# ENFORCEMENT OF NEGATIVE COVENANTS IN A CONTRACT

By Partner - ***Venancio D Costa***
(L & L Partners)
&
Managing Associate - ***Astha Ojha***
(L & L Partners)

Section 27 of the Indian Contract Act, 1872 (hereinafter referred as the Act) states that any agreement in restraint of trade is void, except in case of selling of goodwill of a business.[1] Any restriction, which in anyway limits the right of a person to practice a lawful profession, trade or business is considered as being in restraint of trade and hence void, unless it falls within the exception of Section 27 of the Act i.e. in the event of sale of goodwill of a business, the Courts go into the reasonableness of the restriction.

Section 23 of the Act states that when the consideration or object of any agreement is unlawful, the agreement itself is void. This section lays down that the consideration or object of an agreement is unlawful if it is forbidden by law, or something that would defeat any provisions of law. This section imposes a restriction on the absolute freedom of a person to contract and subjects his rights to the overriding considerations of public policy and others enunciated under this section.[2] Further Section 10 of the Act states that an agreement is enforceable only if it is made for a lawful consideration and with a lawful object.

[1] It may be noted that the Constitution of India guarantees to citizens the right to practice any profession or carry on any occupation, trade or business. While this right is granted to citizens and is generally enforceable against State authorities, the principle has been embodied in Section 27 of the Indian Contract Act, 1872 which states:

"*27:* Agreement in restraint of Trade, void – Every agreement by which anyone is restrained from exercising a lawful profession, trade or business of any kind, is to that extent void.

Exception I- Saving of agreement not to carry on business of which goodwill 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."

[2] Re KL Gauba, AIR 1954 Bom 478

The doctrine of restraint of trade was first considered by the Indian courts in the case of *Madhub Chander v. Rajcoomar Doss*[3], wherein the Hon'ble Court held that the restriction contained in Section 27 of the Act does not apply only in cases of absolute restriction, it applies to all the agreements having even partial or general restraint.

- Non-compete clauses

The Courts in India have adopted the approach that non-compete clauses operating during the subsistence of an employment contract are generally not in restraint of trade. In *Wipro Ltd. V. Beckman Coulter International S.A.*[4], the Hon'ble Delhi High Court, after considering all the previous judgments on restrictive covenants, enumerated the following points-

a) Negative covenants tied up with positive covenants during the subsistence of a contact 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;

b) Negative covenants between employer and employee contracts pertaining to the period post termination and restricting an 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;

c) 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

[3] (1874) 14 Beng. L.R. 76
[4] (2006) 131 DLT 681

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;

d) 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 as to whether a particular term of a contract is or is not in restraint of trade, business or profession.

In a recent judgment of Independent News Service Pvt. Ltd. vs. Sucherita Kukreti[5], the Hon'ble Delhi High Court was dealing with a non-compete clause contained in the employment contract between a Television News Channel and its news broadcaster, which stated that the the Defendant (news broadcaster) had agreed to not associate herself with any other competing news channels during the course of the Agreement. The Defendant resigned from the services of the Plaintiff Company, whereafter the Plaintiff instituted a suit for permanent injunction restraining the Defendant from taking up similar work with any other News Channel during the term of her Employment Agreement with the Plaintiff, the Plaintiff also wanted to restrain the Defendant from allowing her name, image or voice to be associated with any other News Channel, additionally, the Plaintiff was also seeking a recovery of damages amounting to Rs. 2,00,10,000/-. The Hon'ble Court however, opined that granting an interim injunction would amount to restraining the Defendant from doing what she had been skilfully doing for the last 14 years and was also well known for it. The vocation of the Defendant as a 'News Presenter' qualified as a 'lawful profession' in terms of Section 27 of the Indian Contract Act. Hence, in consonance of Section 27, the said Employment Agreement was thus barred in law and could not be enforced in prejudice of the Defendant's career.

- Non-solicitation clauses:

[5] CS(OS) 43 of 2019 & I.A. No 1191/2019, decided on 25.01.2019

A non-solicitation clause is meant to put a restriction on an employee of a company, to prevent him from soliciting the employees or customers of a company, during and post-termination of employment. The Delhi High Court judgment in Wipro Ltd (*Supa*) said that a non-solicitation clause is not void. The facts of the case were that the Respondent was hired by Petitioner as sole and exclusive distributor of its products. The agreement they agreed upon contained a non-solicitation clause to be operative for two years after the termination of agreement. They had worked together for nearly 17 years. Respondent in lieu of launching their direct operations in India published an advertisement which sought applications from prospective employees and specifically mentioned that persons having experience in handling petitioner's products or similar ones. Petitioner considered this advertisement as a breach of the non-solicitation clause. The Court held that non-solicitation clause is a reasonable restriction and is not hit by Section 27 of the Indian Contract Act, 1872. The Court drew a distinction on enforceability of non-solicitation clause based on the relationship between parties. Non- solicitation clause will put a bar on the contracting parties from inducing each other employees but the restriction does not put a bar on employees to join the Respondent company. The restriction is put on the Petitioner and the Respondent and, therefore, has to be viewed more liberally than a restriction in an employer-employee contract.



• Confidentiality Clauses

Although the courts in India have consistently held restrictive covenants in employer-employee contracts, operating after the termination of the contract, is in restraint of trade, however, they have taken a liberal view towards enforcing the confidentiality clause.[6] The courts have considered 'confidential information' as any information which is a trade secret or which is not available to the general public or which is proprietary information.[7] In *Ambience India Pvt. Ltd. v. Naveen Jain*[8], it was held that "nothing has been indicated even as to what trade secrets or technical know-how was revealed to the defendant which should not be divulged to others. In a business house, the employees discharging their duties come across so many matters, but all these matters are not trade secrets or confidential matters of formulae, the divulging of which may be injurious to the employer. If the defendant on account of his employment with the plaintiff has learnt some

[6] Ambience India Pvt. Ltd. v. Naveen Jain 122 (2005) DLT 421
[7] Supra Note 7, American Express v. Priya Puri 2006 (110) FLR 1061
[8] Supra Note 15.

business acumen or ways of dealing with the customers or clients, the same do not constitute trade secrets or confidential information's, the divulgence or use of which should be prohibited. ''

An agreement would be considered in restraint of trade, if it contains partial or general restraint. However, employers do incorporate certain restrictive covenants in the employment agreements, *viz.* non-compete, non-solicitation and confidentiality to protect their proprietary interests of the Company. Such covenants are restrictive in nature in as much as they seek to limit the scope of the employee's rights in dealing with information, skills and contacts which come into his knowledge during the course of his employment. They further seek to safeguard the interests of the employer by ensuring that such knowledge that comes into the hands of the employee is not misused to the detriment of the company and to the unfair advantage of the employee If the agreement is declared void by the Act or by any other law, it is not enforceable in the eyes of law.