

# **PROTECTION OF PROPERTY AND CRIMINAL LAW**

**- A STUDY WITH SPECIAL REFERENCE TO INTELLECTUAL PROPERTY**

THESIS SUBMITTED BY  
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DECLARATION

I do hereby declare that this work has been originally carried out by me under the guidance and supervision of Dr.K.N.Chandrasekharan Pillai, Reader, Department of Law, Cochin University of Science and Technology. This work has not been submitted either in part, or in whole, for any degree at any University.


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CERTIFICATE

This is to certify that this thesis entitled "Protection of Property and Criminal Law - A Study with Special Reference to Intellectual Property", submitted by Shri N.S.Gopalakrishnan, for the Degree of Doctor of Philosophy is the record of bona fide research carried out under my guidance and supervision from 19th June 1985 in the Department of Law, Cochin University of Science and Technology. This thesis, or any part thereof, has not been submitted elsewhere for any other degree.

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## PREFACE

Theoretically speaking, property is extension of the personality of the individual. It serves the purpose of satisfying the self of the individual in the society. Various theories have been attempted to explain its origin and development. However, it is the socialist theory of property which finds acceptance in many societies today.

A proper definition of the concept of property has not been given in the statutes governing protection of property or in the Indian Constitution. While deciding cases under the Indian Penal Code, the courts have however, been interpreting the term 'property' in a manner facilitating its accommodation within the contours of the socialist theory of property, though there was no attempt for any formal theorization. An examination of the decisions under the Penal Code provisions and Constituent Assembly Debates has reinforced the above view that our courts as well as legislature have adopted the socialist concept of property.

Because of the importance of the theory of property in the general scheme of this study, it was thought appropriate to include a chapter on the theory of property as reflected in our

Constitution. It is found that it is the socialist concept of property which runs as the common thread through the whole fabric of our law--constitutional, statutory or case law. The interests protected by the law within the framework of this theory have been identified, and it is found that these very same interests exist in the sphere of intellectual property as well.

Be that as it may, while the criminal courts have been prompt in affording protection to traditional items of property, they do not seem to have been enthusiastic in giving protection to intellectual property by criminal law, the existence of the above mentioned interests notwithstanding. It has been argued that the case for employing criminal law for affording protection to intellectual property is stronger particularly in the light of the technological developments and the consequent frequent emergence of new items of property.

Several difficulties had to be encountered in the preparation of this study. First and foremost was the dearth of material. It being an unbeaten track, published works are scarce; other materials are scanty. The whole mass of scattered case law produced by various courts at different times had to be scanned and evaluated. Indeed, the journey through the labyrinthine recesses of law in this area has been difficult. With the limited time and resources sincere efforts have been made to do the

maximum possible. If it inspires or encourages others to do more, the work would serve its purpose.

I express my gratitude to the Indian Council of Social Science Research, New Delhi, for awarding the "ICSSR Foundation Day Doctoral Fellowship" for undertaking this research. I am also thankful to the Cochin University of Science and Technology for awarding me a Junior Research Fellowship for a short period.

The guidance rendered by my guide Dr.K.N.Chandrasekharan Pillai, Reader, Department of Law, has been of great help to me. I was surely benefited by his criticisms. I am beholden to him for his superb guidance and constant encouragement. I express my thanks to Dr.P.Leelakrishnan, Head, Department of Law, who has also helped me a lot in submitting the thesis on time.

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I am thankful to the library staff of the Department of Law, CUSAT, Indian Law Institute, Supreme Court, Delhi University Campus Law Centre etc. for their valuable help.

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## INTRODUCTION

It is often said that law originated with the institution of property. Society may not exist without property. And it would be well-nigh impossible for any society to regulate property relations without a legal system. The inter-relationship between law and property was expressed by Bentham thus:

Property and law are born together; and die together. Before laws were made there was no property; take away laws, and property ceases.<sup>1</sup>

Legal system develops rules governing possession and holding of property. It also evolves rules with regard to protection that has to be afforded to property. To achieve these purposes law requires property to be given a proper meaning. And this meaning has to come from the socio-economic-political background. Also, the developments in science and technology have had their impact on the meaning of property. New items of property have started emerging from the socio-politico-economic-technological milieu. The new situation thus calls for a reexamination of the concept of property for the purpose of affording protection to the different forms of property.

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1. Bentham, Theory of Legislation (Bombay: N.M.Tripathi Pvt.Ltd., 1975), p.69.



The judiciary having been constrained by the traditional notions of property confronted the new situations demanding expansion of the arena occupied by property with courage. They have started expanding the meaning of property without having any regard for theorization.<sup>2</sup> The approach has really made many notions in law complex. This is evident from the formulations concerning possession. The reason for complexity surrounding the notion of possession, according to Paton, is the inevitable and continuing conflict between the logic of law and the demands of convenience in particular cases to render justice.<sup>3</sup> Thus in fact, the notion of possession was not a logical conclusion or an extension of a concept of property.

This unsatisfactory 'state of affairs' seems to be the result of an unwillingness of the courts to deal with the institution of property in the proper perspectives. The situation gets aggravated when one has to deal with umpteen number of cases calling for including totally new items within the fold of the property concept.<sup>4</sup> Theoretically speaking, property has been looked upon as an extension of the individual's personality or as the means to satisfy the needs of the individual. This holding by individual is in public interest. And property

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2. See the discussion of the decisions of Indian courts in Chapter I.

3. See Paton, Jurisprudence (Oxford University Press, 4th edn., 1972), p.557.

4. See for details Chapter I.

is held for the common good of the society. It is only within the framework of this theory that the individual has been permitted to hold some property to satisfy his needs.

The Constitution has by way of various amendments reached the stage where some amounts of property is allowed to be held by the individual within the framework of the rule that property is meant for the common good.<sup>5</sup> Though there is no fundamental right to property it exists as a legal right. It could be denied by way of law in public interest though.

While thus the Constitution embraced the concept of property as the extension of the personality of the individual within the wide framework of common good, the Indian Penal Code dealing with protection of property is silent about the meaning and content of property.

In this situation the courts have been finding it difficult to work with the provisions in the Penal Code and other statutes inasmuch as the concept of property and the attendant notions were not clear to them. Nor have the statutes been clear about the concepts.<sup>6</sup> This state of flux has made the courts to ascribe certain meanings and notions in relation to property which may not be amenable to the logic of law because

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5. For details see Chapter II.

6. There is no proper definition for the concepts like 'entrustment', 'fraudulently', 'possession' etc.

they were evolved by demands of conveniences in particular cases to render justice. This process of creativity has, however, helped the courts to let in new items also within the fold of the concept of property. The growth of case law on these lines have evaded the attempts to bring the study of this area within a theoretical framework. While civil law has been employed to settle property disputes among the individuals, criminal law has been used to prevent commission of offences in relation to property. The basis for the application of criminal law seems to have been the protection of the societal interest in property. The societal interest includes the individual interest also. It is in the interest of the society that property held by an individual is protected inasmuch as in this sense criminal law is protecting the personality of the individual. Looked in this perspective, it may be said that criminal law should be applied for the protection of property if the interest of the individuals and society in an item of property call for such a step.

In this context the case law produced by the judiciary has to be discussed and the concept of property adopted by the statutes deduced from it. The other complementary concepts and notions have also to be examined and analysed. As already pointed out, though the courts started without any proper definition for property they interpreted it to contain the emerging new forms of property. This became possible only

because of the willingness of the courts to expand the concepts in tune with the needs of the time. They have had ample freedom to interpret the terms because of the absence of any statutory definitions. Of late the Supreme Court has gone to the extent of identifying all things with 'any value' as property for affording protection.<sup>7</sup>

The concept of intellectual property which could not be equated with other forms of property also deserves to be analysed. Civil law has been traditionally employed to govern the relationship in this arena. However, the spate of technological developments paved the way for new forms of violations against this variety of property. Civil law does not appear to be the appropriate tool to contain the ever increasing menace of piracy prevalent in this field. The possibilities of applying criminal law for affording protection to intellectual property have yet to be explored. Since there is public interest as well as individual interests involved in the protection of intellectual property, it would be in the fitness of things if criminal law is employed to ensure protection of intellectual property. At present the peculiar nature of these

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7. The observation of Justice Vaidyalingam in Ishwarlal Girdharilal Parekh v. State of Maharashtra, A.I.R.1969 S.C 40 while considering 'assessment order' as property under section 420 I.P.C. is characteristic of the approach of the Court: "Even if the thing has no money value, in the hand of the person cheated, but becomes a thing of value, in the hand of the person who may get possession of it, as a result of the cheating practised by him, it would still fall within the connotation of the term 'property' in section 420 I.P.C." Id. at 43.

properties--incorporeal, invisible and intangible--and the different ways in which offences are committed against them forced the legislature to enact separate legislation for protecting each of them. These forms of properties are looked upon differently from the traditional forms of property. The statutes limit the individuals' right in these properties only for a prescribed period. The new generation of intellectual properties which have been created by the technological era have also to find their protection under the law which envisaged intellectual properties to be some books or some inventions. The new items thus demand the law to expand and to spread its wings to afford maximum protection. In this context the origin, basis, the reason for limiting the rights and the special treatment, the various types of rights recognized etc. need detailed enquiry. The adequacy of the existing provisions also have to be gone into.

Having regard to the development of law with reference to property and intellectual property in particular, it seems that a study of the efforts of law and law courts in affording protection to property is the need of the hour. Such a study may help the legal fraternity to be clear about the policy of law and to develop new ways and means to protect property. It may also help the courts to develop jurisprudence on proper lines.

## Chapter I

### CONCEPT OF PROPERTY : AN OVERVIEW

It was believed that in olden days every human being had equal right over the objects of nature. The source of this right was traced and expressed by Blackstone thus:

In the beginning of the world, we are informed by holy writ, the all-bountiful Creator gave to man "dominion over all the earth; and over the fish of the sea, and over the fowl of the air, and over every living thing that moveth upon the earth". This is the only true and solid foundation of man's dominion over external things, whatever airy metaphysical notions may have been stated by fanciful writers upon this subject.<sup>1</sup>

When human beings were nomadic, they used these external objects for their subsistence. The chief objects of property at that stage were movables or chattels consisting of food produce and tools for collecting food.<sup>2</sup> As the individuals had equal right over the objects of nature, it was accepted that the first occupier gets a right to it against all others.<sup>3</sup> But it is not

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1. W.Blackstone, Commentaries on the Laws of England (London: Thomas Tegg, 1830), Vol.II, pp.2-3.

2. Id. at 5.

3. See Blackstone, op.cit., pp.3-5. He observed: "Thus the ground was in common, and no part of it was the permanent property of any man in particular; yet whoever was in the occupation of any determined spot of it, for rest, for shade, or the like, acquired for the time a sort of ownership, from which it would have been unjust, and contrary to the law of nature, to have driven him by force; but the instant that he

(...8)

clear whether individual right of occupancy or group occupancy was in existence during the earlier days. Authors differ on this point. Blackstone<sup>4</sup> was of opinion that the individual who occupied the thing first got the right, while Maine<sup>5</sup> and other modern writers were of the view that the group or family of individuals who occupied the thing got the right. The latter view seems to have much credibility. It was in any way clear that the basis of the institution of property at that time was the desire to provide each man his means of subsistence.<sup>6</sup>

By the change of time and advent of civilisation, human beings entered the agricultural era which in turn focused attention on immovable property especially land for cultivation and place for permanent residence.<sup>7</sup> Eventhough the individual

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(f.n.3 contd.)

quitted the use of occupation of it, another might seise it, without injustice". Id. at 3.

Also see H.S.Maine, Ancient Law (London: Oxford University Press, 1959), pp.207-210; Gotius, War and Peace, Book II, chap.2, pp.86-89 extracted in Cohen and Cohen, Readings in Jurisprudence and Legal Philosophy (Boston: Little Brown & Co., 1951), pp.55-58; The Institutes of Justinian, "The Origin and Justification of Private Property", Book II, Title 1 (8th edn., 1888), p.95 extracted in Cohen and Cohen, op.cit., pp.50-52.

4. See Blackstone, op.cit., p.9.

5. See Maine, op.cit., p.215; A.S.Diamond, Primitive Law Past And Present (London: Methuen & Co., 1971), p.188.

6. See for a detailed discussion of the early form of property, R.S.Bhalla, The Institution of Property: Legally, Historically and Philosophically Regarded (Lucknow: Eastern Book Co., 1984), p.45 et seq.

7. See Blackstone, op.cit., pp.7,8.

had the right to occupy land, use his labour for cultivation and utilize the produce for his existence, since people lived in groups and had to share this produce equally among themselves, the ownership seemed to have been vested in the groups for a considerable period.<sup>8</sup> This communal or group holding of property helped these groups to exclude outsiders from interfering with their holding. The exclusive use of the land was believed to be the essential feature of ownership of property.<sup>9</sup> The basis of property even then remained as a means of subsistence, that is, for food and shelter.

The industrial revolution and technological developments opened up new areas which helped people to turn to new phases of life. These developments turned the communal holding of property into that of individual holding. This change helped the individuals to increase their production with less labour and to live in the society without the help of the group. The situation led to the recognition of property in terms of

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8. In this connection, Seagal observed: "If a cultivator shares with other members of the community, he may be said to hold the land for the benefit of all. The important question is not who occupies the soil but what is done with the fruits of the soil". The History of Law (New York: Tudor Puli Co., 1946), p.56; See also M.Gluckman, Politics, Law And Ritual In Tribal Society (Oxford: Blackwell, 1965), p.52.

9. See Blackstone, op.cit., p.5.



economic value.<sup>10</sup> The heads of the groups who had control over the group and the external objects tried to convert their privileges into their rights. This tendency reflected in the individual members of the group also. In the long run owing to the changes in the society, the communal control over the men and external objects were separated and individuals took exclusive control over the external objects possessed by them. This in turn converted the institution of property into an independent institution from the confines of communal control.<sup>11</sup>

When the institution of property lost its communal character, men started accumulating wealth to have a luxurious life. The trend led to the emergence of new criteria for the recognition of an object or thing as property. Apart from the economic criteria which had already crept in as a basis for recognition of property, owing to the interrelation of individuals, their rights, obligations, behavioural relationships etc. were also considered as valid criteria which helped to accept nonphysical objects as property. Equity courts also gave recognition to this.<sup>12</sup> What was lost in this long process

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10. R.S.Bhalla observes: "Thus there started an era of new property rights and a new life for the institution of property where the idea of fulfilling the economic needs of each individual got a back seat and there came into existence a system of private property where social and political power came to be associated with economic power". Op.cit., p.64.

11. Id. at 83,84.

12. J.J.Robinette, "Protection of Property Interest in Equity", (1932), Can.Bar Rev. 172. The best examples are recognition of trust, goodwill etc.

of change was, however, the very basis of the institution of property, i.e. "the notion of property as an expression of self to control, and use to fulfil needs of individual".<sup>13</sup>

Institution of property, like any other legal institution in the society, regulates human conduct. One peculiar feature which distinguishes the institution from others is its role in regulating the relationship between external objects or things and individuals. In other words, it regulates the relationship of individuals with respect to the ownership and possession of things. To say that a person has ownership in a thing means he has the exclusive right to own it and to exclude others from interfering with it. Emphasizing the principle of exclusiveness, Blackstone observed:

There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property; or that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.<sup>14</sup>

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13. R.S.Bhalla, op.cit., p.90. But it may be seen that the criminal courts while affording protection to property rejected the economic or market value as an insignia for recognizing property. An object with 'any value' to an individual appears to be the new criteria accepted by courts for recognition of a thing as property. See, infra.
14. Blackstone, op.cit., p.2; See also Grotius, op.cit., pp.86-89.

This aspect of exclusiveness along with other contents of ownership, possession and thing jointly constitute the legal concept of property.

The word ownership denotes the relation between a person and an object forming the subject matter of his ownership. It consists, according to Salmond, of a complex of rights, all of which are rights in rem, being good against all the world and not merely against specific person.<sup>15</sup> The chief attributes of ownership are right to possession, right of exclusion of others, right to enjoyment etc.<sup>16</sup> Inasmuch as it is an embodiment of different incidents there was confusion whether the term ownership represented a single right or a bundle of rights. It is now accepted by the writers that even though the concept is an aggregate of bundle of rights such bundle is to be considered as a unit to avoid difficulties. In this regard the observation of Roscoe Pound is quite pertinent:

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15. See Salmond, Jurisprudence (London: Sweet & Maxwell, 12th edn., 1966), p.246.

16. Salmond classified the incidents into (a) the rights to possess a thing; (b) the right to use and enjoy the thing; (c) the right to consume, destroy or alienate the thing; (d) characteristic of being indeterminate in duration; and (e) the residuary character. Id. at 246, 247. As per Roscoe Pound they are: (a) Rights - Jus possidendi, jus prohibendi or excludendi; (b) Power - jus disponendi; and (c) Liberties - jus utendi, jus fruendi and jus abutendi. See Roscoe Pound, Jurisprudence (West Pub.Co., 1959) Vol.V, Part-8, p.128.

But if ownership is a term for an aggregate or bundle of rights (strictor sense), power, liberties and privileges, it is important to think of the aggregate or bundle as a unit. Particular rights or powers or liabilities or privileges may be cut off for time or place or person, but ownership may remain. Then, if the separation of the particular right or power or liberty or privilege comes to an end, the ownership fills out again to its normal content.<sup>17</sup>

It is clear that the chief attribute of ownership is the possession of the thing to the exclusion of others. The reason for giving protection of property in possession of a person was explained by Holmes as follows:

Possession is to be protected because a man by taking possession of an object has brought it within the sphere of his will. He has extended his personality into or over that object.<sup>18</sup>

It appears that Justice Holmes was indirectly giving a meaning to the concept of property in the context of affording protection. The property is given protection when it is possessed by an individual because it is then that the individual can extend his personality into the property by way of exercising his will. The term possession includes actual, constructive or implied, and legal possession. In olden days physical control of a

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17. Pound, op.cit., p.127; for a detailed discussion also see, R.S.Bhalla, op.cit., pp.7-13.

18. O.W.Holmes, The Common Law (London: Macmillan & Co., 1887), p.207.

thing was the sole idea of possession. Recognition of certain advantages to the person in possession of a thing, whether he owns it or not, by law made this concept into a state of flux. Extending these advantages to persons who had no physical control of the things possessed by him added more difficulties. Classification of physical control into natural possession, custody and detention brought the concept of possession into a technicality of law.<sup>19</sup> Much came to be written on this concept.

The classical theories on possession based on Roman law advanced by Savigny<sup>20</sup> and Ihering<sup>21</sup> could not satisfactorily explain the modern concept of possession which should answer new demands, policy and conscience to suit the needs of the twentyfirst century. The common law theorists were also in

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19. See Dias, Jurisprudence (London: Butterworths, 5th edn., 1985), pp.274,275. According to him this led to the recognition of three situations--a man with physical control without possession and its advantages; with control without possession and its advantages; with possession and its advantages without physical control; or with both--for giving protection of law.
20. Savigny's explanation of possession consisted of two ingredients--corpus possessionis (effective control) and animus domini (the intention to hold as owner). According to the critics the theory failed to explain the possession of bailee, borrower, depositor etc. See for a detailed discussion Id. at 275-276; R.Pound, op.cit., p.95 et seq.
21. According to Ihering, whenever a person looked like an owner in relation to a thing, he had possession of it, unless possession was denied to him by special rules based on practical convenience. The animus element to him was simply an intelligent awareness of the situation. Though he could overcome the difficulties of animus domini of Savigny's theory his explanation also created difficulties in those cases where law refuses possessory rights to those who are in effective physical control. See Dias, op.cit., p.277.

difficulties in formulating an adequate explanation for this concept in unitary terms.<sup>22</sup> The reason for this complexity surrounding the notion of possession, according to Paton, was the inevitable and continuing conflict between the logic of law and the demands of convenience in particular cases to render justice.<sup>23</sup> It is still not clear whether possession is a matter of fact or law. Possession in fact deals with the actual physical control of a thing while possession in law refers to the legal incidence. Salmond after distinguishing possession in fact and possession in law, stated that possession in fact is a 'conception' and the only one conception in possession is that of fact.<sup>24</sup> But Pound expressed the contrary view. According to him possession is a legal concept.<sup>25</sup> Expressing the difficulty

22. Salmond expressed the opinion that possession is corpus and animus and possession is lost when either corpus or animus is lost. Salmond, op.cit., pp.272-273. A similar view was expressed by Holmes also. He observed: "To gain possession, then, a man must stand in a certain physical relation to the object and to the rest of the world, and must have a certain intent". Holmes, op.cit., p.216. For criticism see Dias, op.cit., p.288.
23. In this connection Paton observed: "The story of the last hundred years or so can be told in terms of a struggle between convenience and theory--theory seeking to discover a unitary concept in the interests of consistency and harmony and the judges seeking to dispose of particular cases so as to achieve justice in each case, on the one hand, and to establish rules for the just disposition of other cases on the other". See Paton, Jurisprudence (Oxford University Press, 4th edn.,1972), p.557.
24. Salmond, Jurisprudence (7th edn. 1924), p.318 et seq.
25. See Pound, op.cit., pp.81-86. According to him possession is a "conception of legal effect given to physical control of an object when coupled with will to exercise that control for one's own purposes". Id. at 84.

in finding a conclusive answer to this question, Dias concludes thus:

Possession has three aspects: firstly, the relation between a person and a thing is a fact. Secondly, the advantages attached by law to that relation is a matter of law. Thirdly, these advantages are also attributed to a person when certain other facts exist. What they are in any given type of case is a matter of law.<sup>26</sup>

The early view considering possession as physical control has lost its basis both in English law and Roman law in modern days. Recognition of the possession of bailor, pledgor, depositor, owner of the lost goods etc. who has no direct physical control of the goods gave new dimensions to the concept of possession. Such recognition made the concept a flexible one to be tailored to suit convenience and policy. Based on the circumstances of each case courts also gave different meaning to the concept to render justice.<sup>27</sup> After examining the development of the concept of possession in Roman law and English law which is now based on particular rules on particular circumstances, Dias argued:

...all that is needed are these rules, which determine what view should be taken of different situations of fact. Reference to possession becomes superfluous. Possession was a mould in which the earlier doctrines were shaped, but these have now so outgrown their

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26. Dias, op.cit., p.290.

27. For a critical evaluation see Dias, op.cit., p.273 et seq.

beginnings that the mould has become a redundant relic. What matters now are the rules which determine the incidence of possession. Analysis reveals the influence of policy behind these rules.<sup>28</sup>

The discussion takes us to the task of examining the meaning of thing which is the subject of possession. It is normally the 'thing' an individual owns or possesses that is considered as the subject matter of protection. What constitute 'thing' is again a subject of debate. Physical objects or tangible things were the only subject matter of the 'thing' in olden days.<sup>29</sup> Recognition of subject matters like intangible objects, obligations, objects with values of interpersonal transferability etc. which give advantages to a person, for protection by law made the term 'thing' into a vague expression.<sup>30</sup> Using of the term 'thing' to identify both corporeal and incorporeal subject matters created much confusion. This in turn converted the meaning of 'thing' from physical objects to any object of economic value.

The recognition of rights and obligations as subject matter of protection led courts to give protection to the

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28. *Id.* at 289.

29. Based on some German writers, Holland defined physical thing as "a locally limited portion of volitionless nature: perhaps better as 'a permanent external cause of sensation". T.E.Holland, *Jurisprudence* (London: Oxford Clarendon Press, 13th edn. 1924), p.103.

30. Some such things are, good-will, copyright, patent, trade mark, bills, promissory note, lease, easement, mortgage etc. See R.S.Bhalla, *op.cit.*, pp.25-30.



'status in employment' as thing or property.<sup>31</sup> It is obvious that the present approach is to consider objects having any economic value or interpersonal transferability as 'things' to afford protection.<sup>32</sup> Bhalla criticizes this approach of limiting the characteristic of 'thing' to the idea of money value or interpersonal transferability.<sup>33</sup> According to him such analysis 'fails to make conspicuous the very idea of property as a reflection of human sentiments in terms of man's psychological, philosophical and moral aspirations'.<sup>34</sup> He argues that subjective

31. The Supreme Court in Goldberg v. Kelly, 397 U.S.254 (1970) recognized the 'status-in-public sector as employee' as property to apply the due process of the Constitution. But the Court in subsequent cases, Board of Regents v. Roth, 408 U.S. 558 (1972); Arnett v. Kennedy, 416 U.S. 134 (1974) and Bishop v. Wood, 426 U.S. 341 (1976), refused to give the benefit. See for a detailed discussion William Van Alstyne, "Cracks in The New Property : Adjudicative Due Process in The Administrative State", 62 Cornell Law Review, 445 (1977). Also see, Charles A.Reich, "The New Property", 73 Yale L.J., 733 (1963-64); A.T.Markose, "The Regulatory Process", in G.S.Sharma (Ed.), Property Relations in Independent India: Constitutional and Legal Implications (Bombay: N.M.Tripathi Pvt.Ltd., 1967), pp.281-287; D.C.Jain, "Concept of Right to Public Employment As a New Species of Property": Penumbra Judicial Activism", (1986) 4 S.C.C.(J), 27. The Privy Council in Government of Malaysia v. Selangor Pilot Association, [1978] A.C. 337 held that the liberties of licensed pilots to provide pilotage services and to employ others as pilots were not property. But Lord Salmon, dissenting, held that the business of providing pilotage service and employing pilots including the good-will attached to it, and was clearly 'property' of respondents. Id. at 351.

32. After an elaborate analysis of the development of the concept of 'thing', Bhalla concludes: "So what we have is a convenient metaphor whereby all legally protected advantages which are interpersonally transferable in law came to be included within the category of 'things'." Bhalla, op.cit., p.31. Also see R.S.Bhalla, "The Concept of Thing Revisited", 22 J.I.L.I. 555 (1980).

33. Id. at 32-35.

34. Id. at 32.

element in the 'thing' which connects the human being with an object and which was the basis of thing for the purpose of property in olden days must be considered as an insignia of property. There are things like 'artistic skill' which cannot be expressed in terms of monetary value or interpersonal transferability. Such things which are of much value to persons suffer lack of protection if the 'self element' in the concept of property is rejected. So he suggests that things necessary, useful, practical for living, whether economical or not, transferable or not, are to be included within the category of things that need to be protected by law.<sup>35</sup>

Generally, things which are the subject matter of property are classified into corporeal and incorporeal property. Corporeal property consists of movables and immovables, and are otherwise called material things. Incorporeal property consists of immaterial things such as copyright, patent, trade mark etc. and other rights and obligations such as leasehold, servitude, security etc.<sup>36</sup>

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35. Bhalla classifies the nature of things into: (a) Any physical object which under a given legal system is regarded as a possible subject matter of rights and duties, is a corporeal thing; (b) Any right or obligation considered valuable and treated as being transferable between persons without loss of its identity is an incorporeal thing; and (c) Any interest, value, or advantage which the law treats as having continuing existence and identity as essential to human life or to the maintenance of human personality is an incorporeal thing. Id. at 35. It appears that this proposition of Bhalla has already been taken into consideration by the courts in providing for protection by criminal law to property. See infra, n.41 et seq.

36. See Salmond, op.cit., p.413. The Roman classification of Res mancipi and Res nec mancipi is no more in vogue. See Paton, op.cit., p.512.

Difficulties involved in properly explaining the concept of property so as to make it workable for the purpose of giving protection make criminal law ineffective in extending protection to property. However, even in olden days property was protected from aggression in one way or other. The reason for giving protection to property seems to have been to maintain social and economic order in society. In this regard the observations of Roscoe Pound are worth-noting:

In civilized society men must be able to assume that they may control, for purposes beneficial to themselves, what they have discovered and appropriated to their own use, what they have created by their own labour, and what they have acquired under the existing social and economic order. This is a jural postulate of civilized society as we know it. The law of property in the widest sense including incorporeal property and the growing doctrine as to protection of economically advantageous relations, gives effect to the social want or demand formulated in this postulate.<sup>37</sup>

Law and property are inseparable. The importance of the relationship between the two has been rightly expressed by Bentham thus:

Property and law are born together, and die together. Before laws were made there was no property; take away laws, and property ceases.<sup>38</sup>

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37. Pound, An Introduction to the Philosophy of Law (New Haven and London: Yale University Press, 1954), p.108.

38. Bentham, Theory of Legislation (Bombay: N.M.Tripathi Pvt.Ltd. 1975), p.69.

## CONCEPT OF PROPERTY AS REFLECTED IN THE PENAL CODE

The framers of the Penal Code were very cautious in employing the word property. They chose not to define the term probably because of the difficulties involved in attempting a satisfactory definition. However, the Code has given an inclusive definition of the term 'movable property'. According to section 22 "the word 'movable property' are intended to include corporeal property of every description, except land and things attached to the earth or permanently fastened to anything which is attached to the earth". Theft, dishonest misappropriation of property, and offences against property marks are offences directly affecting movable property. Though things attached to land are excluded from the definition of immovable property, the severance of them from land amounts to to an offence of theft.<sup>39</sup> The definition of movable property was clearly intended to protect corporeal movable property or material things. The absence of a definition to the term property and restricting the definition of movable property to corporeal property, compelled the judiciary to explore the meaning of property more vigorously. It appears that the intention of the framers at that time was to limit the protection by criminal law to material movable property, and land and

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39. See section 378, Explanation 1, which reads: "A thing so long as it is attached to the earth, not being movable property, is not the subject of theft; but it becomes capable of being the subject of theft as soon as it is severed from the earth".

things attached to it. Incorporeal property and things having no monetary value seemed to have been excluded from the protection by criminal law. This appears to be in consonance with the then existing notion of protection of property. But the judiciary has been alive in interpreting the word property to make it feasible to move in accordance with the mores of the day and to accommodate the changes in the notion of property. It can also be seen that the terms 'thing', 'possession' and 'ownership' which are considered as the components of the concept of property remained undefined in the Code.

An examination of the decisional jurisprudence reveals that the absence of definition of the term 'property' and the limitation of the definition of the term immovable property to corporeal things, tempted the courts to interpret the word 'property' to include things which are movable, immovable and incorporeal, certain rights of the individuals, things having no monetary value etc.

The first addition of a 'thing' having no pecuniary value to the concept of property, was hall ticket.<sup>40</sup> In Queen-Empress v. Appasami<sup>41</sup> the question whether hall ticket was property under section 415 of the Penal Code for the purpose of the offence of cheating came up for consideration. Here the

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40. Certificate issued to an examinee giving permission to write the examination.

41. (1889) I.L.R. 12 Mad.151.

accused falsely representing himself to be Vellore Absalom David, induced the officer of the University to issue the hall ticket meant for said V.A.David, and with the ticket he appeared for the examination. The Madras High Court found that the hall ticket was property since it "entitled him to enter into the examination room and be there examined for matriculation test of the University".<sup>42</sup>

The Supreme Court also had an occasion to consider a similar question in Abhayanand Mishra v. State of Bihar.<sup>43</sup> The facts show that on a request from the appellant, representing himself as a graduate and a school teacher, to appear for M.A.Examination, the Patna University authorities despatched his admission card to the school. But it was withheld on receipt of information that the particulars stated in the application were false. On a charge for attempt to cheat, it was contended among other things that since the admission card had no pecuniary value it could not be considered 'property'. Negating the contention Raghubar Dayal, J. observed:

We do not accept the contention for the appellant that the admission card has no pecuniary value and is therefore not property. The admission card as such has no pecuniary value, but it has immense value to the candidate for the examination. Without it he cannot secure admission to the examination hall and consequently cannot appear at the examination.<sup>44</sup>

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42. Id. at 152.

43. A.I.R. 1961 S.C. 1698.

44. Id. at 1700.

The reason for accepting hall ticket as property seems to be the fact that it confers the holder certain rights or benefits exclusively meant for the holder of the ticket. By accepting it as property the Court has extended the concept of property to include things with limited use for limited time to a particular individual without any pecuniary value.

This trend continued and got within the fold of 'property' 'certificates' without any pecuniary value. In Queen-Empress v. Soshi Bhushan<sup>45</sup> the accused sought admission in a different college. Here by producing a forged transfer certificate in which it was stated that he had completed the course of lectures in Law Class I. He also represented that the requisite fee had been remitted. He sought admission to the next year course on the strength of the transfer certificate. On a charge for the offence of forgery under section 463, Penal Code, it was argued that the certificate was not property, and hence the offence of forgery was not committed. The Court rejected it and stated that it was property since by producing it he saved the payment of fee and obtained a claim to be admitted in the second year. Relying on this decision the Madras High Court held In re Packianathan<sup>46</sup> that a 'health

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45. (1893) I.L.R. 15 All.210; see also Kotamraju Venkatrayadu v. Emperor, (1905) I.L.R. 28 Mad. 90, where a forged conduct certificate was involved.

46. A.I.R. 1920 Mad.131. Here the accused was going to Ceylon using the permit of another person, Kumaraswami. On production of the permit the Health Officer issued the health certificate. On identifying by the clerk of the Health Officer that the accused was not Kumaraswami, a case was filed against him under section 415 of I.P.C. for cheating.

certificate' issued by a Health Officer was also 'property' for the purposes of cheating.

The above reasoning was reiterated elaborately by the Nagpur High Court in Local Government v. Gangaram.<sup>47</sup> In this case the accused produced a false certificate showing that he had passed the examination of fourth Vernacular Standard seeking appointment to a post. He was charged for cheating. It was contended that the certificate was merely a piece of paper without any value. It was also argued that in any case it could not be taken as property. The Court responded:

Whether a certain article is or is not 'property' does not depend upon its possessing a money or market value. An article may not fetch any money in the market and still it may have a value to certain persons. In my opinion the certificate which the accused obtained from the Deputy Inspector had a special value to both of them, though that value could not be computed in money. A University diploma of a graduate or a license of a licentiate has a particular value to its holder and a person stealing it from his possession would not be acquitted on the ground that it had no value and is therefore no 'property'.<sup>48</sup>

Similarly the 'quota transfer certificate' conferring export quota rights was held to be 'property' within the meaning of

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47. A.I.R. 1922 Nag.229.

48. Id. at 231, 232.



section 415 by the Madras High Court in In re J.S.Dhas<sup>49</sup> since that document had an independent value. Here the accused, a tea estate owner, applied for transfer of export quota rights far in excess of what was fixed to his credit. A false endorsement as to the availability of quota was made by the clerk. In consequence of the false endorsement by the clerk, the transferor was granted the certificate whereby he was enabled to transfer export quota rights far in excess of the quota to his credit and made a huge wrongful gain. The Court ruled that the certificate constituted property for the purposes of sections 420 and 120-B, Penal Code and accordingly both the accused and the clerk were adjudged guilty.

In all these cases it may be seen that the documents were accepted as property because in one way or other they provided benefit to the person holding them. While the 'transfer certificate' helped the person to get admitted in the college without paying the required fee, the 'certificate passing examination' helped another to get a job and the 'quota transfer certificate' conferred right to export more materials than the forger was entitled to export. Indeed, in one sense in all these cases the object or certificate had no money value as such. However it cannot be gainsaid that there were some inconvenience involved in all the cases. Though the then prevailing notion that the thing should have

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49. A.I.R. 1940 Mad.155.

monetary value to bring it within the fold of property was rejected, the fact that the forgery perpetrated has caused some inconvenience to a party has been accepted by the courts.

A new dimension to the concept was given by recognizing 'licence' as property. It was the 'driving licence' possessed by a person other than the licensee which came to be first accepted as property by the Madras High Court in In re E.K.Krishnan.<sup>50</sup> Here the accused, an assistant to the Traffic Head Constable, on an agreement to give driving licence without undergoing any test, collected money from applicants, filed application for the licences and made necessary entries in the records (Test Register) and then got the application sent to the various officials so that the licence would be issued in due course. He was charged for the offence of cheating. It was argued inter alia that the licence did not constitute property until it reached the hands of the licensee and when it was in the possession of the licencing officer or in the hands of appellant it was not property but merely a worthless piece of paper. Justice Horwill, speaking for the Court rejected the contention thus:

It is true that it had no monetary value to the licencing authority, but apart from the intrinsic value of the paper on which it was written it had a substantial potential value. As soon as the licence reached the hands of the licensee, it had

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50. A.I.R. 1948 Mad.268.

an actual value; but even before it reached his hands, it was of value to the appellant, because without that licence he would have been unable to fulfil his agreement and to have retained the money that was given to him.<sup>51</sup>

Emphasizing the 'special value' other than the 'money value or market value' the Rajasthan High Court in Ramchander v. State<sup>52</sup> held that a 'duplicate driving licence', obtained by falsely representing that the original was lost was 'property' for the purposes of the offence of cheating under section 420, Penal Code. Adopting the line of reasoning resorted to by the Madras High Court in In re E.K.Krishnan<sup>53</sup>, the Bombay High Court in Durgadas Tulsiram Sood v. State<sup>54</sup> held that an 'import licence' in the hands of the authority was 'property' within the meaning of section 420.

Thus the courts had gone to the extent of recognizing a thing having no pecuniary value as property even though it was in the possession of another. Monetary value as an insignia of property was again discarded by the courts. The special value or benefit to the individual or the satisfaction of the needs of a particular individual thus seems to have got predominance over monetary value in recognizing a thing as property to accord protection.

Inclusion of incorporeal property such as chose-in-action in the term 'property' for the purpose of Penal Code, further broadened the concept of 'property' for affording protection by criminal law. It is specifically stated in the Code that movable property includes only corporeal property.<sup>55</sup> The question of bestowing protection to chose-in-action came to be discussed by the Allahabad High Court in Bishan Prasad v. Emperor.<sup>56</sup> Here the accused bid under a false name at an auction sale of the 'right to sell drugs', but refused to accept it when his bid was finalized. On an action under section 185 Penal Code, for illegal bid of property offered for sale by authority of public servant, it was contended that a sale of such description did not fall within the definition of the section and the 'right to sell drugs' was not property. Finding the offender guilty under section 185, the Court held that "the right to sell drugs, i.e. the monopoly granted for a certain area comes within the definition of property".<sup>57</sup>

In Manchersha Ardesbri Devierwala v. Ismail Ibrahim Patel,<sup>58</sup> the Bombay High Court ruled that the right to cut trees, which the accused disposed along with all other assets he had so as to declare himself insolvent to avoid payment to the creditors, was 'property' within the meaning of the Code.

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55. See section 22, I.P.C.

56. A.I.R. 1915 All.93. See also Shivanarayan Laxminarayan Joshi v. State of Maharashtra, A.I.R. 1980 S.C. 439, where the Supreme Court upheld the view that chose-in-action was property.

57. Ibid.

58. A.I.R. 1936 Bom.167.

Rejecting the contention that the word property in section 421 included only corporeal property the Court held:

The word "property" in S.421 is wide enough to include a chose-in-action, and it appears to us that we should give a wide interpretation to the word here since the act of dishonestly transferring a chose-in-action to defraud creditors is within the mischief of the section.<sup>59</sup>

But the above-mentioned broad interpretation was not taken note of by the Nagpur High Court in Punjaji Chandrabhan v. Maroti Wangoji,<sup>60</sup> where the Court held that an 'easement right' to carry water to the field of the complainant through the drain running through the land of the accused did not come within the purview of property for the purposes of the offence of mischief under section 425, Penal Code. since it was not a tangible property capable of being forcibly destroyed.

At the same time courts have accorded protection even to out-dated cheques, which were of no value, stating that value of a thing is immaterial in considering it as property, and by also interpreting the words 'corporeal property of every description' in the definition of immovable property to include cheques. In Emperor v. Maula Bakhsh<sup>61</sup> the accused was entrusted

59. Id. at 171, per, Barlee, J.

60. A.I.R. 1952 Nag.193. Here the accused, the landowner, who damaged the drain was held not liable for mischief.

61. (1905) I.L.R. 27 All.28. See S.F.Rich v. Emperor, A.I.R.1930 All.449, where a cheque was held to be property for the purposes of the offence of misappropriation. The money drawn was misappropriated.

with some cancelled cheques for producing them before a court. He disappeared with them, but was later arrested. On a charge for breach of trust under section 405, Penal Code, it was contended that since they had no value they could not be considered property. Negating the contention, Justice Knox concluded:

I have come to the conclusion that they were property within the meaning of the Indian Penal Code, even assuming that they were of no value further than the paper upon which they were written. The question of value, except so far as section 95 is concerned, appears quite immaterial...<sup>62</sup>

Thus what was expressly rejected by the legislature as not property for the purpose of giving protection by criminal law was included into the concept by the courts.

By extending the protection of criminal law to things like fund, idol, assessment order, passport etc., new dimensions were added to the concept of property in criminal law. It was in R.K.Dalmia v. Delhi Administration<sup>63</sup>, that the Supreme Court considered the question whether a 'fund' of the company was property for the purpose of interpreting the offence of criminal breach of trust. In this case the accused,

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62. Id. at 30. Following this decision the Madras High Court in In re Ethirajan, A.I.R. 1955 Mad.264 held that a blank cheque leaf taken by a clerk, though valueless, was property.

63. A.I.R. 1962 S.C.1821.

who was the chairman of the company, along with another person transferred the funds of the company so as to purchase shares of the company. They had also sold securities and incurred loss to the Company. On a charge for criminal breach of trust it was contended inter alia that the fund could not be considered property within the meaning of section 405, Penal Code. Justice Raghubar Dayal, speaking on behalf of the Court repelled the contention thus:

The expression 'fund' in the charge is used in the first sense meaning thereby that Dalmia and Chokkani had dominion over the amount credited to the Bharat Insurance Company in the accounts of the Bank, inasmuch as they could draw cheques on that amount.

We are therefore of opinion that the funds referred to in the charge did amount to 'property' within the meaning of that term in S.405 I.P.C.<sup>64</sup>

In Ahmed v. State<sup>65</sup> the accused removed the idol of a temple and immersed it in water, and was charged for theft. It was argued that the idol kept in a temple was immovable property, though it could be moved, since the idol was considered a juridical person it could not constitute property, to be an object of theft. The contention was rejected and the Court reasoned:

An idol which is not attached to earth is usually made of some physical substance which has mundane value. Sometimes their artistic or historic value

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64. Id. at 1834.

65. A.I.R. 1967 Raj.190.

may be quite considerable. All the same I have no difficulty in coming to the conclusion that for certain purposes an idol may be a juridical person but apart from that legal fiction an idol is also movable property which can be subject matter of theft.<sup>66</sup>

The Supreme Court in Ishwarlal Girdharilal Parekh v. State of Maharashtra<sup>67</sup>, held that an income tax assessment order constituted 'property' under the Penal Code. In this case, on giving false statement about the total income of Premier Industries, the accused induced the income-tax authorities to assess at a lesser amount than what was due from them. Believing the statement, the authorities assessed for a lesser amount than what was actually due. The accused was charged under section 420, Penal Code for cheating. This was objected on the ground that assessment order was not property. Rejecting the contention, the Court opined:

Under the scheme of Income-Tax Act, it is clear that the assessment order determines the total income of the assessee, and the tax payable, on the basis of such assessment....The communicated order of assessment, received by an assessee, is in our opinion, 'property', since it is of great importance to an assessee, as containing a computation, of his total assessable income and as a determination of his tax liability.<sup>68</sup>

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66. Id. at 192.

67. A.I.R. 1969 S.C.40.

68. Id. at 43.



The argument that only things which have some money value or market value could be treated property was rejected thus:

In our view, the word 'property' occurring in S.420 I.P.C., does not necessarily mean that the thing, of which a delivery is dishonestly desired by the person who cheats, must have a money value or a market value, in the hand of the person cheated. Even if the thing has no money value, in the hand of the person cheated, but becomes a thing of value, in the hand of the person, who may get possession of it, as a result of the cheating practised by him, it would still fall within the connotation of the term 'property' in S.420 I.P.C.<sup>69</sup>

Thus the Supreme Court categorically spelt out that the criterion for treating a thing as property is to look whether it confers any value to the person who holds it. Following the spirit of Ishwarlal<sup>70</sup> the Supreme Court in N.M.Chakraborty v. State of West Bengal<sup>71</sup> held that 'passport' was property. The accused, who were foreigners, conspired and cheated the passport authorities to issue passport without disclosing their real nationality and address. They were convicted by the trial court for cheating. The High Court affirmed the conviction. Upholding the High Court, the Supreme Court reasoned that though passport had no money value as such, since it conferred

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69. Ibid.

70. A.I.R. 1969 S.C.40.

71. A.I.R. 1977 S.C.1174.

several benefits such as recognition of citizenship, right to free passage in the nation, right to travel abroad etc. it is of considerable value to the holder. The Court added that passport being a 'tangible thing' capable of being "subject of ownership or exclusive possession", it was property within the meaning of sections 415 and 420 of the Penal Code.<sup>72</sup>

It may be safely concluded from the above discussion of case law that the courts have gone ahead in restructuring basic criteria for recognizing a thing as property. The then existing notion of 'money value' as the basic criterion for identifying property was clearly replaced by value or interest of any kind to the person concerned. The stress is on the question whether the 'thing' confers any benefit to any person concerned. The acceptance of 'value or interest of any kind' as the insignia for recognizing a thing as property for affording protection by criminal law seems to have reintroduced the element of 'satisfaction of the self' or the extension of personality of an individual which was the basis of property in olden days.<sup>73</sup>

Some of the earlier decisions give support to this reading of the philosophy of law. A thing which was not owned or possessed by a person was not property for the purpose of protection. In other words, if the thing was not an extension of the personality of a person or was not satisfying the needs

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72. *Id.* at 1176.

73. For details, see *supra*, notes 6, 18, 35. Also see Kenneth J. Vandavelde, "The New Property of The Nineteenth Century: The Development of The Modern Concept of Property", 29 Buffalo L.Rev. 325 (1980).

of the self of an individual, it was not to be protected as property. For example, while in Queen-Empress v. Bandhu<sup>74</sup> a bull owned by none was held not property subject to larceny, in Mukand Ram's case<sup>75</sup> the Allahabad High Court held that a bull dedicated not to a particular deity was also not property that should be protected under Penal Code.<sup>75</sup> It was, however clarified therein that if a bull was dedicated to a deity (a legal person) in the shape of an idol, it would surely be considered property.

It appears that the law protects property only if the thing to be protected is under either ownership or possession.<sup>77</sup> A thing which is not subject to ownership or possession is not considered property for the purpose of affording protection under the Penal Code. In other words, a thing unrelated to an individual does not attain the status of property or come under the concept of property for the purpose of protection by criminal law. The money value of the thing is not the criterion to treat it as property.

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74. (1885) I.L.R. 8 All.52. Here a bull set free by a Hindu in connection with a funeral ceremony was appropriated by the accused. It was held to be not property for it was not only subject of ownership by any person, but the original owner had surrendered all his rights as its proprietor and had given the beast its freedom to go withersoever it chose.

75. Mukand Ram v. State, A.I.R. 1952 All.26. Here the bull was dedicated to Lord Shiva in connection with a religious ceremony. It was taken to cattle pound and was later auctioned. The accused purchased it and used for ploughing. See Romesh Chunder Sanyal v. Hiru Mondal, (1890) I.L.R. 17 Cal.852.

76. It appears that in these cases the courts were treating the bulls as *ferae naturae*.

77. For an interpretation of the concept of possession by judiciary see infra, Chapter III.

## Chapter II

### INSTITUTION OF PROPERTY AND THE CONSTITUTION

#### THE INSTITUTION OF PROPERTY: HISTORICAL EVOLUTION

The Constitution intends to develop a socialistic pattern of society in which every individual must be provided with what is due to him to lead a reasonably decent life. This necessitates the distribution of wealth for the satisfaction of the needs of each individual in the society. To achieve this, law has to recognize and protect at least a minimum extent of property that is required to fulfil the needs of the self of an individual.

Various theories have emerged to justify the concept of private property.<sup>1</sup> Some focused their attention on the development of the concept from the individual point of view while others concentrated on the society to find out the basis for the justification of private property. It was believed by certain writers that property in olden days was held in common by the society, and every individual was permitted to fulfill his needs for existence from such property. They never recognized property as a private institution. Based on this assumption Greek philosophers like Socrates and Plato argued for the

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1. Roscoe Pound conveniently arranged them into six groups: They are: (1) Natural law theories; (2) metaphysical theories; (3) historical theories; (4) positive theories; (5) psychological theories; and (6) sociological theories. For details, see Roscoe Pound, An Introduction to the Philosophy of Law (New Haven and London: Yale University Press, 1922, 3rd printing 1974), p.114 et seq.

communism in holding property.<sup>2</sup> A similar line of thought may be perceived among the Roman philosophers.<sup>3</sup> The early Christian theory based on New Testament and writings of Rufinus<sup>4</sup>, St.Thomas Aquinas<sup>5</sup> etc. also agree that property used to be held in common.

But the need for conceding the right of private property was also rightly recognized. For example in Greece, philosophers like Aristotle emphasized the need for recognizing private property holding that this was necessary for the betterment of the society. He observed:

[It would be the ideal]; for property ought to be generally and in the main private, but common in one respect [i.e. in use]. When everyone has his own separate sphere of interest, there will not be the same ground for quarrels; and the amount of interest will increase, because each man will feel that he is applying himself to what is his own. And on such a scheme, too, moral goodness [and not, as in Plato's scheme, legal compulsion] will ensure that the property of each is made to serve the use of all, in the spirit of the proverb which says 'Friends' goods are goods in common.'<sup>6</sup>

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2. Plato, The Republic, Book V. See B.Jowett (Trans.), The Dialogues of Plato (New York: Random House, 19th print 1937), Vol.I, p.710 et seq. See also Irwin Edman (Ed.) The Works of Plato (New York: The Modern Library, Inc. 1956), p.419; Richard Schlatter, Private Property (London: George Allen & Unwin Ltd., 1951), pp.14 et seq.
  3. See the observation of Cicero, Richard Schlatter, op.cit., p.24.
  4. Id. at 42.
  5. Id. at 57.
  6. See Earnest Barker (Ed.& Tran.), The Politics of Aristotle (London: Oxford University Press, 1958), p.49.

In Rome also Justinian tried to justify private rights in property. Institutes of Justinian, the most influential set of text in Roman law, traces the origin of private property to the law of nature. Based on the theory of occupation, Justinian argued that individuals acquire property. He reasoned:

Wild beasts, birds, fish, that is, all animals, which live either in the sea, the air, or on the earth, so soon as they are taken by any one, immediately become by the law of nations the property of the captor; for natural reason gives to the first occupant that which had no previous owner.<sup>7</sup>

The renowned natural law theorist, Grotius relying on Justinian considered private property as having originated in a kind of agreement among men to respect the right of occupation at the time of agreement. He argued thus:

At the creation, and again after the Flood, God gave the world to men to use as a common inheritance. They lived without strife since they were content to consume only those things which the earth freely offered. The only private property was those consumable goods which each man gathered for his immediate

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7. See The Institutes of Justinian (8th edn. 1888) Book II, Title 1, p.95 extracted in Cohen and Cohen, Readings in Jurisprudence and Legal Philosophy (Boston: Little Brown & Co. 1951), p.51. Theory of occupation was accepted by St. Thomas; but for him private property was the creation of man. This was further extended by his student Aegidius Romanus and observed that it forms part of ius gentium. See Richard Schlatter, op.cit., p.57.

use....Impelled by the vices of avarice and ambition as well as by the desire to obtain a "more refined mode of life", men strove to create and acquire more and more things, quarrels arose, and the preservation of peace required the institution of private property.... Consequently, private ownership was introduced by a kind of agreement, either expressed, as by a division, or implied, as by occupation....<sup>8</sup>

This theory of occupancy based right of private property was accepted by the common law theorist Blackstone.<sup>9</sup> However, it was criticized by Maine. According to Maine the theory of occupancy was the product of "the growth of a refined jurisprudence and of a settled condition of the laws".<sup>10</sup> He added that it was directly reverse to the truth of first stage of civilization where people lived in groups. The occupant according to him "becomes owner, because all things are presumed to be somebody's property and because no one can be pointed out as having a better right than he to the proprietorship of this particular thing".<sup>11</sup> He asserted that the archaic form of property institution was not concentrated on individuals but on joint-ownership.<sup>12</sup> The theory of occupancy was also

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8. See Grotius, War and Peace Book II, chap.2, pp.86-89 quoted in Richard Schlatter, op.cit., pp.127-128.

9. See Blackstone, Commentaries on the Laws of England (London: Thomas Tegg, 1830) Vol.II, pp.2-3. Also see Carol M.Rose, "Possession as the Origin of Property", 52 Uni.Chl.L.Rev., 73 (1985).

10. See Henry Sumner Maine, Ancient Law (London: Oxford University Press, 1959 print),p.212.

11. Id. at 213.

12. Id. at 215.

criticized as not based on natural law, since natural law sought for the equal distribution of wealth to all members of the society. Hobbes<sup>13</sup> was of the view that agreement among men did not originate in natural law inasmuch as such an agreement resulted in unequal distribution of property rights which was against the natural law concept of property right. According to Hobbes, private property was the creation of the 'State'.<sup>14</sup>

Based on natural law principles, John Locke tried to explain property right as a natural right, and right to private property as an institution of the nature rather than creation of mankind.<sup>15</sup> Trying to establish the basis of private property as the fruit of the labour of a person who occupied it, he argued:

Though the Earth, and all inferior Creatures be common to all Men, yet every Man has a Property in his own Person. This no Body has any Right to but himself. The Labour of his Body, and the Work of his Hands, we may say, are properly his. Whatsoever then he removes out of the State that Nature hath provided, and left it in, he hath mixed his Labour with, and joyned to it something that in his own, and thereby makes it his Property.<sup>16</sup>

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13. See Thomas Hobbes, Leviathan (Oxford University Press, 1929), p.230 et seq. For discussion, see Schlatter, op.cit., pp.138-143.

14. Id. at 231 et seq.

15. See John Locke, Two Treatises of Government, Book II, chap.5 (London: Black Swan in Pater-Nofter-Row 1698), S.25 et seq. See also Peter Laslett, John Locke Two Treatises of Government: A Critical Edition (Cambridge: The University Press, 2nd edn. 1970), pp.303-320.

