

conversion of ryoti land into *kambattam* land which process had been adopted largely since the decision in *Chockalinga Pillai v. Vythelalinga Pundara Sunnady*(1). My conclusion is in accordance with the decision of Mr. Justice AYLING and myself in *Markapulli Reddiar v. Thandava Kone*(2); *Nurayanasawmi Naidu v. Venkatrayudu*(3) decided by SADASIVA AYYAR and NAPIER, J.J., is also to the same effect. The decision of the learned Chief Justice and Mr. Justice AYLING in *Chintam Reddi Sanyasi v. Sri Raja Sagi Appala Narasimha Raja Garu*(4) is not opposed to this conclusion. The land in that case was never ryoti land. It only laid down that private land can come into existence even after the permanent settlement. The proviso to section 185 is intended to enact such a rule.

The decision of the Subordinate Judge is therefore right and this appeal must be dismissed with costs.

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APPELLATE CIVIL.

*Before Sir John Wallis, Kt., Chief Justice and
Mr. Justice Seshagiri Ayyar.*

1914.
November
4 and 5
and
December 2

THE SECRETARY OF STATE FOR INDIA IN COUNCIL
THROUGH THE COLLECTOR OF MALABAR
(DEFENDANT), APPELLANT,

v.

A. COCKCRAFT AND ANOTHER (PLAINTIFFS), RESPONDENTS.*

Torts—Negligence of servants of the Public Works Department—Suit against the Secretary of State for India in Council for damages, if maintainable—Stacking of gravel on a military road—Making and maintenance of roads—Governmental or sovereign function, nature of—Non-liability of East India Company and Secretary of State for India, for acts done in exercise of sovereign powers—Exceptions—English and American Laws.

Plaintiff sued the Secretary of State for India in Council for damages in respect of injuries sustained by him in a carriage accident which was alleged to have been due to the negligent stacking of gravel on a road which was stated in the plaint to be a military road maintained by the Public Works Department

(1) (1870) 6 M.H.C.R., 164.

(2) Second Appeal No. 275 of 1913.

(3) Second Appeal No. 1402 of 1912. (4) (1914) M.W.N., 766.

* Appeals Nos, 58 and 59 of 1912,

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of the Government. The defendant pleaded a general denial of liability in law, in addition to some other special pleas.

Held, that the plaintiff had in law no cause of action against the Secretary of State for India in Council.

Per WALLIS, C.J.—In respect of acts done by the East India Company in the exercise of its sovereign powers, it could not have been made liable for the negligence of its servants in the course of their employment.

The liability of the Secretary of State for India in Council is similar to that of the East India Company.

The provision and maintenance of roads, especially a military road, is one of the functions of Government carried on in the exercise of its sovereign powers and is not an undertaking which might have been carried on by private persons

P. & O.S.N. Co. v. Secy. of State for India (1861) 5 Bom., H.C.R., Appx. 1, followed. *Secretary of State for India v. Moment* (1912) 40 I.A., 148, referred to. *Vijaya Ragava v. Secretary of State for India* (1884) L.L.R., 7 Mad., 466, doubted. *Referred to*

Per SESHAGIRI AYYAR, J.—The analogy of the Crown in England has no application to the Secretary of State for India in Council.

The principle that the Crown can be sued only for remedies contemplated by the petition of right is confined in its operation to the United Kingdom: and a general liability for torts is dependent upon the law of the particular dominion wherein the action is instituted.

Under 21 & 22 Vict., cap. 106, the Secretary of State for India in Council is under the same liability as the East India Company was subject to.

The East India Company had two distinctive functions which are even today exercised by the Government of India, namely (1) the exercise of sovereign rights, and (2) the carrying on of transactions which could have been, carried on by private individuals or trading corporations. In the former case the East India Company was generally exempt from liability.

The distinction between sovereign power and powers exercisable by private individuals is that in the former case no question of consideration comes in, whereas the essence of the latter is that some profit is secured or some special injury is inflicted in the exercise of the individual rights.

The making and maintenance of roads is a Governmental or sovereign function.

English and American Law on the subject considered.

APPEALS against the decrees of F. B. EVANS, the District Judge of North Malabar, in Original Suits Nos. 17 and 21 of 1910 respectively.

