

## TORTIOUS LIABILITY OF STATE UNDER THE CONSTITUTION

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The State liability for the acts of omission and commission committed by its servants, not being a static concept, has been governed by written or unwritten laws. Liability of State for the tortious acts of its servants known as tortious liability. of State makes it liable for the acts of omission and commission, voluntary or involuntary and brings it before Court of Law in a claim for non liquidated damages for such acts. This liability is also a branch of Law of Torts. Law of Torts like various other laws has travelled to this country through the British in India and now stands varied due to being regulated by certain local laws and Constitutional provisions.

The English maxim 'the King can do no wrong' regarding the absolute immunity of Crown was never accepted in this country even in the past from ancient times. The Crown could not be sued in tort for acts of its servants in the course of their employment. But it was not accepted in this country even during the rule of the East India Company. The East India Company which came to India initially for carrying on trade gradually became ruler of a great part of this country and made yet another part under its subjugation. It was not a sovereign body but was delegate of the Crown. Its powers and extent of political authority were gradually regulated by certain legislations passed by the British Parliament. The British Crown took over the reigns of this country directly in 1858 after armed uprising in India against the English rule termed by the British Rulers as Sepoy Mutiny of 1857 was quelled. The vicarious liability of the Government in the absence any statutory rules or contours depended on the extent and exercise of the power by the Government or the head of the Government. In pre-independence period, the extent of tortious liability of the State and its immunity was subject matter of dispute before existing Courts. "The liability of the State was dependent on the nature of the act and the category of power in which it was placed viz sovereign or non-sovereign power of the State. Sovereign powers of the State were never defined and in the absence of any clear cut distinction between sovereign and non-sovereign powers of the State Courts of law were faced some times with difficulties in resolving the disputes. The plank for defence by State in cases pertaining to State liability used to be that the acts of omission or commission complained of were within the realm of sovereign powers of the State and as such State was not liable. The first judicial interpretation of State liability during the East India Company was made in John Stuart's case, 1775. It was held for the first time that the Governor Genera~ in Council had no immunity from Court's jurisdiction in cases involving dismissal of Government servants. *In Moodaly v. The East India Company* 1775 (1 Bro-CC 469) the Privy Council expressed the opinion that Common law doctrine of sovereign immunity was not applicable to India. After assumption of sovereign powers by the British Crown in 1858. The first enactment regarding the administration of Country was enacted in 1858 known as Government of India Act 1858. Later on it was replaced by the Government of India Act 1915 and 1935. Sec. 58 of the Act of 1858, the provisions of which remained on Statute Book in subsequent Government of India Acts, for the first time spelt out tortious liability of State in Statutory terms. It provided that Secretary of State may sue or be sued which read as follows "The Secretary of State in Council may sue and be sued as well in India as in England in 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 acquired for the said purpose shall be subject and liable to the same judgments and executions as those vested in the said Company would have been liable to in respect of debts and liabilities lawfully contracted and incurred by the said Company". Sec. 68 of the said Act protected members of the Council from personal liability. Now Article 361 of the Constitution of India exempts the President and the Governors who are heads of State from personal liability. The leading case under Sec. 58 of the Government of India Act 1858 was *Oriental Steam Navigation v. Secretary to the State of India* (Bombay High Court Reports Vol. V, 1868-69) Appendix I. The Calcutta High Court in the said case held that there was a great and clear distinction between acts done by the public servants in the delegated exercise of sovereign powers and acts done by them in the conduct of other activities. The Court held that East India Company were not sovereign, drew distinction between sovereign acts in respect of which State was not liable and the other category i.e. non sovereign in respect of which the Secretary of the State was made liable. In the said case due to negligence of a servant of Government working in Dockyard an accident happened and horse of a carriage hired by an individual was injured. Calcutta High Court had in a subsequent decision adhered to the same view but the Bombay and Madras High Courts did not agree with the same. The Madras High Court in *Secretary of State v. Hari Bhanjj* (1882) ILR Madras 273 held that immunity of East India Company extended only to "Acts of the State". The defence of an act of State is not available against a citizen. Acts of State are directed against another sovereign State or its sovereign personally or its subjects and being based on policy consideration and not on law administered by municipal Courts they are not justiciable.

