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TRADE SECTORS AND NON- DISCLOSURE AGREEMENT AS A TOOL OF PROTECTION PROPRIETARY INFORMATION IN INDIA

AUTHORED BY - SANIYA¹ & DR. JUHI SAXENA²

ABSTRACT

A crucial component of modern business activity is the interaction between trade sectors and non-disclosure agreements (NDAs), which are used in India as a measure for protecting intellectual information. This abstract explores the importance of this subject by emphasizing the changing trade sectors in India and the critical function that non-disclosure agreements (NDAs) play in protecting confidential information.

This paper examines the legal environment surrounding non-disclosure agreements (NDAs) in India, the difficulties experienced by various trade sectors in protecting confidential information, and the efficacy of NDAs as a safeguard through a thorough review and analysis of the literature. This abstract also highlights the necessity for more study and the creation of policies to solve new issues and maximize the application of NDAs in India's changing trade environment.

Keywords: Intellectual Property, Trade Secrets, Confidential information, TRIPS, Non-disclosure agreements.

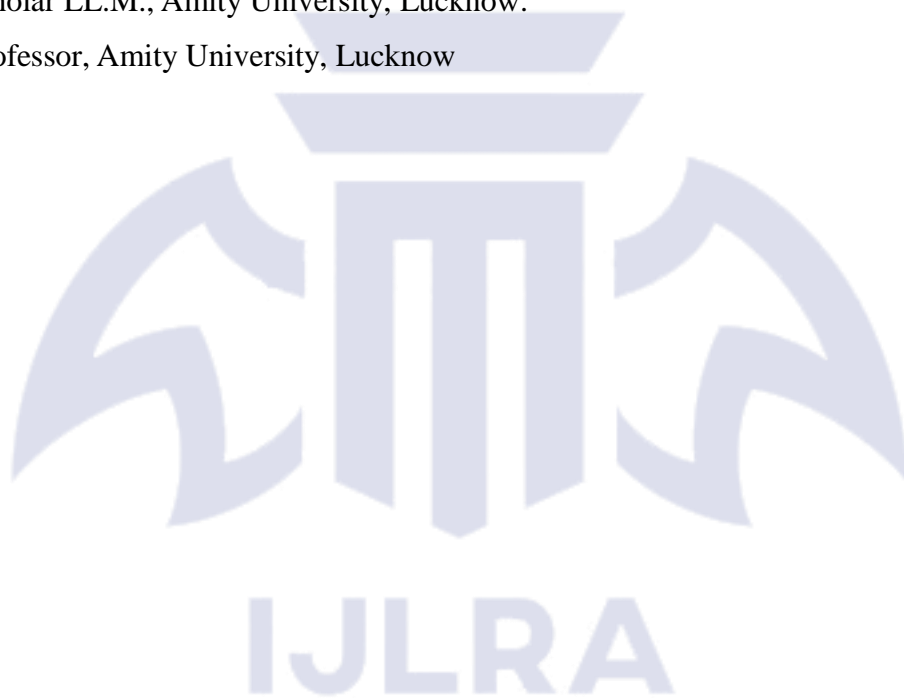
INTRODUCTION

Intellectual Property (IP) is considered as an intangible asset to a business. When there is IP protection laws, partners and institutions in the business get confidence to further develop their businesses by investing and collaborating with other entities to expand and thus to increase profits. If the property is worldly explored, more profit can be earned by the owner. IP is divided into industrial property and copyright.

