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# Vicarious Liability of State with Reference to the Case - Kasturilal Raila Ram Jain vs. State of U.P

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## ABSTRACT

*The Common Law maxim “Rex Non Potest Peccare” which means that The King can do no wrong provided absolute power to the state in that neither the state, nor could its employees or on the other hand workers ever be held at risk for any wrong dedicated by them. This was, however, never followed in India. The East India Company initially came as a trading company in India. In any case, later on it began to administer a huge part of the nation and the extent of its forces 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 state depended upon the powers and authority of the Head of the state. In pre-Constitution period the liability of the State was a major question which confounded all the courts. As of now a qualification was made among sovereign and non-sovereign power with complete immunity being given to the former. However, the scope of sovereign or non-sovereign power was never clearly defined, and hence depended on judicial interpretation.*

## I. INTRODUCTION

The question of liability of the state came up for consideration many time before the Supreme Court and it was another instance in the case of *Kasturilal Raila Ram Jain vs State of U.P.*<sup>3</sup> In This case, a partner of Kasturilal Raila Ram, a firm of jewellers of Amritsar went to Meerut for selling gold and silver ornaments. He was taken into custody by police constable at Meerut On the suspicion of possessing stolen property. He was kept in custody and the gold and silver ornaments recovered from him were kept into custody of the police. He was released on the next day and after sometime the silver ornaments which were seized from him was returned , But the gold was not returned to him because the head constable who was in charge of the mal khana misappropriated the gold and take it away with him to Pakistan. And it was found that was found that the police officer had failed to follow the regulations of U.P.

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<sup>3</sup>1965 AIR 1039 1965 SCR (1) 375

police in taking care of the gold. The Supreme Court held that the State is not liable on the view that the tort was committed by the police officer in course of employment and the job he was doing is comes under the sovereign power of state.

## II. HISTORY OF VICARIOUS LIABILITY

The vicarious liability origin is from England. During the period of king's rule the legal maxim *Rex non protest peccare* which means the king can do no wrong. During the course of employment the tort committed by the king servant, then king is not liable under the vicarious liability because he was considered as the ruling government in today's world. This remedy will available only in tort and not in contract or in crime. In England absolute right and liabilities lies in the crown hand. Tortfeasor could not be sued in the name of the crown course of employment. But after a case is filed in the supreme court of England case was *Tobin vs R*: In this case Court observed that this is against the justice and equity. After this case government abolished the maxim "king can do no wrong". The course of employment principle of respondent superior and king can also be sued for his servant's tortious act. Through this everyone is equal before law, no one is superior and inferior to another.

## III. VICARIOUS LIABILITY OF STATE

It is the liability that lies upon a person for an act done by someone else. It comes into play often in master- servant relationship. Constitutional tort is generally a judicial instrument by which the state can be held vicariously liable for the act committed by his servant in the courses of employment. It is a legal action to get legal remedy in the form of damages when any of the constitutional right is violated. The only exception lying is that it cannot be made liable if the act is done in exercise of sovereign functions. Vicarious liability of state for the tort committed by its employees is based upon its two types

Of power:

1. Sovereign power
2. Non-Sovereign power

## IV. DEVELOPMENT OF 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 prompted the English Crown expecting direct control of India in the era of the British Raj. *Section 65* of this Act, which is the parent source of the law relating to the liability of the Government. The Crown could not be sued in tort for acts of its workers over the span of their business. But this was not accepted in India even

during the rule of the East India Company. The East India Company which came to this country initially for carrying on trade gradually became ruler of a great part of India and made yet another part under its control. The East India Company was not a sovereign body but was delegate of the Crown. Its forces and the degree of political authority were bit by bit managed by specific enactments went in the British Parliament. . The vicarious liability of state in the absence any statutory rules or contours depended on the extent and exercise of the power by the state or the head of the state. In pre-Constitutional period, the extent of tortious liability of the State and its power was subject matter of dispute before existing Courts. "The liability of the government was dependent on the nature of the act and the category of power in which it was placed in sovereign or in non-sovereign power of the State. Sovereign powers of the State were never defined and never distinction between sovereign and non-sovereign forces of the State Official courtrooms were confronted a few times with challenges in settling the disputes. 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 the irrespective affairs in the cases the corresponding Indian States might have sued or be sued, on the off chance that this Constitution had not been ordered", and thirdly, that the second-referenced standard will be dependent upon any arrangements which might be made by a Demonstration of Parliament or of the Legislature of such State, enacted by virtue of powers conferred by the Constitution.<sup>4</sup> 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 been made by Parliament as contemplated by article 300, the fact that the legal position emerging from the article has given rise of the confusion. Even the judgments of the Supreme Court have not been made uniform and had not helped to remove the confusion on this, as would be evident from what is stated herein.

