CHAPTER-IV
TORTIOUS LIABILITY
IN
ANCIENT INDIAN POLITY.

01. There does not appear to be such a developed principle of vicarious liability in ancient India as we see in modern days. Yet in its own status, the rule of accountability of the ruler, or the Government or the Government Servants for their wrongs provides some glimpses in ancient India throwing some light on the "Rule of Law", in respect of Government liability. The doctrine of "Dharma" was an indispensable part of human conduct and the whole machinery of the Government was operated by Dharma. "Dharma" meant Justice, Duty, Moral, Conduct or Religion.

02. There are illustrations in ancient India that, Guru enjoyed a pride of place in the King’s Assembly and the interpretation of Dharma was based on Vedas, Shastras, Shrutis, Smritis., interpretations, comments and opinions of Scholars, Jurists and experts of ancient India. Dharma was the governing factor of ruler’s conduct. No body was above Dharma. Guru's interpretation of Dharma was an authority of law to the King’s in ancient India. Guru played various roles of a Teacher, King and a Lover in ancient India.

03. The King could attain his temporal and spiritual function only by following "Dharma". Rajdharma was essential path to be followed by the King, which defined the powers and

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obligations of the King (K.P. Jaiswal : Hindu Polity, 3rd. Edn. P-310). The King according to Manu could not make laws but according to Kautilya (Arthashastra, B.K. 1 Ch.3,3,(P-11)\(^1\)

"The King could make only regulatory laws and not substantive laws. "Dharma" was the law and great faith was reposed in Dharma. The rules of Shastras were believed to be divine and higher than the King, compliance with Dharma was regarded as a matter of great social and cultural importance and the King could not keep himself separate from it. Nothing could be more than Dharma". On the basis of Dharma even a weaker could have the right over a stranger. Dharma is truth, Dharma and truth are the same according to Kamandak, Yavan King ruled on this earth for a long period because he ruled according to dictates of Dharma.

04. In respect of administration of justice, the king acted under the control of the fearless judges and nobles. They appraised the errors done by the King, Manu had gone to the extent of saying that the public can abdicate a bad or incompetent King. He had even said that such a king can be killed by the public. According to Kautilya, the calamities can thunder on an indisplenced and meek King. (Kautilya 8/3). According to Narad, the subject is under subjugation and the king is unfethered but he can not go against Shastras (Gautam 9/2). The king can not become arbitrary, he has to act under certain limitations. (Katyayan-10). According to Parishar and Manu, the King is Brahma, Shiva Vishnu and Indra, as he is a giver (Data), destroyer, rule maker according to Karma (deeds) of the subjects.

\(^1\) Arthashastra, B.K. 1 Ch. 3,3,(P-11)
05. Legally the king could not become liable for his unjust acts but "Dharma" is the King of Kings. If the king imposes an unjust fine on any body, he has to pay 30 times of it to Varuna either by dropping the money in to water or by distributing it amongst the Brahmins (Manusmriti 8/336). According to Manu, pecuniary liability of the King extended to the extent of one Shastras Karshapana for which an ordinary individual is liable to one Karshapana only.

06. The king is some times liable vicariously for the wrongs done to his subjects by others. If a stolen property is recovered, the king has to restore it to the real owner. If it is not recovered, the king and his servants responsible to protect the citizens and their property are liable to compensate the owner. In ancient Hindu legal system, the king, his servants and the princes were liable and could be sued and punished. Prince Asmanjayasya, the elder son of King Sagar was exiled by the citizens for his habit of enjoying the drowning agony of children thrown by him in the Saryu river. The punishment of cursing (shaap) was also well known whereby even the weakest meakest and humblest could curse even the strongest for the mis-deeds.

07. However, barring a few instances, the rule that the king and his servants would be liable for the wrongs was a rule more in theory than in practice in ancient India, as it would have been a very bad taste to whose who were in authority.
08. During delivery of Tagore Law Lectures on General Principles of Hindu Jurisprudence, Shri P.N. Sen, states that, our sages do mingle religions, moral and legal norms, but there is blending of ethico-religious obligations with legal obligations and at times more emphasis is laid on the former than on the latter and since all duties are binding the distinction between legal duties and other duties was unnecessary. Yet beneath the religious garb the secular rules existed.

09. But whenever it was necessary the sages made distinction between a rule of law and a rule of morality or religion. Rule of "Damdupat" illustrates the point which prohibited a money lender from charging interest more than the principal amount.

10. It is now well established that, rules of Hindu Law were as much Rules of Law as the commands of sovereign though they need emanuate from the determinate authority because they were obeyed by the people for whom they were meant.

