



September 2023

This edition of the JSA Employment Newsletter provides a snapshot on the validity of enforcement of key post-termination restrictive covenants in employment contracts in India. We also discuss some recent regulatory updates and judicial precedents across several employment legislations.

## Enforceability of post-termination restrictive covenants in employment contracts

In the interest of protecting and maintaining market advantage, client relationships, trade secrets and other sensitive data, it is common for employers in India to have employees sign employment contracts which include several post-termination restrictive covenants, particularly relating to non-compete, non-solicit and confidentiality. These restrictions typically extend for specific durations, and in some instances, also have territorial limitations.

Enforceability of restrictive covenants operative both during and after the employment term has often been challenged from time to time as being a restraint on an individual's right to exercise lawful profession, trade or business of any kind, and to that extent, void, as discussed under Section 27 of the Indian Contract Act, 1872. Indian courts have generally upheld the validity of non-compete, non-solicit and confidentiality obligations operational during an employment term, unless unconscionable, excessively harsh, unreasonable or one-sided.<sup>1</sup> However, validity of these restrictions in a post-termination context has been examined on a case-to-case basis, factoring several considerations such as protection of proprietary information, reasonability of restrictions imposed and the balance of convenience between contracting parties. Discussed below are some considerations adopted by Indian courts on key post-termination restrictive covenants.

1. **Non-compete obligations:** Post-termination non-compete clauses have generally not been held to be enforceable in India based on the rationale that the right to livelihood of an employee must prevail over interests of an employer. For instance, the Bombay High Court in *VFS Global Services private Limited v. Mr. Suprit Roy*<sup>2</sup> laid down that "to obstruct an employee who has left service from obtaining gainful employment elsewhere is not fair or proper." Reasonableness of such a clause is generally not relevant and could be unenforceable even if restricted by factors such as geography, duration, etc. Further, the Delhi High Court in *Wipro Limited v. Beckman Coulter International S.A.*<sup>3</sup> held that "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

<sup>1</sup> In a landmark case, *Niranjan Shankar Golikari v. The Century Spinning and Mfg. Co* (1967 AIR 1098), the Supreme Court noted, "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."

<sup>2</sup> 2008 (2) BomCR 446 (Bombay HC)

<sup>3</sup> 131 (2006) DLT 681 (Delhi HC)

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.” In the same vein, the Delhi High Court in *Affle Holdings Pte Limited v. Saurabh Singh*<sup>4</sup> held that a negative covenant in the employment contract, prohibiting carrying on a competing business beyond the tenure of the contract, is void and unenforceable.

2. **Non-solicit obligations:** Unlike non-compete clauses, post-termination employee non-solicit clauses have not been expressly held to be unenforceable under Indian law. Notably, in *E-merge Tech Global Services Private Limited v. M. R. Vindhyasgar and Ors.*,<sup>5</sup> the Madras High Court upheld the validity of a non-solicitation clause operational for a period of 3 (three) years post termination taking into consideration losses suffered by the employer on account of an employee’s breach of non-solicit obligation. Having said that, asserting a non-solicit right often proves demanding as it could be challenging to demonstrate through evidence that an employee was solicited away, as opposed to having them moved away from their own free will.
3. **Confidentiality:** In a landmark case, *Zee Telefilms Limited v. Sundial Communications Private Limited*,<sup>6</sup> the Bombay High Court recognized that maintenance of confidence is in public interest. The court noted that no one should be allowed to profit from the wrongful use of information received in confidence. As such, post-employment confidentiality obligations have generally been held to be enforceable. Even where confidentiality obligations are not specifically spelt out in the terms of employment, employees have an implied duty to protect confidential information even post-employment. Courts have upheld this position in numerous cases. For instance, in the case of *Mr. Diljeet Titus, Advocate v. Mr. Alfred A. Adebare & Ors.*,<sup>7</sup> the Delhi High Court restrained ex-employees of a law-firm from using the confidential information post their employment. The court observed that “*the defendants are free to carry on their profession, utilize the skills and information they have mentally retained and they are being restrained only from using the copied material of the plaintiff in which the plaintiff alone has a right*”. Similarly, the Calcutta High Court in the case of *Hi-Tech Systems & Services Ltd. v. Suprabhat Ray ad Ors.*,<sup>8</sup> prevented ex-employees from utilizing the database and trade secrets of their erstwhile employer after employment cessation.

Enforcing post-termination obligations in India can be challenging, primarily due to the tendency of Indian courts to protect an individual's right to pursue their livelihood. To increase chances of enforcement, employers may ensure that such obligations, if incorporated into an employment contract, are drafted in a manner that takes into consideration contextual reasonability, designed to protect the legitimate business interests of the employer, and strikes the right balance between protecting the employer's interests and respecting the employee's rights.

