

ANALYSING THE LEGAL CONSEQUENCES OF A WORK FROM HOME ECONOMY

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I. INTRODUCTION

On the 31st of December 2019, China reported a number of pneumonia cases in Wuhan, Hubei Province leading to the identification of the novel Coronavirus (Covid-19, which would be one of the greatest healthcare and economic tragedies of the 21st century). Over the course of next four months, the virus would have pervaded across the whole world and would go on to claim over two lakh lives. The World Health Organization (WHO) after taking into account its startling spread as well as the alarming level of inaction, categorised the disease as a pandemic on 11th March, 2020.²

The effects of this pandemic are not limited to the healthcare sector. With lives across the globe coming to a halt, the effects have permeated into global and domestic economic systems. Prior to the declaration of the

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² *Who Timeline - Covid-19*, WORLD HEALTH ORG., <https://www.who.int/emergencies/diseases/novel-coronavirus-2019> (last visited May 05, 2020).

pandemic, the UNCTAD had predicted a \$1 trillion loss in the global economy.³ With the situation becoming graver each passing day, this figure is only expected to be a small fraction of the consequences that are yet to surface. With India alone expecting a negative growth in the present financial year,⁴ the estimated loss after the first three-week lockdown was \$120 billion.⁵ These estimates are only expected to rise as lockdowns across the world have been extended as the number of cases continue to rise.

Global shares have plummeted and central banks have slashed interest rates, which economic analysts believe to be losses so great, that governmental action would not be enough.⁶ A systematic fall in the prices of crude oil, even before the declaration of the pandemic, was noticed as trade and travel bans extended beyond domestic borders.⁷ Every country

³ *Coronavirus outbreak could cost global economy up to USD 2 trillion: UNCTAD*, THE ECONOMIC TIMES (Mar. 10, 2020), <https://economictimes.indiatimes.com/news/international/business/coronavirus-outbreak-could-cost-global-economy-up-to-usd-2-trillion-unctad/articleshow/74560638.cms?from=mdr>.

⁴ *We should plan for negative growth rate this FY, says Arvind Subramanian*, THE INDIAN EXPRESS (Apr. 28, 2020), <https://indianexpress.com/article/india/express-adda-live-updates-arvind-subramanian-coronavirus-economy-recession-india-lockdown-6382855/>.

⁵ Amit Mudgill, *How will India lockdown play out for economy & markets: 4 scenarios*, THE ECONOMIC TIMES (Mar. 25, 2020), <https://economictimes.indiatimes.com/markets/stocks/news/how-will-india-lockdown-play-out-for-economy-markets-4-scenarios/articleshow/74804087.cms>.

⁶ Lora Jones, *Coronavirus: A visual guide to the economic impact*, BBC (Apr. 30, 2020), <https://www.bbc.com/news/business-51706225>.

⁷ *Global crude oil prices fall as coronavirus spreads outside China*, THE ECONOMIC TIMES (Mar. 1, 2020), <https://energy.economictimes.indiatimes.com/news/oil-and-gas/global-crude-oil-prices-fall-as-coronavirus-spreads-outside-china/74422710>; Will Beacham, *Coronavirus, oil price crash - impact on chemicals*, INDEPENDENT COMMODITY INTEL SERVICES (May 6, 2020), <https://www.icis.com/explore/resources/news/2020/04/30/10462108/topic-page-coronavirus-oil-price-crash-impact-on-chemicals>.

under lockdown is facing the problem of decline in the manufacturing sector, which has a cascading effect on surging unemployment rates.

The slowdown in the economy is however, not a complete stoppage on all forms of employment. With people living under quarantine, workspaces too have shifted from the public spaces of offices to the domestic spaces of living rooms. Working from home has emerged as the only solution to oil the gears of the economy. For obvious reasons, the sectors like manufacturing and production, construction, and many more cannot be sustained in the work from home model, but many IT companies, law firms, businesses, etc. seem to appreciate this model.

In Deloitte's "Future of Work Accelerated: Learnings from the COVID-19 Pandemic", while recognising International Monetary Fund's prediction of the magnitude of the current recession to be equivalent to the Great Depression, it is also elucidated that improvements in customer service, decision making and collaboration of various organisations have been documented.⁸ The work from home model has been hailed as a blessing in disguise by a lot of employers, especially in the IT sector, because of the cutting of costs in the management and maintenance of physical workplaces like office campuses.⁹ With the limited measures we have to gauge the benefits and disadvantages of the work from home model, the complete picture cannot be painted yet. However, like every great tragedy, this 21st century pandemic too puts forth a new dimension

⁸ *Future of Work accelerated: Learnings from the COVID-19 Pandemic*, DELOITTE (Apr. 2020), <https://www2.deloitte.com/content/dam/Deloitte/in/Documents/human-capital/in-consulting-accelerated-hc-consulting-noexp.pdf>.

