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A Review on Trade Secrets

Bhirgu Raj Maurya, Assistant Professor,
Department of Law, Teerthanker Mahaveer University, Moradabad, Uttar Pradesh, India
Email Id- brmourya.mourya321@gmail.com

ABSTRACT: ***Trade secrets are intangible assets for a business that have the ability to provide it a competitive advantage over its rivals. Companies have been forced to preserve such trade secrets inside the confines of the company due to increased market rivalry. The Indian government, on the other hand, has fallen behind in providing sufficient protection for trade secrets. While trade secrets are often overlooked in favor of more visible elements of intellectual property rights, it is critical for businesses to protect their private data and procedures. In India, trade secrets are enforced either contractually or via a rudimentary application of common law principles. This study aims to investigate India's trade secret protection system and the serious consequences of insufficient trade secret protection on market conditions. The authors of this article attempt to demonstrate the necessity for a distinct piece of law governing trade secrets. The method used is based on secondary research, which includes a study of the legislation in different countries across the globe. In order to promote the development of a globalized economy, the study suggests that, given the potential that trade secrets have for a company, appropriate protection must be formulated under the Indian IPR system. The purpose of this article is to add to the current literature on trade secrets and their protection in India, as well as to examine the unique arrangements established in other nations.***

KEYWORDS: ***Business, Equity Principles, Protection, Trade Secrets.***

1. INTRODUCTION

Globalization and liberalization[1] are two developments that signaled the start of competitive markets by allowing a large number of businesses to join the industrial and commercial sectors[2]. These marketplaces offered up new opportunities for acquiring a wide range of client groups all around the globe. The necessity to remodel and preserve secret, which is the lifeblood of every company, has been highlighted by such a conception of global companies and competitiveness. Trade secrets [3]are company secrets or private knowledge that may be used without permission, which can be considered an unfair activity. Trade secrets may contain everything from the complexity of a company's operations to simple information that the company wants to keep private. When a company wants to gain and keep a competitive edge in the market, it turns to trade secrets for protection[3].

Despite the fact that trade secrets are an inextricably important intangible asset for every company, they are not as well-known as other intellectual property rights[4]. Many factors contribute to its unpopularity: To begin with, trade secrets are not required to be registered. The common practices in business and business ethics are generally credited with the development of trade secrets and their preservation. Second, trade secret laws are founded on legal concepts that have developed through time; nevertheless, the enforcement regime is not well established. Third, conflicts over such secrecy are rarely accessible to public discussion, which means that knowledge with such issues is typically restricted, making trade secrets relatively unpopular. Fourth, unlike other forms of intellectual property, trade secrets do not provide the possessor the exclusive right to use the knowledge. When knowledge is created independently or extracted via the reverse engineering process, this right may be vested in others. Trade secrets have been estranged from fundamental intellectual property rights due to

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the sharp difference inherent in their nature. While the intellectual property system aims to promote the exchange of intellectually generated goods, information, and management, the trade secret sector is largely reliant on secrecy to operate.

The trust connections are the foundation of the trade secret domain. Since the beginning of time, secrecy has been employed in commerce. The historical example of the Chinese admirably preserving the secret of silk manufacturing, which resulted in a thriving economy as a result of the worldwide demand for Chinese silk[5]. Before the onset of industrialization, such business subtleties were a closely kept secret among families that controlled small companies. With the embrace of dynamism by industries, the magnitude and breadth of trade secrets altered dramatically, necessitating the necessity to govern trade secrets.

1.1. Significance of Trade Secrets

Even at an early stage of a company, when research and development is not well-equipped to attract the patentability process, trade secrets may be beneficial. Because of their concerns regarding patent eligibility, companies often turn to trade secrets, especially when it comes to biotechnology and software innovations[6]. Trade secrets offer a variety of economic benefits to the company. It provides financial stability to the company by guaranteeing appropriate rewards on any invention that is backed up by proper trade secret protection. It does not need the establishment of any costly system to avoid breach. Furthermore, it dispels concerns about company information being misused as a result of a knowledge spill-over.

Trade secrets, while depending on reasonable methods to maintain confidentiality, strike a balance between such secrecy and appropriate disclosures, which may result in knowledge diffusion or independent invention as a consequence of them. The non-exclusivity restriction strikes the ideal balance between guaranteeing secrecy while retaining the necessary difference from absolute secrecy.

1.2. Comparison of Trade Secrets and Patents

Trade secret protection not only covers a wider range of topics, but it also lasts longer than patents, which are only valid for 20 years. Furthermore, unlike patents, which need an application to be submitted with the administrative agency and may only become effective if authorized or evaluated by that agency, there are no stated criteria that must be fulfilled in regard to the registration and filing of trade secrets.

Due to the non-exclusive character of trade secrets, the incidence of rights in respect to trade secrets is considerably lower than that of patents. Misappropriation of a trade secret is required for a trade secret violation to be established, and it does not involve acquiring knowledge via fair and honest methods. Further reverse engineering discovery is beyond the scope of trade secret protection, severely limiting the scope of such protection. Once such a disclosure is made, the information's private value is gone, and the protection provided by law is rendered ineffective. As a result, the sole remedy in trade secret proceedings is damages, which require a much higher level of evidence. As a result, trade secret protection's inherent flexibility, while providing incentives, also restricts the remedies available in instances of infringement. As a result, commercial companies often seek patent protection in order to solidify their exclusive rights to any innovation.

