

Employment Contracts in India

Enforceability of Restrictive Covenants

November 2019

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1. Introduction

The employer-employee relationship is, and has always been, in a constant state of evolution. As the nature of this relationship evolves and changes, so does the nature of disputes that arise as a result of diverging interests, which the employer and employee seek to protect in their interaction with each other and the society in general. Several laws and legislations have been drafted to create an appropriate framework to address these concerns with an objective to reasonably balance the interests of employers and employees. Such employment laws have a broad ambit and include within their scope all areas of the employer-employee relationship and are not merely restricted to contractual issues and/or workplace discrimination.

Globalization coupled with easy accessibility of advanced technology has had a phenomenal impact on the employer-employee relationship in India. The new economic policy announced in 1991 had signaled a decisive shift in economic policies of the government from regulation to liberalization. Further the advent of various multinational companies has substantially changed the relationship between employers and employees and the nature of disputes arising between them. While an increasingly liberalized market has promoted healthy competition between businesses, it has also resulted in accordance of significant importance to protection of innovative ideas, proprietary information, internal workings and mechanisms which lend firms the '*competitive edge*' to thrive in the present economic environment. The objective to protect the '*competitive advantage*' has in turn resulted in concerns of potential misuse of confidential and proprietary information of employers by employees, especially before hiring, during, and post termination of, their employment.

With a distinctive cross border flavor in contemporary transactions, instances of organizations attempting to protect their trade secrets and confidential information manifest themselves in the use of '*restrictive*' agreements between employers and employees, which place limitations and restrictions on the latter pertaining

to the manner in which the employees are allowed to use and disseminate the information they become privy to solely, as a consequence of being in the service of the employer.

When contrasted with the employees' constitutional and statutory rights to pursue occupations of their choice and earn a livelihood, by using the full array of knowledge and skill at their disposal, the diverging interests sought to be advanced by employers (for protection of confidential information to retain the '*competitive edge*') promise to form a fertile ground for contentious disputes between the employers and employees in the near future. This research publication focuses on the analysis of the legal framework existing in India to address such emerging concerns in the relationship between employers and employees along with developments through various case laws.

The legislations governing several aspects of the employer-employee relationship existing both at national and state level are so numerous, complex and ambiguous, that they tend to promote litigation rather than providing easy solutions to potential problems. However, concerns of employers and employees relating to protection of confidential information, non-disclosure and non-solicitation have not yet been addressed through legislation in India, thus warranting recourse to judicial interpretation and common law. There is profound inconsistency within the judiciary itself when it comes to developing appropriate standards of review for addressing these emerging contentious employment related issues relating to confidentiality and non-solicitation.

This paper seeks to provide an overview of the scenarios in which such disputes may arise between employers and employees, and highlights the need for formulation of a coherent legal framework in order to address such concerns. Further, this paper also assesses the validity of various restrictive covenants which are increasingly being incorporated in employment contracts.

2. Rise of a ‘New Breed’ of Employment Related Disputes in India

As we are moving towards a knowledge-based economy, the quest for formulation of a coherent and appropriate understanding of the ever-evolving concept of industrial relations has become one of the most delicate and complex challenges. The disputes in the present context are not just applicable to the two classes that are the employees (labour) and the employer (management/owners), but also to a new work force - the “*White Collar*”, a third class that has emerged as a result of adoption of a liberalized economic regime. The term ‘white-collar’ worker refers to a person who performs professional, managerial, or administrative work which is in contrast to a blue-collar worker, whose job requires manual labour.

The emergence of this new class has made the system more complex. In the past, the majority of the disputes arose between the workers/ labourers or the unions comprising the working class and the employers, which were sought to be addressed through various enacted laws to protect the interests of the weak. These laws also envisioned resolution of disputes between the trade unions and the management for their rights, which were perpetrated either through strikes, bandhs or hartals.

However, as the complexities in the work field increased, the ‘white collar’ workers often found themselves engaged in various matters related to breach of fiduciary responsibilities, corporate defamation, and corporate law non-compliance. They are also engaged in issues regarding payment terms, termination of service, breach of confidentiality, non-compete or non-solicitation clauses adding a new domain to the concept of industrial relations. The legal framework addressing the latter is still at a nascent stage in India. This Part discusses the situations where such disputes may arise between employers and employees at various stages of their relationship.

I. Pre-Hire

It is possible that dispute may arise even before a person is hired as an employee of a company. Cases where a new recruit has joined employment without duly terminating his agreement with the previous employer may pose risk of potential disputes, both for the employee and the new employer. The employers take great effort in creating intellectual property and proprietary information, and in protecting its confidential information. Such situations are also possible in today’s age, when a prospective or a newly hired employee has a post-termination obligation (which include non-disclosure of confidential information, non-solicitation, non-compete etc.) with an erstwhile employer which he or she might have breached. Typically, such disputes would arise between the erstwhile employer and employee. However, there have been instances where the prospective employer has also been dragged into litigation, by taking the position that the new employer is encouraging and assisting the employee to breach his obligations towards the previous employer.

Further, many companies have a pre-employment screening policy, with an objective of gaining a degree of certainty that the potential employee does not have a criminal record involving dishonesty, or breach of trust involving his/her fiduciary or official capacity, or has not misused his/her official or fiduciary position to engage in a wrongful act including money laundering, fraud, corruption etc. Such a screening policy may raise concerns of violation of the right to privacy of the persons being subjected to such screening, as the mode and manner of gathering such information may violate rights of individuals guaranteed under Article 21 of the Indian Constitution.¹

1. Vikram Shroff & Neha Sinha, Background Checks in India, Society for Human Resource Management (2012) available at <http://www.shrmindia.org/knowledge-center/talent-acquisition/background-investigations/background-checks-india>.

The Nine Judge Bench of the Supreme Court in *Justice K.S Puttaswamy (Retd.) v. Union of India and Ors.*² recently held that the right to privacy is protected as an intrinsic part of the right to life and personal liberty under Article 21 and as a part of the freedoms guaranteed by Part III of the Constitution. The judgment has defined nine different kinds of privacy and one of them includes Informational Privacy.³

The following scenario may also give rise to pre-hire employment disputes:-

- a. When the employer withdraws employment offer prior to the employee's joining.
- b. When the employee's background check results are unsatisfactory or the employee provides disclosures or misrepresents to the prospective employer.

But to reduce litigation risk, it is also helpful to obtain a representation from the new employee (whether under the employment contract or otherwise) that the employee has not and will not breach any obligations towards his previous employer, as a result of joining the employment under the new employer. This has been adopted as a standard practice in most multi-national corporations these days to avoid litigation at a later stage.

II. During Employment

During the course of employment, several disputes may arise between the employer and the employee. These can be broadly summed up in 2 categories:

A. Employment Related Disputes

Misconduct or indiscipline of an employee, insider trading, indulging in criminal activities, under-performance, breach of the terms of the employment contract or HR policies/code of

conduct etc., are few of the contentious issues which may ultimately lead to a dispute.

B. Disputes Relating to Restrictive Covenants effective During Employment

There are broadly two kinds of restrictive covenants in operation during the term of employment which are non-compete and non-disclosure of confidential information.

If the employee is in breach of a non-compete restriction, prohibiting him/her from engaging in any kind of business or activity which is similar to the company's business, or making a mandate to not disclose or misuse confidential information or trade secret passed on to the employee, during the course of his/her employment then such breaches would inevitably lead to a potential dispute.

III. Termination

In cases where the employee voluntarily resigns or retires from employment, it is unlikely to happen that there will occur a dispute (unless there are elements of a breach being committed by the employee).