16. Id. section 27.



Thus he established that the first occupier of the property must be considered the owner of that property excluding others from enjoying it. He mixed the theory of occupancy with the theory of labour. He was criticized by many for his overemphasis on the interrelation of liberty and property.<sup>17</sup> Though he argued that labourer was not entitled to excess of what was needed to him, his emphasis that a labourer can acquire as much as he wills through his labour, failed to explain the concept of acquisition of wealth according to the needs of the individuals.<sup>18</sup> He was also attacked on the ground that his theory could not stand in an industrial era where the production was the outcome of the labour of a group of individuals.<sup>19</sup>

As a departure to the traditional natural law theories, Kant and Hegel tried to justify private property as an exercise of the 'will' of an individual. According to Kant "it is possible to have any external object of my will as Mine" if it is res nullius. "The Act of taking possession (apprehensio)" he said, "as being at its beginning the physical appropriation of a corporeal thing in space (possessionis physicae), can accord with the Law of the external Freedom of all, under no other condition that of its priority in respect of time...."<sup>20</sup> Thus it seems

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17. See Walton H.Hamilton, "Property--According to Locke", 41 Yale L.J. 864 (1932). Also see Peter Laslett, op.cit., pp.104-105.  
 18. For a detailed discussion, see R.S.Bhalla, op.cit., pp.118-124.  
 19. See Walton H.Hamilton, op.cit., p.878.  
 20. See Immanuel Kant, Philosophy of Law (1887) Book II, p.89 extracted in Cohen and Cohen, op.cit., p.71.

that the theory of Kant has both the idea of occupation and compact.<sup>21</sup> But Hegel developed the metaphysical theory further by avoiding the idea of occupation and considering property as the realization of the idea of liberty.<sup>22</sup> According to him, "a person has the right to direct his will upon any object, as his real and positive end. The object then becomes his. As it has no end in itself, it receives its meaning and soul from his will".<sup>23</sup> He added that "since property makes objective my personal individual will, it is rightly described as a private possession".<sup>24</sup> These 19th century theories could not adequately answer the questions posed by modern era when there is scarcity of property to meet the needs of all concerned.<sup>25</sup> It is also pointed out that the concept of equal distribution of wealth to all individuals to satisfy their needs cannot be achieved in the present day situations. The utilitarians--Hume and Bentham--also could not satisfactorily explain and justify private property.<sup>26</sup>

The failure of classical theorists to explain satisfactorily the basis for distribution of wealth equally for the satisfaction of the needs of all individuals in the society

21. See Roscoe Pound, op.cit., p.119.

22. Id. at 120.

23. Hegel, Philosophy of Right, pp.51-52, extracted in Cohen and Cohen, op.cit., p.74; see also Hegel, "Metaphysical Basis of Property", Rational Basis of Legal Institutions, The Modern Legal Philosophy Series (New York: Augustus M. Kelley Pub., 1969 Print) Vol.XIV, p.201 et seq.

24. Id. at 75.

25. Roscoe Pound, op.cit., p.121.

26. See R.S.Bhalla, op.cit., pp.124-135.

led to the emergence of a socialistic approach to the justification of private property. The socialist theorists advocated the social ownership of means of production and distribution. They argued for the restructuring of the society to extirpate the imbalances created in the society by the accumulation of wealth in the hands of a few individuals. Taking the thread from the labour theory, the early socialist thinkers urged that man had no right to any property except that which is the fruit of his labour. Writers like Thomas Spence, Ogilvia, Paine etc. advocated for the equal distribution of land, then chief instrument of production, which was monopolized and kept in the hands of a few during the last half of 18th century.<sup>27</sup> They emphasized that land should be in the hands of those who were willing to work, and they should enjoy the fruits of their labour. Godwin<sup>28</sup>, who also shared this view went further and opined that such appropriation of the fruit of the labour must be limited to the satisfaction of the needs of the labourer. Explaining the injustice in holding excess of what is needed to a person, he observed:

The word property would probably remain; its signification only would be modified. The mistake does not so properly lie in the idea itself, as in the source

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27. See M.Beer (Ed.), The Pioneers of Land Reform (London: G.Bell & Sons Ltd. 1920).

28. See "Godwin's Political Justice" in H.S.Salt (Ed.), The Essays on Property (London: George Allen & Unwin Ltd., 1890) quoted in R.S.Bhalla, op.cit., pp.141-143.

from which it is traced. What I have, if it be necessary for my use, is truly mine; What I have, though the fruit of my own industry if unnecessary, it is an usurpation for me to retain.<sup>29</sup>

Godwin was obviously looking at property as communal rather than as purely individualistic.

The socialist theory attained its perfection through the writings of Karl Marx. Relying on the theory of labour he was emphatic on the need for eradicating the exploitation of labourer. Advocating for the conversion of capital into common property he argued:

When, therefore, capital is converted into common property, into the property of all members of society, personal property is not thereby transferred into social property. It is only the social character of the property that is changed. It loses its class character.<sup>30</sup>

Marx considered the product of the labourer not as his own but as the product of the whole society of labourers and argued for its distribution to each individual according to his reasonable needs. Stressing the social nature of capital he said,

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29. Id. at 143.

30. See K.Marx and F.Engels, Selected Works in One Volume (London: Lawrence & Wishart, 1968), p.47.

Capital is a collective product, and only by the united action of many members, nay, in the last resort, only by the united action of all members of society, can it be set in motion....Capital is, therefore, not a personal, it is a social power.<sup>31</sup>

It appears that, though both the classical and socialist thinkers stressed the labour theory of property, the interpretation given to it by the socialists helped to treat labour as a social product to satisfy the needs of the individual. Thus the principle of distribution based on individual's needs rather than on their capacities or capabilities in fact yielded an independent criterion for justification of private property, rather for its social distribution.<sup>32</sup> After examining in detail the justification of private property based on labour theory of the conservatives and socialists, Bhalla notes:

If the institution of property has its justification in the right to labour all those who are not fit to labour will have no property. In short they have no right to life; yet there is a clear individual right to all necessaries of life and one is deprived of life as soon as one takes away the means by which one lives. If the institution of private property has its justification in the right to subsistence, the right can be extended to everybody. Every one will be the owner of property.<sup>33</sup>

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31. Ibid. For a critical view of Marxian theory, see Lecky, "A Survey of Socialist Theories of Property" in Rational Basis of Legal Institutions, op.cit., pp.232-254.

32. See R.S.Bhalla, op.cit., p.151.

33. Id. at p.157.

Thus it may be concluded that only property that is necessary for the satisfaction of the self need be recognized, and protected as private personal property. This has to be done inasmuch as the society cannot function properly without property.

#### INSTITUTION OF PROPERTY IN INDIA

In India even from early days right to property has been recognized and protected. Our ancient law givers like Manu, Jumutavahana, Vijneswara etc. accepted the concept of private ownership.<sup>34</sup> Manu justified it on the theory of occupancy. His statements are quite pertinent:

Sages, who knew former times, consider this earth (Prithivi) as the wife of King Prithu; and thus they pronounce cultivated land to be the property of him, who cut away the wood, or who cleared and tilled it; and the antelope, of the hunter, who mortally wounded it.<sup>35</sup>

This view of Manu got judicial recognition also in The Secretary of State v. Vira Rayan.<sup>36</sup> The Madras High Court there observed:

According to what may be termed the Hindu Common Law, a right to the possession of land is acquired by the first person who makes a beneficial use of the soil.<sup>37</sup>

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34. See for details, Priya Nath Sen, General Principle of Hindu Jurisprudence (Allahabad: Allahabad Law Agency, 1984 Print), pp.39 et seq.

35. Institutes of Manu chap.IX, p.44 (Grady's edn.) quoted in Sundararaja Iyengar, Land Tenures in the Madras Presidency (Madras: The Modern Printing Works, 1916), p.3.

36. (1885) I.L.R. 9 Mad.175.

37. Id. at 179, per, Sir Charls Turner, C.J. and Muthuswamy Ayyar, J.

This has much similarity to that of the Roman concept of occupancy. Based on this concept property rights were recognized which led to concentration of lands in the hands of few. Both under the Hindu Law and Muslim Law the King--Sovereign--had no proprietary right. His only right was to collect taxes from the landlords for extending protection to property.<sup>38</sup> This led to the development of a type of feudal system in India. When the British Government took over administration of India, though they claimed the Crown as the supreme owner of property, they perpetuated the feudal system by injecting into it the concepts then having sway in England.<sup>39</sup> This was reflected in their legislative policy also.<sup>40</sup> This trend resulted in developing a typical landlord-tenant relationship in the pre-independent India.<sup>41</sup> The abolition of this system was one of the main slogan of the Congress during the independent struggle.<sup>42</sup>

#### INSTITUTION OF PROPERTY IN THE CONSTITUTION--A RETROSPECT

When India got independence the goal of creation of an egalitarian society forced the framers of the Constitution to look for a change in the policy as regard to property relations Taking into consideration the conflicts of interests involved

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38. See S.Sundararaja Iyengar, op.cit., pp.5-16.

39. Id. at 16-25.

40. Government of India Act, 1935, section 299.

41. See generally H.C.L.Merillat, Land And The Constitution In India (Bombay: N.M.Tripathi Pvt.Ltd., 1970).

42. See the speech of Nehru in Constituent Assembly; Constituent Assembly Debates Vol.9, p.1195.

in the problem, the framers took a balanced approach. Giving due weight to the individual interest in property they enshrined right to property as a fundamental right. At the same time taking into consideration the social needs, 'equal distribution of wealth' was included as a directive principle of state policy. This approach pregnant with dormant conflicts inevitably resulted in the confrontation between these ideas shortly leading to the abrogation of fundamental right to property.

An attempt was made in the Assembly to introduce into the Constitution the due process clause of the U.S. Constitution for protecting the individual right to property. But this was finally withdrawn because of the apparent dangers involved in such a clause.<sup>43</sup> The right to acquire, hold and dispose of property was included as a fundamental right. Deprivation of property was prohibited except by the authority of law. The question as to the quantum of compensation that has to be paid in case of acquisition or requisition for public purpose created much difficulty.<sup>44</sup>

Focusing on the natural right of individual to own property, one group<sup>45</sup> in the Constituent Assembly argued for

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43. See for a detailed discussion, B.Shiva Rao, The Framing of India's Constitution--A Study (New Delhi: The Indian Institute of Public Administration, 1968), p.281 et seq. Due process has, however, made its entry later though.
44. For details, see Granville Austin, The Indian Constitution: Cornerstone of A Nation (Bombay: Oxford University Press, 1966), pp.87-101; Merillet, op.cit., p.52 et seq.
45. They were B.N.Rau, Syamanandan Sahaya, Thakurdas Bhargava, Mohboob Ali Baig, Ahmed Ibrahim, Naziruddin Ahmed, Jaspal Roy Kapoor etc. For details, see B.Shiva Rao, op.cit., and also Constituent Assembly Debates Vol.IX, p.1199 et seq.



the payment of just compensation while another group<sup>46</sup> owing allegiance to socialistic approach on right to property went to the extent of arguing that there should be no payment of compensation in case of compulsory acquisition for public good. Having regard to these conflicting approaches, Jawaharlal Nehru spelled out the policy to be adopted in the following words:

Now, normally speaking in regard to such acquisition-- what might be called petty acquisition or acquisition of small bits of property or even relatively large bits, if you like, for the improvement of a town, etc.--the law has been clearly laid down. But more and more today the community has to deal with large scheme of social reform, social engineering etc., which can hardly be considered from the point of view of that individual acquisition of a small bit of land or structure....If we have to take the property, if the state so wills, we have to see that fair and equitable compensation is given, because we proceed on the basis of fair and equitable compensation. But when we consider the equity of it we have always to remember that the equity does not apply only to the individual but to the community. No individual can override ultimately the rights of the community at large. No community should injure and invade the rights of the individual unless it be for the most urgent and important reasons.<sup>47</sup>

Article 31 of the Constitution in fact reflected this approach which appeared to prefer protection of societal interest to

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46. They were Jaya Prakash Narayan, Domodar Swarup Seth, K.T.Shah, Guptanath Singh etc. For details see, Constituent Assembly Debates Vol.IX, pp.1199-1201 and 1215-1221.

47. Id. at 1192.

individual interest. Placing the amended article before the Constituent Assembly Nehru said:

This draft article which I have the honour to propose is the result of a great deal of consultation, is the result in fact of the attempt to bring together and compromise various approaches to this question. I feel that that attempt has in a very large measure succeeded. It may not meet the wishes of every individual who may like to emphasize one part of it more than the other. But I think it is a just compromise and it does justice and equity not only to the individual but to the community.<sup>48</sup>

Thus the original Art.31 to the Constitution guaranteed deprivation of property by law alone. It also guaranteed payment of compensation as fixed by the legislature.<sup>49</sup>

As soon as the Constitution was brought into force the conflict which emerged inside the Constituent Assembly took new shape. The constitutional validity of zamindari

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48. *Id.* at 1193.

49. Legislation to abolish the zamindari system were earmarked for special treatment, and it was generally provided by sub-clauses (4) and (6) of Art.31 that bills pending in state legislatures at the commencement of the Constitution and having been passed and obtained the assent of the President of India, and any bill passed by state legislatures not more than eighteen months and certified by the President of India should not be challenged for violation of Art.31(2). To achieve the goal of creating an egalitarian society specific provisions were included in the directive principles of state policy for distribution of wealth. Accordingly Art.39(b) and (c) were included clearly stating that ownership and control of material resources should be distributed to subserve the common good and that the operation of economic system should not result in the concentration of wealth. This also makes it clear that framers of the Constitution viewed right to property from a socialistic angle. The philosophical stand of the Constitution was, it is felt, never understood by the judiciary in the proper perspective.

abolition legislation came to be challenged on various grounds. The litigants were zamindars, who were the descendents of persons appointed to collect land revenue on behalf of the government. In law the zamindars were not landlords<sup>50</sup> to be compensated, because they were farmers, had the status of only officers of the state. This vital fact was overlooked and courts leaned in their favour. Judiciary liberally interpreted the Constitution upholding the property rights of the zamindars. The result of the approach has been the gradual erosion of the concept of private property enshrined in Art.31 which ultimately was deleted by way of amendments to the Constitution.

#### INSTITUTION OF PROPERTY IN THE CONSTITUTION--A SURVEY THROUGH THE CASES AND AMENDMENTS

In this context it may be interesting and fruitful to have a bird's eye view of the development that led to the abrogation of the fundamental right to property and the fall back on the concept of private property as understood by the framers of the Constitution. At the time when Constitution was enacted, an individual had two types of property rights. As per Art.19(1)(f)<sup>51</sup> a citizen had the freedom to acquire, hold and dispose of property. The right was of course subjected to reasonable restrictions in the interest of

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50. See for details Merillat, op.cit., p.9 et seq.

51. Art.19(1)(f) before it was deleted by Forty-fourth Amendment in 1978 read: "All citizens shall have the right to acquire, hold and dispose of property".

general public.<sup>52</sup> Protection of property from deprivation without authority of law was enshrined in Art.31(1).<sup>53</sup> By virtue of Art.31(2)<sup>54</sup> property could be taken possession of or acquired for public purpose only by law, and that too on payment of compensation. Such law had either to fix the amount of compensation or to specify the principles. As an additional check on abuse of power by state legislatures, Constitution made it obligatory that such laws made by a state must obtain the assent of the President to get validity.<sup>55</sup>

The first blow to the above constitutional scheme was given by the decision of Patna High Court in Kameshwar Singh's case.<sup>56</sup> In that the constitutionality of Bihar Land

52. Art.19(5) read: "Nothing in sub-clause (d), (e) and (f) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, reasonable restriction on the exercise of any of the rights conferred by the said sub-clause either in the interests of the general public or for the protection of the interests of any Scheduled Tribe".
53. Art.31(1) read: "No person shall be deprived of his property save by authority of law".
54. Art.31(2) read: "No property, movable or immovable, including any interest in, or in any company owning, any commercial or industrial undertaking, shall be taken possession of or acquired for public purposes under any law authorizing the taking of such possession or such acquisition, unless the law provides for compensation for the property taken possession of or acquired and either fixes the amount of the compensation, or specifies the principles on which, and the manner in which, the compensation is to be determined and given".
55. Art.31(3) read: "No such law as is referred to in clause (2) made by the legislature of a State shall have effect unless such law, having been reserved for consideration of the President, has received his assent".
56. Kameswar Singh v. State of Bihar, A.I.R. 1951 Pat.91.

Reforms Act, 1950, which abolished the zamindari system was questioned. The contention inter alia that there was inadequacy of compensation and that there was unequal payment of compensation was upheld by the Court. The Court declared the Act unconstitutional. While the appeal from Bihar High Court was pending before the Supreme Court, The Constitution (First Amendment) Act, 1951 was passed and two new articles, 31A and 31B were introduced. Art.31A<sup>57</sup> protected legislations providing for acquisition of 'estate' or any rights therein or their modification from challenge on the ground that it took

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57. Art.31A reads: (1) Notwithstanding anything in the foregoing provisions of this Part, no law providing for the acquisition by the State of any estate or of any rights therein or for the extinguishment or modification of any such rights shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by, any provisions of this part.

Provided that where such law is a law made by the Legislature of a State, the provisions of this article shall not apply thereto under such law, having been reserved for the consideration of the President, has received his assent.

(2) In this article--(a) the expression 'estate' shall, in relation to any local area, have the same meaning as that expression or its local equivalent has in the existing law relating to land tenures in force in that area and shall also include any jagir inam or muafi or other similar grant; (b) the expression 'rights' in relation to an estate, shall include any rights vesting in a proprietor, sub-proprietor, under-proprietor, tenure-holder or other intermediary and any rights or privileges in respect of land revenue.

away or abridged any of the rights conferred by Part III of the Constitution. Art.31B<sup>58</sup> restricted the scope for challenge on the plea of violation of fundamental rights. The Acts or Regulations specified in the new Ninth Schedule to the Constitution were given immunity from challenge based on Part III. The Parliament included the impugned Bihar Land Reforms Act as 1st entry in the Ninth Schedule.

Having regard to the amendment, the appeal, Kameswar Singh<sup>59</sup>, was partly allowed by the Supreme Court. The whole Act, except sections 4(b) and 23(f), was held constitutional.<sup>60</sup> Discussing the power of the Court to interfere on the matters of compensation, Mahajan, J. opined:

However repugnant the impugned law may be to our sense of justice, it is not possible for us to examine its contents on the question of quantum of compensation. It is for the appropriate legislature to see if it can revise some of its unjust provisions which are repugnant to all notions of justice and are of an illusory

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58. Art.31B reads: "Without prejudice to the generality of the provisions contained in Art.31A, none of the Acts and Regulations specified in the Ninth Schedule nor any of the provisions thereof shall be deemed to be void, or ever to have become void, on the ground that such Act, Regulation or provision is inconsistent with, or takes away or abridges any of the rights conferred by, any provisions of this part, and notwithstanding any judgment, decree or order of any court or tribunal to the contrary, each of the said Acts and Regulations shall, subject to the power of any competent Legislature to repeal or amend it, continue in force.

59. State of Bihar v. Kameswar Singh, A.I.R. 1952 S.C. 252.

60. Patanjali Sastri, C.J., and Das, J. held the whole Act as valid.

nature. The Court's hands are tied by the provisions of Art.31(4) and that which has been declared by the Constitution in clear terms not to be justiciable cannot be made justiciable in an indirect manner by holding that the same subject-matter which is expressly barred is contained implicitly in some other entry and therefore open to examination. None of these provisions, however, fetter the power of the court to inquire into any other matters the cognizance of which is not expressly taken away by the provisions of clause (4) and clause A and B of Art.31.<sup>61</sup>

According to the majority<sup>62</sup>, section 4(b) was unconstitutional inasmuch as that section did not lay any principle for determining the compensation to be paid for acquiring the arrears of rent.<sup>63</sup> Section 23(f) was invalidated since it was a colourable exercise of power.<sup>64</sup>

Even before the decision of Kameswar Singh<sup>65</sup>, the constitutional validity of The Constitution (First Amendment) Act, 1951 was questioned before the Supreme Court in Sankari Prasad Singh Deo v. Union of India<sup>66</sup> and the Court unanimously

61. A.I.R. 1952 S.C. 252, 273.

62. Majority consistsof Mahajan, Chandrasekhara Aiyer and Mukherjea, JJ.

63. Section 4(b) vested the arrears of rent in the State and section 24 provided that fifty per cent of such arrears were to be added to the compensation. Thus it was held amount to confiscation rather than acquisition.

64. Section 23(f) required that from four to twelve and a half per cent had to be deducted out of the net income on account of cost of work for the benefit of raiyats etc.

65. A.I.R. 1952 S.C. 252.

66. A.I.R. 1951 S.C. 458.

upheld Parliament's power to amend every part of the Constitution including Part III on Fundamental Rights.

Thus the difficulty created by the Patna High Court's decision in Kameshwar Singh in implementing the land reforms legislation was cleared by the amendment and the decisions thereon. However, this was shortlived. The Supreme Court in a series of decisions like State of West Bengal v. Mrs. Bella Banerjee<sup>67</sup>, State of West Bengal v. Subodh Gopal<sup>68</sup>, and Dwarkadas Shrinivas v. The Sholapur Spinning and Weaving Co.Ltd.<sup>69</sup> reversed the trend. These cases dealt with different and interesting questions. While Mrs. Bella Banerjee focused on the interpretation of the word 'compensation' in Art.31(2), Subodh Gopal inquired the question whether the deprivation of the "right to evict a tenant" would come within Art.31(2), and Dwarkadas Shrinivas in turn interpreted the words "taken possession of" in Art.31(2) to include even temporary taking over. It is interesting to note here that on examining the above questions the Court also looked into the mutual relationship of Art.19(1)(f) and Art.31, Art.31(1) and Art.31(2) and also the concept of 'police power' and 'eminent domain'. The observations made by the Court in these cases which tended to run counter to the legislative policy in fact led to the Fourth Amendment of the Constitution.

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67. A.I.R. 1954 S.C. 170.

68. A.I.R. 1954 S.C. 92.

69. A.I.R. 1954 S.C. 119.



Emphasizing the natural right of individuals in property, the Court in Mrs. Bella Banerjee<sup>70</sup> interpreted the word compensation in Art.31(2) to mean "just equivalent of what the owner has been deprived of", a notion which was clearly rejected by the framers of the Constitution. The decision was indeed a retrograde step which hampered the implementation of land reforms and social welfare schemes. The interpretation of the Court, it appears, reflect the Blackstonian approach to property rights concentrating only on individual interest disregarding the socialistic values.

In Subodh Gopal<sup>71</sup>, a legislative provision taking away the right of an auction purchaser to evict tenants was under challenge as violative of Arts.19(1)(f) and 31. The case in fact involved no question of acquisition or requisition. The Court unanimously, though for widely different

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70. A.I.R. 1954 S.C. 170. Here the land of the petitioner was acquired by the State for rehabilitation of the migrants as per the provisions of West Bengal (Development and Planning) Act, 1948. The condition in section 8 proviso (b) of the Act limiting the payment of compensation not exceeding the market value of the land as on December 31st, 1946 was held violative of Art.31(2) since this did not amount to a just equivalent.

71. A.I.R. 1954 S.C. 92. Here Subodh Gopal purchased certain lands on a revenue sale, and filed suits to evict tenants in the land as per the provisions of W.B.Revenue Sales Act. While the appeal was pending the provisions were amended by the Act of 1950, and thereby declared all the pending suits, appeals and other proceedings relating to eviction as abated. The constitutionality of those provisions were questioned.

reasons<sup>72</sup>, upheld the validity of the provision. It incidentally examined the interrelationship between Art.31(1) and (2). Patanjali Sastri, C.J. explained:

Clauses (1) and (2) of Art.31 are thus not mutually exclusive in scope and content, but should, in my view, be read together and understood as dealing with the same subject, namely, the prosecution of the right to property by means of the limitations on the State power referred to above, the deprivation contemplated in clause (1) being no other than acquisition or taking possession of property referred to in clause (2).<sup>73</sup>

Thus the Court rejected the notion that Art.31(1) dealt with 'police power' and Art.31(2) with 'eminent domain'<sup>74</sup>. This led to the rearrangement of Art.31(2) to specifically state that Art.31(1) and (2) deal with different subjects.

The words 'taken possession of' in Art.31(2) was interpreted by the Court in Dwarkadas Shrinivas<sup>75</sup> to include the temporary taking over of the management of a company. The

72. Patanjali Sastri, C.J., Mahajan and Ghulam Hasan, JJ. held the Act valid on the ground that the deprivation did not come under Art.31(1) and (2). Id. at 102. But Das, J. considered right to evict as a right under Art.19(1)(f), and held the provision valid since it was a reasonable restriction under Art.19(5). Id. at 117.

73. A.I.R. 1954 S.C. 92 at 98.

74. Das, J. was of the view that Art.31(1)&(2) dealt with different subjects is 'police power' and 'eminent domain'. See for details Id. at 107 et seq.

75. A.I.R. 1954 S.C. 119.

Ordinance, replaced later by a statute, taking over the management of the Sholapur Spinning and Weaving Co. for its better management without payment of compensation was held violative of Art.31(2), since it took away all the rights of the Company leaving only the husk of the title.<sup>76</sup> The view expressed by Patanjali Sastri, C.J. in Subodh Gopal as to the interrelation of Art.31(1) and (2) was followed by Mahajan, J.<sup>77</sup> and the provision was held unconstitutional for absence of compensation.

To overcome the difficulty created by these decisions The Constitution (Fourth Amendment) Act, 1955 was passed amending Art.31(2), 31A and introducing a new sub-clause Art.31(2A). By virtue of the amendment, Art.31(2)<sup>78</sup> was rearranged and it was specifically provided that deprivation under Art.31(2) should be compulsory acquisition or requisition and that too for public purpose. The power of the court to examine the adequacy of compensation was also taken away.

76. Here the management of the Company was vested in Government and they appointed new directors. They issued a call of Rs.50/- on each preference share and notice was issued. The petitioner, a preference shareholder challenged its validity. Before this case an ordinary shareholder had challenged the constitutional validity of the Ordinance in Chiranjith Lal v. Union of India, A.I.R. 1951 S.C.41. The Court upheld the validity on the ground that the fundamental right of the petitioner was not violated. Mahajan, J. distinguished the case and held that in Dwarkadas since the petitioner was a preference shareholder the Ordinance infringed his right, and thereby the right of the company.

77. A.I.R. 1954 S.C.119 at p.128. But Das, J. took the opposite view based on his observation in Subodh Gopal and Chiranjith Lal. See Id. at 130.

78. Art.31(2) read: "No property shall be compulsorily acquired or requisitioned save for a public purpose and save by authority of a law which provides for compensation for the property so acquired or requisitioned and either fixes the amount of the compensation or specifies the principles on which, and the manner in which, the compensation is to be determined and given; and no such law shall be called in question in any court on the ground that the compensation provided by that law is not adequate".

The new sub-clause 2A<sup>79</sup> further clarified the meaning of compulsory acquisition and requisition. As per the new sub-clause, only cases in which law provided for transfer of ownership or right to possession would amount to compulsory acquisition or requisition. Thus the damage caused by Dwarkadas was rectified.

Parliament also reformulated Art.31A(1). The amended article provided that acquisition of estate, taking over of the management of property for limited period, amalgamation of two or more corporations, extinguishment or modification of rights of managing agents, agreements for issuing minerals etc. could not be deemed to be void on the ground that it was inconsistent with, or took away or abridged any of the rights conferred by Articles 14, 19 or 31.<sup>80</sup> Thus the

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79. Art.31(2A) read: "Where a law does not provide for the transfer of the ownership or right to possession of any property to the State or to a corporation owned or controlled by the State, it shall not be deemed to provide for the compulsory acquisition or requisitioning of property, notwithstanding that it deprives any person of his property".

80. Art.31A(1) read: Notwithstanding anything contained in Art.13, no law providing for--

- (a) the acquisition by the State of any estate or of any rights therein or the extinguishment or modification of any such rights, or
- (b) the taking over of the management of any property by the State for a limited period either in the public interest or in order to secure the proper management of the property, or
- (c) the amalgamation of two or more corporations either in the public interest or in order to secure the proper management of any of the corporations, or
- (d) the extinguishment or modification of any rights of managing agents, secretaries and treasurers, managing directors, directors or managers of corporations, or of any voting rights of shareholders thereof, or

(contd..)

new article specified the different types of law which were protected from the attack of constitutionality.

Parliament thus reiterated its policy on the question of right to property. It asserted the liberty to fix the quantum of compensation. The jurisdiction of the court to determine the adequacy of compensation was taken away. This was done, it appears, to avoid the payment of just equivalent compensation in all cases of compulsory acquisition.<sup>81</sup> Parliament had no intention to provide adequate compensation in cases of large acquisitions for the purpose of nationalization or for social development. At the same time it intended, it appears, to give adequate protection to small holdings in case of acquisition. Thus Parliament has reintroduced the socialistic

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(f.n.80 contd.)

(e) the extinguishment or modification of any rights accruing by virtue of any agreement, lease or licence for the purpose of searching for, or winning, any mineral or mineral oil, or the premature termination or cancellation of any such agreement, lease or licence,

shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by Art.14, Art.19 or Art.31.

Provided....assent (no change).

81. The constitutional position as to compensation after the fourth amendment was expressed by Servali thus: "After the Fourth Amendment the word 'compensation' could not mean 'a full and fair money equivalent', for if it did, the law would have remained unchanged and the fourth amendment would have failed of its purpose". See H.M.Seervai, Constitutional Law of India: A Critical Commentary (Bombay: N.M.Tripathi Pvt.Ltd., 2nd edn. 1975), Vol.1, p.655.

concept of property originally adopted by the Constitution. Commenting on the impact created by the Fourth Amendment by introducing the concept of inadequate compensation Seervai opines:

It is submitted that by introducing the concept of inadequate compensation, the amendment sought to achieve the result which, as we have seen, the framers of the Constitution believed they had achieved in Art.31(2) as originally enacted, namely, that in fixing the compensation, or in laying down principles of compensation, the legislatures were not tied down to the individualistic concept of "market value" but could take into account imponderable factors like social welfare and justice to the community.<sup>82</sup>

The amendment, of course, did not face the acid test of constitutionality immediately. However, the Court tried to reinforce their earlier view on the subject in the subsequent cases. The Supreme Court's decisions in Vajravelu v.

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82. Id. at 657. In this connection it may also be noted that The Constitution (Seventeenth Amendment) Act, 1964 was enacted. It introduced a new proviso to Art.31A which made obligatory to pay market value as compensation in respect of acquired land which were under personal cultivation and within the ceiling limit. It is indicative of the fact that the Parliament intended to protect small holdings used for cultivation. This approach was consistent with the socialistic concept of property.

Sp.Dy.Collector<sup>83</sup> and Union of India v. Metal Corporation of India<sup>84</sup> again tilted the position. In both these decisions the Court interpreted the word 'compensation' to mean what was spelt out in Mrs.Bella Banerjee.<sup>85</sup> It was reasoned in Vajravelu that the very fact of the legislature's retaining the word 'compensation' even after Fourth Amendment, was indicative of the legislature's acceptance of the interpretation placed by the judiciary on that term before the amendment was passed.<sup>86</sup> Thus what was rejected by Parliament was brought in again by the Court. The policy of the legislature to implement Art.39(a), (b) and (c) were once again frustrated by these decisions.

83. A.I.R. 1965 S.C. 1017. The petitioner questioned the constitutional validity of the Land Acquisition (Madras Amendment) Act, 1961, which empowered acquisition of land for development of housing schemes for the Government. Principle for payment of compensation was also laid down. The lands of the petitioner were notified for acquisition. He challenged the constitutionality of the Act as violative of Arts.14, 19 and 31. It was alleged *inter alia* that the principle for payment of compensation in the impugned Act was different from the original Land Acquisition Act.

84. A.I.R. 1967 S.C. 637. The constitutional validity of the Metal Corporation of India (Acquisition of Undertaking) Act, 1965, was challenged on the ground that the compensation provided was not in conformity with Art.31. As per the provisions of the Act compensation was to be determined based on the principles in the schedule. In the schedule two types of valuation were provided for machinery. For the unused machines its value as on the date of purchase and for used one the written-down value determined under the Income Tax Act. This was contended as unconstitutional.

85. See A.I.R. 1954 S.C. 170, *supra* n.70.

86. A.I.R. 1965 S.C. 1017, 1024, *per*, Subba Rao, J. (as he then was).

The Court also examined the scope of judicial review on the question of adequacy of compensation. The Court was of the view that they could look into the question only if the compensation was illusory, or if the principles prescribed were irrelevant to the value of the property at or about the time of its acquisition.<sup>87</sup> It is interesting to note here that though Subba Rao, J. while deciding Vajravelu observed that compensation meant 'just equivalent', he failed to apply the principle to the facts of that case. The benefit was refused on the ground that adequacy could not be questioned.<sup>88</sup> But the Court invalidated the Act on the ground that it violated Art.14. At the same time Subba Rao, C.J. struck down a similar law as violative of Art.31 on the ground of inadequacy of compensation in Metal Corporation.<sup>89</sup> However, the ratio laid down in these

87. Ibid.

88. Refusing to struck down the Act as violative of Art.31(2), Subba Rao, J. observed: "In awarding compensation if the potential value of the land is excluded, it cannot be said that the compensation awarded is the just equivalent of what the owner has been deprived of. But such an exclusion only pertains to the method of ascertaining the compensation. One of the elements that should properly be taken into account in fixing the compensation is omitted: it results in the inadequacy of the compensation but that in itself does not constitute fraud on power, as we have explained earlier. We, therefore, hold that the Amending Act, does not offend Art.31(2) of the Constitution". Id. at 1026. See for critical view, Seervai, op.cit., pp.659,660. See also Upendra Baxi, "The Little Done, The Vast Undone--Some Reflections on Reading Granville Austin's The Indian Constitution", 9 J.I.L.I. 323 at p.374 et seq.

89. A.I.R. 1967 S.C. 637. Striking down the impugned Act as violative Subba Rao, C.J. opined: "Judged by the said test, is manifest that the two principles laid down in clause (b) of Para II of the Schedule to the Act, namely (i) compensation equated to the cost price in the case of unused machinery in good condition, and (ii) written-down value as understood in the Income-Tax law is the value of used

(contd...)



cases were overruled in Shantilal Mangal Das.<sup>90</sup> After reviewing the previous decisions the Court expressed the difficulty created by the decisions in implementing the policy of Parliament in the following words:

The decisions of this Court in the two cases--Mrs. Bella Banerjee's case (1954 SCR 558) and Subodh Gopal Bose's case (1954 SCR 587) were therefore likely to give rise to formidable problems when the principles specified by the Legislature as well as the amounts determined by the application of those principles, were declared justiciable. By qualifying 'equivalent' by the adjective 'just', the inquiry was made more controversial; and apart from the practical difficulties, the law declared by this Court also placed serious obstacles in giving effect to the Directive Principles of State Policy incorporated in Article 39.<sup>91</sup>

Analysing the decisions in Vajravelu and Metal Corporation, Shah, J. held that the observations in Vajravelu interpreting the word compensation to mean 'just equivalent' was obiter.<sup>92</sup> The Court also overruled the decision of Metal Corporation

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(f.n.89 contd.)

machinery, are irrelevant to the fixation of the value of the said machinery as on the date of acquisition. It follows that the impugned Act has not provided for 'compensation' within the meaning of Art.31(2) of the Constitution and therefore, it is void". Id. at 643.

90. State of Gujarat v. Shantilal Mangal Das, A.I.R. 1969 S.C. 634. Here the petitioner questioned the validity of the Bombay Town Planning Act, 1955 on the ground that the land value assessed based on the market value on the date of the declaration of intention was not adequate.

91. Id. at 643.

92. Id. at 651.

since it was a wrong interpretation of the law.<sup>93</sup> The Shantilal Court ruled that after the Fourth Amendment the word compensation did not mean just equivalent. But the Court held that they had the power to look into the matter if the compensation fixed was illusory or the principles laid down were irrelevant to the determination of compensation.<sup>94</sup> It appears that the reasoning of the Court was in tune with the intension of Parliament.<sup>95</sup> It is true that the Court has not discussed the theories justifying private property. But the socialistic values which Parliament was trying to inject into our constitutional provisions have been recognized and accepted by the Court. However, the correct interpretation of the law laid down by Shah, J. in Shantilal was discarded by himself while deciding the Bank Nationalisation Case.<sup>96</sup> Disregarding the importance of Art.39 and the observation made in Shantilal as to the serious obstacles placed by previous decisions in implementing directive principles in Art.39, Shah, J. relied on the Blackstonian theory of private property to give a beneficial interpretation to the individual interest involved in the case.<sup>97</sup> The court reasoned:

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93. Id. at 652, 653.

94. Id. at 650.

95. See for a critical view, Seervai, op.cit., pp.662-668.

96. R.C.Cooper v. Union of India, A.I.R. 1970 S.C. 564. Here the constitutionality of the Banking Companies (Acquisition and Transfer of Undertaking) Ordinance, 1969 and Act, 1969 were under challenge. The Act nationalized 14 scheduled banks. The principle laid down for compensation--market value of the assets or the ascertained value, i.e. ten times the rent, whichever was less--was challenged as violative of Art.31(2).

97. Id. at 605-606.

The constitution guarantees a right to compensation-- an equivalent in money of the property compulsorily acquired. That is the basic guarantee.<sup>98</sup>

The Court also examined the mutual relationship of Art.19(1)(f) and Art.31 and held that they dealt with the same subject.<sup>99</sup>

The Constitution (Twenty-fifth Amendment) Act, 1971 was the result of Bank Nationalisation Case. The word 'compensation' in Art.31(2) was replaced by the word 'amount'. A new sub-clause (2B)<sup>100</sup> was added to Art.31 separating the new relation created between Art.31(2) and Art.19(1)(f) by the Bank Nationalisation Case. To give predominance to directive principles stated in Art.39 over fundamental rights (Arts.14, 19 and 31) a new Article 31C was introduced.<sup>101</sup> As per this article a law made for giving effect to the principles stated in Art.39(a) and (b) should not be deemed to be void on the

98. Id. at 614. The Court in fact interfered only in two specific items where no compensation was provided, viz. good-will and unexpired term of leasehold rights.

99. Id. at 597.

100. Art.31(2B) reads: "Nothing in sub-clause (f) of clause (1) of Article 19 shall affect any such law as is referred to in clause (2)".

101. Art.31C reads: "Notwithstanding anything contained in Article 13, no law giving effect to the policy of the State towards securing the principles specified in clause (b) or clause (c) of Article 39 shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by Article 14, Article 19 or Article 31; and no law containing a declaration that it is for giving effect to such policy shall be called in question in any court on the ground that it does not give effect to such policy

Provided that where such law is made by the Legislature of a State the provisions of this Article shall not apply thereto unless such law, having been reserved for the consideration of the President, has received his assent".

ground that it took away or abridged any rights conferred by Arts.14, 19 and 31. The jurisdiction of courts to enquire into the validity of such laws was also taken away. Thus Parliament once again tried to identify the socialistic values of the concept of right to property to achieve the goal of creating an egalitarian society.

The constitutional validity of the Amendment was questioned. The legislative wisdom of the Twenty-fifth Amendment was finally recognized by the judiciary in Kesavananda Bharati v. State of Kerala.<sup>102</sup> Majority judges refused to interpret the word 'amount' used in Art.31(2) to mean just equivalent of the market value of the property. It was also held that the Court had no power to go into the question of adequacy of the amount fixed. But it asserted that if the principle applied in fixing the amount had no rational basis with the value of property and the amount fixed was illusory, the court would interfere.<sup>103</sup> The Court also validated the new Art.31C confirming power to make law giving predominance to directive principles (Art.39(b)&(c)) over fundamental rights (Arts.14, 19 and 31), but the second part of Art.31C providing for conclusive determination of the nature of the legislation was held invalid.<sup>104</sup> Again, the Court accepted the social values involved in enforcing property rights while protecting individual rights.

102. A.I.R. 1973 S.C. 1461.

103. Id. at 1554, 1555, 1606, 1639, 1640, 1718, 1776, 1824, 1961 etc

104. Id. at 1718, 1777, 1824, 1895, 1967, 2055 etc.

The need for recognizing right to property as a fundamental right, was rightly emphasized by Mathew, J. in his dissent. thus:

The framers of the Constitution regarded the right to acquire and hold property as a fundamental right for the reason that a dignified human life is impossible without it....In short, the concept of property is not an arbitrary ideal but is founded on man's natural impulse to extend his own personality. In the long run, a man cannot exist, cannot make good his right to marriage or found family unless he is entitled to ownership through acquisition of property.<sup>105</sup>

Perhaps with the exception of this brilliant exposition of the basis of property, no judge cared to inquire into the jurisprudential basis of institution of property. Nor was there any attempt to restructuring the concept of private property from history--Constitutional debates and other documents. Such an attempt was not made in the earlier decisions also. In a nutshell, the decision made it clear that Parliament had power to make laws giving predominance to directive principles over fundamental rights relating to property and that the individual had right to approach the court in case his rights had been curtailed beyond a certain limit. Thus it could be said that both the societal and individual interests had been taken care of though societal interests may be allowed to outweigh individual interest.

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105. Id. at 1955-1956 (emphasis mine)

Emboldened by this decision Parliament enacted Constitution (Forty-second Amendment) Act, 1976 declaring that laws made in pursuance of Part IV of the Constitution will have predominance over fundamental rights. The amendment substituted the words "the principles specified in clause (b) or (c) of Article 39" in Art.31C with words "all or any of the principles laid down in Part IV".<sup>106</sup> This amendment paved the way for the total removal of right to property from fundamental rights Part of the Constitution.

The Constitution (Forty-fourth Amendment) Act, 1978 went a little further. It removed the right to property from Part III of the Constitution. Article 19(1)(f) and Art.31 were deleted. The protection given to the educational minorities under Art.31 was reassured to them by introducing Art.30(1A)<sup>107</sup> in the Constitution. A new chapter--Chapter IV--entitled "Right to Property" consisting of Art.300A alone was introduced in Part XII of the Constitution with a view to

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106. Constitutionality of Forty-second Amendment was questioned in Minerva Mills Ltd. v. Union of India, A.I.R. 1980 S.C. 1789. It was argued inter alia that the amendment introduced in Art.31C abrogated the basic structure of the Constitution inasmuch as it gave predominance to Part IV over Arts.14 and 19 in Part III. Majority upheld this argument and held the amendment unconstitutional.

107. Article 30(1A) reads: "In making any law providing for the compulsory acquisition of any property of an educational institution established and administered by a minority, referred to in clause (1), the State shall ensure that the amount fixed by or determined under such law for the acquisition of such property as would not restrict or abrogate the right guaranteed under that clause".

making the right to property a legal right. In other words, it has been stripped off its higher status of being a fundamental right. The new Art.300A is the reincarnation of former Art.31(1):

No person shall be deprived of his property save by authority of law.

Articles 31A, 31B and 31C which were introduced to protect legislation dealing with agrarian reforms are retained in Part III.

The net effect of these developments is that the citizen has lost not only his fundamental freedom to acquire, hold and dispose of property, which is of great importance for the enjoyment of other freedoms, but his fundamental right to get monetary compensation in case of compulsory acquisition or requisition of his property for public purpose.<sup>108</sup> An unlimited power was given to the legislature to deprive property through law. Of course, a limited right to claim market value as compensation in case of acquisition of land within the

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108. It is argued by some authors that right to property is still there as a fundamental right. See H.M.Scervai, Constitutional Law of India (Bombay: N.M.Tripathi Pvt. Ltd., 3rd edn. 1984), pp.1076-1094; T.K.Tope, "Forty-fourth Amendment and the Right to Property", (1979) 4 S.C.C.(Jl.) 27.

ceiling limit under personal cultivation for livelihood or building and structures has been retained.<sup>109</sup> This is to safeguard and ensure retention of some kinds of personal property which is necessary to fulfil the needs of the individual.

Land comprises the major component of property, particularly in a country like India the majority of the population has adopted agriculture as the main occupation. It is therefore natural that the provisions reflect an impression that the framers relied much on land whenever they dealt with property. The concept of private property seems to have been accepted subject to the condition that if the property is required for public purpose it can be acquired and the private interest has to recognize this limitation. However, if the property is land which is absolutely necessary for an individual for his livelihood, it can be acquired only after paying him compensation for his resettlement. Thus the philosophy of the Constitution as it stands today seems to reflect the socialist view of property in which property can be said to be held by the community for the common good. In the scheme the limited right to personal property is also accommodated.

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109. Art. 3 A proviso reads: "Provided further that where any law makes any provision for the acquisition by the State of any estate and where any land comprised therein is held by a person under his personal cultivation, it shall not be law ful for the State to acquire any portion of such land as is within the ceiling limit applicable to him under any law for the time being in force or any building or structure standing thereon or appertinent thereto, unless the law relating to the acquisition of such land, building or structure, provides for payment of compensation at a rate which shall not be less than the market value thereof".



The constitutional concept of property, it appears, cannot be a wider one, inasmuch as it speaks of landed property alone. Even when it speaks about the need to pay compensation, it mentions the land cultivated by the individual for his personal purpose. This view of property is just inadequate to meet the needs of the present-day society.

The concept of property has to take within its sweep many a thing like wages, employment, intellectual properties etc. Then having regard to the present position the effect would be that the individual would be left with no fundamental right to compensation even when his right of property which is used for his livelihood, i.e. right to hold public post, right to wages etc. are interfered with. Such a situation would be chaotic. It may be argued that the individual can safeguard his interest by invoking Art.300A which incorporates a legal right that can be annulled by way of a law passed by the legislature. It cannot be said that such a provision affords adequate protection to the individual to safeguard his personal property. This is evident from the past attitudes of the legislature in dealing with the compensation issues.

The power to fix compensation in the case of acquisition of private property was vested with Parliament. However, this power was not properly exercised. Instead of utilizing this power to fix appropriate compensation, in cases of compulsory acquisition the majority party in power exercised this

power, it was alleged, to collect election funds and other benefits from big capitalists by threatening them that their property would be acquired with inadequate compensation if they did not comply with the request for donation or other benefits.<sup>110</sup>

The judiciary whose power in these matters was looked upon with suspicion<sup>111</sup> has also, it appeared, remained reticent. Even the activist judges failed to attempt to lay down a clear policy. Apparently there have been no jurisprudential inquiry into the concept of property in the decisions.<sup>112</sup> The amendments

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110. See Seervai, Constitutional Law of India (Bombay: N.M.Tripathi Pvt.Ltd. 3rd edn. 1984), Vol.II, p.1091.

111. The framers of the Constitution never had the idea to completely exclude the power of court in these matters. The policy was stated by Nehru thus: "No Supreme Court and no judiciary can stand in judgment over the sovereign will of Parliament representing the will of the entire community. If we go wrong here and there it can point it out, but in the ultimate analysis, where the future of the community is concerned, no judiciary can come in the way....As wise people, their duty it is to see that in a moment of passion, in a moment of excitement, even the representatives of the people do not go wrong, they might. In the detached atmosphere of the court, they should see to it that nothing is done that may be against the Constitution, that may be against the good of the country, that may be against the community in the larger sense of the term. Therefore, if such a thing occurs, they should draw attention to that fact, but it is obvious that no court, no system of judiciary can function in the nature of a third House, as a kind of Third House of correction. So it is important that with this limitation the judiciary should function". Constituent Assembly Debates Vol.9, pp.1195-1196.

112. There is perhaps an exception in the observation of Justice Mathew in Kesavananda, A.I.R. 1973 S.C. 1461 at 1956. See supra n.105.

Criminal law, in consonance with its policy of prevention of crimes, focusses its attention mainly on the maintenance of peace and harmony in the society by using its coercive powers. Naturally it aims to ensure order and to maintain status quo so far as the holding of property is concerned. It does not deal with the questions involving the ownership of property; civil law does take care of such issues. The situation has made it necessary for the criminal law to be concerned with possession, a concept which has not been defined by any statute. The judiciary has been concerned with this task and a good amount of case law has been produced around the concept.

In the law of theft it is the deprivation of possession without the consent of the possessor which criminal law seeks to prevent. But in the case of law of extortion possession is deprived of by using force against the will of the possessor. In certain cases though the property is procured from the possessor with his consent or wilful act, if the property is converted against the interest of the possessor, the law treats such acts as offences of criminal misappropriation and criminal breach of trust.

In short, any person who is in possession of the property is entitled to get the protection of criminal law. It is not mandatory that possessor must be the owner of the

property. Because of this emphasis on possession, on some occasions even the true owner is held liable for committing offence against his own property.<sup>15</sup> The concept of possession as accepted by the criminal law embraces the concepts of actual possession, constructive possession, legal possession etc.<sup>16</sup>

A significant feature of the protection afforded to property through criminal law is the extension of right of private defence to protect property. This right of self defence is available to protect not only one's own property, but also to other's property. The law permits in certain circumstances even taking the life of the offender to protect property.<sup>17</sup> Reasonable apprehension of causing danger to the property is sufficient to entitle a person to avail this right. The framers of the Code had restricted this right only to offences which immediately affect the possession of property or causes damage to it. The offences against which this right is available are robbery, house-breaking by night, mischief by fire to human dwelling places or places where property is kept, and theft, mischief or house-trespass under such circumstances as may reasonably cause apprehension that death or grievous hurt will be the consequence if such right of private defence is not exercised. The provisions enabling

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15. See Kamla Pat v. Emperor, A.I.R. 1926 All 382; In re Veerasami Naicken, A.I.R. 1931 Mad. 18.

16. For a detailed discussion, see infra notes 233,240,244 etc.

17. Amjad Khan v. State, A.I.R. 1952 S.C. 165.

the individual to exercise right of private defence do really indicate that property is allowed, to be defended as part of the self. Thus here also the statute treats personal property as extension of the individual's personality which should be defended in public interest.

It is evident that the framers of the Code made an effective attempt to protect property from all conceivable means of unlawful attack. The definition of the offences, their arrangement and the enhanced punishments prescribed for the aggravated forms of offences clearly reveal this intention.

The Law Commission of India in their Forty-second Report made a thorough examination of the offences against property. They have identified the loopholes and suggested remedies. They noticed the absence of provisions for offence like theft of temple property, theft of property of victims of calamity, blackmail, cheating the government, corruption etc., and suggested new provisions. It has also been suggested by the Commission that punishment for certain offences should be enhanced.<sup>18</sup>

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18. See Law Commission of India, Forty-second Report, Indian Penal Code, (Government of India, Ministry of Law, June 1971), pp.283-318. These recommendations were incorporated in the 1972 I.P.C. Amendment Bill which could not be enacted. See Report of the Joint Select Committee, The Gazette of India Extraordinary, Part II Section 2 (1976), pp.546/82-95.

The mental element in respect of property offences is signified by some terms such as 'intentionally', 'dishonestly', 'fraudulently' and 'knowingly'. It has been stated by courts in several cases that whenever the word 'intention' is used, the actual intention of the accused must be considered, and the knowledge of likelihood of causing harm would not be sufficient to constitute guilty mind.<sup>19</sup> The terms 'dishonestly' and 'fraudulently' are used in many sections alternatively. The term 'dishonestly' is concerned with wrongful loss or wrongful gain of property. But 'fraudulently' is wide enough to include all types of offences. The impact these terms have on the general scheme of the offences is great and worth detailed examination. The scheme of law may be examined by way of an analysis of the jurisprudence surrounding some of these concepts.

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19. See for example, Vullappa v. Bheema, (1918) I.L.R. 41 156; In re Dr.P.Ramachandra Reddi, A.I R. 1960 A.P. 569.

ENTRUSTMENT

One of the major offences against property under the Penal Code is criminal breach of trust. Sections 405 to 409 deal with the various forms of criminal breach of trust. While section 405 defines the offence of criminal breach of trust, the other sections deal with the aggravated forms of the offence. Section 405 of the Penal Code reads:

Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or wilfully suffers any other person so to do, commits 'criminal breach of trust'.

The law of criminal breach of trust protects property that is given to a person for a specific purpose from being unlawfully misappropriated or converted to the benefit of that person. To constitute an offence under this section there must be an entrustment of property to the accused. The dishonest conversion of such property subsequently by the person with whom it is entrusted amounts to the offence of criminal breach of trust.

Though the genesis of the offence of dishonest conversion of property could be traced to the common law offence of larceny in England, an offence similar in nature to that of breach of trust contained in section 405 is absent in English law.<sup>20</sup>

It is clear that there must be entrustment and dishonest misappropriation to constitute the offence of criminal breach of trust. The term 'entrustment' is not defined in the Code. So what constitutes an entrustment has been a subject of judicial interpretation based on the facts and circumstances of each case. An inquiry into this assumes much importance in the light of the recent decision of the Supreme Court in Pratibha Rani v. Suraj Kumar.<sup>21</sup>

Before examining the decision it appears necessary to look into the history of the concept of entrustment. It is clear from section 405 that entrustment need not be by way of a trust or contract as per law. The use of the word 'in any manner entrusted' accommodates within the section an entrustment other than by way of trust or contract. What constitutes an entrustment in the absence of a trust or an express contract is a matter which received much judicial attention. It is only from the facts and circumstances of each case that one

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20. See Velagala Venkata Reddy v. Kovvuri Chinna Venkata Reddy, A.I.R. 1941 Rang. 342.

21. A.I.R. 1985 S.C. 628; (1985) 2 S.C.C. 370.



can derive the incidents of the concept of entrustment. It is therefore fruitful to examine the judicial decisions in this respect to trace out the incidents of entrustment.

In Lolit Mohan Sarkar v. The Queen-Empress<sup>22</sup> the accused was in the service of a zamindar and his duty was to make payment into the collectorate the revenue in respect of the zamindari before due dates. Certain sum of money was sent to him before the due date without any specific instruction. On receipt of the money the accused paid a portion into the account, altered the entry in the challan indicating the amount actually paid. It was sent to his employer. He was inter alia charged for the offence of criminal breach of trust under section 408 of the Penal Code, and was convicted by the lower court. Before the Calcutta High Court it was contended that the charge under the section was not sustainable, inasmuch as the money was not alleged to have been sent to the accused for the specific purpose of paying the zamindari revenue. Negating the contention, the Court observed:

Though there were no express instructions to the accused as to how he was to appropriate the money that was sent to him, yet bearing in mind the close proximity of the date of the remittance to the last day for the payment of the March instalment of Government revenue, and seeing that the challans,

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22. (1894) I.L.R. 22 Cal. 313.

as altered, which were sent by the appellant to his employer, and which in their altered state showed the amounts that were really payable as revenue covered very nearly the whole amount remitted, we think it but reasonable to infer that the accused was aware of the implied purpose for which the money had been sent.<sup>23</sup>

The reasoning makes it clear that to constitute entrustment, there must be a direction as to the way in which the thing handed over must be dealt with. Here in the absence of such an express direction, the Court inferred such direction from the circumstances of the case and held that the elements of the offence of breach of trust were present.

