Vicarious Liability

By

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The term "vicarious liability" does not indicate a distinct tort, but rather a process by which one person can be held liable for a recognised tort committed by another.

An employer is vicariously liable for negligent acts or omissions by his employee in the course of employment whether or not such act or omission was specifically authorized by the employer.

The common examples of such a liability are: -

1) Liability of the principal for the tort of his agent.

2) Liability of partners of each others tort.

3) Liability of the master for the tort of his servant.

A master is jointly and severally liable for any tort committed by his servant while acting in the course of his employment. This is by far the most important of the various cases in which vicarious responsibility or vicarious liability is recongised by the law. Vicarious liability means that one person takes or supplies the place of another so far as liability is concerned. Although the doctrine has its roots in the earliest years of the common law, it was Sir John Holt (1642-1710) who began the task of adapting medieval rules to the needs of a modern society, and his work was continued by the great Victorian-Judges. By the beginning of the twentieth century it was firmly established that the master's liability was based, not on the fiction that he had impliedly commanded his servant to do what he did, but on the safer and simpler ground that it was done in the scope or course of his employment or authority. Today it has been developed so far "that it would be a good deal safer to keep lions or other wild animals in a park than to engage in a business involving the employment of labour".

Some different theories

It will never be possible, or perhaps even desirable, to expound a theory which will at once explain and justify all aspect of the doctrine although it has long been accepted as necessary and beneficial. The combined effect of all the reasons may be

overwhelming, though one or more in isolation may be unconvincing. The maxim respondent superior does not explain why the superior should answer; it does not enshrine a principle, but announces rather a result— namely, that the employer ought to pay. The maxim qui facit per alium facit per se [He who acts through another acts himself i.e., the acts of an agent are the acts of the principal], although often cited with approbation is similarly unhelpful. The truth is that "a mixture of ideas has inspired many unconvincing judicial efforts to find a common basis for the maxim. What was once presented as a legal principle has degenerated into a rule of expediency, imperfectly defined, and changing its shape before our eyes under the impact of changing social and political conditions. But there is one idea which is to be found in the judgments from the time of Sir John Holt to the present day, namely, public policy- As Lord Brougham said: 'The reason that I am liable is this, that by employing him I set the whole thing in motion; and what he does, being done for my benefit and under my direction, I am responsible for the consequences of doing it". In short, vicarious liability is based on "social convenience and rough justice". This is an adequate explanation of the doctrine, subject to the qualification that the master may be liable even though the act or default is not for his benefit, and even though he has expressly prohibited it. In all this there is no doubt that the courts have been much influenced by the fact that the master is usually more able than the servant to satisfy claims by injured persons and can pass on the burden of liability by way of insurance. There is also some evidence to show that the imposition of strict liability on the master results in the prevention of accidents; the master takes more care than he would otherwise have done.

Vicarious Liability of the State

Or
Tortious Liability of the State

Or

Governmental Liability in Tort

In the past, actions against the State for civil wrongs were concerned with personal or proprietary interests in the form of damage to property or misappropriate or loss while in custody. The latter period witnesses actions filed for injuries to a persons life or liberty. The State being a juristic person acting through its officials and agents, the question therefore arises whether it can be made liable for the wrongful acts of its servants and agent. The law relating to tortuous liability of the State in India has witnesses several phases of development right from the earliest decision in Peninsular v. Oriental Steam Navigation Co-Reddy Care, AIR 2000 SC 2083, in 2000.

Introduction

In the post constitutional era, the courts created a new public law remedy which made the State liable for wrongs inflicted in the course of exercise of its non-sovereign powers. However, for injuries caused in the exercise of sovereign power, the liability depend upon the nature of the activity and its relation to the power so exercised. While some cases, the State was made liable, in other Sovereign Immunity was pleaded as defence. Consequently, the decisions were conflicting and no single principle for the liability of the state could be evolved. In this respect, it becomes essential to analyse whether the distinction between the sovereign and non-sovereign functions has become obsolete, unrealistic and impracticable.

The advent of the "Welfare State" philosophy led to the all pervading state intervention, reducing the distinction between Private and Public functions. While, on the one hand, welfare measures multiplied, on the other hand the potentiality of injury to individual interests increased. Under these circumstances, the court tried to limit the concept of State Immunity within a narrow range. The courts confined the immunity of the State to traditional functions of the State like legislation, administration of justice, war, making of treaties and repression of crime. Indian Insurance Company Association Pool v. Radhabar, AIR 1976 MP 164. The law was not only found unsatisfactory by the courts but also by legal jurists.

