CHAPTER-VI
CHAPTER VI
TORTIOUS LIABILITY OF THE GOVERNMENT UNDER THE INDIAN CONSTITUTION.

POSITION UNDER CONSTITUTION:

01. The constitution transformed India into a sovereign, socialist, secular, democratic republic. It gives fundamental rights to the citizens and also to the non-citizens. It has also brought in a welfare government for which it contains many directives in the form of directive principles of state policy. By study of various provisions of the constitution, specially fundamental rights and independence of judiciary, the country appears to have been brought under “Rule of Law”. Further, our constitution makers have borrowed what was good and suitable from the provisions of other constitutions of the world and introduced the same in our constitution to meet the requirement of the masses with new hopes to get rid of various social and political enslavements. Paradoxically, the constitution makers let the law relating to vicarious liability of the government, where it was prior to making the constitution allowing to deny the “Rule of Law” to the people till today in the name of sovereign immunity. This position perhaps would continue in future also not withstanding the posture of judicial activism by way of interpretation of sovereign and non-sovereign powers, until parliament makes deficit law making the government tortiously liable.

(118)
02. The law relating to vicarious liability of the government is contained in Art. 300 as under: -

"Suits and proceedings".

(i) 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 States and may subject to any provisions or of the legislature of such state enacted by virtue of powers conferred by the 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 the constitution had not been enacted.

(ii) If at the commencement of the constitution:

(a) any legal proceedings are pending to which the dominion of India is a party, the union of India shall be deemed to be substituted for the dominion in the proceedings, and

(b) any legal proceedings are pending to which a province or any Indian state is a party, the corresponding state shall be deemed to be substituted for the province of the Indian state in those proceedings".

(119)
03. After coming in to force of the constitution, the Supreme Court by interpreting Art. 300 which continues pre-constitution law in the field of vicarious liability of the government, has approved the theory of sovereign and non-sovereign functions of the state, as adopted by the Calcutta Supreme Court in Pannisular and Oriental Steam Navigation Company's Case (1861) 5 Bom. HCR App.1.¹

04. Art. 300(1) when it mentions the government to sue and to be sued, throws distinct light on sovereign and non-sovereign functions. Government “to sue” indicates the characteristic of sovereign power and “to be sued” gives an inclining of power subordinate to law. Sovereign is always meant supreme and not sub-ordinate in character. To be sued ensembles non-sovereign functions of the government. Therefore, the Art. 300 itself contains sovereign and non-sovereign powers inherently. Afortiory it can be said “to sue” is the characteristic of sovereign and “to be sued” is the characteristic of non-sovereign as an ordinary private individual or employer. In proper order, it can be put in this way “in respect of government. ‘to sue’ is sovereign and ‘to be sued’ is non-sovereign.

05. However, the article declares expressly that, the parliament or legislature of a state may enact the law defining the extent of their liability.

06. In order to determine present day extent of liability of the Government, we have to depend on the pre-constitution

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position, that is going to Government of India Act, 1935 and earlier to that to 1915 Act and earlier even to that to 1858 Act.

07. Apriory, the liability of the government in civil matters shall be the same as that of East India Company before the enactment of 1858 Act.

08. The *State of Rajasthan Vs. Vidyawati, AIR 1962 SC 933* was the first case decided by the Supreme Court of India dealing with the vicarious liability of Government, which approved the theory of sovereign and non-sovereign functions.

09. In the above case, the driver of a jeep car that was officially being used by the Collector of Udaipur in Rajasthan, while taking back the jeep car, from the workshop, after repairs, the driver knocked down a man on the public road, on the footpath on which he was walking. Due to multiple injuries, fractures of the skull and back bone he died in the hospital after three days. The death was held to be caused by the negligence of the driver.

10. The trial court decreed the suit against the driver but dismissed against the state. The High Court decreed against the driver and the State. Before the Supreme Court in appeal, the State raised two points :-

(i) Under Art. 300, the State of Rajasthan would not be liable as the corresponding Indian State would not have been liable had the case been arisen before the constitution came into force.

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(121)
(ii) The jeep car was being maintained officially in exercise of sovereign powers and not under any commercial activity of the state. Article 300 deals with the form of proceedings only. Actually Articles 294 and 295 deal with the rights and liabilities of the States.

11. The Supreme Court negatived the plea of the respondents. According to its judgment, the first part of Article 300 deals with the nomenclature of a suit and the second part defines the extent of liability in the “like cases”, which refers back to the legal position before the enactment of the Constitution of India. The court approved the ratio of Pannisular and Orient Steam Navigation Company Case and held that the Secretary of State would be liable for the negligence of the employees of the Government, if it were, such as to render an ordinary employer liable.