India has a large collection of traditional, oral, customary, Ayurvedic knowledge etc. The lack of protection mechanism to people is an actual setback to a developing country like India. When someone first thinks about IPR laws, patent, trademark, and copyright laws comes to the mind right away. Trade secrets are also added but it is not well known comparing with others. Trade secrets are not known to the at large, they are protected by the owners by instituting special procedures which includes technological and some legal measures. Sometimes the owner keeps the trade secrets with themselves or allow limited number of people to have access for the effective

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running of the business. Economic interest of the owner has to be given a prior importance; Therefore, protection of trade secrets is necessary. The main function of the trade secret is to protect the information that gives a competitive advantage to those people who possess such information, provided such information is not readily available with or discernible by the competitors.³

The IPR laws are normally national, not international. There are laws to protect trade secrets at international level. First protection is offered by United Nations Organization (UNO). UNO has a specialized agency known World Intellectual Property Organization (WIPO), which gives recommendations for the member countries to have an effective law to safeguard the trade secrets. WIPO directives are not binding upon its member countries including India. The instruction of the World Trade Organization is binding on the member countries. For the protection of IP, it has set out a minimum standard criterion under TRIPS agreement for the member countries and these each member countries are expected to frame or reframe its IPR laws by complying with those minimum standards.

As trade secrets come under TRIPS, it is obligatory from the part of India to protect it. TRIPS Article 39.1 clarifies that effective protection from unfair competition includes protection of undisclosed information. In India, TRIPS Article 39.1 clarifies that effective protection from unfair competition includes protection of undisclosed information. Section 27 of the contract act provides an indirect, latent, and covert mention of trade secrets.⁴ Moreover, Indian courts also take approach on common law and grant some relief on dealing with trade secrets. So, it must be that if any country wants a definite and effective IPR law, it must have trade secrets law. Definite and effective trade secret law is one of the pre-requisites to excel the national economy.

There is no specific definition for trade secret under the Indian law. Ideas which have to be protected under trade law, if not protected, it will become detrimental for the traders. And also, if there is no law, there is less chance of conviction for the trade secrets misappropriation, as for an inventor there is no protection under the trade secret, another option is patent protection which may not help in the appropriate long time run. So as there is no particular IPR protection for trade secrets in India, it has become pertinent to see other laws. It is also necessary to find a model law of trade secrets as IPR, which will protect all owners without deviating from WTO-TRIPS.

IPR AND TRADE SECRETS

When an individual creates a property, he enjoys the said property for personal use or uses it for gaining some economic profit. Along with sufficient labour, skill, capital etc. Mind is also applied for such property formation. From these properties, where the intellect is more used, the owner safeguards the property by IPRs.⁵

³ Ambience India Pvt Ltd v. shri Naveen Jain (2005) 122 DLT 421

⁴ American Express bank ltd v. Ms. Priya puri (2006) III LLJ540 Del

⁵ Attorney general v. guardian newspapers (Spy catcher case) (1998)3 AII ER545



The quintessence of trade in the present time is ideas and knowledge. Having a need to give paramount importance to the ideas behind the various property.⁶ Due to this, many corporations which is having multi-national operations need to block others from using their inventions, or from other creations, and use that right to get amount in return, for others using them. These are mentioned as “Intellectual Property Rights” in contemporary-day parlance. Intellectual property is all about the creativity of humans. These rights are observed as a reward for creative and skilful work in executing ideas. The IPR impact has spread to every aspect of life. In modern times, there is a need to protect these intellectual properties. GATT negotiations which resulted in the formation of World Trade Organization including TRIPS have universally recognized the IPR.⁷

Before understanding the nature and meaning of Intellectual Property one must have to know the concept of the property. The term property includes every kind of property whether it is corporeal or incorporate, tangible or intangible, visible, or invisible, real, or personal etc. According to the Encyclopaedia Americana: “Anything whether tangible or intangible, which can be reduced to possession or made the subject of ownership comes within the legal definition of property. Human rights are considered as positive rights, but in case of IPRs it doesn’t allow one to use every right but allows owner to stop others from using the Intellectual property.⁸ In such a case IP is considered as a negative right. Intellectual properties are considered as individual rights, except geographical indications and farmers rights which can be termed as group rights. The IPR is granted only for a temporary period, after that it falls into the public domain, and anybody can use it. In India there is a balance between both capitalist and socialist approach is preserved. Individual rights or private rights are encouraged by the capitalist society whereas socialist society encourages collective or societal rights. India being a member of WTO and one of the TRIPS signatories, it must protect the IPR through legislation. The property which resulted out of mental labour is known as intellectual property.⁹