## **V. WHAT ARE SOVEREING POWER AND NON-SOVEREING POWER?**

A sovereign Power can be described as a function which is performed exclusively by the government under the sovereign power of the state or refers to function authorized by a statute. Example include function of the army, power enjoyed by police under the police act.

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<sup>4</sup>Indian Const. art. 300 cl. 1

Non-Sovereign power include power which are performed by private entities as well.

#### **(A) SOVEREIGN POWER**

Sovereign power or crown power, is a legal doctrine by which the sovereign or government can't perpetrate a legitimate wrong and is insusceptible from common suit or criminal arraignment. In constitution monarchies the sovereign function is the historical organ of the government authority which creates the courts. At their core, what sovereign function doctrine prohibit is generally clear: a suit against an un consenting sovereign power for money damages. There are some cases which fall outside this configuration, in which court have found difficulty to determine how far the doctrine has impact. Sovereign functions are those actions of the state for which it isn't responsible in any court of law. For instance, acts such as defence of the nation, raising and keeping up military, making harmony or war, outside undertakings, obtaining and holding an area, are capacities that are characteristic of outer power furthermore, are political in nature. In this way, they are not amiable to jurisdiction of original civil court. The State is safe from being sued, as the ward of the courts in such issues is impliedly barred.

### **VI. ARTICLE 300 OF THE CONSTITUTION OF INDIA**

The law in India as for the risk of the State for tortuous acts of its workers has become trapped with the nature and character of the job of the East India Company earlier to 1858. It is in this way important to follow the course of the improvement of the law on this subject, as contained in article 300 of the Constitution.

Clause (1) of Article 300 of the Constitution gives that the Government of India may sue or be sued by the name of Union of India and the government of State may sue or on the other hand be sued by the name of State and may, subject to any provisions which may be made by the act of parliament or the state legislature enacted by virtue of powers conferred by this constitution, sue, or be sued comparable to their separate issues in the like cases as the Domain of India and the corresponding provisions or the corresponding Indian states may have sued if this constitution had not been passed.

Even though more than 50 years has been passed since the constitution is formed, no law has so far been made by parliament as contemplated by article 300 despite the way that the legitimate position rising up out of the article has offered ascend to a good amount of confusion. Even the judgements of the Supreme Court have not been uniform what's more, have assisted with expelling the disarray regarding the matter, as would be obvious based on what is stated hereinafter.

Government of India Act, 1858<sup>5</sup>: When the governance of India was taken over by the British Crown in 1858, an Act was passed in that year, entitled the Government of India Act, 1858, Section 65 declared that government's liability in this behalf shall be same as that of the Company. It would be appropriate to set out the section in full:

“The Secretary of State shall and may be sue and be sued as well in India as in Britain by the name of Secretary of State in Gathering as a body corporate; what not people and bodies politic will and may have and take similar suits, remedies and proceedings, legal and equitable, against the Secretary of State in Council, as they could have done against the said Company; and the property and effects hereby vested in the crown for the purposes of government of India, or acquired for the said purpose, shall be subject and subject to indistinguishable decisions and executions from them would, while vested in the said company has been at liable, to in regard of obligations and liabilities legitimately contracted and incurred by the said Company.”

Under the act of 1833, enacted by the England Parliament, the governance of India was entrusted to the East India Company. The Act declared that the Company held the territories in trust for His Majesty, his beneficiaries, and replacements.

Act of 1915<sup>6</sup>: This very provision was for all intents and purposes contained in section 32 of the Government of India Act, 1915. Sub-sections (1) and (2) of that section read as follows:

(1) The Secretary of State in Chamber may sue and be sued by the name of the Secretary of State in Council, as a body corporate.

(2) Each individual will have similar cures against the Secretary of State in council as he might have had against the East India Company, if the Government of India Act 1858 and this Act have not been passed.”

Act of 1935: In any event, when the Government of India Act, 1935 was passed (replacing the act of 1915), the equivalent lawful position was proceeded by section 176(1) of the Act which read as follows:

“ The League may sue or be sued by the name of the Alliance of India and a provincial Government may sue or be sued by the name of Region, and, without partiality to the resulting provisions of this Part, may, subject to any provisions that might be made by an Act of the Federal or a Province legislature enacted by virtue of powers conferred on that Legislature by this act, sue or be sued corresponding to their particular issues in the like cases

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<sup>5</sup> 21 & 22 Vict. c. 106

<sup>6</sup> 5 & 6 Geo. V, c. 61

as the Secretary of State in council may have sued if this act had not been passed.”

