1904.

RAICHAND v. NARAN.

the *khata*, which apart from this supposed oral agreement would not be open to objection under section 257-A of the Civil Procedure Code.

We, therefore, make the rule absolute and pass a decree in the plaintiff's favour for Rs. 101. The plaintiff to get the costs of the Court below but not the costs in this Court.

Rule made absolute.

APPELLATE CIVIL.

Before Sir L. H. Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Aston.

1904. *January* 12.

SHIVABHAJAN DURGAPRASAD (ORIGINAL PLAINTIFF), APPELLANT, *v.* SECRETARY OF STATE FOR INDIA (ORIGINAL DEFENDANT 2), RESPONDENT.*

Statute 21 and 22 Vict., c. 106, sections 41, 42 and 65—Secretary of State in Council—Negligence of Chief Constable—Suit to recover damages—"Liabilities lawfully contracted and incurred"—Construction.

In a suit instituted against the Secretary of State in Council to recover damages on account of the negligence of a Chief Constable with respect to goods seized, it was contended that the liability of the Secretary of State in Council is to be determined with reference to what would have been the liability of the East India Company, were it still in existence,

Held, that the suit was not maintainable inasmuch as the Chief Constable seized the goods not in obedience to an order of the executive Government but in performance of a statutory power vested in him by the Legislature, for the appointment of the Chief Constable was not made by the Bombay Government, but by an officer clothed by the Legislature with power in that behalf; the seizure of the goods was not in any sense productive of benefit to the Revenues of the Bombay Government, nor was it a transaction out of which profit could be derived and there had been no ratification or adoption of the act.

The term "Government of India" in section 42 of the Statute points to its bearing the meaning, not of the Governor General in Council, but of the superintendence, direction and control of the country.

The words of sections 42 and 65 are capable of the construction that the reference in them to the East India Company is in case of the earlier section to furnish a clue to the character of the charge, rather than to the conditions which can bring it into being, and in the later section to indicate the mode in which the liability may be enforced, and not the circumstances under which it may be incurred.

* Appeal No. 6 of 1903.

In order that a suit should lie against the Secretary of State in Council, it must be one in which the East India Company might have been made liable and the liability alleged must be one incurred on account of the Government of India. In such a suit the plaintiff must, in order that he should succeed, establish that the liability was incurred on account of the Government of India, so that he must show that it was incurred by some one competent for that purpose.

Before it can be said that a liability on account of the Government of India had been incurred by the Bombay Government as the result of the act or omission of the Chief Constable, so as to be chargeable on the revenues, it would be necessary to exclude those conditions which afford a principal exemption from liability for the act of an agent. But it is settled law that "where the duty to be performed is imposed by law and not by the will of the party employing the agent, the employer is not liable for the wrong done by the agent in such employment."

APPEAL against the decision of R. S. Tipnis, District Judge of Thána, in original suit No. 3 of 1901.

Suit against the Secretary of State for India in Council to recover damages for seizure of goods by a Chief Constable.

The plaintiff sued to recover Rs. 293-12-10 from the defendants, alleging that 62,500 bundles of hay were attached by defendant 1, Vithal Lakshman, the Chief Constable of Máhím, in the beginning of November, 1900, while the hay was in plaintiff's possession, that on the 2nd January, 1901, the plaintiff gave a notice to the District Superintendent of Police, Thána, for delivery of possession of the said quantity of hay, but only 14,700 bundles were delivered and the remaining 47,800 were not given over to the plaintiff, that defendant 1, the Chief Constable, attached the hay in his capacity as a public servant, that defendant 1 and his superior officers were given due notice of the plaintiff's intention to file a suit to recover damages, that as the Chief Constable was a Government servant and Government was the principal and was liable for the act of their agent, the Secretary of State for India in Council was made a party to the suit after due intimation to the Collector, and that both the Chief Constable and the Secretary of State for India in Council were liable to pay the price of 47,800 bundles of hay at rupees six per 1,000 bundles, with interest.

Defendant 1, Vithal Lakshman, replied that he was unnecessarily joined and that plaintiff had no cause of action against him inasmuch as he was not the Chief Constable at Máhím at

1904.

