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# The Paradigm Shift in Court's Approach towards the Contractual Liability of the Government

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## ABSTRACT

*The Article deals with a significant question of contractual liability of the government in case of bailment contracts. A bailment must be formed for a specified purpose and with a contract that the goods shall be returned to the bailor after the said purpose has been accomplished, thus the parties should enter into a contract, only then a bailment can be enforceable, accordingly, non-contractual bailments were not considered as enforceable in the court of law in India. The court in various judgements were of the view that the contractual liability which has been entered by the government involuntarily should not impose liability or contractual obligation on it, however through various judgements the court has marked a shift in this approach, but counter views have been in this regard, which we will further deal this article. It deals with the nature and applicability of non-contractual bailments in contract law. The researcher considered the two different approaches followed by Indian courts in this matter. It comparatively analyses both the approaches, and opines why the shift was necessary and how it would be a better alternative to the other in an Indian context, as well as how it could be more beneficial in the contemporary era. It encompasses the most crucial aspects of contract law. The primary purpose of this paper is to examine the government's contractual obligation in the case of a bailment contract.*

## I. INTRODUCTION

A bailment is a special type of contract which creates a sort of relationship in which a property of a person goes temporarily in the possession of another person for a specific purpose. The ownership of goods thus in case of bailment is rest with one person and possession with another. In day-to-day business Bailment can take place in a number of cases, so for example delivery of the vehicle to the repairer's shop, giving a watch to the watch repairers, giving jewellery or some goods for touch-ups and customization etc. Therefore, contracts of bailment are of huge public importance. Some necessary conditions must be met for bailment contracts

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to be enforceable. One of these requirements is that the bailment is based on a contract for some purpose or object, and once the object is fulfilled the goods should be returned to the bailor. In India, a bailment is dealt with under Indian contract law only when it is entered through an enforceable contract, which means that, unlike English law, the contract of bailment can only be entered through contract by voluntary actions of the intended parties. This approach of the courts has been regarded as an old doctrine in this article. Unless the contract was explicitly entered into by the government for a particular purpose, this approach will exclude the government from bailment contracts. However, according to the judgement of various High courts and the supreme court, there has been a shift in this approach, which we shall refer to as new doctrine in this article. This new doctrine is in line with the English law, which recognizes bailment without contracts which are known as involuntary bailments, the courts in India have adopted a similar approach in varied cases. However, there has been no enactment by the legislature in this regard. Further, we'll go into why the shift was necessary, and how the new doctrine would be a better alternative to the other in the Indian setting, as well as how it could be more advantageous in the contemporary era, later in this paper.

## **II. OLD DOCTRINE**

A bailment contract must be formed for a specified purpose and with a contract that the items shall be returned to the bailor after the said purpose has been accomplished; once these conditions are met, the contract can be enforced. The delivery of goods in accordance with a contract is critical; otherwise, the bailment will be void. A reference can be made to *Ram Ghulam V. Government of Uttar Pradesh* - <sup>2</sup>

These ornaments were stolen from the plaintiffs' homes. They were discovered during a police investigation from another house and confiscated as stolen goods. They were then taken into police custody, where they have been stolen yet again and are now untraceable. The plaintiffs filed the lawsuit to retrieve the lost goods, and claim that the government is obligated to compensate him as a bailee.

The Hon'ble Court held that a bailee's duty is a contractual obligation that arises only from the bailment contract. In this instance, the ornaments were not given to the government under any contract; in fact, the plaintiffs did not give the ornaments to the government at all. As a result, the government has never been a bailee and is not obligated to compensate the plaintiffs as such.

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<sup>2</sup> *RAM GHULAM V. GOVERNMENT OF UTTAR PRADESH*, AIR 1950 ALL 206.

Similarly, In the case of 'Shivabhajan Durga-prasad v. Secretary of State' 28 Bom 314 (C),<sup>3</sup> an action was brought to collect damages against the Secretary of State for India due to a chief constable's carelessness with regard to items confiscated. The complaint was dismissed because the chief constable seized the items not in response to an Executive Government order, but the exercise of a legislative power vested in **him by the legislature**.

This standing of the courts has been vehemently criticized by the learned scholar Pollack & Mulla. They were of the view that whenever the bailment arises from a contract in the case of India it's dealt with the Indian Contract Act, 1872. However, it is not correct to say that the bailment cannot arise without the enforceable Contract.<sup>4</sup>

### III. THE SHIFT TOWARDS THE NEW DOCTRINE

In English law, a relationship between a bailor and a bailee can exist without the need for a contract. Nowadays, if one lends, puts something for safekeeping, or delivers an item to another person for a specific reason, such delivery will result in a contract, albeit this is not essential in every case. Even though the contract was not formed, the bailment can still exist.

