

## APPELLATE CIVIL.

*Before Mr. Justice Burn and Mr. Justice Lakshmana Rao.*

ETTI AND ANOTHER (PLAINTIFFS), APPELLANTS,

1939,  
February 3.

v.

THE SECRETARY OF STATE FOR INDIA IN  
COUNCIL (DEFENDANT), RESPONDENT.\*

*Government of India Act, 1915, sec. 32—Suit under, against the Secretary of State for India in Council for damages for tort alleged to have been committed by its servants—Maintainability of—Conditions—Proper test of liability—Maintenance of hospital by Government—If, a proper function of Government.*

E took his infant son, two or three days old, to the Government Hospital for Women and Children, Egmore, Madras, for treatment. A few days later a nurse in charge of the children's ward at the hospital told him that the child was cured and might be taken away, but before taking the child away he was advised to buy a piece of rubber apparatus. He went away, bought the appliance, and went back to the hospital the same day to fetch the child and he was informed there by the nurse that the child had been taken away by some one else. In spite of his efforts he was unable to find the child. In a suit against the Secretary of State for India in Council by E and his wife for damages for negligence of the hospital authorities,

*held:* The Secretary of State for India in Council was not liable for the torts of the servants employed in the hospital since the Government in maintaining the hospital for the benefit of the public at the expense of the public revenues was discharging a proper function of Government in the exercise of its sovereign powers and not engaged in a business or commercial undertaking. The fact that such a hospital might be maintained by private persons as well as by Government did not make any difference.

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\* City Civil Court Appeal No. 21 of 1937.

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*Peninsular and Oriental Steam Navigation Company v. The Secretary of State for India*(1) explained.

*McInerny v. Secretary of State for India*(2), *Secretary of State for India in Council v. Shreegobinda Chaudhuri*(3) and *The Secretary of State v. Cockcraft*(4) considered and followed.

APPEAL against the decree of the Additional City Civil Judge of the Court of the City Civil Judge at Madras in Original Suit No. 919 of 1935 (Pauper).

*M. Ranganatha Sastri* for *N. Yagneswara Sastri* for appellants.

*Government Pleader (B. Sitarama Rao)* for respondent.

*Cur. adv. vult.*

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The JUDGMENT of the Court was delivered by BURN J.—This is an appeal from the decision of the learned Additional Judge of the City Civil Court in Original Suit No. 919 of 1935. The suit was filed in *forma pauperis* by a man and his wife living in Madras for Rs. 3,000 as damages against the Secretary of State for India in Council. The plaintiffs' case as set out in the plaint was that on 4th December 1933 the first plaintiff and his brother took the infant son of the plaintiffs to the Government Hospital for Women and Children, Egmore, Madras, for treatment. The child was two or three days old. About the 11th December the nurse in charge of the children's ward at the hospital is said to have told the first plaintiff and his brother that the child was cured and might be taken away, but, before taking the child away, the first plaintiff was advised to buy a piece of rubber apparatus. The first plaintiff and his brother went away, bought this appliance, went back to the hospital the same day

(1) (1861) 5 Bom. H.C. Rep. Appx. A.

(2) (1911) I.L.R. 38 Cal. 797.

(3) (1932) I.L.R. 59 Cal. 1289.

(4) (1914) I.L.R. 39 Mad. 351.

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to fetch the child away, and were then informed by the nurse that the child had been taken away by some one else. The plaintiffs sought for the child in every possible place. The first plaintiff reported the matter to the police, but the police were unable to find the child. On these facts, it was alleged that the loss of the child was due to the negligence of "the hospital authorities". It was also alleged that "the hospital authorities" had committed a breach of contract in failing to return the child to its parents or their nominees, and that they were also guilty of misfeasance, non-feasance and malfeasance in handing over the child to some unknown person. The plaintiffs estimated the damages sustained at Rs. 3,000 and filed the suit, as already stated, against the Secretary of State for India in Council.

The learned Additional Judge of the City Civil Court discussed the following issues as preliminary matters with the consent of both parties :

(i) Is there any valid and binding contract between the plaintiffs and the Secretary of State for India in Council ?

(ii) If there is no such contract, is the defendant liable in damages under section 65 or under section 70 of the Indian Contract Act ?

(iii) Is not the tort, if any, founded on contract ; and, if there is no contract between the plaintiffs and the defendant, is the defendant liable in tort ?

(iv) Is the defendant liable in tort ?

