section 23[46] of the Act invalidates the agreement since its purpose is unlawful.

(2) The maximum liquidated damages of Rs.30,000/- is arbitrary without evidence of the Company's loss or harm.

Judgment: - The 18.9.1982 agreement is unenforceable since the Rs.30,000 liquidated damages provision was not willingly agreed to. Section 27[47] of The Contract Indian Act invalidates such an arrangement. After training, the defendant was elevated without pay. His juniors were promoted and sent abroad. They received additional pay thereafter. So, he resigned on 9.4.1985 and informed his employer on 13.5.1985 that he wouldn't report for work on 14.5.1985. Even with an enforceable agreement for a stated damage, the plaintiff must establish the actual damages. Hence, the action may be dismissed.

In response to the said submissions, Mr. Kamalanathan, 's lawyer for the defendant, would offer up that both Sections 23 and 27[48] would not pertain to the present circumstances of the case as the agreement just wouldn't put restriction on the worker in respect of the time frame of postal system, but it is a reasonable limit by fixing the harm to recompense the loss to the Company as such, the trial Judge properly fixed the quantities as mentioned i.e.

The defendant had never told the Company about the circumstantial coercion or that the agreement really wasn't voluntary until then. The defendant said that he signed the document under circumstantial pressure, but no proof was presented. The printed statement never made this plea.

Having trouble demonstrating circumstantial compulsion, the appellant's attorney would argue that the agreement is invalid and the defendant is not responsible for damages.

Section 27[49] states: Agreements in hindrance of commerce are invalid.

Given the aforesaid legal circumstances, we will examine the negative covenant in Ex. A5 dated 18.9.1982, which is: The Employee agrees, undertakes, and covenants with the firm as follows:

That the employee freely undertakes, covenants, and accepts to come to India and service said business for a minimal period of five years computed from the day of his resuming responsibilities in the company's business in India immediately after his returning from the overseas training. (Or such extended or expanded duration as the multinational enterprise, undertaking, or the company may think suitable and expedient.

This paragraph does not limit the defendant's future freedom to do his trade, business, or profession. Clause 2(e) provides:

That the Employee must indemnify and recompense the said firm against any losses and injuries arising from the Employee's violation of any covenant hereto and pay the liquidated damages of Rs.30,000/-.

The aforementioned provision states that the employee must pay Rs.30,000 in liquidated damages if a covenant violation causes the firm loss and injury. As such, this does not preclude the employee from leaving the Company or joining another Company for future possibilities, but the defendant, the employee, must reimburse the Company for any loss or injury caused by his departing before the five-year term stipulated by the parties.

Restrictive covenants that apply after contract termination are treated differently from those that apply throughout contract duration. Negative covenants throughout the contract of employment, where the employee is committed

---

[45] Supra Note 18

[46] The Indian Contract Act,1872

[47] Supra Note 19

[48] The Indian Contract,1872

[49] Supra Note 20

to serve his employer solely, are typically not considered restraints on trade and do not come under Section 27[50] of the Contract Act.

The second problem is damage quantification.Section 74[51] of the Act reads: When a contract is broken, the party complaints of the breach is obligated, regardless of whether actual harm or loss is demonstrated to have been induced thereby, to obtain from the party who broke the contract fair compensation not more than the amount named or, even as case could be, the penalty stated for.This Section allows penalty or reimbursement for contract violation without loss or harm. Nonetheless, the plaintiff showed the defendant's service loss. Plaintiff claimed both attorneys cited many authorities.

➢ ***SanMar Speciality Chemicals Ltd v Biswajit Roy, AIR 2007 Mad 237[52]***

Facts: -Applicant The firm's technological knowledge is unique. The responder became a Scientific Officer in January 2001. He was a key member of the senior management team and had access to crucial information for the applicant's Bangalore Genie Division, including product and process know-how, R&D processes, protocols, raw materials sources, quality control, etc. 20-6-2005: Respondent and applicant signed a Confidentiality and Non-Compete Agreement. Respondent was Assistant General Manager-Research and Development at agreement. The Confidentiality and Non-Compete Agreement prevents the responder from disclosing sensitive information after leaving the applicant. The response must not work for or with another company in a competitive industry for three years after leaving the applicant.

