

THE INDIAN LAW INSTITUTE.

Seminar

on

The Problems of Law of Torts

Mt. Abu - May 1969

Liability of the State for the wrongs committed  
by its servants in the exercise of statutory powers

By

D. Gopalakrishna Sastri\*

What is the extent to which the State, Union or the Constituent State, may be made liable in a court of law in damages, for wrongful acts done by its servants or agents? It is supposed that the State cannot be made vicariously liable in respect of sovereign acts for the wrongful acts of its agents and servants at the instance of the person wronged, in the course of the exercise of statutory powers, whether the wrongful acts in question are done intentionally or mistakenly. If the Parliament or a State legislature enacts that the Union or the State cannot be made liable for the wrongful acts of its agents or servants in the zeal of officialdom, very likely the legislation would be struck down as abridging the fundamental right to equal protection of laws. But the mysterious legacy of the pre-constitutional anachronism is supposed to confer immunity on the governments, Central and State, from legal liability even in respect of acts of its servants done under the coercive power of State, leaving no choice to the wronged person but to submit to the wrong-doer, penalty for failure to submit being the coercive power of the State in aid of the wrong-doing. If the rule that the State cannot be made liable in those cases is correct, the individual wronged by the State agent under the shield of the power of the State, cannot complain that he is wronged by the power lending its helping hand. Yet it is believed that the State cannot be made vicariously liable for the wrongful acts of its servants and agents in respect of what are described as "sovereign acts". The unrealism of the supposed rule becomes marked when it is observed that the country which had given rise to the rule that the "King can do no wrong" has discarded

---

\* Lecturer in Law, Andhra University,  
Waltair.

it. It is the purpose of this paper to throw light on the doubtful origin of the supposed rule and to notice inadequacy of the measures proposed in dealing with the situation. Earnest measures are required to keep State and its agents within the limits of the law.

A combined reading of the Constitution and earlier provisions makes it clear that a person has the right to sue the State in respect of those matters in which the East India Company might have been made liable under the Charter Act, 1833.<sup>1</sup> But the Charter Act was silent on the subject. It made the Courts to hold that the municipal Courts have no jurisdiction to entertain claims in respect of Act of State, for in those cases the municipal courts have neither the means to judge the rights of the parties nor the capacity to enforce their decisions.<sup>2</sup> An act of State is an act done by the Sovereign in its political capacity against a Sovereign or an enemy alien. This position is that the defence of Act of State cannot be invoked by Sovereign against its citizen<sup>3</sup> or a friendly alien<sup>4</sup> because the relation in those cases is constitutional. In between the two positions lies an expanse where uncertainty now prevails, P & O Steam Navigation Co., V Secretary of State, a decision given by the Calcutta Supreme Court, not reported in the Supreme Court or High Court Reports, but reprinted from a published version in a newspaper, in the Bombay High Court Reports as an Appendix<sup>5</sup> is supposed to cover the gap. It was

- 
1. Section 65 of the Government of India Act, 1858. Section 32 of the Government of India Act, 1919, Section 176 of the Government of India Act, 1935 Art.300 of the Constitution.
  2. Secretary of State for India V Kamachee Boye Saheba (1859) 13 Moo. P.C.22.
  3. Walker V. Baird (1892) A.C.491. Municipal Corporation of Bombay V Secretary of State A.I.R. 1934 Bom.277.
  4. Johnstone v Pedlar (1921) 2 A.C. 262.  
Although the above cases were decided by the Privy Council, they laid down well-established positions. The principles therein laid down are not confined to the country in which the facts of the case arose.
  5. P & O Steam Navigation Co., V Secretary of State V. Bom. H.C.R. App.A  
The publishers of the report made a note saying "This case is republished from a report believed to be a correct one that appeared in the 'Englishman' newspaper of 29rd. October, 1891. Why the case is not reported in the Official Reports is a matter which requires patient research. It is confidently believed that the research will be fruitful. The research is worth time and attention. There are several other cases which are not reported and are important.

held that the Secretary of State for India in Council was liable for the injury caused to the plaintiff's horse by the negligent acts of its servants in the course of the commercial activity of running the Kidderpore docks. But it was observed in the decision that the Government was not liable for the wrongful acts of its servants in respect of sovereign acts. Whether the term 'Sovereign Act' conveyed the sense identical with the Act of State or created a field within the municipal law consisting of acts in respect of which Government cannot be made vicariously liable has been a century old controversy. Adverting to the facts, the Chief Justice observed:<sup>6</sup>

"We are of the opinion that this is a liability not only within the words, but also within the spirit, of the 3rd and 4th William IV c. 85 s. 9 and of the 21st and 22nd Vic. c. 106 S. 65 and that it would be inconsistent with common sense and justice to hold otherwise."