12. The Court with reference to liability of the State said, prior to the coming in to force of the State of Rajasthan, there was Rajasthan Union as a corresponding State and the State has failed to show that, the Rajasthan Union would have been immuned from the liability in like case. The Supreme Court held that, the constitution had established a welfare state, the functions of which were not limited to maintaining the law and order only. The position was analogous to East India Company in carrying on other welfare activities besides governmental functions. It would, therefore, be too much to claim immunity for the tortious act of its employees. Viewing the case from
the first principles, the state would be as such liable for “tort” as in respect of tortious act committed by its servants, within the scope of employment and functioning as such as any other employer.

13. The immunity of Crown in U.K. was based on the old feudalistic notion of justice that the king was incapable of doing any wrong and he could not be sued in his own courts. In India, since the advent of East India Company, the sovereign was held liable to be sued in tort or contract and the common law immunity never operated so far as India was concerned.

14. Now that we have our own constitution established a republican form of the government and one of the objectives is to establish a socialistic state with its varied industrial, commercial and welfare activities, employing a large army of servants both at the centre and states, there is no justification in principle or in public interest that the State should not be held liable victoriously for the tortious acts of its servants.

15. The “Rule of immunity” in favour of the crown. based on common law in the U.K. has itself disappeared from the land of its birth. There is no legal warrant for holding that it has any validity in this country particularly when we have enacted our own constitution as a supreme guiding force.

16. As the cause of action in Vidwati’s case, cited above, arose after the coming in to effect of the constitution. The
court is of the opinion that, it would be only recognising the old established rule going back to more than 100 years, if we hold the vicarious liability of the state. Article 300 of the Constitution itself has saved the right of parliament or the legislature of a state to enact such a law as it may think of fit and proper in this behalf. But so long as the legislature has not expressed its intention to the contrary, it must be held that the law is what it has been ever since the days of East India Company.

17. The observations of Supreme Court as above are certainly progressive in the spirit of Rule of Law. Some of the Text Book writers suggested that, Vidyawati’s Case would be a precursorer of new trend (M.P. Jain and S.N. Jain : Indian Constitutional Law, 2nd. Ed. P.470 : M.P. Jain : Indian Constitutional Law, 2nd. Ed. P. 742, in making the government liable like an ordinary employer. The Vidyawati case approved the law which has been ever since the days of the East India Company.

18. In the Judgment of Vidyawati’s Case, the Courts appear to have endorsed Hari Bhanji’s Case reported at AIR 1882 5, Mad.273 while rejecting the test laid down in Nobin chander Dey (1875 Cal.11). In the latter case, it was stated that, to hold the Government liability, the activity should be such which

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3. Nobin chander Dey (1875 Cal. 11).

(124)
can be undertaken by the private employer. But the endorsement by the Supreme Court of Rajasthan High Court's view in Vidyawati's case, placing differently the driver of vehicle engaged in military or public (police) service from the drivers of other Government vehicles, is unhelpful in clearing confusion. It is difficult to distinguish as to why the accidents resulted by the vehicle engaged in military or police service would not render the Government liable for injuries caused to its own citizens. How the Vidyawati case can be distinguished from the injuries caused to its citizens from the Government vehicles engaged in military and police vehicles is an enigma, since the Collector has not only to discharge the administrative but also police functions as a District Magistrate C.P. Gupta: State of Rajasthan V/s Vidyawati another comment. AIR 1962 SC 933\(^1\).

19. Contrary to the above view, the Supreme Court in Kasturilal Ratna Ram V/s State of Uttar Pradesh (AIR 1965 SC 1039)\(^2\), has disinclined to hold the state liable and up-held the doctrine of "sovereign immunity".

20. Kasturilal was a dealer in bullion at Amritsar. He came to Meerut to sell gold, silver and other goods. He was taken into custody by the police and searched. He was carrying gold of 103 Tolas, 6 Mashas and 1 Ratti and silver 2 Makuds and 61 Seears. They were seized and kept in police custody. He was released from custody and the silver seized from him was released to him.

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(125)
21. He brought suit to return his gold or alternatively pay him Rs. 11075-10-0 as price of gold and Rs. 355-00 as interest. The gold kept in Malkhana was mis-appropriated by the In-charge of Malkhana, Mohammad Amir, who fled away to Pakistan.

22. The respondents claimed it was not a case of negligence by the police, even if it was proved so, the State could not be liable for the loss.