## Regulatory Updates

### Partial stipend support under National Apprenticeship Promotion Scheme – 2

The Ministry of Skill Development and Entrepreneurship, Government of India, *vide* notification dated August 25, 2023, issued ‘Guidelines for Implementation of National Apprenticeship Promotion Scheme-2’ (NAPS-2) under the Apprentices Act, 1961, to replace the previous version of the scheme, with effect from August 25, 2023. An establishment participating in the said scheme is eligible to avail from the Government of India, partial stipend support of up to 25% of the stipend paid to apprentices, subject to a maximum of INR 1,500 (Indian Rupees one thousand five hundred) per month. Once an establishment confirms payment of 75% of the stipend to an apprentice, the government’s share of stipend will be transferred to the apprentice’s designated bank account, within 72 (seventy two) working hours. Upper age limit for apprentices for whom such partial stipend support can be availed is 35 (thirty

<sup>4</sup> 2015 SCC OnLine Del 6765 (Delhi HC)

<sup>5</sup> Civil Suit No. 258 of 2020 (Madras HC)

<sup>6</sup> 2003 (5) BomCR 404 (Bombay HC)

<sup>7</sup> 130 (2006) DLT 330 (Delhi HC)

<sup>8</sup> AIR 2015 Cal 261 (Calcutta HC)

five) years. Under the earlier scheme, the stipend cost-sharing model required establishments to pay the full stipend amount, and later seek reimbursement of 25% of the stipend paid. 'Large private organisations' have been encouraged to voluntarily give up such partial stipend support.

## Exemption of factories in Punjab from prescribed limitations on working hours

The Department of Labour, Government of Punjab *vide* notification dated September 20, 2023, has exempted factories in Punjab from compliance with Section 51 (weekly hours), Section 52 (weekly holidays), 54 (daily hours), and Section 56 (spread over) of the Factories Act, 1948 ("**Factories Act**"), subject to conditions, including, *inter alia*, that (a) daily working hours should not exceed 12 (twelve) hours; (b) weekly working hours, including overtime should not exceed 60 (sixty) hours; (c) the spread over time, inclusive of intervals for rest, should not exceed 13 (thirteen) hours in any 1 (one) day; (d) no worker should be allowed to work overtime for more than 7 (seven) days at a stretch and the total number of hours overtime work in any quarter should not exceed 115 (one hundred fifteen) hours; (e) minimum wages for overtime work will be paid to the workers in accordance with Section 59 of the Factories Act as well as the wage fixed for overtime under the Minimum Wages Act, 1948, and the Punjab Minimum Wages Rules, 1950; and (f) a proper logbook/register should be maintained of all overtime undertaken by the workers and such logbook/register will be open to inspection by the officers of the labour department.

## Maharashtra Legislative Assembly proposes new Bill on adding menstrual leave to the Maharashtra Shops and Establishment (Regulation of Employment and Conditions of Service) Act, 2017

The Maharashtra Legislative Assembly introduced the Maharashtra Shops and Establishment (Regulation of Employment and Conditions of Service) (Amendment) Bill, 2023 which proposes entitlement for female employees working in an establishment in Maharashtra to paid leave during their period of menstruation. In the absence of clarity, determination of the manner in which such menstrual leave is to be recognized and granted, is awaited.

## Case Law Ratios

### Employee on probation can be dismissed without disciplinary proceedings

In *State of Punjab v. Jaswant Singh*,<sup>9</sup> the Supreme Court examined validity of dismissal order passed against an employee on probation. In this case, the employee respondent contended that his dismissal order was in violation of principles of natural justice as it was passed without holding fact-finding inquiry and proceedings. The court noting that the termination order of the probationary employee was not on any "*serious allegation or act of misconduct*" and was passed on account of unsuitability for job position, held that such termination was not punitive in nature, and was termination simpliciter. Upholding the validity thereof, the court relied on earlier judicial precedents in the matter to hold that the requirement of holding fact-finding inquiry, departmental proceedings and opportunity for hearing, would not be triggered in cases of termination simpliciter and also reiterated that if an employee is found unsuitable during the probationary period, an employer retains the right to terminate their service without the need for a punitive inquiry.

### Suspension order passed against employee cannot be extended endlessly

In *The Director General of Police v. D Jayakumar*,<sup>10</sup> the Madras High Court noted that a suspension order passed merely on the basis of pendency of criminal cases against an employee, without initiation of disciplinary proceedings,

<sup>9</sup> CA 11871/2014 (SC)

<sup>10</sup> WA 1657/2019 (Madras HC)

cannot be extended endlessly without reason. While the employer argued that it may not be conducive to revoke the suspension on account of the criminal case pending against the employee, the court rejecting this argument, noted that the employer is required to review the necessity for extension of suspension in every quarter of a year.

### Deference of promotion on account of prolonged pendency of disciplinary proceedings invalid

In *Dhaemaseety Shiva Kumar vs. Principal Secretary, Municipal Admin & Anr.*,<sup>11</sup> considering that the employer had failed to conclude disciplinary proceedings against the employee for a period of almost 14 (fourteen) years, the Telangana High Court noted that the employee should not be denied promotion on grounds of pending disciplinary proceedings. The court placed reliance on the judgement in *K. Sai Ram Vs. State of Andhra Pradesh*,<sup>12</sup> to note that “a person cannot be penalized by keeping disciplinary proceedings pending for unduly long periods and by not considering his case for promotion on purported ground of pendency of disciplinary proceedings.”