The Full Bench of Lower Burma Chief Court in Nga Po Seik v. Emperor<sup>24</sup>, considered elaborately the doctrine of entrustment. Here there was an agreement for the supply of 10,000 baskets of paddy at the market rate. An amount of Rs.10,000 was advanced for this purpose with a condition not to use the money for any other purpose. Five promissory notes (without interest) for Rs.2,000 each were also executed as security for the advance. According to the contract the supplier had to bear the losses, if any, incurred before the paddy reached the company. The accused was charged for dishonestly using part of the money advanced. The majority of

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23. Id. at 320. per, Banerjee and Sale, JJ.

24. (1912) 17 I.C. 824.

the judges<sup>25</sup>, though for different reasons, held that there was no entrustment of money to constitute the offence of breach of trust. Fox, C.J. reasoned that the payment based on the documents was an advance to use it in a certain way. This was not considered to be an entrustment, because the payment created a debt and the obligation was to discharge it and not to pay back the same coins as in the case of trust.<sup>26</sup>

But Ormond, J. examined the ingredients of entrustment by looking at the intention of the parties at the time of creation of the agreement. According to him the execution of promissory notes for the money advanced made the accused the owner of the money. Similarly, the agreement to use the money for purchasing paddy and supplying it to the company at the market rate on the day of delivery indicated the intention that the accused had to purchase paddy and then sell it to the company. These facts negated the creation of a trust and he held that there was no e. trustment.<sup>27</sup>

Justice Robinson also took the view that the payment of money was an advance and not entrustment. According to him the execution of promissory notes and the presence of the

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25. They were Charles Fox, C.J., Ormond, Robinson and Parlett, JJ. Hartnoll, J. dissenting.

26. (1912) 17 I.C. 824, 829.

27. Id. at 830, 831.

idea of profit and loss negatived the concept of entrustment.<sup>28</sup> The consideration to the accused was the chance of making profit and the fact that he would have to bear the loss showed that the legal ownership in the advance vested in him. The money was given not as loan, nor was it a trust. It was advanced to enable the accused to do that which would be for complainant's benefit, and the accused was prepared to undertake the work on the chance of making a profit. All these factors, according to Justice Robinson, made the advance a loan with a condition attached (which was not fulfilled) and negatived entrustment.<sup>29</sup>

In the dissenting judgment Hartnoll, J. held that there was entrustment. He took the real essence of the agreement between the parties as the supply of paddy by the appellant with the money of the company. The money was handed over to him for this purpose. This according to him constituted the element of entrustment. The confidence reposed by the company that the accused would only use the money for the purchase of paddy, and its violation was held sufficient to constitute breach of trust.<sup>30</sup>

change of ownership etc. to find out the real intention of the parties at the time of handing over the money to negative entrustment of property. So to constitute entrustment the handing over of property must be with a specific intention for a specific purpose without the idea of transferring ownership. The payment of money as advance or with an idea of making profit also negatives entrustment. This interpretation restricts the application of section 405 in a broad way as interpreted by Hartnoll, J.<sup>31</sup>

A similar view was followed by the Calcutta High Court also in Kanai Lal Dutta v. State.<sup>32</sup> In this case the Court examined whether there was entrustment when money was paid to a jeweller for making ornaments. Here the complainant instructed the appellant to make a chur (neck chain) and paid Rs.308/- as the cost for gold and cost for making it. But he failed to deliver the chur or return the money. He was convicted by the Magistrate for criminal breach of trust. On revision the High Court reversed. As to the question whether there was entrustment, Harries, C.J. observed:

In fact, the money cannot be said to have been entrusted to the petitioner. It was in fact a payment in advance for the chur which was to be made. That being so, the money become the money of the petitioner the moment it was paid to him

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31. Ibid.

32. A.I.R. 1951 Cal 206.

and though the petitioner is guilty of dishonest or dishonourable conduct in not making the chur, he cannot be said to have misappropriated the money because it was paid to him and it became his.<sup>33</sup>

The reasoning seems to be in line with the decision of Nga Po Seik<sup>34</sup> though this was not referred to in Kanai Lal Dutta. But there is some difference between the two decisions. In Nga Po Seik the Burma Court held that there was no entrustment based on different facts. Along with the fact of the advance of money, the existence of promissory notes, and the idea of profit and loss etc. were also considered. The advance given in that case was also not the actual price of paddy. In Kanai Lal the money given was the actual price of chur including the charges for making it. The intention of the complainant was to get back the money handed over in the form of chur. The money handed over was for a specific purpose with a direction to do a particular act. The transaction also created a fiduciary relationship between the parties.

In this circumstance it appears that the reasoning of the learned Chief Justice is not conducive to give effect to the concept of entrustment in section 405. The Court should have considered the intention of the parties to

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33. Id. at 207; Bose, J. concurred.

34. (1912) 17 I.C. 824.

ascertain whether the concept of entrustment was present in handing over the money. It is evident that the complainant tried to create a fiduciary relationship with the accused and he trusted him. The Court failed to appreciate these factors in rejecting the presence of entrustment.

The Rajasthan High Court also examined a similar issue in State v. Mithalal.<sup>35</sup> The Court held that the handing over of money or gold to a goldsmith for making ornaments amounted to entrustment. Here the complainants handed over money with gold to Mithalal, a goldsmith, for the purpose of making ornaments. Mithalal misappropriated the money and gold, and absconded. The accused was charged for breach of trust. The Magistrate acquitted him relying on Kanai Lal.<sup>36</sup> On appeal it was argued before the High Court of Rajasthan that Kanai Lal had no application to the facts of the case. On the question of 'entrustment', Wanchoo, C.J. held that 'entrustment will arise whenever some thing, it be money or any other thing, is given to a person with some direction as to how it should be dealt with.'<sup>37</sup>

The Court distinguished the case of Kanai Lal in two ways. Two types of transactions were involved in this case. In the first type gold was given to the goldsmith for

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35. A.I.R. 1956 Raj. 20. The case was remanded for fresh disposal.

36. A.I.R. 1951 Cal. 205.

37. State v. Mithalal, A.I.R. 1956 Raj. 20; Dave, J. concurred.

making ornaments. Here the Court held that there was entrustment since the purpose of giving gold was to make ornaments and this was given with specific direction.<sup>38</sup> Kanai Lal was held inapplicable inasmuch as it dealt with a case of payment of money for making ornaments.<sup>39</sup>

In the second type of transaction, money was given to the goldsmith for making ornaments. According to the Court payment of money to a goldsmith with a direction that he should purchase a certain quantity of gold and make ornaments would amount to entrustment.<sup>40</sup> The Court thus gave stress to the intention of the parties at the time of handing over the property. The Court distinguished Kanai Lal on the ground that here money was paid to a goldsmith, whereas in Kanai Lal money was paid to a jeweller and the payment amounted only to an advance, and not the price of the article.<sup>41</sup> It appears that the decision is in tune with the object of section 405 though the way in which Kanai Lal was distinguished does not seem to be correct.

The Punjab High Court in State v. Jage Ram<sup>42</sup> apparently gave the correct interpretation to entrustment. In this case the Court held that handing over of a cycle for

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38. Ibid.

39. Ibid.

40. Id. at 20-21.

41. Ibid.

42. A.I.R. 1951 Punj. 103.



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a temporary use constituted entrustment. Jage Ram borrowed a cycle from Duri Chand, the complainant, promising to return it after two or three days. But he failed to return it. On enquiry it was found that the accused immediately after borrowing the cycle sold it to one Kashmiri Lal for Rs.125/-. He was acquitted by the trial court on the ground that there was no entrustment because the cycle was handed over to the accused for temporary use on his request. The High Court reversed and Bhandari, J. observed:

The word 'trust' which appears in the section is a comprehensive expression which has been used not only to cover the relationship of trustee and beneficiary but also those of bailor and bailee, master and servant, pledger and pledgee, guardian and ward and all other relationship between the complainant and the accused. The expression 'entrusted' has a corresponding meaning and embraces all cases in which goods are 'entrusted' (that is voluntarily handed over for a specific purpose) and are dishonestly disposed of in violation of any direction of law or in violation of the contract.<sup>43</sup>

The Court treated the relationship of the parties in the case as bailor and bailee, since the complainant had delivered the bicycle to the respondent for a specific purpose and specific period upon a contract that after the expiry of the said period it would be returned to him.<sup>44</sup>

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43. *Id.* at 105.

44. *Ibid.*

This makes it clear that to constitute entrustment the parties must have an intention at the time of handing over the property as to the specific purpose for which the property is given, and also as to the return of the property when the purpose is achieved.

The Supreme Court had the occasion to examine the concept of entrustment in Jaswantrao Manilal Akhaney v. State of Bombay.<sup>45</sup> Jaswantrao was the managing director of the Exchange Bank of India and Africa, with power of attorney to engage in certain transactions for the company. The Caubay Hindu Merchants Co-operative Bank directed the Exchange Bank to purchase government securities worth Rs.75,000/-. These were kept in the Exchange Bank as security for overdraft. But the Co-operative Bank never operated the facility of overdraft. Owing to financial difficulties the Exchange Bank took some loan from Canara Bank by pledging some securities including that of the Co-operative Bank. This was against the terms of contract. When the Canara Bank demanded the repayment of loan the Exchange Bank took another loan from Merwanji Dalal and Co. pledging the same securities and repaid the loan of Canara Bank. When the Exchange Bank failed to repay the loans of Dalal and Co., after repeated demands they sold the securities pledged and realized their debt. Later the Co-operative Bank demanded their securities. Realizing the difficult position,

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45. A.I.R. 1956 S.C. 575.

the Directors of the Bank approached the High Court, and the Court declared moratorium. A liquidator was appointed to wind up the company. The agent of the liquidator lodged information to the police charging the appellant with breach of trust in respect of a number of securities including that of the Co-operative Bank. He was convicted. On appeal in the Supreme Court it was argued inter alia that there was no entrustment to constitute the offence under section 405 inasmuch as the parties never contemplated the creation of a trust in the strict sense of the term. The Court negatived this and held that section 405 did not "contemplate the creation of a trust with all the technicalities of the law of trust" when it spoke of a person being in any manner entrusted with property. According to Justice Sinha what section 405 contemplated was "the creation of a relationship whereby the owner of property makes it over to another person to be retained by him until a certain event".<sup>46</sup> Here the depositing of the securities by the Co-operative Bank for overdraft facility was considered an entrustment, since it involved a specific purpose and an obligation to return the property when the purpose was fulfilled. According to the Court, those securities, in law continued to be the property of the Co-operative Bank and as it never borrowed any money from the Exchange Bank, the latter had no interest in those securities which it could transfer in any

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46. Id. at 582.

way to a third party.<sup>47</sup> The entrustment was to the Exchange Bank itself. But it being a non-person and the appellant held the power of attorney to transact business on behalf of the bank, the Court held that the appellant was "entrusted with the property in a derivative sense".<sup>48</sup>

Thus the Court made it clear that there need not be a trust in the legal sense to constitute entrustment. It is the relationship created by the parties for a specific purpose and handing over of property with the intention of getting it back when the purpose is achieved that constitutes entrustment.

The Court has reiterated the elements of the concept of entrustment in State of Uttar Pradesh v. Babu Ram Upadhya.<sup>49</sup> Babu Ram, a sub-inspector of police, while returning after making an investigation of a crime of theft met Mr. Tika Ram in suspicious circumstances. He searched him and found a bundle of currency notes. After counting and ascertaining that it was his own money, the officer returned it. But Tika Ram subsequently found a shortage of Rs.250/-. He filed a complaint to the Superintendent of Police. On inquiry Babu Ram was found guilty and was dismissed from service by the DIG. This order was challenged before the High Court and the High Court set

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47. Id. at 583.

48. Ibid.

49. A.I.R. 1961 S.C. 751. See also R.K.Dalmia v. Delhi Administration, A.I.R. 1962 S.C. 1821.

aside the order. Before the Supreme Court one of the questions for consideration was whether Babu Ram had committed the offence of breach of trust. It was contended that there was no entrustment of property by Tika Ram within the meaning of section 405. Rejecting the contention, Subba Rao, J. observed:

In the instant case the respondent, being a police officer, was legally entitled to search a person found under suspicious circumstances; and Tika Ram in handing over the bundle of notes to the police officer must have done so in the confidence that he would get back the notes from him when the suspicion was cleared. In these circumstances, there cannot be any difficulty in holding that the currency notes were alleged to have been handed over by Tika Ram to the respondent for a specific purpose....We, therefore, hold that if the currency notes were taken by the respondent in discharge of his duty for inspection and return, he was certainly entrusted with the notes within the meaning of S.405 Indian Penal Code.<sup>50</sup>

Thus the Court took into consideration the intention of the parties and the specific purpose for which money was handed over to ascertain whether there was entrustment. In other words, it is the intention of the parties at the time of handing over the property to perform a particular purpose coupled with the belief that the property would be returned after the intention is accomplished, and the establishment of a fiduciary relationship between the parties, that constitute entrustment.

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50. Id. at 756.

The Court in this case has inferred the existence of these elements from the facts of the case. Unlike the previous cases there was no specific direction as to the way in which property had to be dealt with while handing over the property. Thus the Court has slightly extended the concept of entrustment to cases where there was no specific direction but could be inferred from the circumstances.

Applying the same rule the Supreme Court in State of Gujarat v. Jaswantlal Nathalal<sup>51</sup> upheld the acquittal of Jaswantlal by the High Court for misappropriation of cement sold to him by the government for the construction of a building. The cement was handed over to the accused, a contractor, by the government for the purpose of construction of government building. It was alleged that the transfer was by way of sale, and this was not disproved by the prosecution. The accused misappropriated the cement. Since the ownership of the property was vested with the accused the Court held that there was no entrustment. In Kalaktar Singh v. State of Bihar<sup>52</sup> the Patna High Court convicted the contractor for misappropriating the cement allotted by the Government, because the agreement only provided for adjustment of the price and specifically stated that the property in the materials supplied will continue with the Government.

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51. A.I.R. 1968 S.C. 700.

52. 1978 Cri.L.J. 663, 666.

A further extension of the concept of entrustment was made by the Supreme Court in Som Nath Puri v. State of Rajasthan.<sup>53</sup> Som Nath was a Traffic Assistant in Indian Airlines, and was in charge of reservation of seats at Jaipur. It was the practice of Indian Airlines at Jaipur to reserve seats for passengers from other stations, when seats allotted to Jaipur were full. The approximate telephone charges for such arrangement were usually collected from the passengers. The appellant collected Rs.184.90 by way of such charges, but deposited with the Indian Airlines only Rs.44.91. The modus operandi followed by him was to demand higher amounts for the trunk call charges and to issue receipts for those amounts on behalf of Indian Airlines, but after making the calls he would alter the counterfoil with the actual amount of trunk call charges. He was charged for breach of trust and was convicted by the trial court and the High Court upheld it. On appeal to the Supreme Court, it was contended that the excess money collected did not become the property of Airlines, since they were not legally entitled to it and consequently there could not be an entrustment of the money by the Airlines to the accused. It could not be treated as the property of the passenger, it was argued, because he had parted with it when the payment was effected, and was no longer interested in it. It was further contended that any amount could be said to be entrusted only if it was lawfully made over. Since the appellant obtained the amount by cheating, the handing over

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53. A.I.R. 1972 S.C. 1490.

of money could not be treated as entrustment. Explaining the concept of entrustment in section 405, Justice Jagannohan Reddy observed:

The section does not provide that the entrustment of the property should be by someone or the amount received must be the property of the person on whose behalf it is received. As long as the accused is given possession of property for a specific purpose or to deal with it in a particular manner, the ownership being in some person other than the accused, he can be said to be entrusted with that property to be applied in accordance with the terms of entrustment and for the benefit of the owner. The expression 'entrusted' in section 409 is used in a wide sense and includes all cases in which property is voluntarily handed over for a specific purpose and is dishonestly disposed of contrary to the terms on which possession has been handed over.<sup>54</sup>

Thus it is clear that voluntary handing over for a specific purpose must be present to constitute entrustment. The Court said that when money was handed over to a person who was authorized to receive it on behalf of another, he could be said to be entrusted with the money.<sup>55</sup> Similarly the Court said that the person on whose behalf money was collected became the owner as soon as the amount was handed over to the person so authorized to collect on his behalf.<sup>56</sup>

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54. Id. at 1493.

55. Ibid.

56. Ibid.



In this case the money was paid to the Airlines and was accepted by the accused on behalf of the Corporation, and hence the handing over of money to the accused was held entrustment.<sup>57</sup> The Court looked into the fiduciary relationship between the Corporation and its employee. The dishonest way in which he acquired excess money than legally due to the Corporation was disregarded by the Court to find out the incidents of entrustment. Though there was an involuntary transfer of property by the passengers to the accused, since the money was paid to the Corporation and accepted on behalf of the Corporation the involuntariness was not taken into consideration in ascertaining whether there was entrustment.

A new dimension was given to the concept of 'entrustment' in the case of misappropriation of property by partners in a firm. There existed difference of opinion as to the question whether a partner could be charged for criminal breach of trust in case where one of the partners misappropriates partnership property. The Calcutta High Court in The Queen v. Okhoy Coomar<sup>58</sup>, Bhupendranath v. Giridharilal<sup>59</sup>, Alla Rakha v. Liakat and Hossain<sup>60</sup>, the Bombay High Court in Jaganath Raghunath das v. Emperor<sup>61</sup>, the Madras High Court in Satyanaarayana Murthi v. Kotha Manikyala Rao<sup>62</sup>, and the Patna High

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57. Id. at 1494. It was contended that the accused had no intention to receive the excess money on behalf of the Corporation. The contention was rejected as irrelevant.

58. 21 W.R.(Cr.) 59; quoted in A.I.R.1951 Cal.69, 71-72 (F.B.).

59. A.I.R. 1933 Cal. 582.

60. A.I.R. 1940 Cal. 371.

61. A.I.R. 1932 Bom. 57.

62. A.I.R. 1940 Mad. 265.

Court in Bhudhar Mal v. Ramchander<sup>63</sup> expressed the view that a partner could be charged for the offence under section 405 if there was entrustment. But the Calcutta High Court in an earlier decision, Debi Prasad v. Nager Mull<sup>64</sup>, had held that partner could not be charged for breach of trust in case of misappropriation of partnership property. The matter was re-examined by a Full Bench of the Calcutta High Court in Bhuban Mohan Das v. Surendra Mohan Das.<sup>65</sup> In this case Bhuban and Surendra were partners of a firm dealing with the business of selling ghee, butter, and stationary articles. Owing to communal disturbance in 1950 some articles were removed to the house of Bhuban for safety with the consent of Surendra. But this was not replaced even after the repeated demands by Surendra after normalcy was restored. So Surendra filed a complaint and proceedings under section 406 were instituted. The petitioner (Bhuban) filed a revision petition before the High Court to quash the proceedings. The question before the Full Bench was whether a proceeding under section 406 could be initiated against a partner in respect of property belonging to both of them as partners.

After considering the legal relationship of the partners under the Partnership Act, the Court unanimously held that since there was no separate share of property in partnership business

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63. A.I.R. 1920 Pat. 112.

64. (1908) I.L.R. 35 Cal. 1108.

65. A.I.R. 1951 Cal. 69 (F.B.).

before the accounts were settled, and every partner had the ownership over the entire property the question of entrustment of the share of one to another was not possible.<sup>66</sup> The Court observed:

Unless the relationship of partnership imposes on one partner holding property fiduciary obligations, then it appears to me that it cannot be said that, that partner if he holds property of the partnership with the consent of the others, has been entrusted with it and that he is guilty of a fraud on his trust in not accounting to his co-partners for the property.<sup>67</sup>

The Court added that if there existed a special agreement to create a fiduciary relationship in respect of some property the partner could be charged for breach of trust. Harries, C.J. opined:

Whether or not a partner can be said to have been entrusted with property must depend upon whether there is any special agreement between the parties. If there is no special agreement he does not receive property in a fiduciary capacity. It might be that if there was a special agreement between the partners then it could be said that a partner was entrusted with property or with dominion over it.<sup>68</sup>

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66. Id. at 71.

67. Ibid.

68. Id. at 73.

It appears that the Court excluded the presence of the concept of entrustment because the property was jointly owned and possessed by both the parties. This is also the reason for not implying a fiduciary relationship between the parties. The reasoning of the Court is correct and in accordance with the object of section 405.

The view was approved by the Supreme Court in Velji Raghavji Patel v. State of Maharashtra.<sup>69</sup> Justice Mudholkar observed:

In order to establish 'entrustment of dominion' over property to an accused person the mere existence of that person's dominion over property is not enough. It must be further shown that his dominion was the result of entrustment. Therefore, as rightly pointed out by Harries, C.J., the prosecution must establish that dominion over the assets or a particular asset of the partnership was, by a special agreement between the parties, entrusted to the accused person. If in the absence of such a special agreement a partner receives money belonging to the partnership he cannot be said to have received it in a fiduciary capacity or in other words cannot be held to have been 'entrusted' with dominion over partnership properties.<sup>70</sup>

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69. A.I.R. 1965 S.C. 1433. Here the appellant was in charge of the administration of the firm conducting the business of construction of building. The charge was that he misappropriated an amount of Rs.8,905/-. The Court quashed the proceeding negating the contention of special agreement as to the administration of firm since he was a partner. See also, Mohammed Abdul Sattar v. State of Andhra Pradesh, A.I.R. 1958 A.P. 555.

70. Id. at 1435-1436.

Thus it is clear that an owner cannot be said to be entrusted with his own property for the purpose of section 405. This seems to be the reason for the stress on special agreement creating fiduciary relationship to attract section 405.

The courts gave a new interpretation to the concept of entrustment in the case of properties involved in matrimonial relationships. The matter first came to be examined by the Punjab and Haryana High Court. They examined whether there could be entrustment of stridhan property (exclusive property of the wife) to the husband and his relations, when the wife entered the matrimonial home in Bhai Sher Jang Singh v. Smt. Virinder Kaur.<sup>71</sup> The Court held that a proceeding could be taken against the parents-in-law of the married woman for criminal breach of trust in respect of her stridhan property. It was alleged that certain ornaments of their daughter-in-law were kept under the custody of the petitioners, and were never allowed to be used by Kaur. They refused to return them even after repeated demands. On complaint, the magistrate took cognizance of the offence. The petitioners approached the High Court to quash the proceedings on the ground that there could not be an entrustment of stridhan property since it was given for the use of both parties and was joint property. It was also contended that the remedy open in such cases was under section 27 of Hindu Marriage Act and not under section 405 of the Penal Code.

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71. 1979 Cri.L.J. 493.

After examining the concept of stridhan and the purpose for which it was given, the Court said that "it might be that some of the articles which were presented to her are for the use of both the spouses but the ornaments and things of the like nature are certainly meant for her and her alone".<sup>72</sup> So in such cases the Court held that when she alleged conversion, a court must give legal effect. Based on this reasoning the Court dismissed the petition and ordered to proceed with the trial.

It appears that the Court only examined the concept of stridhan and the right of married woman over it. After concluding that she had the absolute ownership on the property, the Court held that there was entrustment as soon as she entered the matrimonial home. The Court never ventured to examine the legal incidents of the concept of entrustment as laid down by the Supreme Court in previous decisions, and to inquire whether such incidents were present. The Court also failed to look into the relationship of the parties in the matrimonial home and the intention at the time of handing over the property. The decision seems to be wrong and contrary to the settled law laid down by the Supreme Court in the previous cases.

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72. Id. at 497.

However, a Full Bench of the same High Court in Vinod Kumar Sethi v. State of Punjab<sup>73</sup> reviewed the question overruled Bhai Sher Jan Singh and negatived the presence of entrustment in such cases. The precise question in this case before the Full Bench was this: Do the bonds of matrimony inhibit a prosecution for breach of trust betwixt the spouses inter se and in particular with regard to the wife's dowry?

The main contention of the petitioners was that the basic prerequisite of entrustment of property or dominion over property to take cognizance under section 405 did not arise in stridhan property so long as the marriage subsisted. To support this, they argued that a Hindu wife by the very factum of her marriage could not own or possess property separately from her husband during the subsistence of the marriage. It was also contended that if at all she could hold stridhan property it became joint property the moment she entered the matrimonial home. The Court after making an elaborate discussion as to the concept of stridhan and the rights of a

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73. A.I.R. 1982 P.& H. 372. Here on the occasion of the marriage between Veena Rani and Vinod Kumar, Veena Rani received some ornaments, valuable clothes, furniture and other household articles besides Rs.21,000/- from her parents and relations. She also received some items from her husband and mother-in-law. It was alleged that all these articles were entrusted with the husband and parents-in-law. After the marriage she was ill-treated for more dowry and was expelled from the house without returning the articles, when she failed to bring more money from her parents. Based on a complaint the magistrate took cognizance. The High Court quashed the proceedings.

married woman on her stridhan property based on pristine and modern Hindu law, including Hindu Succession Act and Hindu Marriage Act, negated this strange argument.<sup>74</sup> The Court held that she must be considered the owner of the property, and such ownership did not vanish as soon as she crossed the threshold of the matrimonial home.<sup>75</sup>

Another contention raised was that the articles given during marriage were intended for common use and enjoyment by the couple, and can never be considered as the exclusive property of the wife, and no question of any entrustment of those articles to the husband or his relations could possibly arise. As to the first part of this contention the Court held that though there were possibilities of joint use of certain articles the mere joint enjoyment did not necessarily divest a Hindu wife of her exclusive ownership or made it joint property by the mere factum of such use.<sup>76</sup> After examining the provisions of Hindu Succession Act, Hindu Marriage Act, Order 32A of Civil Procedure Code and the ratio of Bhai Sher Jan Singh<sup>77</sup> Chief Justice S.S.Sandhawala concluded:

To conclude on this aspect, I find nothing in the codification of Hindu Law which in any way abolishes the concept of stridhana or the right of a Hindu wife

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74. Id. at 386.

75. Id. at 384.

76. Id. at 385.

77. 1979 Cr.L.J. 493.



to exclusive individual ownership. Indeed the resultant effect of such enactment is to put the Hindu female wholly at par with the Hindu male, if not at a higher pedestal with regard to individual ownership of the property.<sup>78</sup>

But the Court was sceptic about the presence of entrustment in matrimonial home. The Court relied on the observation of the Full Bench of Punjab and Haryana High Court in Kailash Vati v. Ayodhic Prakash<sup>79</sup> as to the interpretation of the concept of matrimonial home. The Kailash Vati Court had emphasized the conjugal relationship and the mutual rights and obligations of the spouses in the matrimonial home.<sup>80</sup> The Court observed:

In the light of the above it would be farcical to assume that despite the factum of a marriage and a common matrimonial home the two spouses would stand in a kind of a formal relationship where each is entrusted with or has been passed dominion over the exclusive property of the other. Rather it appears to me that the conjugal relationship and the existence of a matrimonial home automatically obviates any such hypertechnicalities of an entrustment or dominion over property. It seems inapt to conceive the relationship as a day-to-day entrustment of the property of the husband to the custody of the wife or vice versa of the property of the wife to the husband.<sup>81</sup>

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78. A.I.R. 1982 P.& H. 372, 387.

79. (1977) I.L.R. 1 P.& H. 642 quoted in A.I.R. 1982 P.& H. 372.

80. A.I.R. 1982 P.& H. 372, 389.

81. Ibid.

The Court also held that the existence of matrimonial home presumed a jointness of custody and possession of property owned by the spouses and the fact root out the concept of entrustment.<sup>82</sup> Assuming that violation of contract or violation of the direction of law as to the entrustment of property are the prerequisites of section 406, the Court ruled out the possibility of the existence of the prerequisites in matrimonial relationships. The Court opined:

Once it is held as above, that property within the matrimonial home is in the joint possession and custody (despite rights of the individual ownership therein) then these very prerequisites of entrustment or dominion over property cannot be easily satisfied betwixt the spouses inter se.<sup>83</sup>

To buttress its conclusion that the concept of entrustment was absent in joint possession, the Court relied on decisions on exclusion of the concept of entrustment in partnership. It was conceded that there was difference between the incidence of partnership and matrimonial relationships.<sup>84</sup> In the former case there is jointness of ownership and possession, whereas in the latter there is only jointness of possession. The Court also stressed the absence of requisite mens rea to constitute criminal liability in matrimonial relations.<sup>85</sup>

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82. Ibid.

83. Id. at 390.

84. Id. at 390-391.

85. Id. at 393.

The Court thus in categorical terms excluded the presence of entrustment in matrimonial transactions based on the jointness of possession of property in matrimonial home. It appears that though the decision is correct, the Court failed to examine the concept of entrustment as laid down by the Supreme Court in previous cases and to find out whether it was present in the case in hand. Had the Court made such an attempt this conclusion would have been reached without much difficulty.

Be that as it may, Vinod Kumar ratio seems to be in consonance with the general notion of protection afforded by criminal law to property. What criminal law seeks to protect is the possession of property and not the ownership. This is true with the case of offence of breach of trust also. Section 405 does not even make it obligatory that the entrustment must be by the owner of the property. The Supreme Court had made it clear that mere dominion of property by a person did not constitute entrustment nor there could be an entrustment of property to the owner himself.<sup>86</sup> This shows that there must be some act which makes it clear that the person handing over property must intend to create a type of fiduciary relationship with the other. This is absent in ordinary matrimonial relationships.<sup>87</sup> A wife can never have such an intention in ordinary cases when she hands over her property to the husband.

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86. See Velji Raghavji Patel v. State of Maharashtra, A.I.R. 1965 S.C. 1433.

87. Harjeeth Singh Ahluwalia v. State of Punjab, 1986 Cri.L.J. 2070, 2074.

However, Vinod Kumar was overruled by the Supreme Court in Pratibha Rani v. Suraj Kumar.<sup>88</sup> The facts show that the appellant filed a complaint against her husband and his father, brother and brother-in-law alleging breach of trust of dowry articles in the form of jewellery, wearing apparel etc., worth Rs.60,000/- entrusted to them by her parents. When the Magistrate started proceedings against the respondents, they approached the High Court under section 482, Criminal Procedure Code for quashing the proceedings. The High Court relying on Vinod Kumar quashed the proceedings. On appeal, the Supreme Court held that a proceeding could be initiated against the husband for breach of trust of stridhan property of the wife.<sup>89</sup>

On a plain reading of the judgment it appears that the Court had failed to evaluate the concept of entrustment in section 405, and its application to the property given as stridhan. With respect, it may have to be said that the attempt of the Supreme Court was to criticize the Punjab and Haryana High Court's decision of Vinod Kumar rather than to analyse the case in the light of its own previous decisions. It appears that the interpretation given to Vinod Kumar by Justice Fazal Ali is illogical for the following reasons.

in such property and the husband had only limited right to use it.<sup>90</sup> Based on this reasoning the Court held that stridhan could not be treated joint property of husband and wife, when the wife entered the matrimonial home. The Court reasoned that "the entrustment to him is just like something which the wife keeps in a bank and can withdraw any amount, whenever she likes without any hitch or hindrance and the husband cannot use the stridhan for his personal purposes unless he obtains the tacit consent of his wife".<sup>91</sup> This seems to be somewhat a strained interpretation. The usual impression is that when the wife enters the matrimonial home the property forms part of the household for common enjoyment. The reasoning, in the practical context, seems to be illogical.

The Court criticized Vinod Kumar in its conclusion that stridhan became joint property of the spouses when the married woman entered the matrimonial home.<sup>92</sup> It is felt that

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90. Id. at 377.

91. Id. at 385.

92. To buttress its stand the Court relied on the following observation in Vinod Kumar: "To conclude, it necessarily follows from the aforesaid discussion that the very concept of the matrimonial home connotes a jointness of possession and custody by the spouses even with regard to the movable properties exclusively owned by each of them. It is, therefore, inapt to view the same in view of the conjugal relationship as involving any entrustment or passing of dominion over property day-to-day by the husband to the wife or vice-versa. Consequently, barring a special written agreement to the contrary no question of any entrustment or dominion over property would normally arise during coverture or its imminent break-up. Therefore, the very essential prerequisites and the core ingredients of the offence under s.406 of the Penal Code would be lacking in a charge of criminal breach of trust of property by one spouse against the other". A.I.R. 1982 P.& H. 372, 394 (emphasis mine).

the Court's reading of Vinod Kumar was wrong. Vinod Kumar never said that stridhan became joint property of the spouses. Instead the Court in categorical terms said that stridhan was the absolute property of the married woman, and it would not become joint property of the spouses when the wife entered the matrimonial home.<sup>93</sup> What the Court held was that there was a jointness of possession of stridhan in the matrimonial home, which has no relevance to entrustment. It appears that Justice Fazal Ali has failed to distinguish between the concept of 'joint property' and 'joint possession of property'. In joint property the element of transfer of ownership arises, while in joint possession of property there is no transfer of ownership. What the husband receives is an interest to possess and use the property along with his wife for the benefit of both. It is in this context that the Vinod Kumar Court held that the concept of entrustment could not be invoked in matrimonial relationship. This conclusion was reached by the Court only after examining in detail the concept of matrimonial home and the relationship of husband and wife inter se.<sup>94</sup> It is strongly felt that Fazal Ali, J. has failed to look into these aspects while he held that there could be an entrustment of stridhan to the husband as soon as the woman entered the matrimonial home. In this context it is interesting to quote him in some detail,

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93. A.I.R. 1982 P.& H. 372, 389-394.

94. Ibid. See also Kailash Vati v. Ayodhya Prakash, (1977) I.L.R. 1 Punj. & Har. 642.

We are surprised how could the High Court permit the husband to cast his covetous eyes on the absolute and personal property of his wife merely because it is kept in his custody, thereby reducing the custody to a legal farce. On the other hand, it seems to us that even if the personal property of the wife is jointly kept, it would be deemed to be expressly or impliedly kept in the custody of the husband and if he dishonestly misappropriates or refuses to return the same, he is certainly guilty of criminal breach of trust and there can be no escape from this legal consequence.<sup>95</sup>

It seems that such an interpretation of entrustment in section 405 is contrary to the very law laid down by the Supreme Court in previous cases. We have already seen that the Court in a number of decisions<sup>96</sup> has laid down the legal requirements to constitute entrustment. It is the intention of the parties at the time of handing over the property that constitutes the major element of entrustment. The voluntary handing over of property for a specific purpose with a specific direction by creating a fiduciary relationship, and the intention of returning it back in one form or another when the purpose is achieved constitute the concept of entrustment.

Justice Varadarajan, it is submitted, has rightly appreciated this position, though not in clear terms, in his dissent. He expressed doubt about the presence of entrustment in handing over of property during marriage ceremonies in the light of the observations from previous decisions of the Supreme Court.<sup>98</sup> Relying on Vinod Kumar he held that there could not be a prosecution under section 405 in the absence of a special entrustment or separate agreement by the wife to the husband as to her stridhan.<sup>99</sup>

It is true that the married woman is the absolute owner of the stridhan. This is accepted and recognized by the law governing property of woman.<sup>100</sup> The Supreme Court also accepted the view. However, it is the law that the husband is not totally denied the right to use such property.<sup>101</sup> Similarly, section 27

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98. *Id.* at 402.

99. *Id.* at 411.

100. See section 14 of the Hindu Succession Act, 1956.

101. The rights of the husband under the pristine Hindu law over wife's property based on the writings of Manu and others were stated by Gooroodas Banerjee as follows:

...and by the law as expounded by the commentators of the different schools, the unqualified dominion of the husband is limited to only some descriptions of the wife's property, while as regards the rest he is allowed only a qualified right of use under certain circumstances specifically defined.

Gooroodas Banerjee, Hindu Law of Marriage and Stridhana, p.340 quoted in Pratibha Rani's case, (1985) 2 S.C.C. 370, 375.

This shows that the husband has absolute right to hold and dispose of wife's property in certain cases. But his right is limited in other cases. In this regard, N.R.Raghavachariar observed:

Ordinarily, the husband has no manner of right or interest in it. But in times of extreme distress, as in famine, illness or imprisonment, or for the performance of indispensable duty the husband can take and utilize it for his personal purposes, though even then he is morally bound to restore it or its value when able to do so.

N.R.Raghavachariar, Hindu Law (5th ed.), p.533; quoted in (1985) 2 S.C.C. 376. See also Maine's Treatise on Hindu Law (11th ed.), pp.736-737 quoted in 1979 Cri.L.J. 493, 495.



of Hindu Marriage Act provides for the civil court to make necessary provision in the decree in respect of property presented at or about the time of marriage which may belong jointly to both the husband and wife. This also evidences the recognition of the right of possession of the property of wife by the husband. Thus both in the old and new law the right of the husband to possess and use the stridhan has been recognized. In such circumstances the argument of the Court that there is entrustment within the meaning of section 405 seems to be contrary to the basic principles of criminal law. To invoke the law of breach of trust against the husband who has a legal right to use the stridhan amounts stretching the concept of entrustment beyond its basic frame.

It may be inferred from the above analysis that in ordinary cases there cannot be an intention on the part of the wife to create a fiduciary relationship to form a trust while she hands over the property. Such handing over is never intended to be for a specific purpose with specific direction. If at all there can be a purpose and direction it is for the use of the property jointly for the common benefit. There can also be no intention of returning the property given for common benefit. This shows the absence of entrustment as reflected in section 405 and interpreted by the Supreme Court. In these circumstances section 405 can be invoked, as rightly said by Justice Varadarajan<sup>102</sup> and Punjab and Haryana High

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102. (1985) 2 S.C.C. 370, 411.

Court<sup>103</sup>, only if there is a special agreement as to the disposal of property. In its absence the remedy opened is to knock at the doors of civil court rather than rushing to criminal courts.

From the above discussion it may be safely concluded that though the term entrustment is not defined in the Penal Code, the courts have laid down clear guidelines to decide whether there is an entrustment in particular transactions. Based on the observation of the courts the legal incidence of entrustment can be summed up as follows:

- a) There must be a voluntary handing over of property by one person to another;
- b) The handing over must be with an intention to achieve a specific purpose and with a direction to do the act in a particular manner;
- c) The transaction must create a fiduciary relationship between the parties, and;
- d) There must be an intention on the part of the person handing over the property to take back the property handed over in one form or the other when the purpose is achieved.

It is the law that there is no entrustment where there is jointness of ownership or possession. Exclusion of the concept in cases where property was handed over with an intention to transfer the ownership shows the attitude of the court against the employment of criminal law in solving the disputes in such cases. The interpretation of courts also helped to afford more protection to proper

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103. A.I.R. 1982 P.& H. 372, 394.

## FRAUDULENTLY

Another term which invited divergent judicial interpretation in this area is 'fraud'. In the Penal Code the terms 'fraudulently' and 'intent to defraud' are used in a number of sections.<sup>104</sup> Even though 'fraudulently' is defined in the Code, the terms 'intent to defraud' and 'fraud' have not been defined by the Code. Section 25 of the Penal Code lays down:

A person is said to do a thing fraudulently if he does that thing with intent to defraud but not otherwise.

The absence of definitions of the terms 'intent to defraud' and 'defraud' has led to the pronouncement of conflicting decisions by various High Courts.

Under the English law also the terms 'fraud' or 'intent to defraud' have not been defined. The term 'defraud' was interpreted by English courts in different ways. In Haycraft v. Creasy<sup>105</sup> while disposing a case for action for damages, Justice Le Blanc defined fraud,

By fraud, I understand an intention to deceive; whether it be from any expectation of advantage to the party himself or from ill-will towards the other is immaterial.<sup>106</sup>

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104. See sections 206 to 210, 415, 421 to 424, 463, 464, 471, 474, 477, 477A, 482, 487 etc.

105. 102 E.R. 303: (1801) 2 East 92.

106. Id. at 309.

But Justice Buckley In re London and Globe Finance Corporation Ltd.,<sup>107</sup> while deciding a question whether there was a prima facie case against the director of the Corporation for the offence of forgery to take action at the expense of the company during the winding-up proceedings, defined fraud as follows:

To deceive is, I apprehend, to induce a man to believe that a thing is true which is false, and which the person practising the deceit knows or believes to be false. To defraud is to deprive by deceit: it is by deceit to induce a man to act to his injury. More tersely it may be put, that to deceive is by falsehood to induce a state of mind; to defraud is by deceit to induce a course of action.<sup>108</sup>

This makes it clear that to constitute an act fraud in criminal law, there must be an intention to deceive and the act must cause injury to another.

Sir James Stephen also adopted a similar view. After examining the English decisions and explaining the difficulty in defining the term fraud, Stephen suggested:

I shall not attempt to construct a definition which will meet every case which might be suggested, but there is little danger in saying that whenever the words 'fraud'

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107. [1903] 1 Ch. 728. See also, Regina v. Hermann Julius Marcus, (1846) 2 CAR & K 356: 175 E.R. 147 and Regina v. Francis Emsley Toshack, (1849) 1 Den 492: 169 E.R. 341.

108. [1903] 1 Ch. 728, 732-733.

or 'intent to defraud' or 'fraudulently' occur in the definition of a crime two elements at least are essential to the commission of the crime: namely, first, deceit or an intention to deceive or in some cases mere secrecy; and secondly, either actual injury or possible injury or an intent to expose some person either to actual injury or to a risk of possible injury by means of that deceit or secrecy.<sup>109</sup>

He also suggested a practical test to find out the fraudulent character of a deception for criminal purpose. The test is:

Did the author of the deceit derive any advantage from it which he could not have had if the truth had been known? If so, it is hardly possible that that advantage should not have had an equivalent in loss or risk of loss, to someone else; and if so, there was fraud.<sup>110</sup>

It appears that the explanation of Stephen lays much stress on the injury caused to the person deceived. His explanation of the term has no application to a case where there is deception without an actual or possible injury. This explanation, as rightly apprehended by Stephen, failed to accommodate all types of fraud.

In this case after examining the definition given by Justice Buckley In re London Globe Finance Corporation Ltd.,<sup>112</sup> the Court observed that the view was a narrow one arguing that there was no reason to limit the 'intention to deceive' only to economic loss or injuries. According to Justice Hilbery,

It is sufficient if the intention is to deprive him of a right or to induce him to do something contrary to what it would have been his duty to do, had he not been deceived.<sup>113</sup>

Here the Court held Welham, who by forged agreements induced the hire-purchase finance company to advance money, guilty of forgery, though it was not proved that he had an intention to cause loss to the company.<sup>114</sup> The view was approved by the House of Lords.<sup>115</sup> This shows the conflict of views as to the elements of fraud, and the difficulty of applying Stephen's explanation in all circumstances.

The same difficulty was felt in the Indian law also. The view followed by the English courts and summarized by Stephen was shared by the early Indian scholars. Syed Shamsul Huda examining the concept of 'fraudulently' opined:

112. [1903] 1 Ch. 728.

113. [1960] 1 All E.R. 260, 264 (for himself and Lord Parker, C.J., Cassels, Salmon and Edmund Davies, JJ.).

114. Id. at 266.

115. Welham v. D.P.P., [1961] A.C. 103.

It is essential that in order to amount to legal fraud, besides deception, there must be an intention to cause injury or an infringement of a legal right.<sup>116</sup>

The justification for opting this view was further explained by the learned author as follows:

Deception like falsehood is merely a moral wrong. The law does not ordinarily punish a falsehood unless it is calculated to injure someone else. In the same way a mere deception is not punishable unless it has a similar effect. The world, one might think, would be happier if a falsehood or a deception were made punishable, irrespective of consequences, but punishment has not always helped in hastening the millennium and experience has shown that it is not always conducive to the wellbeing of society to create offences of mere moral wrongs, by which I mean wrongs which do not tend directly to the injury of others.<sup>117</sup>

Conceding the fact that the term has not been adequately defined in the Penal Code to include injury also, the author further observes:

Leaving aside the clumsiness of the definition and the tautology that is involved in speaking of fraudulent execution of a document with intent to commit fraud, for that is what it comes to referentially, the definition makes no mention of any intention to injure, and

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116. Syed Shamsul Huda, The Principles of the Law of Crimes in British India (Tagore Law Lectures, 1902 reprinted in 1982, Lucknow: Eastern Book Co.), p.199.

117. Ibid.

this is to be read into the definition by holding that 'fraudulently' or 'intent to defraud' includes, besides deception, an intention to injure.<sup>118</sup>

This explanation, as that of Stephen, also seems inadequate to accommodate all types of frauds.

In the beginning the judges of the High Courts relied on English decisions to decide whether there was fraud in particular cases. In some cases they said that there was a fraudulent act but failed to explain the contents of the term 'fraudulently'. In some other cases the judges defined the term 'fraudulently' to mean dishonestly, i.e. in terms of wrongful gain and wrongful loss. The judges failed to formulate a uniform rule that was applicable to all cases. After the publication of Stephen's work some judges tried to follow the explanation of Stephen as to the term fraud. Some judges refused to accept this definition, on the ground that it was a narrow explanation of the concept of fraud. The basic conflict was on the question whether injury was necessary to constitute fraud. The judges who supported Stephen insisted the presence of injury. They in certain circumstances held that there was injury while in some other circumstance even inference of injury was not resorted to. Having regard to this difficulty another group of judges took the view that injury need not be considered necessary to prove fraud committed by a person.

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118. Id. at 201.



An examination of the important decisions of the various High Courts and Supreme Court interpreting the terms 'fraudulently' and 'intent to defraud' differently is attempted here with a view to drawing some conclusion to improve the definition of fraud so as to make it applicable to all the cases affording more protection to property.

In Reg. v. Bhavanishankar<sup>119</sup>, the accused, manager of Dalsukhram presented an application before the Mamlatdar seeking assistance for the recovery of rents due from the tenants of Dalsukhram. The signature of Dalsukhram was affixed by Bhavanishankar without any authority. He was charged for forgery. The Sessions Judge found it proved that the accused unauthorizedly signed the petition intending to deceive Mamlatdar, and convicted him since he had dishonest intention. But on revision the Bombay High Court held that mere intention to deceive was not sufficient to prove fraudulent act.<sup>120</sup> Melvill and Nanabhai Hari Das, JJ. relying on Reg. v. Marcus<sup>121</sup> held that there must be some injury to constitute forgery. Since the rents were actually due, and the landlord had no complaint about it the Court held that there was no wrongful loss or wrongful gain to the parties. The contention that the signature was forged to avoid a civil suit for recovery of rent and thereby to save money was not accepted by the Court.<sup>122</sup>

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119. (1874) 11 Bom.H.C.R. 3.

120. Id. at 4.

121. 2 C.& K. 356.

122. (1874) 11 Bom.H.C.R. 3, 4.

Thus the Court stressed the need for actual injury to some person by the deception of the accused to make the act fraudulent. The Court also considered the presence of wrongful gain and wrongful loss as the elements of fraud. This interpretation seems not plausible.

Chief Justice Couch of the Calcutta High Court in Queen v. Lal Mahomed<sup>123</sup> held that the terms 'fraudulently' and 'dishonestly' in section 415 were used in the same sense. The Court interpreted the term 'fraudulently' also to mean dishonestly, that is to cause wrongful loss and wrongful gain. Here the accused, a clerk in relief work camp, bought rice from the officer of the relief camp at the rate of 16 seers per rupee on condition that he would sell it at the rate of 15 seers per rupee. But he actually sold it at the rate of 12 seers per rupee. He was convicted by the Magistrate for cheating. Sessions Judge found that he had intention to cheat at the time of the transaction, and referred the matter to the High Court. The High Court interpreting the definition of cheating in section 415 based on the illustration to the section, held that the words 'fraudulently' and 'dishonestly' were used in the same sense. After examining the definitions, Couch, C.J. ruled that since there was no wrongful loss to the Relief Superintendent nor a wrongful gain to the accused he could not be punished for cheating. Here the selling of rice at a higher price against the condition did indicate his intention to make unlawful gain. In fact he received some gain

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123. (1874) 22 W.R.(Cr.) 82.

by selling the rice at a higher rate. This was however, not considered by the Court. Apart from this the reading of the Court that 'dishonestly' and 'fraudulently' were used in the same sense also seems to be wrong. It is clear from the section that they are used alternatively. The definitions of the two terms are also different.

In Empress of India v. Fatch<sup>124</sup> the Allahabad High Court also failed to examine the meaning of the term 'fraudulently' before acquitting the accused for altering the number of the plot in a sale deed after its registration. It was found after registration that the survey number mentioned in the deed was wrong. The accused corrected the number of the plot. The corrected document was produced before the civil court as proof of possession and title to the land. He was convicted by the trial court. Reversing the trial court, Justice Mahmood stated:

The identity of the property which the deed of sale purported to convey could not possibly be affected by the alteration of the figures, and the substitution of one number for the other could not possibly defraud anyone or have the effect of causing wrongful loss or wrongful gain to any person....However foolish or blameable the conduct of the prisoner may be, the alteration cannot be called 'forgery' within the

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124. (1882) I.L.R. 5 All. 217. See also Empress of India v. Jivanand, (1882) I.L.R. 5 All. 221. But this case was dissented by the Calcutta High Court in Lolit Mohan Sarkar v. The Queen-Empress, (1894) I.L.R. 22 Cal. 313, and Emperor v. Rash Behari Das, (1903) I.L.R. 35 Cal. 450.

meaning of S.463, nor can the sale-deed after the alteration be designated 'a forged document' as contemplated by S.470 of the Penal Code, the most important element of the offence, namely wrongful loss or wrongful gain, or the intent to defraud being totally wanting in the case.<sup>125</sup>

The reasoning was given by the Court without analysing the necessary ingredients of the term 'fraud'. The Court had only taken into consideration the ultimate result of the conduct of the accused, but not the effect of the actual conduct in considering whether his conduct was fraudulent or not. The act of correcting the registered document by the accused himself was a wrong act, since it was prohibited. This aspect of the conduct of the accused was not taken care of by the Court while deciding whether his conduct was fraudulent. Had the Court taken into consideration this aspect, the result would have been the other way round. The difficulty was caused because of the attempt of the court to explain the term fraudulently in terms of wrongful gain and wrongful loss.

A very narrow interpretation to the word 'fraudulently' was given by Justice Mitter of Calcutta High Court in Jan Mahomed and Jabar Mahomed v. Queen-Empress.<sup>126</sup> Here the appellants in order to get recognition from a settlement officer

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125. (1882) I.L.R. 5 All. 217, 220.

126. (1884) I.L.R. 10 Cal. 584. Justice Norris concurred. See also Queen-Empress v. Sheo Dayal, (1885) I.L.R. 7 All. 459; Queen-Empress v. Haradhan, (1892) I.L.R. 19 Cal. 380.

that they were entitled to the title of loskur produced a forged sunnud purporting to have been granted by the Raja of Cachar. This was alleged to have been forged and the appellants were convicted for forgery. On appeal, acquitting the appellants of the charge of forgery, Justice Mitter opined:

Without defining precisely what would constitute 'an intent to defraud', we are clear that it cannot be held in this case that the appellants produced the sunnud to 'defraud' the Settlement Officer, and therefore it cannot be said that they used the document 'fraudulently' as defined in S.25 of the Indian Penal Code.<sup>127</sup>

It is clear that the interpretation is wrong and this was dissented from in subsequent decisions.<sup>128</sup> An analysis of these decisions shows the trend of thinking of the three High Courts towards the end of nineteenth century as to the meaning of 'fraud'. They had not attempted to define or analyse the true elements of fraud in detail. Since the words 'dishonestly' and 'fraudulently' are used together in many sections, the Courts showed a tendency to follow the definition of 'dishonesty' to 'fraudulently' also. They resorted to the English decisions in certain cases. The approach seems to be wrong since

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127. Id. at 587. See also Queen-Empress v. Girdhari Lal, (1886) I.L.R. 8 All. 654.

128. See Queen-Empress v. Soshi Bhushan, (1893) I.L.R. 15 All. 210; Queen-Empress v. Haaradhan, (1892) I.L.R. 19 Cal. 380; Kotamraju Venkatrayedu v. Emperor, (1905) I.L.R. 28 Mad.90 (F.B.); Queen-Empress v. Khadusingh, (1897-98) I.L.R. 22 Bom. 768 etc.

'dishonestly' and 'fraudulently' deal with two different aspects. This fact was realized by the judges in subsequent cases and they separated the two concepts.

A slight change to this trend of interpretation of the term 'fraud' can be seen in the judgment of Mitter and Grant, JJ. of the Calcutta High Court in Abdul Hamid v. The Empress.<sup>129</sup> The appellant, a typist in the sub-divisional office at Budruck, falsely endorsed the application for the post of third clerkship in the same office to the Collector, and forged the letter of appointment of the Collector. Based on the forged letter he took charge. However, the forgery was detected and he was proceeded against on the charge of forgery. The Sessions Judge convicted him. On appeal, upholding the conviction of the Sessions Judge the Calcutta High Court observed:

He, therefore, made these two documents falsely with a view to deceive the Collector of Balasore and the Sub-divisional Officer of Budruck respectively and with the intention of gaining a pecuniary advantage by securing his appointment to the post which was vacant in the Sub-divisional Office of Budruck. That being so, we think that he made these documents fraudulently within the meaning of S.25 of the Indian Penal Code, ....<sup>130</sup>

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129. (1886) I.L.R. 13 Cal. 349. See also Queen-Empress v. Appasami, (1889) I.L.R. 12 Mad. 151; Queen-Empress v. Soshi Bhushan, (1893) I.L.R. 15 All. 210.

130. Id. at 351.

Though the Court did not examine the ingredients of fraud, it convicted the accused based on his wrongful act with intent to make a pecuniary advantage. The Court stressed the pecuniary advantage intended to be derived, to conclude that his act was fraudulent. Here the Court gave emphasis not to the injury caused to the parties, but the intention of the accused to derive an advantage. Intention alone was held sufficient to render it fraudulent.

