

# Development of Vicarious Liability of State (Case Comment of Kasturilal v. State of Uttar Pradesh)

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## ABSTRACT:

The maxim that the ‘King can do no wrong’ and the resulting rule of the common law that the ‘Crown was not answerable for the torts committed by its servants’ have never been applied in India. India, as a State, is a mixed economy of vast population. Also, by virtue of being a semi-socialistic economy, the government still plays a major role in almost all aspects of the economy. This means that there is a lot of interaction between the State and the citizens of India, may it be in the form of trading with government companies, or interacting with the State officers such as the police, or the bureaucrats, etc. It is hence of utmost importance that the State should be made liable for all those acts of its officers which cause harm to any of the citizens.

The stance of the Indian Judiciary on the liability of the State for the acts of omission or commission committed by its servants has never been the same, and has kept on changing over the years with varied judgments. The Common Law maxim “Rex Non Potest Peccare”(The King can do no wrong) provided absolute immunity to the Crown in that neither the Crown, nor could its employees or servants ever be held liable for any wrong committed by them. This was, however, never followed in India. The East India Company initially came to India as a trading firm. However, later on it started to rule a large part of the country and the scope of its powers and authority was defined by legislations passed by the British Parliament. After the 1857 uprising the company was dissolved and the rule passed over directly to the British Crown. During this period the liability of the Crown depended upon the powers and authority of the Head of the state. In pre-independence period the liability of the State was a major question which confounded all the courts. At this time a distinction was made between sovereign and non-sovereign functions, with complete immunity being given to the former. However, the scope of sovereign or non-sovereign functions was never clearly defined, and hence depended on judicial interpretation.

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## I. INTRODUCTION

The question of liability of the state came up for consideration many times before the Supreme Court and it was just another instance in the case of *Kasturilal Ralia Ram Jain v. State Of U.P.* In this case, a partner of *Kasturilal Raliaram*, a firm of jewellers of Amritsar went to Meerut for selling gold and silver. He was taken into custody at Meerut by police constables on the suspicion of possessing stolen property. He was kept in lock up and the gold and silver recovered from him were kept in custody of the police. He was released on the next day and sometime later the silver seized from him was returned. The gold could not be returned to him as the Head constable in charge of the malkhana misappropriated it and fled to Pakistan. It was found that the police officers had failed to follow the U.P. police regulations in taking care of the gold. The supreme court held the state not liable on the view that the tort was committed by the police officers in the exercise of delegated sovereign powers.

## II. BACKGROUND

Absolute immunity of the Government was not recognised in the Indian legal system prior to the commencement-

nt of Constitution and in a number of cases the Government was held liable for tortuous acts of its servants.

### **Tort law in India**

In India, the term tort has been in existence since pre-independence era. While India generally follows the UK approach, there are certain differences which may indicate judicial activism, hence creating controversy. Tort law in India, like her common law counterparts, stems from both statute and common law. However, tort law as such has not been codified.

## **III. VICARIOUS LIABILITY**

This is a form of strict, secondary liability that arises under the common law doctrine of agency, *respondeat superior*, the responsibility of the superior for the acts of their subordinate, or, in a broader sense, the responsibility of any third party that had the “right, ability or duty to control” the activities of a violator. *Respondeat Superior* means “let the master answer.” This means that a master is liable in certain cases for the wrongful acts of his servant, and a principal for those of his agent. Under this doctrine master is responsible for want of care on servant’s part toward those to whom master owes duty to use care, provided failure of servant to use such care occurred in course of his employment. Doctrine only applies when relation of master and servant existed between defendant and wrongdoer at time of injury sued for, in respect to very transaction from which it arose. Employers are vicariously liable, under the *respondeat superior* doctrine, for negligent acts or omissions by their employees in the course of employment (sometimes referred to as ‘scope of employment’). For an act to be considered within the course of employment, it must either be authorized or be so connected with an authorized act that it can be considered a mode, though an improper mode, of performing it.