The plaintiffs in these two connected cases drove in a carriage in a road which was alleged in the plaint to be a military road maintained by the Public Works Department of the Government. The plaint alleged that, when the carriage was passing along the road, one of its wheels ran over a heap of gravel carelessly stacked on a side of the road and the carriage capsized. The gravel heap encroached on the wheel track of the

road and was not protected by danger light or other signal and it was not possible to avoid the danger, though the plaintiffs' carriage was provided with a light on each side. The plaintiffs sustained thereby severe bodily injuries. The accident was alleged to be entirely due to the gross negligence and carelessness displayed by the servants of the Public Works Department and the plaintiffs claimed different amounts as damages against the Secretary of State for India in Council. The Secretary of State for India in Council admitted the accident but pleaded that the accident was not due to the gross negligence and carelessness of the servants of the Public Works Department, that he was not liable as the work was done by an independent contractor under the Public Works Department, and also that he was not in any way liable for the plaintiff claim. The learned District Judge, who tried the suit as the Court of first instance, raised several issues with reference to the special allegations made in the pleadings but no issue was raised on the general ground of non-liability of the Secretary of State, which was raised in the written statement of the defendant. The District Judge decided the issues of fact in favour of the plaintiffs and held that the defendant was liable in damages for the accident caused to the plaintiffs in the two suits and awarded a sum of Rs. 250 and of Rs. 1,000 respectively to the plaintiffs in the two suits. Against the decrees in the suits, the defendant (Secretary of State) preferred separate appeals to the High Court.

The Government Pleader for the Crown.

T. Narasimha Ayyangar for the respondent.

WALLIS, C.J.—These are suits against the Secretary of State for India in Council to recover damages for injuries sustained by the plaintiffs in a carriage accident which is alleged to have been due to the careless stacking of gravel on a road which is alleged in the plaints to be a military road maintained by the Public Works Department. The defendant pleaded a general denial of liability and also among other things that he was not responsible as the gravel was stacked by a contractor under the Public Works Department. No issue was framed as to the general denial of liability even if the facts were as stated in the plaints nor was such a defence pressed at the trial. On appeal, however, it has been contended that the plaints disclose no cause of action and that on this ground the

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suits should have been dismissed and in support of this contention *P. & O.S.N. Co. v. Secy. of State for India*(1) is mainly relied on. I have so recently considered this case in *Ross v. Secretary of State*(2) that I will merely say that though it only decides that the East India Company was liable for the negligent acts of its servants as done in the course of their employment when such acts were done in the conduct by the Company of undertakings which might have been carried on by private individuals without any delegation of sovereign powers yet it is also authority for the position that in respect of acts done by the Company in the exercise of its sovereign powers it could not have been made liable for the negligence of its servants in the course of their employment. The authority of this decision in my opinion is not affected by the cases such as *Farnell v. Bowman*(3) and *Attorney-General of the Straits Settlements v. Wemyss*(4) or such as *Parnaby v. Lancaster Canal Company*(5) or *Mersey Docks and Harbour Board v. Gibbs*(6), because in all these cases the liability of the defendants depended on the terms of a particular statute and was merely a question of construing the statute. This test however is inapplicable to the sovereign powers of the East India Company which were not conferred upon it by statute but were derived from the Native Rulers of India, though no doubt held subsequently after some controversy to have been acquired by the Company in trust for the Crown and to be subject to the authority of Parliament. The view taken in the *P. & O.S.N. Co. v. Secy. of State for India*(1) would rather seem to have been that in the exercise of the sovereign powers so acquired the Company was *prima facie* entitled to the immunities of a sovereign. It is however unnecessary to consider the question further in the present occasion and I abstain for doing so. The only question now open seems to be whether the acts complained of can be said to have been done in the conduct by Government of undertakings which might have been carried on by private persons. There is a decision to the contrary of FLETCHER, J., on facts closely resembling the present case in *McInerney v. Secretary of State for India*(7) and apart

(1) (1861) 5 Bom., H.C.R., Appx. 1.

(3) (1887) 12 A.C., 643.

(5) (1839) 11 Ad., & E., 223.

(2) (1914) I.L.R., 37 Mad., 55.

(4) (1886) 13 A.C., 192.

(6) L.R.I.H.L., 93.

(7) (1911) I.L.R., 38 Calc., 797.

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from authority I have come to the same conclusion. I think the provision and maintenance of roads is one of the functions of Government though in India it is now largely delegated by the statute to Municipalities and Local Boards, just as in England it was imposed first upon the parishes and then on statutory bodies created by Parliament and the case seems to be all the stronger where the road in question is a military road as is alleged in the plaints here. As the point was not taken at the trial the decrees must be reversed and the suits dismissed without costs.