The question of State liability for wrongful acts of its employees has assumed great important today, particularly in the context of the State donning innumerable functions for promoting welfare of its citizens. Misuse of power by these employees or their negligence may cause injury to a person or property of a citizen and may even involve our assault on his fundamental rights. Such a situation calls for an adequate mechanism for determining the liability of the State and compensating the victim.

It is, however, strange that the State which has extended its tentacles practically into all spheres of activities has not deemed it fit to enact a statute for determining the citizen's claims against the all powerful State. This paper therefore attempts to evaluate the judicial response for meeting the situation which puts in focus this conflict between the individual and the State.

Genesis of Government Liability in Torts

As Common Law only a legal person can sue or be sued in the court of law. The question of suability of the State therefore begs the question whether the State is a juristic person or a legal entity. There is little controversy amongst the different systems

of law that a corporation is a legal person. To all intents and purposes, the State is a corporate aggregate".

English Position

It is an ancient and fundamental principle of the English Constitution that the King can do no wrong. This maxim means, first, whatever is exceptionable in the conduct of the Public affairs is not to be imputed to the king, nor is he answerable for it personally to his people for this doctrine would totally destroy the constitutional independence of the Crown; and, secondly, that the prerogative of the Crown extends not to do any injury. "He (The King) is not liable to be sued civilly or criminally for a supposed wrong. That while the sovereign does personally, the law presumes will not be wrong; that which the sovereign does by command to his servants, cannot be a wrong in the sovereign because, if the command is unlawful, it is in law no command, and the servant is responsible for the unlawful act, the same as if there had been no command". So the Crown was not liable in tort at common law for wrongs committed by its servants in the course of employment not even for wrongs expressly authorized by it. Even the heads of the department or superior officers could not be sued for torts committed by their subordinates unless expressly authorized by them; only the actual wrong doer could be sued in his personal capacity. In practice, the action against the officer concerned was defended by the Treasury Solicitor and the judgment was satisfied by the Treasury as a matter of grace. Difficulty was, however, felt when the wrong doer was not identifiable. The increased activities of the crown have now made it the largest employer of men and the largest occupier of property. The above system was, therefore, proving wholly inadequate and the law needed a change which was brought about by the Crown Proceedings Act, 1947. Nothing in the Act authorises proceedings in tort against the Crown in its private capacity (S.40), or affects powers or authorities exercisable by virtue of the prerogative of the Crown or conferred upon me Crown by Statute [S. 11(1)]. Subject to this, the Act provides that the Crown shall be subject to all those liabilities in tort to which, if it were a person of full age and capacity, it would be subject

1) in respect of torts committed by its servants or agents, provided that the act or omission of the servant or agent would, apart from the Act, have given rise to a cause of action in tort against that servant or agent his estate.

2) in respect of any breach of those duties which a person owes to his servants or agents at common law by reason of being their employer.

3) in respect of any breach of the duties attaching at common law to the ownership, occupation, possession or control of property. Liability in tort also extends to breach by the Crown of a statutory duty. It is also no defence for the Crown that the tort was committed by its servants in the course of performing or purporting to perform functions extended to them by any rule of the common law or by Statute. The law is also indemnity and contribution as between joint tort-feasors shall be enforceable by or against the Crown and the Law Reform (Contributory Negligence) Act, 1945, binds the Crown. Although the Crown Proceeding Act., preserves the immunity of the Sovereign in person and contains savings in respect of the Crown's prerogative and statutory powers, the effect of the act in other respects, speaking generally, is to abolish the immunity of the crown in tort and to equate the crown with a private citizen in matters of tortuous liability. The Crown is now vicariously liable for torts committed by its servants in the course of their employment if committed in the circumstances which would render a private employer liable. So in Home Office v. Dorset Yacht Co., the Crown was held liable for the damage caused by runaway borstal trainees who escaped because of the negligence of the borstal officers in the exercise of their statutory function to control the trainees.