Respondent resigned 17-7-2006. Despite his claim that his departure was personal, the respondent is using the applicant's sensitive information to run a competing company. Using the applicant's information, the response solicits workers and customers. The application seeks an interim injunction under Section 9[53] of the Arbitration and Conciliation Act, 1996 (the Act) pending arbitration.

This Court issued an interim injunction on March 15, 2007, prohibiting the respondent from using the applicant's client base and personal information.

Issue: -Respondent appeared after notice and produced a rebuttal affidavit. The defendant rejected all charges and claimed that the contract dated 20-6-2005 violates Section 27[54] of the Contract Act and is invalid.

Judgment: -The experienced Senior attorney for the applicant argued that the respondent cannot breach a non-compete condition that it freely signed. He further argued that Section 27[55] of the Contract Act does not apply to the agreement's 3-year restrictive covenant. The experienced Senior Counsel further argued that despite agreeing not to disclose the sensitive information, he is corruptly exploiting it for his company in the same industry as the applicant.

➢ ***Wipro Ltd v Beckman Coulter International SA, (2006) 131 DLT 681[56]***

Facts: -The petitioner requests that the respondent not hire any petitioner employees during the arbitration, under Section 9[57] of the Arbitration and Conciliation Act of 1996. The request followed the petitioner and respondent's January 2002 Canvassing Representative Agreement. Petitioner and Respondent have renewed their distributor and primary positions for 17 years. January 2002's Canvassing Representative Agreement is the latest. This

50 Supra Note 21
51 The Indian Contract, 1872
52 AIR 2007 Mad 237
53 The Indian Contract Act, 1872
54 Supra Note 22
55 Supra Note 23
56 2006 (3) ARBLR 118 Delhi, 2006 (2) CTLJ 57 Del, 131 (2006) DLT 681
57 Ibid

arrangement lasted from January 1 until December 31, 2002. Petitioner claims a May 24, 2004 letter prolonged the 2002 agreement for two years from January 1, 2004, to December 31, 2005.

Issues: -The petitioner argues that they and the defendant worked together to achieve a smooth transition for the thousands of customers or installations nationwide that utilized the respondent's products and were completely maintained by the petitioners. Annexure-P-6 contains many parties' unfinished transition documents. Petitioner is relying on an arbitration term in a contract dated 2002. He contended the Court lacked power due to the arbitration agreement's Article 22 (dated January 2002). There is no non-solicitation clause in the contracts of 21 January 2003 and 10 December 2003, so this court does not have jurisdiction over the parties if the 2002 contract is utilized. Based on his investigation, he determines that this Court does not have the required jurisdiction.

Judgment: -Judge noted that the ruling would exclude the petitioner's fired workers. After hearing arguments from both parties, the Court ruled that the respondent may declare that the 19.12.2005 verdict did not apply to the petitioner employees who were summarily sacked. The responder agreed to follow the previous instructions until the situation was resolved. Ordered filings. The petitioners claim the parties committed to maintain this non-solicitation of employee’s requirement for two years after the agreement expired. Both sides agree not to recruit each other's employees. Generic remarks weren't requested.
Hence, Mr. Arun Mohan determines that the two contracts dated 21.01.2003 and 10.12.2003 are genuine contracts save for signatures. The judgment also dismissed the petitioners' assertions that fabricated letters dated 21.01.2003 and 10.12.2003 deceived DGS & According to the parties' counsel, the petitioner has not concealed important evidence. While Mr. Arun Mohan's viewpoint is interesting, it only points out the obvious. Mr. Arun Mohan may be true that some facts weren't addressed, but that's subjective. Cleverness doesn't conceal or suppress. The respondent's argument cannot reject the petition.