A quite different attitude was adopted by the Bombay High Court in Queen-Empress v. Vithal Narayan.<sup>131</sup> The accused who passed the public service examination, at the age of 23 altered his age in the certificate from 23 to 20 to induce the Collector to give him an employment. He was charge-sheeted for forgery. The Sessions Judge of Poona acquitted him on the ground that his act did not amount to defrauding the Collector. The Bombay High Court relying on illustration (k) of section 464<sup>132</sup> and the observation of Justice Le Blanc in Haycraft v. Creasy.<sup>133</sup> reversed and directed re-trial. Thus the Court focused its attention on the deception rather than on the actual harm caused. This seems to be a wider interpretation to the term 'fraud' so

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131. (1889) I.L.R. 13 Bom. 515 (Note).

132. Illustration (k) to section 464 reads: "A without B's authority writes a letter and signs it in B's name certifying to A's character, intending thereby to obtain employment under Z. A has committed forgery inasmuch as he intended to deceive Z by the forged certificate, and thereby to induce Z to enter into an express or implied contract for service."

133. Supra n.105.

as to include within its sweep all forms of unlawful conduct against property whether it resulted in injury or not. It has to be remembered here that Haycraft was a suit for damages for a fraudulent act. The Bombay High Court examined the definition of fraud in civil cases to dispose of a criminal matter. This shows that if intention to deceive is there, there need not be a further harm to make an act fraudulent in criminal law. The stress seems to be on the wrongful conduct of the accused with a malicious intention rather than on the actual harm caused by the act to the other party.

Relying on the decision of Vithal Narayan, the Calcutta High Court in Lolit Mohan Sarkar v. The Queen-Empress<sup>134</sup> convicted the accused for the alteration of a challan. The accused who was in the services of a zamindar with a duty to pay the land revenue to the government collectorate on due date, received the amount from the zamindar. He deposited only a portion of the revenue and altered the challan with the actual amount due and sent it to the zamindar. He was charged for the offences of criminal breach of trust, forgery and using forged document and was convicted by the Sessions Judge. Before the High Court it was inter alia argued that there was no intention to commit fraud or to act dishonestly. It was also argued that

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134. (1894) I.L.R. 22 Cal. 313; see also Queen-Empress v. Muhammed Saeed Khan, (1898) I.L.R. 21 All. 113.



fraudulently meant dishonestly. Negating the contention, Banerjee and Sale, JJ. held:

...we think the word 'fraudulently' must mean something different from 'dishonestly'. It must be taken to mean as defined in S.25 of the Penal Code 'with intent to defraud', and this was the view taken by the Bombay High Court in the case of Queen-Empress v. Vitthal Narayan Joshi ....We are of opinion therefore, that the forgery in this case, for the abetment of which alone, upon the evidence adduced, it would be safe to convict the appellant, was sufficiently constituted by the alteration in the challan.<sup>135</sup>

Thus the old notion, that the two concepts 'fraudulently' and 'dishonestly' were one and the same, was totally rejected by the Calcutta High Court.

The Full Bench of Calcutta High Court again in Queen-Empress v. Abbas Ali<sup>136</sup> tried to ascertain the real meaning of the term 'fraudulently'. In this case Abbas Ali produced a forged certificate showing competency as an Engineer on First Tindal purporting to be signed by one H.Abern, Chief Engineer of the Steam Launch Nicol along with the application for the qualifying examination for engine drivers. He was convicted.

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135. *Id.* at 322. See also Queen-Empress v. Abbas Ali, (1897) I.L.R. 25 Cal. 512, 521; Babu Ram Rai v. Emperor, (1905) I.L.R. 32 Cal. 775, 779; Emperor v. Chanan Singh, A.I.R. 1929 Lah. 152.

136. (1897) I.L.R. 25 Cal. 512 (F.B.). (Sir Francis Maclean, Kt.C.J., O'Kinealy, Macpherson, Trevelyan and Jenkins, JJ.).

On appeal, after referring to the definition of fraudulently in section 25 and the previous decisions of the Calcutta High Court<sup>137</sup> Chief Justice Maclean opined:

As a definition this provision is obviously imperfect, and perhaps introduces an element of doubt, which did not previously exist; for it leaves it to be determined, and that really is the point on which the present case turns, whether the word 'defraud' as used in S.25 implies the deprivation or intended deprivation of property as a part or result of the fraud. The word defraud is of double meaning in the sense that it either may or may not imply deprivation, and as it is not defined in the Code and is not, so far as we are aware, to be found in the Code except in S.25, its meaning must be sought by a consideration of the context in which the word fraudulently is found.<sup>138</sup>

After examining the context in which the word is used in sections 467 and 471, the Court concluded that the word 'fraudulently' should not be confined to transactions of which only deprivation of property forms a part.<sup>139</sup> The Court followed the English decision, Reg. v. Toshack<sup>140</sup>, to trace the definition of 'intent to defraud' and held that Abbas Ali was rightly convicted for the offence of forgery. The Court did not examine whether an actual injury was required to constitute a fraudulent

137. Queen-Empress v. Haradhan, (1892) I.L.R. 19 Cal. 380. (Other judges concurred).

138. (1887) I.L.R. 25 Cal. 512, 521.

139. *Id.* at 521.

140. (1849) 4 Cox.C.C. 33.

act. The thrust was on the question whether fraudulently could be confined only to cases of deprivation of property. The conclusion that it cannot be confined to such cases alone seems to be the correct interpretation of the law.

But the Division Bench of Calcutta High Court took a different view and refused to convict the accused in Babu Ram Rai v. Emperor<sup>141</sup> for the offence of cheating by impersonation. The accused (Ramdilal), the karta of a Joint Hindu Family, in his representative character applied for the withdrawal of surplus sale proceeds standing in the credit of the joint family in the Treasury. The Collector directed him to produce a power of attorney or to cause all the members to appear and admit his authority to sign on their behalf. All the members except two minors appeared. For the minors two other persons were presented and the money was withdrawn. Later one of the minors applied for his share. But realizing that the Karta received the money on his behalf, he requested to strike off the petition. But the Collector owing to some doubt ordered an inquiry and the irregularity was brought to light. The karta and the sureties were charged for cheating and was convicted by the lower courts. After examining the definition of 'dishonestly' and 'fraudulently' Justice Henderson of Calcutta High Court observed:

Apparently, however, the word 'fraudulently' is not confined to transactions in which there is wrongful gain on the one hand, or wrongful loss on the other,

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141. (1905) I.L.R. 32 Cal. 775. (Henderson and Geldt, JJ.).

consideration of the wrongful act committed by the accused to conclude whether there was fraud. It came out in evidence and also found by the Court that there was deception and the Collector was actually deceived. In that light the Court could have held that there was a fraudulent conduct and the commission of the offence of cheating. The Court also failed to describe what were the necessary ingredients of the term defraud. From the decision it has to be inferred that deception alone is not sufficient to commit fraud. The Court also has not followed any of the previous decisions where in similar circumstances the conduct was held fraudulent. The Court failed to examine whether the word 'fraudulently' used in the definition of 'cheating' along with deception carried a different meaning, than it was used in other sections especially in the offence of forgery. It is true that only in this section 'deception' and 'fraudulently' are used together. In these circumstances the decision cannot be considered a correct interpretation of the term 'fraud'.

The Full Bench of the Madras High Court in Kotamraju Venkatrayadu v. Emperor<sup>146</sup> examined the concept of 'fraudulently'. In this case in order to obtain admission to the Matriculation Examination of the Madras University as a private candidate, the accused was required to produce a certificate signed by the headmaster of a recognized high school that he was of good

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146. (1905) I.L.R. 28 Mad. 90 (F.B.). (Arnold White, C.J., Subrahmania Ayyar, Davies, Benson and Boddam, JJ.).

character and had attained his twentieth year. He fabricated the headmaster's signature to such a certificate and forwarded it to the Registrar along with his application. He was convicted by the Magistrate and on revision the majority<sup>147</sup> of the Judges of the Madras High Court, though for different reasons, upheld the conviction.

Chief Justice Arnold White held that the accused made the document with intent to defraud. The learned Judge relying on Abbas Ali<sup>148</sup> held that the two elements of fraud, viz., intention to secure a benefit or advantage to the party deceiving and an intention to cause loss or detriment to the other party, were present in the present case.<sup>149</sup> The reasoning of Arnold White, C.J. to reach this conclusion is worth-noting:

It is not necessary to decide whether an intention to secure a benefit or advantage to the party deceiving by means of the deceit in itself constitutes an intention to defraud. I may observe, however, in this connection that by S.24 of the Code a person does a thing dishonestly who does it with the intention of causing wrongful gain or wrongful loss. It is not necessary that there should be an intention to cause both. On the analogy of this definition it might be said that either an intention to secure a benefit or advantage on the one hand, or to cause loss or detriment on the other, by means of deceit, is an intent to defraud.<sup>150</sup>

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147. Arnold White, C.J., Benson and Boddam, JJ. upheld the conviction. Subrahmaniam Ayyar and Davies, JJ. dissented.

148. Supra n.136.

149. (1905) I.L.R. 28 Mad. 90, 96-97.

150. Id. at 97.

Though the conclusion reached by the learned Chief Justice in convicting the accused is correct, the reasoning adopted seems unconvincing. The Chief Justice relying on the definition of 'dishonestly' held that the same elements were necessary for fraudulent acts. This seems to be a wrong approach. The two concepts are entirely different, and carries different ideas though on some occasions like the present case they travel together. The difference between these two concepts, and they mean different things, was expressly stated by the Calcutta High Court in the decision of Abbas Ali and other cases.<sup>151</sup> Even though reference was made to Abbas Ali by the learned Chief Justice, he failed to utilize its ratio properly. Such interpretation failed to accommodate a wrongful conduct where these two elements are absent in the strict sense. Similarly, the Chief Justice has referred to Vithal Narayan, but failed to utilize the ratio of the case. It was held in Vithal Narayan that question of advantage or loss need not be considered. The Chief Justice thought it unnecessary to discuss the question in the case.<sup>152</sup> Had the learned Chief Justice followed the ratio of Vithal Narayan, the same result as reached by him could have been carried at and could have treated 'fraudulently' and 'dishonestly' differently. It could have been argued that since there was wrongful loss and wrongful gain there was dishonesty and since there was deception, the element 'fraudulently' was also present.

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151. See *supra* n.136.

152. (1905) I.L.R. 28 Mad. 90, 97.

Justice Benson, who supported the judgment of the Chief Justice, gave a broader interpretation to the term 'fraudulently'. Justice Benson also relied on Abbas Ali and rightly held that 'dishonestly' and 'fraudulently' dealt with two different aspects.<sup>153</sup> After examining the various sections in the Penal Code in which the term 'fraudulently' is used, and the reasoning of the Abbas Ali Court and the illustration (k) to section 463, Justice Benson came to the conclusion:

It follows that the framers of the Code regarded the writing of such a letter as a fraudulent act, though it did not necessarily involve any loss or injury or intended loss or injury to Z.

Those decisions, therefore, which proceed on the ground that an act is not fraudulent unless it causes or is intended to cause loss or injury to someone would seem to take too narrow a view of the meaning of the word 'fraudulently' as used in the Code.<sup>154</sup>

This seems to be the correct approach to the concept of fraud. Justice Benson also analysed the case in terms of advantage and loss. According to him the accused intended to get an advantage by appearing in the examination without fulfilling the condition. The University also incurred loss or injury by getting themselves induced to declare a person as matriculate without fulfilling the conditions.<sup>155</sup>

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153. Id. at 112.

154. Id. at 113.

155. Id. at 114.

case.<sup>160</sup> Confining the definition of fraud to cases in which injury is caused any person or to the general public, creates problems in interpretation. This is evident from the interpretation given by Justice Benson and Justice Subrahmania Ayyar in this case. On the same facts while one judge inferred injury to the University the other refused to do so. It is felt that the explanation to the term 'fraudulently' must not be confined in terms of injury.

Ashutosh Mallick v. Emperor<sup>161</sup> is an interesting case. The accused by making a false representation that he was an employee of the Calcutta Municipality obtained Rs.10/- by way of subscription from the Health Officer of that Corporation towards the funds of a charitable society. The money was duly handed over by the accused to the society, but later he was charged for the offence of cheating and was convicted by the trial court. The Calcutta High Court reversed on the ground that there was no deception since there was no wrongful loss or wrongful gain.<sup>162</sup> The conclusion was reached by interpreting the term 'fraudulently' to mean "making wrongful gain or loss by deception". It may be true that there was actually no harm caused by the act. But it is equally true that the money was given only because of the false representation made by the accused. The accused induced the Health Officer to believe what was not and based on that false belief the officer acted.

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160. Id. at 114.

161. (1905) I.L.R. 33 Cal. 50.

162. Ibid.



Should this conduct not be taken into consideration to decide whether there is a fraudulent act? Is this fact not sufficient for a person to be held fraudulent? Is something else (injury) also always necessary to constitute fraud? Is not this conduct of the accused to be made punishable? Why did the courts want to leave such conduct as not punishable? These questions remained unanswered when Pargiter and Woodroffe, JJ. decided that the accused was not guilty of cheating. Had the Court followed the ratio of Vithal Narayan<sup>163</sup> or the reasoning of Justice Benson in Venkatarayadu<sup>164</sup>, these questions would not have arisen, and the conduct of the accused would have been made an offence of cheating. In the offence of cheating it is always felt that the courts refused to infer such injury. The reason may be because of the need of deception and fraudulent inducement to constitute cheating.

Justice Mookerjee of the Calcutta High Court in Surendra Nath Ghose v. Emperor<sup>165</sup> accepted the definition given by Stephen.<sup>166</sup> In this case the accused affixed his signature to a kabuliat, which was not required by law to be attested by witness, after its execution and registration below the names of attesting witness. The document was produced before the

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163. Supra n. 131.

164. Supra n. 146.

165. (1910) I.L.R. 38 Cal. 75. See also Kalidin v. Emperor, A.I.R. 1919 All. 387; Ram Sarup v. Emperor, A.I.R. 1918 Pat. 640; Abdul Ghafur v. Emperor, A.I.R. 1921 All. 356; Chothmal Narayanji v. Ramachandra Govindram, A.I.R. 1954 M.B. 73; L.K.Siddappa v. Lalithamma, A.I.R. 1954 Mys. 119.

166. See supra n. 109.

court in a section 145 (Criminal Procedure Code) proceedings to prove possession. He was charged and convicted for the offence of forgery. His appeal to the Calcutta High Court was heard by Harington and Tenuon, JJ. They differed in their opinion. According to Harington, J. no offence was committed since the putting of signature did not alter the character of the document or nature of the contract and it was not mandatory that the document should be attested.<sup>167</sup> On the other hand Justice Teunon took the view that since the document was produced to prove possession as against a third person, the signature of the attesting witness was important and held that there was fraudulent intention.<sup>168</sup> Since there was difference of opinion the matter was referred to Mookerjee, J. He followed the conclusion of Harington, J. but for different reasons. According to the learned Judge, insertion of name could not form a dishonest or fraudulent act as defined in sections 24 and 25 of the Penal Code.<sup>169</sup> Relying on Stephen and decisions based on Stephen's explanation, the learned Judge observed:

The expression, 'intent to defraud' implies conduct coupled with intention to deceive and thereby to injure; in other words, 'defraud' involves two conceptions, namely, deceit and injury to the person deceived, that is, infringement of some legal right possessed by him, but not necessarily deprivation of property.<sup>170</sup>

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167. (1901) I.L.R. 38 Cal. 75, 78.

168. Id. at 84.

169. Id. at 89.

170. Id. at 89-90.

Accordingly it was held that the accused had no intention to cause wrongful gain to him or wrongful loss to another when he inserted his name as an attesting witness. The Court reasoned that though the insertion of the name increased the apparent evidentiary value of the instrument, it could not be said that it was done with intent to defraud. Based on this reasoning, it was held that there was no material alteration and the conduct of the accused was not fraudulent.<sup>171</sup> Justice Mookerjee did not say anything about the view expressed by Justice Tenunon and as to the intention of the accused in altering the document.

A contrary interpretation of the term fraud was taken by Justice Page of the same High Court in Emperor v. Mohit Kumar Mukerjee.<sup>172</sup> After referring to the interpretation of this word by various High Courts and the definition given by Stephen, the Court opined:

With great respect I am unable to accept the view that the term 'fraudulently' in S.471 of the Indian Penal Code, necessarily connotes deceit and injury to the person deceived. It may, but it need not, do so.<sup>173</sup>

After explaining the difficulty in defining the term fraudulently the court reasoned:

The ramification of fraud, and the varied garbs in which it appears, make it undesirable to attempt to find an exhaustive definition of the term 'fraudulently'

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171. Ibid.

172. A.I.R. 1926 Cal. 89.

173. Id. at 92.

or 'intent to defraud'; and to do so is unnecessary, for each case must turn on its own facts, and when the facts are known, it is seldom difficult to draw a conclusion as to whether at the material time, a fraudulent intention was present in the mind of the accused.<sup>174</sup>

The accused in this case produced a receipt to acknowledge the payment of a sum of Rs.50,000/- as salami in respect of a sub-lease of certain mining rights in lands of which the firm of Dickie & Co. was the lessee. The Company became insolvent. In the course of insolvency proceedings the document was produced as genuine. It was found that the accused Mohit as a partner of this firm executed the lease in favour of the other and the document and receipt were forged. The High Court held that conviction recorded by the lower court was right. It appears that the Court has taken a balanced view so as to include within the sweep of the term fraud appropriate cases in which there is clear case of deception but no actual injury. But the difficulty still remains as to the criteria that are to be applied to decide which types of facts and circumstances would constitute such cases.

A step further to the similar line of reasoning was adopted by Devadoss and Waller, JJ. of the Madras High Court In re Sivananda Mudali.<sup>175</sup> The petitioner altered the Tamil numeral

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174. Ibid.

175. A.I.R. 1926 Mad. 1072. See also Kalyanmal Mulchand Marwari v Emperor, A.I.R. 1937 Nag. 89; Baij Nath Bhagat v. Emperor, A.I.R. 1940 Pat. 486; Emperor v. Abdul Hamid, A.I.R. 1944 Lah. 380; R.R.Chari v. State, A.I.R. 1959 All. 149.

27 into 32 in a registered deed of partition between him and one Kaliyayi and filed it in a court as evidence to support to his claim in a civil suit. He was held guilty of having committed forgery. It was argued before the Madras High Court that since he acquired the title of the disputed land by prescription and was proved otherwise than by document forged he could not have intended to cause wrongful loss to anybody or any advantage to constitute forgery. Negating this Devadoss, J. observed:

It is not the detriment to any person that is the essential ingredient in the intention to defraud. If a person induces another to believe in a certain state of things which do not exist by the production of a document which is false in material parts, the intention to defraud is made out.<sup>176</sup>

After examining the previous case law and the explanation given by Stephen, the Court concluded:

On a consideration of the cases above referred to I have no hesitation in coming to the conclusion that in order to do a thing fraudulently it is not necessary that the person doing it should intend, or the doing of it should have the necessary consequence of causing wrongful loss to any person. It is sufficient if the doing of it is intended to defraud someone without ultimately acquiring unlawful gain or causing wrongful loss.<sup>177</sup>

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176. Id. at 1073, (Justice Waller concurred).

177. Id. at 1077.

This interpretation, it appears, is wide enough to accommodate in the framework of fraud all types of deception whether it is followed by an injury or not.

The emphasis is not on the result of the deceptive conduct alone, but on the conduct itself which induces another to do certain act. According to the Court, the wrongful deception alone is sufficient to constitute a fraudulent act. This broad interpretation was subsequently followed by various High Courts.<sup>178</sup>

The Bombay High Court was not prepared to follow this broad interpretation given by the Madras High Court. In Sanjiv Ratnappa v. Emperor<sup>179</sup> the restrictive definition of the word 'fraud' by Stephen and the judgments following it, was accepted. The accused, a sub-inspector, arrested certain persons in connection with theft and kept them in the police custody to extort confession. As a result of the maltreatment one of them committed suicide. When an inquiry was started based on the complaint, the accused altered the entries in the police diary to make evidence favourable to his defence. He was prosecuted and was convicted by the trial court on the charge of

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178. See, Kalyanmal Mulchand Marwari v. Emperor, A.I.R. 1937 Nag. 39; Baiju Nath Bhagat v. Emperor, A.I.R. 1940 Pat. 486; Emperor v. Abdul Hamid, A.I.R. 1944 Lah. 380; R.R.Chari v. State, A.I.R. 1959 All. 149.

179. A.I.R. 1932 Bom. 545.

forgery. The High Court refused to convict him for forgery since there was no fraud committed by him. According to Justice Baker in order to make an act of forgery there must be some advantage on the one side with corresponding loss on the other.<sup>180</sup>

It appears that the Court did not appreciate the conduct of the accused realistically. The accused's act was sufficient to infer fraudulent conduct. The facts show that he had altered the entries in the official records to gain an advantage of not being punished for the wrongful act. The injury caused was against the general public. The Court failed to appreciate these factors while acquitting him. This signifies injustice caused to the parties in following Stephen's definition of fraud. No uniform result can be achieved. So it is strongly felt that the broader interpretation may be accepted to render justice to all.

The Supreme Court in Tulsi Ram v. State of Uttar Pradesh<sup>181</sup> had the opportunity to examine the concept of fraud used in the offence of cheating and forgery. The appellants were members of a Marwari trading family and had wholesale business in cloth and supply of foodgrains. They had accounts in various banks with overdraft and other credit facilities. Owing to financial difficulties they obtained short term credit

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180. Id. at 547. Broomfield, J. concurred.

181. A.I.R. 1963 S.C. 666. See also State of Kerala v. Pared Pillai, A.I.R. 1973 S.C. 326.

to the tune of Rs.80 lakhs by resorting to ingenious methods. The method adopted was to book small consignments say, two or three bags of rape seed, poppy seed or mustard seed from various railway stations and obtain the railway receipts. These receipts were then tampered with by altering the number of bags, weight and freight charges and deposited with the bank for obtaining credit. Based on these receipts the bank issued demand drafts or hundies and were also discounted. They used to take delivery of goods by indicating the loss of receipts and making alternative arrangement of producing endorsement bond with indemnity. By the end of December 1949 some hundies returned unhonoured along with the forged railway receipts and on inquiry the fraud was brought to light. They were charged for cheating, forgery and conspiracy and were convicted by the trial court. Before the Supreme Court it was inter alia argued that though they had manipulated the receipts they had no intention to cause loss to the bank since they were paying the credit and was ready to pay the rest and so they could not be punished for the offences charged. As to the question of fraud, Mudholkar, J. held that to constitute fraudulent act the intention to cause injury to the person defrauded must be established.<sup>182</sup> The Court did not make any elaborate discussion on this since dishonesty was proved and the accused were punished for the offence of cheating.

The Supreme Court again in Dr.Vimla v. Delhi Administration<sup>183</sup> elaborately considered the elements of fraud. Here

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182. A.T.R. 1963 S.C. 666, 674 (For S.J.Imam, K.Subba Rao, N.Rajagopala Ayyanger, JJ. also).

183. A.T.R. 1963 S.C. 1572.



the appellant purchased an Austin 10 H.P. car in the name of her 6 month old daughter Nalini. The money was paid by the appellant, but the registration was transferred to Nalini's name. For the purpose of transferring the insurance policy, the appellant went to the office of the insurance company and signed the necessary form as Nalini. Subsequently when the car met with an accident she filed two claims, and the documents were again signed by her as Nalini. When money was allotted she received it and acknowledged the receipt as Nalini. Later this was found out and she was charged for forgery, cheating etc. The Sessions Court acquitted her but was reversed by the High Court. Before the Supreme Court it was argued that she did not act fraudulently since she had no intention to cause any injury or loss to the insurance company.

After examining the ingredients of the offence of forgery and the explanation of the term fraud by Stephen and the relevant judgments, Justice Subba Rao, speaking for the Court, summarized:

...the expression 'defraud' involves two elements, namely, deceit and injury to the person deceived. Injury is something other than economic loss that is, deprivation of property, whether movable or immovable, or of money, and it will include any harm whatever caused to any person in body, mind, reputation or such other. In short, it is a non-economic or non-pecuniary loss. A benefit or advantage to the

deceiver will almost always cause loss or detriment to the deceived. Even in those rare cases where there is a benefit or advantage to the deceiver, but no corresponding loss to the deceived, the second condition is satisfied.<sup>184</sup>

Even though this explanation was formulated, Justice Subba Rao refused to apply it to the present case. As to the guilt of the appellant, Subba Rao, J. opined:

Certainly, Dr. Vimla was guilty of deceit, for though her name was Vimla, she signed in all the relevant papers as Nalini and made the insurance company believe that her name was Nalini, but the said deceit did not either secure to her advantage or cause any non-economic loss or injury to the insurance company.<sup>185</sup>

The Court held the appellant not guilty of any offence. Although the Court reasoned that on some occasions the element of actual injury was not necessary to constitute an act fraudulent, that reasoning was not applied in the instant case. The Court refused to apply it because it was felt that she did not secure any advantage from the transaction.

Here it was admitted by the appellant that such a transaction was entered into to obtain some relief from income

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184. Id. at 1576-1577 (emphasis mine). See also Daniel Hailey Walcott v. State, A.I.R. 1968 Mad. 349.

185. Id. at 1577.

tax. The Court also did not give much weight to the important fact that the insurance company would not have paid the money had the fact that Nalini was a minor was disclosed to the company. Had the Court appreciated these facts it could have easily come to the conclusion that she had an intention to gain some advantage by the act of deceit.

It is also quite pertinent to note that almost all the cases<sup>186</sup> referred to by the Court were in support of the explanation given by Stephen that fraud has two elements-- intention to deceive and causing of injury. Even though Haycraft v. Creasy was referred to, the Court failed to apply its ratio. Justice Subba Rao specifically stated that no judgment contrary to the Stephen's view was cited by the Bar.<sup>187</sup> But this does not appear to be correct. In Emperor v. Abdul Hamid<sup>188</sup>, a decision referred to by Justice Subba Rao, Justice Sale of Lahore High Court referring to Haycraft said that injury was not always necessary to constitute fraud. To the first contention in that case that an intent to cause injury was an essential ingredient in the offence of forgery, Justice Sale said that such a contention was not in accordance with the terms

186. The cases referred are: Haycraft v. Creasy, (1801) 2 East 92; In re London and Globe Finance Corporation Ltd., [1903] 1 Ch. 728; R. v. Welham, [1960] 1 All E.R. 260; Kotamaraju Venkatarayadu v. Emperor, (1905) I.L.R. 28 Mad. 90; Surendra Nath Ghose v. Emperor, (1910) I.L.R. 38 Cal. 75; Sanjiv Ratnappa v. Emperor, A.I.R. 1932 Bom. 545; and Emperor v. Abdul Hamid, A.I.R. 1944 Lah. 380.

187. A.I.R. 1963 S.C. 1572, 1576.

188. A.I.R. 1944 Lah. 380.

of the statutory definition.<sup>189</sup> After referring to Stephen's view and the decisions supporting for and against the view of Stephen, Justice Sale observed:

It appears to me that the definition of fraud given by Leblanc, J. in (1801) 2 East 92, that "by fraud is meant an intention to deceive; whether it be from any expectation of advantage to the party himself, or from ill-will towards the other is immaterial" is a definition which is consistent with one of the elements under S.463, Penal Code, and that it is not essential that the element of injury to others should always be proved. In the present case it is clear that in being a party to the fabrication of these documents Abdul Hamid intended to deceive the department and thereby secure an advantage to himself. This is within the definition of S.463 and, in our view, therefore, amounts to forgery.<sup>190</sup>

In the light of these observations, it is to be said that Justice Subba Rao has wrongly interpreted the ratio of Abdul Hamid and took it as favouring Stephen's view. It may be true that Justice Sale in Abdul Hamid did not say that even in the absence of an advantage a person could be liable for the offence of fraudulent act. But since he relied on the observation of Justice Leblanc in Haycraft, this has to be inferred. Justice Sale did not make

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189. Id. at 382.

190. Id. at 383 (emphasis original)

this clear in that case because in that case it was proved that the accused had gained an advantage.<sup>191</sup>

Relying on Dr.Vimla, Justice Subba Rao in G.S.Bansal v. The Delhi Administration<sup>192</sup>, held the accused guilty of forgery. In that case Janaki Prasad, the father of the accused, had three National Savings Certificates and applied for the transfer of these certificates. While his application was pending, he died. When the prescribed forms were sent by the authorities, Bansal, who was an Under Secretary in the Ministry of Home Affairs and the only son of Janaki Prasad, filled the forms and affixed the signature of his father, attested and presented to the post office. After receiving the certificates he affixed the signature of his father, attested the signature and authorized one Bhawanishankar for encashing it. This was traced out and he was convicted. Before the Supreme Court it was contended that he was not guilty under section 464 since he had received the money which was admittedly due to him as the sole heir of his

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191. We have already discussed many cases like Vithal Narayan, (1889) I.L.R. 13 Bom. 515n; Mohit Kumar Mukerjee, A.I.R. 1926 Cal. 89; In re Sivananda Mudali, A.I.R. 1926 Mad.1072; Baiji Nath Bhagat, A.I.R. 1940 Pat. 486; R.R.Chari, A.I.R. 1959 All. 149 etc. where it was clearly stated that intention to deceive alone was sufficient to constitute fraudulent conduct. In the absence of the discussion of these cases ratio of Dr.Vimla's court could not be considered as a correct law.

192. A.I.R. 1963 S.C. 1577 (for himself and Raghubar Dayal and J.R.Mudholkar, JJ.). See also Dr.S.Dutt v. State of Uttar Pradesh, (1967) 1 S.C.J. 92. Here the accused produced a forged diploma certificate to show his qualification as a criminologist at the request of the Court. Since it was not produced voluntarily the court held him not liable.

father and therefore, he did not either gain an advantage for himself or cause any injury to another. Much reliance was placed on Dr.Vimla's case. Distinguishing the facts of Dr.Vimla but basing on the reasoning adopted in Dr.Vimla, the Court held that Bensal was guilty of fraudulent act. According to the Court two ways were open to Bensal to get money--one by producing a succession certificate and the other by satisfying the Post-Master-General after three months of the death of his father by evidence that he is the only heir and entitled to the money.<sup>193</sup> By the device adopted by him, the Court said, he could overcome the difficulty and thereby got wrongful gain to him by saving the expenditure for obtaining the succession certificate. By this act he had also gained an advantage of escaping from the trouble of satisfying the authorities that he was the sole heir of the deceased.<sup>194</sup> Justice Subba Rao distinguished Dr.Vimla as follows:

...in short Dr.Vimla put through the relevant transactions in the name of her minor daughter for reasons best known to herself, that is to say, the real owner of the car was Dr.Vimla and she only used the name of her minor daughter. Neither she got any economic or non-economic advantage by making the said false documents nor the Insurance Company incurred any economic or non-economic loss by her so doing. Therefore, this Court held that she was not guilty of forgery. But in the present case, the appellant clearly secured an economic advantage by making the false documents by

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193. Id. at 1579.

194. Id. at 1580.

(i) saving the money which he would have otherwise spent in obtaining a succession certificate, and (ii) getting the money belonging to his father as his heir. Even otherwise he secured a non-economic advantage as he got himself relieved of the trouble of getting the certificate of proof to the satisfaction of the rationing authority and the Post Master General of his credential to receive the money. He was, therefore, guilty of making the false documents both dishonestly and fraudulently.<sup>195</sup>

On an analysis of the case it appears that Justice Subba Rao has diluted the requirement of the second element--proof of actual injury to the opposite party--in Stephen's explanation to the concept of fraud. Of course, the seeds for this was sown by His Lordship in Dr.Vimla. To recall his observation,

Even in those rare cases where there is a benefit or advantage to the deceiver, but no corresponding loss to the deceived, the second condition is satisfied.<sup>196</sup>

Bensal Court did not inquire into the actual injury caused to the Post-Master-General or the rationing authority owing to the wrongful conduct of Bensal. But the Court examined the benefit and advantage gained by Bensal to establish that his conduct was fraudulent. Based on the benefit gained by Bensal the Court

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195. Id. at 1581.

196. A.I.R. 1963 S.C. 1572, 1576-77.

concluded that the second element was satisfied and that his conduct was fraudulent. This seems to be a welcome step.

Had Justice Subba Rao adopted the reasoning resorted to in this case, in Dr.Vimla's case, she would also have been held responsible. This is so because in Dr.Vimla it came in evidence that the Insurance Company would not have given the money had they were aware of the fact that Nalini was a minor. In that case she would have been compelled to take some other steps to prove that she was the guardian and was in need of money to get the insurance amount. By resorting to the false method she had escaped from these troubles to get the money. As held in Bensal, this fact should have been treated as an advantage to her, and the conduct to be fraudulent. Justice Subba Rao ignored these aspects in Dr.Vimla. These cases do indicate the uncertainty created by the judges in this area.

The Law Commission in its Forty-second Report has also reviewed the unsatisfactory definition of fraudulently in the Penal Code. After examining the old views and the view of the Supreme Court in Dr.Vimla, the Commission suggested for a new definition to the term fraudulently as follows:

A person is said to do a thing fraudulently if he does that thing with intent to deceive another and, by such deceit, either to cause injury to any person or to induce any person to act to his disadvantage.<sup>197</sup>

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197. See Law Commission of India, 42nd Report, "Indian Penal Code" (Government of India, Ministry of Law, June 1971), p.31.



This definition was included in the I.P.C. Amendment Bill, 1972. A slight change was introduced into it by the Joint Select Committee and proposed the following definition:

A person is said to do a thing 'fraudulently' if he does that thing with intent to deceive another and, by such deceit, either to cause injury or damage to body, mind reputation or property of any person or to induce any person to act to his disadvantage.<sup>198</sup>

Though the rigour of the Stephen's definition was diluted it appears that this definition would not solve the uncertainty created by the judges. The requirement of injury is specifically included. But it is sufficient to constitute fraudulently if there is any damage or disadvantage to the person deceived in the absence of injury. In this circumstances the accused can escape from liability if there is no injury, damage or disadvantage to the other person though the accused gained some advantage by his wrongful conduct. The difficulty can be solved only if the insistence on injury or damage or disadvantage to the other person is ignored. If the accused has an intention to deceive and actually made another to do what he would not have done had he not been deceived, irrespective of the fact that whether there was an actual injury caused to the other by this act, the accused's conduct must be considered as fraudulent. This interpretation may perhaps help the I.P.C. to afford more protection to the pecuniary interests of the people.

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198. The Gazette of India Extraordinary Part II Sec.2, 1986, p.546/36.

DISHONESTLY

The term 'dishonestly' plays a pivotal role in the enforcement of the Penal Code provisions dealing with property offences. Dishonest intention forms an important element in the majority of the offences against property. Realizing its importance the framers of the Code incorporated a very elaborate and comprehensive definition of the concept of dishonestly. Under the Code, sections 23 and 24 together give an exhaustive definition of the concept. While section 24 defines 'dishonestly', section 23 gives the definition of terms, 'wrongful gain' and 'wrongful loss'.

Section 24 defines dishonestly as follows:

Whoever does anything with the intention of causing wrongful gain to one person or wrongful loss to another person, is said to do that thing 'dishonestly'.

So the most important requirement of 'dishonestly' is an intention of causing wrongful gain to one or wrongful loss to another. Section 23 of the Code defines 'wrongful gain' and 'wrongful loss' as follows:

'Wrongful gain' is gain by unlawful means of property to which the person gaining is not legally entitled.

'Wrongful loss' is the loss by unlawful means of property to which the person losing it is legally entitled.

A person is said to gain wrongfully when such person retains wrongfully, as well as when such person acquires wrongfully. A person is said to lose wrongfully when such person is wrongfully kept out of any property, as well as when such person is wrongfully deprived of property.

According to the definition, to constitute 'wrongful gain' there must be a gain by unlawful means of property by a person, who is not legally entitled to it. Apart from this, the second part of the definition also makes wrongful retention as well as wrongful acquisition of property a wrongful gain. Loss of property by unlawful means to a person who is legally entitled to it makes the loss a wrongful one. Wrongful deprivation of property as well as wrongfully keeping out a person of his property has also been made wrongful loss by the second part of the definition.

Thus confining the definition of 'wrongful gain' and 'wrongful loss' to property, the framers limited the concept of dishonestly to property offences. It is evident from the definition that the framers even intended to prevent wrongful retention and wrongful acquisition of property. So also they envisaged the prevention of wrongful deprivation of property and wrongful keeping out of a person from his property. This has widened the scope of the concept of 'dishonestly'. So, whenever the term 'dishonestly' is used the term includes the intention to do any one of the following elements:

- a) gain of property by unlawful means by a person not legally entitled to it;
- b) loss of property by unlawful means to a legally entitled person;
- c) wrongful retention of property;
- d) wrongful acquisition of property;
- e) wrongful keeping out of a person from his property; and
- f) wrongful deprivation of property.

Though the framers took abundant caution in defining 'dishonestly' some difficulties are still experienced in the application of the concept. The courts have succeeded in interpreting the terms correctly, and in giving new meaning and content to the concept of 'dishonestly' so as to afford protection to property.

One of the questions that came up for the consideration of the courts is whether both wrongful gain and wrongful loss must be present to constitute 'dishonestly'. The courts have unanimously held that either wrongful gain or wrongful loss was sufficient to constitute 'dishonestly'.<sup>199</sup> The position was clearly explained by the Rajasthan High Court in Ahmed v. State.<sup>200</sup>

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199. See Queen-Empress v. Sri Churn Churno, (1895) I.L.R. 22 Cal. 1017 (F.B.); Nabi Baksh v. Queen-Empress, (1897) I.L.R. 25 Cal. 417; Kotamraju Venkatrayadu v. Emperor, (1905) I.L.R. 28 Mad. 90 (F.B.) etc.

200. A.I.R. 1967 Raj. 190.

Here the accused was charged for theft of an idol from a temple. He later immersed it in water. It was inter alia argued that there was no dishonest intention since the accused had not obtained any gain out of his act. Justice Beri concluded:

In order to ascertain the existence or otherwise of dishonest intention it is not necessary that there

such a right is not enough to preclude the officer in charge of that office from having actual physical possession of his office building or deprive him of a right to exclude all interference with it if necessary.<sup>232</sup>

One of the major problems that came for consideration of the courts, was regarding the type of possession required to constitute an offence against property. In other words, the question was whether actual physical possession must be there in all cases or whether constructive or legal possession was sufficient to constitute an offence. The courts have followed different standards for movable and immovable property in this respect. While courts afforded protection to actual possessor of movable property disregarding the ownership or title, in case of immovable property on some occasions, courts also recognized constructive and legal possession.

It is unanimously accepted by all courts that actual physical possession must be there to afford protection to movable property. The Madras High Court in Subudhi Rantho v. Balaram Pudi<sup>233</sup> refused to convict the tenant who was in actual possession of the varam crops (crop's sharing) for the theft of the

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232. A.I.R. 1963 Raj. 19, 21, per, Modi, J. For a contrary view, see Basanta Kumar Gon v. State, A.I.R. 1956 Cal. 118.

233. (1903) I.L.R. 26 Mad. 481. See also Ram Brich Lal v. Emperor, A.I.R. 1935 Pat. 472; Tarachand Sah v. Emperor, A.I.R. 1940 Pat. 701.

share of the zaminder. The accused harvested the crop including the share of the zamindar in his absence to avoid damage. When the accused was prosecuted by the zamindar for theft of his share the trial court convicted him on the ground of dishonest removal. But the High Court reversed since the crops were in his actual possession. According to the Court as per the ryot in a zamindari holding on a varam tenure, the tenant has the possession of the whole crop till he delivers the share of zamindar. So the Court held that even the removal of the whole crop by the tenant was not taking of anything out of the possession of the zamindar.<sup>234</sup>

Here the Court recognized and accepted the actual physical possession of the tenant against the legal and constructive possession of the owner of the property. In law the owner can possess property through the tenant. But for affording protection of property by criminal law for movable property, the Court has stressed the need for actual physical possession by the party claiming property. Here the real owner of the property was denied protection of his property since he had no actual possession.

A similar view was taken by the Madras High Court in Nataraja Mudaliar v. Devasigamani Mudaliar.<sup>235</sup> In this case the accused a third party, cut and removed a tree from the land

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234. Id. at 483.

235. A.I.R. 1931 Mad. 241. Facts of the case did not state the interest of the accused in the trees.

which was in the possession of a tenant on lease. The complainant, the landlord, was the owner of the tree. The tenant was in actual physical possession of the property. The accused was convicted for theft. The High Court reversed since the complainant was not in actual possession of the property.<sup>236</sup>

There is difference between Balaram Pudi and Nataraja Mudaliar. It is true that Balaram Pudi was not referred to in Nataraja Mudaliar. In Balaram Pudi the removal was done by the person who was in actual possession of the property, and the real owner was the complainant. But in Nataraja Mudaliar the removal was done by a third party from the actual possession of the tenant. Only because the case was filed by the owner who was not in actual possession of property the Court refused to afford protection. Had the case been filed by the tenant the Court would have held differently. Thus by emphasizing the meaning of possession in the offence of theft as actual physical possession the Court refused to convict offenders for their wrongful act against property and the owner was denied protection of his property. Had the Court recognized the constructive possession of the owner this difficulty could have been avoided.

The Patna High Court in Ram Brich Lal v. Emperor<sup>237</sup>

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236. Id. at 242. It was also held that the trial was vitiated by illegalities since the accused was not questioned under S.342 Cr.P.C. after the close of prosecution evidence.

237. A.I.R. 1935 Pat. 472. The tenant who cut and removed tree from the holding was held to be in possession of the tree and was acquitted.



and Tarachand Sah v. Emperor,<sup>238</sup> and the Orissa High Court in Bramhachari Martha v. State<sup>239</sup> have protected the claim of the persons in actual possession against the ultimate owner. Thus it is the law that in case of offences against movable property, a court will consider only the actual physical possession of the property to afford protection.

But in the case of offences against immovable property there was difference of opinion as to the meaning of possession. Some courts have expressed the view that the protection must be afforded only to the actual possessor of the property, whereas certain other courts included constructive possession also for according protection. Since trespass is an offence mainly designed to protect immovable property, the term possession used in section 441<sup>240</sup> was subjected to different types of interpretation.

238. A.I.R. 1940 Pat. 701. Here the mortgagee, who cut and removed some trees from the mortgage property, was held in possession of property and was acquitted.

239. A.I.R. 1959 Ori. 207. Here the accused cut and removed some mango trees owned by the Government. But these trees were under the possession of the accused as property of the village deity. So he was held to be in possession of trees though the title was with the Government.

240. Section 441 reads: "Whoever enters into or upon property in the possession of another with intent to commit an offence or to intimidate, insult or annoy any person in possession of such property, or having lawfully entered into or upon such property, unlawfully remains there with intent thereby to intimidate, insult or annoy any such person, or with intent to commit an offence, is said to commit 'criminal trespass'".

In re the petition of Gobind Prasad<sup>241</sup> raised the question whether the word 'possession' used in section 441 was confined to actual possession or not. The facts disclose that Gobind Prasad mortgaged some houses to one Ram Ratan on condition that he would sell it to him subsequently if he fails to redeem the mortgage. Ram Ratan filed a suit based on this and a decree was obtained for the possession of the houses and evicted the petitioner from the house legally. But Gobind Prasad did not leave the house. Ram Ratan filed a case for criminal trespass and the petitioners were convicted by the trial court. In the High Court it was argued that the term possession used in section 441 contemplated only actual possession. Accepting the contention, the Court held that possession contemplated and intended by section 441 must be actual.<sup>242</sup> Thus the Court gave stress to the actual physical possession for affording protection to immovable property, and the legal possession of the owner of property was not recognized. This was held so by the Court apparently for the maintenance of peace.<sup>243</sup>

Relying on Gobind Prasad the same High Court in Motilal v. Emperor<sup>244</sup> also emphasized the importance of actual physical possession. In this case both the accused and

241. (1879) I.L.R. 2 All. 465.

242. Id. at 468.

243. Id. at 467.

244. A.I.R. 1925 All. 540. The property was in the possession of Mrs. Basanti. It belonged to her husband. She died. Kanhaiyalal claimed it as the cousin of the husband of the deceased. The accused claimed it as the adopted son.

complainant (Kanhaiyalal) were the claimants of property including a shop. The property was in the possession of a tenant, and Kanhaiyalal obtained a decree for evicting him. After this the tenant gave notice of his intention to vacate. He vacated, but before Kanhaiyalal took actual possession, the accused took physical possession of the shop and locked it. He was proceeded against for trespass. He was convicted for trespass. It was contended in the High Court that the shop was not in the possession of Kanhaiyalal within the meaning of section 441. Accepting this, the Court observed:

First of all it is to be remembered that intimidation, insult or annoyance can in most cases arise only if the premises are in fact in the actual physical possession of somebody, as for instance, the actual owner, his wife, servant, agent, licensee or other person. They are at all events results which more naturally follow when premises are occupied than when vacant.<sup>245</sup>

The Court held that Kanhaiyalal was not in possession of the shop and the legal possession he had was different from being 'in possession' within the meaning of section 441 of the Penal Code.<sup>246</sup> This emphasizes the requirement of actual physical possession of immovable property by the complainant to get

245. Id., at 540 per, Mears, C.J.

246. Id. at 541. A similar view was expressed in Bismillah v. Emperor, A.I.R. 1929 Oudh 369; Lalchand Pitumal v. Emperor, A.I.R. 1933 Sind 396; Satish Chandra v. The King, A.I.R. 1949 Cal. 107; Gurdial Singh v. Abhey Dass, A.I.R. 1967 Punj. 244.

protection of property. While stressing the need for actual physical possession of the property by the complainant, the Court recognized and accepted the possession of property of the complainant by wife etc., as actual physical possession of the complainant. But at the same time the Court refused to accept legal possession of the property of the complainant also as actual possession of the property by the complainant.

The Bombay High Court in Imperatrix v. Keshavlal Jekrishna<sup>247</sup> took the view that an owner who is not in actual possession of the property could bring an action for trespass. Here the accused claiming ownership entered the property of the complainant which was in the actual possession of a tenant. He destroyed the seeds sown therein. He was convicted for criminal trespass by the trial court. The question of title was not considered. In the High Court it was argued that since the complainant was not himself in possession of the land, section 441 could not be applied. This was negatived by the Court and held that 'any person in possession' did not mean 'a complainant in possession'. According to the Court since it was a criminal act any person can file the complaint.<sup>248</sup>

Lahore High Court in Fakirchand v. Fakir.<sup>250</sup> The broad interpretation helps the real owner of the property to ensure protection of property though they are not in actual possession.

Following the above interpretation, the Madras High Court in (Sheik) Hyder Sahib v. Sabjan Sahib<sup>251</sup> held that the decision of Gobind Prasad was a narrow one and reduced the section to a 'ridiculous limits'. Here the accused broke open the house which the complainant obtained possession in due course of law. Following Gobind Prasad the trial court acquitted on the view that the complainant was not in actual physical possession of the property. Reversing Justice Jackson observed that constructive possession was also included in the word possession in section 441, I.P.C. and set aside the acquittal and ordered for re-trial.<sup>252</sup>

The Allahabad High Court distinguished Motilal v. Emperor<sup>253</sup> in Mahadeo v. Emperor<sup>254</sup> to hold that the owner need not be in actual possession to get protection of criminal law. In this case the complainant, the mortgagee was entitled to

250. (1922) 69 I.C. 379. Here a stranger trespassed into the land possessed by the tenant of the complainant, the landlord.

251. A.I.R. 1931 Mad. 560; See also Chinna Venkataesu v. Pedda Kesarima, A.I.R. 1931 Mad. 231; Bansidhar v. Emperor, A.I.R. 1942 Oudh 104.

252. A.I.R. 1931 Mad. 560.

253. A.I.R. 1925 All. 540.

254. A.I.R. 1934 All. 1025. Here the right of the accused in the property was not stated in the facts.

possession. He let out the premises to a sub-tenant and the sub-tenant was in possession of the property. The accused ejected the sub-tenant wrongly and took possession. When the mortgagee filed a case it was contended by the accused that since the mortgagee had no actual possession of property he could not file a case under section 441, I.P.C. The accused relied on Motilal. Distinguishing Motilal, the Court held that no general proposition of law was laid down in that case. The Court also added that in Motilal the house in connection was vacant, whereas in the present case the land was in the possession of the tenant.<sup>255</sup> The Court also held that the Magistrate can take cognizance at the instance of any person if he is satisfied that the ingredients of the offence is present.

The position was reiterated by the same High Court in Sm.Subhana v. State.<sup>256</sup> Emphasizing its earlier view the Court observed:

The argument that the person against whom criminal trespass is committed should be actually present on the property at the time when the illegal act of taking forcible possession is committed by a person is rather startling. If a person in actual possession of a house or shop goes away temporarily leaving it locked and in his absence a third person, without any right, breaks open the lock and occupies the building,

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255. Id. at 1026.

256. A.I.R. 1954 All. 193. Here the accused who was lawfully evicted from the house entered into the house which was locked by the accused after taking possession.

it would be absurd to hold that the trespasser was not guilty of criminal trespass because of the temporary absence of the person in actual possession.<sup>257</sup>

After examining the previous cases the Judicial Commissioner's Court of Himachal Pradesh in Sant v. Union of India<sup>258</sup> explained the position thus:

The concept of possession embraces both actual and constructive possession. Possession may exist in law but not in fact and such possession is termed as constructive. The Roman lawyers distinguished possession in fact as possessio naturalis and possession in law as possessio civilis. It is trite law that every owner of property is presumed to be in possession of it unless the contrary is proved. The word 'possession' as used in the aforesaid section is, therefore, wide enough to include not only actual and physical but also constructive possession. The legislature must be deemed to have been aware of the legal connotation of the word 'possession' when it used that word in S.441, I.P.C. If the intention of the legislature had been that actual and physical possession should be an ingredient of criminal trespass nothing would have been easier for it than to have qualified the word possession with the words 'actual and physical'.<sup>259</sup>

The examination of the case law clearly reveals that the trend was to limit the protection of criminal law to persons in actual

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257. Id. at 193-194.

258. A.I.R. 1962 H.P. 1. Here the accused was prosecuted for trespassing into government property. He pleaded guilty.

259. Id. at 2. See also State v. Hari Ballabh, A.I.R. 1963 Raj.19.

physical possession of immovable property. But a new trend is set by some High Courts in recent times to recognize constructive and legal possession of immovable property of the complainant as possession to extend the wings of criminal law. It is felt that this interpretation accommodating constructive and legal possession also within the concept of possession, is more appropriate. This will help to afford more protection to immovable property.

Be that as it may, the urge of the courts to afford protection to actual possessor of property so as to maintain peace and harmony in the society is reflected in the view that even the possession of a trespasser should not be disturbed except through the process of law.<sup>260</sup> It is not the policy of the law to render help to trespassers. But once he could establish that he is in peaceful possession of property for some period of time law comes for his rescue. The courts in several cases have held that if a trespasser has a 'settled possession' of property, he must be given the protection of criminal law.

Though the need for protecting the peaceful possession of the trespasser has been recognized from olden days,<sup>261</sup> it was the Lahore High Court for the first time spelled out the

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260. See Munshi Ram v. Delhi Administration, A.I.R. 1968 S.C. 702; Lakshmi Tiwari v. State of Bihar, A.I.R. 1972 S.C. 1058; Ram Rattan v. State of Uttar Pradesh, A.I.R. 1977 S.C. 619 etc.

261. See In re the Petition of Gobind Prasad, (1879) I.L.R. 2 All. 465.



principles governing this issue. The Court clarified that the trespasser could claim protection only if he had got 'settled possession'. It was so explained in Muhammad Khan v. Crown.<sup>262</sup> The facts show that there was dispute regarding title and possession of a piece of land between the parties. On partition the land was allotted to one of them and possession was also handed over to him. When he attempted to cultivate the land, the appellants attacked him and his parties resulting the death of one of his party members. During the trial the appellants took the plea of private defence and argued that they had possession of the property and had used force to protect the same. It was found by the Court that the possession of the appellant amounted only to that of a trespasser and that such possession was not settled.<sup>263</sup> The Court spelt out the principle as follows:

Possession which a trespasser is entitled to defend against a rightful owner must be settled possession extending over a sufficiently long period and acquiesced in by the true owner. A casual act of possession would not have the effect of interrupting the possession of the rightful owner.<sup>264</sup>

The Courts examined the period required to constitute settled possession in various cases.<sup>265</sup> The concept of settled

262. A.I.R. 1949 Lah. 128.

263. *Id.* at 130.

264. *Id.* at 131. The Court held that the act of appellant amounted to criminal trespass and convicted him rejecting the plea of private defence.

265. See Ambika Singh v. State, A.I.R. 1961 All. 38; Munshi Ram v. Delhi Administration, A.I.R. 1968 S.C. 702; Lakshmi Tiwari v. State of Bihar, A.I.R. 1972 S.C. 1058; Ram Rattan v. State of Uttar Pradesh, A.I.R. 1977 S.C. 619; State of Orissa v. Bhagabat Mahanta, 1978 Cri.L.J. 1566.

possession came to be elaborately discussed by the Supreme Court in Puran Singh v. State of Punjab.<sup>266</sup> Here the appellants were usufructory mortgagees in respect of certain lands and they transferred the rights to the complainant. Later the appellants purchased the equity of redemption, and redeemed the mortgage, but failed to recover possession. He forcefully took possession of the property. After one month, the quondam mortgagee attempted to reenter the property and breach of peace ensued. It was proved that the property was in the possession of the appellants one month before the incident. The question was whether this period was sufficient to have 'settled possession' to get protection of criminal law. The lower courts refused to extend the criminal law protection. But the Supreme Court extended the protection of criminal law to safeguard the interest of the appellants. As to the concept of settled possession, Justice Fazal Ali observed:

There is no special charm or magic in the words 'settled possession' nor is it a ritualistic formula which can be confined in a strait-jacket but it has been used to mean such clear and effective possession of a person, even if he is a trespasser, who gets the right under the criminal law to defend his property against attack even by the true owner.<sup>267</sup>

This makes it clear that the basis of extending protection to property afforded by the criminal law is not the protection of

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266. A.I.R. 1975 S.C. 1674.