The English law is likely to develop further because of enforcement of the Human Rights Act, 1998 from 2nd October, 2000. The Act gives effect to the European Convention on Human Rights. The Act provides that it is unlawful for any public authority to act in a way which is incompatible with a convention right and a person who considers that these rights have been violated can sue the public authority for damages. Many of the convention rights are also recognised by the Common Law which also provides remedies for their infringement. A claim under the Act will directly arrive when the right infringed is recognized by the Act as a convention right but is not recognized by the Common Law.

Indian Position

The maxim that the King can do no wrong and the resulting rule of the Common Law that the Crown was not answerable for the torts committed by its servants have never been applied in India.

In India, the suability of the State as a body corporate dates back from the days of the East India Company, which was in fact, incorporated by a Royal Charter. This concept was maintained when the governance of the country was taken over by the British Crown from the Company, and in the Government of India Act since 1858, it

was explicitly laid down that the Government of India could sue or be sued in the name of the Secretary of State in council for India, which was to be treated as a body corporate.

Legally, the genesis of State liability for torts in India can be tracked back to the Section 65 of the Government of India Act, 1858, which provided that the Secretary of State could be sued as it could be done against the East India Company. The section was re-enacted as the S.32 of the Government of India Act, 1935. In the present constitution the corresponding Provision is Article 300.

Constitutional Provisions in India

Article 300 of the Constitution Law:-

The law in India with respect to the liability of the State for the tortuous acts of its servants has become entangled with the nature and character of the role of the East India Company prior to 1858. It is therefore necessary to trace the course of development of the law on this subject, as contained in Article 300 of the Constitution.

Clause (1) of Article 300 of the Constitution provides: -

1) that the Government of India may sue or sued by the name of the Union of India and the Government of a State may sue or be sued by the name of the state.

2) that the Government of India or the Government of a State may sue or be sued in relation to their respective affairs in the like cases as the Dominion of India and the corresponding provinces or the corresponding Indian States might have sued or be sued, "if the constitution had not been enacted.,

3) that the second mentioned rule shall be subject to any provisions which may be made by an Act of Parliament or of the legislature of such State, enacted by virtue of powers conferred by the Constitution.

Even though more than 50 years have elapsed since the commencement of the constitution, no law has so far been made by Parliament as contemplated by Article 300, notwithstanding the fact that the legal position emerging from the article has given rise to a good amount of confusion. Even the judgments of the Supreme Court have not been uniform and have not helped to remove the confusion on the subject, as would be evident from what is stated hereinafter.

Act of 1833

Under the Act of 1833 (3 and 4 William IV Ch. 85), enacted by the British Parliament, the governance of India was entrusted on the East India Company. The Act declared that the Company held the territories in trust for His Majesty, his heirs and successors, when the governance of India was taken over by the British Crown in 1858, an Act was passed in that year (Act 21 and 22 Vic. Ch. 106), entitled the Government of India Act, 1858, Section 65 of that Act declared that the Government's liability in this behalf shall be the same as that of the Company. It would be appropriate to set out the section in full: -

> "The Secretary of State in Council shall and may sue and be sued as will in India as in England by the name of the Secretary of State in Council as a body corporate; and all persons and bodies politic shall and may have and take the same suits, remedies and proceedings, legal and equitable, against the Secretary of State in council of India, as they could have done against the said company; and the property and effect hereby vested in Her Majesty for the purposes of to Government of India, or acquired for the said purposes, shall be subject and liable to the same judgments and executions as they would, while vested in the said Company have been liable to in respect of debts and liabilities lawfully contracted and incurred by the said Company."

Act of 1915

This very provision, contained in the Act of 1858, was practically continued by section 32 of the Government of India Act, 1915 Sub-sections (1) and (2) of that Section read as follows: -

> 1) "The Secretary of State in Council may sue and be sued by the name of the Secretary of State in Council, as a body corporate.
>
> 2) Every person shall have the same remedies against the Secretary of State in Council as he might have had against the East India Company, if the Government of India Act 1858, and this Act had not been passed."

Act of 1935

Even when the Government of India Act, 1935 was enacted (replacing the Act of 1915), the same legal position was continued by section 176(1) of the Act, which read as follows:

> "The Federation may sue or be sued by the name of the Federation of India and a Provincial Government may sue or be sued by the name of the Province, and, without prejudice to the subsequent provisions of this chapter, may subject to any provisions which may be made by an Act of the Federal or a Provincial legislature enacted by virtue of powers conferred on that legislature by this Act, sue or be sued in relation to their respective affairs in the like cases as the Secretary of State in Council might have sued or been sued if this Act had not been passed."

