

## ANTON PILLER AND ABUSE

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### ABSTRACT

An Anton Piller Order may comprise of an injunction to restrain infringement, permission to enter defendant's premises to either take inspect and take inventory of documents and remove infringing goods, injunction to restrain defendants from disclosing contents of injunctions to third parties etc. The purpose of the order, as explained in *Yusuf v Salama*<sup>1</sup> is to prevent obstruction of the danger of destruction of evidence. Though Templeman J expounded the concept in *EMI v Pandit*<sup>2</sup>, it was post the judgment in *Anton Piller KG v. Manufacturing Processes*<sup>3</sup> that these orders took shape. The substantive standards for granting such orders were laid down in *Anton Piller*<sup>4</sup> by Lord Denning and Lord Ormrod over which subsequent cases have been developed. The plain reading of the purpose of these orders themselves presents a scope for abuse sans regulation, especially in lieu of *Puttasamy v Union of India*<sup>5</sup> post which Right to Privacy has been included under Art 21 of the Constitution. The note tries to examine the nature of execution of such orders while giving due emphasis on the powers of the commissioners appointed to carry out such searches.

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<sup>1</sup> (1980) 3 All ER 405.

<sup>2</sup> (1975) 1 All ER 418.

<sup>3</sup> (1976) 1 All ER 779

<sup>4</sup> Id

<sup>5</sup> 2017 10 SCC 1

## INTRODUCTION

Anon Piller orders derive its procedural sanctions from Order XXXIX<sup>6</sup> of the Code of Civil Procedure. Order XXXIX Rule 1<sup>7</sup> describes cases in which temporary injunctions may be granted. As was held in the case of *Ramrameshwari Devi & Ors. vs Nirmala Devi & Ors*<sup>8</sup>, the preconditions to obtain an order under the said provisions are

- The Plaintiff establishes a Prima Facie case
- The Balance of convenience or that of inconvenience leans in his favour.
- Sans the order the petitioner would suffer an irreparable loss and injury.

Order XXXIX Rule 7 permits the court to make an order for the detention, preservation or inspection of any property which is the subject-matter of such suit, or as to which any question may arise therein<sup>9</sup>.

Both these rules permit issuance of an order alike Anton Piller. But the quintessence of an Anton Piller Order is issuance of a “search/seizure” *order without granting the defendants due notice*. It is to be noted that such an act would violate Order XXXIX Rule 3<sup>10</sup> which expressly

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<sup>6</sup> TEMPORARY INJUNCTIONS AND INTERLOCUTORY ORDERS

<sup>7</sup> Order-XXXIX, Rule-1. Cases in which temporary injunction may be granted.- Where in any Suit it is proved by affidavit or otherwise—

(a) that any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit, or wrongfully sold in execution of a decree, or

(b) that the defendant threatens, or intends, to remove or dispose of his property with a view to defrauding his creditors,

(c) that the defendant threatens to dispossess the plaintiff or otherwise cause injury to the plaintiff in relation to any property in dispute in the suit, the court may by Order grant a temporary injunction to restrain such act, or make such other Order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal or disposition of the property or dispossession of the plaintiff, or otherwise causing injury to the plaintiff in relation to any property in dispute in the suit] as the court thinks fit, until the disposal of the suit or until further orders.

<sup>8</sup> CIVIL APPEAL NOS. 4912-4913 OF 2011

<sup>9</sup> Detention preservation, inspection, etc., of subject-matter of suit

(1) The Court may, on the application of any party to a suit, and on such terms as it thinks fit,-

(a) make an order for the detention, preservation or inspection of any property which is the subject matter of such suit, or as to which any question may arise therein;

(b) for all or any of the purposes aforesaid authorise any person to enter upon or into any land or building in the possession of any other party to such suit; and

(c) for all or any of the purposes aforesaid authorize any samples to be taken, or any observation to be made or experiment to be tried, which may seem necessary or expedient for the purpose of obtaining full information or evidence.

(2) The provisions as to execution of process shall apply, mutatis mutandis, to persons authorized to enter under this rule.

