CHAPTER-I
TORTIOUS LIABILITY OF
THE GOVERNMENT OF INDIA,
ENSHRINED UNDER ARTICLE 300

INTRODUCTION

01. The present research work is confined to the subject "Tortious Liability of Government of India under Indian Constitution, Article-300" only otherwise, mere "Tortious Liability" will be prolific and its application will be very vast and extensive. For example, a person, causing legal injury can be any person, corporate, in-corporate, association, club, society, board and any individual. Similarly, the person entitled for or authority damages for the injury to his body, reputation and mind, can be any body who may animate. The person causing injury is liable and the person injured, as described above, is entitled.

02. The treatise chosen is self-explanatory and does not need any definition in view of its brevity and clarity. Tortious Liability of Government of India arises, when its agencies or instrumentalities or its Government Servants, omit to act in implementing or enforcing laws, passed by the Government or if they act in excess of powers conferred on them by law and under either of the circumstances cause legal injury to the persons or loss or damage to their properties. Article-300 of Indian Constitution says that, Union of India or its States i.e. Governments can sue and can be sued as obtained in the earlier Dominion Status. When the position of the dominion status is examined, the reference will be found back to the Government
of India's 1935 Act; when that referred to, it makes reference to 1915 Act of Government of India, which in turn, refers to 1858 Act and this Act ultimately refers to the position of East India Company and the King of England in Parliament. The dual functions discharged by East India Company throws some light on the sovereign and non-sovereign powers of the company in India. When the company carried on the administration as agents of the Crown, they are said to have exercised sovereign powers, not liable to tortious actions. Their functions were said to be non-sovereign when they related to their commercial activity. These non-sovereign powers exercised by the company attracted tortious liability. In England by Crown Proceedings Act, 1947, the King is answerable to the English Parliament and the Crown is accountable to legal wrongs of its Government Servants for Tortious Liability. But in India, even after 50 years of independence, no specific law is passed fixing responsibility and accountability of the Government Servants for their legal wrongs holding them tortiously liable if they act in excess of discretionary powers or those conferred on them by law.

03. A public servant retires on a specific day. The Government issues orders to pay the pensionary benefits to the retired person promptly by issuing cheque, the day of retirement. Years elapse, he will not receive the pension unless he approaches the judiciary. There is no law to hold the government servant tortiously liable for in-action. The system "Sati" is prohibited by law. Locally the reputed and responsible persons attend the ceremony with pomp and glory as noticed in Deorala Case, the widow is sacrificed on the funeral pyre of her
husband, the police arrests some people allegedly accused, the Court releases them honourably, for want of evidence. Law of Tortious Liability needs to be passed and extended to such cases in the interest of Social Justice.

04. Besides the above circumstances, the recent scams, Hawalas, Scandals on the political plane in the country provide imperative need and importance for the enactment of law on Tortious Liability. **Boffors Gundeal Case, German Gun Boats' Case, Harshad Mehta's Public Share's Case,** in which public servants and Bankers colluded, were all White Collar Crimes, that took place in the recent past, involving thousands of Crores of rupees belonging to the public finances when C.B.I. questioned one of the accused, **Mr. Harshad Mehta**, he promptly answered that, the fault lies with the system of Government, for such opportunities.

05. Recent investigations by the C.B.I. in to **Hawala Cases Viz. Fertilizer's Case, St. Kitt's Forgery Case, Jharkhand Mukti Morcha Bribery Case, Lakhubhai Pathak's One Lakh Pounds Case and Bihar Animal Husbandary Fodder scam** and so on, disclose that crores of Public Finances are involved in the crimes in which political leaders and ministers are partners. Illegal and out of turn allotment of Government houses and shopping complexes to the interested persons by the Housing Minister and indiscerniionary and arbitrary allotment of Petrol Pumps to the interested persons by the Petroleum Minister of Government of India, clearly indicate favouritism, nepotism and extraneous considerations. The Supreme Court of India has imposed exemplary fine of Rs. 50,00,000/- on **Mr. Satish**

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Sharma, Ex-Petroleum Minister and Rs. 60,00,000/- on Mrs. Sheila Kaul, the Ex-Housing Minister of Government of India. Besides these cases, the C.B.I. has detected Rs. 3.5 Crores belonging to Mr. Sukhram, Ex-Telecom Minister, Government of India, in his house, for which there was no proper explanation. All these Hawala Cases and Scams are fully covered and reported in the regional and national newspapers.

