

Confidential Information, Non-disclosure and Non-compete clauses: A litigator's perspective

STUDY CIRCLE - V.P. SHINTRE & ASSOCIATES

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Confidentiality

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Introduction to the concept of Confidentiality

Any information, which is confided in another person, whether natural or artificial, under the circumstance of confidence, the unauthorized disclosure of which will lead to unwarranted losses to the disclosing party can be defined as confidential.

What is Confidential Information



ANY DATA WHICH IS EXTREMELY VITAL TO A BUSINESS ORGANIZATION, THE UNPERMITTED REVELATION OF WHICH CAN LEAD TO LOSSES AND DAMAGES CAN BE COVERED UNDER ITS CONFIDENTIAL INFORMATION.



CORPORATES DEPLOY MULTIPLE MEASURES TO SAFEGUARD THEIR CONFIDENTIAL AND PROPRIETARY INFORMATION.

Elements of Confidentiality

For any information to be ascribed the element of confidentiality, it must consist of the following characteristics

- Have elements of secrecy.
- Eg: Operations of a Company or business, Proprietary Information, and trade secrets, information about employees and clientele, business strategies, etc.
- Must have economic value.
- Not otherwise freely available in the public domain.
- Be clearly marked as confidential.
- Unauthorized disclosure of which is capable to cause wrongful loss to the owner of the information.

SIGNIFICANCE OF CONFIDENTIALITY



IN TODAY'S DIGITAL AGE, CONFIDENTIAL INFORMATION HAS OCCUPIED AN IMPORTANT PLACE IN ALL WALKS OF BUSINESS AND PERSONAL LIVES.



CONFIDENTIAL INFORMATION IS SIGNIFICANT AND HOLDS KEY TO ALL BUSINESS ENTERPRISES, IN PARTICULAR, TO INFORMATION TECHNOLOGY SEGMENT.



BUSINESSES ARE HIGHLY COMPETITIVE, HENCE, IN ORDER TO MAINTAIN THE UPPER-HAND IT IS VITAL TO PROTECT INFORMATION RELATED TO BUSINESS STRATEGIES, PROFIT MARGINS, PRODUCT DESIGNS, ETC. SUCH INFORMATION IF DISCLOSED IN THE PUBLIC DOMAIN WITHOUT AUTHORIZATION WILL LEAD TO SIGNIFICANT LOSSES FOR THE ORGANIZATION, AND HENCE, FORMS A PART OF ITS CONFIDENTIALITY.

Privacy & Confidentiality

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Privacy & Confidentiality

- Confidentiality and Privacy have a lot in common and are often used interchangeably. However, these two concepts have numerous distinguishing features.
- While Privacy means right of an individual to keep personal information to himself and not disclose it in the public domain, the term Confidentiality is defined by the Black's Law dictionary as secrecy or the state of having the dissemination of certain information restricted.

- Mr. X vs. Hospital Y
- The patient was HIV +. The Hospital authorities without the express permission of the patient disclosed his diagnosis to Ms. A, who was proposed to be married to the patient.
- This led the to the patient being severely criticized and ostracized by the society.
- A petition was filed before the Hon'ble S.C. on the grounds that the Hospital had failed to adhere to its duty to maintain the confidentiality of the patient, and also breached his right to privacy.
- The Hon'ble S.C. rightly held, inter alia, that :
- While the patient indeed had a right to privacy under Art. 21 of the Indian Constitution, this the right of Ms. A to be informed about any threat to her life/health overrides the right of privacy of the patient.
- It was further held that they duty to maintain Doctor-patient confidentiality was not absolute, and such duty can be breached in the interest of public.

Confidentiality v/s. Copyright

Law of Confidentiality

v/s

Law of Copyright

Law of confidence is broader right than of law of copyright and confidential information is well protected under laws of India.

Indian courts and Law of Confidentiality

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Indian courts and Law of Confidentiality

- One must consider real challenge which lies in proving not only of confidentiality but also ownership of information, data & idea, its transfer/transmission/communication to recipient and misuse before courts of law to establish case of breach of confidence
 - ***Urmi Juvekar Chiang Vs. Global Broadcast News Limited***
 - ***Zee Telefilms Ltd. And Anr. Vs Sundial Communications Pvt. Ltd. And Ors***

Protection of Confidentiality

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Protection of Confidential information

Confidential Information such as trade secrets, formulae, designs, process of manufacture, etc. can be protected in the following manner:

- Execution of Non Disclosure Agreements
- Employment Contracts must consist of clauses pertaining to Non-disclosure of confidential information
- Holding Sessions and Trainings on how to handle confidential information
- Establishing policies on using mobile phone and social media in a workplace.