⁹ *Coronavirus lockdown a blessing in disguise for IT sector, say executives*, BUSINESS STANDARD (Apr. 26, 2020), https://www.business-standard.com/article/current-affairs/covid-19-impact-more-people-in-services-sector-to-work-from-home-in-future-120042600500_1.html.

in the legal field. While most legal developments and concerns would be accurately recognised once the pandemic is over, two of the most imminent and pressing legal issues, of contractual obligations and privacy concerns that could possibly arise because of the work from home model shall be focused on in this article.

II. CONTRACTUAL OBLIGATIONS

In wake of the pandemic, many companies in India have asked their employees to work from home. While work from home strategy is well laid out in the IT sector, the same cannot be effectively implemented in the manufacturing sector.¹⁰

This has demonstrated a crippling effect on the supply chain since a party's ability to perform their obligations under a contract was compromised.¹¹ Therefore, suppliers may seek to avoid or delay the performance of contractual obligations due to such effects of the pandemic which could not have been reasonably foreseen or controlled by the performing party. For this purpose, they may invoke the *force majeure* clause under their contracts to prevent themselves from any liability which is to arise out of such non-performance.

The non-performance of contractual obligations would entail severe economic implications at the national and global levels due to non-

¹⁰ Lijee Phillip, *Covid-19 Impact: For manufacturers, work from home doesn't work*, THE ECONOMIC TIMES (Mar. 11, 2020), <https://economictimes.indiatimes.com/news/company/corporate-trends/covid-19-impact-for-manufacturers-work-from-home-doesnt-work/articleshow/74569188.cms>.

¹¹ Dipak Mondal, *Firms to seek protection under 'force majeure' as coronavirus disrupts businesses*, BUSINESS TODAY (Mar. 22, 2020), <https://www.businesstoday.in/top-story/firms-to-seek-protection-under-force-majeure-as-coronavirus-disrupts-businesses/story/398905.html>.

performance of contractual obligations at various levels such as on the part of farmers, manufacturers, wholesalers, retailers, service providers, etc. This stoppage in production of various goods due to non-procurement of raw materials and non-availability of workforce leads to shortage in both the domestic pool of commodities as well as exports.

It is estimated that the pandemic will have an adverse impact on the Indian economy between April and June, 2020 due to a decrease of almost 9% in the Gross Value Added (GVA) despite the \$22.5 billion relief package announced by the government.¹² Statistically speaking, a single day of lockdown entailing zero production of goods and services is around Rs. 50,000 crore of real Gross Domestic Product (GDP).¹³

It can therefore be said that the pandemic is a *force majeure* event owing to its unfavourable impact, and the fact that its escalation could not have been anticipated and controlled by various contracting parties who are not able to fulfil their contractual requirements. However, it must be stated here that there does not exist an implied *force majeure* clause in an agreement but must be explicitly provided for in the contract entered into by the parties, in such a way, that the extent of protection under the clause

¹² Madhumita Jaganmohan, *Estimated economic impact from COVID-19 on India's GVA April-June 2020 by sector*, STATISTA (Apr. 17, 2020), <https://www.statista.com/statistics/1107798/india-estimated-economic-impact-of-coronavirus-by-sector/>.

¹³ Madan Sabnavis, *Coronavirus Outbreak: How a prolonged shutdown will affect India's salaried class, jobs, farm production, manufacturing*, FIRSTPOST (Mar. 23, 2020, 9:39 PM), <https://www.firstpost.com/health/coronavirus-outbreak-how-a-prolonged-shutdown-will-affect-indias-stressed-economy-cause-collateral-damage-to-jobs-farm-production-manufacturing-8179491.html>.

will depend upon the explicit language and wording of the incorporated clause.¹⁴

Therefore, where the defence of *force majeure* is claimed by the performing party, it must be checked whether the clause is expressly provided for in the contract and can also be enforced under the given circumstances. In the absence of any such clause, remedy can be sought under Section 56,¹⁵ due to the applicability of ‘doctrine of frustration’.¹⁶

III. DATA BREACH AND CONFIDENTIALITY

To arrest the spread of the virus through community contact and to successfully implement social distancing, the Government of India advised companies to adopt the work from home policy.¹⁷ Thus, companies and firms that hitherto maintained the highest standards of security and confidentiality, were forced into allowing the employees to switch to remote workplaces through their personal and ‘unprotected’ devices. It must be noted here that ‘work from home’ is not a standard norm or practice,¹⁸ and there does not exist a comprehensive legal framework in India that supports the work from home structure.

Moreover, when working from offices, companies maintain a protected workspace and operate through exclusive in-house or protected

¹⁴ *Lebeaupin v. Crispin* [1920] 2 KB 714.