The courts in India subsequently laid more emphasis on the observations in the decisions than the decision itself. It is opposed to commonsense if a suit does not lie against the Government for the wrongful arrest and detention made by a police official,<sup>7</sup> or when money is paid by the Collector holding a patni sale to a person not lawfully entitled<sup>8</sup> or when the Chief Constable is not able to return the seized hay on payment of the defaulted amount for which seizure was made,<sup>9</sup> It accords with commonsense if the Government is made liable for the wrongful acts of its servants in doing the sovereign acts because the Government allowed its servant to do an act which it ought to have done. Yet the Courts did not make the State liable for the wrongful acts of its servants in the exercise of statutory powers. Thus the aggrieved person very often was left without a remedy when a wrong was done in the ostensible exercise of statutory power.

The Courts even after the Constitution proceeded on the same basis. The law of which P & O case was given in interpretation was not questioned either as a denial of equal protection of laws<sup>10</sup> or as an unreasonable restriction on the

- 
6. Id., p.14.
  7. Kader Zailany V Secretary of State A.I.R. 1931 Ranjoon 294.
  8. Uday Chand Mahatab V. Province of Bengal, I.L.R. (1947) 2 Cal. 141
  9. Shiva Bhajan V Secretary of State, I.L.R. 38 Bom.314
  10. Art. 14 of the Constitution.

right of property.<sup>11</sup> It was held that the State was not liable for the wrongs of its servants exercising statutory powers. For instance, when a police officer made away with the gold of a person detained within the limits of a police station,<sup>12</sup> when the Customs Officers negligently allowed the seized goods to be lost,<sup>13</sup> and when a Sub-divisional officer committed wrong by starting proceedings against a proprietor for illegal cutting of trees,<sup>14</sup> State was not liable.

But when a Provetthicar embezzled money collected on behalf the Government, acting within the scope of the Revenue Recovery Act, the State was bound by the act of its servant in receiving the money.<sup>15</sup> The act of embezzlement is not one in the course of duties. Yet the State was made liable because it entrusted the receipt books to a person exercising statutory powers and thus held the wrong-doer out as an agent and it perhaps is equated with express authority. The loss is capable of justification on the ground and it took place when the money is in the custody of state. On this basis it is difficult to support the decision of *Kasturi Lal V State of U.P.*<sup>16</sup> In that case, gold was lost within the limits of police station. What distinction can be made between the loss of money with a person entrusted by the State with receipt books and a person to whom arms and police station belonging to the state are allowed to be used, it is difficult to say. Nevertheless, in the former case state was bound and in the latter case it was not bound by the act of its servants. In both cases, the servants were exercising statutory powers.

#### Decisions making the State liable

When an officer acts under an authority delegated by statutory agent, in requisitioning a motor vehicle, it was held that he does not exercise statutory powers but he acts as an agent and therefore the State is liable for his wrongful

- 
11. Art. 19(1)(f) of the Constitution read with clause 5.
  12. *Kasturi Lal V State of U.P.* A.I.R. 1965 S.C. 1039.
  13. *Hiralal V Union of India.* A.I.R. 1968 Tr 63.
  14. *State of M.P. V Singha Kapur Chand,* A.I.R. 1961 Madh Pra. 316.
  15. *Poulose V State of Travancore-Cochin* A.I.R. 1957 Ker.40
  16. *A.I.R. 1965 S.C. 1039.*

acts.<sup>17</sup> Again it is difficult to follow the basis for the distinction. If it is correct, if a police officer makes away with gold detained within the police station, State cannot be made liable, but if a person makes away with gold under the powers given by police Regulations, State may be made liable.

Union of India is liable for the death of motor cyclist negligently caused by the driver of an Air Force Vehicle carrying hockey and basket ball teams.<sup>18</sup> So is the State liable when the driver of a vehicle of the Public Works Department caused injury to a motor cyclist.<sup>19</sup> A motor vehicle supplied by the Government for the use of the Collector of a district cannot be deemed to be a vehicle used always for the exercise of sovereign functions. This seems to be the reason why the State was held liable when the driver negligently caused the death of a pedestrian in taking the vehicle back from the workshop after repairs.<sup>20</sup>

In conclusion it is difficult to evolve any consistent principle for making the State liable for wrongful acts. It is surprising to find that the Supreme Court expressed its helplessness to get over the distinction between sovereign and non-sovereign functions<sup>21</sup> and consequently to hold that the state is liable for tortious acts of its servants or agents for acts done in the exercise of their duties, statutory or otherwise. In fact it was held that the Government servants might sue the State for damages for wrongful dismissal.<sup>22</sup> The rule of construction that the State is not bound by a Statute unless expressly or by sufficient implication the statute makes it clear was given up.<sup>23</sup>

