

ILLEGAL TERMINATION OF CORPORATE EMPLOYEES IN INDIA- A CRITIQUE

INTRODUCTION- THE CORPORATE MARKET IN INDIA

The era of globalisation has led to a rapid expansion of corporate market¹. The swift amplification in the foreign direct investment has changed the way of Job market. White collar jobs are majorly concentrated in Indian metros such as Bengaluru, Delhi, Mumbai, Kolkata and Chennai which are creating the maximum employment opportunities². On the other hand, cities like Gurgaon, Noida, Nagpur, Baroda, Ahemdabad, Hyderabad, Pune are the rapid developing cities which have also contributed in elevating India to be a corporate market. Mumbai, Delhi and Bangalore have emerged as the top three Indian cities in terms of generating white-collar jobs with the financial capital of the country alone accounting for 28% of the new employment opportunities³. With the advent of these markets, the relationship between the employer and employee has also been a gradual state of evolution, so does the nature of disputes have rose because of stereotyping employees because of gender⁴, pregnancy, age, caste or other disability, continuous harassment of employees which included inequitable pay, long hours, non-recognition, bullying, favouritism to other workers, unfair demands, public humiliation and intrusive electronic surveillance. Several laws⁵ have been drafted by the state to protect the interests of the employee community. Nonetheless, such laws have been obsolete as they were not able to give any protection to these white-collar employees. Having no recourse against the employers, they are bound by the rigid contract which persisted during the course of employment and in extreme cases; they knock the doors of the civil courts to get remedies which in turn takes countless number of years to be adjudicated by the courts.

¹Globalisation benefits us and the majority of the world — but can it be tamed? ;Available at-<http://timesofindia.indiatimes.com/business/international-business/Globalisation-benefits-us-and-the-majority-of-the-world-but-can-it-be-tamed/articleshow/54403496.cms>,(Last accessed on 5th of Sept.,2016 11.59P.M)

² White-collar jobs focused in 7 cities, Available at- <http://www.financialexpress.com/archive/white-collar-jobs-focused-in-7-cities/66688/>,(Last accessed on 6th of Sept.,2016 11.59P.M)

³ Supra 2.

⁴ Sonali Das, Sonali Jain-Chandra, Kalpana Kochhar, and Naresh Kumar, Women Workers in India: Why So Few Among So Many?;Available at-<https://www.imf.org/external/pubs/ft/wp/2015/wp1555.pdf>, (Last accessed on 9th of Sept.,2016 1.59P.M)

⁵ The Employees' State Insurance Act, 1948 ,The Beedi Workers Welfare Cess Act, 1976,The Contract Labour (Regulation and Abolition) Act, 1970,The Equal Remuneration Act, 1976,The Industrial Disputes Act, 1947,The Industrial Employment (Standing Orders) Act, 1946,The Maternity Benefit Act, 1961,The Minimum Wages Act, 1948,The Trade Unions Act, 1926,The Workmen's Compensation Act, 1923.

EMERGENCE OF A CONTRASTING DIVERSITY OF EMPLOYMENT DISPUTE

Explosion of knowledge and information in a mixed economy like India has led to breathtaking advancement in commercial sectors. This progress has created another type of employees termed as “White-Collar Employees”. The term white collar employees could be better understood as to employees whose job entails, largely or entirely, mental or clerical work, such as in an office. The term white collar work used to characterize non-manual workers, but now it refers to employees or professionals whose work is knowledge intensive, non-routine, and unstructured⁶. The origin of the word “White collar” comes from the fact that these workers traditionally wore white collared dress shirts and were associated with high average salaries and posh office rooms. A Manager in an organisation would be a white collared employee, whereas a janitor would be a blue collared employee⁷. But, in the current times, this term is losing its relevance as the white collar employment constitutes the major chunk of the working class with most “shirt and tie” jobs being low-paying and involving a high amount of stress specifically in the modern service and technology sector⁸. The emergence of this class has made the governance of labour dispute more complex compared to those traditional workers who were given the protection under different labour laws⁹. The legal framework for the protection to these employees in India is still in nascent stage. This part discusses the clauses mentioned in an employment agreement between the employer and employee.