Famous English jurists John Lock propounded ‘Labor theory’ states: “Human labour deserves reward in the form of proprietary rights”. Also, in Utilitarian theory, which is postulated by Bentham states, maximum benefit to the maximum members of the society should be provided. IPR serves benefit to the society by enhancing companies or business value and providing an increasing market share. Reward for the IP owners can be justified as they hold the right only for temporary period and after that it falls on the public domain for the benefit of the public.⁹

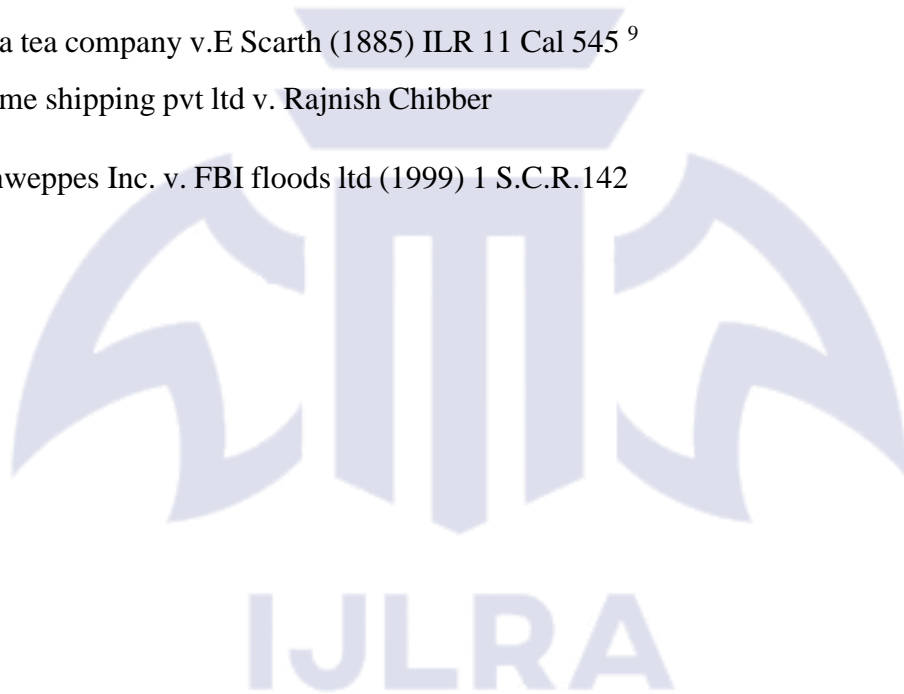
⁶ Barr Mullin Inc. v. Browning (1993) 424 S.E.2d 226

⁷ Bio-tech systems & services ltd v. Suprabhat ray & Ors AIR 2015 Cal 261

⁸ Brahmaputra tea company v. E. Scarth (1885) ILR 11 Cal 545 ⁹

Burlington home shipping pvt ltd v. Rajnish Chibber

⁹ Cadbury Schweppes Inc. v. FBI Foods Ltd (1999) 1 S.C.R. 142



KINDS OF INTELLECTUAL PROPERTY RIGHTS

Intellectual property involves mental labour. As they have intellectual efforts which have commercial value should be given protection. There are many fields such as literature, technology, science, agriculture, manufacturing which gives rise to definite intellectual property rights. Depends upon the nature of work and filed taken for application, IPRs have organized into different kinds:

1. Copyrights
2. Trademarks
3. Patents
4. Geographical indications
5. Industrial designs
6. Semiconductor chips and integrated circuits
7. Protection of plant varieties and farmers rights
8. Trade secrets