## VII. PRECEDENTS

In India the story of the birth of the doctrine of sovereign power began with the decision of C.J. Peacock in *Peninsular and Oriental Steam Navigation Company v. Secretary of State for India*<sup>7</sup>, in which the terms Sovereign power and Non-sovereign power were used while choosing the risk of the East India Company for the torts committed by its worker. In this case (C.J. Peacock) the provision of the Government of India Act, 1858 for the first opportunity arrived under the steady gaze of the Calcutta Supreme Court for legal translation and C.J. Peacock determined the vicarious liability of the East India Company by classifying its power 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 plaintiffs 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 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 thought is landmark decision, where the most important decision was given by the Madras High Court in the case of *Hari Bhan Ji v. Secretary of State*<sup>8</sup>, where the Madras High Court held that the power of the East India Company extended only to what were called the acts of state, state so called and that the differentiation among sovereign and Non-sovereign power was not a well-founded one. However No attempt has been made in the cases to draw a clear-cut distinction between Sovereign and Non-Sovereign functions at all.

After the beginning of the Constitution of India, perhaps the first significant case which came up before the Supreme Court for the assurance of the obligation of the Government for torts of its representatives was the case of *State of Rajasthan v. Vidyawati*<sup>9</sup>. In this case, the court dismissed the request 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

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<sup>7</sup>(1860) 5 Bom HCR.

<sup>8</sup>ILR (1882) 5 Mad 273.

<sup>9</sup>1962 SC 933

done in the exercise of sovereign powers and that done in non-Sovereign power 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 included an activity which can't be said to be referable to, or at least dependent on the delegation of governmental powers of the State. On the other hand, the power involved in Kasturilal Ralia Ram case to arrest, search and seize are powers characterized as Sovereign powers. And finally the court said that the law in this regard is unsatisfactory and the remedy to fix the position lies in the hands of the governing body. 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 ought not to be held liable vicariously for the tortious act of its worker.

### **VIII. ANALYSIS OF KASTURILAL RALIA RAM JAIN VS STATE OF U.P.**

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 Kasturi Lal and whether the state was liable to compensate Kasturi Lal for the loss caused by the public servant employed by the state. In upholding the defense of power 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 in this case the claim cannot be sustained, because the Supreme Court followed the rule laid down in *Peninsular and Oriental Steam Navigation Vs Secretary of State* case by distinguishing Sovereign and non-Sovereign power of the state and held that maltreatment of police power is a Sovereign act, in this way State isn't 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 in Kasturi Lal Ralia Ram case by the Supreme Court isn't good and has been censured by driving constitutional authority. It fails to appreciate the modern development of law where there is no logical basis for State power which has been abolished in the country of its origin. Although the decision of the 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 power of State by holding an ever-increasing number of elements of the State as non-Sovereign.

To ensure the personal liberty of peoples from abuse of sovereign power, a new remedy was created by the supreme court to grant damages through filing writ petitions in the court under Article 32 ( for violation of fundamental rights) and Article 226 (from this article you can file suit in high court) this of the Constitution. In the case of *Rudal Shah v. State of Bihar*<sup>10</sup>, the Supreme Court for the first time awarded damages in the writ petition itself.

In *Bhim Singh v. State of Rajasthan*<sup>11</sup>, then principle laid down in Rudal Shah was further extended to cover cases of unlawful detention. In an appeal 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>12</sup> on the point clearly indicates that the distinction between Sovereign and non-Sovereign powers have no importance in the current occasions. The Apex Court held that the doctrine of Sovereign power is no longer valid. We have noticed above that the A. P. High Court rejected the plea of sovereign power when the compensation was claimed for the violation of fundamental right under article 21. The court was of the feeling that the idea of power in respect of sovereign function implicit in clause 1 of article 300, could not be recognized as an exception to article 21. The liability of the government for tortious acts of its employees and the state power 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 power can be effectively claimed. This issue can be chosen uniquely by a constitutional bench of seven or more judges, if the need emerges to overrule the Kasturi Lal case. Consequently, there has been an expansion in the area of state liability 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>13</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 spoilt. 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 Kasturi Lal as both of them had different facts and different circumstances

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<sup>10</sup>AIR 1983 SC 1086

<sup>11</sup>(1985) 4 SCC 677

<sup>12</sup>(2000) 5 SCC 712

<sup>13</sup>AIR 1994 SC 2663

of exercise of sovereign powers. It must also be noted that state cannot succeed in pleading power 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 power. This was clearly laid down in *Kasturi Lal* case. In *Nagendra Rao* case however it was proved that the authority was not discharging a sovereign function. Hence *Kasturi Lal* 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 power, rather than attempt an express overruling of *Kasturi Lal*. Thus, an attempt has been made to distinguish the sovereign and non-sovereign power with the help of principles laid down in the various judgments rendered by the Apex Court. However, as no interpretation of the term sovereign power exists, the differentiation has to be made with the assistance of understanding of the term as having been completed for other legislation. On the question of what is sovereign capacity, various feelings have been given time and again and attempts have been made to explain in different ways.