SESHAGIRI AYYAR, J.—The facts of these cases are not in dispute in this Appeal. The plaintiffs' carriage was capsized by one of its wheels running over a heap of gravel carelessly stacked on the road by a contractor under the Public Works Department of the Government of Madras. This road is a military road, and it apparently leads to the barracks where soldiers are quartered. The plaintiff sustained injuries. He sues the Secretary of State for India in Council for damages, on the ground that the accident to him "was entirely due to the gross negligence and carelessness displayed by their (the Government's) servants."

The defendant denied carelessness on his part and the liability to pay damages; several subsidiary pleas relating to contributory negligence, etc., were raised. The learned Government Pleader does not rely on them in this Court.

The District Judge awarded Rs. 1,000 as damages in Original Suit No. 17 of 1910 and Rs. 250 in Original Suit No. 21 of 1910. The Government have appealed. It was contended for the appellant that the Secretary of State in Council cannot be sued for a tort committed by any of the servants of the Crown. It is necessary to examine the scope and limitations of this contention.

It is true that ordinarily States and Sovereigns are not liable for damages occasioned by the negligence of their officers or of persons employed in their service (6 Halisbury, sections 683 and 78, Encyclopaedia, 472). But this rule has no application to the Secretary of State for India. Under 21 and 22, Victoria, chapter 106, the Secretary of State is under the same liability as the East India Company were subject to. The Judicial Committee of the Privy Council laid down in *Secretary of State for India v. Moment*(1) that the extent of this liability has been correctly stated

(1) (1912) 40 L.A., 48.

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in *P. & O.S.N. Co. v. Secy. of State for India*(1). It becomes necessary therefore to see whether under that ruling the present action could have been maintained against the East India Company. Before dealing with that point I shall clear the ground by pointing out that the analogy of the Crown in England has no application to the Secretary of State. In *Farnell v. Bowman*(2), it was pointed out by the Privy Council that subjects of the Empire residing in the Colonies are not restricted in suing the Local Governments to such actions only as found a remedy by the Petition of Right in England. In an earlier case *Hettewage Siman Appu v. The Queen's Advocate*(3), Lord BLACKBURN while holding that a subject of the Ceylon Government was entitled to sue the Governor in the Municipal Courts on a breach of contract intimated that action *ex delicto* would not lie; Sir BARNES PEACOCK in *Farnell v. Bowman*(2) points out that this dictum should be read as interpreting the Ceylon Ordinances and not as a general proposition that Colonial Governments are not liable for torts. In *Attorney-General of the Straits Settlements v. Wemyss* (4) which was an appeal from the Straits Settlements, it was held by the Judicial Committee that the Crown is liable to pay damages for trespass to immoveable property. It is therefore evident that the principle that the Crown can be sued only for remedies contemplated by the petition of right is confined in its operation to the United Kingdom: and that general liability for torts is dependent upon the law of the particular dominion wherein the action is instituted.

I may also dispose of another objection to jurisdiction on the ground that "Government departments, public officers and servants of the Crown cannot be made liable for the wrongful acts of their subordinates." This rule as pointed out in *P. & O. S.N. Co. v. Secy. of State for India*(1) and in *Lane v. Cotton*(5) only relates to the personal liability of the officers sued: but where satisfaction can be had from the revenues of the State, this objection cannot prevail; see *Bainbridge v. The Postmaster-General*(6) and *Raleigh v. Goschen*(7). The main point for consideration

(1) (1861) 5 Bom., H.C.R., Appx. 1.

(2) (1887) 12 A.C., 648.

(3) (1884) 9 A.C., 571.

(4) (1888) 13 A.C., 102.

(5) (1701) 1 Lord Rymond, 650.

(6) (1906) 1 K.B., 178.