In contrast, termination of employment by the employer often leads to a stand-off between an employee and employer which has all the ingredients for baking a potential dispute. Termination of employment due to misconduct, breach of the employment agreement including violation of restrictive covenants therein, is often escalated and settled through resort to courts.

An important factor to be considered in a dispute relating to termination of employment by the employer is whether the employee being so terminated enjoys statutory protection of employment such as a "workman" as defined in the Industrial Disputes Act, 1947 ("IDA") and/or protection under the state-specific labour laws such as the Shops and Establishments Act. The IDA also contains provisions for unfair labour practices on the part of the employer.

2. WP (C) 494 of 2012.

3. An interest in preventing information about the self from being dissemination, and controlling the extent of access to the information.

If the employee does enjoy such protection, then before terminating the employment of such an employee for any of the above reasons, the employer would have to serve the employee with at least a 30 days' notice or pay salary in lieu thereof.

The procedure to be followed for termination due to 'misconduct' would involve framing of charges, issuance of a charge sheet, conducting an internal (domestic) enquiry by an unbiased inquiry officer, followed by issuance of a show cause notice. The process needs to be in accordance with the principles of natural justice and the employee should be given an opportunity to submit his/her defence and to call upon witnesses. Decision to terminate employment of an employee should be taken depending upon the gravity of the misconduct done on the part of the employee.

IV. Post-Termination

The covenants restraining employees from joining competitors after the cessation of employment are often found in modern day employment contracts. Restrictions in this category may also prevent a former employee from starting a competing business or advising a family member or relative who is in a similar line of business.

A breach of post termination clauses often forces the employer to seek advice on the legal recourse available to it. Indian courts however prioritize the protection of rights of an employee seeking employment over

protecting the interests of the employer seeking to protect itself from competition. In view of the Constitution of India and the provisions of the Indian Contract Act, 1872, ("**Contract Act**") courts have generally held that the right to livelihood of the employees must prevail over the interest of the employer, in spite of an existing agreement between the employer and the employee.

Further, courts frown upon any form of post-employment restraint, as such restraints are considered to limit the economic mobility of the employees, thereby limiting their personal freedom of choice of work/livelihood. The underlying reason behind invalidating post-employment restraints is that if such restraints are permitted, the employee would be unfairly restrained from using the skills and knowledge gained, to advance further in the industry precisely because of such increased expertise.⁴

In Affle Holdings Pte Limited vs. Saurabh Singh⁵, the Delhi High Court held that *a negative covenant in the employment contract, which prohibits carrying on a competing business beyond the tenure of the contract is void and not enforceable. This prohibition operates on account of the provisions of Section 27 of the Contract Act.*

The validity of such restrictive covenants are tested on the standards of reasonability, involving considerations of duration and space of the restriction in question. The following part discusses the scope and interpretation of such restrictive covenants within the Indian legal framework.

4. Journal of Intellectual Property Rights Vol.11, Nov 2006, pp. 397-408: <http://www.rmarkhalligan2.com/trade/articles.asp?id=next¤tId=2> (18 April 2006).

5. OMP 1257/2014.

3. The Status of Restrictive Covenants in India

Incorporation and subsequent enforcement of ‘restrictive covenants’ such as confidentiality, non-disclosure and non-solicitation in employment contracts, intended to restrict the employees from disseminating confidential and other important information exclusively available with an employer, are often amongst contentious issues in India because such provisions seemingly conflict with Section 27 of the Contract Act.⁶

I. Non-Competition Restriction

An agreement in restraint of trade has been defined as “one in which a party agrees with any other party to restrict his liberty in the future to carry on trade with other persons who are not parties to the contract in such a manner as he chooses”.⁷ As an exception to this general rule, agreements under which one party sells his/her goodwill to another, while agreeing not to carry on a similar business within specified local limits, are valid, provided such an agreement appears to be reasonable to the Court.

Article 19 (g) of the Constitution of India clearly provides every citizen, the right to practice any profession, trade or business. This is not an absolute right, and reasonable restrictions can be placed on this right in the interest of the public. The courts have always been wary of upholding such restrictions and have kept the interpretation of this provision flexible to ensure that the principles of justice, morality

and fairness are aptly applied, depending upon the facts and circumstances of each case.

Employers often tend to incorporate restrictive covenants in the agreement to protect their confidential information and trade secrets and as well as their growing businesses as well. But for any restrictive covenant to fall within the ambit of Section 27 of the Contract Act, the agreement should be in restraint of trade. Unlike the law in the United Kingdom, the Contract Act does not distinguish between partial and total restraint of trade and therefore if the clause in the agreement amounts to post termination restraint, then the same is void. Section 27 itself is succinct and doesn’t offer insight as to what kinds of restraints are valid, so the qualification of ‘reasonable’ restraints being valid and enforceable has been read into Section 27 by the courts.⁸

To determine whether a restrictive covenant in employment contract would be reasonable/valid or not, the courts have paid due regard to bargaining power of each party, reasonableness of restrictions set out in the covenant, time, place and manner of restriction etc.

In India, due to the heavy bargaining power of the employers, the trend is for the courts to protect the rights of the employees and adopt an interpretation favourable to them. Section 27 of the Contract Act applies in the context of (1) employer - employee contracts, (2) contracts with partners, (3) dealer contracts and (4) miscellaneous cases.

6. Section 27 of the Contract Act provides that ‘every agreement by which anyone is restrained from exercising a lawful profession, trade or business of any kind, is to that extent void.’

Exception 1: Saving of agreement not to carry on business of which good will is sold - One who sells the goodwill of a business may agree with the buyer to refrain from carrying on a similar business, within specified local limits, so long as the buyer, or any person deriving title to the goodwill from him, carries on a like business therein, provided that such limits appear to the court reasonable, regard being had to the nature of the business.

7. *Petrofina (Great Britain) Ltd. v. Martin*, (1966) Ch. 146.

8. *Niranjan Shankar Golikari v. The Century Spinning & Mfg. Co. Ltd.* (1967) 2 SCR 378.

While it is a settled position of law that restrictive agreements bind current employees in lawful employment of the employers throughout the duration of the contract, the position of laws regarding validity of such restraints on employees after termination of contract is more contentious and adjudicated before courts.

The Supreme Court of India (“**Supreme Court**”) in *Niranjan Shankar Golikari v. Century Spg & Mfg Co. Ltd*⁹ enumerated the tests to determine the validity of ‘restrictive’ agreements in terms of Section 27 of the Contract Act. In this case, a foreign producer collaborated with a company manufacturing tyre cord yarn by an agreement which stated that the company would maintain secrecy of all technical information. In pursuance of the agreement, the company signed a non-disclosure agreement with the appellant, at the time of his/her employment.

The Supreme Court observed as thus:

“...considerations against restrictive covenants are different in cases where the restriction is to apply during the period after the termination of the contract than those in cases where it is to operate during the period of the contract. Negative covenants operative during the period of the contract of employment when the employee is bound to serve his employer exclusively are generally not regarded as a restraint of trade and therefore do not fall under section 27 of the Contract Act. A negative covenant that the employee would not engage himself in a trade or business or would not get himself employed by any other master for whom he would perform similar or substantially similar duties is not therefore a restraint of trade unless the contract as aforesaid is unconscionable or excessively harsh or unreasonable or one sided...”