23. The trial court gave the decree for Rs. 11430-10-0. The High Court held, the police officer were not negligent and even their negligence would not justify the claim of the plaintiff. The Supreme Court came to the conclusion of negligence by the police but did not allow the claim on the basis of the law laid down in *Penninsular and Oriental Steam Navigation Company's Case (1861) 5 Bom. H.C.R. App.1*.1

24. The Supreme Court observed that, "The power to arrest a person, search him and seize property found with him are sovereign powers". So there is no difficulty in holding that, the act was committed by the employee during the course of his employment. The employment being special characteristic of sovereign power, the claim for damages can not sustain as was decided by C.J. Peacock in 1861.

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(126)
25. Adverting to the decision in *Vidyawati case (AIR 1962 SC 933)*\(^1\), the Supreme Court observed that, the driver in the above case could not be said engaged in sovereign functions when he was taking back jeep car to the residence of the Collector from the workshop. Further the employment of the driver for the official use of the jeep by a civil servant could not be said as an activity of sovereign character. The court stressed the need to limit the area of sovereign immunity because of multi-faced activities of the Government, which are traditionally not considered as sovereign activities. The Court hoped that, the legislature in India would seriously consider to enact law on the line of English Law of Crown Proceedings Act, 1947.

26. Unfortunately, the Governments both at centre and in some states are of minority governments or coalition governments from the recent past. They are not hopeful of their survival if they introduce such bills for enactment. Moreover, they do not want to loose opportunity of the power of sovereign immunity either for the Government or for its servants and on being exposed of their scams and other scandals, the courts by their judicial activism hold them liable un-sympathetically and the danger of their being knocked out from the owner incremental looms large before them.

27. The observations of C.J. Gajendragadkar, in Kasturilal’s Case are pertinent to quote here-under:

\[1. Vidyawati’s Case (AIR 1962 SC 933).\]

(127)
"In dealing with the present appeal, we have ourselves been disturbed by the thought that a citizen whose property was seized by process of law, has to be told, when he seeks a remedy in a court of law that his property has not been returned to him, that he can make no claim against the state. That is not a very satisfactory position in law. The remedy to cure this position however lies in the hands of legislature".

28. The judgment in Kasturilal's case is enigmatic and the ratio is far from satisfactory and not convincing to the intelligentia. Alice Jacob in his book on Vicarious Liability of Government in Tort, 7 JILI 247 (1965) says the distinction between sovereign and non-sovereign functions of the state, as a basis of governmental immunity is upheld in the judgment or liability is outmoded. Alice Jacob is of the opinion that the indemnity from the erring public officer would serve as deterrent against negligence and in-efficiency.

29. In Kasturilal's case (AIR 1965 SC 1039), the "Rule of Law" at least acquired legal action against the police officer as a just measure but it would have been impossible" (A.R. Black Shield) : "Tortious Liability of Government, a jurisprudential case Note 8 JILI 643, 1966 P. 645), as he had fled away to Pakistan, which has no cordial relations with India. Black shield is of the opinion that, justice must be practical and responsible to the realities of the situation (A.R. Black Shield : Tortious Liability of Government : a Jurisprudential Case Note 8 JILI 643, 1966 P. 645). On the reality side, he says, the only possibility is that the loss must be borne by the bullion dealer himself, innocent police officer, or the state of U.P.
30. Blackfield compares Kasturilal’s case with *Australian Case of Howard V/s Jarvis* (98 Comm. W.L.R. 177, Aust, 1958). In the Australian case, Jarvis was arrested for assaulting a man in his house in the drunken state. He was locked up in a small police station guarded by only one policeman. On the night of the incident, Howard, the only policeman on duty had gone to his house, the cell caught fire and Jarvis was burnt to death. It might be due to negligent search of the prisoner, as cigarette and match box might have been left with him. The cause could not be ascertained. Howard was negligent in not making periodical inspection of the cell. The widow of Jarvis brought an action against the police and the state under the Compensation to Relatives Act. The police was partly under dereliction of duty. Whether the prisoner was guilty of contributory negligence and another issue was whether the police was personally liable. The former issue does not arise in Kasturilal’s case. The letter could have been a real issue with reference to the said case.