11. Rule of law prevailed in ancient India as much as in modern India.

12. According to the Hindu sages, rule of law based on ethical principles and a rule of law was against ethical principles. To clarify this controversial situation, we may re-call that the Hindu Philosophy and religion require a Hindu Judge and evaluate all his actions and sensations in this world in terms of ultimate attainment of "Moksha" or objective. For this purpose,
various paths like Karma, Gyana and Bhakti have been prescribed, which are equally efficacious in the attainment of the ultimate object. Performance of Yagna, propitiation of ancestors and Gods, pilgrimages and other religious acts are performed with the same end in view. The Kerala high Court in Biyyachimabai Vs. Balan, (1966) KLT 731\(^1\).

13. From the principles that Hindu Law is sacred law and that Dharma is all pervasive, the Hindu Jurists propounded that, the law is sovereign and not the king in ancient India.

14. In Satapatha Brahmana (Satapatha Brahmana, 4,2,26) the following passage throws more light on sovereignty of law as permitted in ancient India:

"Since the law is king of kings, for more powerful and rigid than they, nothing can be mightier than the law by whose aid as by that highest monarch, even the weak may prevail over the strong."

15. Our kings in ancient India were not law-makers but law enforcers. The king was giving no law making power unlike the western notion that the king was a law giver. Law was the command of sovereign and the Kings were sub-ordinate to law like Louis XIV our kings in ancient India could not say that, their words were law, like any other citizen our ancient king was subject to law. The Shastras laid down the duties of the

\(^1\) Biyyachimabai Vs. Balan, (1966) KLT 731

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king in minutest details and detailed rules were laid down for
the guidance of the king in the performance of his duties. His
formost duty was to uphold law and he was the principal law
enforcer.

16. Administration of justice was his another important
duty. The king was the fountain of justice in ancient India. He
was the court of ultimate resort. The king’s court was presided
by a chief judge and was assisted by counsellor and assessor.
In addition to king’s court, there were three more courts called
“Puga”, “Sreni” and “Kula”. These were the people’s courts.
They were the parts of the regular administration of justice and
their judgments were enforceable like the judgments of the king’s
court. The “Puga” was a local court comprising of fellow
townsmen or fellow villages. The “Sreni” consisted of members
of the trade, business or calling. The “Kula” was composed of
relations by blood or marriage.

17. All the three courts had original jurisdiction. From their
decisions, appeal could go to higher courts and ultimately to
king’s court. In some cases, the king could exercise original
jurisdiction and in his discretion he could hear any case. At the
highest level, there was no separation between judiciary and
executive.

18. Law was sovereign and sacred yet custom and Rajyadesha
were very important. In fact, custom and Rajyadesha were given
over-riding effect over law at times. Brihaspati describes four
decisive rules of law in any dispute. They are “Dharma”,
“Vyavahara”, “Charitra” and “Rajyashasana”.

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19. "Dharma" signifies moral law or rules of justice and reason. "Vyavahara" signifies civil law. "Charitra" refers to custom and "Rajyashasana" refers to King's edicts or ordinances. They are mentioned in Narada Smriti, and Kautilya's Arthashastra also.

20. In the above, we are concerned with the king's edicts. Earlier it was seen that, the theory disclosed that our king did not make law though to a limited extent by ordinance he was recognised so doing. It is not clear at what stage of law the Rajyashasa became important. But Yajnavalka mentions it. Narad clearly states that king made law over-rides the sacred law and custom also. Kautilya also contends to the same effect. Kautilya was in the glorious period of Maurya dynasty. Ashoka ruled over a vast empire one powerful king after another succeeded. At the glorious period and in the need of the governance of vast empire it was but necessary that, the king should make laws. In response to the need of the time, the king made law was given over-riding effect on the sacred law. Narada observed that. "as the king has obtained Lordship, he has to be obeyed, polity demands on him. (Narada Smriti XVIII, 24). Kautilya held the view that the king derived his authority from the people. The king at the time of coronation was required to affirm that his powers and prerogatives emanuated from the people, well known writers and scholars were of the conception that, the main function of the oriental empires was the gathering of taxes and levying of armies and they were seldom concerned themselves with the enforcing of legal rules. But so far as ancient
India was concerned, a study of its ancient Indian institutions
reveals in the works of sages, such as notion was far from true.
According to sages, it was the protection of the people and not
collection of taxes that was regarded as the principle duty of
the king and administration of justice was one of the principal
means to keep the people in order and to protect them in proper
enjoyment of their rights. Of course, the king had the right to
collect taxes but that involved a corresponding duty to afford
protection and whoever failed to discharge the obligations while
enjoying the advantages of right was condemned. Manu said
"a king who without giving protection to his subjects collects
revenue from them may be said to be the Collector of all
impurities to which they are subjects". In similar tone,
Yajnavalka lays down in his texts, that "Whatever sin the people
commit, un-protected by the king, half of that goes to the king
since he takes revenue from them".