In light of the above observations, the agreement was held to be valid and the appellant was accordingly restrained from serving anywhere else for the duration of the agreement. The Supreme Court held that there is an implied term in a contract of employment that a former employee may not make use of

his/her former employer’s trade secrets. Subject to this exception, the employee is entitled to exploit the full range of the knowledge and skill possessed by him/her. The Supreme Court relied on Lord Halsbury’s Laws of England which stated that as a general principle an individual was entitled to exercise his/her lawful trade or calling as and when he wills and that the law had jealously guarded against interference with trade even at the risk of interference with freedom of contract, as it was public policy to oppose all restraints upon liberty of individual action which are injurious to interests of trade. This principle was based on public policy, which is a dynamic concept that changes and evolves depending upon time and needs.

Referring to the above-mentioned Supreme Court case, Delhi High Court in *LE Passage to India Tours & Travels Pvt. Ltd vs. Deepak Bhatnagar*¹⁰ observed that under Indian law there is a complete embargo to an agreement in restraint of the trade with the sole exception that one who sells goodwill of a business may agree with the buyer to refrain from carrying a similar business “within specified local limits” provided that such limits appear to the Court to be reasonable, regard being had to the nature of the business. However, in the garb of the alleged sale of goodwill of the trade, parties cannot enforce a restraint on the employment even after the employee ceases to be in the employment.

Recently, in the case of *Kumar Apurva v. Valuefirst Digital Media Pvt. Ltd.*,¹¹ the court upholding the decision of the Arbitral Tribunal, restrained the appellant from carrying any activity which is competitive to that of company, and also from soliciting, interfering with, disturbing or attempting to disturb the relationship between the company or subsidiary and third party, including any customer or supplier of the company or subsidiary.

In *Percept D’Mark (India) Pvt. Ltd. v. Zaheer Khan & Anr.*¹² it was held by the Supreme Court

9. id.

10. IA Nos. 15636, 16817 & 16770/2013 in CS (OS) 1881/2013.

11. 2015 SCC Online Del 8360.

12. AIR 2006 SC 3426.

that “... a restrictive covenant extending beyond the term of the contract is void and not enforceable”. The Supreme Court also held that “the doctrine of restraint of trade does not apply during the continuance of the contract of employment and it applies only when the contract comes to end.” The Supreme Court further went on to observe that the doctrine of restraint of trade “is not confined to contracts of employment, but is also applicable to all other contracts”.

Further in the case of *Ozone Spa Pvt. Ltd. v. Pure Fitness & Ors.*¹³, the court restricted the defendants from establishing, running or setting up any competing business in any area that falls within a range of 4 kilometers from the premises of the plaintiff. Although, Section 27 states that all agreements in restraint of any profession, are void, so long as an employee does not have the motive to cheat, mistrust or cause irreparable loss to the company, trade or business. Hence, reasonable restraints are permitted and they do not render the contract void.

The next part of the paper discusses the applicability of non-solicitation, non-disclosure and confidentiality clauses at length.

II. Non-Solicitation of Employees and Customers

A non-solicitation clause prevents an employee or a former employee from indulging in business with the company’s employees or customers against the interest of the company. For example, an employee agrees not to solicit the employees or clients of the company for his/her own benefit during or after his/her employment.

Non-solicitation obligations have been enforced in some circumstances, albeit on a case to case basis. For instance, in *Desiccant Rotors International Pvt. Ltd v Bappaditya Sarkar & Anr.*¹⁴, the Delhi High Court allowed an injunction

against the manager prohibiting him/her from soliciting Desiccant’s customers and suppliers to stand in effect. It is pertinent to note, however, that the Delhi High Court held that a marketing manager could not be deemed to possess confidential information and that his written declaration to that effect in his employment agreement was also meaningless and thus the Court rejected Desiccant’s claim to enforce the confidentiality obligations on the manager.

Further, in *FL Smidth Pvt. Ltd. v M/s. Secan Invescast (India) Pvt.Ltd.*¹⁵ (“**Secan Invescast**”) the Madras High Court held that merely approaching customers of a previous employer does not amount to solicitation until orders have been placed by such customers based on such approach. The Madras High Court laid down the standard to establish non-solicitation:

“...solicitation is essentially a question of fact. The appellants should prove that the respondents approached their erstwhile customers and only on account of such solicitation, customers placed orders with the respondents. Mere production of quotation would not serve the purpose. It is not that the appellant is left without any remedy. In case the Court ultimately holds that the appellant has got a case on merits, they can be compensated by awarding damages. The supplies made by the respondent to the erstwhile customers of the appellant would be borne out by records. There would be no difficulty to the appellant to prove that in spite of entering into a non-disclosure agreement, respondent has solicited customers and pursuant to such solicitation they have actually supplied castings. When there is such an alternative remedy, question of issuing a prohibitory injunction does not arise.”

The Secan Invescast judgment states that such clauses may be valid if reasonable restrictions such as distance, time limit (reasonable time frame), protection and non-usage of trade secrets and goodwill are imposed on former employees. The increasing significance of protecting client information is brought out in *Embee Software Pvt.*

13. 2015 SCC Online Del 10768 : 2015 222 DLT 372.

14. *Desiccant Rotors International Pvt Ltd v Bappaditya Sarkar & Anr.*, Delhi HC, CS (OS) No. 337/2008 (decided on July 14, 2009).

15. *M/s.FLSmidth Pvt.Ltd. v M/s.Secan Invescast (India) Pvt.Ltd.*, (2013) 1 CTC 886.

Ltd. v. Samir Kumar Shaw,¹⁶ wherein the Calcutta High Court held that ‘acts of soliciting committed by former employees take such active form that it induces the customers of the former employer to break their contract with the former employer and enter into a contract with the former employee, or prevent other persons from entering into contracts with the former employer cannot be permitted’.

This decision echoes in the decision of *Crowson Fabrics Ltd. v. Rider*,¹⁷ where it was held that even though the act of retaining various documents belonging to the ex-employer concerning customer and supplier contact details by the employees during employment did not amount to a breach of confidentiality, such ‘illegitimate’ actions constituted a breach of employees’ duty of fidelity. Recently the Delhi High Court, setting aside the decision of lower Court, held that an agreement in restraint of carrying of any professional activity is contrary to law.¹⁸

However there are certain non-solicitation clauses that do not amount to restraint of trade, business or profession and would not be subject to Section 27 of the Contract Act, as held by the Delhi High Court in *Wipro Ltd. v. Beckman Coulter International SA*¹⁹ (“**Wipro**”). In this case, Wipro worked as a sole and exclusive canvassing representative/ distributor for Beckman Coulter International, S.A., for 17 years. Beckman Coulter decided to undertake direct operations in India and issued advertisement seeking employment from people and giving preference to candidates having experience in having handled respondent’s product or similar products. Wipro Limited alleged that such advertisement was in violation of non-solicitation clause and approached the court for prohibiting solicitation and claimed damages. It was held that since the restrictions had not been imposed on the employees but on Wipro and Beckman Coulter, Section 27 would not be

attracted and thus the agreement was held not to be in restraint of trade. In *Wipro*, the Delhi High Court highlighted the following salient aspects in this context:

- i. Negative covenants tied up with positive covenants during the subsistence of a contract be it of employment, partnership, commerce, agency or the like, would not normally be regarded as being in restraint of trade, business of profession unless the same are unconscionable or wholly one-sided;
- ii. Negative covenants between employer and employee contracts pertaining to the period post termination and restricting the employee’s right to seek employment, and/ or to do business in the same field as the employer, would be in restraint of trade and, therefore, a stipulation to this effect in the contract would be void. In other words, no employee can be confronted with the situation where he has to either work for the present employer or be forced to idleness;
- iii. While construing a restrictive or negative covenant and for determining whether such covenant is in restraint of trade, business or profession or not, the courts take a stricter view in employer-employee contracts than in other contracts, such as partnership contracts, collaboration contracts, franchise contracts, agency/distributorship contracts, commercial contracts. The reason being that in the latter kind of contracts, the parties are expected to have dealt with each other on more or less an equal footing, whereas in employer-employee contracts, the norm is that the employer has an advantage over the employee and it is quite often the case that employees have to sign standard form contracts or not be employed at all;
- iv. The question of reasonableness as also the question of whether the restraint is partial or complete is not required to be considered at all whenever an issue arises on whether a particular term of a contract is or is not in restraint of trade, business or profession.”