<sup>10</sup> Before granting injunction, court to direct notice to opposite party:

states that “The court shall in all cases, except where it appears that the object of granting the injunction would be defeated by the delay, before granting an injunction, direct notice of the application for the same to be given to the opposite party”. The **phrase “except where it appears that the object of granting the injunction would be defeated by delay”** gives the court power to issue orders in case of Intellectual Property Infringement. The same was elaborated by The Madras High Court , *In Re: P. Moosa Kutty*<sup>11</sup>;

*“This issue of commission can be made 'ex parte' and in fact it stands to common sense has often got to be made 'ex parte'. It will be borne in mind that this application has been filed along with the plaint and before the issue of suit summons. This application is made on account of urgency. If a commission is not going to be issued until the defendant appears, most often there will be no point in taking out a commission because the object of the commission itself would be lost and incriminating circumstances would be obliterated. The appointment of a commissioner for local investigation in such cases would be an instance of locking the stable door after the horse had been stolen.”*

## THE ISSUE

Having established that such orders do in fact possess legal backing, the next question that arises is how to curb the scope for abuse. The right to personal liberty and individual freedom has been long established as a fundamental right.<sup>12</sup> And to protect the same, the court appoints a commissioner under Order XXVI.

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The court shall in all cases, except where it appears that the object of granting the injunction would be defeated by the delay, before granting an injunction, direct notice of the application for the same to be given to the opposite party;

1[Provided that, where it is proposed to grant an injunction without giving notice of the application to the opposite party, the court shall record the reasons for its opinion that the object of granting the injunction would be defeated by delay, and require the applicant--

(a) to deliver to the opposite party, or to send to him by registered post, immediately after the order granting the injunction has been made, a copy of the application for injunction together with--

(i) a copy of the affidavit filed in support of the application;

(ii) a copy of the plaint; and

(iii) copies of documents on which the applicant relies, and

(b) to file, on the day on which such injunction is granted or on the day immediately following that day, an affidavit stating that the copies aforesaid have been so delivered or sent.]

<sup>11</sup> 1953-66-LW418

<sup>12</sup> See *Maneka Gandhi v Union of India* 1978 AIR 597

The powers of the commissioner appointed under Order XXVI Rule 9 have been stated in Order XXVI Rule 16.<sup>13</sup> The expounding of such Powers and the question as to whether a commission can be passed Ex-Parte have been answered time and time again by various High Courts. Broadly, the guidelines for the same have been laid down by a division bench of the Delhi High Court in *Shankerdass*<sup>14</sup>

*"(i) The object of appointment of a Local Commissioner in software piracy matters is not, as much to collect evidence but to preserve and protect the infringing evidence. **The pirated software or incriminating evidence can only be obtained from the premises of the opposite party alone and in the absence of an ex parte appointment of a Local Commissioner there is likelihood that such evidence may be lost, removed or destroyed;***

*(ii) Request for ex parte appointment of a Local Commissioner in such matters is usual and in fact is intended to sub serve the ends of justice as **it is imperative to have an element of surprise so that the actual position is not altered;***

*(iii) The test of reasonable and credible information regarding the existence of pirated software or incriminating evidence **should not be subjected to strict proof** or the requirement to demonstrate or produce part of the pirated software/incriminating evidence at the initial stage itself. It has to be tested on **the touchstone of pragmatism and the natural and normal course of conduct and practice in trade.***

*(iv) It may not always be possible for a Plaintiff to obtain any admission by employing decoy customers and gaining access to the Defendant's premises. Any such attempt also inheres in it the possibility of dis appearance of the pirated software/incriminating evidence in case the decoy customers is exposed. Accordingly, visit by decoy customer or investigator is not to be insisted upon as pre condition. **A report of private Investigator need not be dis-regarded or rejected simply because of his engagement by the Plaintiff."***

Various High Courts have passed Ex-Parte Orders appointing commissioners on the basis of the aforementioned guidelines. There is also mention of such orders by the Supreme Court in

<sup>13</sup> 16. Powers of Commissioners

Any Commissioner appointed under this Order may, unless otherwise directed by the order of appointment,-

(a) examine the parties themselves and any witness whom they or any of them may produce, and any other person whom the Commissioner thinks proper to call upon to give evidence in, the matter referred to him;

(b) call for and examine documents and other things relevant to the subject of inquiry;

(c) at any reasonable time enter upon or into any land or building mentioned in the order.