Resultant Position

Thus, Article 300 of the Constitution practically takes us back to the Act of 1858, which, in its turn, leads us to a consideration of the nature and extent of the liability of the East India Company.

Peninsular and Oriental Steam Navigation Co.

Vs.

Secretary of State for India.

The often-quoted authority on the construction of section 65 of the 1858 Act is the decision of the Supreme Court of Calcutta rendered in 1861 in the case of Peninsular and Oriental Steam Navigation Co. v. Secretary of State for India. The case was actually reported as an Appendix to one of the Bombay High Court Reports- 5 B.H.C.R. App. P. 1.

In this case a servant of the plaintiff company was proceeding on a highway in Calcutta driving a carriage drawn by a pair of horses. Due to the negligence of the servants of the Government employed in the Government Dockyard at Kidderpore in carrying a piece of iron funnel needed for repair of a steamer, an accident happened in which one of the horses driving the plaintiffs carriage was injured. The plaintiff sued the Secretary of State for India for damages for the damage caused due to the negligence of the servants of the Government. In holding that for such accident caused by the negligence of its servants in doing acts not referable to Sovereign Powers the East India Company would have been liable and so the secretary of State for India was liable, Peacock, C.J., who delivered the judgment of the Court, drew a distinction between the acts done by the Public servants in the delegated exercise of sovereign powers and acts done by them in the conduct of other activities and made the following pertinent observation:

> "In determining the question whether the East India Company would, under the circumstances, have been liable to an action under the general principles applicable to Sovereigns and States, and the reasoning deduced from the maxim of the English law that the King can do no wrong would have no force. The East India Company were not Sovereigns and, therefore, could not claim all the exemptions of a Sovereign; and they were not the public servants of Government and, therefore, did not fall under the principle of the case with regard to the liabilities of such persons, but they were a Company to whom sovereign powers were delegated and who traded on their own account and for their own benefit, and were engaged in transactions partly for the purposes of Government, and partly on their own account, which without any delegation of Sovereign rights might be carried on by Private individuals, There is a great and clear distinction between acts done in the exercise of what are usually termed sovereign powers, and acts done in the conduct of undertakings which might be carried on by private individuals without having such powers delegated to them."

The tort in the case of Peninsular and Oriental Steam Navigation Co., was committed by the servants of the Government in the course of a trading activity and the case was not directly concerned with acts done in the exercise of sovereign powers. The Madras High Court in Hari Bhanji case and the Bombay High Court in Rao v. Advani case, therefore, did not accept the reservation made by Peacock, C.J. that the Government was not liable if the tort was committed in the exercise of sovereign powers and the view expressed by these High Courts was that the Government would also be liable for torts committed in the exercise of sovereign powers except when the act complained of amounted to an act of State. The Calcutta High Court, however, followed the view taken by Peacock, C.J.

Nobin Chander Dey Vs. Secretary of State for India.

The doctrine of immunity for acts done in the exercise of "sovereign functions"., enunciated in the P and O case, was applied by the Calcutta high Court in Nobin Chander Dey Vs. Secretary of State, (1873) ILR.1 Cal.1.

In this case, the plaintiff contended that the Government had made a contract with him for the issue of a licence for the sale of ganja and had committed breach of contract. The High Court held as under: -

i) On the evidence, no breach of contract had been proved,

ii) Even if there was a contract, the act was done in exercise of sovereign power and therefore it was not actionable.

The High Court expressly followed the P and O ruling, and the state was exempted from the liability.

On the other hand there is another set of authorities according to which the State is liable for the torts of its servants except when an act done is an "Act of State". "Act of State" is a defence which the State cannot have against its own subjects. According to this view, therefore, the State is liable towards its own subjects, just like an ordinary employer.

The Secretary of State for India Vs. Hari Bhanji.

One of the authorities for this point of view if the case of the Secretary of State for India in Council Vs. Hari Bhanji, wherein the Madras High Court held that the State immunity was confined to acts of State.

The facts of the case briefly were that during the course of transit of salt from Bombay to Madras Parks, the rate of duty payable on salt was enhanced and the merchant was called upon to pay the difference at the port of destination. The amount was paid under protest and a suit was instituted to recover the amount.