16. AIR 2012 Cal 141.

17. [2007] EWHC 2942.

18. Arvinder Singh and Anr. v. Lal Pathlabs Pvt. Ltd. & Ors., 2015 SCC Online Del 8337 : (2015) 149 DRJ 88.

19. 2006 (3) ARBLR 118 (Delhi); see also Secan Investcast.

In *GEA Energy System India Ltd. v. Germanischer Lloyd Aktiengesellschaft*,²⁰ the Madras High Court had occasion to consider that the operation of Section 27 in the context of two joint venture partners. In this case, Defendant had terminated the Joint Venture Agreement (**‘Agreement’**) and plaintiff sought to restrain Defendant from setting up a similar business in India. Although there were several other issues, the High Court examined the contention of the parties regarding the act of restraining Defendant from carrying on business in India and its legality in the context of Section 27 of the Contract Act.

The Madras High Court observed that the restrictive clause only stated that Defendant may not carry on a business which is prejudicial to the plaintiff’s company and as such did not restrict the Defendant in absolute terms from carrying on any business. The Madras High Court further noted that the parties entered into an agreement of their own free will and as per the terms therein had equal bargaining power. The terms were not one-sided and did not betray weakness of any one party. It would thus be seen that the same test as is applicable in the context of employment contracts, would be substantially applicable even in the context of joint venture agreements.

III. Non-Disclosure of Confidential Information and Trade Secrets

The employee is mandated to take reasonable steps to keep all the confidential information in confidence except and to the extent when disclosure is mandatory under any law in force. The employee further agrees that he/she shall not discuss or disclose the confidential information of the company to any person or business unrelated to the company.

In *Hi Tech Systems and Services Ltd. v. Suprabhat Ray*,²¹ the Supreme Court restrained the respondents from acting as sales agent of

other companies, saying that they had acted in breach and they were in process of utilizing trade secrets and confidential information.

In *Escorts Const. Ltd v. Action Const.*²² (**“Escorts”**), the Delhi High Court restrained Escorts from manufacturing, selling or offering for sale the Pick-N-Carry Mobile Cranes that were a substantial imitation or reproduction of the industrial drawings of the plaintiffs, or from using in any other manner whatsoever, the technical know-how. In *Burlington Home Shopping Pvt. Ltd. v. Rajnish Chibber*,²³ the Delhi High Court had restrained carrying on of any business including mail order business by utilizing the list of client/customers included in the database of the petitioner.

In *Diljeet Titus v. Mr. Alfred A. Adebare and Others*,²⁴ the defendant, an advocate, was working at the plaintiff’s law firm. On termination of employment, the defendant took away important confidential business data, such as client lists and proprietary drafts, belonging to the plaintiff. The defendant contended that, he was the owner of the copyright work as it was done by him during his/her employment since the relation between parties was not that of an employer and employee. The Delhi High Court rejected this contention and ruled that the plaintiff had a clear right on the material taken away by the defendant. Accordingly, the Delhi High Court restrained the defendant from using the information taken away illegally. It should be noted that the Delhi High Court did not prohibit the defendant from carrying on a similar service. The defendant was only restrained from using the information he took, as this was necessary to protect the interests of the plaintiff. The relationship between the parties was in the nature of a contract of service.²⁵

20. [2009]149CompCas689(Mad).

21. 2015 SCC Online Cal 1192; AIR 2015 Cal 261.

22. *Escorts Const. Equipment Ltd v. Action Const. Equipment P. Ltd.*, AIR 1999 Delhi 73.

23. *Burlington Home Shopping Pvt. Ltd.v. Rajnish Chibber*, MANU/DE/0718/1995: 61(1995)DLT6.

24. 2006 (32) PTC 609 (Del).

25. Priti Suri & Nikita Ved, *Enforcing Employee Non Compete Covenants*, ASIA LAW INDIA INVESTOR 7 (2008) http://www.psalegal.com/upload/publication/assocFile/JanuaryIssue_1288776504.pdf.

In *American Express Bank Limited v. Priya Puri*²⁶ the defendant was working as the Head of Wealth Management for the plaintiff bank for the North India region. Upon the defendant serving her notice for termination of employment, the plaintiff bank instituted allegations of sharing trade secrets, confidential information and possessing intellectual property of the plaintiff. The plaintiff consequently filed a plea for injunction against the defendant. The Delhi High Court rejected this plea on the ground that “*The inconvenience caused to the defendant shall be much more in case the injunction as prayed by the plaintiff to be granted in his favour*”.

The Delhi High Court further observed that in order to claim copyrights, the plaintiff should have abridged, arranged and/or done something “*which would show that they have done something with the material which is available in public domain so as to claim exclusive rights on that*”.

In addition to restraining employees from using such confidential information post termination, by way of seeking injunction or claiming damages, the criminal legislation also comes to the aid of employers and provides them with an opportunity to take criminal action against the employees in addition to seeking civil remedies.

Several provisions of the Indian Penal Code, 1860 (“**IPC**”)²⁷ and Information Technology Act, 2000 (“**IT Act**”) are also attracted in case of breach of confidentiality and disclosure provisions and allow criminal prosecution and imprisonment or fine or both as required. With increasing dependence on technology, remedies

have been provided under the IT Act to deal with hacking (Section 66); causing damage to computer system (Section 43); tampering with computer source document (Section 65); punishment for violation of privacy policy (Section 66E) etc; may also be considered by the employer as remedies against the employee in case of breach of confidentiality and disclosure provisions.

In *Pyarelal Bhargava v. State of Rajasthan*²⁸ an employee was convicted for theft under Section 378 of IPC. The employee had removed certain confidential information from the government department and had passed it to a friend who in turn had substituted the documents. This friend further removed certain documents while substituting them with others. Thereafter, the file was returned next day. The Supreme Court held that even temporary removal of documents with a dishonest intention can cause loss or harm and hence, would be considered theft.

In *Abhinav Gupta v. State of Haryana*,²⁹ the accused, an ex-employee of Company A had resigned and joined Company B after final clearance from Company A. During his course of exit interview, he had continuously maintained that he would not be joining any company which was in direct competition with Company A. He also agreed that all the confidential information acquired by him during his tenure of work shall be kept confidential at all times. However, two weeks later, it came to the knowledge of Company A that he had joined Company B, which was its direct competitor. Later, it was also discovered that the accused had transferred or downloaded various confidential information of Company A into his personal e-mail id. Screenshots of the mail id of the accused was produced by Company A which showed that such information was passed on to Company B. Thus, the Court was of the view that such act amounted to hacking under Section 66 of the Information Technology Act, 2000; cheating and

26. *American Express Bank Limited v. Ms. Priya Puri* 2006 (110) FLR 2061.

27. IPC provisions like Section 381(Theft by clerk or servant which is punishable with imprisonment which may extend to 7 years and fine); Section 403(Dishonest misappropriation of property which is punishable with imprisonment which may extend to 2 years or fine or both); Section 405 (Criminal breach of trust which is punishable with imprisonment which may extend to 3 years or fine or both); Section 408(Criminal breach of trust by a clerk or servant which is punishable with imprisonment which may extend to 7 years and fine); Section 415(Cheating which is punishable with imprisonment which may extend to 1 year or fine or both); can also be resorted to by the employers in case of breach of confidentiality on part of the employees post-employment period.