267. Id. at 1681.

the real owner of the property, but that of the person in actual physical possession of the property. The object is to preserve peace and public tranquility and thereby to protect property from destruction. In this process the courts seem to have afforded protection also to the real owners in appropriate cases by interpreting the term possession to avoid injustice being caused.

The above discussion irresistibly leads one to the conclusion that the judiciary has been straining every nerve to afford maximum protection to property though it has had no proper definition either in the statute or in approved judicial expositions. The judiciary has evolved a working definition for property and created an impressive decisional jurisprudence around it so as to enable it to embrace new forms of property also within the fold of the new meaning ascribed to it by them.

Similarly the framers of the Code used in many sections the term property without qualifying it as movable or immovable property. Though there was difference of opinion among the various High Courts in interpretation, the Supreme Court in Dalmia<sup>268</sup> set at rest the controversy by making it clear that protection must be afforded to both movable and immovable property irrespective of the fact that it had not

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268. Discussed, supra n.13.

been specifically stated in the sections. The approach also signifies that the courts have been insistent on affording protection to property so as to enable them to spread the wings of criminal law around different kinds of property which emerged out of the new socio-politico technological milieu. This has been made possible by placing wider interpretation on the accepted notions in law such as entrustment, fraudulently etc.

Though the Penal Code is replete with repetitions of terms such as 'entrustment', 'fraudulently', 'dishonestly', 'possession' etc. in the chapter of property offences it is conspicuous that none of these terms has been defined properly in the Code. Nor is there a definition for property, as discussed above. It is in these circumstances that the judiciary had recourse to the purposes of the provisions in the chapter entitled offences against property, i.e. for the protection of property. Indeed, having regard to the jurisprudence created by our judiciary, it has to be said to their credit that they have been successful in affording maximum protection to property. They achieved this by a creative interpretation of the terms employed in the Code. This is evident in relation to property offences, particularly from the interpretation given to the term entrustment by the Supreme Court in Babu Ram<sup>269</sup>, Som Nath Puri<sup>270</sup> etc. However this has not been the case with the other

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269. Discussed supra n.49.

270. Discussed supra n.53.

terms. There have surely been conflicts of opinion with regard to their meaning among the High Courts.

Though an earnest attempt was made by the courts to evolve a proper meaning to the term fraudulently, the courts could not come to an unanimous opinion. Several High Courts have tried to give it a wider interpretation. However, the Supreme Court has not been supporting this trend. It has been giving the term 'fraudulently' a limited meaning till the decision in Bansal.<sup>271</sup> Still it is felt that a broad approach rejecting the need for injury as a precondition, to constitute fraudulent act, should be adopted to afford maximum protection to property.

The interpretation put on the terms 'dishonestly' and 'possession' has been, in a sense, pragmatic. The purpose of maintaining law and order is better served by this kind of interpretation inasmuch as the possessor of the property, rather than the owner, is protected by the criminal law. In this context the notion of possession received a very disciplined interpretation which is in consonance with the policy of criminal law.

Be that as it may, the analysis of the statutory provisions and the decisions makes it clear that the offences are designed to protect only certain forms of property. Though

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271. Discussed supra n.192.

the concept of property has been broadened by the decisional jurisprudence to include the new forms of property emerging from the new socio-economic and technological situation, protection to all these new forms of property cannot be ensured with the help of provisions in the Code inasmuch as they are designed to protect only then extant forms of property. In other words, the Code has been found to be of not much use in containing the violations of the new items of property as it was tailored to suit the needs of the Victorian era. The evolution and development of copyright, patent etc. has called for new legal norms. The legislatures have responded with new legislation on copyright, patent etc. However, the possibilities of criminal law in affording protection to these forms of property have yet to be adequately explored. Such an inquiry assumes much importance in the present context when the distinction between intellectual property and other traditional forms of property for the purposes of protection by criminal law, is getting thinner day by day.

## Chapter IV

### INTELLECTUAL PROPERTY: MEANING AND CONTENT

#### INTRODUCTION

Intellectual property, in its literal sense, means the things which emanate from the exercise of the human brain.<sup>1</sup> It is the product emerging out of the intellectual labour of a human being. It involves the visible expression of a mental conception, the work of both brain and hand.<sup>2</sup> The two chief items are the writings of authors, and inventions made by inventors. In its broadest sense, the term 'intellectual property' includes, on one level, ideas, concepts, know-how, and other creative abstractions, and on a second level, the literary, artistic or mechanical expressions that embody such abstractions.<sup>3</sup>

Just like other forms of things these have also been identified as property on the basis of the general understanding

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1. See Jeremy Phillips, Introduction to Intellectual Property Law (London: Butterworths, 1986), p.3.
2. Simonds, "Natural Right of Property in Intellectual Production", 1 Yale L.J. 16 (1891-92).
3. See John M. Conley and Robert M. Bryan, "A Unifying Theory for the Litigation of Computer Software Copyright Cases", 63 North Carolina Law Review 563, 567 (1985).

of the concept of property.<sup>4</sup> Blackstone explained the development thus:

When a man by the exertion of his rational powers has produced an original work, he seems to have clearly a right to dispose of that identical work as he pleases, and any attempt to vary the disposition he has made of it, appears to be an invasion of that right.<sup>5</sup>

The basic difference between this form of property and other forms is that, in intellectual property the focus is on the produce of the mind, and not on the product itself.<sup>6</sup> For example, in literary property (copyright) it is not the book which is termed property, but the intellectual creation, which composes ideas, conceptions, sentiments, thoughts etc. fixed in a particular form that is considered property for protection.<sup>7</sup> It is incorporeal, invisible and intangible in nature.

In the legal sense, intellectual property means a bundle of rights recognized by the legal system. The owner is given the exclusive right to enjoy this bundle of rights as a form of property. The rights usually available to an owner of

4. See generally, Eaton S. Drone, A Treatise on the Law of Property in Intellectual Productions (1879, New Jersey: Rothmans, Reprints INC, 1972). See also, Kenneth J. Vandavelde, "The New Property of the Nineteenth Century: The Development of the Modern Concept of Property", 29 Buffalo.L.Rev. 325 (1980).
5. Blackstone, Commentaries on the Law of England, Book II, Chapter 26, pp.405-06.
6. See Jeremy Phillips, op.cit., p.3.
7. Eaton S. Drone, op.cit., p.6.



corporeal property can also be enjoyed by the owner of intellectual property. Therefore the owner of intellectual property has the right to transfer, assign or bequeath this form of property. But the perpetual right available to the owner of corporeal form of property is not available to the intellectual property. The period during which the right in intellectual property can be enjoyed is limited by law. So it is always treated as a limited monopoly. Such limitation is based on public interest. The individual right of intellectual property would vanish after the expiry of the specified period. Thereafter it forms part of common property of the public. Because of the peculiar features, this form of property is recognized and protected by separate legislation. Some countries included in their constitution itself provisions for its protection.<sup>8</sup>

Traditionally only a few items were included in the category of intellectual property. At present, generally copyright, designs, patents and trade mark are classified as intellectual property. But by the development of arts, science and technology, many new items have been included in this category. The inclusion of new items calls for a re-evaluation of the basic philosophy under which the concept of intellectual

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8. United States Constitution Art.1, section 8 reads: "to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries".

property originated and developed. On an analysis of the various factors it is found that the concept needs a new theoretical backing. On its nature it calls for different treatment. Hence a separate part for dealing with intellectual property exclusively.

#### COPYRIGHT

Law relating to copyright deals with protection of rights on certain types of works resulting from the intellectual labour of human beings. Though it originated as a right to protect the intellectual labour of a man in his books, in modern times it is extended to protect the intellectual labour of a man in literary, dramatic, musical and artistic works. The reason for the development has been rightly put by Philip Wittenberg thus:

The law of literary property evolved not only from the creative impulse of man, but also from the inhibitions and prohibitions with which writing has ever been involved. From creation for pleasure and aesthetic enjoyment came the notion in acquisitive societies of payment and profit. From autocracy and despotism came prohibition and censorship. All of these commingled to give rise slowly to law governing literary property.<sup>9</sup>

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9. See Philip Wittenberg, The Law of Literary Property (New York: World Publ.Co., 1957), p.13.

Even from very early times there had been a tendency to protect intellectual creation of mankind just like other forms of property. Within the framework of the general theory<sup>10</sup> on property propounded by great theorists like Grotius, Pufendorf, Locke, Blackstone etc. writers tried to identify intellectual production of literary works also as property.<sup>11</sup> Blackstone tried to justify the inclusion of these works within the meaning of property thus:

There is still another species of property, which (if it subsists by the common law) being grounded on labour and invention, is more properly reducible to the head of occupancy than any other; since the right of occupancy itself is supposed by Mr.Locke, and many others, to be founded on the personal labour of the occupant. And this is the right which an author may be supposed to have in his own original literary compositions: so that no other person without his leave may publish or make profit of the copies.<sup>12</sup>

After examining various theories of property, Eaton S.Drone found in labour theory the justification of the concept of property in literary production. He explained:

No theory, no explanation, no consideration, has been advanced by the great writers to account for the inviolability of property in the produce of

10. For a detailed discussion on theories of property, see supra, Chaps.I and II.

11. See Eaton S.Drone, op.cit., p.3 et seq.

12. Blackstone, op.cit., pp.405, 406.

bodily labour, which does not apply with equal force and directness to property in the fruits of intellectual industry. No vital qualities have been assigned to one which are not equally inherent in the other.... In other words, neither in its origin nor in its essential qualities is literary property sui generis; but it is simply a division, a species, of general property.<sup>13</sup>

Copinger also identified property in copyright with labour theory and observed:

Nothing can with great propriety be called a man's property than the fruit of his brain. The property in any article or substance accruing to him by reason of his own mechanical labour is never denied him: the labour of his mind is no less arduous and consequently no less worthy of the protection of the law.<sup>14</sup>

Thus the justification for recognizing property in intellectual creation lies in the principle that a man cannot be denied of the fruits of his labour especially that of the brain.

"Literary property", says Eaton, "is not in the material which preserves the author's production..., but in the intellectual creation, which is composed of ideas, conceptions, sentiments, thoughts. It is in an invisible intangible creation of the mind, fixed in form and communicated to others by language".<sup>15</sup>

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13. Eaton S.Drone, op.cit., p.5. See also R.F.Whale, Copyright, Evolution, Theory and Practice (London: Longman, 1970) pp.17-27.

14. Copinger and Skone James, On Copyright, E.P.Skone James et al. (Eds.) (London: Sweet & Maxwell, 20th edn. 1980), p.4.

15. See Eaton S.Drone, op.cit., p.6.

The law relating to copyright had a chequered history. It originated not as a shield to protect authors' right but as a sword to prevent unauthorized publication of books. The concept of copyright arose as an exclusive right of the author to copy the literature produced by him. Even before the enactment of legislation the right had been recognized and protected, based on common law principles.<sup>16</sup>

Before invention of printing, copies of books were taken by hand. Consent of the author was not sought for copying nor was he paid for taking copies of the books then. The authors were also not conscious of their right.<sup>17</sup> The invention of printing enabled production of books easy and cheap, and publishers started making money out of it. This made the authors conscious of their right in copy leading to the birth of this new property right.<sup>18</sup> Another reason for the emergence of the right was the spate of publications of literature against Church and the King. Since there was no control in England over

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16. There are four decisions of Chancery Court which granted injunction protecting copyright to authors. Cited in Millar v. Taylor, (1769) 4 Burr. 2303 : 98 E.R. 201 (K.B.).

17. See Augustine Birrell, Seven Lectures on the Law and History of Copyright in Books (1899, New York: Augustus M. Kelley, Publishers, reprinted 1971), p.41 et seq. After examining the history he wrote: "It is therefore a fact of great significance that at no time during the manuscript period was any claim for author's copyright made or asserted. It is useless to say there was no need for such a claim. True it is that the books reproduced by the copyists were, for the most part, old books--either of devotion, psalters, homilies, and the like, or the classical authors; but the same is largely true at the present day; and there are no members of the genus irritabile more jealous of their rights and more envious of each other's reputation than rival editors, annotators, and compilers". Id. at 47-48.

18. Id. at 48, 49.

the press and printing, many a publication was brought out against the Church and King. In order to protect them some control on printing was introduced. The control was ensured first by Letters Patent, issued giving right to publish certain works. Later Stationers Company was formed and the sole right to publish was given to its members. The matters to be published had to be registered and copies given to the libraries.<sup>19</sup> The Star Chamber also by its decree prohibited publication without licence.<sup>20</sup> Till this period though many restrictions were imposed, there was no express provision protecting or recognizing any right of the author. It was in the Licensing Act of Charles II (1662) which was enacted when Star Chamber was abolished, for the first time that the property right of the authors was recognized.<sup>21</sup> The Act expressly prohibited the publication of a book without the consent of the author. Though the major purpose was to control printing, the restriction imposed on the press helped the authors to protect their property by way of giving or withholding consent. Commenting on this development after an analysis of various enactments, Eaton says:

It is plain, then, that the primary and chief object of all the decrees, ordinances, and acts promulgated, either by the Star Chamber or by Parliament, prior to the act of Anne, in 1710, was the regulation of the press, and the suppression of all writings obnoxious to the government or the church. But most, if not all,

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19. Id. at 56 et seq.

20. See Eaton S. Drone, op.cit., p.54.

21. Id. at 57-59; also see Augustine Birrell, op.cit., pp.64-65.

of them contained clauses recognising property in books, and providing for its protection. What the extent of this protection was, or what was the exact status of literary property, cannot be precisely determined.<sup>22</sup>

Thus the sole right of the author to take copy of his book, which was in existence by practice, was recognized, reinforced, and accepted in law while introducing restrictions on printing. Based on this, publishers used to purchase right to copy books from the authors before publishing them and kept this right as a perpetual one.<sup>23</sup>

The evil of piracy increased to a large extent when the term of Licensing Act expired. There was a hue and cry from authors, printers and book-sellers for legislative protection which resulted in the enactment of the first direct legislation in the field of copyright, 8 Anne c.19 (1709). The preamble clearly stated that the intention was to curb this unauthorized practice and to encourage literary works.<sup>24</sup> There

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22. Id. at 58.

23. See Eaton, op.cit., pp.61-68.

24. The preamble read: "Printers, book-sellers, and other persons have of late frequently taken the liberty of printing, reprinting, and publishing, or causing to be printed, reprinted, and published, books and other writings, without the consent of the authors or proprietors of such books and writings, to their very great detriment, and too often to the ruin of them and their families; and that the object of the act is to prevent such practices for the future, and for the encouragement of learned men to compose and write useful books". Quoted in Eaton, op.cit., p.69.

were many significant features of the legislation. The Act declared the author's exclusive right of copying and publishing books. For the first time the right was limited for a specific period.<sup>25</sup> The Act also introduced penal liability for violation of the right.

The questions, whether the authors had copyright in common law and if so whether it is abrogated or abridged by the statute law came up for consideration in courts. The Chancery Court in several cases<sup>26</sup> granted injunction against piracy of printed books not protected by the statute on the assumption that the copyright was perpetual in common law, and had not been taken away or abridged by the Statute of Anne. The view was approved by the King's Bench in Millar v. Taylor.<sup>27</sup> After making a thorough examination of the then existing laws--both case law and statutory provisions--majority of judges concluded that there was common law copyright in books, and it was not taken away by the Statute of Anne nor destroyed by the publication of the books.<sup>28</sup> However, the House of Lords in Donaldson v. Becket<sup>29</sup> took a contrary view.

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25. The copyright for published work was limited to 21 years and unpublished work for fourteen years from the date of first publication. If the author was still living at the end of this period, the right continued for another term of fourteen years.

26. They are Eyre v. Walker (1657), Motte v. Falkner (1735), Tonson v. Walker (1739) etc. cited in Millar v. Taylor (1769) 4 Burr. 2325; 98 E.R. 201, 228.

27. 98 E.R. 201; (1769) 4 Burr. 2325.

28. 98 E.R. 201 (K.B.). The majority constituted of Lord Mansfield, C.J. and Justices Aston and Willes, Justice Yates dissented. See for a detailed discussion, Eaton S. Drone, op.cit., pp.20-37.

29. (1774) 4 Burr.2407; 98 E.R. 257. This was an appeal brought from Court of Chancery against the injunction granted in conformity with the law laid down in Millar v. Taylor.



Though the majority held that there was common law copyright in an unpublished work<sup>30</sup>, and that was not lost by publication<sup>31</sup>, they expressed the view that the common law right after publication was taken away by the Statute of Anne.<sup>32</sup>

Lord Camden who moved the judgment of the House placed justification for limiting the copyright not on property theory but on public interest and other matters. This is clear from His Lordship's reasoning:

If there be any thing in the world common to all mankind, science and learning are in their nature public juris, and they ought to be as free and general as air or water. They forget their creator as well as their fellow-creatures, who wish to monopolize his noblest gifts and greatest benefits... Those great men, those favoured mortals, those sublime spirits, who share that ray of divinity which we call genius, are entrusted by Providence with the delegated power of imparting to their fellow creatures that instruction which heaven meant for universal benefit. They must not be niggards to the world, or hoard up for themselves the common stock....Knowledge has no value or use for the solitary owner: to be enjoyed, it must be communicated....Glory is the reward of science, and those who deserve it

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30. There were twelve judges including Lord Mansfield. But Lord Mansfield did not express any opinion. Out of eleven ten expressed the view that there was copyright.

31. Eight judges held that copyright was not lost by publication.

32. Six judges held that the right was taken away by statute, while five of them viewed that the right was not taken away. Lord Mansfield did not express any view.

scorn all meaner views. I speak not of the scribblers for bread, who tease the press with their wretched productions:.....Some authors are as careless about profit as others are rapacious of it; and what a situation would the public be in, with regard to literature, if there were no means of compelling a second impression of a useful work to be put forth, or wait till a wife and children are to be provided for by the sale of an edition! All our learning will be locked up in the hands of the Tonsons and the Lintons of the age, who will set what price upon it their avarice chooses to demand, till the public become as much their slaves as their own hackney compilers are.<sup>33</sup>

Thus the House without properly considering the concept of property in literary work as developed by the common law practice rendered the judgment basing on public interest in sharing the benefit arising out of the thoughts of authors who according to the Court had been blessed with genius by the divine power. Commenting on the decision, Eaton opined:

Contrary to right and reason, it declared that literary property may be lost by the only act--publication--which renders it useful; contrary to the intention of that body, as it had been judicially interpreted for half a century, it decided that Parliament, in legislating for the encouragement of learned men to compose and write useful books, meant to afford such encouragement by taking from authors for more than it gave to them; contrary to these and other considerations, it fixed in English jurisprudence an unjust law, which has ruled the legislatures and courts of England and America for a century.<sup>34</sup>

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33. 17 Cobb.Parl.Hist. 999, quoted in Eaton, op.cit., pp.39-40.

34. See Eaton, op.cit., p.40.

Alarmed by the judgment the publishers who purchased lot of copyright and the Universities applied to Parliament for perpetual copyright. The application by the publishers, though approved by the House of Commons, was rejected by the Lords. At the same time the Universities and other educational institutions were allowed to hold in perpetuity the copyright in books given for the advancement of learning.<sup>35</sup>

The decision of House of Lords influenced the U.S. Supreme Court and was followed in Wheaton v. Peters.<sup>36</sup> The Court also held that the copyright in the United States was creation of statute and there was no common law copyright.<sup>37</sup>

It has to be noted here that the Statute of Anne did not refer to the then existing common law remedy. The provisions in the Act dealt only with criminal remedies. So even after the decision of the House of Lords, the courts in England granted civil remedies as per common law against piracy of books which were not registered, within the statutory period.<sup>38</sup>

35. Id. at 73.

36. (1834) 8 Peters 591; 33 U.S. 591 (1834).

37. 33 U.S. 591, 661-662, per, M'Lean, J. for the majority. Justices Thomson and Baldwin dissented and expressed that there was common law copyright following the argument of Lord Mansfield, Blackstone etc. based on property theory, and also held that it was not taken away by the statute. 33 U.S. 591, 669 et seq. See for an elaborate discussion, Eaton, op.cit., p.43 et seq.

38. See for example, Beckford v. Hood, (1798) 7 Term Report 620: 101 F.R. 1164.

Another attempt to regain the perpetual copyright was made before Parliament of Queen Victoria under the leadership of Sergeant Talfourd when the Copyright Act was placed for reconsideration in 1837. Sergeant Talfourd, supported by persons like Wordsworth, Sir Walter Scott, Professor Wilson, Charles Dickens, Robert Browning etc. argued for perpetual copyright based on property theory and its need for encouraging creation of literary work.<sup>39</sup> The emphatic argument advanced by them was countered by Lord Macaulay basing on Lord Camden's and Justice Yate's reasonings. Without basing his arguments on property concept, Lord Macaulay argued for limiting the right and expressed the principle of copyright thus:

It is a tax on readers for the purpose of giving a bounty to writers. The tax is an exceedingly bad one; it is a tax on one of the most innocent and most salutary human pleasures, and never let us forget, that a tax on innocent pleasures is a premium on vicious pleasures.<sup>40</sup>

The Copyright Act of 1842 was passed by the Victorian Parliament extending the limit of copyright even after the lifetime of the author. It is, however, clear that all the trappings of the concept of property in common law have not been given to the concept of copyright. The emphasis on the public interest involved in literary works diluted the author's right in it.

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39. For details, see Eaton, op.cit., pp.74-76.

40. Lady Trevelyan, (Ed.), 8 Macaulay's Works, p.200, quoted in Eaton, op.cit., p.82.

Viewed in this background the concept of copyright seems to be the result of a compromise between the individual interest and the public interest.

Mr. Eaton S. Drone criticized the approach of the judiciary as well as the legislature to be against justice and reason. He argued that the common law property existed before the Statute of Anne, did not lose either by way of publication or by the provisions of the Statute of Anne. Based on the theories and principles of property he argued that the property right could be lost either by abandonment or contract.<sup>41</sup> He reasoned that the act of publication was neither an act of abandonment nor a contract to give property right to the public. Similarly, relying on the judgment of Mansfield in Millar v. Taylor, he argued that there was no express provision in the Statute of Anne taking away the common law copyright. Since according to him property could be taken away by government only on the basis of concept of eminent domain and it had not been invoked in the case of copyright, the decision of House of Lords was bad law.<sup>42</sup>

With a view to clearing confusion express provision was included in the Copyright Act of 1911 declaring copyright

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41. Eaton, op.cit., pp.9-16.

42. Id. at 16-20.

a statutory right and abolishing the common law right.<sup>43</sup> Thus the law of copyright has now been converted into absolutely a statutory right.<sup>44</sup>

It is evident that the concept of copyright did emerge as a right to copy the books written by an author. The Statute of Anne, which is the first legislation concerning copyright also focused on books and the right to copy it. But by the frequent changes in the society many more items were given copyright and many more rights were embraced by the concept of copyright. Thus engravings<sup>45</sup>, sculptures<sup>46</sup>, fine arts<sup>47</sup>, dramas<sup>48</sup>, etc. were given copyright by separate statutes. All these legislation were codified and put in the Copyright Act, 1911. Adding more items and more rights the law in England was finally revised and codified in Copyright Act of 1956.

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43. Section 31 of Copyright Act, 1911 read: "Abrogation of Common law rights:- No person shall be entitled to copyright or any similar right in any literary, dramatic, musical, or artistic work, whether published or unpublished, otherwise than under and in accordance with the provisions of this Act or of any other statutory enactment for the time being in force, but nothing in this section shall be construed as abrogating any right or jurisdiction to restrain a breach of trust or confidence".

44. In this context it is interesting to note that in spite of these provisions some courts in India still hold the view that there is common law right for authors. This seems to be a wrong interpretation inasmuch as even in England there is no common law right of copyright. See *infra* n.52.

45. Engraving Copyright Act, 1734 (8 Geo. 2, c.13).

46. Sculpture Copyright Act, 1814 (54 Geo. 3, c.56).

47. Fine Arts Copyright Act, 1862.

48. Dramatic Copyright Act, 1833 commonly known as Bulwer Lytton's Act (3 and 4 Will. 4, c.15).

In India the first legislation on copyright was enacted in 1842--Indian Copyright Act, 1847 (Act XX of 1847).<sup>49</sup> This was on the lines of the English Copyright Act, 1842 enacted by the Victorian Parliament. The provisions of both Acts were in force till the Copyright Act, 1911 was enacted.<sup>50</sup> The English Act of 1911 was also extended to India and necessary modification for its application was made by the Indian Copyright Act, 1914. Corresponding to the changes introduced in England, Indian law also has been changed and reenacted in 1957. The present law relating to copyright is governed by the Indian Copyright Act, 1957. The Act in clear terms explains the meaning and content of copyright. It is specifically stated in the Act that copyright is available only according to the provisions of the Act or any law in force in connection with it.<sup>51</sup> This makes it clear that copyright is a statutory right. In other words, common law right is not available in India. Since we followed the statutory provisions in English Acts the law in force was the law of England. Without examining the position of law, the courts in some cases<sup>52</sup> held that common law right was available to authors. The decisions are wrong, being per incurium. Even in England no such common law right exists.

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49. It is not clear whether there was any law or custom before 1847 governing copyright in India.

50. See Mac Millan v. Khan Bahadur Shamsul Ulama M.Zaka, (1895) I.L.R. 19 Bom. 557.

51. See section 16 of the Copyright Act, 1957.

52. See Nav Sahitya Prakash v. Anand Kumar, A.I.R. 1981 All. 200, 204; Madhavan v. S.K.Nayar, 1987 (2) K.L.T. 47, 55; Muppala Ranganayekamma v. Smt.K.Ramalakshmi, 1986 Cri.L.J. 522, 524.

As per the Act, copyright subsists only in

(a) original literary, dramatic, musical and artistic works;  
(b) cinematograph films and (c) records.<sup>53</sup> To become entitled to copyright in published works, the works must be first published outside India. In case of works first published outside India, the author must on the date of such publication, and in case the author was dead at that date, be a citizen, to be entitled for copyright.<sup>54</sup>

In case of unpublished work, other than architectural work of art, the author at the date of making the work must be a citizen or domiciled in India to get copyright.<sup>55</sup> But in case of an architectural work of art, the work must locate in India, and must have an artistic character and design.<sup>56</sup>

The Act also made it clear that the copyright shall not subsist if the cinematograph film or record is made infringing any literary, dramatic or musical work. The copyright in cinematograph film or record is independent from the copyright of the work from which it was made.<sup>57</sup>

According to the definition in the Act, 'literary work' includes tables and compilations, and computer programmes,

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53. Section 13(1).  
54. Section 13(2)(i).  
55. Section 13(2)(ii).  
56. Section 13(2)(iii) and (2)(5).  
57. Section 13(3) and (4).



that is to say, programmes recorded on any disc, tape, perforated media or other information storage device, which if fed into or located in a computer or computer based equipment is capable of reproducing any information.<sup>58</sup> It is an inclusive definition. The judiciary has in many cases interpreted the term literary work widely to embrace many items.

The English Court in University of London Press Ltd. v. University Tutorial Press Ltd.<sup>59</sup> examined the meaning of the term 'literary work'. Here the Court considered whether the question papers set for examination could be treated a literary work. Justice Peterson explained the term literary work thus:

It may be difficult to define 'literary work' as used in this Act, but it seems to be plain that it is not confined to 'literary work' in the sense in which that phrase is applied, for instance, to Meredith's novels and the writings of Robert Louis Stevenson. In speaking of such writings as literary works, one thinks of the quality the style, and the literary finish which exhibit....In my view the words 'literary work' cover work which is expressed in print or writing, irrespective of the question whether the quality or style is high. The word 'literary' seems to be used in a sense somewhat similar to the use of the word 'literature' in political or electioneering literature and refers to written or printed matter.<sup>60</sup>

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58. Section 2(0). The computer programme is included in the definition by the Copyright (Amendment) Act, 1984.

59. [1916] 2 Ch. 601.

60. Id. at 608.

The broad interpretation was followed in India also. The Patna High Court in Jagdish Prasad Gupta v. Parmeshwar Prasad Singh<sup>61</sup> and the Allahabad High Court in Agarwala Publishing House, Khurja v. Board of High School and Intermediate Education, U.P.<sup>62</sup> following the English interpretation, held that question papers set for examination were literary works.

The courts have also examined the meaning of the term 'original' used in the definition. The English Court in University of London Press Ltd. v. University Tutorial Press Ltd.<sup>63</sup> observed:

The word 'original' does not in this connection mean that the work must be the expression of original or inventive thought. Copyright Acts are not concerned with the originality of ideas, but with the expression of thought, and, in the case of 'literary work', with the expression of thought in print or writing. The originality which is required relates to the expression of the thought. But the Act does not require that the expression must be in an original or novel form, but that the work must not be copied from another work-- that it should originate from the author.<sup>64</sup>

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61. A.I.R. 1966 Pat. 33.

62. A.I.R. 1967 All. 91. See also Shyam Lal Paharia v. Gaya Prasad Gupta 'Rasal', A.I.R. 1971 All. 192; Mac Millan Co. v. K.J.Cooper, A.I.R. 1924 P.C. 75; Satsang v. Kiran Chandra Mukhopadhyay, A.I.R. 1972 Cal. 533 etc.

63. [1916] 2 Ch. 601.

64. Id. at 608-609.

This shows that the term is used in a liberal sense. It is not on the originality of ideas copyright stresses, but on the originality of expression of thoughts.<sup>65</sup> This was also followed by the Indian Courts.<sup>66</sup> The test to be applied was stated by the M.P. High Court in M/s. Mishra Bandhu Karyalaya v. Shivratn Lal Koshal<sup>67</sup> thus:

The real test in adjudging the originality of a work is whether it involved any skill, labour and knowledge of the author and that being fulfilled, he could be 'protected by law', and no one else was permitted to steal or appropriate to himself the result of his labour, skill and learning.<sup>68</sup>

Thus it is clear that to become a literary work the work need not have new ideas but must have a new way of presentation. It is also clear that what is protected by the Act is the form in which the ideas are expressed and not the idea itself.<sup>69</sup>

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65. See generally, Leon R. Yankwich, "Originality in the Law of Intellectual Property" in The Los Angeles Copyright Society et al (Ed.), Copyright and Related Topics: A Choice of Articles, (Los Angeles: University of Cal. Press, 1964), p.466.
66. See Mac Millan and Co. v. K.J. Cooper, A.I.R. 1924 P.C. 75; Agarwala Publishing House, Khurja v. Board of High School and Intermediate Education, U.P., A.I.R. 1967 All. 91; Govindan v. Gopalakrishnan Kone, A.I.R. 1955 Mad. 391; C. Cunniah & Co. v. Balraj & Co., A.I.R. 1961 Mad. 111.
67. A.I.R. 1970 M.P. 261.
68. Id. at 267, per, A.P. Sen, J.
69. See R.G. Anand v. M/s. Delux Films, A.I.R. 1978 S.C. 1613; Gopal Das v. Jagannath Prasad, A.I.R. 1938 All. 266; Braithwaite v. Trustees of the Port of Madras, (1956) 2 M.L.J. 486; Pike v. Nicholas, (1869) 5 Ch.App. Cases 251; Baker v. Selden, 101 U.S. 99 (1879); Mazer v. Stein, 347 U.S. 201 (1953) etc.

In case of a work published by the author in his lifetime the copyright will subsist till fifty years after the death of the author. In other cases the period is limited to fifty years from date of publication.<sup>70</sup> The violation of the above rights are termed infringement of copyright. Both civil and criminal remedies are prescribed in the Act.<sup>71</sup>

A new item recently introduced into the category of literary works is computer programmes. A computer system may be divided into two parts consisting of hardware and software. Hardware usually constitutes the "mechanical, magnetic, electronic and electrical devices" of a computer.<sup>72</sup> This consists of a Central Processing Unit (CPU)<sup>73</sup>, the memory units<sup>74</sup> and the input-output devices.<sup>75</sup> The term software is used to describe all of the different types of computer programmes. Computer programmes are basically divided into 'application programmes'

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70. See sections 22-29 of the Copyright Act, 1957.

71. See Chapter V.

72. See Jeff Maynard, Dictionary of Data Processing (London: Butterworths, 2nd edn., 1981), p.86.

73. The CPU is the integrated circuit, or microchip, that executes programmes as instructed by the programmer or the user. Id. at 27.

74. Memory device contains the various computer programmes and data to be processed by the computer and are stored in magnetic tapes, disks, and microchips. The computer operating system programme also is stored and is known as Read Only Memory (ROM), see Apple Computer Inc. v. Franklin Computer Co., 714 F.2d 1240 (3d. Cir. 1983).

75. This is the media through which the user and computer communicate. Consists of Card readers, Keyboards, printers and cathode ray terminals. See A.Ralston and C.Meek (Eds.), Encyclopedia of Computer Science (New York: Van Nostrand Reinhold Co., 1976), pp.666-707.

and 'operating system programmes'. Application programmes are designed to do specific tasks to be executed through the computer and the operating system programmes are used to manage the internal functions of the computer to facilitate use of application programme.<sup>76</sup> These two types of programmes can be written in three levels of computer language--high level, lower level and lowest level. High level language, which is commonly used, are BASIC, COBOL, FORTRAN etc. This consists of English words and symbols and are easy to learn.<sup>77</sup> Lower level language is assembly language which consists of alphanumeric labels. This language is also easily understandable by programmer. Statements of these two languages are referred to as written in 'source code'.<sup>78</sup> The third, lowest level, language is the machine language. This is a binary language using two symbols '0' and '1' called 'bits'. This is the only language which can be followed by the machine but very difficult for the programmer to utilize. Statements in machine language are referred to as written in 'object code'.<sup>79</sup>

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76. See Apple Computer Inc. v. Franklin Computer Corp., 714 F.2d 1240 (3d. Cir. 1983). Also see Wesley M.Lang, "The Semiconductor Chip Protection Act: A New Weapon in the War against Computer Software Piracy", (1986) Utah Law Review 417, 422 et seq.

77. Ibid.

78. Ibid. See also Christopher M.Mislow, "Computer Microcode: Testing the Limits of Software Copyrightability", 65 Boston University Law Review 735, 741-744 (1985).

79. Ibid. See also John M.Conley and Robert M.Beyan, "A Unifying Theory for the Litigation of Computer Software Copyright Cases", 63 North Carolina Law Rev. 563, 564-67 (1985).

Computer programmes are usually written in source code by the programmer. Since programmes in source code is not capable of being followed by the computer this is usually translated into object code by another programme for the use of computer. If it is written in assembly language a programme called 'assembler', and if written in high level language-- BASIC, COBOL etc.--a programme called 'compiler or interpreter' is used to translate it into object code.<sup>80</sup>

To be used in a computer, object code must be available in a memory device such as floppy disk<sup>81</sup> or a 'read only memory' (ROM). The ROM is an internal permanent memory device consisting of a semiconductor chip which is incorporated into the circuitry of the computer.<sup>82</sup> When the computer programme written in the source code is fed into the computer the assembler or compiler, as the case may be, translate this into object code. By using the object code computer can be instructed to perform the particular task and the result can be obtained.

The important question before us is whether these two--source code and object code--must be treated as computer

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80. See J.Boyce, Microprocessor and Microcomputer Basics (New Jersey: Prentice Hall, 1979) p.266. See also 'Note', "Copyright Protection of Computer Program Object Code", 96 Harv.L.Rev. 1725, 1724-25 (1983).

81. A 'floppy disk' is a flexible magnetic disk of Nylon Plastic usually 5.25 or 8 inches in diameter. Information is stored on the disk in concentric tracks of tiny magnetized regions. See "Note", 96 Harv.L.Rev. 1725.

82. See Apple Computer Inc. v. Franklin Computer Corp., 714 F.2d 1240 (3d. cir. 1983).

programme for affording legal protection as an intellectual property. It is also doubtful whether computer operating system programme is covered by the copyright law. It is now well accepted that copyright law is the best media to protect the computer programmes.<sup>83</sup> It is to be noted here that the WIPO has not taken a decision as to the best form of protection of computer software since the conceptual basis was not clear.<sup>84</sup> There is no difference of opinion for treating source code as a computer programme for affording protection of copyright law.<sup>85</sup> But there have been considerable doubt as to whether object code can also be treated as a computer programme for affording protection.

Copyright law protects only original work put in a particular form. The basic doubt has been whether object code is an original work written in a particular form. Some authors expressed the view that object code must be protected as a

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83. See Report of the National Commission on New Technological Uses of Copyrighted Works (CONTU) (1979 United States) quoted in Apple Computer Inc. v. Franklin Computer Corp., 714 F.2d 1240 (3d. Cir. 1983). See also White Paper on Intellectual Property and Innovation, Cmnd. 9712 H.M.S.O. April 1986, quoted in David I. Bainbridge, "Computers and Copyright" (Reports of Committees) 50 M.L.R. 202 (1987).
84. See W.I.P.O.: Legal Protection of Computer Software, 17 J. World Trade Law, 537 (1983), quoted in 7 U.N.S.W.L.J. 161 (1984).
85. For a discussion of the species of intellectual property in computer programme, see John M. Conley and Robert M. Bryan, op.cit., pp.567-569.

copyright subject matter.<sup>86</sup> The American Court of Appeal in Apple Computer Inc. v. Franklin Computer Corp.<sup>87</sup> categorically observed that the object code constituted a computer programme and was covered by the provisions of Copyright Act. As to the question whether operating system programmes are an appropriate subject of copyright, the Court opined:

Both types of programs instruct the computer to do something. Therefore, it should make no difference for purpose of S.102(b) whether these instructions tell the computer to help prepare an income tax return (the task of an application program) or to translate a high level language program from source code into its binary language object code form.... Since it is only the instructions which are protected, a 'process' is no more involved because the instructions in an operating system program may be used to activate the operation of the computer than it would be if instructions were written in ordinary English in a manual which described the necessary steps to activate an intricate complicated machine. There is, therefore, no reason to afford any less copyright protection to the instructions in an operating system program than to the instruction in an application program.<sup>88</sup>

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86. Note, "Copyright Protection of Computer Program Object Code", 96 Harv.L.Rev. 1725 (1983). Cer. denied, 104 S.Ct. 690 (1984).

87. 714 F.2d 1240 (3d.Cir. 1983)

In this case Apple, one of the computer industry leaders, manufactured and marketed personal computers. Latest manufacturer was Apple II computers. Franklin the defendant, manufactured and sold the ACE 100 personal computer. The ACE 100 was designed to be 'Apple Compatible' so that peripheral equipment and software developed for use with the Apple II computer could be used in conjunction with the ACE 100. It was alleged by Apple that Franklin copied the Apple's operating system computer programme to achieve this. See also, Williams Electronics Inc. v. Artic International, Inc., 685 F.2d 870 (3d.Cir.1982); Apple Computer Inc. v. Formula International Inc., 725 F.2d 521 (3d.Cir.1984).

88. Ibid.



Some authors criticized<sup>89</sup> the decision while others expressed the view that the decision was the correct exposition of law.<sup>90</sup> To overcome the difficulty and to afford more protection to object code, Congress recently came out with a separate legislation called Semiconductor Chip Protection Act, 1984. The Act extends a special form of protection to one device that is internal to the computer technologies--the semiconductor chip. The 'mask work' fixed in a semiconductor chip product is protected for ten ye rs from the date of registration or on its use.<sup>91</sup>

Recently the Australian High Court took a different view. In Computer Edge Pty.Ltd. v. Apple Computer Inc.<sup>92</sup> it was held that programmes in the object code were not covered by the copyright law. Negating the argument that object code programmes

89. See Andrew G.Rodau, "Protecting Computer Software: After Apple Computer Inc. v. Franklin Computer Corp., 714 F.2d 1240 (3d. Cir. 1983), Does Copyright Provide the Best Protection?", 57 Temple Law Quarterly 527 (1984).

90. See Christopher M.Mislow, op.cit.

91. For a critical evaluation of the Act, see Wesley M.Lang, "The Semiconductor Chip Protection Act: A New Weapon in the War Against Computer Software Piracy", (1986) Utha Law Review 417; Mitchell S.Eitel, "Microcode Copyright and the Protection of Microprocessors Under Current Intellectual Property Law", 21 Columbia Journal of Law and Social Problems 53 (1987).

92. (1986) 60 A.L.J.R. 313. The appellants imported and sold in Australia 'Wombat' computers. The respondents made, sold and distributed 'Apple' computers. 'Wombat' computers were compatible with 'Apple' computers, could use their programmes, and were so advertised. Apple computer filed a suit for infringement of their copyright. This was filed before the 1984 Amendment Act, which included computer programme also as literary work. The trial court refused injunction. On appeal, the Federal Court reversed and granted injunction. Hence the appeal to High Court.

embodied in the ROM's were literary works, Chief Justice Gibbs reasoned:

As has been shown, these programmes existed in the form of a sequence of electrical impulses, or possibly in the pattern of circuits that when activated generated those electrical impulses. On any view they were not expressed in writing or print. Although the electrical impulses could be represented by words or figures, the impulses themselves did not represent or reproduce any words and figures. They were not visible or otherwise perceptible, and they were not, and were not intended to be, capable by themselves of conveying a meaning which could be understood by human beings. Obviously, the patterns of the circuits in the ROM's also did not represent or reproduce any words or figures, and were incapable of conveying any meaning. It is true that the object programmes might have been printed out in binary or hexadecimal form, but the question whether any such written expression of the programmes would have been a literary work is not the question that now falls for decision. We are concerned with the object programmes embodied in the ROM's and it seems clearly to follow from the cases already cited, which decided that a literary work is a work expressed in print or writing, that they were not literary works.<sup>93</sup>

The majority also opined that the object code was not the adoption of the programme in source code.<sup>94</sup> The decision was

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93. *Id.* at 316. Brennan and Deane, JJ. concurred. But Manson and Wilson, JJ. dissented. For critical view of the case, see Jill McKeough, "Semiconductor Chip Protection: Copyright or *Sui Generis*?", 9 *U.N.S.W.L.J.* 101 (1986).

94. (1986) 60 *A.L.J.R.* 313, 317, 326.

based on the law of copyright in Australia before the 1984 Amendment. By the 1984 Amendment computer programme also has been included as a literary work. The definition of computer programme makes it clear that programmes in object code is also protected.<sup>95</sup>

In England the Whitford Report on the Law of Copyright and Designs (1977) and the Green Paper on "Reform of the Law Relating to Copyright, Design and Performers Protection" recommended protection of computer software. To fulfil this, Copyright (Computer Software) Amendment Act, 1985 was brought into force affording protection to computer programmes. The Act included computer programmes as literary work.<sup>96</sup> The term computer programme has not been defined. According to the Act, "a version of the programme in which it is converted into or out of a computer language or code, or into a different computer language or code is an adaptation of the programme".<sup>97</sup> It appears that by this provision the programme in object code will also get the protection of copyright law in England.

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95. For a critical evaluation, see Steven Stern, "Computer Software Protection After the 1984 Copyright Statutory Amendments", 60 *A.L.J.* 333 (1986). The definition of computer programme reads: "Computer program means an expression, in any language, code or notation, of a set of instructions (whether with or without related information) intended, either directly or after either or both of the following: (a) conversion to another language, code or notation; (b) reproduction in a different material form, to cause a device having digital information processing capabilities to perform a particular function". See section 3(f) of Copyright Amendment Act, 1984, quoted in Steven Stern, *op.cit.*, p.333.

96. See Copyright (Computer Software) Amendment Act, 1985, section 1.

97. *Id.*, section 2.

It is in this context that one has to examine whether the meaning given to computer programme in Indian Copyright Act takes in all forms of computer programmes. Section 2(0) of Copyright Act explains computer programme as follows:

Programmes recorded on any disc, tape, perforated media or other information storage device, which, if fed into or located in a computer or computer based equipment is capable of reproducing any information.<sup>98</sup>

The Act does not contain a definition of computer programme. It is clear that all programmes recorded in any information storage device is entitled to protection if it can, on being fed into or located in a computer, reproduce any information. Thus it appears that the object code recorded in floppy disk or ROM is covered by the Act. It is also felt that both application programme and operating system programme are protected. This is so inasmuch as the programme need only be capable of reproducing an information when fed into or located in a computer. However, since the Act did not define computer programme and has not made explicit whether all the programmes form part of the term 'computer programme', the courts may interpret the term narrowly and deny protection to operating

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98. See section 2(0) of the Indian Copyright Act, 1957.

system programmes on the ground that they are used for the working of hardware or they are part of the hardware.

Apart from the meaning of the term computer programme, there is no other provision in the Act designed to protect copyright. It is true that the provisions applicable to literary works are applicable to computer programmes. Considering the special nature of computer programme, it appears that these provisions are inadequate to afford effective protection. Case law is yet to come in this area. The experience in other jurisdictions shows that copyright law alone may not afford adequate protection to all forms of computer programmes.<sup>99</sup>

Other items included and protected by the Act in the first category are dramatic work, musical works and artistic works. Dramatic work is defined to "include any piece of recitation, choreographic work or entertainment in dumb show, the scenic arrangement or acting form of which is fixed in writing or otherwise but does not include a cinematograph film."<sup>100</sup> This is also an inclusive definition.

'Musical work' according to the Act "means any combination of melody and harmony or either of them, printed, reduced to writing or otherwise graphically produced or

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99. For details, see Chapter V.

100. Section 2(h).

reproduced."<sup>101</sup> And 'artistic work'<sup>102</sup> means "(i) a painting, a sculpture, a drawing (including a diagram, map, chart or plan), an engraving<sup>103</sup> or a photograph<sup>104</sup>, whether or not any such work possess artistic quality; (ii) an architectural work of art<sup>105</sup>; and (iii) any other work of artistic craftsmanship".

The definition of the first category thus seems to be very wide. Almost all types of works connected with writing and art seems to have been included in the definition so as to afford copyright.

The second category in which copyright subsists is cinematograph films. This is defined to include "the sound track, if any, and 'cinematograph' shall be construed as including any work produced by any process analogous to cinematography"<sup>106</sup>. An explanation was added to the definition in 1984 to include video films also. The explanation runs as follows:  
 "For the purpose of this clause, 'video films' shall also be

101. Section 2(p).

102. Section 2(c).

103. Section 2(i) speaks: "'engravings' include etching, lithographs, wood-cuts, prints and other similar works, not being photographs".

104. Section 2(s) reads: "'Photograph' includes photo-lithograph and any works produced by any process analogous to photography but does not include any part of a cinematograph film".

105. Section 2(b) reads: "'architectural work of art' means any building or structure having an artistic character or design, or any model for such building or structure".

106. Section 2(f).

deemed to be work produced by a process analogous to cinematography".<sup>107</sup> Thus cinematograph films include video films.

'Records' are the third and last category for which copyright subsists. This "means any disc, tape, perforated roll or other device in which sounds are embodied so as to be capable of being reproduced therefrom, other than a sound track associated with a cinematograph film".<sup>108</sup> Copyright is available only to the items which fall in the above mentioned categories.

An interesting and important question as to whether the performance of a cine artiste in film is protected by the copyright law came before the Bombay High Court for consideration in M/s. Fortune Films International v. Dev Anand.<sup>109</sup> Dev Anand, a cine artiste, had acted in a Hindi film, "Darling Darling" produced by the appellants. As per the agreement a remuneration of about Rs.7,00,000 had to be paid to the artiste before the release of the film in certain specified territories. It was also stated in the agreement that the copyright in his work will vest with him till the amount was paid. The film was

107. Inserted by 1984 Amendment Act. Before introducing the amendment, some of the High Courts had interpreted the term 'cinematograph' in the Cinema Regulation Act to include video films. See e.g. Restaurant Lee v. State of M.P., A.I.R. 1983 M.P. 146; Dineshkumar Hanuman Prasad Tiwari v. State of Maharashtra, A.I.R. 1984 Bom. 34; Entertaining Enterprises v. State of Tamil Nadu, A.I.R. 1984 Mad. 278.

108. Section 2(x).

109. A.I.R. 1979 Bom. 17.

released before payment of the amount. The plaintiff obtained an injunction restraining the producer from releasing the film, invoking the provisions of Copyright Act. This was challenged before the High Court. It was contended by the appellants that there was no copyright in the performance of an artist in film inasmuch as it was not a 'work' as per the Copyright Act, and so was not entitled to an injunction. On the other hand, on behalf of the plaintiff it was argued that the performance of an actor was covered by the definition of 'artistic work' or 'dramatic work' in the Copyright Act. It was also contended that a cinematograph film would include portions of the film or components of the film, and an artistic's work in the film must be regarded as a component or a part of the film which would be entitled to protection falling within the definition of 'work'.<sup>110</sup>

After examining the definitions of the terms 'artistic work', 'author', 'cinematograph film', 'dramatic work', 'performance' and 'work', Justice Desai concluded that performance of an artiste has not been recognized and included as a right in the Copyright Act.<sup>111</sup> As to the inclusion of the right of performance of the cine artiste within the definition of cinematograph film, Justice Desai observed:



entire film may cover portions of the film in the sense that the owner of the copyright in the film will be entitled to the right in portions of the film; but this idea or concept cannot be extended to encompass an idea that there would be one owner of the cinematograph film and different owners of portions thereof in the sense of performers who have collectively played roles in the motion picture.<sup>112</sup>

The Court further observed that since the performance of an artiste did not fall in the definition of artistic work, dramatic work or cinematograph film and the Copyright Act did not recognize it as a 'work' within the meaning of the Act.<sup>113</sup>

An analysis of the reasoning of the decision makes it clear that the opinion of the Court is in conformity with the present scheme of the Copyright Act. It is true that the present concept of copyright as reflected in the legislation did not envisage the protection of the performance of an artiste. But the question as to whether law has to recognize and protect such rights has necessarily to be gone into.

In this context it is worth mentioning the observation of Justice V.R.Krishna Iyer, though obiter, as to the rights of a singer, in Indian Performing Right Society v. Eastern India Motion Picture Association.<sup>114</sup> After examining

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112. Id. at 24.

113. Ibid.

114. A.I.R. 1977 S.C. 1443.

the copyright in musical work the learned Judge opined:

This means that the composer alone has copyright in a musical work. The singer has none. This disentitlement of the musician or group of musical artists to copyright is un-Indian, because the major attraction which lends monetary value to a musical performance is not the music maker, so much as the musician. Perhaps, both deserve to be recognised by the copyright law. I make this observation only because art in one sense depends on the ethos and the esthetic best of a people, and while universal protection of intellectual and esthetic property of creators of 'work' is an international obligation, each country in its law must protect such rights wherever originality is contributed. So viewed, apart from the music composer, the singer must be conferred a right. Of course, law-making is the province of Parliament, but the court must communicate to the law-maker such infirmities as exist in the law extant.<sup>115</sup>

This adds more strength and vitality to the demand for protection of performer's right in arts. It cannot be gainsaid that there is intellectual labour or creation in the performance of artistes. It is equally true that, that alone is not capable of producing the work of art. If the philosophy of copyright is the protection of intellectual labour of individual, and the public interest, the rights of the artiste in artistic works cannot be brushed aside on the ground that the present legislation is not wide enough to accommodate them. Either

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115. Id. at 1453-54.

by including a new head of right called 'performer's right' or by enacting a separate legislation their rights must be protected.

In England though the present Copyright Act is silent about these rights, the Dramatic and Musical Performer's Protection Act, 1958 takes care of the right of performers. The Act was primarily enacted for affording protection through criminal law. However, the judiciary has invoked the provisions to extend to civil remedies also.<sup>116</sup> The recent trend in England is to afford, more protection to the rights of performers' by treating their right as a separate category.<sup>117</sup>

An interesting question as to the copyright of a cartoonist in his cartoons came up before the Kerala High Court in V.T.Thomas v. Malayala Manorama Co.Ltd.<sup>118</sup> Here V.T.Thomas, popularly known as Toms, had been publishing a cartoon series entitled "Boban and Molly" through the cartoon pages of the weekly named Malayala Manorama owned and published by the respondent. He started publishing it in the weekly

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116. See Ex Parte Inland Records Ltd., [1978] Ch. 122; Lonrho Ltd. v. Shell Petroleum Co. Ltd. (No.2), [1982] A.C. 173; R.C.A. Corporation v. Pollard, [1983] Ch. 135; Rickless and others v. United Artists Corporation and others, [1987] 2 W.L.R. 945 (C.A.).

117. See White Paper on Intellectual Property and Innovation (London: H.M.S.O., Cmd. 9712 April 1986). See also Jeremy Philips, Introduction to Intellectual Property Law (London: Butterworths, 1986), pp.187-190 and Addendum to preface.

118. 1988 (1) K.L.T. 433.

from 1957 onwards. To start with the remuneration was for each piece. Later, he was appointed sub-editor of the weekly to draw "Boban and Molly" every week. By its continuous publication the series and the main characters in the series attained much popularity among the readers. Toms retired on the 30th of June 1987. However, the weekly continued the publication of the cartoon page entitled "Boban and Molly" by engaging some other cartoonist. Both Toms and Manorama had published separate comic books by the name "Toms Comics" and "Manorama Comics" respectively incorporating the pieces of cartoon already published in the weekly.

Mr. Toms after his retirement joined another publication Kala Kaumudi and started publishing the cartoon, "Boban and Molly" in it. Aggrieved by this, the respondent obtained ex parte interim injunction against Toms and Kala Kaumudi preventing them from publishing the cartoon. On appeal, the High Court examined the question whether the respondent had the copyright in the cartoon under section 17(c)<sup>119</sup> of the Copyright Act, and

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119. Section 17 reads: "Subject to the provisions of this Act, the author of a work shall be the first owner of the copyright therein: Provided that--  
 (a)  
 (b) ....  
 (c) in the case of a work made in the course of the author's employment under a contract of service or apprenticeship, to which clause (a) or clause (b) does not apply, the employer shall, in the absence of any agreement to the contrary, be the first owner of the copyright therein".

whether Mr. Toms has the right to continue the publication of the cartoon in Kala Kaumudi.<sup>120</sup> It was argued on behalf of the respondent that as per section 17(c), it was the 'author' of the cartoon and by virtue of its interpretation it continued to be the author even as regards the future cartoons based on "Eoban and Molly".