The principal question that arose was the jurisdiction of the Court to entertain such a suit. The Calcutta High Court in one of its earlier cases of Nobin Chander Dey v. Secretary of State for India, (1932-33) 37 CWN 959 had taken the view that in respect of acts done in the exercise of sovereign functions by the East India Company, no suit could be entertained against the Company.

This position was examined by the Madras High Court and two questions governing the maintainability of the suit were formulated. Firstly what was the personal status of the defendant i.e. whether the defendant was a sovereign who could not be sued in its own Courts and secondly what was the character of the act committed with respect of which the relief was sought. The first question did not pose much of a difficulty as the immunity enjoyed by English Crown did not extend to the East India Company, as all the charters had specifically recognised the liability of the Company to sue or be sued. However with respect to the second question the High Court held that the immunity of the East India Company extended only to what were called the "acts of State", strictly so called and that the distinction between sovereign and non-sovereign functions was not a well founded one.

Turner C.J., in coming to this conclusion, pointed out that in P & O case (Supreme Court Calcutta), Peacock C.J. did not go beyond acts of State, while giving illustrations of situations where the immunity was available. The position was thus explained (in the Madras case):

> "The act of State, of which the municipal courts of I British India are debarred from taking cognizance, are acts done in the exercise of sovereign powers, which do not profess to be justified by municipal law .....where an act complained of is professedly done under the sanction of municipal law, and in exercise of powers conferred by that law, the fact that is done by the sovereign powers and is not an act which could possibly be done by a private individual does not oust the jurisdiction of the civil court."

It should, however, be mentioned that the Madras Judgment in Hari Bhanji also adds that the Government may not be liable for acts connected with public safety (even though they are not acts of State).

The Law Commission of India, in its First Report in 1956, has discussed the whole question and according to its view, "the law was correctly laid down in Hari Bhanji's case".

State of Rajasthan v. Vidyawati.

The point as to how far the State was liable in tort first directly arose before the Supreme Court in State of Rajasthan Vs. Vidyawati. In that case the claims for damages was made by dependants of a person who died in an accident caused by the negligence of the driver of a jeep maintained by the Government for official use of the Collector of Udaipur, while it was being brought back from the workshop after repairs. The Rajasthan High Court took view that the State was liable for "the State is in no better position in so far as it supplies cars and keeps drivers for its civil service". "The Supreme Court endorsed the view taken by the High Court; Sinha, C.J., in delivering the judgment of the Court quoted approvingly the judgment of Peacock, C.J. but he also from the point of view of first principles" made the following observations:

> "The immunity of the Crown in the United Kingdom was based on the old feudalistic notions of Justice, namely, that the King was incapable of doing a wrong, and, therefore, of authorising or instigating one, and that he could not be sued in his courts. In India, ever since the time of the East India Company, the Sovereign has been held liable to be sued in tort or in contract and the common law immunity never operated in India. Now that we have, by our

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> Constitution, established a Republican form of Government, and one of the objectives is to establish a socialistic State with its varied industrial and other activities, employing a large army of servants, there is no justification in principle or in public interest, that the State should not be held liable vicariously for the tortuous act of its servant."

Kasturilal Ralia Ram Jain v. State of U.P.

The question of liability of the State again came up for decision before the Supreme Court in Kasturilal Ralia Ram Jain V. State of U. P. In this case, a partner of Kasturilal Ralia Ram, a firm of jewelers of Amritsar, went to Meerut for selling gold and silver. He was taken into custody at Meerut by Police constables on the suspicion of possessing stolen property. He was kept in police lock-up and the gold and silver recovered from him on search were kept in the custody of the police in Police Malkhana. He was next day released and sometime later silver seized was returned. The gold could not be returned to him as the Head Constable-in-charge of the Malkhana misappropriated it and fled to Pakistan. The suit was filed against the State of U.P. for return of the ornaments or in the alternative for compensation. It was found that the Police Officers had failed to follow the U.P. Police Regulations in taking care of the gold. The Supreme Court held the State not liable on the view that the tort was committed by police officers in the exercise of delegated sovereign powers. The Court speaking through Gajendragadkar, C.J. fully approved the decision of Peacock, C.J. in the case of Peninsular and Oriental Steam Navigation Co., stating per incuriam that it "enumerated a principle which has been consistently followed in all subsequent decisions: and observed:

> "It must be borne in mind that when the State pleads immunity against claims for damages resulting from injury caused by negligent acts of its servant, the area of employment referable to sovereign powers must be strictly determined. Before such a plea is upheld, the Court must always find that the impugned act was committed in course of an undertaking or employment which is referable to the exercise of delegated sovereign power". In upholding the defence of immunity pleaded by the State of U.P.' Gajendragadkar, C.J. further said: "The act of negligence was committed by Police officers while dealing with the property of Raila Ram which they had seized in the exercise of their statutory powers. Now, the power to arrest a person, to search him, and to seize property found with him, are powers conferred on the specified officers by statute and in the last analysis these are powers which can be properly characterized as sovereign powers, and so, there is no difficulty in holding that the act which gave rise to the present

claim for damages has been committed by the employees of the respondent during the course of their employment; but the employment in question being of the category which can claim the special characteristic of sovereign power, the claim cannot be sustained." It may also be mentioned that Vidyawati's case was distinguished as being confined to tortuous liability not arising from the exercise of sovereign power.

The decision of the Supreme Court in Kasturilal's case is not satisfactory and has been critised by a leading constitutional authority of the country. It proceeds upon a wrong impression that the decision of Peacock, C.J., was uniformly followed by failing to take notice that it was dissented to by the Madras and Bombay High Court's, it fails to appreciate that when in modern times there is no logical or practical basis for the rule of State immunity which has been abolished even in the country of its origin, more reasonable view to take in the context of our Constitution was that the State will always be liable for the torts committed by its servants in the course of employment except when the act complained of amount to an act of State; and it omits to consider that even if the statutory power to arrest, search and seize the property recovered may be described to pertain to the sphere of sovereign powers, the duty to take care for the protection of the property and the obligation to return the same to the rightful claimant after the necessity to retain them ceases were more in nature of the duties of a statutory or a contractual bailee and did not fall within the sphere of sovereign powers.

Although the decision of the Supreme Court in Kasturilal's case is yet to be overruled, subsequent decisions of the Court have greatly undermined its authority and attenuated the sphere of sovereign immunity. As recently observed by a three judge bench **"much of its efficacy as a binding precedent has been eroded".**

State of Gujarat v. Memon Mahomed.

In this case, the custom authorities seized two trucks, a station wagon and goods belonging to the plaintiff on the grounds that the plaintiff had not paid import duties on the said trucks, that they were used for smuggling goods, and that some of the goods were smuggled goods. The custom authorities made false representation to a magistrate stating these to be unclaimed property and disposed of the same under the orders of the magistrate. Subsequently, the revenue Tribunal set aside the said order of confiscation and directed the return of the said vehicles to the plaintiff. The plaintiff claimed back his vehicles or in the alternative the value of the same amounting about Rs. 30,000. It was held by the Supreme Court that after the seizure, the position of the Government was that of a bailee. The order of the Magistrate obtained on false representation did not affect the right of the owner to demand the return of the property. The Government,

therefore, had a duty to return the property, and on its failure to do the same, it had a duty to pay compensation."

In other words, on a suit for the value of the goods against the State, the Supreme Court held that when the seizure was illegal, there arose a bailment and a statutory obligation to return the goods and the suit was maintainable.

N. Nagendra Rao and Co. v. the State of Andhara Pradesh.

In this case the appellant carried a business in fertilizers and food grains. Huge stock of fertilizers and food grains was seized from the appellant's premises. In proceedings taken under section 6A of the Essential Commodities Act, 1955, no serious violation of any control order was found and only nominal portion of the stock seized was confiscated and the rest was ordered to be released. The appellant, when he went to take the delivery found that stock had been spoiled both in quantity and quality. The appellant, therefore, instead of taking delivery of the stock sued for compensation against the State. The trial court found negligence on the part of the officers and decreed the suit in part. The High Court did not interfere with the finding of negligence but dismissed the suit relying upon Kasturilal. In the Supreme Court the appeal was heard by two judges who could not overrule Kasturilal (which is a decision of a Constitutional Bench) but they pointed out in an elaborate discussion that it was not correctly decided and that the doctrine of sovereign immunity has no relevance in the present day context. Distinguishing Kasturilal the court, overruling the High Court, observed that maintenance of law and order may be an inalienable sovereign function of the State in the traditional sense but power of regulating and controlling essential commodities as conferred by the Essential Commodities Act and the orders made thereunder did not pertain to that area and the State cannot claim immunity if its officers are negligent in exercise of those powers.