Non-Solicitation:
Neither party shall, directly or indirectly, solicit, induce, or inspire any employee(s) to terminate or accept employment with any competitor, supplier, or customer of the other party within two years of termination of the agreement to which this appendix is attached, including termination by either party without or with cause. To "solicit," "induce," or "encourage" an employee to leave their current employer and accept employment with a competitor, provider, or customer of the soliciting party, one must (a) initiate communication systems with the employee about possible employment, (b) attempt to offer bonuses or additional compensation, and (c) refer the employee to personnel or representatives employed by such parties. Both parties may reply to unsolicited employment prospects who work for the other without solicitation.

- ***Biswaroop Roy Choudhary vs Karan Johar on 28 July, 2006***[58]

Facts: - The defendants were restrained from using the title or the trademark called KANK or Kabhi Alvida Naa Kehna and also were restricted to make any adverse statements against the Plaintiff. Although 'Kabhi Alvida Naa Kehna' is a 25-year-old film song, neither party wrote it. The BBC ratio might differ somewhat. This Complaint seeks permanent injunction, delivery of accounting of income received by the Respondents under the impugned trademark/title, and an order requiring the Defendants to provide all trademark/title-related material for destruction.
The Plaintiff claims he registered KANK under the Trade Marks Act in Class 41 on 17.5.2005. On June 20, 2005,

[58] 131 (2006) DLT 458, 2006 (33) PTC 381 Del

the Registrar ordered its advertisement in the February 15, 2006 Journal. Aruna Irani attended the film's Mahoorat on 23.6.2005. Plaintiff started Production. Counsel for the Plaintiff admitted during arguments that just 40% of the shooting has been done. The Plaintiff could not sue the Defendants based on media and trade magazine reporting of the picture with the same name KANK. After the Defendants' Mahoorat in September 2005, the Plaintiff sent a legal notification on 13.10.2005.

Issues: - In these circumstances, the Defendant unlawfully exploits the Plaintiff's goodwill. In such cases, the Plaintiff's grievance would not only be loss of profits due to one of its loyal consumers being caused to buy Defendants' products. The Registrar of Trademarks was notified of the film title dispute. This factual matrix determines party rights.

Judgment: - Mr. Bansal, experienced Counsel for the Plaintiff, argues that relying on Press Reports of conflicting and competing usage of the term KANK was not a sufficient basis for legal action, given the Supreme Court's ruling in State of Haryana v. Ch. Bhajan Lal. Even if this is true, the Plaintiff's refusal to sue after the Defendants' Mahoorat in September 2005 is inexplicable.

In Gujarat Bottling Co. Ltd. v. Coca Cola Corporation, the notion of approaching the Court with clean hands applied to both the Plaintiff and the party requesting the lifting of an injunction.

The Defendant's Affidavit stated that the film's production costs are approximately Rs. 45 crores, that it sold the music rights to Sony BMG Music Entertainment (India) Pvt. Ltd. for Rs. 5 crores and sold one million cassettes, and that KANK is ready for commercial release.

After consideration, the Plaintiff does not merit an injunction. As mentioned above, neither party invented KANK, which many Indians say every day. As Plaintiff counsel has not disputed, the Defendants may immediately release KANK for commercial exploitation. He requested an immediate release hearing. Evidence is lacking that the Plaintiff traveled half the distance for his output. Plaintiff presented a KANK CD. As competent Defendants' Counsel noted, the CD is free. Defendant wins KANK. These circumstances should not injunct defendants. Defendants choose KANK over the Plaintiff. Instead of the Patent Registrar, the Defendant sued the Trade Organization and Guild. Even if the Defendants' actions are pointless, the Plaintiff's Registrar of Trademark application matters. Thus, the Court would never grant injunctive relief if the Defendant has completed film production and is ready to distribute it for commercial exploitation. The judge rejected the application and after legal notice, the Defendants failed to respond and present their case. Defendant may have sued Plaintiff knowing conflicting claims.