<sup>14</sup> AIR 2008 Delhi 167

**Mohit Bhargava v. Bharatbhushan Bhargava** <sup>15</sup>. The High Court of Bombay, in **Foundry Visionmongers Limited v. Ankur Sudhir Sachdev & Ors.**<sup>16</sup> ; **Foundry Visionmongers Limited v. Parish Tekriwal and Ors.**<sup>17</sup>; **G.M. Breweries Ltd. v. The Sanjivani (Takli) Sahakari Sakhar Karkhana Ltd. & Ors.**<sup>18</sup> have issued such orders.

For better appreciation of the powers entailed under Order XXVI Rule 9 and Rule 16, a judgment of the Bombay, Delhi and Madras High Court have been discussed hereinunder; In *Foundry* <sup>19</sup>, wherein it was alleged that the plaintiffs' software was being reproduced and used in an unauthorized manner, Hon'Ble Justice GS Patel J slated the following powers on the commissioner;

*“(a) The Court Receiver, High Court, Bombay is appointed a Commissioner to visit all the premises of the Defendants described in the cause title of the Plaint and the Notice of Motion. The Court Receiver shall be accompanied by an Officer designated by the Deputy Registrar (IT), High Court, Bombay. The Court Receiver and the representative of the IT Department of this Court are directed to carry out an immediate site inspection at all the Defendants' premises. They will, on the basis of this order, search and conduct a thorough audit of all the computer systems including all desktops, laptops and hand held devices or tablets found at any of those locations. They shall also visit the residences of Defendants Nos. 1 and 2 for this purpose. In the course of this, they will note and ascertain the number of copies of the Plaintiffs software NUKE, NUKE-X and, if found, NUKE STUDIO, on any of these computers, along with all software variants and version numbers installed on computers. It is clarified that the use of the word 'computer' includes all servers, mirrors, hard drives, arrays and storage devices. An inventory of all of these machines is to be made with complete details;*

*(b) The Plaintiffs authorized representative and the technical team will be entitled to assist the Court Receiver and the representative of the Registrar (IT) in this exercise;*

*(c) The Court Receiver and the Deputy Registrar (IT) are directed to first ensure that the entire network in the Defendants' premises is isolated and is taken offline, i.e., it is disconnected*

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<sup>15</sup> (2007) 4 SCC 795

<sup>16</sup> 2016 (65) PTC 388 (Bom)

<sup>17</sup> 2017(69)PTC 360(Bom)

<sup>18</sup> Notice of Motion (L) No. 1834 of 2014 in Suit (L) No. 766 of 2014

<sup>19</sup> Id Para 24



from all outside Internet connectivity. All internal LAN communications must also be severed except for the limited purpose required for accessing the servers or the RAID arrays.

(d) In addition, the **Court Receiver will be entitled to take the assistance of the Local Police at Santacruz as also the Authorities from the Cyber Crime Cell;**

(e) **The representative of the Court Receiver will obtain screen shots of the installations as also the installer or executable files and fake licenses, including crackz, patches and warez. I am making it clear that I do not direct the Court Receiver's representative to make copies of the entire hard disk, as this may well contain other proprietary material that belongs to the Defendants. To my mind, the screenshots will suffice for this purpose. These screenshots are to be stored on the IT Departments systems. Print outs are to be authenticated by the IT Department with the accompanying certificates under Section 65B of the Evidence Act.**

(f) In addition to the screenshots of the actual installation, the technical team assisting the Court Receiver will be entitled to make a note, take a print out or a screenshot of the actual system registry entries following the installation of the software in question.”