*Bailment is a relationship sui generis, and unless it is sought to increase or diminish the burdens imposed upon the bailee by the very fact of bailment, it is not necessary to incorporate it into the law of Contract and to prove a consideration*<sup>5</sup>

For a long time, Indian courts were indifferent in considering the above-mentioned rationale. The view was that a bailment could not exist without a contract and that the Indian Contract Act, 1872, did not allow for involuntary contracts. However, in retaining the old doctrine, judges overlooked certain sections of the Indian Contract Act, which provide a legal basis for involuntary contracts to subsist. Sec 71<sup>6</sup> of the Contract Acts states that if the finder of goods takes into custody the lost goods, then he would have the same responsibility as that of a bailee. The involuntary contract is formed between the finder of goods and the original owner or possessor, Similarly, if parties have engaged in a contract, both parties are obligated to execute the contract, and in the event of their death, their legal representatives are accountable to the extent of their interest in the property. Bail can be both voluntary and involuntary. When a bailee dies and the items bailed transfer to a person acting on his behalf like the sub-bailee or its representatives, the latter becomes an involuntary bailee.

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<sup>3</sup> 'SHIVABHAJAN DURGA-PRASAD V. SECRETARY OF STATE' 28 BOM 314 (C)

<sup>4</sup> POLLOCK & MULLA: THE INDIAN CONTRACT AND SPECIFIC RELIEF ACTS, 16<sup>TH</sup> ED

<sup>5</sup> STATE OF GUJARAT V MEMON MAHOMED HAJI HASAM, 1967 AIR 1885

<sup>6</sup> INDIAN CONTRACT ACT, 1872, 71, ACT OF PARLIAMENT (INDIA)

For the first time in *Lasalgaon Merchants Coop Bank Ltd V Prabhudas Hathibhai*<sup>7</sup>, the court has pioneered the imposition of a bailee's responsibility in the absence of a contract. the facts of the case were –

Certain tobacco packets in the partnership firm's godown were pledged to the plaintiff bank. The circle officer came to the plaintiff and informed him that he had orders from the superior to attach the items since some of the partners had not paid their income tax dues. The plaintiff objected, claiming it was a secured creditor and that the goods had been committed to it. Despite this objection, the defendant continued to seize the things and took the key to the godown with him. Then came the torrential rains. The godown's roof leaked, causing the tobacco to be ruined.

In the present case, the court determined that the excessive rains were not the result of an act of God. The harm occurred as a result of the government's negligence, and they failed to take the appropriate level of care that any prudent man would have done in a similar situation. Even though there is no indication of a contract between the Government and the individual, when certain things belonging to the latter are seized by the former, the former becomes the bailee thereof. Accordingly, the government-held responsible.

Subsequently, in the *State of Gujarat v Memon Mahomed Haji Hasan*<sup>8</sup> the Supreme Court upheld this view. the certain motor vehicle belonging to the plaintiff were ceased by the government and while they were in the custody of the government, they have remained uncared. Due to which the goods suffered major harm. While delivering the judgement the J. Shelat held that The Contract Act only addresses bailment when it derives from a contract, however it is not necessary that a bailment cannot arise independently of any contract. Nor consent is mandatory for such a relation to exist. Sec 71 under the Indian Contract Act is one such example. The Supreme Court has supported the approach established by these judgments in several cases.

#### **IV. CONSTRUCTIVE BENEFICIALLY IN THE MODERN CONTEXT**

In the modern era, the government has presumed the role of the welfare state, and it plays a critical role in stimulating economic activity and protecting individual interests. The economic activities of the government are expanding. Through its agencies, the government now operates a variety of businesses and enters into various contracts. This increases the risk of the government acting inappropriately in its exercise of power. As a result, the subject of

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<sup>7</sup> LASALGAON MERCHANTS COOP BANK LTD V PRABHUDAS HATHIBHAL, AIR 1966 BOM 134

<sup>8</sup> 1967 AIR 1885

government contracts has become more important than ever. Therefore, the government must bear a similar level of duty to that of a prudent man as envisioned by contract law. This becomes necessary in order to defend the other contracting party's interests.

The Indian Law Commission through its 13<sup>th</sup> law commission report recommended an enactment in the contract law for a distinct section to define the non-contractual bailment. Thus, upholding the similar view in line with the new approach upheld by the supreme court.

## **V. POSITION IN OTHER COUNTRIES**

Similar views have been held in England & Australia. In England, before the abolishment of the Crown Proceeding Act, 1947 it was a settled position that the crown cannot be sued in court on a contract. However, soon it was realized that such a position is arbitrary and thereby this procedure was abolished from the Crown Proceeding Act, 1947. And it was settled that the suit can be brought against the crown in the court of law for the enforcement of the contractual obligations. Similarly, The Judiciary Act, 1961 was enacted in Australia which deals with the government's liability under various circumstances. Moreover, In *Commonwealth v New South Wales*,<sup>9</sup> it was held that a government can be made liable in contract and tort law without its consent.

## **VI. CONCLUSION**

The shift towards the new approach was the prominent move taken up by the court in the time when the government's economic activities are ever-expanding, it's in the interest of the general public that the state should be held liable and be bond for its contractual obligation, otherwise it increases the risk of the government acting inappropriately in its exercise of power. This position has also been upheld in countries like England, United States and Australia. It is a settled position now that non-contractual bailment can arise even when it is not based on any contract. In India, though the approach has been upheld by the courts there has been no enactment as such in the Indian Contract Act, 1872. Thus, it becomes important to enact a separate section in the Indian Contract Act, 1872 to define non-contractual bailments.

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<sup>9</sup> *Commonwealth v New South Wales*, (1923) 32 CLR 200.