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Patent protection is given on a first-to-file basis and is exclusive. The infringer's assertions of innocence and fair practices have no bearing on the patent infringement decision. Patents are only granted to particular technical innovations that pass the usefulness, novelty, and non-obviousness tests. On the other hand, the wide definition of trade secrets includes both patentable and non-patentable subject matter, as well as know-how. The protective option chosen may have social ramifications. While patents may bring about social benefit because to its unique and well-established regime, the effect of trade secrets on the societal front may be best described as optimum.

1.3. International Regulations Relating To Trade Secrets

The North Atlantic Free Trade Agreement (NAFTA)[7], which went into effect in 1994, was the first pact to establish an international trade secret protection system. Commerce secret rights are recognized in Chapter 17 of the NAFTA as a critical intellectual property needed for the development of international trade and the removal of obstacles to lawful trade between the parties.

Trade secrets have the ability to turn intangible value into economic gain, either via competitive advantages or market retention. The need of trade secrets to safeguard a majority of functioning companies and their technology has been acknowledged worldwide in an effort to foster free market economies. As a result of this acknowledgment, worldwide efforts to safeguard trade secrets have been undertaken. The ratification of the Agreement on Trade-Related Aspects of Intellectual Property (TRIPS)[8] at the Uruguay round of the General Agreement on Tariff and Trade is the main source of information in this respect (GATT)[9].

The TRIPS Agreement does not specify the precise word, although it does specify the components of such unreleased information. It discusses the conceivable protection that secret information with economic value may be given against illegal disclosure or acquisition carried out without the agreement of the information's possessor. The member nations are also obligated under the Paris Convention to safeguard such unreleased material. The article outlines the extent of unreleased information and discusses worries about data theft by government agencies while approvals for certain goods, particularly medicines, are pending.

The TRIPS agreement sets a boundary between maintaining confidentiality and providing sufficient public disclosures to the government. This restriction, however, is only applicable to pharmaceutical and chemical-agricultural goods. It goes on to state that such information cannot be used for unfair competition, which is an important goal of secrecy. These rules, which contain three fundamental grounds: secrecy, economic value, and reasonable attempts to preserve such secrecy, have been recognized and enforced as trade secret law. While such an interpretation gives the phrase a broad reach, encompassing both technical and other private company knowledge, it excludes independent inventions, learning through reasonable means, and reverse engineering techniques, all of which may threaten trade secret exclusivity. As previously said, trade secret protection entails the vesting of exclusive rights, which, although fair, may be seen as an inherent restriction.

On the one hand, while TRIPS requires its members to adopt a system to provide the TRIPS-mandated protections, Art. 39 does not include an elaborate framework for the protection of secret information, as a result of which member states have dispensed with the need to enact specific legislation and instead covered this aspect under ancillary remedies. Such importation

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1.4. Trade Secrets Protection under the Indian Regime

In February 2004, the Indian government established the Satwant Reddy Committee, recognizing the Indian market's development potential and the pressure from multinational corporations (MNCs)[10]. The Committee was tasked with developing suggestions for a data exclusivity policy, which they delivered in 2007. In the case of agrochemicals, the Satwant Reddy Committee proposed three years of data exclusivity, with two alternative models for medicines. The suggestions, however, were placed on hold owing to strong resistance. As a result, India lacks explicit laws to safeguard trade secrets; nevertheless, Indian courts have taken a proactive role in protecting trade secrets under TRIPS Article 39.3.

The draft National Innovation Act of 2008, proposed by the Indian government, is yet another effort to safeguard trade secrets. Confidentiality, confidential information, and associated remedies were addressed in Chapter VI of the Act. The Act enabled the parties to stipulate the terms and circumstances for the use of private information as well as the disclosure of such information. The Act also allowed the court to limit the publication of any material claimed to be private by a party without the need for previous court orders. The draft law under S. 11 contained exceptions to the confidentiality protection, such as material that was already in the public domain, independently generated information, or disclosures made in the public interest. However, owing to widespread resistance, the proposed law did not see the light of day.

The National IPR Policy of 2016, which included issues such as more research and effective legislative actions to extend the present Intellectual Property Rights framework, emphasized the necessity to address Trade Secrets protection within the existing protection and enforcement system. The strategy seeks to build a high brand value in order to gain economic advantages; yet, brand development is hampered in the lack of appropriate Trade Secrets

Protection, necessitating more study. In October 2016, the US-India Trade Policy Forum convened in New Delhi to discuss the feasibility of a Trade Secrets system in India. India has paved the path for autonomous legislation as a result of these efforts. It's worth noting that the creation of such Trade Secret protection takes on further importance in light of the recent economic progress made possible by Make in India initiatives, which seek to make India self-sufficient and startup-friendly. In light of such measures, the impact that legislation may have on SMEs cannot be underestimated.

