



THEFT - BNS

S- 303. ESSENTIAL INGREDIENTS

- ❖ **Dishonest Intention** to take property (Mens rea – Dishonest intention)
- ❖ **Taking out** of the **possession** of another person
- ❖ The property **must be moved** in order to such taking (Actus reus – Moving of property)
- ❖ Property should be taken **without** the person's **consent**.
- ❖ Property must be **movable**.

Exp 1.— It states that things as long as attached to the earth will not be a movable property but it may become a movable property if it is cut off from the ground (**severance from the earth**).

Exp 2.— If the act of separation itself causes something to move, it constitutes theft. [A moving effected by the act of **severance itself** will be theft.]

Exp 3.—It states that **how moving could be effected**. A thing is said to be moved by

- (1) removal of obstacle
- (2) separation and
- (3) actual moving.

Exp 4.— A person is said to **move everything** with animal which is moved in consequence of the motion of animal caused by that person.

Exp 5.— Consent can be express or implied and if property is taken **with consent then no theft** is committed. Consent may be given either by the person in possession or by the person having authority.

Note:

1. Movable property

According to Section **2(21)** of BNS "**movable property**" includes property (**Corporeal and incorporeal**) of every description, except land and things attached to the earth or permanently fastened to anything which is attached to the earth.

For example, a **standing tree** is immovable property, but it becomes movable property when it is severed from the earth.

Fishes kept in tank (tamed/domesticated animals) & fish in running water are a movable property.

Animal as such are classified as movable and can be subject to theft.(Refer Illustration (b) &(c))

Theft of **electricity** comes under the purview of this section. (Nature of electricity – Incorporeal)

Water (But not sea and river), cooking gas are movable properties. (water conveyed in pipes and so reduced possession)

Human body cannot be subject matter of theft. However, human corpses in the form of anatomical specimen (body/portions/preserved in museum) are personal property.

2. Dishonestly

According to Section **2(7)** of BNS “**Dishonestly**” means doing anything with the intention of causing **wrongful gain** to one person **or wrongful loss** to another person.

Under the section the term dishonestly has been used in relation to property. It includes an intentional act to cause **wrongful gain** to one or **wrongful loss** to another. Intention being a psychological act, it can be inferred from the conduct of party.

The loss should not necessarily result in gain to the offender. In other words, there may be loss to victim but there may not be gain for the alleged offender. For example, when a person takes another's property dishonestly and distributes it among the needy ones.

But if servant finds a ring belonging to A in his room and removes it for his own use. This is a dishonest act causing wrongful gain to one and wrongful loss to another.

Hence, **it is sufficient** if either one person has been wrongfully gained **or** the other person has suffered wrongful loss.

Guiding principle – Court

- To constitute offence of theft it is necessary that there should be animus furandi or dishonest intention to cause **wrongful gain** to oneself **or wrongful loss** to another.
- As a general rule, theft requires actual physical possession of the item. Theft under BNS is offence against possession and not ownership.
- Consent obtained by force is no consent.
- It is important to note that the theft can **also be committed by owner** against his own property when the property is in other's possession.
- **Temporary loss** (deprivation) of movable property will be sufficient to commit the offence of theft.

- Dishonest intention should exist at the time of taking of property. The offence of theft is complete at the time of the **dishonest movement** of the property.
- Where property dishonestly taken belonged to a person who is dead, and therefore, **in nobody's possession**, or where it is lost property without any apparent possessor, **not the offence of theft** but criminal misappropriation is constituted. (**Illustration** (g))
- Hiding itself is moving and it constitutes theft. (**Illustration** (h))
- Hacking and Data theft are considered as theft offence.
- A person can be convicted of stealing his own property if he takes it dishonestly from another. (**Illustration** (j)&(k))

No theft : Taking without any dishonest Intention

There can be no theft where there is no dishonesty, i.e., taking without any dishonest intention is not theft. A bona-fide claim of right rebuts the presumption of dishonesty and where such a plea is raised by the accused it is mainly a question of fact whether such belief exists or not. For example, A, in good faith, believing property belonging to B to be his own property, takes that property out of B's possession. Here, as A does not take dishonestly, he does not commit theft. (**S 303, 'p' Illustration**)