28. AIR 1963 SC 1094.

29. 2008 CriLJ 4356.

dishonestly inducing of property under Section 420 of IPC and criminal breach of trust under Section 406 of IPC.

The uncertainty of the judicial decisions over the non-compete clauses has resulted in the development and taking recourse to a concept called “garden leave” in the corporate industry, having its genesis in England,³⁰ under which, employees are paid their full salary during the period in which they are restrained from competing. However, when the validity of “garden leave” clauses came for consideration before the Bombay High Court, it was argued that “*the Garden Leave Clause is... prima facie in restraint of trade and is hit by Section 27 of the Contract Act. The effect of the clause is to prohibit the employee from taking up any employment during the period of three months upon the cessation of the employment*”. The Bombay High Court, accepting the argument, held that obstructing “an employee who has left service from obtaining gainful employment elsewhere is not fair or proper”.³¹ However, the concept of garden leave has gained popularity recently in India and practiced across various companies.

IV. Difference between Trade Secrets and Confidential Information

Information may be classified as a trade secret if such information is exclusively available to a particular business, is not available in the public domain, and allows that business to obtain an economic advantage over its competitors. Secret processes of manufacture, methods of construction, customer databases and business plans may constitute trade secrets. Trade secrets enjoy protection of the law, both during and after termination of employment.

In *Polymer Papers Limited v. Gurmit Singh & Ors.*³², the Delhi High Court considered a case wherein plaintiff sought to restrain an employee from disclosing certain trade secrets on the basis of rights claimed under intellectual property law, even though there was no agreement between the parties. The defendant had earlier worked with the plaintiff’s company and later joined a competing venture. The plaintiff had alleged that the defendant was revealing trade secrets and other confidential information related to certain products in respect of which plaintiff had exclusive rights, and had thus committed breach. However, as per the facts as substantiated before the Delhi High Court, there was no agreement between the parties and plaintiff had not made disclosure of material facts or concealed information relating to the relation between plaintiff and the competing company that defendant had joined. Consequently, Delhi High Court held that in any event, plaintiff was not entitled to discretionary relief of injunction. The Delhi High Court further held that plaintiff did not possess any exclusive intellectual property rights in respect of the products in dispute, and hence, there was no ground on which plaintiff was entitled to injunction.

However, there may be other information particular to a business which is highly important, confidential and instrumental to the success of that business. Affording protection to such information is a more complicated exercise. In *Faccenda Chicken Ltd v. Fowler*³³, the English Court of Appeal classified ‘confidential information’ into the following two categories: ‘highly confidential information’, which are entitled to protection after the termination of the employment relationship, and ‘less confidential information’ which are not so entitled.³⁴ While creating the trinity of ‘trade secrets’, ‘highly confidential information’

30. Evening Standard Co. Ltd. v. Henderson, [1987] I.R.L.R. 64. (This case is credited with giving rise to the concept of garden leave. The court found that Henderson “ought not, pending trial, to be allowed to do the very thing which his contract was intended to stop him doing, namely working for somebody else during the period of his contract.”)

31. VFS Global Services Private Limited v. Mr. Suprit Roy, 2008 (2) Bom. CR 446, 2008 (3) MhLj 266.

32. AIR 2002 Del 530.

33. Relied on Wolf Mountain Coal Limited v Netherlands Pacific Mining Co Pvt Ltd, (1988) 31 BCLR (2d) 16; Johnson v Agnew, (1980) AC 367.

34. Coin-A-Matic (Pacific) Ltd v Saibil et al, (1986), 13 CCEL 59 (BCSC) (the Court held that solicitation of the ex-employer’s clients was part of a permissible general solicitation as it is obtained through ‘less confidential information’); White Oaks Welding Supplies v Tapp (1983), 42 OR (2d) 445 (HC).

and 'less confidential information', the Court came up with a new challenge for other courts to identify where an employee's general knowledge ends and where the employee's confidentiality begins.³⁵ India does not have a concrete legislation with respect to trade secrets and therefore, companies in India have to rely on such agreements to protect its trade secrets. It is interesting to note that even countries that have a statute with respect to the protection of trade secrets often rely on the necessity of non-compete agreements.

V. Training Bonds

The employer in order to protect and safeguard its interest often executes a training bond with its employees for training imparted and/or provided during the course of their employment or specifically provided prior to their joining, to ensure that they work for a particular duration. These bonds specify the minimum period for which the employee shall serve the employer, though such clauses may not be enforceable in the Indian context. If the employee acts in breach of such an agreement, the employer can seek compensation, at times which are limited to the expenses incurred for training the employees. However, the compensation demanded should be reasonable and not imposed by way of a penalty. The employer is entitled only to reasonable compensation based on facts and circumstances of the case.³⁶

The sole purpose of such contracts is to ensure that the resources and time of employers are not rendered meaningless in training with no benefits derived whatsoever due to early resignation. In *Satyam Computer Services Limited v. Ladella Ravichander*,³⁷ the defendant was an employee who had abruptly left the company and as per terms of employment bond, was required to pay liquidated damages of Rs. 2,00,000 along with stipend charges and

additional expenses incurred by the company for the defendant. However, the Andhra Pradesh High Court held that such action by the defendant did not cause any damage or loss to the company and it would be unreasonable to acquire such an amount from the defendant. An amount of Rs. 1,00,000 was fixed by the court as reasonable damages taking into consideration the period of work and the fact that no actual loss was caused to the Company.

In *Kailash Kumar v. Syndicate Bank Ltd.*,³⁸ the employee had entered into a bond with the employer which stipulated that if the employee intends to discontinue or resign from services during the probationary period, the employee will be required to reimburse the bond amount of Rs. 2,00,000 to the employer for the notional training expenses and any other expenses that the employer had incurred on behalf of the employee. The Delhi High Court observed that there was no occasion for the employee to undergo training or the employer to incur any expenses on training. The court observed that expenses incurred by the employer towards carrying out the process of appointment including advertisement, or the expenses incurred expenses in future for making an appointment against the vacancy arisen because of the employee's resignation cannot be treated as amounts reimbursable by the employee. Accordingly, the Delhi High Court held that since there were no training expenses incurred in the present case, the condition containing the employment bond would not be enforceable against the employee at the time of the employee's resignation.

Similarly, in *M/s Sicpa India Limited v. Shri Manas Pratim Deb*,³⁹ the employee had to enter into two bonds, one which provided that the employee had to work for a period of five years or pay an amount of Rs. 200,000, and another which stated that the expenditure on business trip would be recouped from the services of the employee. The employee resigned from the company towards the end of five years of his/

35. *Poeton Ltd v Horton*, [2001] FSR 169; *FSS Travel v Johnson*, [1999] FSR 505.

36.

37. MANU/AP/0416/2011.

38. 2018IAD(Delhi)444

39. MANU/DE/6554/2011.

her bond period. The company instructed the employee to pay certain amounts for medical expenses incurred by the company on behalf of the employee. The employee refused to pay the amount as it was unreasonable and the matter was taken up to the court where it was held that the five years mentioned in the first bond was almost coming towards the end and Rs. 67,596 was already recouped from the services of the employee for the second bond. Therefore, taking into consideration the period left in the bond, the court awarded reasonable damages to the employer.

