

Tortious Liability of the State in India: A Comprehensive Study.

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Abstract : In the democratic system of India, the government in their action stand on an equal traction with their citizen. However, the State is given a authority as it has to perform certain roles on behalf of all the citizens, but when it acts erroneously, the wronged should be entitled to claim damages from the State except at the demand of larger people. In India, there is no such legislation which administers the responsibility of the State for the torts committed by its servants. It is the article 300 of the Indian Constitution, which specifies the liability of the Union or State in tortious act of the Government. The Law Commission Of India looked into the matter of a specific law with respect to the claims of the citizens on tort against the Union and the States, and if so, what should be the level of State's liability. It recommended the enactment of a suitable law to define the position on Government's tortious liability, stating that it "is necessary that the law should, as far as possible, be made certain and definite." the Commission recommended that this issue requires "undoubtedly, a nice balancing consideration so as not to unduly restrict the sphere of activities of the State and at the same time to afford sufficient protection to the citizen." The Commission also considered the scope of the immunity of the State for the tortious acts of its officials and recommended the relaxation of the rule of state immunity, and that "the old distinction between sovereign and non-sovereign functions should no longer be invoked to determine the liability of the State."

I. INTRODUCTION

The Constituent Assembly for free and democratic India framed a Constitution for the country. The Constitutional advisor Sri B.N. Rau prepared the draft of the Constitution based on several reports submitted by various committees and sub-committees. Clause 214¹ of his draft contained the provision with regard to suits and proceeding for and against the State. The drafting Committee headed by Dr. B.R. Ambedkar provided that firstly the Government of India and the Government of the State may sue or be sued by the name of the Government of India and the Government of a State by the name of that State respectively and may, subject to any provisions which may be made by the Act of Parliament or by the legislature of a State for the time being specified in Part-I of the First Schedule, enacted by virtue of the powers conferred by the Constitution sue or be sued in relation to their respective affairs in the like cases as the Dominion of India and the corresponding provinces might have sued or been sued, if this Constitution had not been enacted.

(2) If at the date of commencement of this Constitution;

(a) Any legal proceedings pending to which the Dominion of India is a party, the Government of India shall be deemed to be substituted for the Dominion in those proceedings;

(b) any proceedings are pending to which a province is a party, the corresponding State shall be deemed to be substituted for the province in those proceedings.

This revised clause 214 later became Article 274 of the Draft Constitution which was put for debate in the Constituent Assembly, on June 15, 1949 which ultimately emerged as Article 300 of the Constitution. The Supreme Court of India also confirmed the Chairman's view in *State of Punjab v. O.G.B. Syndicate Ltd.*² A five member Bench speaking through N. Rajagopala Ayyangar J. observed, "it would not be correct to say that the State is not a Constitutional or even a juristic entity for the reason that it does not partake the characteristics of or satisfy in whole, the definition of Corporation. The State is an organized political institution which has several of the attributes of the Corporation, the Government of the Union and the Government of a State is enabled to sue and be sued in the name of Union of India and of the Government

¹ Based on Section 176 of The Government of India Act, 1935.

² AIR 1964 SC 669.

of a State, as the case may be. It would not, therefore, be improper to speak of the Union and the State as Constitutional entities, which have attributes defined by the Constitution”³.

Therefore, Article 300 of the Constitution⁴ reads as under

(1) The Government of India may sue or be sued by the name of the Union of India and the Government of the State may sue or be sued by the name of the State and may, subject to any provisions which may be made by Act of Parliament or of the Legislature of such State enacted by virtue of powers conferred by this Constitution, sue or be sued in relation to their respective affairs in the like cases as the Dominion of India and the corresponding Indian States might have sued or be sued if this Constitution had not been enacted.

(2) If, at the date of commencement of this Constitution;

(a) any legal proceedings are pending to which the Dominion of India is a party, the Union of India shall be deemed to be substituted for the Dominion in those proceedings; and

(b) any legal proceedings are pending to which a province or an Indian State is party, the corresponding State shall be deemed to be substituted for the province or Indian State in those proceedings.

II. Pre Constitutional Judicial Decisions

The first and the foremost judgment relating to tortious liability of the State was *P. & O. Steam Navigation Company v. Secretary of State*⁵ given by the Supreme Court of Calcutta in which a servant of the plaintiff company was driving a carriage on a highway in Calcutta, which was drawn by a two horses. The carriage met with an accident by the negligence of the Government servant. The plaintiff claimed for the damages suffered by him from the Secretary of the State of

India. Sir B. Peacock C.J. of the said Court observed that the Secretary of the State is liable to give damages to the plaintiff as the doctrine that “King can do no wrong” has no application on East India Company. Although Justice Peacock did not make any distinction between what is sovereign and non-sovereign but made division between the two and held that in case of accomplishing any sovereign function by the servant of the State, any tort committed will bring no action against the State.