But the State in any event may be made liable if it ratified the illegal acts of its servants<sup>24</sup> or profits by the transaction<sup>25</sup> or when there is trespass to immovable property.<sup>26</sup>

- 
17. Premhl Singh V U.P. Government, A.I.R. 1962 233.
  18. Satyawathi V. Union of India. A.I.R. 1967 Delhi 98.
  19. Dup Ram V Punjab State A.I.R. 1961 Punjab 336 F.B.
  20. State of Rajasthan V Mst. Vidyawathi A.I.R. 1962 S.C.933.
  21. Kasturi Lal V.State of U.P. 1965 S.C. 1039.
  22. Jyotirmoyee Sharma V Union of India A.I.R. 1962 Cal.349.
  23. State of W.B. V Corporation of Calcutta A.I.R. 1967 S.C.997.
  24. State of Orissa V Bharat Chandra 26 Cut. L.T. 605
  25. Union of India V Muralidhar A.I.R. 1952 All.141.
  26. Municipal Corporation of Bombay V Secretary of State A.I.R. 1934 Bom 277.

## Liberal Trends

When the Employees State Insurance Corporation paid compensation by way of disablement benefit to an insured employee who sustained injury due to the negligence of the driver of a State Transport bus, the Madras High Court permitted the Corporation to recover the amount from the State.<sup>27</sup> It is clear that the insured person himself may in that case recover from the State. When on account of the negligence and rashness of the driver of a police van carrying Police Trainees to a Jail, one of the constables undergoing training sitting in the van died, the Cuttack High Court held the State to be vicariously liable for the negligence of the driver.<sup>28</sup> Thus the anxiety of the Courts to bring the law in consonance with public sentiment may be seen.

## Reasons for amendment of law

1. State under the existing law cannot be made liable for the revolting acts done by the servants it has chosen and over whom it has control and in support of the exercise of whose powers it extends help. For instance, when a Police Officer in the exercise of statutory power detains a person and his property within the limits of the Police Station and he escapes stealthily with the property from the Police Station, the Supreme Court was embarrassed to say that the State was not liable to compensate the law abiding citizen who was deprived of the property. So is the case when the Police Officer detains a Person without any reasonable ground for believing that he has committed a cognizable offence or no credible information is received or no reasonable suspicion exists for arresting that person. The horrors committed in the recent times in the name of enforcement of law and order are indescribable. Remedy is required to be provided.

When the customs Authorities detain the goods of a person engaged in normal trade on the suspicion that they are smuggled and allow the goods to be lost, when a Police Constable seizes hay for collecting the governmental dues and when dues are paid hay was not restored, when sugar bags are seized under suspicion that they are intended for black-marketing and they are not restored when innocence is established, it is unholy if the State disowns responsibility.

2. The distinction between Sovereign and non-Sovereign functions became obsolete even assuming that it once had a

---

27. State V Employees State Insurance Corporation, A.I.R. 1967 Mad. 372.

28. Amulya Patnaid V State, A.I.R. 1967 Orissa 116.

basis. Maintaining hospitals and construction of roads are now considered to be part of industrial activity.<sup>29</sup> If the activity is industrial towards its employees, it cannot be Sovereign towards public at large. Otherwise contradictions would result. It was held that the eighteen departments of the Corporation of the City of Nagpur including the departments of Revenue collection and encroachments removal to be industrial.<sup>30</sup>

3. Conception of State is very much changed. The State is directed to "regard the raising of the level of nutrition and the standard of living of its people and improvement of public health as among its primary duties."<sup>31</sup>

4. When the Danish Parliamentary Commissioner recommended to the Parliament that compensation should be paid to a person who was detained by the Police for a cause which was discovered to be untrue and the Swedish Ombudsman recommended compensation to be paid to a person who had not at all conducted in an objectionable manner but was injured by the discharge of a bullet of a Police Official not identified, Indian Law cannot lag behind the times.

5. The present law is conducive to a state of lawlessness. Neither the State nor the Servant may be made responsible for wrongs. Many statutes provide that a person acting under the powers conferred by the statutes cannot be made liable either civilly or criminally for the bonafide exercise of powers or for exercise of powers with bonafide intent. There are instances where statutes provide that neither state nor the employee may be made liable. For instance, Section 22-A of the Payment of Wages Act provides:

"No suit, prosecution or other legal proceeding shall lie against the Government or any officer of the Government for anything which is in good faith done or intended to be done under this Act."

Remedy is to be provided to an aggrieved person.