Under the Constitution of India two Articles viz Article 294 and Article 300 contain explicit and implicit provisions regarding tortious liability of State and suit against it. Both the Articles come under Chapter III of "Part XII of the Constitution of India which is headed as Property Contracts, Rights, Liabilities Obligations and Suits." Article 294 (b) of the Constitution of India provides that the liability of Union Government or State Government may arise out of any contract or otherwise. The word "otherwise" would include various liabilities including tortious liability also. This Article thus constitutes and transfers the liabilities of Government of India and Government of each governing province in the Union of India and corresponding States.

Article 300 of the Constitution of India provides that State can sue or be sued as juristic personality. It reads as under:

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

The first part of the Article 300 deals with the nomenclature of the parties to a suit or proceeding, that is Union of India and State Government but the second part defines the extent of liability by the use of words 'in the like cases. The Supreme Court of India after coming into force of the Constitution of India in the first notable case regarding State's tortious liability viz. *State of Rajasthan v. Mrs. Vidyavati*, AIR 1962 SC 937 removed the doubt that the scope of Article 300 was limited and held that the scope of Article 300 is not limited and the expression 'in the like cases' refers back for the determination of such cases to the legal position before the enactment of the Constitution and Article 300 has saved the right of Parliament or legislature of a State to enact such law as it may think fit and proper in this

behalf and so long as legislature has not expressed its intention to the contrary, law must be held to be the same which has been continuing from the day of the East India Company. The Court further held that there can be no difficulty in holding that the State should be as much liable for tort in respect of a tortious act committed by its servant within the scope of his employment and wholly dissociated from the exercise of sovereign powers as any other employer. Sovereign functions were specified as defence act of State and other like operatives. It was thus made clear that ambit of Article 300 included tortious liability of State and its scope is not limited to suit or right to one in respect of contractual liability only. In the said case a vehicle owned by the State of Rajasthan met with an accident causing death of one person due to negligence of the driver. The State was held liable as the said accident could not be associated with the sovereign powers. The Court held that the act of public servant committed by him during the course of his employment was in discharge of duties assigned to him not by virtue of delegation of any sovereign powers. In subsequent decision of *Kasturi Lal Ralia Ram v. State of Uttar Pradesh*, AIR 1965 SC 1039 the case of Vidyavati was distinguished on facts confining it to tortious liability not arising from the exercise of sovereign powers. The Court in *Kasturi Lal's* case upheld the defence of sovereign immunity and held that area of employment referable to sovereign powers must be strictly determined. In the said case the seized gold was kept in the Malkhana and the person from whom it was seized applied for its return later on but the case was not done and it appeared that it was no longer in Malkhana and the same was misappropriated by the person incharge of the same. It was held that this happened because of the negligence on the part of the police officers who acted in violation of provision of U.P. Police Regulations and the powers which were exercised by them could be properly characterised as sovereign powers. *Kasturi Lal's* case was distinguished by the Supreme Court in subsequent decisions and without overruling it the Court diluted the emphasis laid in the said case on sovereign immunity of the State and the Court took these Regulations to have special characteristics of sovereign functions of State. These cases and other cases came up for consideration before the Supreme Court in the case of *Nagendra Rao v. State of Andhra Pradesh*, AIR 1994 SC 2663 which arose under Essential Commodities Act. The Court observed that in welfare state functions of State are not only defence or administration of Justice or maintaining law and order which are sovereign functions of State, but its functions intend to regulate and control activities of people in almost every sphere: educational, commercial, social, economic, political or even marital, and the demarcating line between sovereign and non sovereign powers for which no rational basis survives has largely disappeared. The water tight compartmentation of sovereign and non-sovereign functions was held not to be sound and against modern jurisprudential thinking. The Court observed that distinction between sovereign and non sovereign powers depends upon the nature of power and its exercise. One of the tests to determine if the legislative or executive function is sovereign in nature is whether the State is answerable for such actions in Courts of law. For instance, such as defence, security, raising armed forces and maintaining it, making peace or war, foreign affairs, power to clear territory are functions which are indicative of external sovereignty and therefore they are not amenable to the civil courts.