SRIVABHAJAN v. SECRETARY OF STATE FOR INDIA.

the time the plaintiff's hay was attached or returned to him. Pending suit defendant 1 died and his heirs were not brought on the record. The suit, therefore, proceeded against defendant 2, the Secretary of State for India in Council, alone.

Defendant 2 contended that the plaintiff had not suffered any loss as alleged, he or his servants having clandestinely and wrongfully removed the missing bundles, that the Revenue Pátil, Ramji Hari, into whose charge the hay was given, was bound to take care of it as ordered by the Head Constable, Lakshman Daji, and if the plaintiff succeeded in proving the loss as alleged by him nobody else but the Revenue Pátil would be responsible if it was caused by his fault or negligence, and that the Secretary of State for India in Council was not liable for the Revenue Pátil's negligence, if any, in guarding the hay because his omission to take proper steps for its security was not for the benefit of Government, nor had Government derived any profit therefrom.

The Judge found that the Chief Constable of Máhím did attach from plaintiff's possession 62,500 bundles of hay in his official capacity as a public servant, that defendant 1, Vithal Lakshman, was not then the Chief Constable of Máhím and was not in any way concerned with the attachment and was not liable to plaintiff's claim, that 14,700 bundles of hay were returned to plaintiff by Head Constable Lakshman Daji on behalf of the Chief Constable of Máhím and by his order because the attachment on the hay had been raised, that the plaintiff or his servants had not clandestinely or wrongfully removed 47,800 bundles of hay or any portion thereof while the hay was under attachment or at any subsequent time, that 47,800 bundles of hay were not returned to plaintiff by the Chief Constable of Máhím, because they were lost and not available for delivery, that the loss took place in consequence of the negligence of the Chief Constable of Máhím, who ratified the act of his Head Constable, Lakshman Daji, in omitting to take proper security from Ramji Hari Patil in whose charge the hay was given and in omitting to supervise its safe custody, but the loss was not occasioned by any negligence or laches of defendants 1 and 2, that the hay was given in Ramji Pátil's charge by Head Constable Lakshman without plaintiff's consent and this act of Lakshman was ratified by the Chief Constable of Máhím, that

the negligence of the Revenue Pátil, Ramji, in not properly taking care of the hay and thereby causing loss to the plaintiff was proved, and that the defendants were not liable to make good the loss occasioned by the fault or negligence of Ramji Pátil. On the above findings the Judge dismissed the suit.

The plaintiff appealed.

G. S. Rao appeared for the appellant (plaintiff):—It is a rule of Municipal law that a sovereign is not liable to be sued in his own Courts except with his consent. This rule does not apply to the Secretary of State for India. His liability to be sued in the Courts in British India is determined by 21 and 22 Vict., c. 106, section 65. He is liable to the same extent as the East India Company would have been liable: see the Preamble of Bengal Regulation III of 1793, which shows the policy deliberately adopted at that period, and the same principle generally applied throughout the territories of the Company.

The East India Company was invested with powers of two-fold character, *viz.*, (1) the power to carry on trade as merchants, and (2) the power to acquire and govern territory, to raise and maintain armed forces and to make peace or war with Native States. Acts done in the execution of these sovereign powers are not subject to the control of the Municipal Courts. But acts done under the sanction of the Municipal law and in the exercise of the powers conferred by that law are subject to the control of the Municipal Courts, although the acts are done by the sovereign power or its deputy: *P. & O. S. N. Company* v. *The Secretary of State for India* [1]; *Forester* v. *The Secretary of State for India* [2]; *Hari Bhanji* v. *The Secretary of State for India* [3] upheld in appeal; *The Secretary of State for India* v. *Hari Bhanji* [4]; *Barwick* v. *English Joint Stock Bank* [5].

Whether the master does or does not derive benefit from the act of the servant or deputy, the liability of the master remains unaffected: *British Mutual Banking Company* v. *Charnwood Forest Railway Company* [6].

(1) (1861) 5 Bom. H. C. R., Appx. I.
(2) (1872) I. A. Sup. Vol., pp. 13, 17.
(3) (1879) 4 Mad., 344.
(4) (1882) 5 Mad., 273.
(5) (1867) L. R. 2 Ex., 259.
(6) (1887) 18 Q. B. D. 714 at p. 717.