31. So hold that, the loss should lie where it was as in Jarvis’ case and the bullion dealer himself should sustain the loss would be un-just and contrary to justice and fair-play. It was not the first case of theft from Malkhana by a police constable says Blackshield in his book of Jurisprudence mentioned supra. He is of positive view in his book that the man who is deprived of his property by such act of the Government Servant must be recompensed and this is what justice insists and Rule of Law requires.
32. The two important cases of the Supreme Court i.e. "Vidyawati" and "Kasturilal" have been said to have created confusion in the existing dual criterion of sovereign and non-sovereign functions. Kasuarilal's case is said to be one of the "rash decisions" struggling to re-assess and rationally redeem the modern scope of old governmental prerogatives and immunities says A.R. Blackshield in his book of Tortious Liability of Government mentioned supra. Kasturilal's case has retarded the progress of fresh stimulus received in the field of Governmental liability in Vidyawati's case says Alice Jacob in his book on Vicarious Liability of Government in Torts mentioned supra. In the absence of definite enactment of law, we can not but depend upon the interpretations of the courts regarding sovereign and non-sovereign functions of the State and understand its tortious liability. Here are some of the cases cited from the Supreme Court judgments.

33. In Shamsunder Vs. State of Rajasthan (AIR 1974 SC 890, 1974, 2 SCC 690)\(^1\) a truck of PWD was engaged in famine relief work. The truck caught fire and the driver cautioned the occupants to jump out. Navneethan jumped out but struck against a stone and died instantaneously. His widow claimed damages for the negligence of the driver, because the truck was not road-worthy. The trial court found the truck was not road-worthy and held the driver negligent and held that, the plaintiff failed to prove the facts. The Supreme Court allowed to appear and awarded damages. The Supreme Court drew the inference

of negligence from the known circumstances. The court also
did not allow the plea of sovereign functions as the famine relief
work was not a sovereign function. The court did not go in to
rational dividing line of sovereign and non-sovereign functions
of the state.

34. In *State of Orissa Vs. Padmalochan Panda (AIR 1975
Ori. 41)*¹, there was an apprehension of danger of attack on the
office of the S.D.O. due to violent student and mob
demonstration the Orissa police cordoned off the court without
any order from the magistrate or higher police authorities. The
police assaulted the mob in which a plaintiff an advocate was
injured. He claimed damages against the police and the state
for vicarious liability. The plaintiff failed to prove the case, the
State was held not liable as the act was done in exercise of
sovereign powers.

35. The Orissa High Court technically held the State
vicariously not liable because the suit was dismissed against
the two police constables. The state was held not liable because
the act of the police was in exercise of sovereign powers. In
1749, 1977, 4 SCC 358)*², a theft was committed in the house
of the appellant and a large number of ornaments and cash were
stolen. The articles were recovered from the possession of
five persons and they were charge-sheeted. The articles were
produced before the magistrate who ordered to keep the articles

¹. *State of Orissa Vs. Padmalochan Panda (AIR 1975 Ori. 41).*

(131)
in Malkhana until they were verified and their value was determined by Gold-smith. The articles were kept in a trunk by the Sub-Inspector, placed the same in the guard-room of the police station. The new Sub-Inspector took charge and found the articles in-tact in the trunk. He proceeded on leave for 9 days. He was directed by the court to produce the articles before it after his return. When he opened the trunk he found stones in the place of articles. The articles were stolen away and the accused were not traceable.

36. After the trial the five accused were convicted. The appellate court acquitted them on technical ground. The appellant filed an application before the magistrate to return the articles or pay their value. The trial court rejected his application stating that the articles never reached the court and the petitioner was not entitled for restoration of the articles. His appeal to the Sessions Court and High Court failed. He took the matter to the Supreme Court with special leave petition.

37. The Supreme Court took the view that, where the subject matter of an offence is property, it should not be retained any longer than necessary. The Supreme Court held the decisions of Subordinate courts, including High Court were erroneous. The Supreme Court said where the property was stolen or destroyed or lost and there was no prima facie defence made out the state or its officer had taken due care and caution to protect the property, the magistrate, to meet the ends of justice, order payment of the value of the property.
38. The court further held that, the state could not be allowed to resist the claim as no action had been taken against the Sub Inspector or officers responsible for the loss except lodging FIR. The state was held liable to pay Rs. 10,000/- as the value of the property to the appellant.

39. The above case is distinguishable from Kasturilal’s case. Kasturilal’s case is a civil case and Smt. Basavva K.D. Patil’s case is a criminal case, because in Kasturilal’s case a civil suit was filed for claim. The Supreme Court by not referring Kasturilal’s case law in the present case, has not fully clarified the law. The theory of “Sovereign Functions” of the State immunizing the State from liability is an inroad in bringing the “Rule of Law”. Had the applicant made a reference in this case, to the theory of “Sovereign Immunity” on the ground of “Sovereign Functions” the facts not being different from Kasturilal’s case, the court might have been influenced otherwise. But there is a view that the court was justified in not referring Kasturilal’s case in this case because that case had no relevance to the criminal case (B.B. Pande in his book “A Step in The Direction of Reasonable Accountability, 1977 4 SCC (Journal Section) 13 P. 15, 16).