Similar guidelines were expounded even in the *IPL Case*<sup>20</sup>, wherein several cable TV Channels were broadcasting the VIVO Indian Premier League unauthorized were under scrutiny . Therein, the High Court of Delhi , ordered the commissioners

“(i) to ascertain whether the 2017 season of IPL is being unauthorisedly exhibited, communicated or made available for viewing by the public on SONY MAX, SONY SIX, SONY KIX, SONY AATH and SONY SIX HD channels **at the premises to be visited by the Local Commissioners;**

(ii) to serve a copy of the order of injunction passed by this Court on the person(s) in-charge of the establishment, **located at the premises to be visited by the Local Commissioners.** In case the Local Commissioners visit the premises of person(s) other than the named defendants, i.e. defendants No.1 to 40, they shall serve the complete paper book containing the plaint, affidavits, list of documents and the interim applications with supporting affidavits upon all such persons;

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<sup>20</sup> CS(COMM) 239/2017

(iii) *to search and make an inventory of all equipment which is being used for the unauthorized broadcast, telecast or communication of SIX, SIX HD, SONY ESPN, SONY ESPN HD and SET MAX channels to the defendants subscribers/public, found at such premises or any other premises where the infringing activity is taking place;*

(iv) *to seize/take into custody all equipment which is being used for the unauthorized broadcast / re-broadcast / transmit / re-transmit or communication of SIX, SIX HD, SONY ESPN, SONY ESPN HD and SET MAX channels showing the 2017 season of IPL to the defendants' subscribers / public, and thereafter seal the same in suitable packing material/containers;*

(v) *to hand over the seized goods on superdari to the defendants or CS(COMM) 239/2017 their representatives, or the person(s) in-charge of the premises, who may be directed to give an appropriate undertaking that the seized goods will be produced before this Court, as and when directed.*

(vi) *to take photographs and video recordings of the unauthorized broadcasting, re-broadcasting, transmitting, retransmitting, exhibiting, exploiting, communicating and / or making available SIX, SIX HD, SONY ESPN, SONY ESPN HD and SET MAX channels showing the 2017 season of IPL and also of the commission proceedings, and take assistance of the plaintiffs' representatives or the technical experts of the plaintiffs for such purpose;*

(vii) *to direct the persons in-charge of such premises visited by the Local Commissioner where unauthorised broadcasting, rebroadcasting, transmitting, re-transmitting, exhibiting, exploiting,*

*communicating and / or making available SIX, SIX HD, SONY ESPN, SONY ESPN HD and SET MAX channels showing the 2017 season of IPL is in progress:*

(a) *to disclose the legal status (i.e. sole proprietorship, partnership, company etc.) of the entity located at such premises and*

(b) *to disclose the names and details of persons responsible for owning and managing the said entity."*

Between both the aforementioned orders, **the IPL case also allowed the commissioners to Seize and take into custody all equipment.** This grant of powers on the commissioner leaves scope for abuse and seemingly a disruption of the business of a company but a narrative of a case of the Delhi High Court is pertinent here.

In the case of Autodesk Inc. v. Mr. Kumar Sam Prahlad<sup>21</sup> the Delhi High Court noted that the Court appointed Commissioner supervising the execution of an “Anton Piller” **order had seized and sealed 18 computers of the Defendant on the grounds that they contained pirated software despite the fact that the Court had only ordered the Commissioner to take an inventory** of the pirated software contained on the computers and return the computers to the Defendant with an undertaking that the same would be preserved for production before Court at a later stage. The Plaintiff company however attempted to defend the Commissioner’s report on the grounds that if the computers were released the Defendant would continue to use the infringing software. The Court dismissed the Plaintiff’s reasoning with the argument that the Defendant had been restrained, by an interim injunction, from using any infringing software on its computers and that such an order would adequately protect the rights of the Plaintiff. As a result, the Court allowed the Defendant to unseal all 18 computers. Once the unsealing order was given the case was finally disposed only when the Plaintiff Company elected to give up all of its initial prayers, including the prayer for damages, in favour of only a permanent injunction, which the Defendant was anyway ready to suffer. Unlike other cases there is no mention of a settlement before the Court wherein the Defendant buys new software and also pays damages to the Plaintiff for lost profits. **This case may serve as an example of the Defendant’s increased bargaining power in case its computers are not sealed.**<sup>22</sup>