1904.

SHIVABHAJAN v. SECRETARY OF STATE FOR INDIA.

Scott (Advocate General with *Ráo Bahádur V. J. Kirtikar*, Government Pleader) for the respondent (defendant 2) :—A suit like the present cannot lie against the Secretary of State for India. The Secretary of State, whenever he acts either himself or through his officers, acts as a sovereign power and no suit can lie against him in respect of such acts except when he has expressly allowed it : *P. & O. S. N. Company* v. *The Secretary of State for India* [1] supports this view.

The East India Company had sovereign powers by delegation and they had also other powers. They could be sued with respect to the acts done by them in virtue of the other powers, but not with respect to the acts done by them under the sovereign powers : *Grant* v. *The Secretary of State for India in Council* [2] ; *Thomas Eales Rogers* v. *Rajendro Dutt* [3] ; *Doss* v. *The Secretary of State for India in Council* [4].

The Chief Constable had no authority to appoint Ramji as the custodian of hay. No section of the Criminal Procedure Code gave him that power.

G. S. Rao, in reply :—Sections 500 and 165 of the Criminal Procedure Code authorized the Chief Constable to attach the hay and he was bound to take proper care. We rely on *The Secretary of State in Council of India* v. *Kamachee Boye Sahaba* [5], which was the case of an act of State, namely, annexation. Articles 15—18, schedule II of the Limitation Act, clearly show that suits can lie against Government. See also *Vijaya Ragava* v. *Secretary of State for India* [6].

JENKINS, C. J. :—This is an appeal from a decree of the District Judge at Thána, in which a question of considerable importance is raised, as the purpose of the suit is to render the Secretary of State in Council liable for the negligence of a Chief Constable. The claim arises out of the seizure by the Chief Constable of 62,500 bundles of hay in the possession of the plaintiff, and the occasion of this seizure was that complaints had been lodged against the plaintiff of his having stolen the hay.

The charge of theft was not sustained, and when the plaintiff demanded a return of the hay, 14,700 bundles only were restored

(1) (1872) L. A. Sup. Vol., pp. 13, 17.
(2) (1877) 2 C. P. D., 445.
(3) (1860) 2 W. R. (P. C.), 51, 52.
(4) (1875) L. R. 19 Eq. 509.
(5) (1859) 7 Moore's I. A., 476.
(6) (1884) 7 Mad., 466.

to him. This suit has been brought in respect of the balance of 47,800. It has been found by the District Judge, that the 47,800 bundles of hay were not returned to the plaintiff by the Chief Constable of Máhím because they were lost and not available for delivery; that this loss took place in consequence of the negligence of the Chief Constable of Máhím "who ratified the act of his Head Constable Lakshman in omitting to take proper security from Ramji Pátil in whose charge the hay was given and in omitting to supervise its safe custody: but the loss was not occasioned by any laches or negligence of defendants 1 and 2." The case has been argued before us on the basis of these findings, which we, therefore, accept for the purpose of this decision without expressing any opinion as to their correctness and without any regard to any defect there may be in the plaintiff's pleading. Defendant No. 2 is the Secretary of State for India in Council, against whom alone the plaintiff now makes his claim. The Secretary of State in Council had no direct concern with the matter of which complaint is made, and he is sued by virtue of the provisions contained in the Statute 21 and 22 Vic., c. 106.

It has been argued before us that the liability of the Secretary of State in Council is to be determined by reference to what would have been the liability of the East India Company, were it still in existence.

But as the present suit is brought against the Secretary of State in Council to charge the revenues of India with a liability alleged to have been incurred, we propose to examine the terms of 21 & 22 Vic., c. 106; for it is under that Statute that the revenues can be charged, and that the suit is brought: *Sanitary Commissioners of Gibraltar* v. *Orfila* [1]. The scheme of the Statute in this respect appears to be that it indicates first, the circumstances under which a liability may become chargeable upon the revenues of India, and secondly, the method whereby the liability (if it exists) can be enforced.

After providing for (*a*) the transfer of the Government of India to Her late Majesty and the exercise by one of the

(1) (1890) 15 App. Cas., 400.