The classic statement of the law until the recent cases was the formulation in Salmond, Law of Torts : a wrongful act is deemed to be done in the course of the employment: If it is either

- (1) a wrongful act authorised by the master, or
- (2) a wrongful and unauthorised mode of doing some act authorised by the master.

*Qui facit per alium facit per se* is a Latin legal term meaning, “He who acts through another does the act himself.” It is a fundamental maxim of the law of agency. This is a maxim often stated in discussing the liability of employer for the act of employee.

## **IV. DEVELOPMENT VICARIOUS LIABILITY OF STATE IN INDIA:**

The Company eventually came to rule large areas of India, following the Indian Rebellion of 1857, the **Government of India Act 1858** led to the British Crown assuming direct control of India in the era of the

new British Raj. Section 65 of this Act, which is the parent source of the law relating to the liability of the Government, provided that: “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 for India as they could have done against the said Company”. 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 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. These provisions were continued by the succeeding Government of India Acts, and is also continued by article 300(1) of the constitution of India which provides that 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; secondly, that the Government of India or the Government of a State may 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 be sued, “if this Constitution had not been enacted”, and thirdly, that the second mentioned rule shall be subject to any provisions which may be made by an Act of Parliament or of the Legislature of such State, enacted by virtue of powers conferred by the Constitution. There are many other acts before constitution which talked about liability of the government like, Government of India Act of 1833, 1915 and 1935. Even though more than 50 years have elapsed since the commencement of the Constitution, no law has so far been made by Parliament as contemplated by article 300, notwithstanding the fact that the legal position emerging from the article has given rise to a good amount of confusion. Even the judgments of the Supreme Court have not been uniform and have not helped to remove the confusion on the subject, as would be evident from what is stated hereinafter.<sup>1</sup>

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<sup>1</sup> Ratanlal and Dhirajlal, Law Of Torts, 27<sup>th</sup> Edition.

## V. WHAT ARE SOVEREIGN FUNCTIONS AND NON-SOVEREIGN FUNCTIONS?

A sovereign function can be described as a function which is performed exclusively by the government under the sovereign powers of the state or refers to functions authorized by a statute. Examples include functions of the army, powers enjoyed by police under the police act. Non sovereign functions include functions which are performed by private entities as well.

## VI. SOVEREIGN IMMUNITY

Sovereign immunity, or crown immunity, is a legal doctrine by which the sovereign or state cannot commit a legal wrong and is immune from civil suit or criminal prosecution. In constitutional monarchies the sovereign is the historical origin of the authority which creates the courts. Thus the courts had no power to compel the sovereign to be bound by the courts, as they were created by the sovereign for the protection of his or her subjects. At their core, what sovereign immunity doctrines prohibit is generally clear: a suit against an unconsenting sovereign (whether a state, a tribe, a foreign nation, or the federal government) for money damages. When suits fall outside this configuration, however, courts often have difficulty determining exactly how far the doctrine should extend. Sovereign immunity, the principle derived from the ancient truism that the “king can do no wrong” and holding that nations are immune from the jurisdiction of other nations’ courts, is recognized by virtually every nation in the world. It basically provides immunity to the state while performing sovereign functions in other words state cannot be sued in performance of sovereign functions.

## VII. PRECEDENTS

In India, the story of the birth of the doctrine of Sovereign Immunity begins with the decision of Peacock C.J. in *Peninsular and Oriental Steam Navigation Company v. Secretary of State for India*,<sup>2</sup> in which the terms “Sovereign” and “Non-sovereign” were used while deciding the liability of the East India Company for the torts committed by its servants. In this case the provision of the Government of India Act, 1858 for the first time came before the Calcutta Supreme Court for judicial interpretation and C.J. Peacock determined the vicarious liability of the East India Company by classifying its functions into “sovereign” and “non-sovereign”. In this case a servant of the plaintiff company was proceeding on a highway driving a carriage drawn by a pair of horses. Due to the negligence of the servants of the Government an accident happened and in which one of the one of the horse of the plaintiff’s carriage was injured. In holding that for such an accident caused by the negligence of its servants in doing acts not referable to Sovereign powers the East India Company would have been liable and so the secretary of the state was liable. The East India Company were not sovereigns and therefore, could not claim all the exemptions of a sovereign and they were not the public servants of

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<sup>2</sup> (1861) 5 Bom HCR.