(7) (1898) 1 Ch., 73.

is whether the present action could have been successfully maintained against the East India Company. We are only concerned with the position of that Company when the India Councils Act was passed. After 3 and 4 William 85, the Company held the British possession in India in trust for the King of England. By section 4 of that Act, the right to carry on business for the benefit of the State was recognised. The monopoly in salt and opium is referred to by Sir BARNES PEACOCK as coming under this section. The Company had therefore two distinctive functions which are even today exercised by the Government of India: In so far as the Company exercised sovereign rights, they are generally exempt from liability to be sued in the Municipal Courts. But with reference to transactions which though carried on for public purposes and for the public benefit are of such a nature as could have been undertaken by private individuals or by a trading Corporation, they are governed by laws regulating private rights and obligations. Even in regard to the exercise of sovereign functions, the immunity is subject to exceptions. As the Chief Justice points out in *Dhakjee Dadajee v. The East India Company*(1), "an action of trespass will lie against a Corporation, and especially against the East India Company if, assuming to act in their political capacity, they commit a trespass by having ordered it, or by recognising it when done for their benefit, as much as trespass would lie against the Governor of a Colony, who, assuming to act in his political capacity, should commit a trespass." Another exception is that if the State by its legislature prescribes the limits or conditions under which executive acts are to be performed, a liability may arise for transgressing those limits or conditions. *The Secretary of State for India v. Hari Bhanji*(2). Mr. Narasimha Ayyangar suggested another limitation with reference to the observations of the learned Chief Justice in *The Bank of Bengal v. The United Company*(3), namely that whenever a State has benefited by the wrongful act of its servants, it is liable to be sued for the restitution of the profit unlawfully made.

The present case is not covered by any of these exceptions. The learned Government Pleader argued that in making roads like the one in question, the Government was acting in its sovereign

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(1) (1848) 2 Morley's Digest, 307.

(2) (1882) I.L.R., 5 Mad., 273.

(3) (1881) Bigsall, 87; s.c., 1 Ind. Dec., 439.

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capacity and consequently came within the exemption recognised in *P. & O.S.N. Co. v. Secy. of State for India*(1). The proposition is thus stated in that judgment: "But where an act is done, or a contract is entered into, in the exercise of powers usually called sovereign powers, by which we mean powers which cannot be lawfully exercised except by sovereign or private individual delegated by a sovereign to exercise them, no action will lie." In *Moodalaya v. Morton*(2) referred to in *P. & O.S.N. Co. v. Secy. of State for India*(1), the Master of Rolls has drawn a distinction between sovereign powers and powers exercisable by individuals. The line of demarcation seems to be that in the one case, no question of consideration comes in, whereas the essence of the other is that some profit is secured, or some special injury is inflicted in the exercise of the individual rights. Sir BARNES PEACOCK recognises that it is difficult to determine in individual instances whether the act complained of was done in pursuance of sovereign rights or not. The mere fact that a duty is undertaken in the interests of the public will not make it a sovereign act. It has been decided that corporations entrusted by statute with the execution of public duties and in receipt of tolls or dues for such purposes are liable for acts of negligence on the part of its servants—*Parnaby. v. Lancaster Canal Company*(3).

This principle was elaborated in great detail by Justice BLACKBURN in *Mersey Docks Trustees v. Gibbs*(4), in delivering the unanimous opinion of the Judges consulted in that case. Lord CRANWORTH (Lord Chancellor) and Lord WESTBURY in accepting the opinion say that the fact that tolls are levied for the public benefit is not an answer to an action for negligence caused by a servant [see also *Cox v. Wise*(5)]. The position of the East India Company is not very dissimilar to that of the Company whose liability was discussed by Mr. Justice BLACKBURN. At first, I was inclined to think that the present case was covered by that decision. But the Judicial Committee have held that the law was correctly laid down by Sir BARNES PEACOCK in *P. & O.S.N. Co. v. Secy. of State for India*(1). In that case, the learned Chief Justice specifically exempts cases in which the sovereign delegates

(1) (186) 5 Bom. H.C.R., Appx. 1.

(2) (1875) 1 B.L.O., C.C., 469; s.3, 28 E.R., 124, at p. 126.

(3) (1839) 11 Ad. & El., 223.

(4) 1 Eng. & Irish App., 93.

(5) (1900) L.R.I.Q.B., 711.

to a private individual (a Company will be in the same position) his sovereign powers. Consequently, the only question open for argument is whether in making and repairing the road in question, the Government acted in the exercise of private rights. The cases quoted by Mr. Narasimha Ayyangar in which the Secretary of State was held liable for the negligence of a servant employed in a State railway cannot afford much assistance in this case. A State railway is managed by the Government for commercial purposes, although it secures considerable benefit to the public. I have felt doubts whether the maintenance of the military road is done in the exercise of sovereign functions. The absence of any profit, the securing of the public benefit alone, are some *indicia* of the act having been done in the public capacity. Mr. Narasimha Ayyangar has been unable to draw our attention to any authority which defines sovereign functions. The policing of a province, the constitution and control of the various departments of the State may be instances of the exercise of sovereign rights. But where the sole object of the Government in carrying out a project is the public good, and no ideas of profit enter into it, *prima facie*, the business cannot be said to have been done in the discharge of private duties.