The learned Judge held that there was no valid and binding contract and that the defendant could not be said to be liable in damages under section 65 or section 70 of the Indian Contract Act. The third issue was not pressed before him on behalf of the defendant. On the fourth issue, the learned Judge

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held that the defendant was not liable in tort. The plaintiffs have filed this appeal.

The suit was filed against the Secretary of State for India in Council under section 32 of the Government of India Act, 1915. The material portions of that section are 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.”

Put briefly, the case for the plaintiffs is that, in such a case as this, the East India Company would have been liable for the torts of its servants, and therefore the Secretary of State for India in Council is liable for the torts of the staff of the Government Hospital for Women and Children. The learned Counsel for the appellants has relied in this Court, as he did in the lower Court, on the leading case of the *Peninsular and Oriental Steam Navigation Company v. The Secretary of State for India*(1). That is, of course, a very well-known case. The substance of the ruling is given in the headnote as follows :

“The Secretary of State in Council for India is liable for the damages occasioned by the negligence of servants in the service of Government if the negligence is such as would render an ordinary employer liable.”

The P. & O. Company sued the Government for damages occasioned by injuries caused to a horse belonging to them. Their carriage was being driven along a public road passing between two portions of the Government dockyard at Kidderpore. Some coolies in the service of the Government were carrying a

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piece of funnel casing from the works on one side of the road to the works on the other side of the road, and owing to their negligence, a horse drawing the plaintiffs' carriage was seriously injured. The learned First Judge of the Calcutta Court of Small Causes stated a case for the opinion of the Supreme Court on the question of the liability of the Secretary of State for India for the damages occasioned to the plaintiffs. The learned Judges, PEACOCK C.J., JACKSON and WELLS JJ., held that the Secretary of State for India in Council was liable to the plaintiffs on the facts found by the learned Judge of the Court of Small Causes. The provision of law under which the Secretary of State for India in Council was held responsible was section 65 of the Act for the better Government of India (21 and 22 Vict. C. 106). That was in the same terms as section 32 of the Government of India Act, 1915, already quoted. The learned Judges drew a distinction between acts done by the Government in the exercise of sovereign powers and acts done by the Government in the conduct of undertakings which might be carried on by private individuals to whom sovereign powers had not been delegated. PEACOCK C.J. said :

“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 learned Chief Justice and the other Judges held that in the former case the Secretary of State for India in Council would not be liable for the torts of its servants, but that in the latter case he would be. Learned Counsel for the appellants relies entirely upon the words quoted above from the judgment of

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PEACOCK C.J. He points out that any private individual may carry on a hospital for women and children in precisely the same way that the Government Hospital for Women and Children, Egmore, is carried on by the Government. He goes further than that. He points out that the history of the institution is that it actually began as a private hospital. It was started by a number of private individuals acting jointly and was later taken over by the Government. Learned Counsel argues that the case therefore falls within the *dictum* of PEACOCK C.J. This contention however entirely fails to take into consideration the facts of the *P. & O.* case(1). The Kidderpore dockyard, as appears from the judgment in the case, was being maintained by the East India Company for the repair of their river steamers, which carried both passengers and goods for hire. This dockyard was taken over by the Government from the East India Company. This is the principal fact in the case which must not be lost sight of when considering the distinction drawn by PEACOCK C.J. between acts done in the exercise of sovereign powers and acts done in the conduct of undertakings which might be carried on by private individuals. It is quite clear that PEACOCK C.J. was considering undertakings of a business or commercial nature. There is no analogy whatever between the carrying on of a dockyard for the purpose of repairing steamers engaged in commercial traffic and the carrying on of a hospital for the purpose of curing the diseases of women and children. Learned Counsel for the appellants objects to the proposition that the Secretary of State's immunity is taken away only in cases where the Government is engaged in undertakings

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of a commercial or a business character. He wishes to rely on the letter of the *dictum* of PEACOCK C.J. This is, in our opinion, clearly unsound. The judgment of PEACOCK C.J. has been referred to in many cases subsequently, and it has, we think, always been recognized that the learned Chief Justice was there dealing with undertakings of a business or commercial character; vide *McInerny v. Secretary of State for India*(1), where FLETCHER J. held that the Government were not liable for damages sustained by the plaintiff through coming in contact with a post set up by the Government on a public road on the Calcutta Maidan. After referring to the *P. & O.* case(2), the learned Judge enquires :

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“This case is a case to make the Government liable to pay compensation out of Government revenues. What for? For an act which happened to the plaintiff on the public highway. What commercial undertaking or other trading operation were the Government of India carrying on in maintaining the public path on the public highway?” (Page 801).