After examining section 17 and the definition of 'author' in section 2(d)<sup>121</sup> the Court concluded that the appellant was the author of the cartoon characters "Boban and Molly", and he had copyright in it. Justice Sukumaran reasoned:

Toms is the person who clothes the idea in form. He is not a mere shorthand writer transcribing an author's stenographed words. Toms is the person who impregnates an idea; one who actually executes a design. It is Tom's hands which fix the picture upon the paper. Toms is therefore the author. In a sense, his authorship of the content and form of the cartoon series way back in 1957 (at a time when he was not the employee of Manorama as is inferable from paragraph 21 of the plaint itself) ordinarily entitles him to the copyright.<sup>122</sup>

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120. The Court did not inquire the rights of cartoons already published, and no interim order was passed in that respect.

121. Section 2(d) reads: "Author means,-- (i) in relation to a literary or dramatic work, the author of the work; (ii) in relation to a musical work, the composer; (iii) in relation to an artistic work other than a photograph, the artist; (iv) in relation to a photograph, the person taking the photograph; (v) in relation to a cinematograph film, the owner of the film at the time of its completion; and (vi) in relation to a record, the owner of the original plate from which the record is made, at the time of the making of the plate;...."

122. 1988 (1) K.L.T. 433, 436.

The Court said that section 17(c) postulated only artistic work made by the employee while he was in the course of employment, and added that by the termination of such employment, the application of section 17(c) would also come to an end. Court concluded that the respondent had no arguable case as to the future artistic productions of the appellant. As to the right of the appellant, Court observed:

It would then follow that as regards the future productions of Toms, there is no inhibition arising out of the statutory sanction under S.17(c). He is free to draw. He is independent to take his brush and draw the lines and create the figures. He can give life to his characters as he wishes; and he can present them in such media as he prefers.<sup>123</sup>

Based on this reasoning the Court stayed the effect of order passed by the lower court precluding Toms from drawing the cartoon series and preventing the publishers Kala Kaumudi from publishing it.

In arriving at this conclusion it seems that the Court understood the term cartoon as a piece depicting an episode with the main characters. There may be several such pieces. The cartoonist has copyright in such pieces drawn by him using the regular characters. It also seems to be the reasoning that by virtue of section 17(c) of the Copyright Act, the cartoonist's

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123. Ibid.

copyright in the pieces he drew, while in service, would stand transferred to the employer. Since the cartoonist retired, the Court concluded that the cartoonist could have the copyright in the pieces which he may draw in future. In this view of the matter it may be doubted whether Toms could retain his copyright inasmuch as it could be argued that he had contracted out his copyright.

Indeed, the Court has not ventured to treat, the series as such and the different pieces using the main characters in different episodes, as two distinct items for the purpose of according copyright. If the case was looked at in that perspective it is felt that, it would have helped the court to conclude that the copyright of the pieces depicting different episodes drawn by the cartoonist as an employee would vest with the employer, whereas the series entitled "Boban and Molly" would remain with the author who has in fact floated the idea of such a series for the first time and had depicted and named the main characters. A question may be raised as to the nature of the cartoonist's proprietary interest in the series as such. It may be doubted whether it is within the meaning of copyright as provided for in the Copyright Act. It seems that this interest is a sort of intellectual property right acquired by the author by virtue of his ability, in cultivating a sense of acceptance of the series and characters among the reading public. It could perhaps compare with the interest in trade marks. Viewed

in this perspective it may be right to say that the cartoonist has copyright in the series, apart from the different pieces which he had produced while in employment. And this right is inextricably associated with the public's interest in getting the original cartoonist's pieces of cartoons using the main characters "Boban and Molly".

Be that as it may, the inclusion of the cartoonist's right in the series within the meaning of copyright as defined under the Copyright Act needs stretching the language of the statutory provision. It may be necessary to widen the definition or to think of some new provision to include this form of property interest. The new forms of intellectual property such as computer programmes, performer's right, musician's rights, cartoonist's right etc. have been tried to be brought with under the provisions of the Copyright Act. As has already been discussed, many of these items cannot be brought under the coverage of the Copyright Act, though basically the reason for their protection seems to be the same as in the case of copyright. A new legislation or even different pieces of legislation, if need be, should be enacted to provide for the protection of new forms of intellectual property emerging out of the technological advancements.



DESIGNS

The theoretical basis for the protection of designs is similar to that of copyright. Designs have been identified and recognized as a form of intellectual property. Copyright has been given to it through separate legislation. Though in the beginning this was identified along with copyright, subsequently because of its association with industry, it has been grouped with patent. Designs were first protected in India along with patents in 1872 by Patents and Designs Protection Act, 1872. This was consolidated in 1883. When Patent and Designs Act, 1911 was passed separate provisions were included to protect designs. By the enactment of Patents Act in 1970, the Act of 1911 contains only provisions for protecting designs. The Act defined 'design' as follows:

'Design' means only the features of shape, configuration, pattern or ornament applied to any article by any industrial process or means, whether manual, mechanical or chemical, separate or combined, which in the finished article appeal to and are judged solely by the eye; but does not include any mode or principle of construction or anything which is in substance a mere mechanical device, and does not include any trade mark as defined in clause (v) of sub-sec.(1) of S.2 of the Trade and Merchandise Marks Act, 1958; or property mark as defined in section 479 of the Indian Penal Code.<sup>124</sup>

According to the Act the registered designs are entitled to get copyright for five years.<sup>125</sup> Copyright for the purposes

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124. The Designs Act, 1911, section 2(5).

125. Section 47.

of the Act means the exclusive right to apply a design to any article in any class in which the design is registered.<sup>126</sup>

Certain acts are considered as violation of copyright in design. Applying the registered design for sale to any class of goods in which the design is registered, and the fraudulent or obvious imitation of design are considered as unlawful. Similarly importation of goods for sale in which the design was applied without the consent of the proprietor is also prohibited.<sup>127</sup> The violators are liable to pay a sum not exceeding five hundred rupees as contract debt. The proprietor may elect a civil suit<sup>128</sup>, but only one method is permissible. Criminal law has not been employed in protecting copyright in designs.

The above discussion indicates that the law protects copyright and designs not only to safeguard the interests of the individual concerned but also for the benefits of the public. Thus it may be equated with copyright in the matter of protection.

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126. Section 2(4).

127. Section 53(1).

128. Section 53(2).

PATENT

Patent is a statutory grant of monopoly for working an invention and vending the resulting product.<sup>129</sup> This is conferred for a limited period and the right includes the right to exclude others from using the invention.<sup>130</sup> The term originated from Letters Patent, i.e. open letters (literae patentes) issued by the Crown in olden days.<sup>131</sup>

The theory under which the modern patent system functions in England was explained by Blanco White thus:

The basic theory of the patent system is simple and reasonable. It is desirable in the public interest that industrial techniques should be improved. In order to encourage improvement, and to encourage also the disclosure of improvements in preference to their use in secret, any person devising an improvement in a manufactured article, or in machinery or methods of making it, may upon disclosure of

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129. See N.Rajagopala Ayyangar, Report on the Revision of the Patents Law (Govt. of India, 1959), p.9.

130. See Terrell, Law of Patents (London: Sweet & Maxwell, 13th edn. 1982), p.1.

131. The reason for calling these grants as letters patent was explained by Blackstone thus: "These grants...literae patentes: so called because they are not sealed up, but exposed to open view, with the great seal pendant at the bottom; and are usually directed or addressed by the King to all his subjects at large". See Blackstone, Commentaries on the Law of England Book II, Chap.21, s.II, p.346.

his improvement at the Patent Office demand to be given monopoly in the use of it for a period of sixteen years. After that period it passes into the public domain; and the temporary monopoly is not objectionable, for if it had not been for the inventor who devised and disclosed the improvement nobody would have been able to use it at that or any other time, since nobody would have known about it. Furthermore, the giving of the monopoly encourages the putting into practice of the invention, for the only way the inventor can make a profit from it (or even recover the fee for his patent) is by putting it into practice: either by using it himself, and deriving an advantage over his competitors by its use, or by allowing others to use it in return for royalties.<sup>132</sup>

This reflected the balancing of the two-fold interest involved in the patent system. On the one side public interest necessitates the improvement of technological invention and industrial growth for the development of the nation. On the other side for achieving this we have to recognize and protect the rights of the inventor. The prime object seems to be the industrial growth rather than the protection of the rights of the inventors. The rights of the inventors were taken care of by permitting them for a limited period to exclusively enjoy the fruits of their

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132. T.A. Blanco White, Patents for Inventions (Stevens, ed., 3rd ed. 1962), quoted in M.A.L. Banks, The British Patent System: Report of the Committee to Examine the Patent System and Patent Law (Her Majesty's Stationary Office, 1970), p.1. See also Anthony William Deller (Ed.), Deller's Walker on Patents (New York: Baker, Voorhis & Co. Inc. 2nd edn. 1964) Vol.1, p.40.

invention. The justification for this limited monopoly was explained in the statement of objects and reasons of the Bill prepared by the Board of Trade in England in connection with Patents and Designs Amendment Bill of 1919 thus:

A monopoly being contrary to the common law right can only be justified by some consideration moving to the public. The consideration justifying the grant of a monopoly for a new invention is not only the disclosure to the public of information which they can use when the period of monopoly expires but the benefit to trade by the new invention being brought into commercial use during that period. The public therefore are entitled to have the monopoly so framed and guarded that they are not deprived of this consideration.<sup>133</sup>

This was further explained by Swan Committee as follows:

...the opportunity of acquiring exclusive rights in an invention stimulates technical progress, mainly in four ways: first, that it encourages research and inventions; second, that it induces an inventor to disclose his discoveries instead of keeping them as a trade secret; third, that it offers a reward for the expense of developing inventions to the stage at which they are commercially practicable; and fourth, that it provides an inducement to invest capital in new lines

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133. Quoted in N.Rajagopala Ayyangar, op.cit., p.11.

of production which might not appear profitable if many competing producers embarked on them simultaneously.<sup>134</sup>

Thus requirement for disclosure of the invention to the public is considered as one of the main basis for patent system. This helps the public to utilize it when the period of monopoly is over.

These principles have been followed in the Indian patent system also. This was spelt out in the report on the revision of the patents law<sup>135</sup> as well as by the Supreme Court. Justice Sarkaria in M/s.Bishwanath Prasad Radhey Shyam v. M/s.H.M.Industries<sup>136</sup> observed:

The object of Patent Law is to encourage scientific research, new technology and industrial progress. Grant of exclusive privilege to own, use or sell the method or the product patented for a limited period, stimulates new inventions of commercial utility. The price of the grant of the monopoly is the disclosure of the invention at the Patent Office, which, after the expiry of the fixed period of the monopoly, passes into the public domain.<sup>137</sup>

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134. See Kenneth Swan, Second Interim Report of the Departmental Committee on the Patents and Designs Act, para 9, (1946), quoted in Banks, op.cit., p.10.

135. See N.Rajagopala Ayyangar, op.cit., p.17.

136. A.I.R. 1982 S.C. 1444.

137. Id. at 1447-48.

It is obvious that the modern patent system concentrates on the recognition and protection of the intellectual labour of the inventor for the development of technological progress of the society. Apart from this, it focuses much attention on the disclosure of the invention to the public for public good. The ultimate benefit in any case is to the public rather than to the inventor.

The origin of the patent system in England has been intrinsically connected with the development of industry. Since England was very backward in industrial development, growth of industry was the sole object when the patent system emerged in England. It was for the growth of textile industry during the thirteenth and fourteenth century that various grants were given by the Crown to foreign traders to establish industry in the realm.<sup>138</sup> The reason for offering grant at that time, according to Seabrone Davies, was that:

...since the Crown has made the grant of privileges, it is for the patentee to fulfil his side of the bargain by using his utmost endeavours to secure the benefits which he has led the Crown to believe would result from the grant. The 'consideration' is the putting in practice of the invention or the establishment of the new industry or trade in such a way as

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138. See E. Wyndham Hulme, "The History of the Patent System under the Prerogative and at Common Law", 12 L.Q.R. 141 (1896); Romon A. Klitzke, "Historical Background of the English Patent Law", 41 Journal of the Patent Office Society 615 (1959).

'to secure the memory of this invention' and to 'make certain that the knowledge of it should remain known to our people.'<sup>139</sup>

During that period the grant was issued to any one who brings the industry to Commonwealth. It was not necessary that he must be the person who devised the invention.<sup>140</sup> Similarly, the Crown was not concerned whether the invention for which grant was given was a new manufacture. The patentee was also not bound to disclose his invention.<sup>141</sup> The only condition was to establish a new industry in the realm and teach the trade to those willing to learn.<sup>142</sup> It appears that the basic theory of the protection of these types of property, i.e. protection of the intellectual labour of the man, has not been recognized and considered as basis of patent system at that time. This is evident inasmuch as grants were issued to any one who brought an invention to Commonwealth whether he be an inventor or not.

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139. See D.Seabrone Davies, "The Early History of the Patent Specification", 50 L.Q.R. 86,99 (1934).

140. See E.Wyndham Hulme, "The History of the Patent System under the Prerogative and at Common Law--A Sequel", 16 L.Q.R. 44, 55 (1900).

141. See E.Wyndham Hulme, "On the Consideration of the Patent Grant, Past and Present", 13 L.Q.R. 313 (1897).

142. See E.Wyndham Hulme, "The History of the Patent System under the Prerogative and at Common Law", 12 L.Q.R. 141, 153 (1896).



The judiciary also examined the scheme of patent grant in those period in Darcy v. Allein<sup>143</sup> and Clothworkers of Ipswich case.<sup>144</sup> The Court spelled out the justification for the grant thus:

But if a man hath brought in a new invention and a new trade within the kingdom in peril of his life and consumption of his estate or stock, etc., or if a man hath made a new discovery of any thing, in such cases the king of this grace and favour in recompense of his costs and travail may grant by charter unto him that he shall only use such a trade or trafique for a certain time, because at first people of the kingdom are ignorant, and have not the knowledge and skill to use it. But when the patent is expired the king cannot make a new grant thereof.<sup>145</sup>

Thus it is clear that in olden days neither disclosure of the invention to the public nor the protection of the intellectual labour of the inventor was the consideration or basis of the patent system. Industrial growth was the immediate object of granting patent monopoly at that time.

During the period of Henry IV a statute was introduced in 1399 regarding the issue of patent grants and a clause was included in it to produce a description of the invention

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143. 1 W.P.C. 1 Moore K.B. 671.

144. Godbolt's Reports K.B. 252.

145. Ibid. quoted in Terrell, op.cit., p.3.

for granting patent.<sup>146</sup> Even then the Crown used to exempt the production of description while granting patent. So in practice the patentee never disclosed his invention to the public.<sup>147</sup> A strict insistence on disclosure of the invention was made during 1611. But the specifications filed during that period were only outlines of the inventions involved and from that no one could learn the technical details of the invention to put it in practice.<sup>148</sup>

There was much criticism as to the abuse of the monopoly system. Many patent grants were revoked by proclamations and trial started in courts against some others.<sup>149</sup> This led the Parliament to come out with a legislation in 1624 known as Statute of Monopolies (21 Jac 1, Ch.3). The foundations of the modern patent system were laid down in section 6 which read:

Provided also (and be it declared and enacted) that any declaration before mentioned shall not extend to any letters patent and grants of privilege, for the term of fourteen years or under, hereafter to be made, to the sole working or making of any manner of new manufactures, within this realm, to be the true and first inventor and inventors of such manufactures, which others, at the time of making such letters-patent

and grant, shall not use, so as also they be not contrary to the law, nor mischievous to the state, by raising prices of commodities at home, or hurt of trade, or generally inconvenient.<sup>150</sup>

This demonstrates that to obtain the privilege the invention must be a 'new manner of manufacture' and the patentee must be the 'true and first inventor'. Thus the element of novelty was introduced. The period of the grant was also limited to fourteen years. According to Hulme, the statutory provision was the codification of the common law practice of the patent system in the 17th century.<sup>151</sup> The statute has not specified the consideration of the monopoly except the introduction of the words "new manner of manufacture". Though the test of novelty was introduced, since it was not defined in the statute it was limited to the practice of art or prior user within the memory of man.<sup>152</sup> It is clear that only 'true and first inventor' was eligible for patent monopoly. Since the term was left undefined, for a considerable period of time a person who 'brings the invention' was also given the monopoly right. So

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150. See Terrell, *op.cit.*, p.4. The words in bracket were repealed by the S.L.R. Act 1888. For a full text of statute of Monopolies see *Deller's Walker on Patents*, *supra* at 31-34.

151. See E.Wyndham Hulme, "The History of the Patent System under the Prerogative and at Common Law--A Sequel" 16 *L.Q.R.* 44 (1900) and E.Wyndham Hulme, "On the History of Patent Law in the Seventeenth and Eighteenth Centuries", 18 *L.Q.R.* 280 (1902).

152. E.Wyndham Hulme, 18 *L.Q.R.* 280, 282.

it may be concluded that even during this period the main consideration for granting patent rights was the development of industry in the realm.<sup>153</sup>

Specification of the invention as a consideration ~~of~~ of the monopoly was the outcome of the growth of patent system in the seventeenth century. Two explanations were offered for the origin of specification. One view was that it originated at the instance of the patentees themselves. They included the specification in the applications for grant to distinguish their inventions from previous devices, to get priority and for easy proof in case of infringement.<sup>154</sup> The other view was that the specification was necessary to enable the Law Officer to know exactly the nature of the grant made for the purpose of settling the dispute, and to avoid issue of grant to similar inventions.<sup>155</sup> Seabrone Davies is of the view that the true explanation was the combination of the two views expressed above.<sup>156</sup> But Hulme expressed the view that specification originated by way of suggestion from the patentees themselves for their safety.<sup>157</sup> After examining Sturtevant's Patent and Treatise of Metallica,

153. E.Wyndham Hulme, 16 L.Q.R. 44.

154. See D.Seabrone Davies, op.cit., p.269; also Hulme 13 L.Q.R. 313, 317. This was supported by the specifications in the Sturtevant's Patent and Treatise of Metallica and Nasmyths Patent.

155. D.Seabrone Davies, op.cit., p.269.

156. Ibid.

157. Hulme, 13 L.Q.R. 313, 317.

1611-12 (Patent Office Supplement to Letters Patent No.1) and Nasmyth's Patent and Specification, 1711-12, two patent grants issued at that time, Hulme concluded:

From these cases we may deduce the origin of the specification, viz. that the practice arose at the suggestion, and for the benefit, of the grantee with the view of making the grant more certain, and not primarily as constituting the full disclosure of the invention now required at law for the instruction of the public.<sup>158</sup>

This makes it clear that specification of invention originated not as a consideration for grant of patent keeping in view the public benefit.

Lord Mansfield in categorical terms stated that the consideration of patent monopoly should be the disclosure of the invention for the benefit of the public. His Lordship in Liardet v. Johnson<sup>159</sup> emphasized the need for the specification of the invention in detail. He laid down the basis of patent monopoly as follows:

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158. Ibid.

159. Morning Post, Feb. 23 1778 (No.1667, p.2 col.4) (K.B.). The relevant portions of the judgment are extracted in 18 L.Q.R. 283-287. In this case, Liardet had a patent for his new invention on Stucco or composition, to imitate stone, for covering the outside of building. Johnson also obtained a patent imitating his patent and executed many works. Liardet filed a case for infringement of his patent. One of the question was whether the patent and specification of Liardet were sufficient to support the exclusive privilege. Court gave verdict in favour of Liardet.

For the condition of giving encouragement is this: that you must specify upon record your invention in such a way as shall teach an artist, when your term is out, to make it- and to make it as well as you by your directions; for then at the end of the term, the public have the benefit of it. The inventor has the benefit during the term, and the public have the benefit after.<sup>160</sup>

Thus the Court said in clear terms that the object of patent monopoly was the disclosure of the invention to the public so that they could use it after the expiry of the term. The Court also laid down that the specification must be elaborate and clear, so that another could utilize it in future. Thus at the end of the eighteenth century the theoretical foundation for the grant of patent monopoly had changed from the sole idea of industrial growth to the need for written disclosure of the invention for public benefit. The crucial test for the grant of monopoly was the absolute novelty of the invention both in practice and as regards the published literature of the art within the realm.<sup>161</sup>

Though the basis of the modern patent system was laid down by the Statute of Monopolies, the statute remained idle for practical purposes for a considerable period.<sup>162</sup> Except

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160. Liardet v. Johnson, Morning Post, Feb. 23, 1778 extracted in 18 L.Q.R. 280, 285.

161. See Hulme, 13 L.Q.R. 313, 318.

162. Terrell, op.cit., p.4.

some changes made to the system by the end of nineteenth century, the law continued to be the same as stated in the Statute of Monopolies and interpreted by Lord Mansfield. The criterion for the grant of patent at the end of century was that the invention must be a manner of manufacture, and it must be disclosed clearly. It was also necessary that the invention must be novel and must be brought by the true and first inventor.<sup>163</sup> Though the disclosure of the invention has been accepted and followed as the true basis of patent monopoly, the idea of protection of the intellectual labour of the inventor did not gain acceptance till the nineteenth century. Though the grant of patent was restricted to the true and first inventor by the Statute of Monopolies the term 'true and first inventor' has been interpreted to mean the 'bringer in' of the invention to the realm.

In olden days at common law the patentee need only be a 'bringer in' of the invention and must have taken certain 'steps towards introducing an industry' in the country as discussed above.<sup>164</sup> There was no definition to the term 'true and first inventor' in the Statute of Monopolies. So on the basis of common practice the term 'true and first inventor' was interpreted to mean the 'true and first founder or institutor' of the manufacture.<sup>165</sup> Jessel, M.R. in Plimpton v. Malcolmson<sup>166</sup>

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163. The terms manner of manufacture and novelty, were subjected to judicial interpretation. For details, see infra.

164. See supra notes 150-153.

165. E.W.Hulme, 18 L.Q.R. 280. See also Terrell, Law of Patents (London: Sweet & Maxwell, 11th ed. 1965), pp.23-29.

166. (1876) 3 Ch.D. 531.

had explained this development:

As I understand, shortly after the passing of the statute, the question arose whether a man could be called a first and true inventor who, in the popular sense, had never invented anything, but who having learned abroad (that is out of the realm, in a foreign country, because it has been decided that Scotland is within the realm for this purpose) that somebody else had invented something, quietly copied the invention, and brought it over to this country, and then took out a patent. As I said before, in the popular sense he had invented nothing. But it was decided, and now, therefore, is the legal sense and meaning of the Statute, that he was a first and true inventor within the statute,....<sup>167</sup>

For a considerable period of time this interpretation had been followed and both the 'devisor' of the invention and 'introducer' were treated as 'true and first inventor'. There was no statutory rule in England till recently to prevent such persons from taking patent.<sup>168</sup>

The principle for limiting the meaning of the true and first inventor to the actual devisor was laid down by Tindal, C.J. in Cornish v. Keene<sup>169</sup> His Lordship reasoned:

Sometimes it is a material question to determine whether the party who got the patent was the real and original inventor or not; because these patents

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167. Id. at 555.

168. See Terrell, Law of Patents (11th edn.), p. 25.

169. 1 W.P.C. 501, quoted in Terrell, op.cit., p.28; see also Tennant's case, 1 W.P.C. 125 n quoted in Terrell, op.cit., pp.27-28.



are granted as a reward, not only for the benefit conferred upon the public by the discovery, but also to the ingenuity of the first inventor; and although it is proved that it is a new discovery, so far as the world is concerned, yet if anybody is able to show that although that [i.e. publication to the world] was new--that the party who got the patent was not the man whose ingenuity first discovered it, that he borrowed it from A or B, or had taken it from a book that was printed in England, and which was open to all the world--then, although the public had the benefit of it, it would be an important question whether he was the first and original inventor of it.<sup>170</sup>

The principle was followed in many cases in England and the term 'true and first inventor' was limited to the actual deviser of the invention and his assignees.<sup>171</sup> Thus by the creative interpretation of the term the protection of the intellectual labour of the inventor also formed the basis for the grant of patent. When the Patent law in England was codified in 1883 a provision, section 5(2)<sup>172</sup> was introduced to give statutory recognition to this right recognized by way of judicial interpretation. This was followed in the subsequent

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170. *Id.* at 507, quoted in Terrell, *op.cit.*, p.28.

171. See Terrell, *op.cit.*, pp.28-29.

172. Section 5(2) read: "An application must contain a declaration to the effect that the applicant is in possession of an invention, whereof he, or in the case of a joint application, one or more of the applicants, claims or claim to be the true and first inventor or inventors, and for which he or they desires or desire to obtain a patent; and must be accompanied by either a provisional or complete specification".

patent legislation also.<sup>173</sup> Though it was made mandatory that there must be a declaration to the true and first inventor, the patent legislation till 1977 did not contain an explanation to the term 'inventor' to mean the 'actual devisor' of the invention. But by virtue of the decisions, patent was granted only to the actual devisor or his assignee in England. Only in the Patent Act of 1977 it was expressly stated in section 7(3) that 'inventor' means the actual devisor of the invention. Now it has been statutorily recognized that patent is available only to the actual devisor of the invention.

In India also there was some difficulty as to the meaning of the term "true and first inventor". Though the right was given to any person--citizen or not--to apply for patent, he was bound to declare that he was the true and first inventor or assignee or legal representative of the inventor.<sup>174</sup> As a further clarification it was also made mandatory that in case

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173. See section 1 of Patents and Designs Act, 1907, sections 1 and 2(3) of Patent Act, 1949.

174. See section 3 of the Patents and Designs Act, 1911. Section 3 of the Act read: "(1) An application for a patent may be made by any person whether he is a citizen of India or not, and whether alone or jointly with any other person... (3) The application must contain a declaration to the effect that the applicant is in possession of an invention, whereof he, or in the case of a joint application one at least of the applicants, claims to be the true and first inventor or the legal representative or assign of such inventor and for which he desires to obtain a patent, and must be accompanied by either a provisional or complete specification and by the prescribed fee. (4) Where the true and first inventor is not a party to the application, the application must contain a statement of his name, and such particulars for his identifications as may be prescribed, and the applicant must show that he is the legal representative or assign of such inventor".

the 'true and first inventor' was not a party to the application his name and details must be stated in the application. But the term 'true and first inventor' was left undefined. In the forms prescribed under Patent Rules it was, however, mentioned 'communiquee' also as a person entitled to file application as 'true and first inventor'.<sup>175</sup> Assuming that 'importer' also is included within the term, the Patent Enquiry Committee recommended to include both 'importer' and 'communiquee' in the definition of 'true and first inventor' and it was so included in the Patent Bill.<sup>176</sup> But after a review of the subject, Rajagopala Ayyangar Committee recommended to exclude those two categories from the definition.<sup>177</sup> Accepting this in the Patent Act of 1970, the term 'true and first inventor' was defined to exclude 'importer' and 'communiquee'.<sup>178</sup>

The analysis reveals that the main object of the present patent system is the protection of the intellectual labour of the inventor. The public interest value of the patents is simultaneously recognized. The patent system was evolved for the first time to serve the public interest in developing industries. But now it reached a stage where much

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175. See Justice N.Rajagopala Ayyangar, *op.cit.*, p.47.

176. *Ibid.*

177. *Id.* at 48.

178. Section 2(y) reads: "'true and first inventor' does not include either the first importer of an invention into India, or a person to whom an invention is first communicated from outside India".

emphasis is given to the individual interest. It is now statutorily declared in England and India that patent grants are issued only to the actual devisor of the invention. It is also mandatory that the invention must be disclosed to the public in a clear and descriptive manner so that one can utilize it at the end of the statutory period of monopoly.

Unlike English system, Indian patent system originated and developed through legislation. The first Indian Patent Act was enacted in 1856 (Act VI of 1856) which was amended in 1859. This was in similar terms with that of the English Act of 1852. In 1872 the Patents and Design Protection Act was passed. This was further consolidated in 1883 in line with the English Protection of Inventions Act of 1883. In 1911 Indian Patents and Design Act (Act II of 1911) was enacted on the lines of the English Act of 1907. For the first time the administration was brought under the control of a controller. When India got independence, the patent system was subjected to review by committees<sup>179</sup> and the present Act--Indian Patent Act, 1970 was brought into force. The basis of the Indian patent system is the same as that of the English system.

The term 'invention' is defined in the Act to mean, any new and useful--

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179. See Dr. Bakshi Tek Chand, Report of the Patent Enquiry Committee 1948-1950, (1950) and Justice N. Rajagopala Ayyangar, op.cit.

- i) art, process, method or manner of manufacture;
- ii) machine, apparatus or other article;
- iii) substance produced by manufacture, and includes any new and useful improvement of any of them, and alleged invention.

The new definition only reformulated the judicial interpretation of the term 'invention' in olden days. It is clear from the definition that to get patent, the invention must be 'new' and 'useful'. The legislature expressly excluded certain inventions from its purview. Under section 3 of the Act the following are not considered inventions:

- a) an invention which is frivolous or which claims anything obviously contrary to well established natural laws;
- b) an invention the primary or intended use of which would be contrary to law or morality or injurious to public health;
- c) the mere discovery of a scientific principle or the formulation of an abstract theory;
- d) the mere discovery of any new property or new use for a known substance or of the mere use of a known process, machine or apparatus unless such known process results in a new product or employs at least one new reactant;

- e) a substance obtained by a mere admixture resulting only in the aggregation of the properties of the components thereof or a process for producing such substance;
- f) the mere arrangement or re-arrangement or duplication of known devices each functioning independently of one another in a known way;
- g) a method or process of testing applicable during the process of manufacture for rendering the machine, apparatus or other equipment more efficient or for the improvement or restoration of the existing machine, apparatus or other equipment or for the improvement or control of manufacture;
- h) a method of agriculture or horticulture; and
- i) any process for the medicinal, surgical, curative, prophylactic or other treatment of human beings or any process for a similar treatment of animals or plants to render them free of disease or to increase their economic value or that of other products.<sup>180</sup>

Similarly inventions relating to atomic energy have also been excluded.<sup>181</sup> In the case of invention concerning food<sup>182</sup>, medicine or drug<sup>183</sup> and chemical processes (including alloys, optical glass, semiconductors and inter-metallic compounds), patent is not granted to the substance themselves. But the methods or process of manufacture of the above substances are patentable.<sup>184</sup>

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180. See section 3.

181. Section 4.

182. Section 2(1)(g).

183. Section 2(1)(l).

184. Section 5.

One of the conditions precedent to granting patent is the disclosure of the invention. So it is made mandatory in the Act that applicant, along with the application must file a provisional or complete specification.<sup>185</sup> If the applicant has only filed provisional specification along with application, a complete specification is to be filed within twelve months.<sup>186</sup> The specification must contain an elaborate description of the invention for which patent is sought.<sup>187</sup>

Thus in India, patent is granted for inventions which are new and useful to a true and first inventor on disclosure of his invention. The terms 'any manner of manufacture', 'new-novelty', 'useful-utility' have been subjected to judicial interpretation. To understand the actual meaning and content of patent right it is worth to have a discussion of these terms.

Any manner of manufacture:

Till the enactment of Statute of Monopolies in 1623 there was no specific criterion to determine the subject matter of patent monopolies. The King had the absolute right to grant the monopoly on any subject matter which he felt good for the improvement of the industry in the realm.<sup>188</sup> For the first time

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185. Section 7(4).

186. Section 9(1).

187. Section 10.

188. See E.W.Hulme, 12 L.Q.R. 141.

it was stated in the Statute of Monopolies that the grant had to be issued for the working or making of 'any manner of new manufacture'.<sup>189</sup> This continued to be the criterion for the subject matter of patent both in England and in India till now. But the term 'any manner of manufacture' has been left undefined. In olden days an art substantially and essentially newly invented



commercial success can be obtained, but on whether by such directions the effects which the patentee professed to produce could be produced, and on the practical utility of those effects... to judge of utility the directions in the amended specification must be followed, and, if the result is that the object sought to be attained by the patentee can be attained, and is practically useful at the time when the patent is granted, the test of utility is satisfied.<sup>226</sup>

Thus it is clear that the invention to be patentable need not have a commercial pecuniary success. The approach was followed in India also.<sup>227</sup> In the modern patent legislation there are express provisions as to the need of utility.<sup>228</sup> But till recently this had not been included in the definition of 'invention'. In the Patent Act, 1970 it has been expressly stated in the definition of 'invention' that it must be useful. So it is now statutorily recognized that there must be some utility in the invention to deserve patent. The degree of utility required to fulfil this test is not settled. Whether this relates to any industrial application or not is yet to be settled.

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226. *Id.* at 431.

227. See Indian Vacuum Brake Co. Ltd. v. E.S.Luard, A.I.R. 1926 Cal. 152; Vidya Prakash v. M/s.Shah Charan Singh, A.I.R. 1943 Lah. 247; Farbwerke Hoechst Aktiengesellschaft Vormals Heister Lucius and Burning a Corporation etc. v. Unichem Laboratories, A.I.R. 1969 Bom. 255; M/s.Bishwanath Prasad Radhey Shyam v. M/s.Hindustan Metal Industries, A.I.R. 1982 S.C. 1444.

228. See section 26(f) of Indian Patents and Designs Act, 1911; section 64(1)(g) of Patents Act, 1970.

In the 1977 Patent Act of U.K., it has been specifically stated that the invention must be capable of industrial application.<sup>229</sup> This seems to be a new development of the concept of utility. Now it may be safely concluded that in England also utility is insisted upon as a criterion for the grant of patent and that too of industrial application. If the invention has no industrial application it is not possible to get patent in England. Any how, our law has not developed on those lines. Developments may perhaps demand amendment of our law also.

From the above analysis it is clear that in India patents are issued only to inventions. For constituting a subject matter as invention, it has to fulfil the test of novelty, utility etc. It was based on the above tests, many items have been identified as patentable subject matter and included in the definition of inventions. Many new items have been included interpreting the terms 'process', 'method or manner of manufacture', 'alleged inventions' etc. as inventions.

We are now witnessing a technological revolution all over the world. Owing to this some new forms of inventions are gaining acceptance for patentability. Computer programmes and man-made living micro-organisms are the two controversial items which have been included as subject matter of patents in recent years. The law in the area still remains unsettled.

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229. Patents Act, 1971, section 1(1)(c).

The Courts in India have yet to grapple with such issues. In future having regard to the fast growth of technology pressure may be mounting on to tailor our laws also to suit the needs of the India of the twenty-first century.

Patentability of computer-related invention and man-made living micro-organism have been examined and accepted by the Supreme Court of United States. An examination of brief history will help to identify the problems attendant with the grant of patents to these items.

When the computer technology was in its infancy, the patent application moved for computer programmes and computer-related inventions were rejected, based on the 'mental steps doctrine'.<sup>230</sup> According to this doctrine, if the method of calculation involved some mental calculation patent was denied on the ground of statutory prohibition. In computer related invention, algorithm<sup>231</sup> usually constitutes the novel feature.

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230. See generally, McClashkey, "The Mental Process Doctrine: Its Origin, Legal Basis and Scope", 55 Iowa L.Rev. 1149 (1970).

231. An algorithm is defined to mean, (1) A statement of the steps to be followed in the solution of a problem. (2) A procedure, process, or rule for the solution of a problem in a finite number of steps. The process may be carried out according to a precise prescription or problem description, leading, under fixed or variable conditions, to definite result. An algorithm may be a set of computational rules for the solution of a mathematically expressed problem or for evaluating a function; for example a statement of an arithmetic procedure for evaluating  $\sin x$  to a given precision. Thus, the algorithm is a statement of the step-by-step procedure for solving complex problems by simple steps". M.Weick, Standard Dictionary of Computers and Information Processing (2nd ed. 1977), p.21, quoted in Jeffrey A.Simenauer, "Patentability of Computer-related Inventions: A Criticism of the PTO's View on Algorithms", 54 The George Washington Law Review 871, 872 (1986).

Patentability was denied on the ground that algorithm was only a mathematical calculation, which was not patentable under the statute.

It was on Gottschalk v. Benson<sup>232</sup> that the Supreme Court examined the issue for the first time. The Court of Customs and Patent Appeals (CCPA) reversed the Patent and Trade Mark Office (PTO) denial of patent protection for Benson's method of converting numerical information from binary-coded decimal numbers into binary numbers, which could then be used to programme a computer. The Court denied patent on the ground that the claimed programming algorithm was not a 'process' as defined by the Patent Act, and reasoned that an algorithm, or mathematical formula, was analogous to law of nature which was not patentable.<sup>233</sup>

The issue was again considered in Parker v. Flook.<sup>234</sup> The applicant here sought patent protection for a method of updating alarm limits used in connection with catalytic conversion process. This was employed in a novel algorithm. The Court rejected the claim on the score that it was only a mental operation and did not come within the statutory definition.

Based on the above decisions a two-pronged test was introduced by the Court of Customs and Patent Appeal in

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232. 409 U.S. 63 (1972).

233. Id. at 67.

234. 437 U.S. 584 (1978).

In re Freeman<sup>235</sup> to determine whether a computer-related invention could be patentable. This was summarized by Rodau thus:

- 1) The patent claim must first be evaluated to determine if it directly or indirectly recited an algorithm which is defined as a procedure for solving a given type of mathematical problem;
- 2) Then, if it was found to relate to an algorithm, the claim was analyzed to determine whether, in its entirety, the claim wholly preempted the use of that algorithm, and was therefore unpatentable subject-matter.<sup>236</sup>

Patent was usually denied to computer-related invention and programmes based on these tests.

It was in Diamond v. Diehr<sup>237</sup> that the Court for the first time recognized a computer-related invention as a patentable subject matter. The invention claimed was a process for moulding raw, uncured synthetic rubber into cured precision products. The contribution constitute the process of constantly measuring the actual temperature inside the mould. These temperature measurements being automatically fed into a computer which recalculated the cure time by use

235. 573 F.2d 1237 (C.C.P.A. 1978).

236. Andrew G. Rodau, "Protecting Computer Software: After Apple Computer, Inc. v. Franklin Computer Corp., 714 F.2d 1240 (3rd Cir. 1983). Does Copyright Provide the Best Protection", 57 Temple Law Quarterly 527, 529 (1984).

237. 450 U.S. 175 (1981).

of the mathematical equation and ultimately signalled a device to open the press at the correct moment. Rehnquist, J. delivering the opinion of the Court distinguished the claim in the case with that of Benson<sup>238</sup> and Flook.<sup>239</sup> According to the Court, the protection sought was for a process of curing synthetic rubber.<sup>240</sup> The process included a well known equation and the use of a digital computer. Allowing patent claim, the Court reasoned that "a claim drawn to subject matter otherwise statutory does not become non-statutory simply because it uses a mathematical formula, computer program, or digital computer".<sup>241</sup> The Court added that the claim must be considered as a whole. In determining the patentability, according to the Court, the claim must be examined to ascertain whether it contained a mathematical formula. If it is an abstract formula patent cannot be granted. The Court, however stated that "when a claim containing a mathematical formula implements or applies that formula in a structure or process which, when considered as a whole, is performing a function which the patent law were designed to protect (e.g. transforming or reducing an article to different state or thing), then the claim satisfies the requirements of S.101".<sup>242</sup> Based on this reasoning, the claim in this case was held patentable. Many cases<sup>243</sup> were decided by the C.C.P.A. based on the above cases and modified the two-step analysis laid down in In re Freeman.<sup>244</sup> The refined two-step analysis is as follows:

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238. 409 U.S. 63 (1972).

239. 437 U.S. 584 (1978).

240. 450 U.S. 175, 187 (1981).

241. Ibid.

242. Id. at 192.

243. See In re Tanner, 681 F.2d 787 (C.C.P.A. 1982). In re Abele, 684 F.2d 902 (C.C.P.A. 1982) and In re Meyer, 688 F.2d 789 (C.C.P.A. 1982) quoted in 57 Temple Law Quarterly 531 (1984).

244. 573 F.2d 1237 (C.C.P.A. 1978).

...the claim in question must first be evaluated to determine whether it clearly includes a mathematical algorithm in the form of a mathematical formula or procedure for solving a mathematical problem; secondly, if such a mathematical formula or procedure is included, then the claim must be further analyzed to determine whether it includes only the mathematical algorithm and is therefore unpatentable subject-matter, or whether it encompasses an application of the algorithm that includes statutory subject-matter and is therefore patentable.<sup>245</sup>

The test is now being used by the Court of Appeal for the Federal Circuit<sup>246</sup> in determining the patentability of computer-related inventions.<sup>247</sup> Only invention which satisfies the test is given patent. This makes it clear that all computer programmes are not patentable. Though the test was laid down, patent applications are still being rejected by the Patent Office, based on the law laid down in Flook.<sup>248</sup> This creates much difficulty in the United States as to the patentability of computer programmes. The difficulty is to draw a line demarcating patentable and unpatentable computer programmes.

Another new item that has been accepted as a patentable subject matter was the live, human-made micro-organism.

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245. See Andrew G. Rodau, op.cit., p.531.

246. Substituted for C.C.P.A.

247. See South Corp. v. U.S., 690 F.2d 1368 (Fed.Cir. 1982).

248. See Jeffrey A. Simenauer, op.cit., pp.897-909.

It has been generally regarded that living things are outside the purview of patent system. This is based on the principle that such things are product of natural phenomena, common to all and are not capable of being given monopoly. But when living organisms are made by human beings, the question arose whether it could be treated as an invention for patentability. The U.S. Supreme Court in Diamond v. Chakrabarty<sup>249</sup>, for the first time accepted such an invention as patentable. Chakrabarty filed a patent application for a claim of his invention of a bacterium from the genus *Pseudomonas* containing therein at least two stable energy generating plasmids, each of said plasmids providing a separate hydrocarbon degradative pathway. This human-made genetically engineered bacterium is capable of breaking down multiple components of crude oil. Because of this property, which is possessed by no naturally occurring bacteria, Chakrabarty's invention is believed to have significant value for the treatment of oil spills.<sup>250</sup> His claim for patent of bacteria was rejected by the Patent Office on the following two grounds:

- 1) that micro-organisms are products of nature and
- 2) that as living things they are not patentable subject matter under 35 USC S.101.<sup>251</sup>

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249. 447 U.S. 303 (1980).

250. Id. at 305.

251. Id. at 306.



But the Court of Customs and Patents Appeal allowed the claim. The Government appealed to the U.S. Supreme Court. After examining the legislative history and decisions, the Court held that the subject matter was patentable. To reach the conclusion the Court heavily relied on the Committee Report of the Congress on the 1952 Act. According to the Report, statutory subject matter 'includes anything under the sun that is made by man'. Based on this, Chief Justice Burger observed:

Judged in this light, respondent's micro-organism plainly qualifies as patentable subject matter. His claim is not to a hitherto unknown natural phenomenon, but to a non-naturally occurring manufacture or composition of matter--a product of human ingenuity 'having a distinctive name, character and use.'<sup>252</sup>

The contention based on Plant Patent Act, 1930 and Plant Variety Protection Act, 1970, which exclude patentability of micro-organism, was rejected by the Court, on the score that they meant only for natural products.<sup>253</sup> Thus for the first time, live human-made organisms were treated patentable. The reactions to the decision were mixed. Some criticized it as a decision on policy considerations<sup>254</sup> while others supported it as good for improving research in the area.<sup>255</sup>

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252. *Id.* at 309.

253. *Id.* at 311-315.

254. See Frank P. Darr, "Expanding Patent Coverage: Policy Implications of Diamond v. Chakrabarty", 42 Ohio State Law Journal 1040 (1981).

255. G. Scott Rayson, "The Patentability of Living Matters: Hey Waiter, What's Chakrabarty's Pseudomonas's Bacterium Doing Back in the Supreme Court's Soup?", 37 Washington and Lee Law Review 183 (1980); Comment, "The Patentability of Living Organisms Under 35 U.S.C. S.101 In re Bergy", 91 Harv.L.Rev. 1357 (1978).

In the midst of the controversy based on Chakrabarty decision, the Patent Office recently (16th April, 1987) issued an order recognizing patentability of new forms of animal life created through gene splicing.<sup>256</sup> Under this policy adopted by the Patent and Trade Mark Office of the Federal Department of Commerce, it would be permissible to patent animal with new characteristics, provided that these are the result of reproductive technologies, including genetic engineering.<sup>257</sup> Thus America became the first country to render admissible the patenting of animals with new traits created by man and not evolved as the consequence of natural processes.

In England the present Patent Act has expressly stated that 'programme for a computer' is not an invention for the purpose of patent.<sup>258</sup> There is no express provision in the Indian Act excluding or including computer programmes. If the legislature is not going to express the governing policy courts will have to interpret the term 'process' or 'method or manner of manufacture' in the definition of invention in the Act to include or exclude patentability of computer programme. It appears that at least some kinds of computer

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256. See, Current Topics, "The Patenting of Animal Forms with New Traits", 61 Aust.L.J. 324 (1987).

257. Id. at 325.

258. Section 1(2)(c) of Patent Act, 1977 (U.K.).

programmes have to be recognized for patentability. This is so because copyright provisions now included are insufficient to protect adequately all forms of computer programme. Similarly absence of express prohibition in the Act as to patentability of live human-made micro-organisms may lead the judiciary to interpret the definition of invention in future to grant patents to such inventions as well.

It is evident from the above inquiry of the philosophical basis of the patent system, that the public interest plays a significant role in recognizing and accepting it. It originated with the idea of protecting the society and still continues to be so. Industrial growth was the prime concern when the concept originated. Though for a considerable period this interest was shadowed by other interests, the recent development in England insisting on industrial utility of the invention for patentability shows that this regains importance. Similarly, protection of individual interest of the inventor was not taken care of originally. By the development of the patent system, it was realised that individual interest of the inventor must be protected in the larger interest of the society. Thus the patent system attained a stage in which both individual interest and social interest are adequately taken care of.

## TRADE MARK

Trade mark has often been identified and grouped along with copyright and patent as a form of intellectual property. Copyright and patent have been recognized on the basis of the public benefit and intellectual labour put in by the human beings. Trade mark gained recognition as signifying property right inasmuch as the owner of the trade mark acquired a 'value' in the mark by his constant use. Though generally speaking, trade mark has nothing to do with the intellectual labour of a man, it has always been recognized as a species of incorporeal property. It appears that since it is an incorporeal property and has some features similar to those of copyright and patent it has been tagged along with them.

The origin of trade mark law may be traced back to the history of marking of property. Marks used to be affixed on property as well as on person from olden days. Branding cattles, putting marks on pottery, bricks, files, cloths, books, etc. were very common in ancient days.<sup>259</sup> The sole purpose at that time was to identify the ownership

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259. See Sidney A. Diamond, "The Historical Development of Trade Marks", 65 Trade Mark Reporter, 267 et seq; Edward S. Rogers, "Some Historical Matter Concerning Trade Marks", 62 Trade Mark Reporter, 239; Gerald Ruston, "On the Origin of Trade Marks", 45 Trade Mark Reporter, 127.

of property and to trace its origin.<sup>260</sup> It also helped in some cases to pay wages to the person who made the goods.<sup>261</sup> It was used in trade to help the illiterate clerks to identify the goods of their owners and to trace out the goods in case of shipwreck or piracy.<sup>262</sup>

By the starting of guilds during the medieval period marking of property had a new purpose. They insisted for a compulsory marking of property manufactured by their artisans. This was primarily done to fix responsibility on the person who had made poor quality merchandise.<sup>263</sup> The practice had in fact led to the emergence of modern trade mark system. Sidney A. Diamond summarizes the development thus:

In summary, the guild marks which were the principal development of the medieval period very largely were compulsory marks whose primary purpose was to fix the blame for inferior workmanship. They evolved into trade marks in the modern sense when goods began to be shipped for substantial distance. There no longer was direct contact between the consumer and the artisan in his workshop. Preferences for particular workmanship began to develop and, as in modern times, the trade mark on the goods made it possible for the consumer to identify a product with its source.<sup>264</sup>

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260. *Id.* at 269-270.

261. *Id.* at 270.

262. See Frank I. Schechter, "The Rational Basis of Trade Mark Protection", 40 *Harv.L.Rev.* 813, 814.

263. *Ibid.* See also Edward S. Rogers, "The Landham Act and the Social Function of Trade Marks", 14 *Law and Contemporary Problems*, 173 (1949); Sidney A. Diamond, *op.cit.*, pp.277-80.

264. Sidney A. Diamond, *op.cit.*, p.280.

The growth of modern methods of manufacturing, replacing the hand-work new methods of distribution of goods through advertisement etc. gave a new direction to the development of trade mark. In modern days goods are manufactured by persons other than the real inventor. Products are transferred to distant places for marketing. It is not often possible for the consumer to know the real source of the goods. Large scale advertisements are given as to the nature and quality of the goods. Trade mark plays a vital role with multifarious purposes in the present commercial world. In this process consumers and traders first used trade mark as identifiers of the source of goods rather than its ownership.<sup>265</sup> But in the spate of increased commercial transactions the goods were purchased by the consumer on the basis of marks rather than the source. This trend has been noted by Frank I. Schechter thus:

It indicates, not that the article in question comes from a definite or particular source, the characteristics of which or the personalities connected with which are specifically known to the consumer, but merely that the goods in connection with which it is used emanate from the same--possibly anonymous--source or have reached the consumer through the same channels as certain other goods that have already given the consumer satisfaction, and that bore the same trade mark.<sup>266</sup>

The trade mark in this context assumes a new role in the business world. It envisages new purposes and relationships. As to the new relationship of trade mark with its owner and consumer, Schechter says:

The trade mark is a valuable, even though anonymous, link between the owner of the mark and the consumer. It is not merely his commercial signature but is a creative 'silent sales man' through which direct contact between the owner of the mark and the consumer is obtained and maintained.<sup>267</sup>

Thus the mark helps the trader to establish a good market of his goods with the consumer. In the modern sense it has always been treated as a creator of goodwill to the owner of the mark.

Apart from this, the trade mark has a social function to perform. Since the consumer in modern times depend on the mark for selecting the goods, the trade mark has now the function of protecting the public interest. By using a false trade mark the user not only cheats the owner of the trade mark, but also the consuming public. Thus it has two-fold function to perform. This is reflected in the legislation also. Senator Pepper noted thus:

particular trade mark which it favourably knows, it will get the product which it asks for and wants to get. Secondly, where the owner of a trade mark has spent energy, time, and money in presenting to the public the product, he is protected in his investment from its misappropriation by pirates and cheats. This is the well established rule of law protecting both the public and trade mark owner.<sup>268</sup>

It is this duality which help trade marks to be tied with copy-right and patent.

Even before the enactment of separate legislation affording protection to trade mark, English courts, based on the common law principles, extended protection to trade marks. It was only in the middle of 19th century, the Chancery Court first issued injunction to protect trade mark treating it as a species of incorporeal property.<sup>269</sup> Before this attempts were made by court of equity and common law courts to afford protection to trade marks.<sup>270</sup> The equity courts first refused to protect it though it recognized that a trader has a right to use a trade mark. In Blanchard v. Hill<sup>271</sup> Lord Chancellor

268. Quoted in Edward S. Rogers, "The Lanham Act and the Social Function of Trade-Marks", 14 Law and Contemporary Problems 173, 181 (1949). See also Kenneth J. Vandeveld, op.cit., p.341.

269. See General Electric Co. v. The General Electric Co.Ltd., [1972] 2 All E.R. 507, 518.

270. For a detailed discussion see S.Venkateswaran, The Law of Trade and Merchandise Marks in India (Madras: MLJ, Law Publishers, 1937), pp.119-23.

271. (1742) 2 Atkyns. 484: 26 E.R. 692.



Hardwicke observed:

Every particular trader has some particular mark or stamp; but I do not know of any instance of granting an injunction here, to restrain one trader from using the same mark as another; and I think it would be of mischievous consequence to do it.<sup>272</sup>

But later based on the legal norms against deception and fraud, courts showed its willingness to protect trade mark. For example, Lord Mansfield, C.J. in Singleton v. Bolton<sup>273</sup> said:

...if the defendant had sold a medicine of his own under the plaintiff's name or mark, that would be a fraud for which an action would lie.<sup>274</sup>

Relying on this principle by the beginning of 19th century, courts of equity granted injunction in many cases.<sup>275</sup> This was followed by the common law courts also.<sup>276</sup>

In Millington v. Fox<sup>277</sup> the Chancery Court for the first time granted perpetual injunction against the false use of trade mark treating it as species of incorporeal property. The

272. 26 E.R. 692, 693.

273. (1783) 3 Dougl 293: 99 E.R. 661.

274. Ibid.

275. See Hogg v. Kirby, (1803) 8 Ves. Jun. 215 :32 E.R. 336; Crettwell v. Lye, (1810) 17 Ves. 335 etc. See Venkateswaran, op.cit., pp.121-22.

276. See Sykes v. Sykes, (1824) 3 B & Cr. 541: 107 E.R. 834.

277. (1838) 3 My. & Cr. 338: 40 E.R. 956. In this case the plaintiff had been carrying on the business of manufacturing steel for sale in the name 'Crowley Millington.' The

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Court held that the owner had a right to the exclusive use of the trade mark. Though there was no fraudulent intent or use of the mark in the case, the Court granted a perpetual injunction recognizing the right of the trade mark owner. Since the property right on the title was accepted by the defendants, the Court did not discuss in detail the basis for the protection.

It was Lord Langdale, M.R., who spelt out the currently accepted basis of the protection afforded to trade mark in Perry v. Truefitt<sup>278</sup>. The principle was laid down as follows:

A man is not to sell his own goods under the pretence that they are the goods of another man; he cannot be permitted to practise such a deception, nor to use the means which contribute to that end. He cannot therefore be allowed to use names, marks, letters, or

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(f.n.277 contd.)

method was invented by one Crowley and the business was transferred to the plaintiff's predecessors. It was alleged that the defendants used the marks in the steel manufactured by them. Although the defendant showed that he had never heard of the name of the plaintiff's firm, and that he had acted innocently, injunction was granted restraining the defendant from continuing to use the mark.