In *Toshnial Brothers (Pvt.) Ltd. v. E. Eswarprasad & Ors.*⁴⁰ the Madras High Court dealt with a situation where an employee working as sales engineer in breach of his undertaking left his services within 14 months as against the contractually agreed period of three years. The Madras High Court held that the employer was entitled to recover the stipulated damages, which is a genuine pre-estimate by the parties of the damages incurred. There is no requirement to prove separately any post-breach damages. The employer is required to establish that the employee was the beneficiary of special favor or concession or training at the cost and expense wholly or on the part of the employer and there had been a breach of the undertaking by the beneficiary of the same. In such cases, the breach would per se constitute the required legal injury resulting for the employer due to breach of the contract.

VI. Non-Poaching Agreements

Whilst non-compete, non-solicitation and non-disclosure agreements deal with the employer-employee relationship, a fourth class of restrictive agreement which are often signed by the parties is the non-poaching agreement which is executed between two employers. In an age of constantly evolving specialized

industries and niche talent pools, employers often tend to invest a very large amount of human capital into their employees. If these employees subsequently join direct competitors, it can result in substantial economic loss for the ex-employer. A non-poaching agreement therefore enforces guidelines to be followed in cases of lateral hiring.

This type of agreement essentially considers the case wherein two organizations/companies agree not to solicit or 'poach' the employees of their direct competitors. Non-poaching agreement per se does not contravene Section 27 of the Contract Act as it does not restraint an employee from seeking and/or applying for any job/employment. What this class of agreement does instead is, it simply mandates that one competitor should seek the consent of the other before hiring that other competitors' employee/s.

However, non-poaching agreements have been thought to enhance non-competitive behavior in the market place. This was the view adopted by the Department of Justice in the USA in 2009 wherein investigations were initiated into companies who had signed non-poaching agreements. In India, the law regarding Section 27 of the Contract Act is well settled as has been previously discussed. However, the issue of non-poaching agreements now also comes within the ambit of the Competition Act, 2002. Whilst no cases have been considered exclusively in connection with non-poaching agreements under the Competition Act so far, Section 3 of the Competition Act expressly states that agreements which are anti-competitive in nature are banned.

However, so long as non-poaching agreements prescribe guidelines for lateral hiring and do not outrightly ban this practice, they are not thought to be in contravention of Section 3.

40. 1997 LLR 500.

4. Possible Ways to Enforce Restrictive Covenants

- i. Serving the employee with a legal notice.
- ii. Seeking enforcement of undertaking or encashment of cheque based on clauses of the agreement.
- iii. Initiating civil suit seeking injunction/ specific performance of contract as well as damages.
- iv. While damages are a remedy that an employer may seek for breach of employment contract, including breach of confidential agreements, the same requires trial and evidence. Therefore, the employer once again would require only injunction under Order XXXIX Rule 1 and 2 of the Code of Civil Procedure, 1908 (“CPC”) at the interim stage or initially if they apprehend that premature departure of an employee could cause injury to the employer.
- v. Filing suit for declaration that the acts of the employee amount to tortious interference in the business of the employer and injunction therefrom.⁴¹

41. Embee Software Private Ltd v. Samir Kumar Shaw & Ors. 2012(3)CHN250.

5. Emerging Trends

The discussion above on Section 27 of the Contract Act clearly states that restraints can be enforced only when the employee is in the service of the employer and these restraints cannot be enforced after the employee leaves service of the employer – irrespective of whether the employee leaves voluntarily or as a result of his/her service being terminated.⁴² However, the only restrictions that would be enforceable in an Indian court after the termination of employment would be non-disclosure of confidential information and non-solicitation of customers and employees.

In *Gujarat Bottling v. Coca Cola*,⁴³ the Supreme Court observed:-

“...In the past, nations often went to war for the protection and advancement of their economic interests. Things have changed now.

In the time of cut throat competition and high employee turnover rate, the employers usually try to protect their trade secrets and in order to compete in the market, make their employees sign contracts/agreements which restrain their employees from disclosing the job profile, in future, or from competing with the same establishment or from working with the competitors. These agreements entered between the employer and the employee should not hamper the growth of the employee as well as secure the interests of the employer.

The approach used by the Supreme Court in *Percept D'Mark (India) Pvt. Ltd. v. Zaheer Khan & Anr.*⁴⁴ seems to be the most appropriate approach to address concerns arising out of restrictive covenants:-

“.....Somewhere there must be a line between those contracts which are in restraint of trade and whose reasonableness can, therefore, be considered by the courts, and those contracts which merely regulate the normal commercial relations between the parties and are, therefore, free from doctrine....”

The relevance of inserting restrictive covenants in all kinds of contracts has evolved over a period and gained significant importance specifically due to growing trend of employer-employee disputes. The Law Commission of India in its 13th Report in 1958 had recommended that Section 27 under the Contract Act shall be amended to include only agreements in restraint of trade that are unreasonable or are not in the interests of public to be void, however till date no such amendment has taken place.⁴⁵ Restrictive covenants need to be analyzed on a case-to-case basis. While broad principles emerge from the rulings, whether a condition is violative or not is a question of fact which only a court of law can examine and arrive at an appropriate conclusion based on facts and circumstances.

42. *Superintendence Co. of India Pvt. Ltd. v. Krishan Murgai*, AIR 1980 SC 1717.

43. AIR 1995 SC 2372.

44. AIR 2006 SC 3426

45. Law Commission of India Report, 1958 Available at <http://lawcommissionofindia.nic.in/1-50/Report13.pdf>, last seen at February 26, 2014.

6. Index of Cases

Sr. no.	Cases	Relevant Paragraphs	Page
1.	Affle Holdings Pte Limited Vs. Saurabh Singh, OMP 1257/2014	Court held that a negative covenant in the employment contract, which prohibits carrying on a competing business beyond the tenure of the contract is void and not enforceable. This prohibition operates on account of the provisions of Section 27 of the Contract Act.	5
2.	Petrofina (Great Britain) v. Martin, (1966) Ch. 146.	An agreement in restraint of trade is one in which a party agrees with any other party to restrict his liberty in the future to carry on trade with other persons who are not parties to the contract in such a manner as he chooses.	6
3.	Niranjan Shankar Golikari v. The Century Spinning Mfg. Co. Ltd. (1967)2 SCR 378.	Section 27 itself is succinct and doesn't offer insight as to what kinds of restraints are valid; the qualification of 'reasonable' restraints being valid and enforceable has been read into Section 27 by the courts. “...Considerations against restrictive covenants are different in cases where the restriction is to apply during the period after the termination of the contract than those in cases where it is to operate during the period of the contract. Negative covenants operative during the period of the contract of employment when the employee is bound to serve his employer exclusively are generally not regarded as restraint of trade and therefore do not fall under section 27 of the Contract Act. A negative covenant that the employee would not engage himself in a trade or business or would not get himself employed by any other master for whom he would perform similar or substantially similar duties is not therefore a restraint of trade unless the contract as aforesaid is unconscionable or excessively harsh or unreasonable or one sided....”	6, 7
4.	LE Passage to India Tours & Travels Pvt. Ltd Vs. Deepak Bhatnagar	A contract of employment, which debar an employee, restraining him to carry on an employment after the term of employment, is not protected under Section 27 of the Contract Act.	7
5.	Kumar Apurva v. Valuefirst Digital Media Pvt. Ltd, 2015 SCC Online Del 8360	Appellant restricted from carrying any activity which is competitive to that of Company, and also from soliciting , interfering with, disturbing or attempting to disturb the relationship between the company or subsidiary and third party, including any customer or supplier of the company or subsidiary.	7