1904.

SHIVABHAJAN v. SECRETARY OF STATE FOR INDIA.

Principal Secretaries of State of the Powers then exercised by the East India Company, (*b*) the establishment of the Council of India, and (*c*) the transfer to Her late Majesty of the real and personal estate of the Company, it is by the 41st section provided that the expenditure of the revenues of India both in India and elsewhere shall be subject to the control of the Secretary of State in Council. Then by the 42nd section it is provided that "all the bond, debenture, and other debt of the said Company in Great Britain, and all the territorial debt and all other debts of the said Company, and all sums of money, costs, charges and expenses which if this Act had not been passed would after the time appointed for the commencement thereof have been payable by the said Company out of the revenues of India, in respect or by reason of any treaties, covenants, contracts, grants or liabilities then existing, and all expenses, debts and liabilities which after the commencement of this Act shall be lawfully contracted and incurred on account of the Government of India and all payments under this Act, shall be charged and chargeable upon the revenues of India alone, as the same would have been if this Act had not been passed, and such expenses, debts, liabilities and payments as last aforesaid had been expenses, debts and liabilities lawfully contracted and incurred by the said Company; and such revenues shall not be applied to any other purpose whatsoever:

"and all other monies vested in or arising or accruing from property or rights vested in Her Majesty under this Act, or to be received or disposed of by the Council under this Act, shall be applied in aid of such revenues."

If then the liability now under discussion falls within the section, it is because it is covered by the words "all expenses, debts and liabilities which after the commencement of this Act shall be lawfully contracted and incurred on account of the Government of India." These words have been taken from 3 & 4 Will. IV, c. 85, for we find the same expression in the 9th section of that Act. Were the matter uncovered by authority we should have been disposed to hold that the word *lawfully* qualified *incurred* as well as *contracted*, but in the *Peninsular and Oriental Steam Navigation Company* v. *The Secretary of State for*

India (1) it was said "we are of opinion that the words 'liabilities incurred' in 3 & 4 Will. IV, c. 85, section 9, and the same words in 21 & 22 Vic., c. 106, sections 42 and 65, are not necessarily limited to liabilities arising out of contract; for if so, there was no necessity to use the word 'incurred' at all. We think the words 'expenses, debts and liabilities lawfully contracted and incurred' must be construed as 'debts lawfully contracted and expenses or liabilities incurred'." This reasoning, so far as it implies that the words *must* cover torts, seems to overlook the language of section 71 of the Act where we have the words *liability* and *incurred* used in a context in which tort has no place; nor does it appear to us that the construction there adopted was necessary (as was supposed) to support a suit in ejectment, for the relief in such a suit need not involve any charge on the revenues, but merely the recovery of property which forms no part of those revenues. The view, however, enunciated in the Peninsular and Oriental Steam Navigation Company's case has now stood so long unchallenged, that we think we ought to accept it as an authority binding on us, more especially as it was the basis of the decision in that case, where it was held that the Secretary of State in Council was liable for damages occasioned by the negligence of servants in the service of the Government. This decision proceeded on the ground that the servants were engaged on an undertaking, which might have been carried on by private individuals without the delegation of sovereign rights and that as under the like circumstances a private individual would have been liable, the Secretary of State in Council must similarly be liable. The expression *Government of India* as used in section 42 is not defined by the Statute, but, notwithstanding the sense ascribed to it by section 3 (22) of the General Clauses Act of 1897, we think its use in 21 & 22 Vic., c. 106, and in the earlier Acts 16 & 17 Vic., c. 95, 3 & 4 Will. IV, c. 85, 53 Geo. III, c. 155, and 33 Geo. III, c. 52, points to its bearing the meaning not of the Governor General in Council, but (in the phraseology of the older Acts) of the superintendence, direction and control of the country. So much for section 42; we now pass to section 65, under which the Secretary of State in Council is sued.

(1) (1861) Bourke's Rep. (Part VII) 166; 5 Bom. H. C. Appx. I.

1904.

SHIVABHAJAN v. SECRETARY OF STATE FOR INDIA.