PROTECTION OF TRADE SECRETS UNDER COMMON LAW AND WORLDWIDE

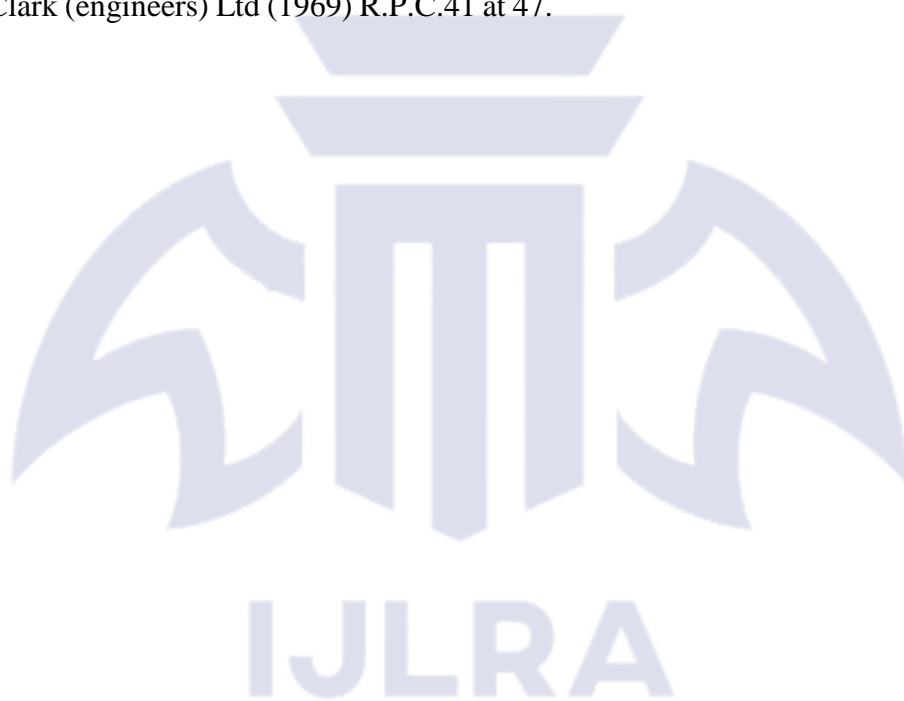
Under the system of free private enterprise and competition, the trader should obtain as much information concerning his rival's business and let him know a little of it. This information may be a trade secret like the method of production or a business, financial secret, or arrangements. Some of this information would be extremely confidential, as being potentially changing. If a competitor obtained it, some would be less so, and much would be worthless to a rival organization. Countries protect trade secrets in the form of confidential information. Where there are no specific laws for the protection of trade secrets, common law provides protection.¹⁰ Common laws are uncodified. This means there is no inclusive compilation of legal rules and statutes which comprise common law. Common law is mainly based on judicial precedents. These are maintained year by year through the court records and journals, and reports. The applications of precedent in each case decision are determined by presiding judges of the case. Trade secrets protection is mainly based on common law principles. Trade secrets are being protected under the contract, quasi-contract, and the property

rights.¹¹ The trade secrets protection under contract theories include in which were existed an express contract or a confidential information etc. The quasi-contract protection includes avoidance of unjust enrichment from misappropriation of trade secrets. Trade secrets are seen as a property right under property theory, which includes subjective as well as objective

¹⁰ Charles worth v. MacDonald (1898) ILR 23 Bom

¹¹ Ciba Inc. v. Sequent scientific ltd., notice of motion no:3472 of 2009 in suit No.2501 of 2009 Bom HC ¹³

Coco v. A.N Clark (engineers) Ltd (1969) R.P.C.41 at 47.



approaches subjects to protective rights in its uses and disclosures. Under common law, liability for trade secrets misappropriation needs acquisition by another by improper conduct or unfair means and the use or disclosure by such person to the detriment of the trade owner. The jurisdiction for restraining the breach of confidence has its origin in the law of contract and equity due to the remedy of injunction. The subject matter also occupies the same moral terrain as a breach of trust.¹³ In this modern era, the breaking of confidence started in 1948 by appealing an English court decision in *Saltman engineering co ltd v. Campbell engineering co ltd*¹² In this case, breach of confidence is considered as a different cause of action, and liability exists detached from any other legal action. Trade secrets and confidential information are considered as an equitable right more than a property right in commonwealth common law jurisdictions.