Rudal Shah V. State of Bihar.

In this case, the petitioner was acquitted by the Court of Sessions on June 3, 1968, but was released from the jail more than 14 years thereafter, on October 16, 1982. In the habeas corpus petition, the petitioner not only sought his release but also claimed ancillary reliefs like rehabilitation, reimbursement of expenses likely on medical treatment and compensation for unlawful detention. The State could not give any justifiable cause of detention except pleading that the detention was for medical treatment of the mental imbalance of the petitioner. The Supreme Court ordered the payment of compensation of Rs. 30,000 (as an interim measure) in addition to the payment of Rs.5000/- which had already been made by the State of Bihar. It was also

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stated that the said order of compensation did not preclude the petitioner from bringing a suit to claim appropriate damages from the State and its erring officials.

Bhim Singh v. The State of J and K.

In this case, the petitioner who was an M.L.A. was wrongfully detained by the police and thus prevented from attending the assembly session. The Supreme Court ordered the payment of Rs. 50,000/- by way of compensation to the petitioner.

Conclusion

It is crystal clear from the discussions made in the earlier chapters that the common law rule of absolute immunity of the Crown based on the maxim. The King can do no wrong has never been applied in India in toto. Right from the time of the East India Company, the State has been made liable for the torts of its servants but the Courts have fixed liability for torts without any difficulty only to those acts committed by the servants of the State in exercise of non-sovereign powers.

However in case of acts committed in exercise of sovereign powers, there is a conflict and great confusion. Here it is submitted that the Courts have erringly confused sovereign powers with acts of State, which though done by the sovereign, is an act against another sovereign or alien outside the national territory and is not an act for which the question of compensation arises.

In order to determine whether an act is a sovereign function or not, the Court in India have often resorted to the test laid down by Chief Justice Peacock in Peninsular & Oriental Steam Navigation Co. v. Secretary of State for India case. According to him sovereign powers mean 'powers which cannot be lawfully exercised except by sovereign or private individuals delegated by a sovereign to exercise them'. However the judiciary has not laid down any clear or unambiguous test for determining what actually these sovereign powers are. The test evolved so far may not be of any help in most of the situations or in penumbral cases.

The view that a power conferred by a statute is sovereign is also not a sound one. An activity may be regarded as a sovereign function although it might not have any statutory basis and conversely it may be a non-sovereign function despite having a statutory basis. Therefore the Law Commission of India has recommended as early as 1956 for dispensing with the distinction between sovereign and non-sovereign powers. The judiciary's attempts to reform the law with interpretation have met with very limited success.

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The Courts have tried to delimit this liability of the State by treating more and more acts as non-sovereign functions and confining sovereign immunity to traditional functions of the State but even this limit is very vague. In a Welfare State, the State should not hesitate in owning responsibility for the wrongs of its servants. The Law Commission in its first report rightly observed that there is no convincing reason as to why the Government should not place itself in the same position as a private employer, subject to the same rights and duties as imposed by the statute.

The Commission suggested the making of suitable law on this point. In England, the Crown Proceedings Act, 1947 made the Crown liable for the acts of its servants. This parity is maintained between the Crown and a private individual in respect of liability under torts. In the United States of America also the Federal Tort Claims Act, 1946 has been created to define the immunity of the State for tortuous acts. In India, a bill entitled the Government (Liability in Tort) Bill drafted on the lines of the Law Commission of India recommendations was introduced and re-introduced in 1965 and 1967 respectively, with certain modifications suggested in 1969 by the Joint Committee of the Parliament but it still remains to be enacted as a law.

Under a Republican Constitution particularly in a socialist State, the sovereign immunity should be confined to the bar essential functions of the State. In all other cases, the Government should be made liable for the wrongful acts of its servants. It is submitted that the legislature should come forward with a legislation clearly defining and demarcating the scope of the immunity and liability of the Government. The liability should be broad enough to cover all the illegal acts of the Government servants and the agents of the State committed in the course of their lawful employment. It is only by such a rule can justice be rendered to the helpless victims against the monolith institution of the State and its atrocities.

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