6.	Superintendence Co. of India Pvt. Ltd. v. Krishan Murgai, AIR 1980 SC 1717.	Restrictive agreements bind current employees in lawful employment of the employer throughout the duration of the contract.	16
7.	Ozone Spa Pvt. Ltd. v. Pure Fitness & Ors, 2015 222 DLT 372	Restricted the defendants from establishing, running or setting up any competing business in any area that falls within a range of 4 kilometers from the premises of the Plaintiff	8
8.	Percept D'Mark (India) Pvt. Ltd. v. Zaheer Khan & Anr, AIR 2006 SC 3426.	<p>Under Section 27 of the Contract Act (a) a restrictive covenant extending beyond the term of the contract is void and not enforceable. (b) The doctrine of restraint of trade does not apply during the continuance of the contract for employment and it applied only when the contract comes to an end.</p> <p>Somewhere there must be a line between those contracts which are in restraint of trade and whose reasonableness can, therefore, be considered by the courts, and those contracts which merely regulate the normal commercial relations between the parties and are, therefore, free from doctrine.</p>	7, 16
9.	Desiccant Rotors International Pvt Ltd v Bappaditya Sarkar & Anr., Delhi HC, CS (OS) No. 337/2008 (decided on July 14, 2009).	Court allowed an injunction against the manager prohibiting him from soliciting Desiccant's customers and suppliers to stand in effect. It is pertinent to note, however, that the Court held that a marketing manager could not be deemed to possess confidential information and that his written declaration to that effect in his employment agreement was meaningless and thus rejected Desiccant's claim to enforce the confidentiality obligations on the manager.	8
10.	M/s.FLSmidth Pvt. Ltd. v M/s. Secan Invescast (India) Pvt.Ltd., (2013) 1 CTC 886.	<p>Merely approaching customers of a previous employer does not amount to solicitation until orders are placed by such customers based on such approach.</p> <p>Test for solicitation: It needs to be proved that erstwhile customers were approached and only on account of such solicitation, customers placed orders with the respondent. Mere production of quotation would not serve the purpose. It is not as if the appellant is without any remedy. In case the Court ultimately holds that the appellant has got a case on merits, they can be compensated by awarding damages.</p>	8

11.	Embee Software Pvt. Ltd. v. Samir Kumar Shaw, AIR 2012 Cal 141.	If the act of soliciting by the respondents takes such an active form that it induces the customers of the plaintiff to break their contract with the plaintiff and enter into a contract with the said respondents or the fourth respondent or prevents other persons from entering into a contract with the plaintiff, such acts of soliciting cannot be permitted.	8, 15
12.	Crowson Fabrics Ltd. v. Rider, [2007] EWHC 2942	Even though the act of retaining various documents belonging to the ex-employer concerning customer and supplier contact details by the employees during employment did not amount to a breach of confidentiality, such 'illegitimate' actions constituted a breach of employees' duty of fidelity.	9
13.	Arvinder Singh and Anr. v. Lal Pathlabs Pvt. Ltd. & Ors., 2015 SCC Online Del 8337	Court held that an agreement in restraint of carrying of any professional activity is contrary to law.	9
14.	Wipro Ltd. v. Beckman Coulter International SA,, 2006 (3) ARBLR 118 (Delhi)	Stricter view for employee-employer contracts: The reason being that in the latter kind of contracts, the parties are expected to have dealt with each other on more or less an equal footing, whereas in employer- employee contracts, the norm is that the employer has an advantage over the employee and it is quite often the case that employees have to sign standard form contracts or not be employed at all.	9
15.	GEA Energy System India Ltd. v. Germanischer Lloyd Aktiengesellschaft, [2009]149Comp-Cas689(Mad)	The restrictive clause only stated that Defendant may not carry on a business which is prejudicial to the Plaintiff company and as such did not restrict the Defendant in absolute terms from carrying on any business. The Madras High Court further noted that the parties entered into the Agreement of their own free will and as per the terms of the Agreement, had equal bargaining power. The terms were not one-sided and did not betray weakness of any one party. It would thus be seen that the same test as is applicable in the context of employment contracts, is substantially applicable even in the context of joint venture agreements.	10
16.	Escorts Const. Equipment Ltd v. Action Const. Equipment P. Ltd., AIR 1999 Delhi 73.	[Former Employees carrying out similar business] Restrained from using Substantial imitation or reproduction of the industrial drawings of the plaintiffs or from using in any other manner whatsoever the technical knowhow, specifications or drawings of the plaintiffs.	10

17.	Burlington Home Shopping Pvt. Ltd.v. Rajnish Chibber, MANU/DE/0718/1995: 61(1995)DLT6	The Court restrained carrying on of any business including mail order business by utilizing the list of clientele/customers included in the database of the petitioner.	10
18.	Diljeet Titus v. Mr. Alfred A. Adebare and Others, 2006 (32) PTC 609 (Del).	(Question of ownership of copyright work)- On termination of employment, the defendant took away important confidential business data, such as client lists and proprietary drafts, belonging to the plaintiff. The defendants contended that, they were the owners of the copyright work as it was done by them during their employment since the relation between parties was not that of an employer and employee. The Delhi High Court rejected this contention and ruled that the plaintiff had a clear right in the material taken away by the defendant. Accordingly, the Delhi High Court restrained the defendant from using the information taken away illegally. It should be noted that the Delhi High Court did not prohibit the defendants from carrying on a similar service. The defendants were only restrained from using the information they took, as this was necessary to protect the interests of the plaintiff.	10
19.	American Express Bank Ltd. v. Ms. Priya Puri, 2006 (110) FLR1061	The Delhi High Court rejected this plea on the grounds that “The inconvenience caused to the defendant shall be much more in case the injunction as prayed by the plaintiff is granted in his favour”. The Delhi High Court further observed that in order to claim copyrights, the plaintiff should have abridged, arranged and/or done something “which would show that they have done something with the material which is available in public domain so as to claim exclusive rights on that”.	11
20.	Pyarelal Bhargava v. State of Rajasthan, AIR 1963 SC 1094	[Allegation of theft for temporary removal of files by employee of Government] The Supreme Court held that even temporary removal of documents with a dishonest intention could cause loss or harm and hence, would be considered theft.	11
21.	Abhinav Gupta v. State of Haryana , 2008 CriLJ 4356	[Allegation of hacking by employer]The Court was of the view that the act of transferring or downloading various confidential information of the company into personal e-mail id. amounted to hacking under Section 66 of the Information Technology Act, 2000; cheating and dishonestly inducing of property under Section 420 of IPC and also amounted to criminal breach of trust under Section 406 of IPC.	11

22.	Evening Standard Co. Ltd. v. Henderson, [1987] I.R.L.R. 64.	[Legitimate recognition to Garden leave clauses] The court held that employee ought not, pending trial, to be allowed to do the very thing which his contract was intended to stop him doing, namely working for somebody else during the period of his contract.	12
23.	VFS Global Services Private Limited v. Mr. Suprit Roy, 2008 (2) Bom. CR 446, 2008 (3) MhLj 266.	To obstruct on employee who has left service from obtaining gainful employment elsewhere is not fair or proper.-[holding Garden Leave clauses in restraint of trade under Section 27 of The Contract Act, 1872]	12
24.	Polymer Papers Limited v. Gurmit Singh & Ors., AIR 2002 Del 530	[Claiming trade secret against employee as an intellectual property right] As per the facts as substantiated before the Delhi High Court, there was no agreement between Plaintiff and Defendant and further, Plaintiff had not made disclosure of material facts and had also not concealed information relating to the relation between Plaintiff and the competing company that Defendant had joined. Consequently, the Delhi High Court held that in any event, Plaintiff was not entitled to discretionary relief of injunction. The Delhi High Court further held that Plaintiff did not possess any exclusive intellectual property rights in respect of the products in dispute and hence there was no ground on which Plaintiff was entitled to injunction.	12
25.	Faccenda Chicken v. Fowler, [1986] 1 All E.R. 617 (C.A.)	The English Court of Appeal classified 'confidential information' into the following two categories: 'highly confidential information', which are entitled to protection after the termination of the employment relationship, and 'less confidential information' which are not so entitled.	13
26.	Poeton Ltd v Horton, [2001] FSR 169	In creating the trinity of 'trade secrets', 'highly confidential information' and 'less confidential information', the Court came up with a new challenge for other courts to identify where an employee's general knowledge ends and where the employee's confidentiality begins	13
27.	Satyam Computer Services Limited v. Ladella Ravichander, MANU/ AP/0416/2011	[In relation to employee abruptly leaving the company] The Andhra Pradesh High Court held that such action by the Defendant did not cause any damage or loss to the company and it would be unreasonable to acquire such amount from the Defendant. An amount of Rs. 100, 000 was fixed by the court as reasonable damages taking into consideration the period of work and the fact that no actual loss was caused to the Company.	13