#### **IX. PRESENT POSITION IN INDIA IS UNCERTAIN**

Has the law as expressed in *Kasturi Lal* been changed through a number of decisions of the Supreme Court referred to above? Should the courts in India follow *Kasturi Lal* or subsequent choices of the Supreme Court in which the State has been held liable for servants? It is interesting to note that in many of the cases, the Supreme Court has granted compensation as an ancillary relief while exercising its writ jurisdiction under Article 32 of the Constitution. The Supreme Court has not only itself granted compensation as an interim measure but has also expressly stated that the same is granted without prejudice to the right of the petitioners to guarantee only remuneration from the State by a subsequent regular suit. This approach by the Supreme Court is an invited measure which was long past due to do away with the antiquated law which were being applied for historical reasons, and maybe, inferable from the wrong interpretation of the law on the subject.

In *Kasturi Lal*, the Supreme Court had expressed dissatisfaction at the prevailing position, when Gajendragadkar, C.J. stated:

"Our lone point in referencing the act is to show that the principle of invulnerability which has been acquired in India in managing the subject of the insusceptibility of the State with respect to claims made against it for tortious acts committed by its servants was truly founded on the Common Law rule which has now been substantially adjusted by the Crown

Procedures Act. In managing the current appeal, we have ourselves been upset by the felt that a citizen whose property was seized by the procedure of law, must be told when he looks for a cure in a court of law ground that his property has not been come back to him, that he can make no claim against the State. That, we think, is not a very satisfactory position in law. The solution for fix this position, be that as it may, lies in the hands of the legislature."

In its first Report on the 'Liability of State in Tort', The Law Commission of India recommended legislation prescribing State liability, as in England. On the basis that Report, a Bill entitled The Government (Liability in Tort) Bill, 1967 was presented in the Lok Sabha. The Bill as reported by the Joint Committee of both the Houses of Parliament was placed before the Lok Sabha in 1969. It has not yet become the law. The Bill tries to characterize the liability of the Government towards third party for the wrongs of its workers, agents, and autonomous contractors employed by it.

In *N. Nagendra Rao & Co. v. State of A.P.*, the Supreme Court considered the topic of vicarious liability of the government for the negligence of its servants, it noted the earlier Supreme Court decisions in *Vidyawati's and Kasturi Lal's cases*, recommendation of the Law Commission in its First Report for legally perceiving the liability of the State as had been done in Britain through the Crown Proceedings Act, 1947 and in U.S.A. through the Federal Torts Claims Act, 1946. It accordingly, held that the doctrine of sovereign immunity has no importance in the current day. It is sad that the proposal of the Law Commission made long in 1956, and the proposals made by the Supreme Court have not yet been given effect to. The unacceptable state of affairs in such manner is against social equity in a government welfare State. It is trusted that the act regarding State liability will be passed without a further delay. In the absence of such legislation, it will be in consonance with social justice demanded by the changed conditions and the concept of welfare State that the courts will follow the recent decisions of the Supreme Court as opposed to Kasturi Lal.

## **X. CONCLUSION**

In all the cases discussed which are before and after independence, the authority made to be liable is not the government but the State. So far as the government is concerned, it may well say that the statutory authority is neither accountable nor responsible to it. Hence the government cannot be held liable for the wrong order made by a statutory authority. To the extent the State is concerned, it can't advance any such supplication in light of the fact that the resolution is ordered by it by Legislature. The appointment of the authority is also done either by the State itself by such authority as may be authorized by the State. The act of the

statutory authority in some of the case is an act done for and on behalf of the State. Hence the state is held liable. State's liability for the acts or omissions of statutory authorities arises only in cases where the state authority acts outside his legitimate power while indicating to act in accordance with the lawful authority conferred upon him and the act or omission, which causes or results in damage to a person, is not within the scope of the state protection, if any, contained in such enactments. This standard is advanced for the undeniable explanation that an act done under a rule and in accordance with the state can never amount to tort as was said by the Supreme Court by following cases. And court also said 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 be sue or be sued in the name of the State what's more, may, subject to any provision that might be made by act of Parliament or of the Legislature of such State enacted the law by the virtue of powers conferred by the Constitution, sue or be sued according to their separate undertakings in the like cases as the territory of India and the corresponding Indian States might have sued or been sued if this Constitution had not been enacted.

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