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Dancing Shiva Statue – India and National Gallery of Australia

February 2015

Case Dancing Shiva Statue – India and National Gallery of Australia

*India/Inde – National Gallery of Australia – Subhash Kapoor – Post 1970
restitution claims/Demandes de restitution post 1970 – Antiquity/antiquités –
Diplomatic channel/voie diplomatique – Negotiation/négociation –
Settlement Agreement/accord transactionnel – Deaccession – Criminal
offence/infraction pénale – Due diligence – Illicit exportation/exportation
illicite – Ownership/propriété – Unconditional restitution/restitution sans
condition*

*In 2006, New York art dealer Subhash Kapoor arranged the theft and illegal
exportation of a 900-year old bronze statue of the Dancing Shiva from a small
temple in Southern India. In 2008, the National Gallery of Australia bought
the statue for AUD\$5.6 million. In 2013, Kapoor was arrested and news
spread of his illicit activity. The Indian Government requested the statue be
returned. In 2014, the Gallery relinquished the work, and the Australian
Prime Minister returned it to India.*

*I. Chronology; II. Dispute Resolution Process; III. Legal Issues; IV. Adopted
Solution; V. Comment; VI. Sources.*

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I. Chronology

Post 1970 restitution claims

- **30 September 2005:** The New York art dealer **Subhash Kapoor** visited Chennai, the capital of Tamil Nadu, in southern **India**, and met **Sanjivi Asokan**. Asokan headed a ring of **thieves** in the region. Kapoor contracted Asokan to steal idols belonging to Chola Era.¹
- **January 2006:** Asokan's hired temple looters **stole antique sculptures** from a temple in Sripuranthan village, in the Ariyalur district of Tamil Nadu. Among others, Asokan's thieves stole a 11th century **Dancing Shiva statue**,² which was subsequently shipped to **New York**.
- **February 2008:** The **National Gallery of Australia** (the Gallery), a state institution, paid Subhash Kapoor AUD\$5.6 million for the **Dancing Shiva statue**.³ Weeks before acquiring the statue, the Gallery consulted an art law expert who cautioned the Gallery officials about the considerable risks of acquiring the sculpture, including the likely possibility that it was stolen.⁴
- **August 2008:** When villagers in Tamil Nadu **discovered the theft**, they **reported** it to the **Tamil Nadu Police "Idol Wing"**.⁵
- **March 2009:** The police **arrested** 7 locals alleged to be involved in the theft, including Sanjivi **Asokan**. The detectives obtained the information that **Kapoor** had directed them.⁶
- **25 October 2011:** India's Central Bureau of Investigation issued an international alert, Interpol's Red Corner Notice, for Kapoor's "non bailable" **warrant for arrest** in connection with the case.⁷ Five days later, **Kapoor was arrested** in Germany.
- **14 July 2012:** **Kapoor was extradited to India**, where he faced criminal proceedings for the **looting and trafficking of Indian art**. Kapoor pleaded not guilty.

¹ Government of Tamil Nadu-Police Department, Economic Offences Wing, Status of Case, accessed January 20, 2015, http://www.tneow.gov.in/IDOL/status_info.html.

² The *Dancing Shiva* statue was created by an Indian craftsman in c. 1100 AD. It is a 130 cm bronze figure from the Chola dynasty, which depicts the Hindu god as the Lord of the Dance or Nataraja.

³ The National Gallery of Australia purchased 22 objects from Kapoor's gallery between 2002 and 2011. Jason Felch, "Kapoor's Footprints: 240 Objects from Alleged Antiquities Trafficker Traced to Museums around the Globe," *Chasing Aphrodite*, August 3, 2012, accessed January 20, 2015, <http://chasingaphrodite.com/2012/08/03/kapoors-footprints-230-objects-from-alleged-antiquities-trafficker-traced-to-museums-around-the-globe/>.

⁴ Jason Felch, "Reckless: In Pursuit of Shiva, the National Gallery of Australia Ignored the Advice of Its Attorney," *Chasing Aphrodite*, March 17, 2014, accessed January 20, 2015, <http://chasingaphrodite.com/2014/03/27/reckless-in-pursuit-of-shiva-the-national-gallery-of-australia-ignored-the-advice-of-its-attorney/>.

⁵ Government of Tamil Nadu-Police Department, Economic Offences Wing, Status of Case, accessed January 20, 2015, http://www.tneow.gov.in/IDOL/status_info.html.

⁶ Adam Matthews, "The Man Who Sold the World," *GQ India*, December 5, 2013, accessed January 20, 2015, <http://www.gqindia.com/get-smart/pop-culture/man-who-sold-world>.

⁷ *Subash Candra Kapoor v. Inspector of Police*, Mandras High Court, 3 April 2012, accessed January 20, 2015, <http://indiankanoon.org/doc/14478654/>.