A. EMPLOYMENT AGREEMENT

An Employment Contract is a legal document that outlines the terms of employment between an employer and an employee¹⁰. They are executed for a time period of one year and on the performance of the employee the contract can be renewed. This document acts as a grund norm¹¹; it specifies the rights and duties of an employee. This document can be used by the employee in case the employer is trying to coerce any work which the employees are not obliged to do. It is a smart way to make sure everyone is on the same par. There are no such

⁶ Business Dictionary, Available at-<http://www.businessdictionary.com/definition/white-collar.html>

⁷ Business Dictionary, Available at- <http://www.businessdictionary.com/definition/blue-collar.html>

⁸ The Changing Nature of Job Stress: Risk and Resources, Mark Tausig, Rudy Fenwick, Steven L. Saute, Lawrence R. Murphy, Corina Graif; Available at - <http://scholar.harvard.edu/files/corinagraif/files/changnature.pdf>,

⁹ Supra 5.

¹⁰ <https://www.rocketlawyer.com/document/employment-contract.rtf#/>;

¹¹ Grundnorm is a German word meaning "fundamental norm." The jurist and legal philosopher Hans Kelsen coined the term to refer to the fundamental norm, order, or rule that forms an underlying basis for a legal system.

specific guidelines which will specify the clauses in the agreement. Nonetheless, the employment agreement can be classified in to the following clauses. They are as follows-

- **Name of the Employer and Employee-** This is the beginning clause of the contract which specifies the Name of the employer and its address and name of the employee and its address.
- **Starting Date of Employment-**This clause mentions the starting date of the employment. It is necessary to keep track of, for reviews, seniority, and/or acquisition of new benefits as employment continues.
- **Address of Employment-** This clause mentions the list of offices of the employer and the employer should specify the current office where the employee is to be recruited. If it is a branch of the office, it is necessary to mention the address of the head office for communication.
- **Job Title and Description of Employment Duties-** The job title clause should be the same as the one the employer used when advertising the position. Also, a description of all the expected employment duties should be listed. The employer may wish to include some flexibility here, in case employment duties change as time progresses.
- **Cost to the Company** –This is the salary clause which the company shall be giving to the employee for its service to the company. It is subject to change on an annual basis.
- **Expenses-** This special clause which can be invoked when the employee is doing the work for the company during the course of his employment¹². The employee will be reimbursed for certain expenses (e.g. car expenses, moving expenses, etc), detail those expenses and make sure that the employee retains receipts or other proof that the expenses were legitimate.
- **Hours Worked Each Week-** The contract should outline how many hours of work are expected each week, and any restrictions on when these hours should be worked. This clause may be changed at the consent of the employee, if he consents to do extra work.
- **Leave-** This clause specifies the number of leaves (includes casual and personal) being provided to the employee in a particular year. This should also provide eight weeks to the employee at the cost to the company.
- **Probationary Period-** In case for some reason the employment arrangement is not working out, a probationary period can allow for termination of the employment

¹² This clause cannot be invoked if the employee is acting outside the scope of employment.

contract by either the employer or the employee with a shorter notice period. Probation normally lasts a few weeks to a few months.

- **Performance Assessments**- If the employer wishes to assess employee skills and performance on a timely basis, the employee can do it through and initiate necessary actions for his promotion and increase in wages etc.
- **Term of Employment**- This Indicate whether this is a temporary or on-going position. If it is a temporary position, include an estimated end date in the contract.
- **Deductions**- If on the negligence of the employee, the employer suffers losses, the employer may carry out deductions from the employee's salary; but this cannot be done if the employee has taken reasonable care to avoid the same.
- **Confidentiality/Restrictive Covenants**-Through this clause; the employer can protect its important confidential information by stating things that the employee may not disclose. In addition, the employer can add a non-compete clause to prevent the employee from switching employment to a competing business, or attempting to entice other employees away. This section should mention the possibility of legal action if these terms are broken.
- **Grievances**- This clause outlines the company's disciplinary policy and grievance procedures.
- **Notice for Termination of Contract**-This clause includes a list of employee misconduct that may justify termination without notice. It also outlines the notice periods for termination of the contract by either the employer or employee. The employer should also outline any circumstances in which an employee will receive severance pay, and the amount of such pay.

