Unraveling the Idea of "Commons" in Employment Relations

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Abstract

The idea of "Commons" in employment relations emerges as a criticism of organizational and institutional practices rendering people as employees, their intellectual labour, and even the customers as the eternal or near-permanent property of such organizations. Organizations ensure that the creation of intellectual property by the knowledge workers is captured through the "Work for Hire" clauses in the employment contract which require them to assign the ownership rights to their organizations for achieving competitive advantage. However, organizations try to achieve sustainability of such competitive advantage through various restrictive covenants such as non-disclosure, non-compete, and non-solicitation agreements signed by the employees. While some organizations provide employees with some incentives for signing such restrictive covenants, the approach towards enforcement of such restrictive covenants varies across the globe depending upon the local, regional and national regulations and legislations.

While there is no dearth of literature depicting the manifestation of ownership interests of organizations, democratization of corporate ownership or community ownership is also advocated by another set of literature. However, the existing literature and institutional practices tend to recognize the interest of one or more stakeholders such as employees, organizations, customers, and society at the expense of the legitimate interests of others resulting in perceived inequitable and unsustainable outcomes. This research paper attempts to highlight such perceived inequitable and unsustainable outcomes based on different disputed legal cases in a developing country like India in the post liberalization and globalization era across different industries like FMCG, Banking and Financial Services, Bio-medical Services etc., with the objective of providing alternate approach towards the enforcement of restrictive covenants.

Key Words: Intellectual Property Rights; Trade Secrets; Non-Disclosure, Non-Compete and Non-Solicitation Agreements

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Introduction

Organizations in the knowledge economy try to achieve competitive advantage through intellectual property rights (IPRs) such as patents, copyrights, and trademarks. While it takes considerable resources and time for organizations to create intellectual property rights, they may not be able to control these assets (IPRs) without the conjunction of the property law with the employment contracts (May, 2002) since IPRs are the outcome of the work produced by employees in the information economy. Hence, the relationship between intellectual property rights (IPRs) and employment contract creates a significant dimension in employment relations with an examination of the property-based relationship between the employer (organizations) and the employees, the knowledge workers, in today's organizations.

One of the key issues facing the organizations in the knowledge economy to achieve sustained competitive advantage through intellectual property rights (IRs) is to capture and secure the exchange of knowledge among employees and prevent the employees from utilizing the knowledge (Kay, 1993), either for their own benefit or for their competitors benefit in their future workplaces. Employment contracts of knowledge workers ensure that the knowledge created in workplaces are captured through the ownership rights clauses such as "Work for Hire" clauses which provide the organizations the entitlement to the copyright as a condition of employment.

With the increased competence and mobility of knowledge workers, the control of intellectual property rights are achieved not only through the "Work for Hire" clauses, but also through restrictive covenants such as non-compete, non-solicitation, and most importantly the non-disclosure agreements to prevent the competition from taking advantage out of the knowledge gained at the expense of organizational resources in the previous organizations. Upon the departure of the employees, organizations attempt to enforce these restrictive covenants through economic incentives such as stock options, accrued but unpaid bonuses etc., while negotiating the separation agreement and also through the court of law in case employees breach the terms and conditions of the restrictive covenants. While the enforcement or non-enforcement of such restrictive covenants depends upon the approach taken by the jurisdiction based on the laws of that jurisdiction, such organizational practices related to restrictive covenants aim to render the employees, the knowledge produced by employees, or even the customers or clients as the property of the employer or the employing organization.

In this context, the research paper attempts to explore the idea of "Commons" in employments relations by critically examining the enforcement of restrictive covenants and the equity of outcome emanating from such enforcements from the various stakeholders' perspective such as employers, employees, customers, and society based on the disputed legal cases in India in the post liberalization era across different industries.

"Employees," "Knowledge" and "Customers" Private Property or Commons?: Evidence from Restrictive Covenant Disputes in India

We present three legal cases of restrictive covenants which provide insights into the classification of "employees," "knowledge," and "customers" as private property of organizations as well as commons. They are; 1) Pepsi Foods Limited and Others Vs. Bharat Coca-Cola Holdings Private Limited and Others; 2) Wipro Limited Vs. Beckman Coulter International S.A.; and 3) American Express Bank Limited Vs. Priya Puri.