In the case of *Coco V.A.N. Clark(engineers) Ltd*, the test for detecting a cause of action for breach of confidence in the common law world is set out. The court, while granting the injunction, pointed out, provided the test for a cause of action for breach of confidence as:

The information must contain the necessary quality of confidence concerning it.

Information has been imparted in the circumstances imparting an obligation of confidence. There must be an unauthorized use of that information, which in turn, detrimental to the party communicating it.¹³

If the elements of the tort of breach of confidence are satisfied, action can be started for the trade secrets disclosure under the tort of breach of faith. Courts provide various cases for breach of confidence. A trade secret is an aspect that must be kept in confidence with other people. It is impossible to run a business or trade without sharing the secret with associated people, and such sharing is done in confidence. A trade secret has monopoly value as well as use-value. Still, the former will be usually affected by the misuse of the unknown.¹⁴ A right of action for confidence breach, strengthens and, in many of the cases, it predates a more crystallized intellectual property right. The nature of this kind of action can be considered in the leading *Spy catcher case (Attorney general v guardian newspapers)* where Lord Keith held that based on an equitable principle of confidence, the obligation may exist independently of any contract. Such an action seems to stem from the belief that information can be seen as a property right.¹⁵

But this assertion has been the focus of rigorous debate. The main problem, however, occurs because

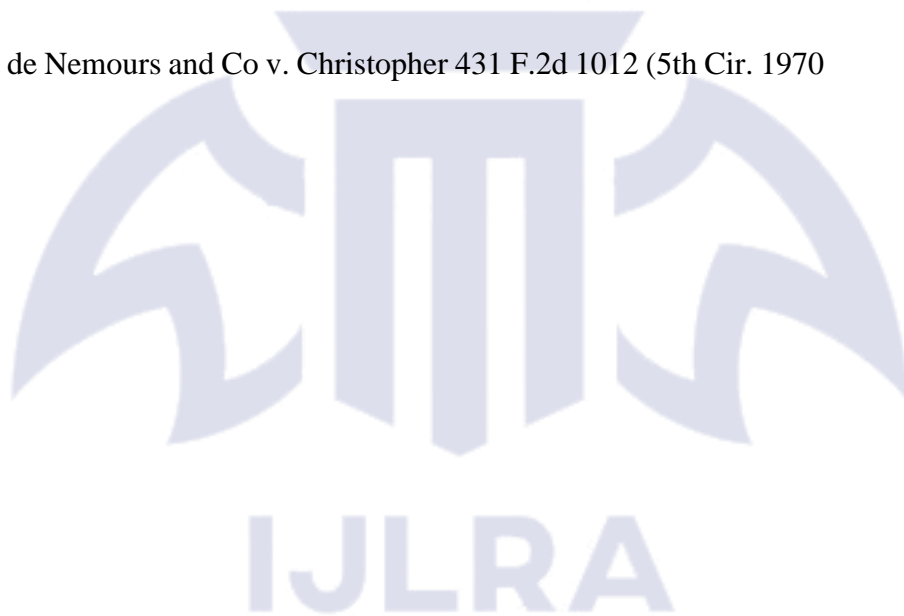
the secret is once revealed, the ideas of legal and equitable title cannot be applied. In certain circumstances, courts have looked at trade secrets protection in a new light where traditional characteristics are not necessary. Moreover, it was held that trade secrets disclosure in the form of breach of confidence is not allowed. It deemed that there exists an implied contract in

¹² Saltman engineering co ltd v. Campbell engineering co ltd

¹³ Coke v. Gujarat bottling company AIR 1995 SC 2372; (1995) 5 SCC 545

¹⁴ Desiccant rotors international v. Bappad Sarkar & another IA No.5455/2008, I.A No.5454/2008 &I. A.No5453/2008 in CS(OS)No.337/2008, Delhi HC ,14 July ,2009.