278. (1842) 6 Beav. 66; 49 E.R. 749. One Mr. Leathart invented a grease or mixture for the hair, and the secret of making it was sold to the plaintiff. He gave the composition the name 'Perry's Medicated Mexican Balm'. The defendant started selling similar composition in the name 'Truefitt's Medicated Mexican Balm'. The plaintiff sought special injunction.

other indicia, by which he may induce purchasers to believe, that the goods which he is selling are the manufacture of another person. I own it does not seem to me that a man can acquire a property merely in a name or mark; but whether he has or not a property in the name or the mark, I have no doubt that another person has not a right to use that name or mark for the purposes of deception, and in order to attract to himself that course of trade, or that custom, which without that improper act, would have flowed to the person who first used, or was alone in the habit of using the particular name or mark.<sup>279</sup>

Expressing doubt as to whether there was property right in trade mark, the Court found its justification in affording protection on the basis of the need for preventing deception and fraud. The Court considered the damage caused to the owner of the trade mark as well as to the public in justifying its intervention. Thus by considering the individual and public interest involved, the principles of justice and equity were used to protect trade mark.

The same principle was reemphasized by Lord Langdale in Croft v. Day.<sup>280</sup> Restraining the defendants from using the

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279. 49 E.R. 749, 752. Per, Langdale, M.R.

280. (1843) 7 Beav. 84; 49 E.R. 994. Here an action was by the executors of Day, the well-known blacking maker, to restrain the defendant, his nephew from selling blacking manufactured by him, in bottles having the labels similar to that of the firm of Day and Martin.

mark similar to that of Day and Martin Co., the Court reasoned:

You may express the same principle in a different form, and say that no man has a right to dress himself in colours, or adopt and bear symbols, to which he has no peculiar or exclusive right, and thereby personate another person, for the purpose of inducing the public to suppose, either that he is that other person, or that he is connected with and selling        manufacture of such other person, while he is really selling his own. It is perfectly manifest, that to do these things is to commit a fraud, and a very gross fraud.<sup>281</sup>

Thus it is clear that it was by equating it with fraud and deception that the Court intervened and the relief granted for the violation of trade mark. There was considerable doubt as to the nature of property right involved in trade mark. There was a tendency to equate this with that of copyright and patent, because of the monopoly granted to its use. Courts though on earlier occasions tried to equate it with copyright and patent, subsequently held in categorical terms that there were subtle differences among these.

The question whether there is property right in trade mark was first considered by the English court in Hall v. Barrows.<sup>282</sup> As per the conditions in the articles of

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281. 49 E.R. 994, 996. See also Farina v. Silverlock, (1856) 6 De.G.M. and G.214: 43 E.R. 1214.

282. (1863) 4 DEG.J. and S.150: 46 E.R. 873.

partnership between Hall and Barrows, the surviving partner had the option to take all property of the partnership giving the legal representatives of the deceased partner the value of the share due to him, in case either of them died during the partnership and failed to nominate the son of the deceased to succeed. Hall died and his son was not nominated. The amount was calculated excluding the value of the goodwill and trade mark of the business. The Master of Rolls included goodwill, but excluded trade mark on the ground that it was not property. On appeal, the Chancery Court treated it as property and directed the inclusion in the valuation list. The reasoning of the Court was expressed by Lord Chancellor Westbury as follows:

...I am of opinion that these initial letters, surmounted by a crown, have become and are a trade mark property so called, that is, a brand which has reputation and currency in the market as a well-known sign of quality; and that, as such, the trade mark is a valuable property of the partnership as an addition to the Bloomfield works and, may be property sold with the works, and, therefore, properly included as a distinct subject of value in the valuation to the surviving partner.<sup>283</sup>

Thus the Court considered the reputation gained by the owner of the trade mark as to the quality of the goods by the constant use of the trade mark as basis for treating trade mark as property.

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283. 46 E.R. 873, 876.

As to the question of jurisdiction of courts to grant injunction, it was held:

Imposition on the public is indeed necessary for the Plaintiff's title, but in this way only, that it is the test of the invasion by the Defendant of the Plaintiff's right of property; for there is no injury if the mark used by the Defendant is not such as is mistaken, or is likely to be mistaken, by the public for the mark of the Plaintiff; but the true ground of these Courts' jurisdiction is property, and the necessity of interfering to protect it by reason of the inadequacy of the legal remedy.<sup>284</sup>

The question received adequate examination by House of Lords in The Leather Cloth Co. (Ltd.) v. The American Leather Cloth Co. (Ltd.).<sup>285</sup> Lord Cranworth recognized the property right in trade mark by a process of comparison with copyright.<sup>286</sup> Emphasizing the monopoly element in copyright and trade mark, his Lordship argued:

The right to a trade mark is a right closely resembling, though not exactly the same as, copyright. The word 'property', when used with respect to an author's right to the productions of his brain, is used in a sense very different from what is meant by it when

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284. Id. at 877.

285. 11 E.R. 1435: (1865) XI H.L.C. 523. Here the appellants were cloth merchants using the trade mark of Crocketts Co. Defendants also used a similar mark using the word Crocketts.

286. Id. at 1440.

applied to a house or a watch. It means no more than that the author has the sole right of printing or otherwise multiplying copies of his work. The right which a manufacturer has in his trade mark is the exclusive right to use it for the purpose of indicating where, or by whom, or at what manufactory, the article to which it is affixed was manufactured. If the word 'property' is aptly used with reference to copyright, I see no reason for doubting that it may with equal propriety be applied to trade marks.<sup>287</sup>

Though the conclusion that trade mark contained the elements of property rights is correct, it appears that the reasoning is against the basic philosophy of protection afforded to these two rights. It is true that there is monopoly in both cases. The monopoly is given to the copyright owner recognizing his intellectual creation based on the intellectual labour. Generally speaking there is no question of intellectual creation in trade mark. The justification for monopoly is based on the value obtained by its constant use. There is also difference between the nature of monopoly given to these rights. In case of copyright there is only a limited monopoly. But in the case of trade mark the owner gets a perpetual right to use the mark for a particular goods. Apart from this, the only common ground is the protection of public interest involved in both rights.

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287. 11 E.R. 1435, 1440. See also Thomas Somerville v. Paolo Schembri, (1887) A.C. 453 (P.C.).

Accepting the proposition of Lord Westbury in Hall v. Barrows<sup>288</sup> that there is property right in trade mark, W. Page Wood, V.C. explained further in Ainsworth v. Walmsley<sup>289</sup> the exact nature of property right involved in trade mark thus:

This court has taken upon itself to protect a man in the use of a certain trade mark as applied to a particular description of article. He has no property in that mark per se, any more than in any other fanciful denomination he may assume for his own private use, otherwise than with reference to his trade. If he does not carry on a trade in iron, but carries on a trade in linen, and stamps a lion on his linen, another person may stamp a lion on iron; but when he has appropriated a mark to a particular species of goods, and caused his goods to circulate with this mark upon them, the court has said that no one shall be at liberty to defraud that man by using that mark, and passing off goods of his manufacture as being the goods of the owner of that mark. And inasmuch as the Court protects the owner of the mark, he is entitled to authorize another, when he hands over his business to him, to place that mark on his goods. That is a right which, being protected by this Court, may be disposed of for value, may be bought and sold, and is, therefore, in that sense of the word, property.<sup>290</sup>

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288. (1863) 4 DEG.J. and S.150: 46 E.R. 873.

289. (1866) 1 Eq. 518. The plaintiff was a manufacturer of thread and had a good repute. Defendants made threads of inferior quality and marketed it using the marks of plaintiff.

290. (1866) 1 Eq. 518, 524-525.



It seems clear that though the law recognizes perpetual property right to the sole use of trade mark, it is limited to the particular type of goods to which it is used, and is restricted to the field of trade.

The difference between the nature of property right in trade mark, copyright and patent was stated by the Court of Appeal in Singer Manufacturing Co. v. Loog.<sup>291</sup> Lord Justice James, speaking for the Court, distinguished:

That being, as it appears to me, a comprehensive statement of what the law is upon the question of trade mark or trade designation, I am of opinion that there is no such thing as a monopoly or a property in the nature of a copyright, or in the nature of a patent, in the use of any name. Whatever name is used to designate goods, anybody may use that name to designate goods; always subject to this, that he must not, as I said, make directly, or through the medium of another person, a false representation that his goods are the goods of another person.<sup>292</sup>

This was accepted by the House of Lords also in Reddaway v.

Banham.<sup>293</sup> While granting injunction restraining the defendant

291. (1880-81) 18 Ch. 395. The plaintiff used the word 'singer' as a designation to all the sewing machines manufactured by them. They used different specific words along with 'singer' for different types of machines. The defendants, another company, in England used the label 'singer machines' in their sewing machine.

292. (1880-81) 18 Ch. 395, 412-13.

293. [1896] A.C. 199. The plaintiff was a manufacturer of belting, and sold it in the name 'Camel Hair Belting'. Defendant after making the belting using yarn of Camel's hair used the name 'Camel Hair Belting' for his products. Held that the plaintiff was entitled to injunction.

from using the words 'Camel Hair' which was the trade mark of the plaintiff based on the law laid down in Singer's Case, the House doubted the use of the word 'property' in its true sense to refer to trade mark. However, it was accepted that some rights incidental to property were present in trade mark.<sup>294</sup>

Following the reasoning resorted to by the English courts, the U.S. Supreme Court also held that there was property right in trade mark though it was quite different from that of patent and copyright. The nature of property right involved in trade mark and the basis for its protection was first analysed by the U.S. Supreme Court in United States v. Emil Stefens.<sup>295</sup> There were three cases of same nature and were heard together. In these famous trade mark cases criminal prosecution was initiated as per the provisions of the Act of Congress for infringement of trade mark. While examining the constitutional validity of the legislation, Justice Miller distinguished the rights in trade mark from that in copyright and patent thus:

The ordinary trade mark has no necessary relation to invention or discovery. The trade mark recognized by the common law is generally the growth of a considerable

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294. Id. at 209.

295. 100 U.S. 82 (1879). For a detailed discussion of the development of trade mark in America, see, Beverly W. Pattishall, "Two Hundred Years of American Trade Mark Law", 68 T.M.R. 121.

period of use, rather than a sudden invention....The writings which are to be protected are the fruits of intellectual labor, embodied in the form of books, prints, engravings and the like. The trade mark may be and, generally, is, the adoption of something already in existence as the distinctive symbol of the party using it. At common law the exclusive right to it grows out of the use of it, and not its mere adoption. By the Act of Congress this exclusive right attaches upon registration. But in neither case does it depend upon novelty, upon invention, upon discovery, or upon any work of the brain. It requires no fancy or imagination, no genius, no laborious thought. It is simply founded on priority of appropriation.<sup>296</sup>

The view taken by the English court that there is property right in trade mark has been followed in India also. Our courts in many cases held that there was property in trade mark.<sup>297</sup>

Having regard to the case law in England, America and India, it may now be concluded that there is some kind of property right in trade mark, though it is not similar to that in copyright, patent or other corporeal property. It is the value

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296. Id. at 82-99. This was followed in Hanover Star Milling Co. v. D.D.Metcalf, 240 U.S. 403 (1915) and in United Drug Co. v. Theodore Rectanus Co., 248 U.S. 90 (1918).

297. See Orr-Ewing v. Grant, Smith & Co., 2 Hyde 185; Mohamed Ishaq v. Arif Khan, 98 P.L.R. 1902; L.Ganeshi Lal v. Anwar Khan Mahboob & Co., A.I.R. 1933 All. 495; Von Wulffing v. Jivandas & Co., A.I.R. 1926 Bom. 200; Imperial Tobacco Co. v. A. Bonnan, A.I.R. 1924 Cal. 216 etc.

gained by an owner of trade mark through constant use of it in business by way of reputation obtained in the market as to the quality of goods produced. This gives the trade mark the status of property. The nature of property right involved in this species of incorporeal property is a limited one. The owner has the exclusive right in perpetuity to use the mark for trade purposes. The right is limited only to a particular type of goods. This is acquired because of the constant use. However, at present it cannot perhaps be said that the criterion for granting trade mark is its constant use inasmuch as the current practice is to give a trade mark to a product immediately after its registration though it had never been used prior to the registration.

By recognizing the property right in trade mark, courts recognized the individual interest involved in it. Thus along with public interest which has been recognized as a basis for protecting trade mark, courts also recognized the individual interest of the user of trade mark. However, limiting the right of monopoly in trade mark only to the particular goods demonstrates that the individual interest is recognized only incidental to public interest. It is with this idea of giving additional protection to the public that trade mark is now recognized immediately after registration.

The first legislative attempt to codify the law of trade mark in England was made in 1875. The Act was primarily intended for the registration of trade mark. Though the Act insisted registration of trade mark for getting legal remedies, the common law basis for recognition of trade-mark--prior public use--was not changed. The Act did not authorize the registration of a prospective trade mark before it had been actually used as such or after it had ceased to be used.<sup>298</sup> Registration of the trade mark was merely treated as evidence of a title acquired at common law by actual public use of the trade mark.<sup>299</sup>

But when the Act of 1905 was enacted there was a change in the position. The basic change was the recognition of absolute title of the owner by registration. For the first time marks proposed to be used were considered for registration.<sup>300</sup> Even without the actual use of the mark one could acquire trade mark right by mere registration. Thus the basic common law rule that a property right in trade mark can only be acquired by constant use was diluted to a considerable extent.

The term trade mark has not been defined till the enactment of the trade mark legislation. There was no earnest attempt by courts to define it. A person had the right to use

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298. The Trade Mark Registration Act 1875, section 1.

299. Section 2. See also observation of Lord Diplock in General Electric Co. v. The General Electric Co.Ltd., [1972] 2 All E.R. 507, 520.

300. The Trade Mark Act, 1905, section 34.

any mark distinctive from an already used mark. The major outcome of the first trade mark legislation was a comprehensive definition of the term 'trade mark'. The Act of 1875 defined trade mark as follows:

A trade mark consists of one or more of the following essential particulars; that is to say;

A name of an individual or firm printed, impressed, or woven in some particular and distinctive manner; or

A written signature or copy of a written signature of an individual or firm; or

A distinctive device, mark, heading, label, or ticket; and there may be added to any one or more of the said particulars any letters, words, or figures, or combination of letters, words or figures; also

Any special and distinctive word or words or combination of figures or letters used as a trade mark before the passing of this Act may be registered as such under this Act.<sup>301</sup>

When the law relating to trade mark, patents and designs were codified in 1883 some changes were introduced in the definition of 'trade mark'. The new definition included 'invented words' and 'word or words having no reference to the character or quality of the goods and not being a geographical name' as trade mark.<sup>302</sup>

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301. The Trade Mark Registration Act, 1875, section 10.

302. The Patent, Designs and Trade Marks Acts (1883-1902), (46 and 47 Vict. c.57), Section 64.

With the passing of the Act of 1905 the law of trade mark started to assume its modern form. The term 'mark' and 'trade mark' were given new definitions. As per the Act mark means:

A mark shall include a device, brand, heading, label, ticket, name, signature, word, letter, numeral, or any combination thereof.<sup>303</sup>

This even now continues as the definition of mark without any change in England and in India.

But the term trade mark has been given a new meaning. Trade mark was defined as:

A trade mark shall mean a mark used or proposed to be used upon or in connection with goods for the purpose of indicating that they are the goods of the proprietor of such trade mark by virtue of manufacture, selection, certification, dealing with, or offering for sale.<sup>304</sup>

This makes it clear that the purpose of the trade mark was to identify the source of the goods and its quality. It also indicated the connection between the owner of the trade mark and the goods.

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303. The Trade Mark Act, 1905 (5 Edw. 7, c.15). Section 3.

304. Ibid.

Though an elaborate definition was given to the terms 'mark' and 'trade mark', only few marks which satisfy the conditions laid down in section 9 of the Act was given registration.<sup>305</sup>

The law in England was again changed and the present Act was passed in 1938. As per this Act:

"trade mark" means, except in relation to a certification trade mark, a mark used or proposed to be used in relation to goods for the purpose of indicating, or so as to indicate, a connection in the course of trade between the goods and some person having the right either as proprietor or as registered user to use the mark, whether with or without any indication of the identity of that person, and means, in relation to a certification trade mark, a mark registered or deemed to have been registered under section thirty-seven of this Act.<sup>306</sup>

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305. Section 9 read: "A registrable trade mark must contain or consist of at least one of the following essential particulars:- (1) The name of a company, individual, or firm represented in a special or particular manner; (2) The signature of the applicant for registration or some predecessor in his business; (3) An invented word or invented words; (4) A word or words having no direct reference to the character or quality of the goods, and not being according to its ordinary signification a geographical name or a surname; (5) Any other distinctive mark, but a name, signature, or word or words, other than such as fall within the descriptions in the above paragraphs (1), (2), (3) and (4), shall not, except by order of the Board of Trade or the Court, be deemed a distinctive mark..."
306. The Trade Mark Act, 1938, section 68(1).



According to the definition a mark will be treated trade mark even if the identity of the owner of the mark is not disclosed. This is in conformity with the most modern function of trade mark as the identifier of the quality of the goods rather than its origin or source. The register of trade mark is also divided into two parts--Part A and Part B. Separate conditions are laid down for getting registrations in these parts.<sup>307</sup>

In India the term 'trade mark' was first defined through the Penal Code. Section 478 of the Code, as it was originally enacted, defined trade mark as follows:

A mark used for denoting that goods have been made or manufactured by a particular person, or at a particular time or place, or that they are of a particular quality, is called a trade mark.

It seems that the idea was to find out the source or quality of the goods rather than its ownership. Since the term 'mark' was not defined in the Code, it appears that there was no restriction at that time as to the nature of the mark. According to the definition, a mark becomes trade mark only if the article in which the mark is affixed is actually manufactured by the owner of the trade mark.

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307. See sections 9 and 10.

This definition was amended and broadened by the amendment to the section introduced through section 3 of the Indian Merchandise Marks Act, 1889 (Act IV of 1889).<sup>308</sup> By the section marks used to articles that were not actually manufactured by the owner of the mark were included as trade mark. Apart from this, the definition was extended to include all marks registered by the then existing English law on trade marks, and also to unregistered marks protected by English law. Thus the definition was broadened to include all types of marks existing at that time.

The section (section 3 of Merchandise Marks Act, 1889) was repealed by the Repealing Act of 1938. By amending the Merchandise Marks Act 1889 in 1941, a new definition was introduced to section 478 of the Penal Code.<sup>309</sup> The definition was same as that of the definition in the first Indian Trade

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308. Section 478 read: "A mark used for denoting that goods are the manufacture or merchandise of a particular person is called a trade mark, and for the purposes of this Code the expression 'trade mark' includes any trade mark which is registered in the register of trade marks kept under the Patents, Designs and Trade Marks Act 1883 and any trade mark which, either with or without registration, is protected by law in any British possession or foreign state to which the provisions of the one hundred and third section of the Patents, Designs and Trade Mark Act 1883 are, under order in council, for the time being applicable". Whitley Stokes, A Supplement to the Anglo-Indian Codes (Oxford: The Clarendon Press, 1889), pp.5-6.

309. See section 12 of the Indian Merchandise Marks (Amendment) Act, 1941 (Act No.II of 1941).

Marks Act of 1940. Section 478 of the Penal Code was repealed when the present Trade and Merchandise Marks Act was enacted in 1958. An elaborate definition was included in the Act.<sup>310</sup>

Even though the term 'trade mark' had been defined and the trade marks were protected through Penal Code since 1860, there was no legislation till 1940 for registration of trade mark. The common law principles were used to afford protection.<sup>311</sup> Many attempts were made since 1877 to enact a comprehensive trade mark legislation in India.<sup>312</sup> The Bills introduced in 1879, and 1880, could not be passed because of the opposition of the commercial community in India.<sup>313</sup> By the growth of commerce and trade in India, different organisations had passed resolutions demanding the enactment of a trade mark legislation.<sup>314</sup> Realizing the necessity, Government of India prepared a memorandum in 1937 and circulated among the provincial governments. After making necessary changes based on the opinion of the provincial governments, the first legislation was enacted on 1940. However difficulties arose in the enforcement of this

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310. See infra n.315.

311. See, British American Tobacco Co.Ltd. v. Mahboob Buksh, (1911) I.L.R. 38 Cal. 110; Bansari Das v. Emperor, A.I.R. 1928 Lah. 186; Von Wulfing v. Jivandas & Co., A.I.R. 1926 Bom. 200; Jawala Prasad v. Munnalal Serowjee, (1910) I.L.R. 37 Cal. 204; Abdul Kareem Shahib v. Abdul Kareem Sahib, A.I.R. 1931 Mad. 461 etc.

312. See S.Venkateswaran, The Law of the Trade and Merchandise Marks in India (Madras: Law Publishers, 1937), p.10.

313. Ibid.

314. Ibid.

legislation. After independence the Government of India appointed a Select Committee to revise the Trade Marks Act, 1940. Based on their report the present Trade and Merchandise Marks Act, 1958 was passed repealing the Trade Marks Act, 1940 and the Indian Merchandise Marks Act, 1889.

In the Act of 1958 the definition of trade mark reads as follows:

Trade mark means:- (i) in relation to Chapter X (other than s.81), a registered trade mark or a mark used in relation to goods for the purpose of indicating or so as to indicate a connection in the course of trade between the goods and some person having the right as proprietor to use the mark; and (ii) in relation to the other provisions of this Act, a mark used or proposed to be used in relation to goods for the purpose of indicating or so as to indicate a connection in the course of trade between the goods and some person having the right, either as proprietor or as registered user, to use the mark whether with or without any indication of the identity of that person, and includes a certification trade mark registered as such under the provisions of chapter VIII.<sup>315</sup>

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315. Trade and Merchandise Marks Act 1958, section 2(v). The term trade mark was defined in section 2(1) of the Act of 1940 as follows: "Trade mark means a mark used or proposed to be used in relation to goods for the purpose of indicating or so as to indicate a connection in the course of trade between the goods and some person having the right, either as proprietor or as registered user, to use the mark whether with or without any indication of the identity of that person".

The term 'mark' is defined thus in section 2(f): "Mark includes a device, brand, heading, label, ticket, name, signature, word, letter or numeral or any combination thereof".

(contd...)

Following the pattern of English Act, the Act also contains provision for registration of trade mark on the basis of their nature. The register of trade mark is divided into two parts for registration--Part A and Part B. Certain conditions are laid down to get registration in these parts. To get registration in Part A, the trade mark must have at least one of the following particulars:

- a) the name of a company, individual or firm represented in a special or particular manner;
- b) the signature of the applicant for registration of some predecessor in his business;
- c) one or more invented words;
- d) one or more words having no direct reference to the character or quality of the goods and not being, according to its ordinary signification, a geographical name or a surname or a personal name or any common abbreviation thereof or the name of a sect, caste, or tribe in India;
- e) any other distinctive mark.<sup>316</sup>

As per sub-section (2) to get registration for a name, signature or word other than specified in the above section, must have distinctiveness.<sup>317</sup>

To get registration in Part B of the register, the mark in relation to the goods in respect of which it is proposed to be registered must be distinctive. In case it is not distinctive, it must be capable of distinguishing goods with which the proprietor of a trade mark is or may be connected in the course of trade from goods in the case of which no such connection subsist.<sup>318</sup>

Thus the test of 'distinctiveness' is used to identify the appropriate marks for getting registration. The above analysis of the law of trade mark demonstrates that though trade mark has been identified along with other intellectual properties, it has no relationship with the basis of protection afforded to intellectual properties. It is now well settled that trade mark contains a species of property. Just like in the copyright and patent it is the public interest along with the individual interest which form the basis of according protection to this form of property.

Though the interest involved in protection of trade marks can be distinguished from the interests protected by copyright and patent, there is no denying the fact that there is a

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317. Sections 9(2) and 9(3).

318. Sections 9(4) and 9(5).

common element of property right in all these items of intellectual property.

In all these three items of intellectual property, there is a common thread running through the fundamental-conceptual-level. For example, when one examines the rationale of protecting copyright, one realises that protection is granted to copyright not only to confer some special rights to the initiator of the idea contained in the book but to safeguard the interest of the public in making the book available for its benefit in posterity. That is the main reason why the copyright is limited to a specified period. Similarly, patent system has also been introduced not only to protect the right of the inventor, but to afford ample chance to the public to get benefitted by the invention. It is worth-mentioning that patent system had its origin in the anxiety of the Crown to start new industrial ventures. The conceptual foundation of trade marks also presents a similar situation. It is more to protect the society from being deceived rather than to protect the pecuniary benefit accruing to the individual businessman that trade mark had been developed.

On a closer analysis one may notice that the conceptual foundation of property right as such has now undergone change as made out in Chapters I and II. Property right is given to the individual not to safeguard his interest alone. He is allowed to hold property for common good. In other words, in recognizing

property rights law takes care of the public interest rather than the individual right. If this is so, there is no gain-saying the fact that copyright, patent and trade mark would constitute property. Viewed in this perspective, there is no theoretical inconsistency as is usually made out, in recognizing these items as property needing protection on the basis on which traditional forms of property are protected.



## Chapter V

### CRIMINAL LAW AND INTELLECTUAL PROPERTY:

#### CURRENT PRACTICE

Just as in the case of corporeal property, it is in public interest that criminal law is commanded to aid enforcement authorities for the protection of intellectual property. As has been discussed in the earlier chapters, it is the public's concern to see that the right of an individual in a particular thing is safeguarded. In order to carry out this function, criminal law looks at the interest an individual has on the property. Practical considerations make it to honour possession of movable property as the evidence of the interest the individual has on the property. However, in the case of intellectual property, possession cannot be the criterion; its ownership is the main concern. Thus though the very basis of protection afforded by criminal law to the property interests of the individuals is the public interest, i.e. safeguarding the property for the public benefit as well as the benefit of the individual who has a special interest by way of ownership, authorship or possession, the possibilities of criminal law in affording adequate protection to the category of intellectual property have not been adequately explored. This is true in the case of copyright, patent or trade mark as explained below.

COPYRIGHT

Civil law had been affording protection to the authors in earlier times.<sup>1</sup> The courts had been employing common law remedies for this purpose. The ineffectiveness and inadequacy of these civil remedies led to the enactment of the first legislation of copyright--Statute of Anne 1709--with alternate remedies in the nature of penalties, confiscation of infringed copies etc.<sup>2</sup> Criminal law as such was not employed to ensure protection of interests in this field. However, the spate of technological developments has had its impact, and of late the possibilities of employing criminal law came to be tapped. Still, the punishment and penalties prescribed in those days were of mild nature.

Legislation in the field of copyright in India started with the English legislative efforts. Following the English pattern, the Indian Copyright Act also contained criminal law remedies for infringement of copyright. The Statutes of 1847 and 1914 contained provisions similar in nature to English Act.

Since the provisions in these enactments could not keep pace with the developments that had been taking place, the

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1. See The Stationer Co. v. Parker, (1685) Skin. 233; The Company of Stationers v. Seymour, 29 Car.2 (1677):1 Mod.Rep. 256; Ponder v. Bradyl, 31 C.2, B.R.; Lilly's Entries, 67; Miller v. Kincaid, H.L. 1750; Tonson v. Walker, (1752) 3 Swan 672 etc. quoted in Millar v. Taylor, (1769) 4 Burr. 2303: 98 E.R. 201, 208-16.
  2. See Millar v. Taylor, (1769) 4 Burr. 2303.

legislature had to bring out a new legislation in 1957. Criminal law provisions have been incorporated profusely in this Act. The Act of 1957 was amended in 1983 and 1984; elaborate provisions were included by treating all forms of infringement of copyright as offences, and giving police special powers to take action. Stringent punishments are also provided for to arrest infringement. It is interesting and fruitful to have a bird's eye view of the functioning of the enactment.

According to the Copyright Act, 1957, any person who knowingly infringes or abets the infringement of the copyright in a work or any other right conferred by the Act is treated as an offender. He is punishable with a minimum punishment of six months imprisonment which may extend to three years, and a fine between fifty thousand rupees and two lakhs rupees.<sup>3</sup> Though minimum punishment has been prescribed, courts have been given the power to award a lesser punishment after stating special reasons in the judgment. Possession of a plate for the purpose of making infringing copies of any work with copyright is an offence punishable with imprisonment upto two years and with fine.<sup>4</sup> Apart from this, making false entries in copyright register and producing false entry or writing of the register as

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3. Section 63 reads: "Any person who knowingly infringes or abets the infringement of--(a) the copyright in a work, or (b) any other right conferred by this Act, shall be punishable with imprisonment for a term which shall not be less than six months but which may extend to three years, and with fine which shall not be less than fifty thousand rupees but which may extend to two lakh rupees."

4. Section 65.

evidence are also made offences punishable under the Act.<sup>5</sup> Similarly, making false statement to deceive any authority executing the provisions of the Act is also punishable.<sup>6</sup> Construction of a building infringing copyright is, however not an offence under this Act.<sup>7</sup>

To contain the problem of video piracy, special provision has been included in the Act. According to the new provision, taking video films or records in contravention of the provisions of the Act is an offence punishable with imprisonment for a term upto three years and fine.<sup>8</sup> A company, as well as the person in charge of the company at the time of commission of the offence, is also liable for punishment under the Act.<sup>9</sup>

The Act also envisages special provisions and devices for its effective enforcement. Special powers are given to the police officers. A police officer on his satisfaction that there has been a violation of the Act can without warrant, seize infringed copies and plates used for making

5. Section 67.

6. Section 68.

7. Section 63, Explanation.

8. Section 68(A) lays down: "Any person who publishes a record or a video film in contravention of the provisions of Section 52A shall be punishable with imprisonment which may extend to three years and shall also be liable to fine". Section 52-A deals with particulars to be included in records and video films while publishing it.

9. Section 69.

infringed copies.<sup>10</sup> These copies must be produced before a magistrate at the earliest. After making necessary inquiry the magistrate can deliver them to the interested parties who apply for their release.<sup>11</sup> The court is also duty bound to deliver such things to the true owner irrespective of the fact that the accused is punished or not.<sup>12</sup> The power to try the offences under the Act is vested with first class magistrates.<sup>13</sup>

The provisions are indicative of the legislature's concern for the prevention of copyright violations. The prescription of minimum punishment and the wide powers given to the police officers show the legislative determination to deal with copyright violations strongly. Though the punishment was enhanced to three years, it is not made clear whether the offence is cognizable or not. Though the police has the power to search and seize the infringed copies without warrant, it is not clear whether the accused can be arrested without warrant. According to the general pattern of Cr.P.Code since the punishment prescribed is three years, it appears that the offence may be treated as cognizable and non-bailable. In spite of the existence of these provisions in the statute Book for a long time, only very few cases have been reported in these areas. Probably, the police is reticent in enforcing

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10. Section 64(1).

11. Section 64(2).

12. Section 66.

13. Section 70.

these provisions. Or the victims of these offences might not be active in getting these provisions enforced adequately. Or such cases might not be travelling to the appellate courts. Be that as it may, the few decisions which have been reported are also not indicative of any enthusiasm on the part of the judiciary in enforcing them effectively.

The requirement of mens rea is insisted upon in the case of offences under the Copyright Act. The use of the word 'knowingly' makes it clear that the offender must have a guilty mind to commit the offence under the Act. It is also evident that mere knowledge of violating copyright is sufficient to constitute the offence under the Act. However, the judiciary has not been reading mens rea as it is generally understood in criminal jurisprudence in interpreting the Copyright Act. For example, the reading of 'knowingly' in section 63 of the Act by the Allahabad High Court may be examined. In Sheo Ratan Upadhyaya v. Gopal Chandra Nepali<sup>14</sup> the appellant was the copyright holder of the book Shri Mahabharat written in Nepali by his father. The book was first published in 1929 and the author died in 1950. The respondents published the book making some alterations and omissions in the name of one Krishna Prasad Regini. The appellant filed a complaint under section 63 alleging infringement of copyright. The accused contended before

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14. A.I.R. 1965 All. 274.

the Magistrate that they had published the book on a bona fide belief that they have acquired the copyright. The Magistrate acquitted the accused for lack of knowledge to constitute mens rea. On appeal, it was contended before the High Court that the ingredient of mens rea required under the section would be satisfied if a person knowingly published or printed work in which another had a copyright. After examining section 63<sup>15</sup> of the Copyright Act, the Court held that the words used were "knowingly infringes...the copyright in a work" and not "knowingly publishes or prints a work in which there is a copyright".<sup>16</sup> So the acceptance of the contention that knowingly published or printed a work in which copyright subsisted amounted to an offence would be "to modify the language of section 63 which is not possible for any court of law to do".<sup>17</sup> This seems to be an interpretation which has taken the wind out of the sail. It is evident from section 14 that it is the exclusive right of the author to publish his work. Any one who publishes the work without his permission would thus infringe his copyright. The Court does not seem to have given much thought to the implications of the other connected provisions.

In this case it was also contended that the existence of the copyright must be presumed to be known to every one, and

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15. See supra, n.3 and the text accompanying it.

16. A.I.R. 1965 All. 274, 275.

17. Ibid.

one who violates it must be treated as a person infringing it knowingly. This was repelled by the Court saying:

Such an argument, if accepted, would result in casting upon an accused person, in every case in which the initial existence of copyrights of the complainant is not established, to prove that he did not possess the copyright. This means that a person who publishes or prints a work in which there is or may be a copyright does so at his own peril and risk. He must first ascertain the exact legal position about the existence of the copyright and his right to publish, or else he automatically commits an offence under S.63 of the Copyright Act by mere publication or printing. This view would exclude the existence of a bona fide belief or mistake of fact as to sufficient defence to a prosecution under S.63 of the Copyright Act.<sup>18</sup>

The appeal was dismissed on the ground of lack of sufficient evidence to prove knowledge of accused. The view taken by the Court does not appear to be conducive to the proper enforcement of the provisions of Copyright Act. It is not understood how the defence of mistake of fact could be excluded even if the Court takes the view that everyone knows the existence of copyright. To say the least, this is an unreasonably restrictive interpretation.

Need for conclusive proof of knowledge of the accused in case of infringement was stressed by the Kerala High Court

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18. A.I.R. 1965 All. 274, 276.



also in Cherian P. Joseph v. K. Prabhakaran Nair.<sup>19</sup> Here the books written by the complainant in English were translated into Malayalam and published by the accused without the permission of the complainant. The accused was acquitted by the trial court. On appeal the High Court on comparison of the books found that the books to be translation of the English books. But the Court refused to reverse the lower court for lack of conclusive proof of knowledge of the accused. Justice Govinda Menon observed:

Section 63 of the Act postulates a knowledge on the part of the accused that the Malayalam translations were really piratical reproductions of the complainant's books. It is true that the possibilities are that he must have known, but in a case of an appeal against acquittal unless there is clear and conclusive proof of the knowledge the accused cannot be found guilty of the offence.<sup>20</sup>

It appears that the courts have not been giving effect to the legislative intention in these decisions. The general apathy towards such violations and the unwillingness to treat such violations as criminal offences carrying punishments would have made the courts to be over cautious in their approach and

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19. A.I.R. 1967 Ker. 234.

20. Id. at 235. The alleged offence being translation of a book, the accused ought to have adduced some evidence to prove good faith, i.e. he had made reasonable enquiry about the matter.

too technical in their interpretation. Moreover, the feeling that it is only the individual's property right which is affected by such violations must also have influenced the judiciary to be reluctant in spreading the net of criminal law in a hitherto purely private domain.

Another question that came for consideration of the courts was whether registration of copyright was mandatory for filing criminal complaint under the Act. The Madras High Court in Venkata Rao v. Padmanabha Raju<sup>21</sup>, examined the question. In 1906 and 1908 a book of folklore stories in Telugu was published in two parts. The second edition was also published in 1914. In 1925 the defendant published and sold the books without permission. When the complainants filed a criminal case against the defendant, it was argued that since the books were not registered under the Copyright Act no action would lie. The complaint was filed under section 7 of the Copyright Act, 1914. Accepting the argument, the Magistrate acquitted the accused. On revision the High Court reversed. After examining the provisions of the Act of 1911 (England), the Court held that since there was no provision for registration the action could be taken even if the books were not registered. The mandatory provision for registration in the Indian

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21. A.I.R. 1927 Mad. 981.

Copyright Act, 1847<sup>22</sup> was held not applicable in the case since the Act had been repealed by Act 3 of 1914.<sup>23</sup>

This trend was followed in subsequent cases also by other High Courts. The Patna High Court in Radha Krishna Sinha v. State of Bihar<sup>24</sup> held that registration was not mandatory under the provisions of the Copyright Act, 1957 for invoking penal provisions under the Act. The Court relied on various decisions of other High Courts wherein it was held that registration was not mandatory for filing civil cases.<sup>25</sup>

The Andhra Pradesh High Court in Muppala Ranganayakamma v. Smt.K.Ramalakshmi<sup>26</sup> elaborately considered whether registration was a prerequisite for initiating criminal

22. Section 14 of the Indian Copyright Act, 1847 read: "...no proprietor of copyright shall maintain, under the provisions of this Act, any action or suit at law or in equity, or any summary proceedings in respect of any infringement of such copyright, unless he shall, before commencing such action, suit or proceeding, have caused an entry to be made in the book of registry, provided always that the omission to make such entry shall not affect the copyright in any book, nor the right to sue or proceed in respect of the infringement thereof except the right to sue or proceed in respect of the infringement thereof under the provisions of this Act".

23. A.I.R. 1927 Mad. 981, 982.

24. 1979 Cri.L.J. 757 (Pat.). See also Govt. of West Bengal v. Nitya Gopal Basak, 1985 Cri.L.J. 202 (Cal.).

25. Cases relied are Satsang v. Kiron Chandra, A.I.R. 1972 Cal. 533; M/s.Manojah Cine Productions v. A.Sundaresan, A.I.R. 1976 Mad. 22 etc.

26. 1986 Cri.L.J. 522 (A.P.).

proceedings. After examining sections 44<sup>27</sup> and 45<sup>28</sup> of the Copyright Act, 1957, the Court observed:

The object behind the enactment of Sec.44 of the said Act was not to make registration compulsory or mandatory for the purpose of enforcement of copyright. It provided an option. It was, therefore, not obligatory for an author to get the copyright registered under Sec.44 of the said Act for the purpose of acquiring rights conferred by it....If the legislature intended to make the requirement of registration mandatory, the language of Sec.44 would have been different. It could be on the lines of section 69 of the Partnership Act. There is no provision in the Act depriving an author of the rights conferred by this Act on account of non-registration of the copyright.<sup>29</sup>

It seems that the interpretation by the courts that registration is not mandatory for invoking the criminal jurisdiction for preventing infringement of copyright is correct in the light of the present statutory provisions. Only the Act of 1847 contained

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27. Section 44 reads: "There shall be kept at the Copyright Office a register in the prescribed form to be called the Register of Copyrights in which may be entered the names or titles of works and the names and addresses of authors, publishers and owners of copyright and such other particulars as may be prescribed".
28. Section 45(1) reads: "The author or publisher of, or the owner of or other person interested in the copyright in, any work may make an application in the prescribed form accompanied by the prescribed fee to the Registrar of Copyrights for entering particulars of the work in the Register of Copyrights...."
29. 1986 Cri.L.J. 522, 523-24, per, Sriramulu, J.

mandatory provision for registration. The Act of 1914 was silent about registration, and in the Act of 1957 registration is optional. But it appears that registration will be of much practical use for the enforcement of penal provisions in the Act. The Act confers on the police officer the power to search and seize infringed goods without warrant. Of course, in case of disputes regarding copyright, the police officer has to ascertain the real owner of copyright. If registration is made mandatory it will help the police officer to identify the owner. It will help the owner of copyright also to prevent the unnecessary harassment of the police officer. In these circumstances it is suggested that the law should be amended to make registration mandatory.

High Courts were unanimous in adopting the method for finding out whether there was infringement of copyright. According to various courts, it is the duty of a court to compare the originals with the infringed copies to find out whether there was infringement. The Jammu and Kashmir High Court had an occasion to examine whether some notes taken from the original book could be considered violation of copyright. The Court in Romesh Chowdhry v. Kh.Ali Mohamad Nowsheri<sup>30</sup> held

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30. A.I.R. 1965 J.& K. 101. In this case the J.& K. University had published certain books and prescribed it for certain courses. The accused published notes on these books including certain portions of the book. The University filed complaint under section 63 for infringement.

that the notes prepared by the accused from the original book were not infringement of copyright. The Court reasoned:

It is well settled that in order to be actionable, the infringement must be a colourable imitation of the originals with the purpose of deriving profit. We have gone through the notes prepared by the petitioner No.3 and published by petitioners Nos.1 and 2 and we do not find anything in these notes to indicate that there is any colourable imitation of the original.<sup>31</sup>

Thus the Court compared the original with the notes to find out whether there was any infringement of copyright. This was followed by the Kerala High Court in Cherian P. Joseph v. K.Prabhakaran Nair<sup>32</sup> discussed supra. The Court compared the books published in English with those published in Malayalam to find out whether the translation of the books amounted to infringement of copyright.

The question whether an expert should be consulted to ascertain infringement of copyright came to be examined in Government of West Bengal v. Nitya Gopal Basak.<sup>33</sup> In this case

31. Id. at 101-02, per, Murtaza Fazl Ali, J.

32. A.I.R. 1967 Ker. 234. The court acquitted the accused also on the ground that a civil suit was pending. See also Radha Krishna Sinha v. State of Bihar, 1979 Cri.L.J. 757.

33. 1985 Cri.L.J. 202 (Cal.). Here the accused published a book similar in nature to the book of the complainant's Bengali book Adarshalipi O Saral Barna Parichay.

the Magistrate acquitted the accused. He inter alia held that in the absence of an expert opinion it was not possible for a court to come to a finding that the materials of the books were reproduced and printed by the accused.<sup>34</sup> The High Court negatived this. It held that the case could not be dismissed on the ground that expert opinion to decide whether there was any infringement was not available. The High Court compared the books and held that there was no infringement of copyright.<sup>35</sup> Thus it is the law that a court has to compare the books to find out whether there is any infringement. It is, however to be noted that all these cases were concerned with the infringement of copyright in books. The test of comparison may be appropriate only to find out infringement of copyright in books. But this would not be adequate in cases of video piracy, and copyright violations in computer programmes and other new intellectual properties. It appears that the assistance of an expert will have to be sought for by a court to find out whether there is any infringement of rights in these new forms of property.

For the first time, the Allahabad High Court examined the question of right of a person to invoke criminal law jurisdiction to afford protection to copyright in Nagin Chand Jain v. State of U.P.<sup>36</sup> The petitioner was the publisher of a physics

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34. The Court referred to Sita Nath Basak v. Mohini Mohan Singh, A.I.R. 1924 Cal. 595.

35. 1985 Cri.L.J. 202, 204.

36. 1981 All.L.J. 1272.

text book High School Bhautiki authored by Shri Rajkumar and G.D.Mittal. The copyright was assigned to the petitioner in 1968. The accused published a book New Pattern Gagan Guide, which according to the petitioner had infringed his copyright. He filed a complaint under section 63 before the Magistrate. The Magistrate found that the assignment was not proved, and held that the petitioner had no locus standi to file the case.<sup>37</sup> This was approved by the Sessions Judge. In the High Court it was contended that assignment was not a condition precedent to initiate criminal proceedings and the prima facie infringement of copyright was sufficient to file a criminal complaint. The Court concluded that the party did not have the right to invoke criminal jurisdiction:

Thus, it is the owner or assignee or licensee of a copyright who can feel aggrieved on account of the infringement of that right in a particular work. S.63 of the Act is intended to safeguard the right and interest of such author, assignee or licensee. It is open to these persons to ignore infringement of their copyright in a work. Though S.63 of the Act does not contain any word suggesting that only the author or assignee or licensee of the copyright can take criminal action for infringement of copyright, this section should be read to imply that

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37. The accused filed the true copy of the assignment and requested the court to summon the original which was in the possession of Income tax authorities. This was rejected by the Magistrate. High Court held that the order was not a correct and proper one.



the pirating person shall be liable to punishment for infringement only if such author or assignee or licensee seeks to claim protection of law. If such a person, notwithstanding the infringement, does not choose to take any action for the infringement, there is no harm caused to anyone else.<sup>38</sup>

Justice R.B.Lal developed the point further:

The infringement of copyright is not to be regarded as an offence against the society at large, for which anyone may move the machinery of criminal law. In fact, the infringement of copyright in a work suggests that the infringed work is of value to the society. Dissemination of parts of such a work by pirating the same by another author, can hardly have an adverse effect on the society. Piracy of a work can adversely affect the financial interests of the author or assignee or licensee and, therefore, he should alone be held entitled to claim the protection of criminal law.<sup>39</sup>

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38. 1981 All L.J. 1272 1274-75, per R.B.Lal, J.

39. Id. at 1275. In this context it may be noted that Copyright Act did not prescribe any special procedure for trying the offences committed under Act. According to section 4(2) of the Criminal Procedure Code, the provisions of Cr.P.Code have to be followed. Similarly, it is also to be noted that the Copyright Act did not restrict the rights of the parties to invoke criminal jurisdiction. In these circumstances one has to look into the provisions of the Cr.P.Code regarding the right of the persons. It is expressly stated in section 190 of the Cr.P.Code that any person can set the criminal law in motion. This line of approach has been adopted by the Supreme Court in a recent case involving trade mark violation. Unfortunately there was no attempt on the part of the Court to enter into an inquiry on these lines.

As has been pointed out earlier these decisions reflect a lazy and lousy approach adopted by the judiciary towards the violations of Copyright Act.<sup>40</sup> This was characteristic of our judiciary in their approach towards white collar offences. We feel uncomfortable to describe such violations as offences inviting punishments such as imprisonment. Such violations are also committed by the white collar segment of our society. The situation again makes us reluctant and reticent in taking remedial action. It is really unfortunate to say that copyright violations are only violations of private nature where unaffected individuals should be chary about involving criminal law. Copyright protection is not only the concern of the copyright holder but also of the society at large, though the immediate victim is the owner. Many a thing which have not been intended by the author could be disseminated in the society by copyright piracy. He could be misquoted, quoted out of context with a view to distortion of the meaning, and thus misleading the society. Moreover, protection of the individual's right is in the public interest. If a man's right in relation to a subject, in which the society is also interested, is violated it should be possible for any citizen to turn the wheel of criminal law--that too in a case where the statute has criminalized such violation.

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40. The same attitude may be seen in the decisions of Sheo Ratan Upadhyaya v. Gopal Chandra Nepali, A.I.R. 1965 All. 274; Cherian P. Joseph v. K. Prabhakaran Nair, A.I.R. 1967 Ker. 234 etc.

The examination of case law would show that the judiciary was not much concerned for the employment of criminal law to afford protection to copyright. Wherever possible the courts tried to protect the accused rather than trying to achieve the object of protecting the author's rights or safeguarding the public interest. It is true that majority of these decisions were handed over before the Copyright Act was amended providing stringent measures for protecting copyright. In the light of more violations against intellectual property in recent years, it is hoped that the judiciary may be more enthusiastic in enforcing the penal provisions of Copyright Act to fulfil the object of protecting public interest in the protection of copyright in books, video tapes, computer programmes etc.

#### PATENT

Criminal law has not been invoked to afford protection against infringement of patent rights. Even from the very beginning civil law alone has been used. This is the case with almost all common law countries.<sup>41</sup> Though a separate chapter, Ch.XX, has been included in the Indian Patent Act, 1970 detailing penalties, for certain acts, there is no provision making infringement of patent rights an offence.<sup>42</sup> The historical

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41. Hobart N. Durham (Ed.), World Patent Litigation (Washington: The Bureau of National Affairs, Inc., 1967).

42. See sections 118-132.

origin of the patent system explains the reason for not seeking the help of criminal law. The concept was originated and developed with the idea of helping development of industry rather than affording protection to the proprietary right of the individual. The protection of intellectual labour of the inventor has not been recognized as an object when the concept originated. It was developed as a contractual relationship between the King and the person who agreed to start an industry with the invention in his hand. Till recently this continued to be the position. The recognition of intellectual labour of the inventor as an object of granting patent gained acceptance only recently. Naturally the chances for its violations were remote, and that explains the nonemployment of criminal law in this field. But now the position has undergone change. Protection of intellectual property in patent is now getting recognized. In fact the main thrust of patent law is the protection of the rights of inventor. Apart from this, public interest is involved in protecting patents. For the industrial and technological growth of the country the inventions must be protected. Right from its very inception it was in the larger interests of society that patent was granted. In these circumstances it is felt that the aid of criminal law must also be sought for to afford protection to this form of intellectual property. Though majority of common law countries has not resorted to the aid of criminal law, many continental countries have been already

invoking criminal jurisdiction for protecting patent rights. Countries like Argentina, Austria, Brazil, France, Germany, Italy, Japan, Mexico, Netherlands, Sweden, Switzerland etc. have invoked criminal law also for affording protection to Patents.<sup>43</sup> Though in many countries civil action is preferred to criminal action, because of various practical reasons, in countries like Italy, Japan etc. criminal prosecution is commonly resorted to.<sup>44</sup> Stringent punishments are also imposed in majority of the countries.<sup>45</sup> Once it is conceded that the individual, as well as the society, is concerned with the protection of patents, it is all the more necessary and appropriate that criminal law should be employed to afford maximum protection to the proprietary right of an individual in patents within the frame work of public policy.

#### DESIGN

There is no statutory provision in the Design Act, 1911 enabling the authorities to invoke criminal law for affording protection to this form of intellectual property. Though the origin of design had its connection with copyright and the basis of protection is the same as that of copyright, criminal law has not been used to protect the property in designs. Apart from its relationship with copyright, design has been categorized

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43. See Hobart N. Durham, op.cit.

44. Ibid.

45. Ibid.

along with patent for according protection. It may be seen that design is protected only for a short period of five years. Since criminal law has not been invoked for protecting patent, design also was not protected by criminal law. After the enactment of Patent Act, 1970, Patent and Design Act, 1911 was renamed Design Act, 1911. No attempt was made to remodel the provisions. It is hoped that the legislature will introduce some penal provisions enabling the criminal justice system to take cognizance of the violations of design law with a view to the protection of the individual interests as well as the public interest involved in designs.

#### TRADE MARK

It has been discussed in the previous chapter that trade mark is not an intellectual property in the strict sense. But it was also noticed that this form of property has many similarities with intellectual property, and the basis for protection is safeguarding of public interest. Study of relevant case law in this area is fruitful and informative.

Long before the enactment of a separate legislation for protecting trade mark, the assistance of criminal law was resorted to to afford adequate protection to this form of property. This was evident from the provisions incorporated in the Penal Code by the framers. Several provisions for

protecting trade mark were included from the very inception of the Code. Till the enactment of the Trade and Merchandise Marks Act, 1958, these provisions continued to be in force giving effective protection to trade marks. According to the provisions of the Code, as it was enacted in 1860, using false trade mark<sup>46</sup> with an intention to deceive or injure any person was an offence punishable with imprisonment and fine.<sup>47</sup> Counterfeiting of trade mark used by any other person<sup>48</sup> as well as fraudulent making and possessing of die, plate or other instruments for counterfeiting trade mark<sup>49</sup> were also offences punishable under the Code. Similarly, knowingly selling goods

46. Section 480, I.P.C., as it was originally enacted read: "Whoever marks any goods, or any case, package, or other receptacle containing goods, or uses any case, package, or other receptacle with any mark thereon, with the intention of causing it to be believed that the goods so marked, or any goods contained in any such case, package or receptacle so marked, were made or manufactured by any person by whom they were not made or manufactured, or that they were made or manufactured at any time or place at which they were not made or manufactured, or that they are of a particular quality of which they are not, is said to use a false trade mark". See Standish Grove Grady, The Indian Codes (London: Wildy & Sons, 1871), p.73.

47. Section 482 read: "Whoever uses any false trade mark or any false property mark, with intention to deceive or injure any person, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both". See Standish Grove Grady, op.cit., p.73

48. Section 483 read: "Whoever, with intent to cause damage or injury to the public or to any person, knowingly counterfeits any trade or property mark used by any other person, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both". Ibid.

49. Section 485.

marked with counterfeit trade mark with intent to deceive, injure or damage any person was an offence punishable with imprisonment and fine.<sup>50</sup> This shows that framers of the Code gave much importance to the protection of this form of property. It is a matter of importance that requirement of mens rea was much stressed by the use of words like intentionally, knowingly, fraudulently etc.

These provisions were amended in 1889. The amendments were introduced through section 3 of the Indian Merchandise Marks Act, 1889. The major change introduced was the shifting of burden of proof to the accused in certain offences. According to the new section, a person who used false trade mark shall be punished unless he proved that he acted without intent to defraud.<sup>51</sup> Same was the case with a person selling goods marked with counterfeit trade mark. The amended section 486 read as follows:

Whoever sells, or exposes, or has in possession for sale or any purpose of trade or manufacture, any goods or thing with a counterfeit trade mark or property mark affixed to or impressed upon the same or to or upon any case, package or other receptacle in which such goods are contained, shall, unless he proves--

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50. Section 486.

51. Section 482 read: "Whoever uses any false trade mark or any false property mark shall, unless he proves that he acted without intent to defraud, be punished with imprisonment of either description for a term which may extend to one year, or with fine or with both" (emphasis mine).



(a) that, having taken all reasonable precautions against committing an offence against this section he had at the time of the commission of the alleged offence no reason to suspect the genuineness of the mark, and

(b) that, on demand made by or on behalf of the prosecutor, he gave all the information in his power with respect to the persons from whom he obtained such goods or things, or

(c) that otherwise he had acted innocently, be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.<sup>52</sup>

This appears to be a new provision introduced into the general framework of the Penal Code. It appears to be somewhat a deviation from the well accepted general rule that it is the duty of the prosecution to prove the case. The introduction of this change within the Penal Code shifting the burden of proof to accused is indicative of the earnestness of the lawmakers to catch and bring to book the violators of trade marks.

When the first trade mark Act was passed in 1940 no special provisions were introduced to afford remedies for violation of trade mark. The Penal Code provisions were invoked to provide criminal law remedies for violation of trade marks. But when the present Trade and Merchandise Marks Act was enacted in 1958, the Penal Code provisions were repealed, and new and

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52. (Emphasis mine).

elaborate provisions were included in the Act itself to afford criminal law remedies. It appears that these provisions also reflect the same spirit of the then existing Penal Code provisions. Chapter X of the present Act deals with the offences, penalties and procedure regarding the violation of trade marks. A review of this chapter would reinforce the view.