While Pepsi Foods Limited and Others vs Bharat Coca-Cola Holdings Private Limited, and Others case illustrates the principles on the enforcement of non-compete restrictive covenant, the case of Wipro Limited Vs. Beckman Coulter International S.A., highlights the principles of enforcement of non-solicitation restrictive covenant but in a different context as the case involves the non-solicitation (of employees) restrictive covenant signed by two organizations than between an organization and its employees. However, the case of American Express Bank Limited Vs. Priya Puri illustrates the principles behind the enforcement of non-solicitation (of customers) and non-disclosure restrictive covenant between an organization and its employees.

1) Pepsi Foods Limited and Others Vs. Bharat Coca-Cola Holdings Private Limited and Others

The Delhi High Court's decree on the Pepsi Foods Limited and Others vs Bharat Coca-Cola Holdings Private Limited, and Others serves as a appropriate example to understand the principle behind the enforcement or non-enforcement of non-compete agreements in the Indian context. Pepsi alleged that Coke approached Mr. Kochin Wu, one of the territory development managers of Pepsi in the Kanpur circle, with an offer of increasing his salary and emoluments substantially in case he moved over along with his sales team to Coke. The employment contract of Pepsi sales team contained the non-compete agreement which required them not to take up any employment with the competitor of Pepsi within one year of leaving Pepsi's employment for any reason whatsoever. The employees had also signed a confidential agreement (Non-Disclosure Agreement) in favour of Pepsi to keep all information, knowledge, data, etc. acquired by them during the course of their employment. Notwithstanding the non-compete agreement and non-disclosure agreement, Mr. Kochin Wu with two more members of the sales team joined Coke which made Pepsi to allege that Coke had entered into a conspiracy with a specific objective to undertake tortious[2] and illegal action

[2] TORTIOUS/WRONGFUL INTERFERENCE (IN BUSINESS RELATIONSHIP) - The theory of the tort or wrong of interference is that the law draws a line beyond which no one may go in intentionally intermeddling with the business affairs of others. So, a systematic effort to induce employees to leave their present employment and take work with another is unlawful when the purpose of such enticement is to cripple or destroy their employer rather than to obtain their skills and services in the legitimate furtherance of one's own business enterprise.

It also becomes unlawful when the inducement is made through the use of untruthful means, or for the purpose of having the employees commit wrongs such as disclosing the former employer's trade secrets. It is not unlawful or improper, standing alone, to hire away someone else's employee so long as the person doing so wants to use the employee's services in advancing his own business rather than with the intent of destroying the other employer's

against Pepsi and cause loss and damage to it. However, Delhi High Court refused to enforce non-compete agreement against the employees based on the principles that employee mobility cannot be restricted by a court injunction. The Delhi High Court verdict said, "Rights of an employee to seek and search for better employment cannot be restricted by an injunction. *Injunction cannot be granted to create a situation such a* "*Once a Pepsi employee, always a Pepsi employee*". It would almost be a situation of 'economic terrorism' or a situation creating conditions of 'bonded labour'. Freedom of changing employment for improving service conditions is a vital and important right of an employee, which cannot be restricted or curtailed by a Court injunction. Rough and tumble of the business including stiff competition has to be faced in a free market economy. The problems which should be settled in the market place cannot be brought to Law Courts or settled by a Court injunction. It is, impracticable and unrealistic to artificially create a situation by a Court injunction when employees would first leave the employment and then look for better service conditions and job opportunities elsewhere. Pepsi itself has engaged a large number of employees who were working in other multinationals or business organisations. In a free market economy, everyone concerned, must learn that the only way to retain their employees is to provide them attractive salaries and better service conditions."

2) Wipro Limited Vs. Beckman Coulter International S.A.