¹⁵ E.I. DuPont de Nemours and Co v. Christopher 431 F.2d 1012 (5th Cir. 1970)



the case of employment. Breach of confidence in such a kind of case may amount to the disclosure of confidential information or trade secrets and will be considered as a tort of breach of confidence. The law of breach of confidence is focused mainly on use or disclosure, not on acquiring information. In *Saltman Engg Co v. Campbell Engg, Ltd* Lord Green, shown that primary test for imposing an obligation for confidence breach. Suppose it proved that the defendant used confidential information directly or indirectly obtained from the plaintiff without the plaintiff's consent, express or implied. In that case, he will be considered to have done infringement of the plaintiff's rights.¹⁶

CONFIDENTIAL INFORMATION

The business may have a different type of information. But all information is not equal. Some information is relatively important than others. Some of the reports are so important that they determine the fate of the businesses, and these are considered confidential and kept as secrets. The most asset of a company is confidential information. Law may not automatically prevent others from using the most valuable information. Confidential information can be ascertained by testing the basics of the information such as objective and subjective tests. In *Thomas Marshall (EXPORTS) Ltd v Guinle*¹⁷, here Ms. Guinle was the managing director in the company of the plaintiff and then later he started a competitive company. Plaintiff after knowing this had filed a petition and sought for an injunction against the starting of the competitive business. The plaintiff said that the defendant was a previous employee, and he knew some confidential information. The court observed that once information is considered confidential, it's not available in the public domain and the owner of this information has a reasonable belief that its release would be detrimental to the business. Here the idea of the owner has given the primary importance.¹⁸ These decisions were reviewed by the House of Lords in the famous *Spy catcher case*, (*Attorney General v. Guardian Newspapers*) and observed that if the holder of information himself has made the information in the public domain, no action of breach of confidence will exist.

CONCLUSION & RECOMMENDATIONS

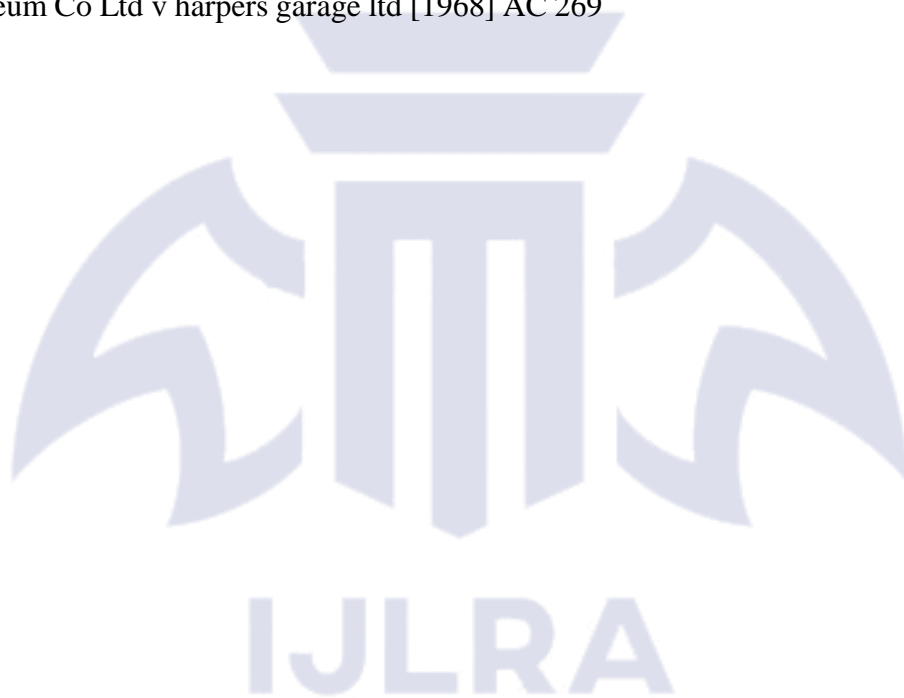
Currently, the Indian trade secrets law is a judiciary-made law based on common law and principles of

equity, and Indian jurisprudence regarding trade secrets is unclear on number of important aspects like scope of damages, theft of trade secrets by competitors, procedural safeguards during court proceedings etc.