E-merge Tech Global Services P. Ltd vs. Vindhyasagar and Ors.[59]

Facts: - E-merge Tech Global Services Pvt. Ltd., the plaintiff, sued its former employee, M.R. Vindhyasagar ("Defendant"), for violating non-disclosure, non-compete, and non-solicitation agreements, particularly by courting one of the plaintiff's key customers. Plaintiff sought damages of Rs. 2,00,00,000 (Rs. 2 crore) and a perpetual injunction barring the defendants from disclosing or exploiting its copyrighted work and soliciting its customers.

Issues: - Civil Suit Defendant #2 left Plaintiff in 2017 and founded Datasolve Analytics Pvt. Ltd. in 2019. Documents showed Plaintiff lost money in 2019-2020 when turnover dropped from Rs. 1,17,44,656 to Rs. 20,93,425 (Rupees Two Lakhs Ninety-Three Thousand Four Hundred and Twenty-Five only). because Defendant transferred income from one of Plaintiff's biggest customers to his own firm, costing Plaintiff Rs. 96,51,264.

[59] E-Merge Tech Global Services P Ltd vs Mr.M.R. Vindhyasagar on 31 December, 2007

Section 27 of the Indian Contract Act, 1872, prohibits post-employment non-compete covenants, so the Madras HC limited the plaintiff's claims to non-solicitation and non-disclosure.

Judgment: -The Madras HC added that the defendant was bound by the secrecy condition while employed by the plaintiff and the non-solicit clause for three years afterward. The Madras High Court awarded restitutionary damages. Defendants must repay the plaintiff for unfair gain. The Madras HC cited the UK Supreme Court's "One Step (Support) Ltd. v. Morris-Garner" decision to award punitive damages when financial loss can be proven by traditional methods.The Madras HC found no need to impose restitutionary damages since the Plaintiff's losses were based on a valid link.The Madras HC ordered the Defendants to reveal all sensitive Plaintiff operation information in an affidavit for Rs. 2,50,000. Namely, to return all sensitive information maintained by the Defendants to Plaintiff. Thus, Madras HC awarded the Plaintiff: I a total amount of Rs.96,51,264/ towards losses along with interest at 9% annually from the date of demonstration of the Counterclaim till the deadline of realization; and (ii) a perpetual injunction against by the Defense attorneys from disclosing Plaintiff's sensitive information and soliciting enterprise from Claimant's major clients.

Chapter 5: CRITICAL ANALYSIS

Both post-employment covenants and agreements in restraint of trade have been subjected to an in-depth analysis within the current body of work. As we progressed, we learned how the non-compete procedure works and why it is important to employers. Additionally, we gained an understanding of why it is necessary. We also gained an understanding of the similarities and differences between various nations, as well as the necessity of this law of restraint in every nation.

Employees need to be protected because it is highly unlikely that they will not immediately seek employment with another reputable organization after leaving their current position. Therefore, moderation ought to be justifiable to and for both sides rather than being especially favorable to one party over the other.

Garden leave is a good example of this; it is a transitional period during which employees are still paid but are not present in the office for those who are giving or receiving notice of termination. This allows the employees to avoid disrupting the workflow of those who are giving or receiving notice. Workers are not permitted to work for themselves or for companies that are in direct competition with their employer while they are on leave. All of the major organizations in India ought to implement this novel idea into their operations immediately in order to protect not only their own interests but also the interests of their workforce.

Why Garden leave should be followed?

The employee's employer may worry that they will become uncooperative or that they will have a negative impact on the workplace and other workers. The employer might also prefer that the worker keep their client interactions to a minimum out of concern that they might convince the potential clients to join them to their new firm or to the employer.