Wipro Biomed was the sole distributor for Beckman Coulter International for around 17 years distributing its bio-medical products ranging from life sciences, clinical diagnostics to cellular analysis catering to firms in various industries such as biotechnology, pharmaceutical, research and educational institutions, hospital laboratories, and commercial laboratories in India. Wipro Biomed and Beckman Coulter had signed the Canvassing Representative Agreement which set out a two years "Employee Non-Solicitation" clause binding on both Wipro and Beckman Coulter (See Exhibit 02). The Non-Solicitation of Employees clause provided that upon termination of the Canvassing Representative Agreement, neither Wipro nor Beckman Coulter should solicit, directly or indirectly, or induce or encourage employees of the partner's organization to join them or even the competitors of both organizations. However, both organizations agreed that general means of recruitment of employees of the partners through advertising in the open market would not amount to solicitation and therefore such recruitments should be kept out of the purview of the non-solicitation agreement.

During February 2005, Beckman Coulter sent out the formal non-renewal notice to Wipro at the end of October 2005 to sever the ties with Wipro Biomed and communicating its intentions to carry out the distribution on its own. Subsequently, Beckman Coulter released a pan India advertisement from Mumbai in one of the leading English newspapers in October 2005 seeking to recruit personnel for various positions in Sales, Marketing, Service and Support positions. The advertisement read out,

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business. This is true regardless of how much the loss of the employee may inconvenience his former employer. The mere fact that someone's activity has injured another in his business does not mean that the latter may recover because, in a free enterprise system, a businessman has no legal complaint concerning a loss resulting from lawful competition, including competition for the services of skilled employees. If the means of competition are fair, the advantage gained should remain where success has put it. (Source: www.lectlaw.com/def2/t061.htm)

"*For all Sales and Marketing and Service and Support positions experience of working with or having handled Beckman Coulter products and or similar products would be a distinct advantage*."

However, shortly after the release of the above advertisement, Wipro Biomed was flabbergasted as it received resignation letters from 21 employees across India possessing considerable expertise and experience in their areas of specialization. The sudden exodus of competent manpower created a fear psychosis across Wipro Biomed threatening to cripple its operations and thereby end its business in the biomedical segment since their most valuable assets i.e., the Sales, Marketing, Service and Support personnel were poached by their partner Beckman Coulter. Consequently, Wipro Biomed served a notice to Beckman Coulter regarding solicitation of its employees by the partner in violation of the non-solicitation clause signed in the Canvassing Representative Agreement. It also approached the Delhi High Court to get an interim order to put a restraint on the solicitation of Wipro Biomed employees by Beckman Coulter.

After listening to the arguments from the legal counsel, the Delhi High Court decree said, "this advertisement was directed towards the employees of Wipro Biomed and it was definitely a solicitation on behalf of Beckman Coulter. This Court is of prima facie view that the Agreement between the parties prohibiting the defendant for two years from taking employment with any present, past or prospective customer of Wipro Biomed is void and hit by Section 27 of the Indian Contract Act. *This stipulation was prima facie against public policy of India and an arm-twisting tactic adopted by an employer against a young man who was looking for a job….Beckman Coulter is restrained during the pendency of the arbitration proceedings from taking out any other or further advertisements or to do anything to solicit, induce or encourage the employees of the petitioner to leave Wipro Biomed's employment and take up employment of the respondent and / or its agents and / or representatives and / or competitors. The employees of Wipro Biomed would, however, be free to take up employment with Beckman Coulter, even in response to the said advertisement which has prima facie been held to be solicitation, but, Beckman Coulter would be liable to compensate Wipro Biomed for such breach of the non-solicitation clause, if so established in the pending arbitration proceedings*".

3) American Express Bank Limited Vs. Priya Puri

Priya Puri was the Head of Wealth Management Division of Northern Region of American Express Bank Limited. During September 2005, She resigned from American Express Bank as she had got an offer from Societe Generale , the European Corporate and Investment Banking firm. On receiving the offer from Societe Generale, Priya Puri submitted her resignation to Kaustub Majumdar, Director of Wealth Management division and served a notice period of 30 days as stipulated in her employment contract.