Government and therefore did not fall under the principle of the cases with regard to liability of such persons but they were a company to whom sovereign powers were delegated so the state was held liable.

Two divergent views were expressed by the courts after this landmark decision in which the most important decision was given by the Madras High Court in the case of Hari Bhan Ji v. Secretary of State,<sup>3</sup> where the Madras High Court held that the immunity of the East India Company extended only to what were called the 'acts of state', strictly so called and that the distinction between sovereign and Non-sovereign functions was not a well-founded one. No attempt however has been made in the cases to draw a clear and coherent distinction between Sovereign and Non-Sovereign functions at all.

After the commencement of the Constitution, perhaps the first major case which came up before the Supreme Court for the determination of liability of Government for torts of its employees was the case of State of Rajasthan v. Vidyawati.<sup>4</sup> In this case, court rejected the plea of immunity of the State and held that the State was liable for the tortious act of the driver like any other employer. In practice, the distinction between the acts done in the exercise of sovereign functions and that done in non-Sovereign functions would not be so easy or is liable to create considerable difficulty for the courts. The court distinguished the decision in Vidyawati's case as it involved an activity which cannot be said to be referable to, or ultimately based on the delegation of governmental powers of the State. On the other hand, the power involved in Kasturilal's case to arrest, search and seize are powers characterized as Sovereign powers. Finally the court expressed that the law in this regard is unsatisfactory and the remedy to cure the position lies in the hands of the legislature. The court in the above case stated that it was a non sovereign function and now that we have, by our constitution established a Republican form of Government there is no justification in principle or in public interest that the State should not be held liable vicariously for the tortious act of its servant.

## VIII. ANALYSIS

As already mentioned the question of liability of the State again came up for consideration before the Supreme Court in Kasturilal Ralia Ram Jain v. State of U.P. The issues raised in this case were: (i) whether the police officers were guilty of negligence in taking care of the gold seized from Kasturilal and whether the state was liable to compensate Kasturilal for the loss caused by the public servant employed by the state. In upholding the defence of immunity pleaded by the State of U.P. GAJENDRAGADKAR C.J., further held: "The act of negligence was committed by police officers while dealing with the property which they had seized in the exercise of their statutory powers. Now the power to arrest, to seize are powers conferred by statute and in the last analysis they are powers which can be properly characterized as sovereign powers, so the claim cannot be

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<sup>3</sup> ILR (1882) 5 Mad 273.

<sup>4</sup> 1962 SC 933

sustained.” In this case, the Supreme Court followed the rule laid down in P.S.O. Steam Navigation case by distinguishing Sovereign and non-Sovereign functions of the state and held that abuse of police power is a Sovereign act, therefore State is not liable. It may also be noted that Vidyawati’s case was distinguished as being confined to tortious liability arising from the exercise of sovereign power.

The decision of the Supreme Court in Kasturilal’s case is not satisfactory and has been criticized by leading constitutional authority. It fails to appreciate the modern development of law where there is no logical basis for State immunity which has been abolished in the country of its origin. Although the decision of Supreme Court in this case is yet to be overruled subsequent decisions have greatly undermined its authority and are hardly ever used as a precedent.

The Courts in later years, by liberal interpretation, limited the immunity of State by holding more and more functions of the State as non-Sovereign.

To ensure the personal liberty of individuals from abuse of public power, a new remedy was created by the Apex court to grant damages through writ petitions under Article 32 and Article 226 of the Constitution. In the case of Rudal Shah v. State of Bihar,<sup>5</sup> the Supreme Court for the first time awarded damages in the writ petition itself.

In Bhim Singh v. State of Rajasthan,<sup>6</sup> then principle laid down in Rudal Shah was further extended to cover cases of unlawful detention. In a petition under article 32, the Apex court awarded Rs. 50,000 by way of compensation for wrongful arrest and detention.