06. In the circumstances, mentioned supra, the subject of research assumes double the importance and there is urgent need of passing law by the Central Government of India on Tortious Liability and fixing accountability with transparency and responsibility on the public servants and political leaders wielding governmental and public authority. In all financial scams and scams, law of tortious liability, need to be strengthened for imposition of fines equivalent to a sum of each scam involved. There is a need of a separate bill to that effect to be passed in the Parliament.

07. Above all, the following three judicial decisions attracted my attention and arose curiosity in me to formulate the above subject for taking up research work:

i) Peninsular and Oriental Steam Navigation Company v/s Secretary of State for India¹.

ii) State of Rajasthan v/s Vidwati².

iii) Kasturilal Raha Ram Jain v/s State of U.P.³.

¹. (1861) 5 Bom.H.C.R. App. 1, P-1
². AIR 1962 Supreme Court 933.
³. AIR 1965 SC 1039.
08. The Peninsular and Steam Navigation Company, cited at Sr.no.[i] is supposed to be a first case decided under the Government of India Act, 1858. Section 65 of the Act expressly stated that:—

"The Secretary of State-in-Council shall and may sue and be sued as well in India as in England.... and all persons and bodies politic shall and may have take the same suits against the Secretary of India in respect of debts and liabilities lawfully contracted and incurred by the East India Company".

09. The first case cited was decided by the Supreme Court of Bengal in accordance with the 1858 Act, distinguishing between sovereign and non-sovereign functions over-looking the principle of "Rule of Law" and the well established maxim of "King can do no wrong". The Supreme Court of Bengal in the above case laid down a law of Governmental Liability in case of injury caused by the Government Servants in course of non-sovereign functions of the State.

10. In the Second case cited, the Supreme Court held that, "the state should be as much liable for Tort in respect of tortious act committed by its servants within the scope of his employment, and functioning as such as any other employer".

11. The State of Rajasthan V/s Vidyawati¹, the Supreme Court of India in 1962 decided as a first case of a State, after independence, distinguishing sovereign and non-

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¹ AIR 1962 SC 933.
sovereign powers of the Government on the basis of its activities such as welfare state and commercial activities which could be carried on by a private individual also. The state is held liable by both the High Court of Rajasthan and Supreme Court. Had the event taken place before independence i.e. 1947, the State perhaps would have been liable as a sovereign princely state in India since it was not a province under British rule in India. Even if the decision were to be after independence and the event before 1947, Article-300 of the Indian Constitution would have protected the sovereignty of the state and prevented the liability.

12. The third case cited was decided by the Supreme Court in 1965 and the event took place before the Constitution of India was enacted in 1949. The Supreme Court, in this case, distinguished sovereign and non-sovereign functions of a state as a basis of Governmental immunity and upheld the case as a sovereign function. The mis-conduct of the Police Officer was not brought to scrutiny although he removed the seized gold from the official custody and ran away to Pakistan with the gold. It was a clear act of theft of Government property and his act was a misconduct. Rule of Law demanded legal action against him, in the least. Justice is far from practical situation. The police officer was not to be found. The state is given safe position of sovereignty as not liable. The petitioner who is the innocent bullion dealer is made a sacrificial goat to bear the loss. It looked as though "King is dead in England and long live the King in India"., after 1947 Crown Proceedings Act.
3. But in a similar parallel case, the Supreme Court in Smt. Basawa K.D. Patil v/s State of Mysore. The Supreme Court of India decided that, the State in the matter functioned as a non-sovereign and hence held liable. In this case, theft took place in a private house. Articles were recovered by the police from the five accused persons. The Magistrate directed the articles to be kept in Mal-khana until verification and determination of value by gold-smith. The articles were kept in a truck by the S.I. in the guard room of the police station. The S.I. took charge of the articles in tact. The new S.I. who took charge, went on leave. The Court ordered the new S.I. to produce the articles before the Court, after the expiry of leave of 9 dyas. When he opened, the found stones in the truck. The articles were stolen away and the accused were acquitted on technical grounds and they petitioned to return the articles or their value in their absence. The Trial Court, Sessions Court and High Court rejected on the ground that the articles never reached the custody of the Court and as such they were not entitled to claim. The matter was taken upto Supreme Court. The Supreme Court held that the articles were "custodia legis" and the State has not made prima facie defence and the State could not be allowed to resist the claim. The Supreme Court decided that the State was liable to pay Rs. 10,000/- as the value of the property to the appellants.