21. It was thus one of the principal duties of the king to administer
justice among the people, for administration of justice and maintenance
of order go hand-in-hand and we can not conceive the one without the
other. It was not, however, his function to legislate except in minor
matters of local or temporary importance and the general body of the
law contained in the "Shastras" and their exposition was in the hands
of learned class who by reason of their piety and intellectual eminence,
were specially suited for the task. Thus, law in ancient India emanated
from the higher wisdom and not originated from the fiat of the Royal
will, although enforced by the temporal power, which was in the
king.
22. In regard to absoluteness of the king’s sovereignty in ancient India, attention may be invited to the nature of king’s right in the soil within whose dominion private individuals owned and occupied the landed property. The discussion is contained in Viswajidadlinkarana and Minansa. It was a widely recognised opinion that, private individuals were the true owners of the soil and the little of the king being generally limited to the right of collection of revenue and taxes from them. Nilakantha in his Vyavaharamayukha and Srikrishna Tarkalankara in his commentary on Dayabhaga seemed to endorse the above view and regard the Bhoomikas (land-lords, as the real owners of the soil held by them, while they ascribe to the king merely the right to collect revenue from the land-lords as representing his proper share of the produce of the soil to which he became entitled by reason of protection he afforded to them for peaceful enjoyment of their property.

23. The above situation indicates that the sovereignty of the king was limited. Another ancient scholar, Jagannath, maintains that, by looking at the origin of the proprietary right, this limited conception of the right of sovereign is not justifiable. He further maintains that, if ownership primarily arose from first occupation, it would be more reasonable to suppose that, the sovereign being the stronger right, would have the prevalent right, such rights as the subjects possessed being permissive in their character and terminable at this option by the withdrawal of the permission at the end of the year.
24. It is strange to observe that, more modern view gives a
greater latitude to the rights of sovereign as opposed to the
rights of the people as the sovereign was unlimited in the western
conception. The attempt of Sri Jagannath to explain
unlimitedness of the sovereign power is not understandable
although he goes to the root of the matter in support of his
contention and explains how originally the rights of the sovereign
came to co-exist with the rights of the subjects. There is
manifestly a perplexion in his conception. In view of Sri
Jagannath that, private owners might be regarded as if they were
losses of the king finds little support from the Dharmashastra
which also dilate upon the divine character of the sovereign
and revenue due to his position. But they too do not furnish
any basis for maintaining that, he was the absolute master of
his territory and free to deal with the lands within his dominion
in any way he liked to the settled rights of his subjects. How
and why the sovereign came to be limited is difficult to explain.

25. In regard to vicarious liability of state, much evidence is
not available, either in observation of master and servant rule
of western conception or liability of the state for the wrongs
done by its servants during the course of discharge of lawful
duties entrusted to them by the king or the sovereign authority,
if it can be called so.

26. Sir Henry Mane’s saying needs to be elucidated in this
connection. He said, “the penal law of ancient communities is
not the law of crimes, but it is the law of wrongs technically
known as torts”. The person injured proceeded against the
wrong-doer by ordinary civil action and recovered compensation in the shape of money damages, if he succeeded. He pointed out that, in Roman Law offences were accustomed to be called torts Viz.theft, assault, violent, robbery, trespass, libel and slander. All of them gave rise to obligation or “Vinculum Juris” and were requited by payment of money. He also pointed out that, old Germanic law was also similar.

27. But ancient Indian law did not exhibit similar characteristics since punishment of crimes were more prominent than payment of compensation for wrongs. Mere payment of compensation to the individual injured was seldom regarded as adequate when the injury inflicted was more serious. However, under certain circumstances, wrong-doer was compelled to compensate the person wronged. But compensation was generally awarded in addition to penalty. Under these circumstances, it is difficult to presume that, law of tort known to the western world, was practiced in the ancient India distinctly.

28. It was believed that, it was the duty of the king to impose penalty, adequately and properly. Manu says “a king who punishes those who do not deserve to be condemned punishment becomes in-famous and is ultimately doomed to lull”. It was considered to be the duty of the king to punish the culprit for his offense against the law. It can be, therefore, presumed that, the penal law in ancient India was the law of crimes in the strict sense and the law of torts occupied comparatively a subordinate position in that system.