40. According to A.R. Black-shield, the court in Kasturilal’s case (AIR 1965 SC 1039) immunity in India and would have brought the Government under the liability for the tort of its servants, if the Court had concentrated on the first judgment of the Penninsular and Oriental Stream Navigation Company’s case:

(133)
“Where an act is done or a contract is entered in to in the exercise of powers usually called sovereign powers, by which we mean powers which can not be lawfully exercised by a sovereign or private individual delegated by sovereign to exercise then, no action will lie”. (5 Bom. HCR APPL. P. 15).

41. With reference to the above view, it is submitted that, such an approach by the court would be self contradictory. To reply the first half and ignore the second half will create a dilemma. To it Blackshield answers in his book mentioned supra that, the court could treat the second half of the judgment as obiter dicta.

42. For the last one decade it is interesting to note that the judiciary has been taking recourse to Article 300-A. The Madras High Court in Indira Gandhi V/s Union of India (AIR 1989 MADRAS 205)\(^1\) awarded damages against the state as police failed to quell riots timely when the properties of members of Sikh community were damaged soon after Indira Gandhi’s assassination. The damages were rewarded under Article 300-A which albeit not a fundamental right. The same view was taken by Jammu and Kashmir High Court in “Inderpuri General Stores V/s Union of India, AIR 1992 J & K. 11.\(^2\)

43. In State of Kerala V/s Padmanabhan Nair\(^3\), the Supreme Court on the point of Article 300-A (also Article 311) held the Government liable vicariously. The facts of the case

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1. Rajiv Gandhi v/s Union of India AIR 1989 MADRAS 205.
3. State of Kerala v/s Padmanabhan Nair
are, the respondent could not get his pension for more than 2 years three months after his retirement for the default of the Treasury Officer to grant Last Pay Certificate timely without any justification. The respondent claimed 12% interest per annum for delayed payment, by way of liquidated damages. But the District Court and High Court allowed interest at 6% per annum, as the respondent acquiesced for the same and the Supreme Court also has confirmed the same.

44. The Supreme Court observed that, pension and gratuity are no longer bounty to be distributed by the Government, to its employees on the retirement but have become under the decisions of this court valuable rights and property in their hands and any culpable delay in settlement and disbursement thereof must be visited with the penalty of payment of interest at the current market rate till actual payment.

45. Such judicial orders fall as soft petals on the ears of the Government servants who sit at the vantage points in the concerned departments. Since the penal interest for their default will be paid from the exchequer they are least bothered to change their attitude of delay. If the Government fixes the pension and issues the proceedings to the employee on the day of his retirement, it is an exceptional case boon for him. But the common grievance is the pension is never fixed and paid in time until some months or years are elapsed and it is a common phenomena with the Government either it is a State Government or Central Government. Some times the pensioner dies without
receiving the arrears of pension and that would be most unfortunate day. It is, therefore, suggested that criminal law as a deterrent action against the defaulting government servant may be enacted as a substitute for penal interest of payment on the analogy of Sec. 125 of Criminal Procedure Code.

46. In other case where the court did not spare the Government for its negligence was “State of Bihar V/S S.K. Mukherjee”. In that case, an employee of Bihar Government while crossing the turbulent river Cozy on a boat of Cozy Project Department was drowned. The Government was held liable for damages on an action by the father of the deceased. The ratio of the judgment was the government was liable for its negligence as it was the obligation of the master to ensure that the reasonable care was taken in performing the duties.

47. In State of Kerala v/s Cheri Babu (AIR 1978 KER.43)
the Government was held liable to pay damages when the advisor of the Governor going in a jeep on a private visit knocked down a person causing multiple injuries.

48. In Premavati Soni V/S The State of Rajasthan (AIR 1977 Rajasthan, 116), the driver took the jeep of the Forest Department and after repairs, instead of taking it in to the garage, gave lift to some persons and then gave a joy ride. The jeep met with an accident hitting the mile-stone and then falling in to

a ditch. The Court held the Government not vicariously liable for the death of two persons and injuries to others as giving lift and joy ride were not the acts of the driver in the course of employment. In case of employment there exists an implied prohibition to give lift to third parties (1976 ACJ 72 Gujrat Strict on “Law of Torts” 5th Edn. P. 429 Salmond on “Law of Torts”, 16 Ed. PP 474, 475).