Protection of Confidentiality through Agreements

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Protection of Confidentiality through agreements

A Non-disclosure Agreement is a legally binding Agreement between the disclosing party and recipient party which mandated that the recipient shall not disclose or divulge any information so revealed by the disclosing party under such Agreement

- In a situation where both Parties are making disclosures that are required to be kept secret, a **mutual** non-disclosure agreement can be executed by both parties. NDA's can be unilateral, bilateral, or even multilateral.
- In the event of a breach of confidentiality, these agreements can provide for monetary remedies as well as injunctive reliefs to prevent the occurrence of a any further breach.

Protection of Confidentiality in absence of Agreements

Protection of Confidentiality in absence of agreements

Confidential information can be very well protected in the absence of a written contract if the below conditions are satisfied:

- Information must have element of confidentiality;
- The owner should trust, on reasonable grounds, that information being disclosed is confidential in nature;
- Information and its confidentiality must be considered in view of the prevalent industry practices specific to each industry.
- **Saltman Engineering Company Limited v. Campbell Engineering Company Limited**

CONFIDENTIALTY AND SECTION 27 OF INDIAN CONTRACT ACT, 1872

CONFIDENTIALTY AND SEC. 27 OF INDIAN CONTRACT ACT, 1872

- The law u/s. 27 of the Indian Contract Act, 1872 clearly establishes that any negative covenant cannot be enforced on an employee post his employment.
- However, the Indian Courts have, in a plethora of Judgments, upheld the enforcement of post contractual confidentiality restraints
- The landmark judgment pertaining to the same was delivered in ***VFS Global Services Private v Suprit Roy***

BREACH OF CONFIDENTIALITY

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INGREDIENTS OF BREACH OF CONFIDENTIALITY

- Any **intentional** or **unintentional** disclosure of information given to the recipient in *confidence*, or under the *circumstance of confidence*.
- It is a violation of the trust of the disclosing party by the recipient.
- The breach of confidence is a recognized tort in the united Kingdom.
- While the UK offers an equitable relief for violation of one's confidentiality, the Indian law is still evolving in this area with the aid of precedents.

REMEDIES FOR BREACH OF CONFIDENTIALITY

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REMEDIES FOR BREACH OF CONFIDENTIALITY

In an action for breach of Confidence the following equitable relief are available:

- Injunction:
 - To prevent further disclosure of confidential information and trade secrets
 - Return and/or destruction of all confidential and proprietary material and trade secrets
- Damages

REMEDIES FOR BREACH OF CONFIDENTIALITY - cyberspace

- With the widespread use of internet and computer networks has led to the frequent misuse of technology. Theft of Source codes and other confidential and proprietary information by securing unauthorized access and/or by introducing computer contaminants is now a common phenomenon.
- Such unauthorized access or theft of confidential information, or instances of breach of privacy in the cyber space are punishable under Sections 43A, 65, 72 and 72A of the Information and Technology Act, 2000
- In case if there is a breach of confidential information an action can be initiated in civil court for breach of confidence and payment of damages. Simultaneously the owner of such confidential information is also entitled right to initiate criminal proceedings against the perpetrator.

Extent of Protection

The protection under confidentiality is not absolute.

- Any information which is already available in the public domain cannot be termed as confidential as it lacks the element of secrecy.
- Any information which forms a part of the employees knowledge and skill set cannot be covered and protected under confidentiality
- **Bombay Dyeing and Manufacturing v Mehar Karan Singh : 2010 (112) BomLR 3759**

Checklist to prevent unauthorized disclosure



Always put confidential documents away when not in use and, based upon the sensitivity of the material, keep such documents in a locked desk or cabinet.



Do not leave documents containing confidential information where they may be seen by persons who do not have a need to know the content of the documents



Avoid unnecessary copying of confidential documents.