On one hand, the plaintiff has unfettered powers on his hands whilst on the other, the defendant takes advantage of the lack of power fettered with the commissioner. While facing this conundrum, The Madras High Court, in *Microsoft Corporation v Fu-tronix*<sup>23</sup>, while appointing a commissioner to inspect the respondents at the infamous Richie Street directed;<sup>24</sup>

- i) ***To inspect the premises of the Respondent including any Hard Disks of computers, compact discs and other storage media, with the help of technical Experts, and representatives of the Applicants at the said premises and also prepare audit reports/inventories of the same, and to determine if they contain pirated/counterfeit/unlicensed versions of the Applicants' software programs, and if so, then to seize and seal the computer hard disks, compact discs, and other***

<sup>21</sup> CS (OS) 2375 OF 2007 at the Delhi High Court decided on 18<sup>th</sup> March 2009

<sup>22</sup> A Critical Analysis of the Delhi High Court’s Approach to ex parte Orders in Copyright and Trade Mark Cases by T. Prashant Reddy ( SSRN ID 1969777)

<sup>23</sup> C.S.NO.4 OF 2012

<sup>24</sup> Id P1



*storage media as found to contain unlicensed/pirated/counterfeit. versions of any of the Applicants' software, and return the said seized goods on superdari to the respondents with a direction to produce the same before the Hon 'ble Court, without tampering with them in any manner, as and when directed by this Hon 'ble court;*

- ii) *To direct the respondent, its employee and agents to **provide password particulars of any computer**, if required, in order to be enabled to carry out the acts specified in (i) above;*
- iii) ***The SHO of the area be directed to provide immediate protection** and assistance on request to the Advocate Commissioner, should there be any resistance by the Respondent in the execution of the said order.*

On perusal of the aforementioned orders, the following (inclusive but not limited) may be construed as *sine qua non* powers of the Commissioner;

- Right of Entry (may extend to the residence of the defendants as seen in *Foundry*<sup>25</sup>)
- Right of Inspection
- Right to Seize & take into custody infringing material.
- Right to be accompanied by a local police officer.<sup>26</sup>

Like seen above, any other right may be granted on a case by case basis.

Under S 135 of the Trademarks act 1999, the court may grant an ex-parte injunction or any interlocutory order for discovery of documents or other evidence which are related to the subject matter of the suit much akin to Order XXXIX. Similar remedies can be found in S 55 of the Copyrights Act, 1957 and the Patents Act, 1970.

In *Anton Pillar KG vs. Manufacturing process*<sup>27</sup>, the plaintiffs, German manufacturers of sophisticated electrical components, after discovering that the defendants, their UK agents were passing the drawings and other confidential information to other German companies, sought an ex-parte order for infringing their copyrights and misusing confidential information. Lord

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<sup>25</sup> 2017(69)PTC 360(Bom)

<sup>26</sup> See S64 of the Copyright Act, 1957

<sup>27</sup> [1976] Ch. 55 (C.A.).

Ormond & Lord Denning enumerated four prerequisites for making the application of such order could be concluded as follows:

- a. A strong prima facie case against the defendant easily is available which would be clear and compelling evidence against defendant for enforcing such an order.**
- b. That the potential or actual damage done to the plaintiff by the defendant is serious in nature and irreversible**
- c. Clear evidence that the defendant has necessary and relevant documents or articles or goods or items in his possession and scope of real possibility and fear that the defendant might destroy such crucial concerns before any inter parties application made in respect of the same.**
- d. Should an order be made but, it would do no real harm to defendant or his case. No effect of such an order would cause any harm to the defendant during the course of such an order and pertaining to exercise such an order favouring the plaintiff's claim.**

It is seen, that the preconditions are similar to the preconditions laid down in Order XXXIX. Over time, these Anton Piller orders turned to be potent abuse weapons on the hands of the Plaintiff. A typical *modus operandi* was, to hire a private technician and brand him an independent investigator. Thereafter, sue the Defendant company on the basis of an “investigator’s report” outlining the suspicions of the so called private independent investigator.<sup>28</sup> The “investigator’s report” is used to establish a prima facie case before the High Court, which if convinced of the same, passes an ex parte interim injunction order restraining the Defendant from infringing the Plaintiff’s copyright in its software.<sup>29</sup> The interim injunction is usually accompanied by an “Anton Piller” order which allows the Plaintiff to enter the office of the Defendant, **without prior notice and** conduct an inspection of the Defendant’s computers to establish whether the Defendant is indeed using pirated software.<sup>30</sup> In case the Defendant is using pirated software the Plaintiff is entitled to preserve the evidence in a manner prescribed by the Court. In order to ensure that the orders of the Court are implemented in the