¹⁶ DVD copy control assn. Inc. v. bunner (2003)31 Cal 4th 864.

¹⁷ Thomas Marshall (EXPORTS) Ltd v Guinle³⁸

¹⁸ Esso petroleum Co Ltd v harpers garage ltd [1968] AC 269



The recent formation of national IP rights policy has given plans for the introduction of trade secrets law. currently there is no particular time frame has given to achieve the objective, it is undeniable that there will be a trade secret law in near future Legislation in other countries and possible influence of such legislation in India. There is a strong need for legislation with respect to the trade secrets.¹⁹ Indian law can be made conveniently based on English law or English court principles or federal trade secrets law of USA under 1990 uniform trade secrets act, the Restatement (Third) Unfair and the judicial pronouncements of the same.

In India, the codified law must first define the word trade secrets and the subject matter. protection also should be extended. information in combination to other information also should be protected. to make sure that the knowledge is not in the public domain, factors such as industrial level of general knowledge and information ability can be taken.²⁰ it is necessary for a codified law to take tort of misappropriation into consideration which is committed through improper means. a body specializing in deciding cases related to trade secrets as in other cases related to IPR have to be kept in conduct proceedings. disclosure of the trade secrets should be taken care of and in lieu of proceedings should be also taken care of. Starting from the Paris convention to the TRIPS agreement, there were many international agreements that were adopted for the protection of the intellectual property rights. the TRIPS agreement actually unified the IPR law in all the member states. this agreement can be considered as the magna carta of the IPR. trade secrets are confidential, at the same time they have commercial value. so, in order to maintain its practical value, one has to share it with few people like the employees or the business partners. So, a little disclosure about the information is a must.

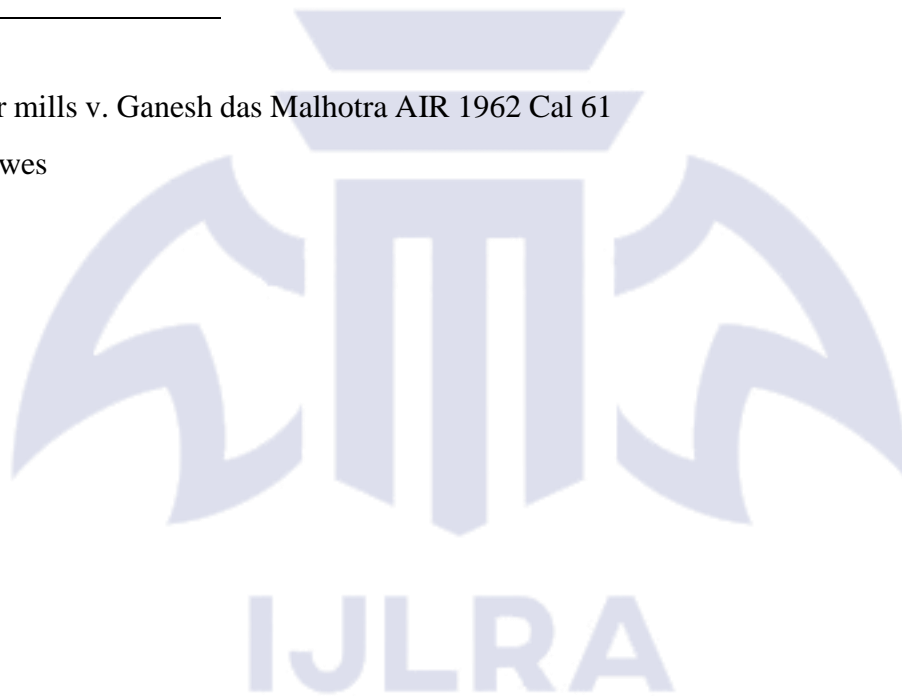
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¹⁹ Gopal paper mills v. Ganesh das Malhotra AIR 1962 Cal 61

²⁰ Flitch v. Dewes



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