14. Kasturilal’s case dealt with Civil Suit whereas the above case is a criminal case in Criminal Court. Rule of Law is followed in Mrs. Basawa Patil case and Justice is done to the individual. But the Rule of Law was antithetic to immunity of

1. AIR 1977 SC 1748.
2. Kasturilal’s V State of U.P. AIR 1965 SC 1039
State under sovereign functions. Perhaps that was the reason why Kasturilal's case has not been referred to, by the Supreme Court in Mrs. Basawa Patil's case. The Supreme Court in effect followed Vidyawati case in Basawa Patil case.

15. From the cases cited, it is inferred that any citizen or non-citizen in India aggrieved of legal injury, to the body, mind and reputation or to his property caused by the servants or agencies or instrumentalities of Central or State Government will have to depend on the construction of the sovereign and non-sovereign functions of the State by the High Court and Supreme on the principle of equity, justice and good conscience of English common Law. That means, immediate redressal by way of damages for the legal injury caused by the State is a far off cry of the victim in the absence of enactment of definite law. The doctrine of immunity of State in regard to claims made against it for tortious acts committed by its servants was imported into India by the British Rulers from England. The Common Law Principle was substantially modified in England itself by the Crown Proceedings Act, 1947. The Law Commission of India in its First Report on the "Liability of State" in Tort, "has recommended legislation prescribing State liability as in England. On the basis of the above report, a bill entitled "The Government Liability in Tort" Bill 1967 was introduced in Lok-Sabha. The bill was reported to have been placed before the Lok-Sabha in 1969. It has not yet become law. The Bill seeks to define the liability of the Government towards third parties i.e. citizens and non-citizens of India for the wrongs of its servants, agents and independent contractors employed by it.
16. As per the information of "Lokmat Times", an English daily of Marathwada, dated 26.12.1996, the Law Commission of India, once again, defining Tortious Liability of the State for the legal wrongs done by its servants, causing legal injury to a person in body, mind and reputation and loss or damage to his property, has sent a report to the Central Government to formulate a Bill, incorporating appropriate damages, introduce the same in the Parliament and make an enactment in the matter. It is to be seen how far the present coalition Government in the Centre takes interest and submit the Bill and make a Law.

17. I am of the firm conviction that adequate and prompt payment of fixed damages by way of compensation is a sine-qua-non for rendering social justice in the welfare State to the people and the State must honourably acquiesce in its tortious liability by making express law, that is a need of the time. The idea of social justice has ultimately compelled me to take up the research work on the subject mentioned at the top of introduction.

18. For the convenience of the project, of the research work, the title of the subject has been sub-divided into Chapters as shown in the following:

- **CHAPTER - I** Introduction
- **CHAPTER - II** The Concept of Sovereign Immunity
- **CHAPTER-III** Tortious Liability of Governemnt of India - a Comparative study.
  i) United Kingdom
  ii) Law Prior to 1947
  iii) U.S.A. (Federal Tort Claims Act, 1946)
  iv) France
CHAPTER-IV  Tortious liability in Ancient Indian Polity
CHAPTER-VI  Tortious liability of the Government under the Constitution.
CHAPTER-VII Sovereign and non-soverign functions
CHAPTER-VIII Reforms in Tort law in India.
             (Recommendations of Law Commission of India in Tort Law)
CHAPTER-IX  Conclusion and Suggestion.