Now the question arises, what if in this case A realizes his mistake later but instead of returning the property back to B, he appropriates the same to his own use (say for example he sells the property or consumes it)? That is to say what if A develops dishonest intention later on, will it amount to theft? The answer will be NO; it can still not be termed as theft. The reason being, that the dishonest intention of the accused should exist at the time of moving of that property out of the possession in case of theft. (**S 303, 'h' Illustration**) But, that doesn't mean that this will help A to escape his liability altogether. As in that case he can be held liable for criminal misappropriation.

In the case ***K.N. Mehra Vs. State of Rajasthan***, 1957 AIR 369, two cadets of air force (one discharged for wrongful conduct and one trainee as navigator) took an aircraft to Pakistan without any authorization with the apparent purpose of seeking employment for the discharged cadet. They took the aircraft by misrepresenting that they had the authorization. It was held by the Supreme Court that there was a **dishonest intention at the time of taking of the property**. According to the court, 'a person can be said to have dishonest intention if in taking the property it is his intention to cause gain, by unlawful means, of property to which the person so losing is legally entitled.' The court held that the unauthorized taking had given the appellant the temporary use of the aircraft for his own purpose and had **temporarily deprived the owner** of the aircraft, the Government of the India, of its legitimate use for its purposes. Hence, taking of aircraft temporarily with dishonest intention was held to satisfy the requirement of offence of theft under s. 378(**Now section 303**)

Possession

Possession is control over a property by a person which is recognized by law. Possession is different from 'custody'.

If 'A' gives his coat to 'B' for some time for use out of friendship, 'B' has only custody of the coat. If 'A' takes his coat back without the consent of 'B', he is not guilty of theft because 'B' did not have possession of the coat but only custody of the coat.

However, if 'C' takes it from 'B' without his consent, he would be guilty of theft because 'B' has possession over the coat.

In ***Pyare Lal Bhargava Vs. State of Rajasthan***, 1963 AIR 1094, The accused was a Superintendent in Public Works Department of the State Government. A friend of his wanted a file of Public Works Department under the control of the Chief Engineer for removing certain unfavourable documents and putting documents which were more favourable to him. This was done by the accused.

When the tampering was discovered by the officer concerned both the accused were charged with the offence under theft.

In the instant case, it is not correct to say that the accused was in legal possession of the file. The file was in the Secretariat of the Department concerned which was under the charge of the Chief Engineer. The accused was only one of the officers working in the department;

(ii) it cannot be said that the accused had not taken the file out of the possession of the department;

(iii) to commit the theft one need not take movable property permanently out of the possession of another with the intention not to return it to him. If the movable property is dishonestly taken out of possession of another **with intention to return later** then also it would amount to theft.

Taking of Property/Moving the property

Theft is complete the moment goods are moved out of the possession of the victim with dishonest intention. It need not have come into possession of the accused. Definition of theft under s. 378(**Now section 303**) would be satisfied if the property is temporarily taken out of the possession of a person though the accused intended to return it later on. Wrongful loss need not be caused by permanent deprivation of property but may be caused even by temporary dispossession. A **temporary period of deprivation** or dispossession of the property of another causes loss to the other.

Illustration (b)

A puts a bait for dogs in his pocket, and thus induces Z's dog to follow it. Here, if A's intention be dishonestly to take the dog out of Z's possession without Z's consent, A has committed theft as soon as Z's dog has begun to follow A.

Even a dog can be subject matter of theft and if it is **moved** with dishonest intention, then it is theft.

Moving the property

Theft is complete as soon as the property is moved with dishonest intention. Explanation 2 provides that a moving effected by the same act which effects the severance may be a theft. Explanation 3 further provides that a person is said to cause a thing to move by removing an obstacle which prevented it from moving or by separating it from any other thing, as well as by actually moving it. Explanation 4 provides that a person, who by any means causes an animal to move, is said to move that animal, and to move everything which, in consequence of the motion so caused, is moved by that animal.