That section provides "that the Secretary of State in Council shall and may sue and be sued as well 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 effects hereby vested in Her Majesty for the purposes of the 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."

Of this section it was said by Lord Selborne in *Kinloch* v. *Secretary of State for India in Council* (1) that it "simply enacted that suits to establish rights, which, if that Act had not been passed, would have belonged to the East India Company and for which they might have sued, and again suits to establish claims, which if that Act had not been passed would have been proper to be made in actions at law or suits in equity against the East India Company, might be brought by or against the Secretary of State for India in Council."

"The enactment seems to proceed on the same principle on which in Banking Acts public officers are authorised to sue and be sued as representing the persons really entitled or liable. This is no doubt a very high public officer: and the designation 'in Council,' is added, I suppose, in order that all matters arising out of such suits may be considered not only by himself individually, but by himself in his Council. Whatever the reason for that may have been, the enactment is limited as I have expressed it; and this is clearly not a suit brought against him as representing the late East India Company, or which can by any possibility be described as a suit which, if the Indian Government Act had not been passed, might have been brought against the East India Company. Therefore so far there seems to be no ground for suing the Secretary of State for India in Council in the manner in which he is here sued." The words of sections 42

(1) (1882) 7 App. Cas. 619 at p. 622.

and 65 are possibly capable of the construction that the reference in them to the East India Company is in the case of the earlier section to furnish a clue to the character of the charge, rather than to the conditions which can bring it into being, and in the later section to indicate the mode in which liability may be enforced, and not the circumstances under which it may be incurred; but it would seem to follow from Lord Selborne's view that for this suit to lie against the Secretary of State in Council it must be one in which the East India Company might have been made liable, while section 42 imposes the further qualification that the liability alleged must be one incurred on account of the Government of India. But in *Rogers* v. *Rajendro Dutt* (1) it appears to have been assumed that the East India Company would not be liable for the tortuous acts of their servants, in respect of which a claim for unliquidated damages was made. There a suit was brought against an officer of the East India Company to recover damages for an alleged wrongful act and one of the pleas advanced was that the act complained of was done by a Government officer on behalf of, and with the sanction of, the Government, and on it their Lordships expressed the following opinion (p. 130):—

"Neither does it seem to them to conclude the question in the action that the act complained of is to be considered the act of the Government, and that in the part which the defendant took in it he acted only as the officer of the Government, intending to discharge his duty as a public servant with perfect good faith, and with an entire absence of any malice, particular or general, against the plaintiffs. For if the act which he did was in itself wrongful as against the plaintiffs, and produced damage to them, they must have the same remedy by action against the doer, whether the act was his own, spontaneous and unauthorised, or whether it were done by the order of the superior power. *The civil irresponsibility of the Supreme power for tortuous acts could not be maintained with any show of justice, if its agents were not personally responsible for them**; in such cases the Government is morally bound to indemnify its agent and it is hard on such

(1) (1860) 8 Moo. I. A., 103.

* These words are not in italics in the Judgment quoted from. Reporter's note.

1904.

SHIVABHAJAN v. SECRETARY OF STATE FOR INDIA.

agent when this obligation is not satisfied; but the right to compensation in the party injured is paramount to this consideration."

If this be the correct view and the liability of the revenues of India are no greater under the Statute than in the time of the East India Company, it follows that the plaintiff's claim here must fail.

It is interesting in this connection to note that in 1843 it was said by Sir Erskine Perry in *Dhackjee Dadajee* v. *The East India Company* (1) that he could not find a single instance during the 240 years' existence of the Company as a corporation of an action having been brought against the Company for the illegal acts of the Governors and Members of Council.

There is another aspect of the case which appears to us to lead to the same result. The plaintiff to succeed must establish that this is a liability incurred on account of the Government of India, so that he must show that it was incurred by some one competent for that purpose. Therefore we must consider by whom can such a liability be incurred? There must be some limit, and the reasonable view would seem to be that, apart from the Secretary of State in Council, it can only be incurred by those in whom the governing of the country is vested. Who then are they? By section 39 of 3 & 4 Will. IV, c. 85, the superintendence, direction and control of the whole of the Civil and Military Government is vested in the Governor General of India in Council, while by section 56 of the same Act it is enacted that the executive Government of Bombay shall be administered by the Governor in Council of Bombay. In the circumstances of the present case we can confine ourselves to considering whether it can be said that the liability under discussion has been incurred by the latter of these bodies (of whom we will speak as the Bombay Government) on account of the Government of India. It is not suggested that the Bombay Government directly had any concern in the matter, but that does not dispose of the case; for the acts and omission of another may in law be equivalent of a man's own.