Also in case of *Nobin Chunder Dey v. Secretary of State for India*⁶ In that case, the plaintiff challenged 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 the 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 actionable⁷. The High Court expressly followed the ruling of P & O Navigation’s case

III. Post Constitutional Judicial Decisions

The first case relating to this subject after the Independence which was dealt by the Supreme Court was *State of Rajasthan v. Vidyawati*⁸ held that the State should be Liable for the tort committed by his servant during the course of his employment and thus the Government working as other employer. Now that India has its own Constitution that has set up a Republican form of Government, and the objectives of it is to establish a Socialistic State with diverse industrial and other activities, employing a large number of servants, there is no justification, in principle, or in public interest, that the State should not be held liable

³ *Id.* at p.2.

⁴ The Constitution of India, 1950.

⁵ (1861)5 Bom. H.C.R. App1.p.1.

⁶(1861) ILR 1 Cal. 12

⁷ *Id* at p.3.

⁸ AIR 1962 SC 933.

vicariously for tortious acts of its servant. This Court has deliberately departed from the Common Law rule that a civil servant cannot maintain a suit against the Crown⁹ Later in case of *Kasturi Lal v. State of Uttar Pradesh*¹⁰ the Supreme Court held that the act of negligence was committed by the police officers in which they had seized the property under statutory powers. These are such powers which can be put in the category of sovereign powers. Therefore the present was committed by the servants of the Government during the course of their employment, but the employment in question being of such category which can claim the special characteristics of sovereign powers, the claim cannot be sustained.¹¹ Eventually, the Supreme Court held that the liability of the State for the acts of public servants would not arise if the tortious act in question was committed by the public servant while employed “*in discharge of statutory functions which are referable to, and ultimately based on, the delegation of the sovereign powers of the State*”¹²

IV. Sovereign and Non sovereign functions.

The term sovereign and non sovereign functions means that if the act was done by a public servant during the sovereign function wherefore no state liability will arise. This difference was made so that the East India Company can be deemed to be held liable of the act of their employees during the course of employment for the activities which are delegated by the crown.¹³

The main distinction between the sovereign and non- sovereign function were discussed in the case of *Nagendra Rao*¹⁴ which almost every other courts decision was referred to. The court stated that, “In the modern sense the difference between any sovereign and non sovereign function is extinct. Every liability depends upon its power and manner of exercise. The constitution has given the right to legislature who is free to legislate any law on any subjects, similarly the executive is free to implement the law in the way the executive deems fit. Even if the law made by the legislature become ultra vires, any person can though challenge its validity but cannot approach the court for the negligence of making law because the law was made within the exercise of legislative power. Similarly, the government cannot be sued for the exercise of its executive action for its policy matters. It is in the public interest that for the acts performed by legislative and executive within its capacity should be answerable under tort as that would be illogical and impracticable even in the modern nations of sovereignty.”

In order to determine the sovereign power of executive and legislative a test was laid down. “one of the test was to determine whether the act of the executive and legislative are sovereign in nature and whether the concerned authority is liable to answer for such actions in the court of law. If the power and functions are indicative of external sovereignty and are political in nature they are amenable under the jurisdiction of ordinary civil court. The state is immune of being sued, as the jurisdiction is barred of the lower courts for such matter.”

The court in the aforesaid case further proceeds that, “no civilized system can permit any executive to play with the citizens in the name of sovereignty and that is where the immunity of the state ends. No legal system can place the state above any citizens, which means that it is unjust and unfair for a citizen of India to be withdrawn from his property illegally by the negligent act of the officers of the state without any subsequent remedy.

The need of the State to have extraordinary powers cannot be further doubted. But, with the conceptual change of statutory power being statutory duty for welfare of the society and the people, the claim of a common man or ordinary citizen cannot be outlawed, merely because it was done by an officer of the

⁹ National Commission to review the working of the Constitution, “A Consultation Paper on Liability of the State in Tort.” available at:

legalaffairs.gov.in/sites/.../%28XI%29%20Liability%20of%20State%20in%20Tort.pdf (Last visited on March 4, 2019).

¹⁰ AIR 1965 SC 1039.

¹¹ *Supra* note9.

¹² *Id* at p.4.

¹³ The Secretary of State’s liability was coterminous with the liability of the East India Company under Sec. 65, The Government of India Act, 1858.

¹⁴ AIR 1994 SC 2663: (1994) 6 SCC 205.

State; duty of its officials and right of the citizens are required to be administered, so that the rule of law in a Welfare State is not shaken”.