- **2012:** The **US FBI** raided Kapoor's warehouse in **New York** seizing \$100 million worth of allegedly looted art.⁸
- **December 2013:** Kapoor's business partner Aaron **Freedman** pleaded guilty to six criminal counts to the New York Supreme Court. He admitted that the *Dancing Shiva* was **stolen** from an Indian temple and that he had created forged documents to give a fake collecting history to the statue and facilitating its sale to Australia.⁹
- **February 2014:** The **Gallery** contacted the **Indian Government** to discuss avenues for restitution for the statue.
- **March 2014:** The **Indian High Commission** lodged a formal request to the Australian **Attorney-General Department** asking for the *Dancing Shiva* to be returned to India. **Negotiations** subsequently took place between the Gallery, the Australian and the Indian Governments. The Gallery "voluntarily removed" the statue from public display.¹⁰
- **5 September 2014:** The Australian Prime Minister, Tony Abbot, **returned** the *Dancing Shiva* to the Indian Prime Minister, Narendra Modi.

II. Dispute Resolution Process

Diplomatic channel – Negotiation – Settlement agreement

- In February 2014, once more evidence about Kapoor's illicit activity had emerged through investigations, the Gallery admitted that the statue was *likely* to be stolen.¹¹ Hence the Gallery was willing to discuss avenues for restitution with the Indian Government.
- The Indian and Australian Governments became more involved in the dispute over ownership of the statue. This is because the process for returning foreign cultural objects was handled on a government-to-government basis in accordance with the provisions of the *Protection of Moveable Cultural Heritage Act 1986*, which implements Australia's obligations under the 1970 *UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property* (1970 UNESCO Convention). In response to the March 2014 return request from the Indian Government, the Gallery voluntarily removed the *Dancing Shiva* from public display.

⁸ Jason Felch, "Feds: Subhash Kapoor 'One of the Most Prolific Commodities Smugglers in the World'," *Chasing Aphrodite*, December 6, 2012, accessed January 20, 2015, <http://chasingaphrodite.com/2012/12/06/feds-subhash-kapoor-one-of-the-most-prolific-commodities-smugglers-in-the-world/>.

⁹ Jason Felch, "Unprecedented: Australia's National Gallery Sues Kapoor Over \$5 Million Stolen Shiva," *Chasing Aphrodite*, February 11, 2014, accessed January 20, 2015, <http://chasingaphrodite.com/2014/02/11/unprecedented-australias-national-gallery-sues-kapoor-over-5-million-stolen-shiva/>.

¹⁰ Press Release: National Gallery of Australia, Questions and Answers: Shiva as Lord of the Dance (Nataraja), Updated September 5, 2014, accessed January 20, 2015, http://www.australianprints.gov.au/AboutUs/press/pdf/Q&A_Update_Shiva_Nataraja.pdf.

¹¹ Ibid.

- In its September 2014 Press Release, the Gallery stated that it “is cooperating and working closely with relevant authorities on fact gathering and on possible outcomes”.¹²

III. Legal Issues

Deaccession – Due diligence – Criminal offence (theft) – Illicit exportation – Ownership

- In 1972, the Indian Government introduced the *Antiquities Act*, which established that after 1972 all items of antiquity are to be owned by the Indian State and are only to be exported with exhibition licenses.¹³ Therefore, the removal of *the Dancing Shiva* from a Tamil Nadu temple and its export to New York constituted a theft and illicit exportation under Indian law. In fact, Kapoor is currently on trial before Indian courts, accused of the looting and the illicit trafficking of Indian art. Moreover, Kapoor’s business partner Freedman acknowledged that the statue was stolen from a Tamil Nadu temple before US courts, and that they had sold numerous artworks to famous museums and galleries around the world with forged provenance documents.¹⁴
- Whilst a court has still to decide the matter, one can argue that the Gallery did not acquire the ownership of the *Dancing Shiva*. The forged provenance records that lead the Gallery to purchase the stolen item hold no legal weight for the Gallery’s claim of title over the work. However, the Gallery maintained that it made a *bona fide* (good faith) purchase, based on diligent provenance research that was in accordance with their Museum’s protocol and ICOM’s *Code of Ethics for Museums*.
- However, under Article 14(2) of Australia’s *Protection of Moveable Cultural Heritage Act* 1986, *knowingly* importing a cultural object, whose export has been prohibited, constitutes a breach of law.¹⁵ Furthermore, under Australian common law regulating tangible personal property,¹⁶ if an object is stolen then it is illegal to acquire the work, even as a good faith purchaser. Criminal liability has not been attributed to the Gallery.

IV. Adopted Solution

Unconditional restitution

- On 5 September 2014, the Prime Minister of Australia, Tony Abbott, presented the *Dancing Shiva* statue to the Prime Minister of India, Mr Narendra Modi, “in a (diplomatic) gesture of

¹² Ibid.