In section 78 of the Act all possible violations of trade mark are categorized and put together as offences. Thus falsification of trade mark, falsely applying trade mark to goods, making, disposing or possessing materials for falsification of trade mark, applying the false trade description to goods, giving false indication as to country of manufacture, tampering or altering the indication of origin of goods etc. are offences punishable with imprisonment and fine. The accused has to prove that he had acted without intent to defraud for avoiding punishment.<sup>53</sup>

Penalty for selling goods with false trade mark is provided for in section 79. This section is similar in nature to section 486, I.P.C. In addition to the previous Penal Code provisions, the present Act makes false representation of a trade mark which has not been registered, as

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53. Section 78.

registered, an offence.<sup>54</sup> Similarly falsification of entries in the register, and producing false copy of entry in the register for evidence are also offences punishable with imprisonment and fine.<sup>55</sup>

The Act also contains provisions for forfeiture of goods. A court convicting or acquitting the accused on lack of proof of intention, has to direct the forfeiture of all goods and things connected with the case to the government.<sup>56</sup> A company which commits the offence under the Act, as well as the person in charge of the company at the time of commission of the offence, is punishable under the Act. The person in charge may avoid responsibility if he is able to prove that he had no knowledge about the offence.<sup>57</sup>

The power to take cognizance under the Act is given to the Sessions Judge or First Class Magistrate. A court can take cognizance of cases connected with falsification of register only on written complaint of the Registrar.<sup>58</sup>

Analysis of the provisions in the present Act makes it clear that the legislature has tried its best to protect

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54. Section 81.  
55. Section 83.  
56. Section 85.  
57. Section 88.  
58. Section 89.

trade mark. Almost all possible violations against trade mark have been criminalized. Though the mental element is insisted upon, the burden of proof stands shifted to the accused.

Be that as it may, it appears that even after the lapse of a long period of time, irrespective of the fact that new types of offences are included in the Act, the quantum of punishment remains the same. It is a well accepted fact that the offences against this form of property is increasing day by day. Since the offences are noncognizable, the police officer cannot arrest a person or search and seize goods without warrant. Lack of these powers naturally affect the law's efficacy. In the light of modern developments, it is felt that the law has to be amended with deterrent punishment and more powers conferred on authorities to take quick action. The offences have to be made cognizable and nonbailable. The police must also be armed with power to search and seize the goods without warrant.

There have been a number of cases decided by various courts on various aspects. On examination of the cases, it is found that the judiciary has taken on many occasions effective measures. They have also placed correct interpretation of provisions to give full protection to this form of property.

One of the questions that came before the Supreme Court was concerned with the right of a person to initiate criminal prosecution under the Trade and Merchandise Marks Act, 1958. As discussed above, except for certain matters connected with the falsification of entries in the register, the Act is silent about the person who has to initiate proceedings. In these circumstances one has to travel through Cr.P.Code provisions to find out the procedure. The question was examined<sup>59</sup> by the Supreme Court in State of U.P. v. Ram Nath and Vishwa Mitter v. O.P.Poddar.<sup>60</sup> In Ram Nath, M/s.Habib Bank Ltd. was producing coins and pieces of gold of various shapes and size for sale commonly known as 'Habib ka Sona' and 'Sher Chap Pansa' with trade marks. The Inspector of Trade Marks on behalf of the Director of Industries wrote a letter to the Additional City Magistrate alleging that M/s.Panna Lal Durga Prasad were producing similar coins and pieces of gold applying a trade mark deceptively similar to that of M/s. Habib Bank Ltd. He also requested to take necessary action under sections 78 and 79 of the Trade and Merchandise Marks Act. Magistrate directed the police to register a case. Based on this the police collected evidence and the case was charged. An application for stay of proceedings stating that the accused stopped producing the coins and the criminal prosecution need not be proceeded with was filed. It was also contended that since the

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59. A.I.R. 1972 S.C. 232.

60. A.I.R. 1984 S.C. 5.

trade mark of M/s.Habib Bank Ltd. was abandoned for more than five years, the accused could not commit the offence under the Act. The application was rejected by the Magistrate. Against this a revision was filed before the Sessions Judge and he referred the matter to the High Court. The High Court inter alia held that since the complaint had not been filed by the proprietor of the trade mark, the prosecution of the accused on the complaint of the Trade Mark Inspector was not tenable under sections 78 and 79 of the Act and quashed the proceedings. When the matter was brought before the Supreme Court, after referring to sections 82, 83 and 89 of the Act dealing with the power of the court to take cognizance, the Court observed:

Merely because sub-section (1) of S.89 refers to the manner of taking cognizance in respect of offence under the section specified therein, it does not preclude cognizance of other offences specified in chapter X from being taken under the procedure prescribed by the Criminal Procedure Code.<sup>61</sup>

After referring to the provisions of Criminal Procedure Code dealing with investigation of noncognizable offences, the Court reversed the High Court.<sup>62</sup>

The position was further clarified by the Supreme Court in Vishwa Mitter v. O.P.Poddar.<sup>63</sup> Here the dealer and

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61. A.I.R. 1972 S.C. 232, 236.

62. Ibid.

63. A.I.R. 1984 S.C. 5.

power of attorney holder of M/s.Mangalore Ganesh Beedies Work filed a complaint before the Pathankot Magistrate alleging the unauthorized use of their trade mark--motif of Lord Ganesh and the numeral '501'. The Magistrate after inquiry directed to issue process to the accused. The accused moved the High Court of Punjab and Haryana to quash the proceedings. The High Court directed the Magistrate to consider the issue afresh. He re-considered the case and held that there was no case and dismissed the complaint on the ground that the complainant was not competent to file complaint since he was not the holder of trade mark. Revision against this order was dismissed in limine by the High Court. The Supreme Court reversed. After examining sections 4(2) and 190 of the Criminal Procedure Code, it was observed:

Therefore, from a combined reading of Section 4(2) with S.190 of the Cr.P.C., it transpires that upon a complaint filed by a person setting out facts therein which constitutes the offence before a Magistrate specified in Section 190, the Magistrate will be competent to take cognizance of the offence irrespective of the qualifications or eligibility of the complainant to file the complaint. It must, however, be conceded that where a provision to the contrary is made in any statute, which may indicate the qualification or eligibility of a complainant to file the complaint, the Magistrate before taking cognizance is entitled and has power to inquire whether the complainant satisfies the eligibility criteria.<sup>64</sup>

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64. Id. at 7 per, Desai, J.

Based on this principle, the Court examined the provisions in the Trade Marks Act and observed that the restriction was there only regarding sections 81 and 82, where cognizance could be taken only upon a written complaint of the Registrar. Since there was no such restriction expressly made with respect to other provisions of the Act, the Court concluded that section 190 read with section 4(2) of the Cr.P.Code would permit anyone to file complaint under section 78 of Trade and Merchandise Marks Act.<sup>65</sup>

It seems that both these decisions are in tune with the policy of affording maximum effective protection to trade mark by way of invoking criminal jurisdiction.

The effectiveness of the law has further been enhanced by the shifting of burden of proof to the accused. Concerning the discharge of the burden, the courts have made certain observations. For example, the Punjab and Haryana High Court in Ajith Singh v. Charan Singh Pardeshi<sup>66</sup> has categorically stated that the burden was not that heavy. The facts show that the complainant, Ajith Singh, was the managing partner of the

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65. Id. at 8. It has to be noted here that neither the lower courts nor the Supreme Court referred to the observation of Justice Jaganmohan Reddy in Ramanath at arriving this conclusion.

66. A.I.R. 1974 P.& H. 116. See also Hazarimal L.Shah v. Philips India Ltd., (1968) 2 M.L.J. 523.



firm Wattam Singh & Sons manufacturing agricultural machinery with the registered trade mark 'Do Chiri'. It was alleged by the complainant that the accused firm manufacturing similar items was using trade mark 'Do Kabutar' deceptively similar to that of the complainant. The Magistrate convicted the accused. On appeal, the Sessions Judge acquitted the accused on the ground that the trade mark was not deceptively similar, and there was honest concurrent use of the mark. In the High Court it was inter alia contended by the complainant that the accused had not proved that he had used the trade mark without intent to defraud or with the assent of the complainant. To this the Court replied:

It was, however, not necessary for the accused to produce evidence aliunde in defence to prove that he had been applying the trade mark of 'Do Kabutar' to his goods with the assent of the complainant or without intent to defraud. He could prove the said matters from the prosecution evidence, from the material elicited by him in cross-examination of witnesses for the prosecution or from the circumstances of the case. The quantum of proof required from him is not proof beyond reasonable doubt. It is sufficient if he can show that preponderance of probabilities warrants a decision of the said matters in his favour.<sup>67</sup>

The reasoning seems to be in consonance with the general trend taken towards the accused in criminal cases.

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67. A.I.R. 1974 P.& H. 116, 119.

The prerequisite of registration for taking criminal action under the Act was examined by the Madras High Court which concluded that registration was not a sine qua non for taking action under section 79 of the Act. In In re S.T. Shanmugham<sup>68</sup>, the petitioners who were doing beedi business were found in possession of beedi bundles bearing false trade mark of one Kareem Beedi factory. They were convicted by the Magistrate. On revision it was argued by the accused in the High Court that since the trade mark was not registered as per the provisions of the Act no action could be taken under section 79 of the Act. After examining the definition of trade mark and section 79, the Court concluded:

It would thus appear that for sale or exposing for sale or for having in one's possession for sale or for any purposes of trade, any goods or thing with any false trade mark or false trade description, to be penalised under S.79 of the Act, registration of the trade mark or trade description is not necessary. "Trade Mark" as now defined, comprises both registered and unregistered trade mark in use for purpose of Chapter X, other than S.81.<sup>69</sup>

The contention that according to section 50, the registration made before the Act will cease to have effect after three years was not considered though there was no evidence to prove

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68. A.I.R. 1965 Mad. 214.

69. Id. at 215.

that the trade mark of Kareem Beedi Factory was renewed, after the expiration of three years.<sup>70</sup> The Court also did not consider the effect of section 27<sup>71</sup> of the Act where it was specifically stated that no person should be entitled to initiate any proceeding to prevent infringement of an unregistered trade mark.

The Supreme Court in State of Uttar Pradesh v. Ram Nath<sup>72</sup> also has not elaborately examined the issue. As a passing observation after examining the definition of trade mark the court said that an offence under sections 78 and 79 relates to both registered and unregistered trade marks.<sup>73</sup>

It is true that the definition of 'trade mark' for the purpose of Chapter X (offences) includes not only registered marks but also marks used to goods but not registered. But section 27 of the Act specifically says that no person shall be entitled to institute any proceedings to prevent infringement of an unregistered trade mark. Similarly, it is made clear by

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70. Ibid.

71. Section 27 reads: "(1) No person shall be entitled to institute any proceeding to prevent, or to recover damages for, infringement of an unregistered trade mark. (2) Nothing in this Act shall be deemed to affect right, of action against any person for passing off the goods as the goods of another person or the remedies in respect thereof".

72. A.I.R. 1972 S.C. 232.

73. Id. at 235.

section 50<sup>74</sup> of the Act that the registration of trade mark already existing before the Act shall cease to have the effect after the expiration of three years. Viewed in this perspective, it appears that the legislature intended to make registration mandatory for invoking remedies under the Act. Since the meaning of the term 'trade mark' for the purpose of criminal proceeding includes unregistered marks also, it gives an impression that the aforesaid mandatory provisions are applicable only to civil cases. This appears to be the reasoning adopted by courts also. Though the interpretation may be justified, for effective enforcement of penal provisions, making registration mandatory will be of great help to the police to identify the owner of trade mark. In this case it is also worthwhile to remember that courts have taken a similar view with reference to copyright violations also.<sup>75</sup>

Our courts in many cases examined the meaning of deceptive similarity, the test to be applied to find out the violation. The question whether actual deception is necessary to constitute the offence has also been gone into by the Courts. Based on the old Penal Code provisions, the Calcutta High Court in Lakhan Chandra Basak v. King Emperor<sup>76</sup> held that actual

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74. Section 50 reads: "Notwithstanding anything contained in any law for the time being in force or in any contract or agreement, every registration made before the commencement of this Act of a registered user shall cease to have effect after the expiration of three years from such commencement".

75. See supra text accompanying n.29.

76. A.I.R. 1925 Cal. 149. See also Madan Lal Arora v. State, A.I.R. 1961 Cal. 240, 247.

deception was not necessary. Here the complainants were dealers in umbrella, and their trade mark was counterfeited by the accused. He was convicted by the Magistrate. It was argued before the High Court that there was only insufficient evidence to prove that the accused had actually deceived any person, and so could not be convicted. The Court ruled:

As a result of perusing the evidence, I think that there is evidence to support the Magistrate's findings and to justify the conviction. There is, it is true no evidence of any person being actually deceived, but I do not think that this is necessary for a conviction. There is the evidence that the mark used by the accused was likely to deceive and I think from a comparison of the two marks that this is clearly so.<sup>77</sup>

The Supreme Court in State of Uttar Pradesh v. Hafiz Mohd. Ismail<sup>78</sup> examined the question of imitation required to constitute deceptive similarity. The accused were charged for counterfeiting the wrappers of 'Sunlight' and 'Lifebuoy' produced by Lever Brothers Ltd., India. They were convicted by the Magistrate and the conviction was upheld by the Sessions Judge. But the High Court set aside the conviction on the score

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77. Id. at 151.

78. A.I.R. 1960 S.C. 669. See also Noor Mahomed Haji Usman v. State, A.I.R. 1956 Bom. 700; Madan Lal Arora v. State, A.I.R. 1961 Cal. 240; Hariprasad Lal Chand v. Nanoo Khan Hussain Bux, A.I.R. 1968 M.P. 234; Ajit Singh v. Charan Singh Pardeshi, A.I.R. 1974 P.& H. 116.

that the wrappers used were not colourable imitation of the products of Lever Brothers Ltd. After examining the ingredients of section 28 of I.P.C. defining counterfeiting, Justice Wanchoo observed:

Ordinarily counterfeiting implies the idea of an exact imitation; but for the purpose of the Indian Penal Code there can be counterfeiting eventhough the imitation is not exact and there are differences in detail between the original and the imitation so long as the resemblance is so close that deception may thereby be practised....This analysis of section 28 shows that there is no necessity of importing words like 'colourable imitation' therein. In order to apply it, what the court has to see is whether one thing is made to resemble another thing, and if that is so and if the resemblance is such that a person might be deceived by it there will be a presumption of the necessary intention or knowledge to make the thing counterfeit unless the contrary is proved.<sup>79</sup>

After comparing the original and counterfeited wrappers, the Court held that the view taken by the Magistrate and Sessions Judge that there was resemblance to deceive was correct.

The above analysis of case law shows that when compared to copyright, patent and design, protection afforded to trade mark is more effective. Though the punishment imposed

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79. A.I.R. 1960 S.C. 669, 670-71.

is surely not severe, the burden of proof is shifted to the accused. The requirement that the aggrieved person alone should initiate criminal prosecution is also absent. This difference is accounted for by the origin and development of trade mark law within the framework of the Penal Code.<sup>80</sup>

An examination of the provisions of the legislation protecting intellectual property, however reveals that the present protection afforded to this form of property through criminal law is inadequate. For copyright, criminal law has been invoked for protection. Patent and design, though recognized and protected as intellectual property, the assistance of criminal law has not been extended. Even in the case of copyright it is felt that the present provisions are inadequate to contain the everincreasing phenomena of piracy. Though stringent punishments are introduced recently, judicial attitude still manifests a lazy and lousy approach. No adequate steps have been taken by the legislature to solve the problem of video piracy or piracy of computer programmes, and other new forms of property. An attitude still reflects both on the part of legislature and judiciary to treat this as a civil matter, and to handle it through civil law. The public interest involved and the importance of the protection of these forms of property for the development of society have not been adequately

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80. See supra, text accompanying n.46 et seq.

appreciated in proper perspectives. This attitude is discernible if one tries to compare the attitude of judiciary and legislature in protecting this form of property and other forms of property. We have already seen that effective provisions have been made in the Penal Code to protect corporeal property. Same is the case with trade mark also. It appears that the apathy towards intellectual property is due to the lack of awareness of public interest involved in protecting intellectual property. The best example is the observation of Allahabad High Court in Nagin Chand Jain,<sup>81</sup> stating that only copyright holder can initiate a criminal prosecution. It is well accepted that criminal jurisdiction is invoked to protect societal interest rather than individual interest. It is also true that individual interest will always be taken care of while protecting societal interest. Had the legislature and judiciary viewed protection of intellectual property also from this correct perspective, the present position would have been improved long ago. Having regard to the scanty and scarce enforcement of the current penal provisions it is felt that a comprehensive legislation utilizing the possibilities of criminal law and providing for the protection of all forms of intellectual property is essential.

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81. 1981 All.L.J. 1272, 1275.



## CONCLUSION

Though there is a chapter in the Penal Code exclusively to deal with offences against property the concept of property was left undefined probably in the hope that the judiciary would supply it with proper meaning and content in accordance with the needs of the time. In fact an analysis of the case law produced by the judiciary would inevitably lead one to the conclusion that the judiciary has lived upto the expectations of the framers of the Code. Not only did courts give meaning to the concept but also by its flexible interpretation enclosed a large area of property interests within the fold of the concept of property.

It is quite interesting and fruitful in this context to inquire into the jurisprudential basis of the concept of property. On an examination of the origin of the institution of property it is found that the concept of property has been identified as the satisfaction of the self of an individual in the society. In other words, it has been taken as an extension of the personality of the individual. This explanation of the concept of property is really in consonance with the meaning provided to it by courts in the course of their judgments though there was no attempts on

the part of the courts to enter into a theoretical discourse on the concept of property as such. This concept has indeed given courts ample freedom to stretch it to the maximum extent to include the emerging new forms of property. Thus a thing having any value to the individual has been recognized as property for affording protection. It was also made clear that the property sought to be protected must be in the possession or ownership of a person. This further signifies the basic theory of recognition of property as an extension of the personality of an individual.

The same philosophy has been followed in recognizing personal property. The political system has to recognize a limited extent of personal property for the development of the personality of the individual in the society. This in turn will help the society also to develop. Our Constitution rightly signifies this as the basis of institution of private property. Analysis of the constitutional provisions revealed that our Constitution while recognizing the need for protecting a certain limit of personal property for the proper development of the personality of the individual in the society, gives much stress on the need for retaining property for the common good.

Viewed in this perspective, the recognition of limited right to the individuals in their intellectual creations

is in consonance with the theory of institution of property. The examination of the origin and development of intellectual property indicates that it was based on the public interest that these forms of property had been recognized and accepted by the society. While copyright was recognized for the cultural growth of the nation, patent received recognition for the industrial and technological growth of the society.

though copyright had its genesis in

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and the cases which came on their anvil have, it appears, prepared the judiciary to assume a constructive role. The 'more activist' judges looking forward to abolish poverty have in their arsenal the dynamic concept of protection of life and liberty in Art.21 of the Constitution. They have already succeeded in establishing that life includes livelihood.<sup>113</sup> They will surely, it appears, intrude into the terrain of property rights with the aid of Art.21. The seeds have already been sown by the Bombay High Court in Basantibai.<sup>114</sup> The Court in that case with the aid of Art.21 interpreted the word 'law' in Art.300A to mean 'just fair and reasonable'. Although the Supreme Court has tried to arrest this trend its observations are pregnant with a more liberal view on the application of Art.21:

Art.21 essentially deals with personal liberty. It has little to do with the right to own property as such. Here we are not concerned with a case where the deprivation of property would lead to deprivation of life or liberty or livelihood. On the other hand land is being acquired to improve the living conditions of a large number of people. To rely upon Art.21 of the Constitution for striking down the provisions of the Act amounts to a clear misapplication of the great doctrine enshrined in Art.21.<sup>115</sup>

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113. Olga Tellis v. Bombay Municipal Corporation, A.I.R. 1986 S.C. 180.

114. Basantibai v. State of Maharashtra, A.I.R. 1984 Bom. 366.

115. State of Maharashtra v. Basantibai Mohanlal Khetan, (1986) 2 S.C.C. 516, 533, Venkataramiah, J. (emphasis mine).

These words do indicate that the court will cross the rubicon in case of necessity. This in turn may then lead to the completion of the reception process of the socialistic concept of property in India. And this process may need the help of criminal law for affording maximum protection.

## Chapter III

### PROTECTION OF PROPERTY AND THE INDIAN PENAL CODE

#### INTRODUCTION

Like other similar penal codes, the Indian Penal Code also envisages protection of property. It makes special provisions for this purpose in two separate chapters-- Chapter XVII and Chapter XVIII. While the former deals with offences against property in general, the latter aims to protect certain special types of property.

The provisions in these chapters seem to reflect the Victorian concept of property. They also seem to envisage the traditional forms of property and offences committed against them. However, it has to be said to the credit of the framers of the Code that the language employed in framing these provisions allow much flexibility in making it possible for the courts to apply them to the twentieth century concept of property. For example, the Code has imaginatively left the terms like property, entrustment, possession, fraudulently etc. undefined. This has helped our courts to bring within its fold a large number of items of property. In fact the position helped to make the concept to move in tune with the changes of time.<sup>1</sup> The courts went to the extent of defining

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1. For detailed discussion, see supra, Chapter I.



property in terms of things having 'any value' to the person. The Supreme Court in Ishwarlal Girdharilal Parekh v. State of Maharashtra<sup>2</sup> while recognizing 'assessment order' as property categorically said:

In our view, the word 'property' occurring in S.420 I.P.C., does not necessarily mean that the thing, of which a delivery is dishonestly desired by the person who cheats, must have a money value or a market value, in the hand of the person cheated. Even if the thing has no money value, in the hand of the person cheated but becomes a thing of value in the hand of the person, who may get possession of it, as a result of the cheating practised by him, it would still fall within the connotation of the term 'property' in S.420 I.P.C.<sup>3</sup>

Only in offences like theft, criminal misappropriation of property, and offences against property marks the term 'movable property' is used. In all other offences the term 'property' is used. So the question arose in many cases whether the term 'property' used in these sections will include both movable and immovable property. The courts in some cases confined it to immovable property, but on other occasions broadened it to include all types of property.

2. A.I.R. 1969 S.C.40; see also N.M.Chakraborty v. State of West Bengal, A.I.R. 1977 S.C. 1174, where passport was held to be property.

3. A.I.R. 1969 S.C. 40, 43 (emphasis mine).

The Allahabad High Court in Daud Khan v. King Emperor<sup>4</sup> examined the question whether the term 'property' used in section 404<sup>5</sup> of the Code includes both movable and immovable property. In this case the accused removed some rafters from the house left by the deceased. According to the Court the term used in section 404 is not expressly limited to movable property alone. It was pointed out that the offence of criminal misappropriation or conversion was possible in the case of immovable property as well. The Court added that since rafters, when severed from the house, became movable property there was also dishonest misappropriation.<sup>6</sup>

But this line of interpretation was not accepted by the Madhya Bharat High Court in Dhulji v. Kanchan.<sup>7</sup> Here the accused entered into and took possession of a house owned by the deceased in collusion with the tenant who was in actual possession of the house. The complainant claimed legal title of the house on the basis of a will. After examining sections 403 and 404, the Court held that section 404 was included in

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4. A.I.R. 1925 All.673. See also Dhananjay v. Provat Chandra Biswas, A.I.R. 1934 Cal.480, where the Court held that the term property used in section 441 included movable property also. The forceful entry into a ferry boat was held criminal trespass. In Manchersha Ardeshir Devlerwala v. Ismail Ibrahim Patel, A.I.R. 1936 Bom. 167, the High Court held that the term property in section 421 Penal Code included not only movable property but also a chose-in-action. The right to cut trees was held to be property.

5. Section 404 deals with dishonest misappropriation of property possessed by deceased person at the time of his death. Removing property before it reaches the hands of the legally entitled person is prohibited.

6. A.I.R. 1925 All.673, 674.

7. A.I.R. 1956 M.B.49 (Indore Bench).

the Code to protect movable property alone.<sup>8</sup> Since house was not movable property section 404 was not attracted. This appears to be a very restricted interpretation of the term 'property', and it is not in tune with the general policy of affording protection to the property as reflected in the Code.

The Calcutta High Court also examined the term property in Jugdawn Sinha v. Queen-Empress<sup>9</sup> in the context of section 405.<sup>10</sup> In this case the accused, who was an officer of a factory, let out some portion of the factory's land which was used for planting indigo, for cultivating other crops for his own benefit without the knowledge of the management. He was charged and convicted for criminal breach of trust by the lower courts. Before the High Court it was argued that breach of trust could not be committed in respect of immovable property. Making an analogy with the term property used in section 403 and relying on Reg v. Girdhar Dharamdas<sup>11</sup>, the Court opined that the term 'property' used in section 405 also referred to movable property and an offence of criminal breach of trust could not be committed in respect of immovable property.<sup>12</sup>

8. *Id.* at 49-50.

9. (1895) I.L.R. 23 Cal.372.

10. Section 405 deals with the offence of criminal breach of trust.

11. (1869) 6 Bom.H.C.R. (Cr.) 33. Here the Court held that section 405 did not apply to immovable property.

12. (1895) I.L.R. 23 Cal.372, 374.

The Supreme Court has however, in R.K.Dalmia v. Delhi Administration<sup>13</sup> took a broader view while discussing the question whether breach of trust could be committed in respect of funds of a company. Examining the question, Justice Raghuber Dayal observed:

We are of opinion that there is no good reason to restrict the meaning of the word 'property' to movable property only when it is used without any qualification in s.405 or in other sections of the Indian Penal Code. Whether the offence defined in a particular section of the Indian Penal Code be committed in respect of any particular kind of property will depend not on the interpretation of the word 'property' but on the fact whether that particular kind of property can be subject to the acts covered by that section. It is in this sense that it may be said that the word 'property' in a particular section covers only that type of property with respect to which the offence contemplated in that section can be committed.<sup>14</sup>

Thus the Court has set at rest the controversy and it appears that the interpretation and reasoning given are correct.

The chapters in the Code made special provisions to prevent damages to property. The offences dealt with in these chapters are those against unlawful deprivation of

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13. A.I.R. 1962 S.C. 1821.

14. Id. at 1833.

property from the possessor by another through means which are considered unlawful. Depending on the mode of deprivation, different offences have been created and punishments prescribed.

One way of deprivation of property is by taking the property without the consent of the possessor or taking by putting the possessor in fear or using force after obtaining the consent by threatening him. The offences of theft, extortion, robbery and decoity are designed to protect property from such deprivations. While law of theft prohibits taking property without consent of the possessor, law of extortion prevents taking property by putting the person in fear. The aggravated forms of the above offences committed by using force are dealt with by the law of robbery and decoity.

Property can also be deprived of by means of misappropriation. This involves the conversion of another's property dishonestly. The property reaches the hands of the accused by way of entrustment or by innocent act. The subsequent conversion of such property by the accused constitutes misappropriation. The offences of criminal misappropriation and breach of trust have been created to take care of such situations. While the offence of breach of trust requires entrustment of property which is subsequently

misappropriated, in the case of criminal misappropriation, the property reaches the hands of the accused by some other peaceful means.

The law of cheating is designed to protect deprivation of property by deception. This involves making of a false representation to the person in possession of property and thereby inducing him to deliver it. Causing destruction to property by way of wrongful loss or damage constitutes another type of deprivation of property which criminal law seeks to prohibit. Unlawfully entering into the property or lawfully entering and unlawfully remaining with intention to cause annoyance, insult etc., are also within the purview of the criminal law. The law of mischief which is designed to prevent destruction of property protects not only individual property but also public property. The offence of criminal trespass has been created to deal with unlawful entry into the property of another.

Apart from this the Code also incorporates provisions to prevent the deprivation of property by means of forgery. Chapter XVIII of the Code is specially meant to prevent such offences. Violation of property rights by way of false property marks, counterfeiting of coins, currency, benami transactions etc., have been specifically brought within the purview of criminal law for affording protection.

either actual or intended. The word 'defraud', which is not defined in the Code, may or may not imply deprivation, actual or intended. The Collector was undoubtedly deceived. He had refused to pay upon the receipt of Ramdihal and would not have paid out for the fact that the receipt purported to be though in fact it was not, signed by all the persons entitled to the money; but in the general acceptance of the word he was not defrauded.<sup>142</sup>

Relying on the decisions of Reg. v. Langhurst<sup>143</sup> and In re Loothy Bewa<sup>144</sup>, wherein in similar circumstance it was held that there was no fraudulent intention, the Court concluded that the accused also had no intention to defraud the Collector. The Court also added that the payment of money could not be said to have caused or was likely to cause damage or harm to the Collector in body, mind or reputation since he was bound to deliver the money to the person authorized.<sup>145</sup>

Here it appears that the Court failed to appreciate the conduct of the accused in deceiving the Collector to get the money. It may be true that the minor who had withdrawn the petition had no grievance for the improper and illegal way in which the money was taken. But the Court should have taken into

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142. Id. at 779.

143. Unreported, quoted in Mayne's Criminal Law of India (2nd ed.), p.786.

144. (1889) 11 W.R.(Cr.) 24.

145. (1905) I.L.R. 32 Cal. 775, 780-781.

Subrahmania Ayyar and Davies, JJ. wrote dissenting judgments stressing the importance of the presence of the element of 'loss' or 'injury' in 'fraud'. They resorted to the definition of Stephen and the observation of Justice Banerjee based on Stephen's definition in Queen-Empress v. Muhammed Saeed Khan<sup>156</sup> to arrive at this conclusion. The learned Judges refused to infer any sort of injury to the University by the conduct of the accused to bring it under fraud. Subrahmania Ayyar, J. distinguished the present case with the decisions of Toshack<sup>157</sup> and Abbas Ali<sup>158</sup> in the following words:

For the risk of injury to life and property resulting from a person not possessing sufficient skill, training etc., for exercising the calling of a master mariner or of an engineer, being in charge of a ship or dangerous machinery, is so manifest and serious that no reasonable man can question its reality or gravity. But, surely, there is no comparison between such risk and the detriment supposed to accrue to the public from a candidate not of good character, appearing for the Matriculation Examination as if he were possessed of such character, or from evasion of the conditions prescribed by the University as to pre-Matriculation studies, granting that the system in vogue as to that examination is flawless.<sup>159</sup>



Here the accused was charged for theft of an idol from a temple. He later immersed it in water. It was inter alia argued that there was no dishonest intention since the accused had not obtained any gain out of his act. Justice Beri concluded:

In order to ascertain the existence or otherwise of dishonest intention it is not necessary that there must be a wrongful gain to the thief, it does not matter whether the intention of the thief was or was not to derive profit from the property; it is sufficient if the removal of movable property causes wrongful loss to the owner....<sup>201</sup>

Thus it is the law that either wrongful gain or wrongful loss is sufficient to constitute 'dishonestly'. The word 'or' used in between wrongful gain and wrongful loss in section 24 is indicative of the intention of the legislature about the requirement of dishonest intention.

Another question that came up for consideration was whether there must be an actual wrongful gain or wrongful loss to constitute dishonestly. The Full Bench of Allahabad High Court in Kashi Ram Mehta v. Emperor<sup>202</sup> examined this question

201. Id. at 193.

202. A.I.R. 1934 All. 499 (F.B.). Here the complainant, Mohan Lal, received a bearer cheque and was given to the General Matches Agency, Dehra Dun in payment of some outstanding liabilities without endorsement. But this was mistakenly delivered to Jai Singh, the proprietor of General Trading Co. and he handed it over to Kashi Ram Mehta, the Manager of the Indian National Bank of Industries Ltd. and was cashed. Both were prosecuted for criminal misappropriation of property. See also Chunku v. Emperor, A.I.R. 1931 All. 258.

it was stated in the Statute of Monopolies that the grant had to be issued for the working or making of 'any manner of new manufacture'<sup>189</sup>. This continued to be the criterion for the subject matter of patent both in England and in India till now. But the term 'any manner of manufacture' has been left undefined. In olden days an art substantially and essentially newly invented alone was considered as a manufacture. An improvement upon an existing art or a process for the manufacture of an art were not considered as 'any manner of manufacture'.<sup>190</sup> But by the passage of time courts have included these items also within the term 'manufacture'.<sup>191</sup> In R. v. Wheeler<sup>192</sup>, Abbott, C.J. defined manufacture thus:

Something of a corporeal and substantial nature, something that can be made by man from the matters subjected to his art and skill, or at least some new mode of employing practically his art and skill, is requisite to satisfy this word.<sup>193</sup>

The English court has interpreted the term and included many items manufactured. They also excluded many things as not manufactured and not patentable. In the patent legislation the term

189. Section 6 of Statute of Monopolies, 1623. See supra n.150.

190. See E.W.Hulme, 16 L.Q.R. 44, 56.

191. R. v. Wheeler, 2 B.& Ald. 345; Ralston v. Smith, (1865) 11 H.L. 223; Boulton v. Bull, 2 H.Bl. 463 etc; quoted in Terrell, op.cit. p.14. The test applied in olden days was the 'vendible product test' laid down by Morton, J. in G.E.C's Application, 60 R.P.C. According to this test, if the product, resulting from the method or process is a vendible product, the method or process will be treated as a manner of manufacture. See for a detailed discussion, Terrell, op.cit., p.14 et seq.

192. 2 B.& Ald. 345.

193. Id. at 350; 106 E.R. 392, 395.

'invention' has been defined so as to include all the items recognized by court as patentable. The items which were excluded by the judiciary as not patentable were included in the statute stating expressly as not patentable.

In India also some difficulty was felt as to the determination of the subject matter of patent. The term 'invention' was defined in the Invention and Designs Act, 1888 to mean any manner of new manufacture and including an improvement.<sup>194</sup> The term 'manufacture' was defined in the Indian Act 1888 as follows:

Manufacture includes any art, process or manners of producing, preparing or making an article, and also any article prepared or produced by manufacture.

The Allahabad High Court in The Elgin Mills Co. v. The Muir Mills Co.<sup>195</sup> examined the meaning of the term invention and the criteria for treating an improvement as invention. Here one Noble, employee of Elgin Mills Co., obtained a patent in respect of a kind of tent called 'the native cavalry trooper's pal', and was sold to the employer. The patent was challenged by the respondent on the score that it was not an invention,

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194. See section 4(1) of Invention and Designs Act, 1888. (Act No.V of 1888) quoted in The Elgin Mills Co. v. The Muir Mills Co., (1895) I.L.R. 17 All. 490, 492. It was the same as the English Act of 1883.

195. (1895) I.L.R. 17 All. 490.

and the specification was included knowingly that the invention was not new. It was contended by the appellant that the invention was an improvement of the existing type of tent. The new improvement, according to them combined cheapness, portability and adaptability. After examining the statutory provision and English case law, the Court held that the particular combination in this case was not an improvement to constitute a patentable invention.<sup>196</sup> Justice Aikman observed:

...to justify the grant of the exclusive privilege of a patent, there must be a certain amount of invention of inventive faculty displayed.<sup>197</sup>

Since there was no such inventive faculty displayed in the case, the improvement was not considered an invention. The cheapness, portability and adaptability claimed by the patentee were held not sufficient to satisfy the test.<sup>198</sup> Though the law was codified in 1911 no substantial change has been introduced to solve the definitional problem.<sup>199</sup>

The term 'manufacture' was again subjected to judicial interpretation in Lallubhai Chakubhai Jariwala v. Chimanlal Chunilal & Co.<sup>200</sup> Justice B.J.Wadia of Bombay High Court after

196. Id. at 495.

197. Id. at 496.

198. Ibid.

199. Section 2(8) of the Indian Patents and Designs Act, 1911.

200. A.I.R. 1936 Bom. 99. Here the plaintiff was the holder of a patent for an improved process of treating dried fruits. Defendants were betel-nut merchants, and the plaintiff alleged that the defendants had been using his process

(contd...)

elaborately considering the existing law observed:

'Manufacture' therefore comprehends not only the production of an article, but also the means or method of producing it, so that a new process or the improvement of an old process can be a manufacture within the meaning of the Act. The word 'art' is sometimes used as an equivalent of manufacture. The subject-matter of a patent must be a new manufacture or art, for, if there is no new manufacture or art, there is no subject-matter and therefore no invention. The question whether there is an invention is a question of fact in each case. A new and useful application of an old principle may be good subject-matter. An improvement on something known may also afford subject-matter; so also a new combination of different matters already known. A patentable combination is one in which the component elements are so combined as to produce a new result or to arrive at an old result in a better or more expeditious or more economical manner. If the result produced by the combination is either a new article or a better or a cheaper article than before, the combination may afford subject-matter for a patent. The mere collocation of two or more things however without some exercise of the inventive faculty in combining them is not subject-matter for a patent. In the case of a combination the inventor may have taken a great many things which are common knowledge and acted on a

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(f.n. 200 contd.)

for treatment of betel-nuts and selling it in the market. It was contended by the defendant that the process patented by the plaintiff was not a new invention. Held that the process was an improvement of an existing system and patentable. But the suit was dismissed since infringement was not proved.

number of principles which are well known. If he has tried to see which of them, when combined produce a new and useful result, and if he succeeds in ascertaining that such a result is arrived at by a particular combination, the combination will, generally speaking, afford subject-matter for a patent.<sup>201</sup>

It appears clear that an inventive faculty must be present in the thing manufactured to constitute it to be a patentable invention. Thus the criterion laid down by Justice Aikman of Allahabad High Court in Elgin Mills Co.<sup>202</sup> was reemphasized by the Bombay High Court also.<sup>203</sup> The Supreme Court, in its most recent encounter with a similar case has also accepted this principle of 'inventive step' to find out whether there is an invention. In M/s. Bishwanath Prasad Radhey Shyam v. M/s. Hindustan Metal Industries<sup>204</sup> Justice R.S.Sarkaria,

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201. A.I.R. 1936 Bom. 99, 104-05.

202. The Elgin Mills Co. v. The Muir Mills Co., (1895) I.L.R. 17 All. 490.

203. A.I.R. 1936 Bom. 99. The principle was followed in Vidya Prakash v. Messers. Shah Charan Singh, A.I.R. 1943 Lah. 247; Ganendro Nath Banerji v. Dhanpal Das Gupta, A.I.R. 1945 Oudh 6; The Bombay Agarwal Co., Akola v. Ramchand Diwan-chand, A.I.R. 1953 Nag. 154; Farbwerke Hoechst Aktiengesellschaft Vormals Meister Lucius and Buring a Corp. etc. v. Unichem Laboratories, A.I.R. 1969 Bom. 255; M/s. Shining Industries v. M/s. Shri Krishna Industries, A.I.R. 1975 All. 231; Press Metal Corporation Ltd. v. Noshir Sorabji Pochkhanawalla, A.I.R. 1983 Bom. 144 etc.

204. A.I.R. 1982 S.C. 1444. In this case, the respondent was manufacturer of brass and German silver utensils. Instead of the old method of making dishes, they introduced an improvement of the method of manufacture, and a patent was obtained in 1952. They alleged the infringement of the patent by the appellants before the Court. The trial Judge (Single Judge of the H.C.) dismissed the suit, but the Division Bench reversed. The Supreme Court upheld the Single Judge. Held, that there was no inventive step in the improvement. The improvement patented was held only workshop improvement.

speaking for the Court<sup>205</sup>, observed:

It is important to bear in mind that in order to be patentable an improvement on something known before or a combination of different matters already known, should be something more than a mere workshop improvement; and must independently satisfy the test of invention or an 'inventive step' To be patentable the improvement or the combination must produce a new result, or a new article or a better or cheaper article than before. The combination of old known integers may be so combined that by their working inter-relation they produce a new process or improved result. Mere collection of more than one integers or things, not involving the exercise of any inventive faculty, does not qualify for the grant of a patent.<sup>206</sup>

The test to find out whether the 'manner of manufacture' is patentable invention is the presence of 'inventive step' or 'inventive faculty'. The employment of the independent thought, ingenuity and skill of the inventor must be there to satisfy the test. The definition of the term 'manufacture' has been broadened to include many things which satisfy the test. Having regard to this development a new definition was included in the Act of 1970.

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205. For himself and V.D.Tulzapurkar and A.P.Sen, JJ.

206. A.I.R. 1982 S.C. 1444, 1448 (emphasis original).

## Novelty:

Another requirement of an invention to be patentable is that the invention must be new. Thus novelty of the invention plays an important role in the grant of patent. The element of novelty was introduced for the first time by the Statute of Monopolies.<sup>207</sup> In olden days in England the test applied to see whether there was novelty was to examine whether the invention was in practice or used by any one during the memory of a man.<sup>208</sup> The examination of prior use was also limited within the realm. The stress was on the formation of a new industry rather than a new invention.<sup>209</sup> It was Lord Mansfield, in Liardet v. Johnson<sup>210</sup> who gave a meaningful interpretation to the term 'novelty'. According to him "the issue of want of novelty must be supported either by proof of continuous and successful prior user of the invention, or, that the substance of the invention was common knowledge in the trade".<sup>211</sup> However, this was not followed and avoided by introducing new terms in the contract between the Crown and patentee when the patent monopoly was granted.<sup>212</sup>

The test applied in recent times was to look whether there was a prior publication or prior use of the invention. The

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207. Section 6 of the Statute of Monopolies states that patent must be given to any manner of new manufacture.

208. See E.W.Hulme, 16 L.Q.R. 44, 56.

209. See E.W.Hulme, 18 L.Q.R. 280, 280-82.

210. Morning Post, Feb. 23, 1778, extracted in E.W.Hulme, 18 L.Q.R. 280, 283-87.

211. Id. at 287.

212. Ibid.



courts in England have interpreted the term prior publication to mean the publication of the invention in a manner which was open to the public for inspection.<sup>213</sup> The actual knowledge of the publication was held not required to constitute prior publication. The term prior user also was interpreted to mean public use. Selling of the product in a secret way was also held as prior user.<sup>214</sup>

In India also one of the conditions for grant of patent is the novelty of the subject matter. Just as in England the test applied in India also involves an inquiry as to whether there was 'prior publication' or 'public use'. The question arose In the matter of the Inventions and Designs Act, 1888 and In the matter of an Alleged Invention of A.E. Short<sup>215</sup> was whether the secret use of a process of manufacture

213. See Harris v. Rothwell, 35 Ch. D. 416 : 3 R.P.C. 383; Pickard v. Prescott, 9 R.P.C. 195; V.D.Ltd. v. Boston Deep Sea Fishing Co.Ltd., 52 R.P.C. 303. See also Terrell, op.cit., pp.116-19.

214. See Carpenter v. Smith, 1 W.P.C. 530; Stead v. Anderson, 2 W.P.C. 151; Bristol-Myers Co.'s Appn., [1975] R.P.C. 127, etc. See also Terrell, op.cit., pp.119-21.

215. (1896) I.L.R. 23 Cal. 702. In this case one M.K. Angelo and Short had been doing business and manufacture of Shellac for a long period. They had been selling Shellac produced by a process invented by them. The process was for the conversion of clean lac and seedlac into Shellac. The process and machinery were kept secret. Short applied for a patent which was objected by John Carapiet under S.30 of the Act.

before applying for patent amounted to user. After referring to the English cases Justice Sale observed:

If the public vending for profit of the article produced by the process is a public use of the process, although the process itself is kept secret, then this question must be answered in the affirmative.<sup>216</sup>

Thus selling of product produced by a secret method was held as public user.<sup>217</sup> The justification for this stand, according to the Court, was that "if the inventor could sell his invention, keeping the secret to himself, and when it was likely to be discovered by another, take out a patent, he might have practically a monopoly for a much larger period than fourteen years".<sup>218</sup>

But this strict rule laid down by the Calcutta High Court was diluted by the Bombay High Court in Lallubhai Chakubhai Jariwala v. Sharaldas Senkalchand Shah.<sup>219</sup> Accepting

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216. Id. at 711. The English cases referred are Health v. Smith, 3 Ell. & Bl. 256; Wood v. Zimmer, Holt 58; Morgan v. Sea Ward, M. & W. 544.

217. Here the Court held that since Short was selling the product for profit for the last ten years, he was a user of the invention. (1896) I.L.R. 23 Cal. 702, 712. See also Gopilal v. Lakhpatt Rai, A.I.R. 1923 P.C. 103.

218. (1896) I.L.R. 23 Cal. 702, 711 (emphasis original)

219. A.I.R. 1934 Bom. 407. Here the plaintiff, a Chemist, was doing business and was working in the experiment branch of a Company. On the request of one Harkchand Shivji Co., plaintiff found out a system for producing white almonds and sold to them. Harkchand sold it to Chunnilal. They appointed one chemist Varmani who worked along with the

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the principle that sale of products made in secret for profit amounted to public user, the Court added that if the process applied was not traceable by the examination of the product in the market, the secret use could not be held as public user.

Justice Beaumont reasoned:

Whether a process has been publically used or not is, as all the cases show, a question of fact. I have no doubt that in numerous cases the sale of an article manufactured under a secret process may amount to a public user of the process, because the article may be of such a character that anybody buying it and getting it examined by experts can ascertain the secret of its manufacture, and if the article is of that character, the sale of the article in public would, in my opinion, involve a disclosure of the secret of manufacture and thus amount to public user of the process....It seems to me that, at any rate in a case in which the Indian Patents and Designs Act applies, if you have an article manufactured under a secret process and that article is of such a character that nobody by examining it can find out the secret of that manufacture, then the sale of that article in public cannot amount to public user of the process.<sup>220</sup>

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(f.n.219 contd.)

- plaintiff and knew about the process. Varmani agreed to help the defendant Co., to bleach almond using the plaintiff's process. The plaintiff applied for patent and was granted. When the defendants with the help of Varmani started producing white almond, plaintiff filed a suit for infringement. It was contended by the defendants that the specification filed was not an invention inasmuch as there was public use of the invention previously. This was negatived and injunction was granted.
220. Id. at 411. Here the process applied was to treat the almond to become more whiter and soother could not be traced out by examining the white almond the aprocess applied was held not publi user. (Justice Rangnekar concurred). See also Lallubhai Chakubhai Jariwala v. Chimanlal Chunilal & Co., A.I.R.1936 Bom. 99; Ganendro Nath Banerji v.Dhanpal Das Gupta, A.I.R. 1945 Oudh 6; The Bombay Agarwal Co., Akola v. Ramchand Diwanchand, A.I.R. 1953 Nag. 154.

Novelty is also lost if the invention is publically known by prior publication. It is not necessary that the public or the persons connected with the trade must have an actual knowledge of the invention. Availability of the publication for public reference is sufficient to constitute prior publication. Thus in Lallubhai Chakubhai Jariwala v. Chimanlal Chunilal & Co.<sup>221</sup> the Bombay High Court held:

As to the sufficiency of the publication it is necessary that the publication of the knowledge must be within the realm, and so far as we are concerned, it must be a publication in British India....It may not be necessary that members of the public should have actually read it. It is enough if the publication is accessible to the public without much trouble, e.g. if the document is to be found in the library of the Government Patent Office in Calcutta, or on the shelves of a public library in any known place in India, or of a library appertaining to an educational or scientific institution and easily accessible.<sup>222</sup>

As to the sufficiency of the knowledge, the Court further observed:

With regard to the sufficiency of the knowledge, the earlier publication must give the requisite knowledge clearly, and it is not enough that it merely gives the

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221. A.I.R. 1936 Bom. 99. See for facts supra n.200.

222. Id. at 108. per B.J.Wadia, J.; see also Monsanto Company v. Coramandal Indeg Products (P) Ltd., A.I.R. 1986 S.C. 712. Similar view was expressed by the Supreme Court.

means of attaining such knowledge. It must give sufficient information to a workman skilled in the particular art or craft in order to enable him to carry out the invention.<sup>223</sup>

It appears that a strict rule as to novelty is followed in our country. Here prior publication or prior use is sufficient to negative the novelty of the invention. Whether it is actually known to the public or not is immaterial.

#### Utility:

Utility of the invention constitutes another criterion for the grant of patent. The requirement of the usefulness of the invention for which patent monopoly was granted was not expressly stated in the patent grants or statutes in the olden days. But the condition in the patent grants that an industry must be started within the period prescribed<sup>224</sup> clearly shows that usefulness of the invention was always considered before the grant was given. The quantum of usefulness required to grant patent was explained by Leindley, L.J. in Lane Fox v. Kensington and Knightsbridge Electric Lighting Co.<sup>225</sup> as follows:

The utility of the alleged invention depends not on whether by following the directions in the complete specification all the results now necessary for

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223. *Id.* at 108.

224. *E.W.Hulme*, 12 *L.Q.R.* 141, 153.

225. [1892] 3 *Ch.* 424.

along with patent for according protection. It may be seen that design is protected only for a short period of five years. Since criminal law has not been invoked for protecting patent, design also was not protected by criminal law. After the enactment of Patent Act, 1970, Patent and Design Act, 1911 was renamed Design Act, 1911. No attempt was made to remodel the provisions. It is hoped that the legislature will introduce some penal provisions enabling the criminal justice system to take cognizance of the violations of design law with a view to the protection of the individual interests as well as the public interest involved in designs.

#### TRADE MARK

It has been discussed in the previous chapter that trade mark is not an intellectual property in the strict sense. But it was also noticed that this form of property has many similarities with intellectual property, and the basis for protection is safeguarding of public interest. Study of relevant case law in this area is fruitful and informative.

Long before the enactment of a separate legislation for protecting trade mark, the assistance of criminal law was resorted to to afford adequate protection to this form of property. This was evident from the provisions incorporated in the Penal Code by the framers. Several provisions for

protecting trade mark were included from the very inception of the Code. Till the enactment of the Trade and Merchandise Marks Act, 1958, these provisions continued to be in force giving effective protection to trade marks. According to the provisions of the Code, as it was enacted in 1860, using false trade mark<sup>46</sup> with an intention to deceive or injure any person was an offence punishable with imprisonment and fine.<sup>47</sup> Counterfeiting of trade mark used by any other person<sup>48</sup> as well as fraudulent making and possessing of die, plate or other instruments for counterfeiting trade mark<sup>49</sup> were also offences punishable under the Code. Similarly, knowingly selling goods

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46. Section 480, I.P.C., as it was originally enacted read: "Whoever marks any goods, or any case, package, or other receptacle containing goods, or uses any case, package, or other receptacle with any mark thereon, with the intention of causing it to be believed that the goods so marked, or any goods contained in any such case, package or receptacle so marked, were made or manufactured by any person by whom they were not made or manufactured, or that they were made or manufactured at any time or place at which they were not made or manufactured, or that they are of a particular quality of which they are not, is said to use a false trade mark". See Standish Grove Grady, The Indian Codes (London: Wildy & Sons, 1871), p.73.
47. Section 482 read: "Whoever uses any false trade mark or any false property mark, with intention to deceive or injure any person, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both". See Standish Grove Grady, op.cit., p.73.
48. Section 483 read: "Whoever, with intent to cause damage or injury to the public or to any person, knowingly counterfeits any trade or property mark used by any other person, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both". Ibid.
49. Section 485.

is in consonance with the theory of institution of property. The examination of the origin and development of intellectual property indicates that it was based on the public interest that these forms of property had been recognized and accepted by the society. While copyright was recognized for the cultural growth of the nation, patent received recognition for the industrial and technological growth of the society. It is to be noted that though copyright had its genesis in the common law concept of property, the right was limited by the statutes for the betterment of the society. This is true with the case of trade mark also. The basis for its recognition was the protection of society from deception by the unauthorised use of trade marks. In all these cases the rights of the individual have been recognized and protected to a limited extent. It was on the basis of the intellectual labour of the individual that property right was recognized in the products of intellectual labour, such as copyright. The individual is permitted to utilize the property interest for his benefit for a certain period. After the statutory period is over, copyright goes to the society. This indicates that the society looked upon copyright as property because it was considered as the extension of the personality of the individual or as the satisfaction of the self of the individual. Thus the individual rights are recognized as incidental to the public interest. The individuals are permitted to hold



property to a limited extent for their benefits within the framework of common good of the society. After sometimes it is held in common.

Criminal law is being employed usually when the public interest rather than the private interest is likely to be affected. While redressal of private grievances are in the domain of civil law, public grievances are to be attended by the criminal law. Sometimes redressal of the private grievances is in the interest of the public. In such cases also criminal law has to be employed. This approach is amply reflected in the provisions of the Indian Penal Code. This can be adopted in the case of intellectual property also. Just as in the case of corporeal property both private interest and public interest are involved in protecting intellectual property. While the law determines the proprietary right of the individual in copyrights and patents, the fact that both are meant for the society is very well recognized by law. As such violation of the rights may affect the public interest as well. It is therefore in the fitness of things if criminal law is employed for their protection.

On examination of the provisions in the Penal Code, it is found that these provisions are inadequate to protect the new forms of property emerging out of the technological

development especially in the area of intellectual property. This is because the existing provisions were enacted with a view to protecting only the then existing forms of property. This situation called for separate legislation for protecting these forms of property.

The legislature responded with the enactments covering copyright, design, patent, trade mark etc. But these legislation are found inadequate to catch up with the pace of technological development. They are neither capable of covering the new forms of property such as performers' right, computer programme, man-made living organism etc. nor containing the problems attendant with their violations. Many a new forms of property are now outside the purview of these pieces of legislation.

The possibilities of criminal law in protecting these forms of property have not been properly explored. Disregarding the public interest involved in recognizing and protecting these forms of property legislatures as well as the judiciary try to deal with them in the domain of civil law. Patent and design are still outside the purview of criminal law. The attempt made by the legislature to bring copyright under the protective cover of criminal law has been frustrated. Though additional care was taken in the case of trade mark, the results are not encouraging. The apathy seems to have arisen from the lack of awareness of the importance in protecting these forms of property.

Having regard to the technical nature of the offences and the ways of committing them it seems necessary that we should develop expertise in investigating the offences in the field of intellectual property. The traditional machinery is of no avail. Nor are the rules of evidence adequate and efficacious in proving the offences. The punishments are also not adequate. The disabilities imposed by the civil law are also not deterrent.

In these circumstances a comprehensive legislation incorporating proper definitions of new forms of property, machinery for investigation and trial of the offences, special rules of evidence which would answer the needs of the technological developments and adequate deterrent punishment including reparation of the victims by the offenders etc. is the desideratum.

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