49. Street and Salmond were in the days sovereign immunity of the king before 1947 Crown Proceedings were passed, when the common principle that king can do no wrong was indispensably followed in the English Courts. So was the case in India. But after enactment of Indian Constitution, 1950, Indian Courts by and large followed the spirit of Article 300-A and held the state liable in tort cases.

50. The court in the above case was not concerned whether there was an implied prohibition to give lift or not, whether giving lift to third parties was legal or illegal, whether the owner is the deciding authority to run the risk or not. The risk was taken. Ostensibly, the owner was liable for damages. The state being the owner is vicariously liable under Motor Vehicles Act, 1939. The judgment is unfortunate in Mariyam Joseph Vs. Hematlal Ratilal (AIR 1982 Guj. 23), the appellants, the wife and children of the deceased claimed damages from the state for the death of the deceased, as the death resulted when the driver of the water tanker gave him a lift and the accident

occurred on a sharp curve due to rash and negligent driving. The state took the defence that the driver had no authority to give lift to any person and if he did so, it was not in discharge of his duties and as such the state was not vicariously liable.

51. The court held that the driver could not have given a lift to the deceased as it was not a passenger vehicle, made no difference. He was driving the vehicle, for masters business. The presumption would always be that the vehicle was driven for the master's purpose and the driver was acting in the course of employment unless the presumption was rebutted (The court referred to Sitaram Vs. Shantaram Prasad, AIR 1966 SC 1697). In this case the presumption was not rebutted. The Gujrat High Court finally held the state vicariously liable under section 110-B and 116 of Motor Vehicles Act, 1939.

52. This appears to be certainly a changed thinking in a judiciary in regard to tortious liability of the state in consonance of the spirit and letter of "to be sued" under Article 300-A of the Constitution. It goes a long way in future to set a new trend of "Rule of Law" vis-a-vis the conception of sovereign immaturity of the State.

53. In Iqbal Kaur Vs. Chief of Army Staff (AIR 1978 All. 417, 1978 All.L.J. 654) the damages were claimed under section 110-B of Motor Vehicles Act, 1939 against the driver of

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(138)
the truck, Chief of the Army staff, the Commandant of the Centre, the Sub-area Commander, and the Union of India for the negligent and rash driving on account of which the deceased was killed. The claim was opposed on the negligence of the deceased himself and not of the driver. The liability of the chief of the army staff, Commandant of the centre and area commander, was opposed because the vehicle involved in the accident did not belong to any one of them. The liability of Union of India was opposed because the vehicle was detailed for the training of M.T. recruits and the driver was engaged in performing statutory duty at the time of the accident. The Claims Tribunal held the claim not sustainable since the driver was found not driving the vehicle rashly and negligently. The tribunal also held the Military Officers not liable on their above plea of the vehicle not belonging to them. It also held the Union of India not liable since the driver was performing statutory duty at the time of the accident.

54. But the Allahabad High Court held that, the accident occurred due to rash and negligent driving. The High Court held the driver and the Union of India liable. The court rejected the plea that the act resulted in accident while exercising statutory sovereign power because the truck was engaged in imparting training of motor driving to new recruits.

55. The growing trend of judiciary holding state tortiously liable as against the victimized citizen, is a happy agony in favour of Rule of Law. It is rather a check against the autocratic exercise of power by the Government in democracy.
56. In *Union of India Vs. Abdul Raheman (AIR 1981 J&K 60)*, there was a head-on-collision between a truck driven by a driver of private owner and the water tanker driven by Border Security Force driver. The truck was completely damaged and its driver received some injuries.

57. There was no dispute that the act of the Border Security Force driver was not referable to the exercise of any sovereign power delegated to him by Union of India. But the stand taken was, the driver was a "statutory employee" under B.S.F. Act, and the Union of India could not be fastened with liability because, it had not control over the statutory employees.

58. The Court held that, the Union of India was liable since the plea taken by the respondent was "misconceived" as the status of B.S.F. did not lose the character of being employees of the Union of India merely because the BSF regulated the working of the force. The BSF Act contains that the BSF is a force of the Union of India and the general superintendence, direction and control vests in the Central Government. That being so, the fallacy of the argument stood exposed that the Union of India had no control over the personal of BSF regarding the control test, the court observed:

"For a long time, the test of determining master and servant relationship was that of "control" only but that test was the product of primitive society where the employer had the

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(140)
competence of instruct the workman as to the methods to be followed in the performance of his work. But with the advancement of science and technology, the control test has fallen into disrepute and it can not be strictly applied in each and every case. It remains an important factor, where it can be applied but it is not the only matter to be taken in to account to determine the relationship between the master and servant”.