### Industrial Employment (Standing Orders) Act, 1946 supersedes contractual arrangement between employer and workmen

In *Bharatiya Kamgar Karmachari Mahasangh v. Jet Airways Limited*,<sup>13</sup> the Supreme Court reiterated the position that employers and workmen cannot enter into a contract which would override a statutory prescription in accordance with the certified standing orders issued under the Industrial Employment (Standing Orders) Act, 1946 (“IESO Act”). The Supreme Court ruled that in industrial establishments, standing orders exclusively govern workmen's service conditions, and stipulates a contractual framework between the parties. It held that “the standing order implies a contract between the employer and the workmen. Therefore, the employer and workmen cannot enter into a contract overriding the statutory contract embodied in the certified standing orders.” The court emphasized that the IESO Act, being a beneficial legislation, provides that any agreement/contract/settlement wherein rights of workmen are waived off would not supersede the certified standing orders.

### Order for dismissal from services on account of unauthorised absence to be passed after examination of relevant factors including gravity of misconduct, past conduct

In *Union of India v. Yashpal*,<sup>14</sup> the Allahabad High Court examining a challenge to a termination order passed by an employer on account of the employee's prolonged absence from work, noted that “In the context of absence from duty without leave, all factors should have been examined by the disciplinary authority before award of major punishment of dismissal could be made”. The court noted that, *inter alia*, gravity of misconduct, past conduct, nature of duties, position in organization, previous penalty, if any and requirement of discipline to be enforced were relevant to be considered by the disciplinary authority before awarding a major punishment such as dismissal from service. In the present case, the court set aside the termination order observing that the disciplinary authority (employer) had failed to take into consideration material aspects of the matter while passing the termination order, including past records of the employee.

<sup>11</sup> WP 38953 of 2017 (Telangana HC)

<sup>12</sup> 2017(6) ALD 623 (Telangana HC)

<sup>13</sup> CA No. 4404 of 2023 (Madras HC)

<sup>14</sup> WA 15295/2023 (Allahabad HC)

## Employment Practice

JSA has a team of experienced employment law specialists who work with clients from a wide range of sectors, to tackle local and cross-border, contentious and non-contentious employment law issues. Our key areas of advice include (a) advising on boardroom disputes including issues with directors, both executive and non-executive; (b) providing support for business restructuring and turnaround transactions, addressing employment and labour aspects of a deal, to minimize associated risks and ensure legal compliance; (c) providing transaction support with reference to employment law aspects of all corporate finance transactions, including the transfer of undertakings, transfer of accumulated employee benefits of outgoing employees to a new employer, redundancies, and dismissals; (d) advising on compliance and investigations, including creating compliance programs and policy, compliance evaluation assessment, procedure development and providing support for conducting internal investigations into alleged wrongful conduct; (e) designing, documenting, reviewing, and operating all types of employee benefit plans and arrangements, including incentive, bonus and severance programs; and (f) advising on international employment issues, including immigration, residency, social security benefits, taxation issues, Indian laws applicable to spouses and children of expatriates, and other legal requirements that arise when sending employees to India and recruiting from India, including body shopping situations.

JSA also has significant experience in assisting employers to ensure that they provide focused and proactive counselling to comply with the obligations placed on employees under the prevention of sexual harassment regime in India. We advise and assist clients in cases involving sexual harassment at the workplace, intra-office consensual relationships, including drafting of prevention of sexual harassment (POSH) policies, participating in POSH proceedings, conducting training for employees as well as Internal Complaints Committee members, and acting as external members of POSH Committees.

**This Newsletter has been prepared by:**



**Gerald Manoharan**  
Partner



**Sonakshi Das**  
Principal Associate



**Sandhya Swaminathan**  
Associate



17 Practices and  
24 Ranked Lawyers



16 Practices and  
11 Ranked Lawyers



7 Practices and  
2 Ranked Lawyers



11 Practices and  
39 Ranked Partners  
**IFLR1000 APAC  
Rankings 2022**

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Banking & Finance Team  
of the Year

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Fintech Team of the Year

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Restructuring & Insolvency  
Team of the Year



Among Top 7 Best Overall  
Law Firms in India and  
9 Ranked Practices

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11 winning Deals in  
IBLJ Deals of the Year

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10 A List Lawyers in  
IBLJ Top 100 Lawyer List



Banking & Financial Services  
Law Firm of the Year 2022

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Dispute Resolution Law  
Firm of the Year 2022

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Equity Market Deal of the  
Year (Premium) 2022

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Energy Law Firm of the  
Year 2021



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For more details, please contact [km@jsalaw.com](mailto:km@jsalaw.com)

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