*Kasturi Lal's* case was distinguished in this case too and it was pointed out that the property in respect of which suit for damages was filed was seized by the police officers while exercising the powers of arrest under Section 54(1) (4) of the Cr. P.C. and the act complained of was committed during the course of employment being of the category which can claim special characteristics of sovereign powers and it was for this reason that the principle of sovereign immunity was extended by the Court, which was not available in a large number of other activities. In the recent decision of *Achut Rao Hari Bhau Kodwa and another v. State of Maharashtra and others*, (1996) 2 SCC 634 the Government doctor and

the State were held liable because of the negligence of the said doctor in the hospital resulting in death of the patients, it was held that running of hospitals not being exclusive function of the Government, maintaining a hospital by Govt. would not be an exercise of sovereign power so as to enable to claim immunity from liability for the tortious acts of its hospital employees. Compensation was awarded to the family of the deceased reversing the decision of the High Court and affirming the decision of the Trial Court. Sovereignty in India now vests in the people who have given a written constitution to India with certain aims and objects enshrined in the Preamble to the Constitution. It is obvious that the claim of immunity now survives in defence, administration of justice, maintenance of law and order, repression of crime etc. which are primary and inalienable functions of Government regulated by a constitution. The Supreme Court in *Dr. M. Ismail Farooqui v. Union of India*, AIR 1995 se 605 held that the acquisition of temple and mosque may it be because it is covered in maintenance of law and order is also covered in the sovereign functions of State. In the matter of payment of compensation for damage caused to a person by the wrongful act of another person, say Government servant, there is some deviation from the traditional concept in this behalf even if no specific damage is alleged. The liability of the State has gone beyond the traditional principles in view of changing laws and the Constitutional mandates in this country too. Negligence and carelessness of the employees are words of great importance and the State would be liable to pay compensation to aggrieved persons because of the negligent and careless act done by its employees during the course of employment. Even if an employee was doing an unauthorised act but not in a prohibited way, the employer is liable for such acts because such employee was acting within the scope of his employment and in acting did something negligent or wrongful. A master would be liable even for acts which he has not authorised if the same can be connected with the acts so authorised.

Article 21 of the Constitution of India forbids State to deprive a person of his life and liberty except in accordance with a procedure established by law. To expand the word 'life', it includes every aspect of life which makes life meaningful, complete and living, and even culture, tradition, heritage and personal liberty which have a very expanded meaning impose negative deed on the State and in view of Constitutional provisions including Directives Principles of State Policy it has been interpreted to be imposing positive obligation upon the State which is to ensure better enjoyment of life and dignity of individual. The Fundamental Rights which have been guaranteed and are enforceable by the Supreme Court. Under Article 32 and High Court, under Article 226 have not only made the defence of sovereign immunity completely inapplicable but have overthrown it altogether as it cannot go with constitutionally guaranteed rights. In view of complete ouster of sovereign immunity in regard to fundamental rights particularly Article 21, right to award money compensation for violation of the law is justified. The Union and State governments would be liable for tortious acts committed by their employees in the course of employment for violation of Article 21. The Supreme Court awarded monetary compensation in a large number of cases. In the case of *Nibati Behera v. State of Orissa*, AIR 1993 SC 1960, the Court spelt out the principles on the liability of the State in case for payment of compensation and the distinction between this liability and the liability in law for the payment of compensation for the tort so committed. If no other practicable mode of redress is available the Court would award monetary compensation for breach of fundamental rights by State or its employees based on the principle of strict liability.

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