59. The test of hire and fire has also of late assumed more importance. The right of “Hire” and “Fire” under BSF Act vests in the Union of India. If it was only “control” test to be applied in every case, then the house surgeons and medical assistants of state owned hospitals cannot be regarded as servants of the state and consequently the state can not be held liable for the torts committed by those doctors.

60. In Subhash Chandra Meena Vs. Madan Mohan Sood AIR 1988 Raj.186¹, a jeep owned by State of Rajasthan was being driven by one Subhash Chandra Meena, the Asstt. Engineer, when he was going on state work. The authorized driver of the jeep Premchandra was sitting in the vehicle when an accident took place and the jeep rolled down in a canal causing death of a man called Rajeev. The lower court allowed compensation against Subhash Chandra Meena and not the State. He filed the appeal for vicarious liability of the State. The High Court held that the State of Rajasthan would also be liable vicariously in addition to the liability of the appellant, since the

jeep was owned by the state and the authorized driver by allowing the appellant to drive, allowed it to be driven for himself and the state and the injury resulted during the course of his employment due to his negligence.

61. In *State of U.P. Vs. Hindustan Lever Ltd. AIR 1972 All.486¹*, the facts of the case are: It was a Public Limited Company and it wanted to deposit Rs. 50,000/- by way of excise duty in the Sub-Treasury maintained by the State Government of Uttar Pradesh at Gaziabad, Punjab National Bank to deposit Rs. 50,000/- on their behalf in the Government Sub-Treasury at Gaziabad, and debit their current account to the said amount. The Bank after making the deposit informed the plaintiff about the payment and also annexed to the latter a challan no. 3 in duplicate dt. 18th July 1955. The plaintiff afterwards came to know that the said deposit had not been credited to the plaintiff’s account at the Sub-Treasury because the Accountant and the Treasurer of the Sub-Treasury had embezzled the said amount. The Accountant was acting in exercise of the statutory powers as he was authorized to receive money according to Treasury Rules. In action against the State of U.P. the Allahabad High Court referred to Kasturilal’s case and held that mere fact that the act was done in exercise of statutory powers is no defence. It has got to be further proved that the act was done by way of exercise of sovereign power. Maintaining the Treasury was considered to be an ordinary banking business, which could have been carried by any private individual. The State was, thus, held liable.

³ State of UP Vs. Hindustan Lever Ltd. AIR 1972 All.486.
62. In State of U.P. Vs Tulshiram, AIR 1971 All. 162¹ five persons were prosecuted for offences punishable under sections 148, 323, 325, 307 of Indian Penal Code. In the Sessions Court, Tulsiiram, one of the accused, was acquitted by the said court while the rest were convicted.

63. On appeal to the Allahabad High Court, Ramprakash, another accused, was acquitted by the High Court, but the conviction of the remaining three was confirmed. The High Court authorized the arrest of the three persons. The order of the arrest was sent to Sessions Court. The Sessions Court in turn sent the directions to the District Magistrate to cause the arrest of the three persons. The District Magistrate forwarded the same to the Committing Magistrate (a Judicial Officer) to see that the orders of arrest of three persons were complied with. His sub-ordinate prepared warrants of arrest of all the five persons and caused the arrest of acquitted persons also. The Judicial Officer negligently signed the warrant of arrest. The plaintiff/respondents who were acquitted, having thus being arrested by the police, filed a suit for false imprisonment against the government of UP as well as the judicial officer.

64. Following Kasturilal’s case, the High Court held that the Judicial Officer was carrying out a duty imposed upon him by law to carry out the directions of the Sessions Judge and the State of UP was thus, not liable.

¹ State of U.P Vs. Tulshiram AIR 1971 All. 162.
65. The High Court also held that the exemption of the State from liability still kept open the liability of the guilty government servant intact unless he was otherwise protected.

66. It also held that the Judicial Officer while ordering the arrest was performing only a ministerial and not a judicial function and as such he could not claim immunity under the Judicial Officer's Protection Act. A decree of Rs. 500/- was passed in favour of the plaintiff/respondent against the Judicial Officer.

67. As in England, after passing of the Crown Proceedings Act, 1947, so is the case in India. The above decision is, therefore, perfectly in equi-justice.