(1) (1843) 2 Morley's Digest 307 at p. 323.

We must therefore consider the precise position of the Chief Constable, through whose negligence their liability is in this case said to have been incurred. His grade was below that of an Inspector so that he presumably was appointed to his post by the District Superintendent as provided by section 9 of Bombay Act IV of 1890.

Then the seizure is said to have been made, not as the District Judge supposed under section 165 of the Criminal Procedure Code, but under section 550 of that Act. But it really matters little under which of these sections the seizure actually was made, for in either case it was, according to the decision *In re Ratanlal Rangildas* (1), obligatory to proceed under section 523 of the Criminal Procedure Code. Apparently this was not done.

Now it appears to me on principle that before it can be said that a liability *on account of the Government of India* has been incurred by the Bombay Government as the result of the act or omission of the Chief Constable so as to be chargeable on the revenues, it is necessary to exclude those conditions which would afford a principal exemption from liability for the act of an agent. But it is settled law that "where the duty to be performed is imposed by law and not by the will of the party employing the agent, the employer is not liable for the wrong done by the agent in such employment": *Tobin* v. *The Queen* (2), referred to recently in *Nireaha Tamaki* v. *Baker* (3).

In this case the Chief Constable seized the hay, not in obedience to an order of the executive Government, but in performance of a statutory power vested in him by the Legislature. Nor does the matter rest there; for the appointment of the Chief Constable was made not by the Bombay Government but by an officer clothed by the Legislature with a power in that behalf; the seizure of the hay was not in any sense productive of benefit to the revenues of the Bombay Government, nor was it in a transaction out of which profit could be derived; and finally there has been no ratification or adoption of the act. In the face of these facts it appears to us it would be giving the words "liability incurred on account of the Government of India" an

(1) (1892) 17 Bom., 748 at p. 751. (2) (1864) 33 L. J. C. P., 199 at p. 204.
(3) (1901) A. C., 561 at p. 575.

1904.

SHIVABHAJAN v. SECRETARY OF STATE FOR INDIA.

application that could not have been intended were we to hold that under the circumstances we have described there has been a liability incurred on account of the Government of India and chargeable on the revenues under 21 and 22 Vic., c. 106. For these reasons we confirm the decree of the District Court with costs.

Decree confirmed.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Aston.

1904. *January* 12.

DALSUKHRAM HARGOVANDAS (ORIGINAL PLAINTIFF), APPELLANT, *v.* CHARLES DeBRETTON (ORIGINAL DEFENDANT), RESPONDENT *

Contract Act (IX of 1872), section 23—Agreement to stifle a prosecution—Compounding a non-compoundable offence—Agreement as defence in a civil action—Suit for wrongful confinement.

The plaintiff sued the defendant in damages for wrongful arrest and confinement. The defence pleaded an agreement whereby the parties had agreed to settle their differences in consideration of compounding some criminal charges, one of which was not by law compoundable and which were then pending between the parties in a Criminal Court. The Lower Appellate Court held that the plaintiff was prevented from bringing the action by reason of the agreement. On appeal—

Held, that the object of the agreement being to stifle a prosecution was bad in law, and that the agreement, therefore, could not be set up as a defence in a Court of law.

SECOND appeal from the decision of S. L. Batchelor, District Judge of Ahmedabad, reversing the decree passed by Vadilal Tarachand Parekh, Joint Subordinate Judge at Ahmedabad.

Suit for damages.

The plaintiff sued to recover Rs. 2,000 as damages for wrongful assault, arrest and confinement.

The defendant pleaded *inter alia* that the plaintiff had trespassed on his land, that the acts complained of having been done by his servants, he was not liable for their *bonâ fide* mistake,

* Second Appeal No. 273 of 1903.