Theft of one's own property amount to committing theft

Theft under the BNS is an offence against possession and not ownership. A person can be convicted of stealing his own property if he takes it dishonestly from another.

For example, **S -303** ,BNS **Illustration 'k'** If, A, having pawned (Mortgage) his watch to Z, takes it out of Z's possession without Z's consent, not having paid what he borrowed on the watch, he commits theft, though the watch is his own property, inasmuch as he takes it dishonestly.

Again, BNS Illustration 'j' of Section 303 – A gives his watch to B for repairs. B repairs the watch but A does not pay the repairing charges, because of which B does not return the watch as a security. A forcibly takes his watch from B. Here, **A is guilty of theft of his own watch.**

In **R Vs. Turner**, 1971,WLR,901, the defendant took his car in to a service station for repairs. When he went to pick it up he saw that the car was left outside with the key in. He took the car without paying for the repairs. He was **liable for theft** of his own car since the car was regarded as belonging to the service station as they were in possession and control of it.

It was held that “Where the accused took a bundle belonging to himself, which was in the possession of a police constable and for which the constable was accountable, it was held that the constable had special property in it and that, the accused was **guilty of theft**”.

For the following situations, own property theft is not amount to theft;

Seizure of goods under the Mortgage deed

Sekar Vs. Arumugham (2000) CrLJ 1552 was held as **not amounting to theft** under the Code. Here when the person defaulted in his payments to the bank then, the bank under the express clause in the deed seized the lorry; **it didn't amount to theft** because the bank acted as per the deed and there was no dishonest intention.

Also in the case of ***Charanjit Singh Chadha Vs. Sudhir Mehra***, AIR 2001, SC 3721, in case of a hire-purchase agreement, the custody of vehicle was given to the hirer with a condition stipulated in the agreement that the financier will continue to be the owner till payment of last installment. Subsequently, there was a default in payment made by the hirer and as a result the financier took back the vehicle. The Supreme Court held that it **did not amount to theft** because the agreement specifically provided that the owner as a right could repossess the vehicle in case of default in payment. So, the act of financier was lacking dishonest intention.

Theft Vs Criminal misappropriation of property Vs Criminal breach of trust

Theft under BNS is offence against possession and not ownership. Property has to be in possession of someone so that someone else can be liable for its theft. As a general rule, theft requires actual physical possession of the item.

Here, we can understand it through comparison between two situations:

Situation A:

Illustration (f) to Section 303 of the BNS

A finds a ring belonging to Z on a table in the house which Z occupies. Here the ring is in Z's possession, and if A dishonestly removes it, A commits **theft**.

[Ring on the table in the house possessed by Z is in Z's possession.]

Situation B

Illustration (g) to Section 303 of the BNS

A finds a ring lying on the highroad, not in the possession of any person. A, by taking it, commits no theft, though he may commit **criminal misappropriation of property**.

[Ring on highroad is not in possession of any person, so it cannot be subject matter of theft but as A found ring and now he dishonestly misappropriates or convert to his own use he may be guilty of Criminal Misappropriation of Property.]

Can there be theft by a person whose possession began with the consent of the owner?

Before answer this question, one needs to understand the law stated under Section 3(3) of the BNS.

Constructive possession/ deemed possession

According to **BNS 3(3)**, the property in the possession of a person's wife, clerk or servant on behalf of husband or principal or master, is deemed to be in that person's possession. It is also known as "deemed possession".

For instance, A, being a servant in the deemed possession of a ring which belongs to Z. Here, Z is the master of A.

Even though the possession began with the consent of the owner, or that the possession of property has been given by the owner to his wife, clerk or servant, still in the eyes of law it will be considered to be in the possession of the actual owner only (this is called de jure possession or, possession in law).