68. In the case of State of Gujrat Vs. Memon Mohammad, AIR 1967 SC 1885\(^1\), the Custom authorities of India seized two trucks, a station-wagon and other goods belonging to the plaintiff on the grounds that the plaintiff had not paid import duties on the said trucks and that they were sued for smuggling goods and that some of the goods were smuggled goods. The custom authorities made false representations to the magistrate concerned stating these to be regarded as un-claimed property and disposed of the same under the orders of the Magistrate.

69. Subsequently the Revenue Tribunal set aside the said order of confiscation and directed the return of the vehicle to

\(^1\) State of Gujrat Vs. Memon Mohammad, AIR 1967 SC 1885.

(144)
the plaintiff. The plaintiff claimed back his vehicles or in the alternative, the value of the same, amounting to Rs. 30,000/-.

70. The Supreme Court held that after the seizure, the position of the Government was that of a bailee. The order of the magistrate obtained falsely representing did not effect the right of the owner to demand the return of the property. The Government, therefore, had a duty to return the property and on its failure to do the same, it had a duty to pay compensation.

71. In *Peoples Union for Democratic Rights Vs. State of Bihar, AIR 1987 SC 355*¹, about 700 poor peasants and landless persons had gathered for peaceful meeting, without any previous warning by the Police or provocation by those gathered, the Superintendent of Police surrounded the gathering with the help of the police force and opened fire. As a result, at least 21 persons including children died and many more injured. The People's Union of Democratic Rights (PUDR) filed an application before the Supreme Court under Article 32 of the Constitution, claiming compensation for victims of the firing.

72. The Supreme Court held that, the state should pay compensation of Rs. 20,000/- for every case of death and Rs. 5,000/- for every person injured. The amounts were ordered to be paid within two months without prejudice to further just claim victims afterwards.

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¹ *People's Union for Democratic Rights Vs. State of Bihar, AIR 1987 SC 355.*
73. This is a successful break through the traditional concept of sovereign immunity. In *Sebastian M. Hungary Vs. Union of India (AIR 1984 SC 1026)*\(^1\) two persons were taken in to custody by the army authorities at Manipur. The army authorities failed to produce these persons in obedience to the writ of Habeas Corpus. They were feared to have been met with unnatural death while in the army custody. The wives of the two persons were awarded exemplary costs of Rs.1,00,000/- to each and this amount was ordered to be paid within four months.

74. In *Bhim Singh Vs. State of J&K (AIR 1986 SC 494)*\(^2\) the petitioner who was a M.L.A. was wrongfully detained by the police and thus prevented him from attending the assembly session. The Supreme Court ordered the payment of Rs. 50,000/- by way of compensation to the petitioner.

75. In *Radul Sahh Vs. State of Bihar (AIR 1983 SC 1086)*\(^3\) the petitioner was acquitted by the Court of Session on June 3, 1968, but was released from the jail more than 14 years thereafter on October 16th 1982. In the Habeas Corpus petition, the petitioner not only sought his release, but also claimed ancillary reliefs like re-habilitation, re-embursement of expenses likely on medical treatment and compensation for unlawful detention. The state could not give any justifiable reasons for

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treatment of mental imbalance of the petitioner.

76. The Supreme Court ordered the payment of compensation of Rs. 30,000/- as an interim relief in addition to the payment of Rs. 5,000/- which was already been made by the State of Bihar. It was also held that the order of compensation did not preclude the petitioner from bringing a suit to claim appropriate damages from the State and its erring officials.

77. The approach of the Supreme Court in the above cases of Sebastain M. Hungary, Bhimsingh and Rudul Shah is a welcome measure which was long over due.

78. For the last one and half decades, it may be observed that the Supreme Court decisions have been literally by-passing the law laid down in Kasturilal’s case. It may be further noticed that the Supreme Court under Article 300-A of the constitution has been granting compensation liberally to the citizens who have been deprived of life, liberty and property by the State holding it tortiously liable as an ancillary relief while exercising its writ jurisdiction under Article 32.

79. Explaining Vidyawati and Kasturilal’s case in the case of Devasetty Rama Murthy (1985(2) Andhra W.R. 402, F.B.) the Supreme Court said that the liability of the State to compensate for negligence of officers was to be decided on general principle in the absence of any law framed by the legislature.

80. The court impressed upon the necessity to enact a law regarding the liability of Government for the negligence of its servants in keeping with the dignity of the country and to remove the uncertainty and dispel the mis-givings.

81. It needs political will to enact such a law. Let us hope and look forward for such enactments to be made by the legislature.