A week after receiving the resignation letter from Priya Puri, the Director of Wealth Management division complained to the top management that she had illegally detained the confidential data and information owned by American Express Bank Ltd. He alleged that Priya

Puri instructed Shika Sharma, one of her subordinates, to compile the exhaustive list of large number of customers of iWealth View, their contact details, and their investment accounts in the pretext of briefing the department heads about the fall in AUM[3] figures.

Mr. Kaustub Majumdar also claimed that Shika Sharma brought this episode to his notice only when she realized the gravity of the situation as she came to know from a client that Priya Puri was leaving American Express and had apparently asked the client to change his accounts to her new employer Societe Generale. In addition to that American Express happened to learn from a few clients that Priya had been approaching them to change their loyalty to her new employer.

Subsequently American Express Bank terminated Priya Puri from her service and approached the Delhi High Court seeking a permanent injunction against Priya Puri 1) From using or disclosing any confidential data and trade secrets relating to business and operations of American Express Bank Limited; 2) From endeavoring to solicit or induce away any of the customers of the American Expres and from doing any acts which would breach the confidentiality terms as in letter of appointment/code of conduct including the Customers Privacy Principles/Policies of American Express Bank Limited; and 3) For a mandatory injunction directing Priya Puri to deliver up all confidential information, data, trade secret including customers list in particular the customers list of Wealth Management Operations and/or iWealthview program/operations of American Express Bank Limited.

The Delhi High Court decree said, "*In the garb of confidentiality, American Express Bank (AEB) is trying to contend that once the customer of AEB, always a customer of AEB*…. no Bank should be allowed to create monopolies on the ground that they have developed exhaustive data of their clients/customers. Mere knowledge of names and addresses and even the financial details of a customer will not be material, as the consent of the customer and his volition as to with whom to bank, is of prime importance. The option of the customers/clients to bank with any one cannot be curtailed on the plea of confidentiality of their details with any particular bank. Creating a data base of the clients/customers and then claiming confidentiality about it, will not permit such bank to create a monopoly about such customers that even such customers can not be approached. Those cases will be different where the processes and products which may be confidential are taken by another organization or company….

What is inevitable to infer in the whole facts and circumstances is that Priya performed extremely well and her desire to leave has been interpreted by AEB as losing all the business which she was able to get for them in previous years and therefore, the plea of Priya getting information about AEB's customers illegally and unlawfully and alleging confidentiality about the same, was made as an afterthought to pressurize her either not to leave AEB or to teach her a lesson and curtail her future prospect for employment. Priya cannot be restrained from dealing with the persons who are banking with AEB. Such an injunction will affect even those

[3] Assets Under Management (AUM) is measure of success in financial services companies, especially in Investment Banking, where the market value of assets managed by a company on behalf of investors in comparison with their competitors is evaluated in terms of growth with respect to capital appreciation and money inflow and outflow (Source: www.investopedia.com)

customers /persons who would like to bank with some other banks than plaintiff despite banking with AEB. Some of the customers have given letters and communications which have been produced on record to show that it is their decision to be with any bank/institution for managing their investment. In totality of circumstances AEB has failed to make out a strong prima facie case in his favor. The inconvenience caused to Priya shall be much more in case the injunction as prayed by AEB is granted in his favor and therefore, the balance of convenience is in favor of Priya Puri."

Issues in Enforceability of Restrictive Covenants in India

Indian courts have generally adopted the Freedom of Occupation approach, a pro-employee approach, in the (non)enforcement of restrictive covenants as every employee has the right to pursue any legal employment for growth and prosperous career which cannot be restrained artificially by a court injunction as violates Section 27 of the Indian Contract Act, 1872. Section 27 of the Indian Contract Act emphasizes that every agreement by which any one is restrained from exercising a lawful profession, trade or business of any kind, is to that extent void.

Section of 27 of the Indian Contract Act does not allow any restraint of trade whether general or partial based on the reasonableness of the restraint imposed on the covenanting parties. It has a very strict exception drafted narrowly to provide restraint on trade only in case where goodwill is sold i.e., 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.