Never distribute internal-use-only documents outside the Company



Do not use trash or recycling bins to dispose of confidential documents. If available, use shredders prior to disposal

Checklist to prevent unauthorized disclosure

Label

- Clearly label all sensitive and confidential information as “CONFIDENTIAL”

Secure

- Secure all sensitive personal and confidential data by passwords and encryptions

Ensure

- Ensure that only relevant data is disclosed on a need to know basis

Keep Records

- Keep a record of what information is disclosed and to whom.

DO NOT reveal

- DO NOT reveal confidential information without executing NDA's.

Prepare Policies

- Prepare internal policies on how to deal with confidential information and distribute the same to all employees.

Hold Trainings

- Hold mandatory training sessions on how to handle confidential information

Non-compete and Non-solicitation

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Principles of Non- compete

- A Non-compete agreement or clause prohibits an employee from entering the same business as that of the employer, as his competitor.
- The term Non-compete in simple terms means Do Not Compete.
- Such clauses are usually inserted in employment contracts which are executed between the employer and employee at the beginning of the employee's engagement.
- These clauses are considered as negative covenants and are viewed as in restraint of employment.

Garden Leave Clauses

- A Garden leave clause is similar to non-compete clause and operates for a specified duration, after the cessation of an employee's employment with his employer, either due to termination or resignation from his service.
- Under such clause the employer actively prohibits and restrains his employee from carrying on any business which competes directly or indirectly with the business of the employer, or prevents the employee from establishing a business similar to that of the employer.
- Such clauses are held to be in restraint of Section 27 of the Indian Contract Act and are not enforceable in the Court of law.

Non-Solicitation

- A non-solicitation is an agreement, usually executed between employee and employer, which prohibits an employee from utilizing the company's clients, customers, and contact lists for personal gain upon leaving the company.
- Any clauses pertaining to non-solicitation are viewed as restrictive covenants, however, the same are not completely void under the Indian law.
- The basic principle is that any solicitation which results in breaking of contractual relationship between the existing Clients (or employees) of the former employer and the ex-employer is a TORT.
- Thus, such actions will be considered to cause injury to the ex-employer, and are hence, prohibited by law. It is also important to note that merely approaching the customers of previous employer does not amount to solicitation unless such customer places an order as a result of such approach

Non - enforceability Of Negative Covenants

- The general principle followed by Courts in India is that any restriction on trade, occupation, or profession of an employee post completion of the employment, whether general or partial or complete is illegal in the eyes of law.
- Thus, the law is clear on the aspect that any negative covenant which forces a former employee to idleness or be compelled to work for his ex-employer cannot be enforced.
- It is also pertinent to note that while an employee is free to carry out business in the same domain as that of his employer, precaution and due diligence must be exercised to ensure that there is no violation of the terms pertaining to confidentiality.

Non - enforceability Of Negative Covenants

A former employer cannot restrain its employees from carrying out any trade, profession or business post the termination of their employment unless there is a violation of any one of the following:

- Breach of terms pertaining to Confidentiality, Proprietary Information as is mentioned under the Appointment Letter, NDA, Undertaking, any other document which may have been signed during the course of employment.
- Infringement of IP
- Breach of Non-solicit terms as mentioned in the Appointment Letter and NDA

Leading Judgement on Non- Solicitation and Non- compete

- **Desiccant Rotors International Pvt. Ltd. v. Bappaditya Sarkar and Anr.: 2006 (3) ARBLR 118 (Delhi)**
- **Hi-Tech Systems & Services Ltd. vs. Suprabhat Ray and Ors.: AIR 2015 Cal 261**
- **Embee Software Private Limited Vs. Samir Kumar Shaw: 2012 (3) CHN 250**

Key Takeaways

- For any information to be termed confidential it must have an elements of secrecy.
- Protection under confidentiality is not absolute and any information which is available in the public domain, or is generally obtained as knowledge during ordinary course of employment, or has been acquired as a skill cannot be termed confidential.
- Law of confidence is a broader right than law of Copyright
- Post employment confidentiality restraints are valid.
- Establishing a competing business based upon ex-employer's confidential information is not permissible.
- Solicitation which results in breaking of contractual relationship between the existing Clients (or employees) of the former employer and the ex-employer is a TORT

THANK YOU

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