¹⁵ Indian Contract Act, No. 9 of 1872, Imperial Legislative Council, § 56.

¹⁶ *Energy Washdog v. Cent. Electricity Regulatory Comm’n*, (2017) 14 SCC 80.

¹⁷ *Implement 'Work from Home' policy for employees: Govt advises companies*, THE ECONOMIC TIMES (Mar. 19, 2020), <https://economictimes.indiatimes.com/news/economy/policy/implement-work-from-home-policy-for-employees-govt-advises-companies/articleshow/74718157.cms>.

¹⁸ *Coronavirus: Health scare forces work from home, but is India Inc ready?*, BUSINESS STANDARD (Mar. 23, 2020), https://www.business-standard.com/article/companies/coronavirus-health-scare-forces-work-from-home-but-is-india-inc-ready-120032300027_1.html

servers and provide for added safeguards such as data protection software, cloud services, virtual private network (VPN), endpoint encryption, firewalls, etc.¹⁹ However, the same level of protection cannot be ensured when the employees are working from their homes as it increases the possibility of confidentiality breaches by unauthorised third parties.²⁰ Confidential information refers to the data or material that, having been designated as secret or confidential, only a limited number of authorized persons may know about.²¹ In the past two months, almost 4000 fraud portals related to coronavirus have been created across the globe by cybercriminals and other mafia organizations.²²

It must be noted here that India lacks a dedicated data protection legislation. While the Personal Data Protection Bill, 2019 was introduced in the Lower House of the Parliament, it is yet to see the light of day as a binding legislation passed by both houses.

It thus becomes pertinent to appreciate the remedies available with the provider of information for breach of confidentiality by the receiver of such information and the intermediaries.

¹⁹ Diane Wilson, *Hackers targeting employees who are working from home due to coronavirus*, ABC NEWS (Mar. 27, 2020), <https://abc11.com/work-from-home-hacker-vpn-cybersecurity/6053032/>.

²⁰ Vinod Malhotra, *Hackers are using Covid-19 disruption to infiltrate corporate networks*, THE ECONOMIC TIMES (Mar. 27, 2020), <https://economictimes.indiatimes.com/tech/internet/hackers-are-using-covid-19-disruption-to-infiltrate-corporate-networks/articleshow/74837213.cms?from=mdr>

²¹ BLACK'S LAW DICTIONARY (9th ed. 2009).

²² Sandhya Sharma, *Cyber chiefs warning as hackers target PM's Covid fund*, THE ECONOMIC TIMES (Mar. 31, 2020), <https://economictimes.indiatimes.com/tech/internet/cyber-chiefs-warning-as-hackers-target-pms-covid-fund/articleshow/74877953.cms?from=mdr>.

A. Indian Contract Act, 1872

Generally, there exists a non-disclosure agreement (NDA) that has to be signed by the employee at the time of the employment. Thus, any instance of breach of this agreement of confidentiality on part of the ‘receiver of information’, would attract the provisions of Section 73,²³ or 74,²⁴ of the Indian Contract Act, 1872 whereby the ‘provider of information’ may file a suit for recovery on account of such breach.

B. Specific Relief Act, 1963

Under the Specific Relief Act, 1963 remedy can be sought in form of prohibitory injunction by a client or the ‘provider of information’ under Section 38 of the Act,²⁵ if he apprehends a breach of the agreement of confidentiality on part of the ‘receiver of information’ on the assertion of its right to confidentiality in its information.²⁶

Until the application of prohibitory injunction is heard by the Court, interim prohibitory injunction can also be sought under Order XXXIX, Rule 1 and 2 of the Civil Procedure Code, 1908.²⁷

C. Indian Penal Code, 1860

A party that stands in breach of the agreement of confidentiality can also be prosecuted under various provisions of the penal code. A party can be prosecuted under Section 403,²⁸ of the Indian Penal Code (“IPC”) for

²³ Indian Contract Act, No. 9 of 1872, Imperial Legislative Council, § 73.

²⁴ *Id.*, § 74.

²⁵ Specific Relief Act, 1963, No. 47, Acts of Parliament, 1963, § 38.

²⁶ *Petronet LNG Ltd. v. Indian Petro Group*, 2009 SCC OnLine Del 841.

²⁷ CODE CIV. PROC. (1908) Order XXXIX, rule 1, 2.

²⁸ PEN. CODE (1860) § 403.

in case of dishonest misappropriation of confidential information on his part, to his own use.²⁹

Moreover, a person can also be prosecuted under the provisions contained in Section 405,³⁰ and 408,³¹ for criminal breach of trust in case of dishonest misappropriation of property in such a manner that it stands in contravention with the provisions of law or it is against the spirit of contract entered into between the parties.³²

It would be pertinent to note here that Section 405 does not use the word ‘property’ in a restrictive sense and thus data would be covered within the ambit of ‘property’ in Section 405 of IPC³³ and such a person can therefore be prosecuted for sharing the confidential information with an unauthorized third person.