RANKIN C.J. explains the *P. & O.* case(2) in similar language in *Secretary of State for India in Council v. Shreegobinda Chaudhuri*(3). At page 1293 the learned Chief Justice observes with regard to the *P. & O.* case(2) :

“It was an action in tort and the matter, having come before this Court, on a reference from the Small Cause Court, and it being contended that the Secretary of State for India in Council was not liable, this Court decided that there was a distinction between a business or mercantile concern carried on by the East India Company, whether for its own private or for public benefit, and acts done in connection with Governmental power or powers which could not be lawfully exercised save by the sovereign or an individual delegated by the sovereign to exercise such powers.”

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(3) (1932) I.L.R. 59 Cal. 1289.

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It is impossible in our opinion to treat the *dictum* of PEACOCK C.J. as though it had been intended to cover cases of an institution such as a hospital, which may be maintained by private persons as well as by Government. The real question is, as the learned Judge of the Court below has found, whether the Government, in maintaining the Hospital for Women and Children, Egmore, is discharging a function of Government. There is no allegation that that hospital is maintained by the Government as a commercial or business undertaking. It is admittedly maintained out of public revenues. Now, by section 20 (1) of the Government of India Act, the Revenues of India can only be applied for the purposes of the Government of India. The maintenance of a hospital is a proper object for the expenditure of the public revenues; *vide* item (2) in Part II of Schedule I appended to the Devolution Rules framed under section 45-A of the Government of India Act. That section authorizes the framing of rules

“for the classification of subjects, in relation to the functions of Government, as central and provincial subjects, for the purpose of distinguishing the functions of Local Governments and Local Legislatures from the functions of the Governor-General in Council and the Indian Legislature”.

In maintaining a hospital such as this for the benefit of the public at the expense of the public revenues, we are quite clear that the Government is discharging a proper function of Government, and that, under the principle enunciated in the *P. & O.* case(1) and in many subsequent cases, the Secretary of State is not liable for the torts of his servants employed in the hospital.

We have been referred to a large number of cases by the learned Counsel for the appellants, but there is

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nothing in them which supports his contention, unless the *dictum* of PEACOCK C.J. is taken literally, without any reference to the facts of the *P. & O.* case(1). The case which is most nearly parallel to this is, we think, *The Secretary of State v. Cockcraft*(2). In that case Wallis J. expresses the view that, in maintaining a road, and more particularly in maintaining a military road, the Government were exercising a function of Government and that consequently the Secretary of State for India in Council was not liable for damages occasioned to the plaintiff by the careless stacking of gravel on road by the persons engaged to carry out the work of repairs. It is not necessary, in our opinion, to refer to the other cases which have been cited. The learned Additional Judge of the City Civil Court has dealt with all the important cases, and we have scarcely anything to add to his able and accurate exposition of the law on this point.

The learned Counsel did not seriously press before us the claim of the plaintiffs based upon contract, and quite rightly, as it is clear that none of the proper formalities necessary to bind the Secretary of State in a case of contract was observed in this case. This appeal must therefore be dismissed.

The learned Judge of the Court below did not direct the plaintiffs to pay the Government's costs, and the learned Government Pleader has not pressed before us the question of the costs in the lower Court. If he had, we should have been disposed to say, as RANKIN C.J. said in *Secretary of State for India in Council v. Shreegobinda Chaudhuri*(3), that there is no justification for making the tax-payer contribute a single penny towards the costs of the suit. The plaintiffs

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were very ill-advised in filing this suit against the Secretary of State for India in Council, but since the learned Judge of the Court below did not award costs against them we shall not interfere with his decree in that respect. We shall however direct that the appellants must pay the costs of the respondent in this appeal, since, whatever grounds there might have been for filing a suit, there were certainly none for preferring this appeal.

It is necessary to note that the learned Judge of the Court below proceeded on the assumption that an actionable tort had been committed by some person employed on the staff of the Hospital for Women and Children. The learned Government Pleader does not admit the soundness of that assumption ; he is prepared to contend that the plaintiffs, on the facts of this case, had no cause of action in tort against anybody. We express no opinion on that question, as it was not discussed in the lower Court and a decision of it is not necessary for the purposes of this appeal. The plaintiffs must pay the court-fees.

G.R.

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