These clauses are merely illustrative but not exhaustive. An Employment Agreement may also contain several other clauses frequently found in contracts, such as severability (if one part of the document does not apply, the rest of the document remains in effect), prior agreements (that the current contract is the full and final agreement between the parties), and a note of which jurisdiction the contract is governed by for adjudication of disputes.

Termination

Terminating employees is one of the most unpleasant aspects of a business owner or manager's job duties, but sometimes it is absolutely necessary in order to continue the business of the employer. But if terminating an employee is necessary, then it should be

performed in the most ethical, and professional manner possible¹³. It often leads to a stand-off between an employee and employer which satisfy 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. The employer might avail the **Audi Alter Partem**¹⁴ i.e., Right to be heard that is the basic principle of natural justice. Decision to terminate employment should be taken depending on the gravity of the misconduct on the part of the employee. The employee might be given a show cause notice on why the termination should not be done. The procedure to be followed for termination due to 'misconduct' would involve framing of charges and 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 followed as per the principles of natural justice and the employee should be given an opportunity to submit his defence and call upon witnesses.

A. State of affairs in Termination

An employee may be terminated due to several factors like closure of business due to change of market situations or other reasons, organizational restructuring, employee's inability to fulfill material obligations, misconduct, inefficiency, loss of confidence by management etc. Some of the essential grounds of termination are as follows:-

1. Inefficiency – An employer can terminate the services of the employee after conducting a performance test or else by keeping a track record of the career progress in the company if the employer finds that the employee is performing poorly and he is generally inefficient in achieving the organisational targets and which in turn causes loss to the company, it can be valid ground as it is not prudent for the employer to retain such employees in the organization who fails to perform consistently, are reluctant to change the behaviour and are incapable to produce quality deliverables. In the event of a dispute, the burden of discharging proof lies on the employer to show and place such evidence on record and on the contrary if the employer fails to prove it he might pay necessary benefits claimed by the employee¹⁵.

2. Violation of confidentiality provisions – Employees are usually under an obligation to defend confidential business information of the company which they are exposed to during

¹³ The Correct Way to Terminate an Employee; Noah Green, Kelly Ryan, and Martin Levy; Available at-http://www.humanresources4u.com/cms_files/original/How_to_Terminate_an_Employee1.pdf

¹⁴ Audi alteram partem (or audiatur et altera pars) is a Latin phrase meaning "listen to the other side", or "let the other side be heard as well".

¹⁵ A. N. Shukul v. Phillips India & Others, Delhi High Court decided on September 7, 2009 followed in Y.K Sethi v. BASF India (CS (08) 1761/2006)

the course of the employment which, if abused, is capable of commercial exploitation in the hands of a competitor which in turn leads to revealing trade secrets¹⁶ or doing an act of insider trading¹⁷. Confidential information is usually industry specific but typically includes customer/supplier list, formulas, know-how, knowledge of customer or prospective customers, methods, plans, processes, products, research, financial or personal data, techniques, and trade secrets. The employer may terminate the employee and may initiate criminal proceedings for such act¹⁸. In the case of *M. Rajan Issac v. The Chairman & Managing Director*¹⁹, the Madras High Court held that the reasons for termination must be applied objectively i.e. must be based on the facts which should be proved by documentation or evidence. The court held that a company cannot make out charges of theft and fraud, unless evidence is provided to show that material loss was caused. The Court ordered fresh enquiry and set aside dismissal order of the petitioner. Therefore, it is important for the employer to ensure that due process is followed before implementing termination.

3. Breach of employment contract – This is the most used weapon by the employer in case; they want to terminate the employee by alleging that the employee has breached of the terms of the employment contract. Breach can be due to a variety of causes as mentioned in the second chapter titled “Employment Agreement”²⁰. In *A. N. Shukul v. Phillips India & Others*²¹, the employer terminated the employment of a person on account of change in business plan. The employee was informed that the company went through the process of reorganization and reconstruction and due to such changes his services were no longer required. The employer contended that being unaware of such clause. The Court denied the contentions of the plaintiff and held that in term of the appointment letter, defendant had the right to terminate the employment of the plaintiff.