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29. When the act is looked upon the standpoint of view of the individual injured, the compensation was allowed to the injured party and it is treated in the light of tort, when it is looked upon the transgression of sacred law which endangered the security of the community and such visited with punishment without any reparation to the injured individual and it is treated as crime.

30. In ancient India law did not take such a rigorous view of civil liability as to allow pecuniary compensation for a mere infringement of a private right when it is not accompanied by some tangible dis-advantage involving pecuniary loss.

31. Slander and adultery were regarded as crimes and punishment awarded accordingly. No pecuniary compensation could be awarded unless the injury involved was accompanied by actual pecuniary damage.

32. In respect of king’s voluntary liability, it is remarkable to note that, it conceived to be the duty of the king to protect the property of the people. If the king could not restore stolen articles of his people or recover their price and pay to the owner by apprehending the thief, it was deemed to be his duty to pay the price to the owner out of his own treasury and in his turn could recover the same from the village officers, who by reason of their negligence were accountable for the thief’s escape. It appears, there was regular, distinct organisation of the police force in the state in ancient India to enforce criminal laws excepted the specified villagers.
33. In this way, the idea of the responsibility of the king and his officers to protect the property of the people to ensure the security of the private property of the people in their state. This is a self imposed duty of the king indicating the characteristic of vicarious liability of the state in ancient India.

34. It is further remarkable to note that, our ancient law givers distinctly declared that, no one however closely he might be related to the king, should be found transgressing the law, be exempted from punishment. Yajnavalkya says no one who has transgressed the law is exempt from punishment by the king, be he a brother, son, preceptor, a father-in-law or a maternal uncle. Manu further declares that, where an ordinary man is punishable, with a fine of one Karshapana, if the king commits the offence, he should punish himself, with thousand times the said amount and the commentators say that, he should distribute the sum among the priestly class and Tagore Lectures by Prinjanath Sen at Page 47 of the book. The above principle signifies the idea that, law was supreme in ancient India and it could be rightly called sovereign authority and the king was only up-holder and guardian of sovereign authority.

35. Some light may be thrown on the corruption of judges since they were appointed by the king and they were the servants of the states in discharging their lawful duties.

36. Corruption in a judge was very strongly condemned. Yajnavalka says that, each member of a court of justice who out of partiality or avarice or fear act against the law, he should be made to suffer twice
the punishment inflicted upon the person who loses the action. However, when a judge works injustice by taking a bribe from a litigant, the king should confiscate his property and banish him from the place. (P.N. Sen’s Tagore Lecture Book P. 356). Omission to bring certain offences to the notice of the king’s officers was also made punishable. This shows that, in case of negligence responsibility is fixed by law on the state officers and people who know the particular offence. Negligence under certain circumstance was regarded as own offence Viz., in a case of rash driving, it was the driver who is held committing offence, but in case of negligence, the employer might also be liable to punishment if he had employed as un-skill-full person and the negligence was the consequence of want of skill. This gives some glimpse into master and servant relation. But still evences are wanting where a state is master and its servant or officer commits an offence in the course of his employment. This is perhaps, on account of the executive, administrative and judicial powers being vested in the king in ancient India for the servant’s wrongs, the state was not liable since the king in his own court and as the head of the court, can not punish himself as was the prevailing conception in England before Crown Proceedings Act, 1947, except in the circumstances, when he himself committed the offence personally and if the offence was major one, the option of expectation as a punishment was open to him. In total, therefore, it can not be said that, in ancient India that the doctrine of king can do no wrong is wrongly applied except the second part of the doctrine that “King is dead long live the king”, since on his heirs succeeded to the invariably as the throne could not be vacant at any given time and that was the law in the past and law in the present also.

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37. As already stated Manu had declared that a king who condemns the innocent and absolved the guilty subjects himself, falls in great disgrace and goes to bell. If unwarily he imposes penalty unjustly, he should expiate himself by distributing among priestly class thirty times the amount which has so realised.

38. Manu further said one of the objects of punishment was protection of the people and the punishment serves as a source of purification of the culprit under “Dharma” as a source of righteousness according to Manu.

39. The over all position of law in ancient India indicates it was supreme and sovereign. Sovereignty existed for the benefit of the people. It justifies itself by being conducive to the welfare of the people who are governed by it. The king can not over ride it./ The judges could not dispute its authority and people were bound to obey it, not merely because it has a support of temporal authority but because it draws its inspiration from the fountain of supreme wisdom. The principles of sovereignty, vicarious liability of State were embodied in the law in its own way.