#### Report of the Law Commission

In making its first Report on the liability of the State in tort, the Law Commission did not examine the question

---

29. State of Bombay V Hospital Mazdoor Sabha, A.I.R. 1960 S.C.610.

30. Nagpur Corporation V Its Employees A.I.R.1960 S.C.675.

31 Art. 47 of the Constitution of India.

with thoroughness it required, but it made a report recommending the enactment of a law generally on the lines of the Crown Proceedings Act<sup>32</sup> after considering the inadequacies of the existing law and comparing it with the law obtaining in other countries. It would have been better if the Bill was prepared under the supervision of the Law Commission, as it was the case with the Contempt of Courts Bill, than to leave the drafting of the Bill to the Ministry of law.

On the lines of the Report of the Law Commission, Liability of the Government in Tort Bill was introduced in the Lok Sabha.<sup>33</sup> If a law is enacted on the lines of the provisions made in the Bill, many inadequacies continue to remain in the law. It is outside the scope of this paper to point out comprehensively the inadequacies, but it would appear that if the facts of the case in *Kasturi Lal V State of U.P.* were again to occur, decision of a court would not in all likelihood be otherwise.

The Bill provides that the Government is liable in respect of any tort committed by an employee or agent of the Government.<sup>34</sup>

- (i) while acting in the course of his employment or
- (ii) while acting beyond the course of his employment if the act constituting the tort was done by the employee or agent on behalf of the Government and is ratified by the Government.

Firstly, the bill does not define tort. It does not say who is a wrong-doer and what is wrong-doing on the lines of Pollock's Bill. Secondly, if the Government is to become liable, the act must be done by the employee or the agent on behalf, of the Government and it should be ratified by the Government. The conditions are cumulative. Thus the bill seeks to provide in a statutory form the existing state of things with the exception making it clear that a member of Police force is not governed by the proposed law.<sup>35</sup>

The corresponding provision of the Crown Proceedings Act reads:<sup>36</sup>

- 
- 32. 10 and 11 Geo. 6 Ch. 44.
  - 33. The Bill was introduced on August 31, 1965.
  - 34. Clause 3(a)
  - 35. Clause 11(h)
  - 36. Sec.3(2).



"Where any functions are conferred or imposed upon an officer of the Crown as such either by any rule of the Common law or by Statute, and that officer commits a tort while performing or purporting to perform those functions have been conferred or imposed solely by virtue of instructions lawfully given by the Crown."

The emphatic language of the Crown Proceedings Act and the dubious language of the proposed law in making the Government liable for breach of statutory duties imposed on its employees stand in contrast. In regard to the liability of the Government for the acts of the Police, the bill seeks to explain by saying that the Police in England is under the control of the Local Authority and the fact that it is under the control of the Government in India makes exemption for the Government necessary.<sup>37</sup> But the explanation loses its force when the observations made by the Law Commission in another context is taken into consideration. It said,<sup>38</sup>

"Responsible Police Officers of the Rank of the I.G. of Police have told me that among the non-gazetted Police Staff, corruption is almost universal."

It is sad to find that the citizen is helpless against the third degree methods, unlawful arrests and detention resulting in loss and misappropriation of properties. Citizen is equally helpless against persons exercising statutory powers. To remedy the situation following suggestions may be considered.

- (1) If a suit is filed against person exercising statutory powers, not judicial or quasi-judicial, for damages alleging that a wrong is committed in the exercise or purportdd exercise of the powers, and if a defence of good faith is set up, the burden of proving good faith is upon the defendant claiming to exercise the powers bona fide.
- (2) Even if the defendant is able to prove good faith, if special damage is caused, the defendant is liable.
- (3) When persons are arrested and detained or injury is caused to persons by persons exercising statutory powers, special damage should be presumed to have been caused.

---

37. Note on Clause 10.

38. No. F3(2) 55-L.C. M.XII.

- (4) State is liable vicariously in respect of wrongs done by persons exercising statutory powers as if the acts were done under its authority.
- (5) If a person alleging to be wronged by a person exercising statutory powers sues only the State, excluding the wrong-doer, State may set up all defences which the person alleged to have done wrong may set up.
- (6) Notwithstanding anything contained in any other law the period of limitation for suing the State or the wrong doer, should be six months.
- (7) No state should be construed in such a way that it would deny remedy by way of civil suit for damages by a person wronged against the wrong-doer.

The Select Committee on the Bill expressed that "if any tort is committed by an employee or agent of Government while acting beyond the course of employment by on behalf of, "even without ratification Government should be held liable. The report goes to a considerable extent. But that is not all. It is respectfully submitted that the report should be considered in the light of suggestions above made.