4. Misconduct –Misconduct can be defined as “dereliction of duty, unlawful or improper behaviour.”²² It is usually the HR policy of the company which describes what constitutes misconduct, but the misconduct differs from case to case and cannot be restricted to a single

¹⁶Pyarelal Bhargava v. State of Rajasthan, AIR 1963 SC 1094

¹⁷ VFS Global Services Private Limited v. Mr. Suprit Roy, 2008 (2) Bom. CR 446, 2008 (3) MhLj 266

¹⁸ 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

¹⁹ M. Rajan Issac vs. The Chairman & Managing Director, Madras High Court decided on April 29, 2004

²⁰ Refer Chapter II “Employment Agreement”.

²¹ Supra 16.

²² Blacks law dictionary, Available at- <http://thelawdictionary.org/misconduct/>

definition²³. The Supreme Court in the case of *State of U.P. v. Kaushal Shukla*²⁴ considered the act of the respondent while conducting the audit as a gross misconduct because he was acting outside his authority along with his co-worker.

CONSEQUENCES OF TERMINATION

The bond between the employer and employee does not come to an end when the employee is terminated from his employment. The employee still owes certain post-termination duties towards the employer. This includes returning back all the assets of the company which the employer was using during his course of his employment, to refrain from any unauthorized access or usage of the company's website and financial information and to abstain from seeking employment with competitors post termination for a defined period. The clause is crucial to protect the business of the company and to prevent the potential loss of revenue which a company may incur if valuable employee leaves to join the competitor, and uses the information of the erstwhile employer²⁵. This clause is not enforceable under Indian laws and employer will not be protected against the competition. These are broadly discussed below through different Indian decisions by different courts.

A. Non-Competition Restriction

An employer may have non-competition clause or agreement in restraint of trade²⁶ in his employment agreement, that itself would not coerce the employee to follow it because that is against the law of the land. The Constitution of India itself guarantees citizens to practice any profession, trade or business²⁷. However, this is not an absolute right and reasonable restrictions can be placed on this right in the interest of the public. The attitude of the judiciary has also been on the social welfare scheme protecting the rights of the aggrieved party.

²³ Some of the instances of misconduct are unauthorized absence from work, negligence in performing duties, data theft, misrepresentation of facts, and willful disobedience of the instructions of the management or supervisor

²⁴ 1991(1) SCC 691

²⁵ <http://psalegal.com/upload/publication/assocFile/Labor-Bulletin-Issue-IX06072010035116PM.pdf>

²⁶ 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"; *Petrofina (Great Britain) Ltd. v. Martin*, (1966) Ch. 146.

²⁷ Article 19(1)(g) in The Constitution Of India 1949 reads as follows-(g) to practise any profession, or to carry on any occupation, trade or business.

Section 27 of the Contract Act²⁸ has been applied to determine whether a restrictive covenant in employment contract would be reasonable and valid or not. The Supreme Court of India in *Niranjan Shankar Golikari v. Century Spg & Mfg Co. Ltd*²⁹ enumerated the tests to determine the validity of 'restrictive' agreements in terms of Section 27 of the Contract Act. In this case the company signed a non-disclosure agreement with the appellant, at the time of his employment. The Supreme Court relying on Lord Halsbury's Laws of England which clearly stated that as a general principle an individual was entitled to exercise his 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. The court held that the agreement was held to be valid and the appellant was accordingly restrained from serving anywhere else for the duration of the agreement. The agreements of such kind are void and not enforceable³⁰.