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<sup>28</sup> , Microsoft Corporation & Ors. v. Y. Parthasarathy & Ors. CS(OS) No. 875 of 2011

<sup>29</sup> Id

<sup>30</sup> Id

right spirit the Court also ensures a “Commissioner,” to accompany the Plaintiff to the site of the Defendant.

The aforementioned practice was totally against the basic tenets of Civil law. It came up for review in the case of *Microsoft v. Dhiren Gopal*<sup>31</sup>. Though it was subsequently modified by an Appellate Court, it harshly criticized the manner in which these orders were being enforced by Plaintiffs. The fundamental objections of the Single Judge in this particular case are as listed below:

- (a) The investigators who had filed affidavits to establish a prima facie case for the Plaintiffs, were not “independent” but in fact employees of the law firms who represent the software companies in the law suits<sup>32</sup>;
- (b) As a practice most, but not all judges of the Delhi High Court, granting “Anton Piller” orders were allowing the Plaintiffs to seal the hard-discs of the computers of the alleged infringer-Defendant which contained the infringing software. In this case the Court criticized this practice of allowing for the “sealing” of hard-discs since the effect of such an order would be to shut down the entire business of a company which was using pirated software to run an otherwise legitimate business establishment.<sup>33</sup> The judge further elaborates that there was no requirement to seize hard-discs or the computers containing the infringing software since the technology existed to create mirror images of the hard-discs and preserve the same for trial and it was preservation which was the entire intent of the “Anton Piller” order.<sup>34</sup> To further support his argument against the forcible seizure of evidence the Court cites Supreme Court precedents which categorically stated that Civil Courts in India had no power to forcibly seize evidence on behalf of one party.<sup>35</sup>
- (c) The Judge then notes that once computers are sealed and the entire business of the Defendant is brought to a grinding halt, the Defendant companies more often than not succumb to the “blackmailing” tactics of the Plaintiff software company and settle the dispute during

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<sup>31</sup> CS (OS) No. 2027 of 2009 at the Delhi High Court

<sup>32</sup> *Ibid* at Para 8.

<sup>33</sup> *Ibid* at Para 9, 10, 11 and 14.

<sup>34</sup> *Id*

<sup>35</sup> *Id*

negotiations by buying legitimate copies of the Plaintiff's software and also paying damages for lost profits.<sup>36</sup>

(d) The Judge then notes that since Plaintiffs were not suing the Defendants in their own cities it was more likely than not that the Defendant would not be able to seek effective and prompt legal representation before the Delhi High Court.

(e) The Court subsequently issued the "Anton Piller" orders, since it was bound by precedent but subjected the execution of the orders to the payment of a substantial security deposit which would be given to the Defendant in case the Plaintiff's information proved to be wrong.

This judgment though, was expressly overturned in by a Division Bench of the High Court.<sup>37</sup>

## CONCLUSION

The aforementioned precedents lay down the base, the benefits and the pitfalls of granting Anton Piller orders. It is seen in *Dhiren Gopal*<sup>38</sup>, the levels to which the practice may be stretched. It is rather unfortunate that the court or the legislature has come up with standard, practice guidelines to curb the same. The High Court, especially, Delhi High Court has been very proactive in granting such orders without giving much thought to the scope of its abuse. Other High Courts have been following suit. The right thing to do would be, adopt the guidelines from a developed common law country, amend the same and implement it to the courts in India.

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<sup>36</sup> *Ibid* at Para 10

<sup>37</sup> Microsoft v Dhiren Gopal FAO(OS) 624 of 2009.

<sup>38</sup> CS (OS) No. 2027 of 2009 at the Delhi High Court