The absence of test of reasonableness and strict enforcement of section of 27 brings rigidity in carrying out business activities in the liberalized and globalized world in the 21st Century as it does not recognize the freedom of contract principles and yield perceived inequitable and unsustainable outcomes as present in the outcome of the case, "Wipro Limited Vs Beckman Coulter International" as summarized below.

1. At first, the Delhi High Court has recognized that the non-solicitation agreement between the parties preventing the employees from taking any, present, past or prospective customer of is void and hit by Section 27 of the Indian Contract Act, 1972.

2. Secondly, it has also recognized the fact that Beckman Coulter had solicited the employees of Wipro Biomed and recognized such solicitation as a breach of contract by Beckman Coulter and suggested Wipro Biomed to seek for damages and injunction against such solicitation in future through arbitration proceeding.

3. Thirdly, the court also prevented Beckman Coulter from releasing any other or further advertisements or to do anything to solicit, induce or encourage the employees of the petitioner to leave Wipro Biomed's employment and take up employment of the respondent and / or its agents and / or representatives and / or competitors.

4. Finally, the Delhi High Court had mentioned that the employees of Wipro Biomed would, however, be free to take up employment with Beckman Coulter, even in response to the said advertisement which has prima facie been held to be solicitation, but, Beckman Coulter would be liable to compensate Wipro Biomed for such breach of the non-solicitation clause, if so established in the pending arbitration proceedings.

The Delhi High Court's verdict in the above case is ambiguous as it neither fully recognizes the freedom of occupation principles nor the freedom of contract principles. By the virtue of allowing the Wipro Biomed employees to join Beckman Coulter, the Delhi High Court has indirectly, but intentionally, strengthened the position of Beckman Coulter to employ any Wipro Biomed employee in future as it is very difficult to prove solicitation in a competitive market scenario and thereby violating non-solicitation agreement (Freedom of Contract). Similarly, it could be argued that by not allowing to release any other advertisement, the Delhi High Court has indirectly but intentionally, affected the Freedom of Occupation principles.

The Need for Shift from Freedom of Occupation to Balancing Equities Approach

The complexities in the above case necessitate the incorporation of standard of reasonableness in the restraint of trade clause under the Indian Contract Act, 1872. A.K. Sen, the Chairman of Law Commission and the Law Minister of India, submitted the thirteen law commission report during 1958 which recommended that the *provision (Section 27 of the Indian Contract Act, 1872) should be suitably amended to allow such restrictions and all contracts in restraint of trade, general or partial, as were reasonable, in the interest of the parties as well as of the public*." However, no such amendment has taken place during the last five decades which constraints business and economic growth in the liberalized economy as even the Delhi High Court observed that *liberalisation and globalisation is likely to bring in numerous shades of such restrictions.*

The origin of the Section 27 of the Indian Contract Act, 1872 was from Hon. D. Field's Draft Code for New York which was based on the ancient English Doctrine of Restraint of Trade. The Supreme Court of India has quoted Sir Frederick Pollock's, the well known English Jurist, criticism on the adoption of this provision in Indian Contract Act in Superintendence Company of India (P) Ltd Vs. Krishan Murugai. Sir Frederick Pollock observed that, "the law of India is tied down by the language of the section to the principle, now exploded in England, of *a hard and fast rule* qualified by strictly limited exceptions."

Although New York jurisdiction can easily be categorized as pro-employee in enforcement of restrictive covenant, its application of exceptions are worth noticing as it has evolved the Covenant per se Invalid approach (Vanko, K.J, 2002). Covenant per se is Invalid Approach is looking into the conditions of employment terminations as whether they are voluntary (resignation – employee initiated) or involuntary (employer induced) with / without cause in order to decide the enforcement of non-compete. For example, courts may decide as not to enforce the non-compete agreement based on the principle of "mutuality of obligation" when the employer terminates the employment relationship without cause. The underlying

assumption behind the principle of "mutuality of obligation" is that an employer's willingness to employ an employee who has signed a non-compete clause and hence no employer can terminate an employment relationship without cause. In the event, an employer terminates an employee without cause, the employer's action would be deemed to be destroying the mutuality of obligation and therefore, the non-compete covenant cannot be enforced.