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As I felt some doubts regarding the correctness of this position, I examined the American Law to find out under what category of duties, the maintenance of roads comes in. It seems clear from the passages I shall refer to, that the laying of roads is a governmental or sovereign function. Questions of this kind are considered in America with reference to the liability of municipal corporations for the negligence of their servants. The right to sue municipal bodies in India may not rest on the same considerations as in America. Much will depend upon the Legislative enactment which has brought these institutions into existence. And as pointed out in *The Secretary of State for India v. Hari Bhanji* (1) the measure of exception from liability of boards and municipalities will depend upon how far their powers are defined by the Act constituting them. Apart from these special considerations, the authorities in America indicate definitely and clearly that the maintenance of roads is carried

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on in the exercise of public functions and that consequently negligence in relation to them will not be actionable.

In 28 Encyclopædia at page 834, it is pointed out that there are three modes of establishing a public highway: (a) "by the State in the exercise of its sovereign function," (b) "by the municipality, as its agent," and (c) "by dedication, prescription or statutory proceedings." In the same volume it is stated at page 1340 "In the absence of statutes imposing liability it has been held in some jurisdictions that the duties of a municipal corporation with regard to its streets are governmental and that it is not liable to an individual injured by its failure to keep them in repair or safe for travel." The distinction between public or governmental, and corporate or private duties has been pointed out in *Hart v. Bridgeport* (1). Public duties are, in general, those which are exercised by the State as a part of its sovereignty, for the benefit of the whole public and the discharge of which is delegated or imposed by the State upon the municipal corporation. They are not exercised either by the State or the corporation for its own emolument or benefit, but for the benefit and protection of the entire population. Private or corporate powers are those which the city is authorised to execute for its own emolument or from which it derives special advantage, or for the increased comfort of its citizens, or for the well ordering and convenient regulation of particular classes of the business of its inhabitants, but are not exercised in the discharge of those general and recognized duties which are undertaken by the Government for the universal benefit." The citations I have made are applicable to the present case. In the first place, this is not a road maintained by a local board or municipality. Consequently, it is strictly within the exercise of Governmental duties that this road is made and maintained. In the second place, if the position of the East India Company is analogous to that of municipal corporations in America, even then, it is clear that the company will not be liable for the negligence of its servants in failing to keep the road in good repair.

I must hold, therefore, that this case comes under the exception suggested by Sir BARNES PEACOCK in *P. & O. S. N. Co. v.*

Secy. of State for India (1). The subject of liability for the negligence of public servants is elaborately discussed by the learned Chief Justice in *Ross v. Secretary of State* (2). The question which we have to decide, namely, whether the act complained of in this case was done in the exercise of sovereign powers did not arise for decision in that case. The learned Government Pleader relying on the observations of Sir LAWRENCE JENKINS in *Sivabhajan v. Secretary of State for India* (3) and of the learned Chief Justice in the case already referred to contended that as the Executive Government is vested in the Governor in Council by section 56 of 3 and 4 William, Cap. 85, the maintenance of the military road is not a liability incurred on behalf of the Government of India and consequently, the Secretary of State is not liable. For a proper solution of this question, it will be necessary to investigate between the relative powers of superintendence possessed by the Government of India and the Government of Madras in relation to the Public Works Department. We have not sufficient materials before us for that purpose. It would also necessitate an enquiry into the correctness of the concession made by the Advocate-General in *Vijaya Ragava v. Secretary of State for India* (4) that the Secretary of State is liable for all illegal acts of the Governor in Council, Fort St. George. I do not propose to go into these questions, as I have come to the conclusion on the records before us, that the injury caused in this case was not due to negligence resulting from the exercise of other than sovereign or administrative powers by the Government of Madras. I would therefore reverse the decrees of the District Judge and dismiss the suit.

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(1) (1861) 5 Bom. H.C.R. Appx. 1. (2) (1914) I.L.R., 37 Mad., 55.
(3) (1904) I.L.R., 28 Bom., 314. (4) (1884) I.L.R., 7 Mad., 466 (F.B.)