V. Why was the bill drafted ?

The bill was proposed to give effect to the suggestion to the Supreme Court in *Kasturilal's* case and sought to implement it in order to subject to some modifications the recommendations of the Law Commission in variety of ways. *Firstly*, the Government like any private person/company had been made vicariously liable for torts committed by its employees and agents in the course of their employment and were considered as torts committed on behalf of the Governments and subsequently ratified by the Government. *Secondly*, accountability of the Government to third parties for torts committed by an independent Contractor employed by the Government was specified. *Thirdly*, it gave effect to the Common Law duties attaching to ownership, occupation, possession or control of property. *Fourthly* it provided for the liability of the State in respect of escape of precarious things. *Fifthly*, it dealt with the liability of the Government towards its own employees and agents. Several other recommendations of the Law Commission in regard to minor, incidental and ancillary nature were also incorporated in the Bill. Though the provisions of the Bill does not apply to the State of Jammu and Kashmir keeping in view of Article 370 of Indian Constitution.¹⁵

VI. Vicariously Liability of the State under the Bill:

Section 3 of the bill enlists the provisions when the government shall be deemed to be vicariously liable in tort. This section states that the state will be liable for any and every act by its employee and agents employed by the government. The pre-requisite before the vicarious liability includes that the employee or the agent of the state must work within the course of his employment after which the tortious act done by the employee will be within the course of employment. The term “within the course of employment” had been used in similar sense as the term “in scope of the authority” and “within the ambit of the employment”.-

Moreover, section 3(a) of the bill gave effect to the recommendation of the law commission and is modeled on the Crown Proceedings Act, 1947. Thus, according to the bill the state has been in the same positions as the individual of the country and the difference between sovereign and non- sovereign function has been parted with.

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¹⁵ Article 370 gave special status to the State of Jammu and Kashmir. Many provisions of the Constitution and many Central Acts do not apply to this State.

VII. Need for the Legislation

In India, the law relating to ‘Tortious Liability of The State’ is substandard as the law in this field is formless and perplexing mainly because of the influence of Common Law in the initial stage and later because of several judicial decisions. The huge mass of conflicting case laws that recently came up, requires systematic analysis. As it is the Constitution which does not hinder with the continued prevalence of colonial laws and legislatures attempts have failed. With the changing times new problems have sprung up with barely any effectual resolution. The doctrine forming the basis of the State’s liability needs reassessment in respect to modern times.

It rebuffs relief to citizens wronged by a wrongful act of the State, on the basis of employing sovereign functions – a theory which itself carries a essence of tyranny and high-handedness. It would have been considered, that if the State exists for the people, this should not to be the situation in law. A political organization which is responsible to protect its citizens and to promote their well being, should, as a canon, accept legal liability for its wrongful acts, rather them deplore such liability. Exceptions can be made for exceptional cases – but the exceptions should be confined to genuinely extraordinary situations. The view of the Law Commission of India is that it is that sphere of law where the necessity of clear statement or draft to such law in substantive form is urgently required and views of different Jurists are important as to the relative merits of the codified and un- codified law. Also where the subject is under question which is to be considered , the legal maxim *Ubi jus incertum, ibi jus nullum* i.e. where the law is uncertain, there is no law can be put in use.

VIII. Conclusion

During the course of employment. This concept is based on a maxim “qui facit per alium facit per se”¹⁶ and respondent superior¹⁷. But the question of how far the state is liable for the act of their employee is a displeased question to answer.

With the introduction of the concept of welfare state, the state’s increasing activity and power has to be controlled and it is the responsibility of state to control the authorities. The public servants power ought to be controlled else it would violate the rights of the citizens.¹⁸

The state liability of the state only extends for the acts or omission which is done by the concerned authority within the terms of its employment. The time the concerned authority acts outside its legal authority, the liability of the state will not be considered. This rule evolved for understandable reasons as the act done in accordance with the law can never be amount to tort as said by the Supreme Court in the catena of judgments. Where the court stated that the result originating from a statutory provision is never an evil and the government of India may sue and may be sued by the name of the state subject to any provisions which may be made by Act of Parliament or of the Legislature of such State enacted by virtue of powers conferred by this Constitution, 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 been sued if this Constitution had not been enacted.”¹⁹

¹⁶ He who acts through another is deemed in law to act in person

¹⁷ Let the principle be held responsible

¹⁸ P.Ishwara Bhat, *Administrative Liability of the Government and Public Servant*, 121 (New Delhi: Deep and Deep Pub, 1983).

¹⁹ Vijay Singh And Ors. V. State Of Uttar Pradesh And Ors. 2005 (2) AWC 1191, (2004) 3 UPLBEC 2778.