The latest case of State of A.P. v. Challa Ramakrishna Reddy<sup>7</sup> on the point clearly indicates that the distinction between Sovereign and non-Sovereign powers have no relevance in the present times. The Apex Court held that the doctrine of Sovereign immunity is no longer valid. We have noticed above that the A. P. High Court rejected the plea of sovereign immunity when the compensation was claimed for the violation of fundamental right under article 21. The court was of the opinion that the concept of immunity in respect of sovereign function implicit in clause 1 of article 300, could not be recognised as an exception to article 21. The liability of the government for tortious acts of its employees and the state immunity for sovereign functions was, of course, read into article 300. However, the scope of governmental liability under that article was not made clear. The question that arises is whether in violation of such statutory rights, the sovereign immunity can be effectively claimed. This issue can be decided only by a Constitutional bench of seven or more judges, if the need arises to overrule the Kasturi Lal case. Consequently, there has been an expansion in the area of governmental liability

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<sup>5</sup> AIR 1983 SC 1086.

<sup>6</sup> (1985) 4 SCC 677.

<sup>7</sup> (2000) 5 SCC 712



in torts.

The legal position of state liability was strongly affirmed by the Supreme court in *N. Nagendra Rao & Co. v. State of Andhra Pradesh*.<sup>8</sup> In this case the appellant was having fertilizers business and the police seized the goods, after a point of time they were not freed and the goods were spoiled. The court held that the deterioration of the goods was not in the exercise of sovereign powers and also proper maintenance of the seized goods was the responsibility of the officers so the state was held liable. It also stated that there is no such distinction between sovereign and non sovereign functions in the present context. This case was not related to *Kasturilal* as both of them had different facts and different circumstances of exercise of sovereign powers. It must also be noted that state cannot succeed in pleading immunity by merely showing that the tort was committed by its servants in the course of discharge of statutory functions. The statutory functions must be referred to the Government activity where the exercise of sovereign power was involved to enable the state to claim immunity. This was clearly laid down in *Kasturilal's* case. In *Nagendra Rao* case however it was proved that the authority was not discharging a sovereign function. Hence *Kasturilal* case has been differentiated and cannot be a precedent in this case. The courts in successive cases continued with the policy of narrowing the scope of sovereign immunity, rather than attempt an express overruling of *Kasturilal*. Thus, an attempt has been made to distinguish the sovereign and non-sovereign functions with the help of principles laid down in the various judgments rendered by the Apex Court. However, as no interpretation of the term 'sovereign functions' exists, the differentiation has to be made with the help of interpretation of the term as has been carried out for other legislations. On the question of 'what is sovereign function', different opinions have been given time and again and attempts have been made to explain in different ways.

## IX. CONCLUSION

Sovereign immunity is a common-law doctrine which originated in court decisions. Historically, the doctrine of sovereign immunity has been justified on the grounds that the King could do no wrong, the diversion of funds required for other governmental purposes could bankrupt the State and retard its growth, the State could perform its duties more efficiently and effectively if it were not faced with the threat of a floodgate of actions involving tort liability, and it was more expedient for an individual to suffer than for society to be inconvenienced.

Whatever justifications initially existed for sovereign immunity, they are no longer valid in today's society. Sovereign immunity from tort liability. Perpetuates injustice by barring recovery for tortious conduct merely because of the status of the wrongdoer. Sovereign immunity contradicts the essence of tort law that liability

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<sup>8</sup> AIR 1994 SC 2663.

follows negligence and that individuals and corporations are responsible for the negligence of their agents and employees acting in the course of their employment. To conclude that the State's sovereign immunity for tort liability is outdated and is no longer warranted.

Furthermore, although we abrogate the State's sovereign immunity from tort liability, I conclude that abrogation should be prospective so that the Legislature can implement and plan in advance by securing liability insurance, or by creating funds necessary for self-insurance. Thus a "fundamental right to compensation" for the illegal acts of employees of the state has emerged. Hopefully this judicial innovation be nurtured and extended to cover other regions where a citizen attempts to vindicate his rights.