The possibility that the employee will have access to current data that could be useful to the employer's rivals is another justification for the implementation of a garden leave. An employee could be placed on garden leave to help ensure that they will have been cut off from information long enough to lessen any potential threat by the time they are contractually free.

COMPARATIVE STUDY

Enforcing Restrictive Covenants Abroad[60]

It's common practice for large companies to look for restrictive covenants that may be enforced in other nations. Laws in each nation are quite different from one another.

It is commonly accepted that restrictive covenants, like agreements not to compete, constitute a kind of commercial stifling when applied in the United Kingdom. A covenant to not compete in the United Kingdom is required to meet specific criteria, including that it be fairly necessary to safeguard a genuine economic interest, that it be properly confined to a specified geographical region, and that it be reasonably limited in term. As compared to courts in the United States, those in the United Kingdom are less inclined to impose a non-compete clause.

As a result, a significant number of businesses in the United Kingdom depend on "garden leave" arrangements, which may often be enforced. A customary condition known as "garden leave" compels an employee to provide notice many (varies from 3-12) months in advance of quitting their current job to begin working for a rival company.

During such a period, the worker continues to get pay despite the fact that they are not doing any job. As a result, they do not engage in any sort of competition and do not have access to any secret information. Even if they are costly, measures for "garden leave" are likely to be implemented, which will, in the end, preclude competition for a considerable length of time.

Non-compete agreements and other restrictive covenants are the subject of complicated and ever-changing legal systems both inside and outside of the United States, and employment attorneys need to have a solid grasp of these agreements. In addition to this, it investigates a number of developing concerns, including the employee option doctrine and issues pertaining to forfeiture, preference, non-poaching agreements, and the execution of restrictive covenants outside of the United States.

Conclusion

The debate regarding non-compete and non-solicit clauses is another difficult fight to have and is undeniably an essential topic of conversation. Since we are people of a free nation with certain inalienable rights, the law needs to evolve and adapt to reflect the changing world around it. It seems cruel to restrict someone's freedom of choice when it comes to their occupation, trade, or business in order to safeguard someone else's interests. It is necessary to make changes to Section 27[61], as it not only allows but also mandates a "reasonability" inquiry.

When the topic of restraint of trade comes up in the context of India, the first thing that is brought to attention is the fact that the Indian role is distinct from the English common law in that it does not allow for a reasonableness inquiry to be conducted.

Legal frameworks for non-compete clauses and other restrictive covenants are complex and constantly evolving, both domestically and abroad. The regulations of the applicable jurisdiction must be known to practitioners. What legislation the court will use typically determines whether a contract is enforceable. Skilled lawyers should specifically design the agreements to protectable interests and be vigilant to reassess such arrangements in the event that the law changes or the employee offers services for the company in a new position or location.

[60] Developing Trends in Non-Compete Agreements and Other Restrictive Covenants Author(s): Angie Davis, Eric D. Reicin and Marisa Warren Source: ABA Journal of Labor & Employment Law, Vol. 30, No. 2 (Winter 2015), pp. 255-272 Published by: American Bar Association Stable URL: https://www.jstor.org/stable/10.2307/26410764

[61] Supra Note 24

While courts have reached different conclusions on the legality of such restrictions, the current state of business and employment contracts worldwide calls for the inclusion of such clauses. While courts have dealt with the validity of such covenants in a number of instances, they have generally considered such provisions in light of the facts and circumstances in each case, paying due consideration to the rationality of the limits set out in such contracts.

Apparently, Indian courts have ruled that including such provisions in a contract does not automatically make it null and invalid. Although the safeguarding of privileged data, the reasonableness of restrictions imposed, and the stability of convenience between both the contracting parties all factor into the judicial norms and standards policing of such restrictive clauses, the principles differ according to the nature of agreements.

