



A CRITICAL ANALYSIS OF A CONFIDENTIALITY AGREEMENT UNDER COMPANY LAW

Dr. Hiren B Patel

Assistant Professor, Maneklal Nanavati Law College, Ahmedabad, Gujarat, India.

ABSTRACT

The confidentiality agreement is a legal document that is used to safeguard sensitive information about a firm, employee, or employer. Confidentiality originated in India's early independent days as a rising time for business, and it evolved into a basic and essential element throughout the era of globalisation since it protects sensitive information as well as trade secrets, which play a critical role in company. Non-disclosure agreements and confidentiality agreements have the same goal, but confidentiality agreements are more complicated, provide more protection, and are more often employed in businesses. The necessity for a confidentiality agreement arose when the employer and employees of the company needed to discuss sensitive information because its exposure to the outside could cause major damage to the organisation. The firm's reputation would be jeopardised if any of its employees quit and went to work for a competitor company in the same area, knowing all of the former company's secrets. To avoid such situations, a confidentiality agreement is utilised. As a result, the researcher's goal in this study is to delve into the topic of confidentiality agreements and how they are assisting organisations in the modern world from the standpoint of company law, as well as how these contracts are lawful under contract law.

KEYWORDS: Confidentiality, Agreement, Company, Business, Protection.

INTRODUCTION:

In today's world, all companies are supported by fresh ideas and unique thinking, which play a critical role in determining a company's future and sustainability in a certain industry. These are believed to be the most valuable knowledge that must be kept secret by company employees; in general, trade secrets are secrets that are exclusively tied to a corporation. For example, the Coca Cola formula, which is regarded one of the most valuable trade secrets, has been kept safe by the corporation in one of the world's most secure lockers.

In *Coca-Cola Bottling Co. of Shreveport, Inc. v. the Coca-Cola Co.*², employees quit after a year and went to work for a competitor, for which the firm sued them for breach of confidentiality and an investigation was launched. The three employees were later convicted guilty of disclosing the Coca-Cola Company's secret to other competitors. It is necessary to construct a proper agreement between the employee and the employer to safeguard the firm's sensitive information in order to protect the company and its secrets. Following the globalisation and rapid development of creative ideas and startups in the twentieth century, employers were required to preserve confidential information shared between them and their employees.

To protect themselves from this type of fraud, it has been standard practise for businesses to attach non-disclosure or non-competition clauses when recruiting new personnel. Companies began implementing confidentiality agreements between the corporation and its employees when it became necessary. Employees and trade secrets are regarded the two most important features and assets of a business in order to run it successfully.

OBJECTIVES/AIMS OF THE STUDY:

The main of this project is to understand the need for the creation of Confidentiality agreements

They understand the importance of creating confidentiality agreements under the company law and contract law of India

NEED FOR CONFIDENTIAL AGREEMENTS TO PROTECT COMMERCIAL SECRECY:

TYPES OF CONFIDENTIAL INFORMATION:

Employee Information:

Confidentiality Agreements are commonly found between employees and employers to protect the company's secrets, but we often forget that the information provided by employees should also be protected because they provide personal and sensitive information to the company when applying for a job. For instance, if the information provided by X is used by Y to get access to confidential materials, this could have unintended effects. Because there is a higher risk of misappropriation and fraud, the corporation should also protect the personal information of its personnel.

Information on the Business:

Business information refers to any trade secrets that are unique to a particular company, and these must be secured with extreme care and caution because they

are vital to the company's operations. The trade secrets will give the company a competitive advantage because they are unique to the company, and revealing them to the outside world could harm the company by providing other competitors an advantage. Staff in the technical group, as well as any other employees, will often have access to this information that the general public does not. To protect the information, the corporation will engage into confidential and non-disclosure agreements with the personnel in advance.

There is a need to enter into confidentiality agreements between both parties in some cases where two companies are merging or if one of the companies is acquiring the other company in which the target company holds some shares because the acquiring company will have access to the target company's confidential information.

Information for Management:

Information about a company's management is also vital at times, even if it isn't illegal in and of itself. This is especially true when employees are regarded the company's most valuable assets. For example, if A uses the information from the disciplinary committee against B, it may harm B's reputation. As a result, the corporation must preserve some secrecy in its crucial daily operations.

LEGAL PROVISIONS THAT MANDATE THE CONFIDENTIALITY AGREEMENTS:

Under Contract Law:

When compared to the United States and the United Kingdom, India's law on confidentiality and trade secret protection is lacking. The Uniform Trade Secrets Act (UTSA) is a separate piece of legislation in the United States that protects trade secrets solely. Because the majority of Indian laws are based on English law, the concept of confidentiality is more popular in common law countries than in contractual law.

In Indian courts, however, any agreement formed between the two parties as a confidential agreement that complies with Indian Contract law is considered legal. *Sunil Mazumdar v. Aryodaya Spinning & Weaving Mills Co. Ltd.*⁴ is an example. The defendant was a diploma holder and qualified technician in the textiles business who signed a contract with the plaintiff company to work in a spinning mill for a period of five years and began working accordingly. He left his employment after completing a year's worth of labour and went to work for a competitor of the plaintiff's spinning mill company. He has not only begun working, but he also has detailed information on the spinning of the cloth during the specific breeding season utilised in the plaintiff's company, which he has provided to the competitor. This was deemed a breach of sensitive information as well as a breach of employment terms and conditions, and the court issued the injunction.