If a master delivers property in the hands of his servant for a special purpose, as to leave it at the house of a friend, or to deposit it with the banker, the servant will be guilty of theft if he runs away with the same, because it still remains in the constructive possession of the master.

We can now compare two situations here:

Situation A:

Illustration (d) to Section 303 of the BNS

A being Z's servant, and entrusted by Z with the care of Z's plate, dishonestly runs away with the plate, without Z's consent. A has committed **theft**.

[A thing in possession of servant on behalf of master is master's possession, so when he runs away with plate, he takes it out of possession of master. So, he commits theft]

Situation B:

Illustration (e) to Section 303 of the BNS

Z, going on a journey, entrusts his plate to A, the **keeper of a warehouse**, till Z shall return. A carries the plate to a goldsmith and sells it. Here the plate was not in Z's possession. It **could not therefore be taken out of Z's possession**, and A has not committed theft, though he may have committed **criminal breach of trust**.

[A, the keeper of warehouse has got the possession of plate which Z entrusted to him. With dishonest intention, he sells the plate. It is the case of criminal breach of trust and not theft.]

Without the consent

The offence of theft is committed if the property of a person is taken away from him without his consent with a dishonest intention. Consent obtained by force is no consent. Explanation 5 to Section 303 of the BNS says that **consent must be express or implied**, and may be given either by the person in possession or, by any person having for that purpose authority either express or implied.

Illustration (n) to Section 303 of the BNS

A asks charity from Z's wife. She gives A money, food and clothes, which A knows to belong to Z her husband. Here it is probable that A may conceive that Z's wife is authorised to give away alms. If this was A's impression, A has not committed theft.

Illustration (o) to Section 303 of the BNS

A is the paramour (illicit partner) of Z's wife. She gives a valuable property, which A knows to belong to her husband Z, and to be such property as she has no authority from Z to give. If A takes the property dishonestly, he commits theft.

[In illustrations (n) and (o) the relationship between donor and donee and nature of property as in case of illustration (o) makes it clear that it is dishonest taking. Relationship of wife and paramour and nature of property makes it clear that in illustration (o) it is taken dishonestly. In comparison of illustration (n) and (o), A asks charity from Z's wife and he has no dishonest intention to take clothes, money, etc. so therefore it is not a theft. Whereas in illustration (o), A is paramour of Z's wife and has dishonest intention to take valuable things. So, he commits theft.]

Goods as Movable Property

In *Commissioner of Sales Tax, Madhya Pradesh, Indore vs. Madhya Pradesh Electricity Board, Jabalpur*, AIR 1970 SC 732, it has been held that **electricity is goods**. The court held that the definition of "goods" is very wide and includes all kinds of movable property. The term "movable property" when considered with reference to "goods" as defined for the purpose of sales-tax cannot be taken in a narrow sense and merely, because electric energy is not tangible or cannot be moved or touched, it cannot cease to be movable property when it has all the attributes of such property. It is capable of abstraction, consumption and use which if done dishonestly is punishable under Section 39 of the Indian Electricity Act, 1910 (now section 135 of the Indian Electricity Act, 2003). **It can be transferred, stored, possessed, etc. in the same way as any other movable property.**

AGGRAVATED FORMS OF THEFT UNDER BNS

Section 305: Theft in a dwelling house, or means of transportation or place of worship, etc

Section 306: Theft by clerk or servant of property in possession of master.

Section 307: Theft after preparation made for causing death, hurt or restraint in order to committing of theft. Of extortion

The only difference between the offence under this section(**307**) and that in the case of robbery (Section 309 of the BNS) is that some **injury is actually inflicted** in the case of robbery, while under this section all preparations are made **for facilitating his escape** after committing such theft or to retain the property stolen is sufficient.

For example,

A commits theft on property in Z's possession; and, while committing this theft, he has a loaded pistol under his garment, having provided this pistol for the purpose of hurting Z in case Z should resist. A has committed the offence defined in this section; but where Z tries to resist and A uses his pistol to hurt Z, then in that case offence committed would be of theft. Proof of actual fact is necessary before conviction under this section.