¹³ Felch, “Unprecedented”.

¹⁴ Ibid.

¹⁵ Australian, *Protection of Movable Cultural Heritage Act*, 1986.

¹⁶ Australia, *Personal Property Securities Act 2009*. Property legislation in all Australian States is grounded upon the British Torrens principle of registration of title.

goodwill and respect. This action was undertaken with the cooperation and approbation of the Gallery”.¹⁷

V. Comment

- The Gallery’s lawsuit to recover its losses from Kapoor has been considered “unprecedented” because of its rarity.¹⁸ Many museums, galleries and private collectors around the world have returned looted objects to countries like Italy, Greece, Turkey, India and Cambodia. However, according to Felch, no museum or collector has filed a similar suit because it would possibly expose claimants to investigations into their due diligence and prior knowledge of the items being looted – regardless of the fact that dealers had provided standard warranties guaranteeing good title to the objects. The Gallery’s press release lists its “thorough and extensive research process ... which found no indications that the acquisition would be improper or illegal”.¹⁹ The Gallery maintained that “it did what any reputable international gallery would have done and what is required to comply with the UNESCO conventions”.²⁰ However, the *Chasing Aphrodite* author also claimed that the Gallery performed “optical due diligence”, because it did not properly follow up provenance concerns, such as the authenticity of Kapoor’s contacts.²¹
- The news of Kapoor’s illicit activity, after his arrest in 2011, has raised numerous concerns for other museums and galleries that have purchased art through him, and “been victim of a most audacious act of fraud”.²² “The man who sold the world” and “created a black-market Sotheby’s”²³ also made deals with the Metropolitan Museum of Art in New York, the Los Angeles’ Getty Museum, Sydney’s Art Gallery of New South Wales, and many more. In total, 236 objects have been traced to galleries and museums.²⁴ This has caused a wave of increased provenance checks occurring, and policies being updated. The overwhelming influence Kapoor had in the art world, and the contacts that he used, are under continued police investigation.
- Blame has been pointed in all directions, for the looting and trafficking of art. Vijay Kumar²⁵ and Hemang Desai²⁶ believe the Western demand in the art market encourages the continued

¹⁷ National Gallery of Australia, Questions and Answers.

¹⁸ Ibid. Filed February 5, 2014, in the New York Supreme Court.

¹⁹ Ibid.

²⁰ National Gallery of Australia, Questions and Answers.

²¹ Creating the appearance of caution while continuing to buy suspect antiquities. Jason Felch, “Optical Due Diligence: Art Loss Register Claims to Vet Ancient Art. Does it?,” *Chasing Aphrodite*, August 1, 2013, accessed January 20, 2015, <http://chasingaphrodite.com/2013/08/01/optical-due-diligence-art-loss-register-claims-to-vet-ancient-art-does-it/>.

²² Ibid.

²³ Matthews, “The Man Who Sold the World”.

²⁴ Felch, “Kapoor’s Footprints”.

²⁵ Matthews, “The Man Who Sold the World”.

²⁶ Hemang Desai, “The Pride and Poaching of Our Heritage,” *The Tribune*, January 26, 2015, accessed January 20, 2015, <http://www.tribuneindia.com/news/comment/the-pride-and-poaching-of-our-heritage/34288.html>.

illegal supply of works. However, it is the responsibility of a number of stakeholders to protect cultural heritage. The 1970 UNESCO Convention outlines that Member States must “protect the cultural property existing within its territory against the dangers of theft, clandestine excavation, and illicit export”.²⁷ This means that governments of countries like India, and not just their museums, hold responsibility for protecting their own heritage. Accordingly, the Indian Government has received criticism for its “seemingly apathetic view and response to the theft of thousands of priceless heritage objects, despite the millions of dollars being spent on historical preservation”.²⁸ UNESCO estimates that nearly 50,000 objects were smuggled out of India between 1979 and 1989 alone, with figures multiplying in the last two decades.²⁹ Furthermore, the tolerance for “reputable galleries knowingly and unknowingly buying stolen or looted art”³⁰ has drastically fallen in the post-war period, with the implementation of the 1970 UNESCO Convention and ICOM’s *Code of Ethics for Museums*.

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²⁸ Neeta Lal, “India Blinks as Art Treasures Disappear,” *Asia Times Online*, October 15, 2011, accessed January 20, 2015, http://atimes.com/atimes/South_Asia/MJ15Df03.html.

²⁹ Ibid.

³⁰ Sally Pryor, “NGA’s Retiring Director Ron Radford Glad Stolen Statue Returned to India,” *The Canberra Times*, September 5, 2014, accessed January 20, 2015, <http://www.theaustralian.com.au/arts/visual-arts/art-returned-to-india-in-bid-to-end-shiva-saga/storyfn9d3avm-1227049534214>.

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