The essential criterion for issuing an injunction in this case is a violation of confidential information or the disclosure of a trade secret, rather than a general restraint of trade, which is not admissible under section 27 of the Indian Contract Act, 1872. In the other case, *Magan Lal v. Ambica Mills*⁵, the court refused to award the injunction because there was no element of trade secret, and the court reasoned that mere competition and the employee's own talents (personal) are

not sufficient grounds for restraining the other party.

Under Competition Law:

Restriction on disclosure of information is covered by Section 57 of the Competition Act of 2002. No information relating to any enterprise received by or on behalf of [the Commission or the Appellate Tribunal] for this Act may be disclosed other than in conformity with or for this Act or any other law currently in effect without the prior written authorization of the enterprise.

It was then revised as Clause 44 indicates in the 2007 Competition Amendment Bill. This section proposes to change Section 57 of the Competition Act of 2002, which regulates information disclosure limits. The Appellate Tribunal will be subject to Section 57 of the Competition Act, 2002 as a result of the proposal to create a new Chapter VIII-A via Clause 43 of the Bill. The proposed modification has a major impact.

The primary goal of enacting these regulations is to preserve trade secrets and, as a result, business rivals' commercial secrecy.

In the case of *Sterile industries v. Designated authority*⁷, it was held that in the absence of trust or antitrust concerns, it is obligatory for the designated authority to keep secret information secured, as this is the only way to prevent it from being used by competitor authorities. The Competition Act's Section 41(3) aids in the protection of information during the investigation. If the investigation operations are carried out in accordance with the Director-General, this provision can be used under Section 240 and Section 240-A of the Companies Act, 2013.

Section 57 of the Competition Act of 2002 details the circumstances in which confidentiality cannot be asserted or information must be shared.

- (i) Waving of the right by the enterprise itself; and
- (ii) For this Act or any other law for the time being in force.

Disclosure of the Identity of the Informant- The proviso to Regulation 6(a) of the Competition Commission of India (Lesser Penalty) Regulations, 2009 provides for the conditions under which the identity of the applicant may be disclosed, if:

- (a) The disclosure is mandated by law
- (b) The applicant has voluntarily consented to disclose in writing
- (c) The applicant discloses it publicly

Grounds for Taking Away the Privacy of an Enterprise. During a Proceeding—Regulation 47 of the Competition Commission of India (General) Regulations, 2009 requires the proceedings before Commission not to be open to the public. However, the Commission may direct otherwise and record the reasons for the same. The factors to be taken into account by the Competition Commission of India (CCI) while deciding on this matter are:

- (a) If no significant harm is caused to the party owing to the disclosure.
- (b) Level of encouragement in publishing the information.
- (c) Efficiency and smooth functioning of the proceeding.
- (d) Considerations for the Commissions such as its resources.

Under Company Law:

In general, the confidentiality agreement plays an important role in business law when a company merges or acquires another.

During a merger and acquisition, the acquiring business gets extensive access to the target company's information. As a result, it is required to reach an agreement with the company that it will not expose the target company's trade secrets and will keep any unpublished information for themselves. People who have access to this unreleased information, as well as any insider information, may take advantage of it. The Security Exchange Board of India has put in place several restrictions to curb such behaviour. Insider trading (PIT) is prohibited, and access to Unpublished Sensitive Information is restricted, according to SEBI laws from 2015. (UPTI)

Code of Conduct of Companies and Fair Disclosure:

Every business should create a code of conduct in accordance with Schedule-A of the PIT Regulations. The PIT Regulations provide some minimal regulatory standards, such as equality policies, dividend publications, and so on. The Board of Directors of publicly traded firms is responsible for monitoring and reporting the trading process.

Confidentiality Under Insolvency Law:

Clause 21 of Schedule 1 of the Insolvency and Bankruptcy Code, 2016 prohibits the insolvency professional from releasing the information. He does, however, have the right to reveal the information if the law requires it. Section 29 (2)

clearly mentions the importance of keeping the information private.

The resolution professional will provide all relevant information to the resolution applicant in both physical and electronic form if the resolution applicant agrees to (a) follow current law regarding confidentiality and insider trading; (b) protect any intellectual property of the corporate debtor it may have access to; and (c) follow the resolution professional's instructions.

CONCLUSION:

Because the notion is so perplexing and revolves around the rights and duties of parties, there is still a strong discussion in India about whether trade secrets and confidential information should be considered under intellectual property rights or not. There is no specific statutory provision that governs these trade secrets and confidentiality agreements. Only a judicial method is used, which is bolstered by different case laws that are solely based on common law and equity principles. Though no comprehensive law has been formed on this subject to date, the agreements can be enforced as any other contract under the Indian Contract Act of 1872. Because India is growing rapidly on a global scale and receiving a large inflow of foreign investment, filling the gaps is seen as a pressing requirement, as it encourages Multinational Corporations (MNCs) to increase their investments in India.

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- IV. Sec 57 of Competition Act, 2002
- V. Sec 29(2) of Insolvency and bankruptcy code, 2016
- VI. Section 27 of Indian Contract Act, 1872