Suggestion

Restrictive covenant agreements are typically entered into with little to no negotiation between the employee and the employer beyond the scope of the executive employment contracts and sales of businesses or practices. Typically, a candidate's employment is contingent upon his or her signing a written and documented employment agreement or offer letter, which both contain covenants. Restrictive covenant agreements are designed to protect employers from former employees who might violate them by refusing to perform certain duties after they leave the company. Another time, a court will likely maintain a restrictive covenant agreement if it is reasonable in context of the same and duration which protects a legitimate interest of the employer. Limiting covenants can be challenged in a number of ways, and the specifics of these challenges can vary from state to state.

- ➢ The employees should pay close attention to the terms and conditions of the given non-competence in terms of the agreement's breadth of time and duration. The terms defined should be reasonable; in most cases, the time period is between one and two years. However, the time period may vary depending on the circumstance.
- ➢ Employers should also consider whether the employee has a legitimate and protectable interest. To increase the likelihood of enforceability, employers should consider articulating the specific interests they are attempting to protect.
- ➢ Before accepting a position, job applicants should determine whether the employer has waived the right to enforcement. The waiver defense should always be present.
- ➢ The terms and conditions for maternity leave should also be reviewed by female employees to determine if they are valid and favorable.
- ➢ The employee should concentrate on the benefits offered by the employer, such as compensation, provident funds, paid vacation, etc.
- ➢ The employee should evaluate whether the compensation provided for the non-compete is adequate and worthwhile.

Bibliography

❖ Articles

- ➢ Callahan, Maureen B. "Post-Employment Restraint Agreements: A Reassessment." *The University of Chicago Law Review* 52, no. 3 (1985): 703–28.
  URL:https://doi.org/10.2307/1599633
- ➢ Smith, Stephen A. "Reconstructing Restraint of Trade." *Oxford Journal of Legal Studies* 15, no. 4 (1995): 565–95.
  URL: http://www.jstor.org/stable/764564
- ➢ McNair, Arnold D. "Agreements in Restraint of Trade." *Economica*, no. 11 (1924): 176–85. URL:https://doi.org/10.2307/2548168
- ➢ Davis, Angie, Eric D. Reicin, and Marisa Warren. "Developing Trends in Non-Compete Agreements and Other Restrictive Covenants." *ABA Journal of Labor & Employment Law* 30, no. 2 (2015): 255–72.

URL: https://www.jstor.org/stable/26410764

- "PROTECTION OF TRADE SECRETS AND UNDISCLOSED INFORMATION: LAW AND LITIGATION"

URL:D.S. Sengar Journal of the Indian Law Institute b, Vol. 53, No. 2 (APRIL-JUNE 2011), pp. 254-274 (21 pages) https://www.jstor.org/stable/43953505

Books

- Avtar Singh 2017, Law of Contract and Special Relief Act
- Contracts in Restraint of Trade
- The Indian Contract Act and Specific Relief Act, Pollock and Mulla
- Law of Contract and Specific Relief Act, Moitra
- The Law of Contract with special emphasis on the law relating Government Contracts, Tenders and Blacklist

Case Laws

- *Madhub Chander v Raj Coomer*
- *Superintendence Company Of India vs Krishan Murgai 1979*
- *Niranjan Shankar Golikari v. Century Spg. and Mfg. Co. Ltd 1967*
- *Gujarat Bottling Co. Ltd. v. Coca Cola Co. 1994*
- *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd*
- *E-merge Tech Global Services P. Ltd vM.R Vindhyasagar and Ors*.
- *Modicare Limited v Gautam Bali and Ors.*
- *Nazir Maricar v Marshalls Sons & Co (India) Ltd, (2005)*
- *Sanmar Speciality Chemicals Ltd v Biswajit Roy, AIR 2007 Mad 237*
- *Wipro Ltd v Beckman Coulter International SA, (2006) 131 DLT 681*
- *Biswaroop Roy Choudhary vs Karan Johar on 28 July, 2006*

Websites Database

- www.manupatra.com
- www.scconline.com
- www.jstor.com
- www.heinonline.com