D. Information Technology Act, 2000

The Information Technology Act, 2000 read with Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011 seek to protect personal information and sensitive personal information or data.

Section 43A of the Act provides for penal consequences for negligence in implementing and maintaining reasonable security practices and procedures in relation to sensitive personal data or information by a body

²⁹ *Indian Oil Corp. v. NEPC India Ltd.*, (2006) 6 SCC 736.

³⁰ PEN. CODE (1860) § 405.

³¹ *Id.*, § 408.

³² *Jaswantrai Akhaney v. State of Bombay*, AIR 1956 SC 575.

³³ *R.K. Dalmia v. Delhi Administration*, AIR 1962 SC 182; *Common Cause v. Union of India*, (1999) 6 SCC 667.

corporate.³⁴ Thus, failure to adopt and implement a strong and adequate work from home policy, on part of the corporates, such that this ‘negligence’ leads to disclosure of such confidential information that causes wrongful loss or a wrongful gain to another person, the body corporate would be liable to pay compensation to such person on account of such disclosure.

Furthermore, Section 72A of the Act provides that when a person stands in breach of the contract by disclosing personal information of a person to an unauthorised third party, i.e. without the consent of such party, with the intent to cause of knowing that he will cause a wrongful loss or a wrongful gain to another party, can face a punishment of up to three years imprisonment and/or a fine to the tune of five lakhs.³⁵

IV. THE WAY FORWARD

The human cost of the coronavirus pandemic is quite extensive and worrisome. The pandemic however, has not broken the systems in which we worked and lived, but has rather exposed a broken system. From the lack of health care facilities, to the ailing (im) balance in global wealth, the pandemic has brought to light all the problems that should have been noticed without a crippling global emergency.

As debilitating as the virus might be for the world, the experience that we shall gain while fighting might just revolutionise workspaces forever. The economic impact of working from home is yet to be materialised in quantitative data, but a lot of banking and IT leaders are

³⁴ Information Technology Act, 2000, No. 21, Acts of Parliament, 2000, § 43A.

³⁵ *Id.*, § 72A.

considering to continue the model even after situations normalise. Aditya Puri, the managing director of HDFC bank, considers the work from home model as a viable one, because of the benefits of saving costs.³⁶ In his view, the application of this model only highlighted how so many employes could have already worked from home.

Finland stands a world leader in the successful application of a work from home model.³⁷ The country has achieved this by allowing a statutory intervention in this regard, by passing the Working Hours Act in 1996,³⁸ which allowed workers to work flexibly. With the 2020 amendments in the Act, the flexibility is not limited to just the hours but also the place of work.³⁹ Not only has this reduced exploitation, but has improved employees' productivity, and hence succoured companies economically. As revealed by the 2015 Stanford study by Nicholas Bloom,⁴⁰ work ethic improves and sick leaves decrease when employees are allowed to work from home. Since a company's success is directly proportionate to the productivity of its workers, innovative ways have to be come up with in order to boost this productivity. The work from home model is what is supporting many industries at the moment, and it is this model that can perhaps be applied in the future too if inspiration is drawn from the Finland example of statutory intervention.

³⁶ *supra* Note 18.

³⁷ Maddy Savage, *Why Finland leads the world in flexible work*, BBC (Aug. 9, 2020), <https://www.bbc.com/worklife/article/20190807-why-finland-leads-the-world-in-flexible-work>.

³⁸ Working Hours Act, 1996 (Fin).

³⁹ Mika Karkkainen, *Finland - New Working Hours Act brings changes to working hour arrangements*, LEXOLOGY (Sept. 12, 2019), <https://www.lexology.com/library/detail.aspx?g=0a9a381e-3f35-487c-b853-9df5fc745244>.

⁴⁰ Nicholas Bloom et al., *Does Working from Home Work? Evidence from a Chinese Experiment*, 130 QUARTERLY J. ECON. 165, 218 (2015).

If companies decide to adopt this model even after the lockdown is lifted, many workers of the lower rungs would be at a risk of losing their jobs. The question of compensations and the furore raised by labour unions would become the dominating factors in the intersection of law and economics. While issues like sexual harassment at workplaces would be mitigated, the new problem of dividing the line between professional and personal relationships in a virtual space shall emerge as a novel legal issue.

What the future has in store for the work from home model is not easy to gauge at this nascent stage. The economic viability of this model seems alluring, but the legal viability too has to be kept in mind, before the model is actually applied. Concerns like contractual liability and a safe environment which diminishes privacy and data beaches have to be considered. Lessons learnt from the ill experiences of coronavirus, should not be overlooked, but rather used to fix the broken system that allowed such a tragedy to happen in the first place.