1.5. Remedies: Position of Trade Secrets in India

India currently lacks any particular law to safeguard trade secrets and private information, which is critical for advancing innovation and international investment. Currently, the courts have only given trade secret protection on the basis of former Common Law Principles of equity and, on occasion, a common law action for breach of confidence, which amounts to a violation of contractual duty.

Non-Disclosure Agreements may be enforced contractually in India, and parties can be legally obligated by them. Non-disclosure agreements are a frequent sensible practice to prevent the misuse of trade secrets. The Delhi High Court held that secrecy is implicit even if there is no explicit confidentiality provision in the contract, and that the defendant is responsible for breaching the confidentiality requirements. 29

The Indian Contract Act, 1872, provides a suitable framework for setting down rules and regulations regulating the formation and execution of a contract. When deciding cases, the courts have resorted to Section 27 of the Act. It addresses the legality of non-compete agreements and states that any agreement that prevents someone from engaging in a legitimate profession, trade, or company is invalid to that degree. 30 A restraint of trade agreement is defined as one in which a party agrees with any other party to restrict his liberty in the present or future to carry on or undertake a specified trade or profession with other persons who are not parties to the contract without the latter party's exclusive permission in any manner he chooses.

According to Section 27 of the Act, a restriction of trade agreement must be reasonable between the parties and in the public interest in order to be legal. However, in order to protect the employer's interests, an injunction may be granted to enforce a negative contract that imposes a time limit. The goal is not to prevent a person from learning new skills that would help him become a better employee. It is forbidden to provide such information to a third party. Restraints should not be imposed in excess of what is required to safeguard the employer, nor should they be too severe or burdensome to the employee.

2. DISCUSSION

India presently lacks any specific legislation to protect trade secrets and private information, which is essential for promoting innovation and attracting foreign investment. Currently, trade secrets are solely protected by the courts on old Common Law Principles of Equity and, on rare occasions, a common law case for breach of confidence, which amounts to a breach of contractual duty. Non-disclosure agreements may be enforced contractually in India, and they can bind parties legally. Non-disclosure agreements are a common and reasonable technique for preventing trade secret misappropriation. The Delhi High Court ruled that even if there is

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no express confidentiality clause in the contract, secrecy is implied, and that the defendant is liable for violating the confidentiality obligations.

The Indian Contract Act of 1872 offers an appropriate foundation for establishing rules and regulations governing contract creation and execution. The courts have relied on Section 27 of the Act while making decisions. It discusses the validity of non-compete agreements, stating that any agreement that prohibits someone from participating in a genuine profession, trade, or business is unenforceable to that extent. 30 A restraint of trade agreement is one in which a party agrees with any other party to restrict his liberty to carry on or undertake a specified trade or profession with other persons who are not parties to the contract without the latter party's exclusive permission in any manner he chooses in the present or future.

To be lawful, a limitation of trade agreement must be fair between the parties and in the public interest, according to Section 27 of the Act. An injunction may be issued to enforce a negative contract that sets a time restriction in order to safeguard the employer's interests. The aim isn't to stop someone from acquiring new abilities that will help them improve as employees. It is against the law to disclose such information to a third party. Restraints should not be applied beyond what is necessary to protect the employer, nor should they be excessively harsh or onerous for the employee.

3. CONCLUSION

Trade secrets have grown in importance and impact in the industrial economy over the last several years for a variety of reasons. Technology has advanced at a breakneck pace during the last several decades. The speed with which this transformation is occurring has significant consequences for both local and global economies. This advancement in technology has had an effect on intellectual property rights, since the development has outpaced the regulations in place to safeguard ideas and innovations. In many respects, trade-secret theft is an unavoidable consequence of growing global marketplaces. India currently lacks a defined legislation to protect trade secrets. It is apparent from the examples mentioned that common law principles have been used to safeguard trade secrets in India. In the face of a rapidly expanding economy, many Common Law concepts have lost their meaning, notwithstanding their practical usefulness. Instead than relying only on Common Law Principles, there is an urgent need for statutory protection of trade secrets in the form of a suitable policy framework to enable regulation of protection. Numerous businesses across a wide range of industries choose to preserve Trade Secrets as a type of Intellectual Property.

Because there is no legislative framework in place, many businesses are reluctant to invest in India, causing India to miss out on significant foreign direct investment, which has a negative impact on the economy. The protection of trade secrets has become a need for the Indian government, and one of the most difficult jobs it faces. For foreign investors to conduct business with our nation, they must have trust and certainty that their trade secrets will be protected. In most instances, the courts have resorted to Section 27 of the Indian Contract Act. The enforcement of non-disclosure agreements between the employee and the employer is the most common relief sought in these instances. According to the trend in adjudication, courts have been wary of implementing covenants that impose post-employment restrictions on employees. On many instances, such situations have placed the courts in a bind. The courts have seen these instances as a conflict of two interests, the employee's right to a living against

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the employer's right to profit, for which no consistent norm can be applied. A specific law for the protection of trade secrets in India is urgently needed to provide international investors a feeling of security and encourage them to share their trade secrets, which would assist develop the Indian economy. To create a strong policy framework, Indian lawmakers may use the provisions of the UTSA or the EEA.

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