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29.	Hi Tech Systems and Services Ltd. v. Suprabhat Ray, 2015 SCC Online Cal 1192: AIR 2015 Cal 261	Respondent restricted from serving as a Sales agent of the competing companies as they had acted in breach and were in process of utilizing trade secrets and confidential information of the plaintiff company.	10
30.	Toshnial Brothers (Pvt.) Ltd. v. E.Eswarprasad & Ors, 1997 LLR 500	Sudden termination of contract- The Madras High Court held that the employer was entitled to recover the stipulated damages, which is a genuine pre- estimate by the parties of the damages incurred. There is no requirement to prove separately any post-breach damages. The employer is required to establish that the employee was the beneficiary of special favour or concession or training at the cost and expense wholly or in part of the employer and there had been a breach of the undertaking by the beneficiary of the same. In such cases, the breach would per se constitute the required legal injury resulting for the employer due to breach of the contract.	14
31.	Kailash Kumar v. Syndicate Bank Ltd. 2018 IAD(Delhi) 444	Enforceability of employment bond - In the absence of any expenses incurred by the employer towards the employee's training, the employment bond would not be enforceable.	13

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	<p>IP Centric Deals: Key legal, tax and structuring considerations from Indian law perspective</p>		<p>Fund Formation: Attracting Global Investors</p>		<p>Building a Successful Blockchain Ecosystem for India</p>
	<p>February 2019</p>		<p>February 2019</p>		<p>December 2018</p>

NDA Insights

TITLE	TYPE	DATE
Bombay High Court Quashes 197 Order Rejecting Mauritius Tax Treaty Benefits	Tax	May 2019
Payments For Online Subscription Services Not To Be Taxed As Royalty	Tax	May 2019
Taxation Of Unexplained Cash Credits: Recent Developments	Tax	May 2019
Taxing Cross-Border Production Activities – Contract Language Re-Emphasized	Tax	May 2019
Delhi High Court Sets Aside The Arbitral Award Passed In The Airport Metro Express Dispute	Dispute Resolution	May 2019
Arbitration Clause In An Unstamped Agreement? Supreme Court Lays Down The Law	Dispute Resolution	May 2019
English Court’s Dictum On The “Without Prejudice” Rule	Dispute Resolution	May 2019
Bombay High Court Settles Dust Over Validity Of ‘Options’ Under Securities Law	Dispute Resolution	May 2019
Stamp Duty Stumps Brokers And Demat Transfers	Regulatory	May 2019
External Commercial Borrowings: Regulatory Framework Substantially Relaxed	Regulatory	May 2019
NDA Presents Regulatory Approaches On Crypto-Assets To The Government Of India	Regulatory	May 2019
To Strike While The Iron Is Hot: Sebi Relaxes Norms For Listing Of Start-Ups	Regulatory	May 2019

Research @ NDA

Research is the DNA of NDA. In early 1980s, our firm emerged from an extensive, and then pioneering, research by Nishith M. Desai on the taxation of cross-border transactions. The research book written by him provided the foundation for our international tax practice. Since then, we have relied upon research to be the cornerstone of our practice development. Today, research is fully ingrained in the firm's culture.

Our dedication to research has been instrumental in creating thought leadership in various areas of law and public policy. Through research, we develop intellectual capital and leverage it actively for both our clients and the development of our associates. We use research to discover new thinking, approaches, skills and reflections on jurisprudence, and ultimately deliver superior value to our clients. Over time, we have embedded a culture and built processes of learning through research that give us a robust edge in providing best quality advices and services to our clients, to our fraternity and to the community at large.

Every member of the firm is required to participate in research activities. The seeds of research are typically sown in hour-long continuing education sessions conducted every day as the first thing in the morning. Free interactions in these sessions help associates identify new legal, regulatory, technological and business trends that require intellectual investigation from the legal and tax perspectives. Then, one or few associates take up an emerging trend or issue under the guidance of seniors and put it through our "Anticipate-Prepare-Deliver" research model.

As the first step, they would conduct a capsule research, which involves a quick analysis of readily available secondary data. Often such basic research provides valuable insights and creates broader understanding of the issue for the involved associates, who in turn would disseminate it to other associates through tacit and explicit knowledge exchange processes. For us, knowledge sharing is as important an attribute as knowledge acquisition.

When the issue requires further investigation, we develop an extensive research paper. Often we collect our own primary data when we feel the issue demands going deep to the root or when we find gaps in secondary data. In some cases, we have even taken up multi-year research projects to investigate every aspect of the topic and build unparalleled mastery. Our TMT practice, IP practice, Pharma & Healthcare/Med-Tech and Medical Device, practice and energy sector practice have emerged from such projects. Research in essence graduates to Knowledge, and finally to *Intellectual Property*.

Over the years, we have produced some outstanding research papers, articles, webinars and talks. Almost on daily basis, we analyze and offer our perspective on latest legal developments through our regular "Hotlines", which go out to our clients and fraternity. These Hotlines provide immediate awareness and quick reference, and have been eagerly received. We also provide expanded commentary on issues through detailed articles for publication in newspapers and periodicals for dissemination to wider audience. Our Lab Reports dissect and analyze a published, distinctive legal transaction using multiple lenses and offer various perspectives, including some even overlooked by the executors of the transaction. We regularly write extensive research articles and disseminate them through our website. Our research has also contributed to public policy discourse, helped state and central governments in drafting statutes, and provided regulators with much needed comparative research for rule making. Our discourses on Taxation of eCommerce, Arbitration, and Direct Tax Code have been widely acknowledged. Although we invest heavily in terms of time and expenses in our research activities, we are happy to provide unlimited access to our research to our clients and the community for greater good.

As we continue to grow through our research-based approach, we now have established an exclusive four-acre, state-of-the-art research center, just a 45-minute ferry ride from Mumbai but in the middle of verdant hills of reclusive Alibaug-Raigadh district. **Imaginarium AliGunjan** is a platform for creative thinking; an apolitical ecosystem that connects multi-disciplinary threads of ideas, innovation and imagination. Designed to inspire 'blue sky' thinking, research, exploration and synthesis, reflections and communication, it aims to bring in wholeness – that leads to answers to the biggest challenges of our time and beyond. It seeks to be a bridge that connects the futuristic advancements of diverse disciplines. It offers a space, both virtually and literally, for integration and synthesis of knowhow and innovation from various streams and serves as a dais to internationally renowned professionals to share their expertise and experience with our associates and select clients.

We would love to hear your suggestions on our research reports. Please feel free to contact us at research@nishithdesai.com

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