B. NON-SOLICITATION RESTRICTIONS

Non-solicitation agreement is a contract in which an employee agrees not to solicit a company's clients or customers, for his or her own benefit or for the benefit of a competitor, after leaving the company³¹. An employer that wants to protect only its customer list, for example, might use a standalone non solicitation agreement. It might be presented at any stage of the employment relationship. The enforceability of this clause varies from case to case³². The terminated employee may not carry on a business which is prejudicial to the company and as such did not restrict in absolute terms from carrying on any business³³. In *FLS midth Pvt.Ltd. v. M/s. Secan Invescast (India) Pvt.Ltd.*³⁴ the Madras High Court held

²⁸ Section 27 in The Indian Contract Act, 1872 read as follows- Agreement in restraint of trade, void.—Every agreement by which any one is restrained from exercising a lawful profession, trade or business of any kind, is to that extent void. —Every agreement by which any one 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 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.

²⁹ AIR 1967 SC 1098.

³⁰ Percept D'Mark (India) Pvt. Ltd. v. Zaheer Khan & Anr, AIR 2006 SC 3426; Gujarat Bottling Company Ltd. v. Coca Cola Company, AIR 1995 SC 2372.

³¹ Desiccant Rotors International Pvt Ltd v Bappaditya Sarkar & Anr., Delhi HC, CS (OS) No. 337/2008 (decided on July 14, 2009)

³² M/s.FLSmidth Pvt.Ltd. v M/s.Secan Invescast (India) Pvt.Ltd., (2013) 1 CTC 886.

³³ GEA Energy System India Ltd. v. Germanischer Lloyd Aktiengesellschaft, [2009]149CompCas689(Mad)

³⁴ M/s.FLSmidth Pvt.Ltd. v M/s.Secan Invescast (India) Pvt.Ltd., (2013) 1 CTC 886.

that merely approaching customers of a previous employer does not amount to solicitation until orders are placed by such customers based on such approach.

C. NON- DISCLOSURE OF CONFIDENTIAL INFORMATION

A non-disclosure of confidential information agreement is crucial for an inventor or any other party who needs to protect confidential information. As the importance of the confidential information increases, so does the relative complexity of the agreement³⁵. The employee shall take reasonable steps to keep all the confidential information an employee should further agree that he shall not discuss or disclose the confidential information to any third party. In *Diljeet Titus v. Mr. Alfred A. Adebare and Others*³⁶, the defendant was working as an advocate 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 plaintiffs 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 and issued an injunction restraining the defendant from using the information taken away illegally. In the recently celebrated case of *Microsoft v. Google*³⁷, Microsoft alleged that Kai-fu Lee who had intimate knowledge of the company's trade secrets had violated a non-compete agreement by defecting to Google. But the Judicial decisions on this are not settled, so it leads to the emerging concept called garden leave which has emerged in U.K³⁸. In a Bombay High court decision it was held that "The Garden Leave Clause is prima facie in restraint of trade and is hit by Section 27 of the Contract Act"³⁹.

CONCLUSION

The time has come for India to enact a legislation which will provide protection to the white collar employees who are illegally terminated on baseless grounds with hardly any right of

³⁵http://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research%20Papers/Employment_Contracts_in_India.pdf.

³⁶ 2006 (32) PTC 609 (Del)

³⁷ 415 F.Supp.2d 1018; Available at- <https://h2o.law.harvard.edu/cases/2677>

³⁸ It is basically a device which an employer can use to help protect itself against possible mischief by an employee during his notice period when the employee has resigned or been dismissed. The employee must stay away from work during the whole or part of his notice period but continues to be employed and to receive pay and benefits. While a person is on garden leave he is usually forbidden to contact any of his employer's customers or fellow employees.

³⁹ VFS Global Services Private Limited v. Mr. Suprit Roy, 2008 (2) Bom. CR 446, 2008 (3) MhLj 266.

being heard and after the termination as well the employer coerce them with post- termination duties. The legal relationship is basically governed by the employment contract and employees are left with no bargaining power which leaves it to be decided at the complete discretion of the employer. It is imperative to safeguard such managerial employees by enacting legislation. Apart from a law it is necessary for setting up an Independent regulatory commission to check all the issues which persist between the employer and employee. The body will act as tribunals in the case of workmen under labour laws. Apart from initiating a civil suit for seeking special performance, injunctions or damages which takes ages to be decided, the parties may resort to arbitration. The arbitration proceedings may be initiated which will lead to give remedy to the aggrieved parties on their own convenience and renders justice at earlier dates than courts.

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