On the contrary, when an employee is terminated for cause on the grounds of violation of employment contract by the employee, courts may decide to enforce non-compete agreements. The term "cause" is a contentious one as what actions of employees constitute "cause" and what actions cannot. While actions like "theft", "misappropriation of funds / records", "sexual harassment" etc., can easily be covered under the term cause, it is relatively very difficult to prove in a court of law when the term cause covers employee actions like "failing to promote professional practice", "deliberate poor performance" etc., The rationale behind the enforcement of non-compete based on termination with cause conditions is that there should be material breach of terms and conditions of employment contract by the employee and such breach should be proved in a court of law by the employer.

There are several other approaches various jurisdictions across the globe such as the Presumption against Enforcement (based on ability to compete), Bad Faith (questioning the parties' intent of termination), Discharge is Not A Factor to Consider approaches (Freedom of Contract), it is appropriate for developing country like India to consider the "Balancing Equities Approach" as it would provide for equitable outcome as it protects interests of employers, employees, customers, and society while taking into consideration of "standard of reasonableness" of the non-compete agreement, the nature of business / profession, the nature of employee's position and responsibilities (e.g., Vice President Vs. Sales Executive), the limited skills of an employee in other industry, the economic / psychological / social hardships that the employee and his/her family may face when the covenant is enforced, and even the public interest in the employee pursuing a job in the same industry etc. The standard of reasonableness of the non-compete is decided on the basis of the duration of non-compete period in terms of the length of time and the geographic scope in terms of the size of territory in which a former employee cannot compete against his / her former employer. When the courts find the scope of restrictive covenant is not so reasonable, they may alter the scope of non-compete by modifying the time duration and / or size of the territory, using the Blue Pencil Approach, in order to restrict the arbitrariness of the restrictive covenant which may favour an employer unduly.

Conclusion

The outcome Delhi High Court Verdict on the case Pepsi Foods Limited and Others Vs. Bharat Coca-Cola Holdings Private Limited and Others suggests a Commons perspective of employees when it said, "***Injunction cannot be granted to create a situation such a*** "***Once a Pepsi employee, always a Pepsi employee***." The same logic is applied in American Express Bank Limited Vs. Priya Puri case when the Delhi High Court asserted that "***In the garb of confidentiality, American Express Bank (AEB) is trying to contend that once the customer of AEB, always a customer of AEB.***"

The disputed case of restrictive covenants in India during the post liberalization period highlights the dynamics of globalization and suggests that what appears to be rational approach towards enforcement of restrictive covenant in one business environment is seen as arbitrary employment practice in another business environment.

For example, unlike in India, Pepsi was able to successfully obtain the Seventh Circuit U.S. court's injunction against Mr. William Redmond Jnr who left PepsiCo to join Snapple Beverage Corp, the firm acquired by Quaker. The Seventh Circuit U.S. Court investigated the case and ruled in favour of PepsiCo sanctioning an injunction against Redmond joining Snapple using the principle of "inevitable disclosure" and a permanent injunction from using or disclosing any trade secrets or confidential information belonging to Pepsico. The doctrine of inevitable disclosure requires an employer to prove in a court of law that the employee cannot succeed in a new job with his/her future employer without using the trade secrets in carrying out the responsibilities of similar duties.

Stewart (1997) emphasized that "*a corporate asset should be social in origin…* Swiping secrets is odious to both law and etiquette, and that's a legally enforceable …. First you swap proprietary information all the time; in fact, the company probably wouldn't prosper unless you did. Second, the real genesis and true ownership of ideas and know-how aren't corporate. Nor personal, for that matter. They belong to something that is coming to be known as "community of practice." Thus, the doctrine of inevitable disclosure could also be approached from the Commons perspective as the employees' ability to secure a new job and an enriching career and also the survival and profitability of other business organizations lie in the access to and utilization of "information" and "knowledge" generated from the previous employment, although using the organizational resources, as in the case of Priya Puri at American Express Limited.

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