CAPACITY OF THE STATE AND ITS SUBORDINATES

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CHAPTER-I

INTRODUCTION

1.1 Brief Overview of the Project

This research project deals with the capacity of the state and its subordinate to sue and be sued in the law of torts. The researcher starts off by explaining the definition and the essentials for such a provision, goes on to briefly mention the Indian law relating to it and lastly states various specific instances where this is applicable.

1.2 Purpose of Research

The purpose for this research is to basically understand the nature of capacity of state and its subordinates to sue and be sued in torts, to briefly understand the Indian law relating to this provision and finally to critically analyse the specific instances related to this provision.

1.3 Research Plan

The researcher, for the purpose of his research has followed the doctrinal method of research. He has used the resources in the library of National Law University, Delhi and has referred to various books by eminent jurist like Winfield and Ramaswamy Iyer. The researcher has also referred to books by distinguished professors like R.K Bangia, and Ratanlal and Dhirajlal.

1.4 Scheme of Chapterisation

Chapter I deals with the basic overview of the project, the purpose of the research and the research plan used. It also provides the definition and essentials of the Capacity of the State and its subordinates. Chapter II gives the provision of the Indian Law relating to Capacity of the State and its subordinates. Chapter III deals with specific instances of this provision and lastly Chapter IV forms the researcher’s concluding opinion about it.
1.5 Definition and Essentials

According to Wade and Philips¹, the term “Act of State’ means an act of the Executive as a matter of policy performed in the course of its relations with another state, including its relations with the subjects of that state, unless they are temporarily within the allegiance of the crown.”

In the words of Hidayatullah J., “an Act of State is an exercise of power against an alien and neither intended nor purporting to be legally founded. A defence of this kind does not seek to justify the action with reference to the law but questions the very jurisdiction of the courts to pronounce upon the legality of justice of the action.”

The essentials of an Act of State are:

(1) The act is done by the representative of a state.
(2) The act is injurious to some other state or its subject.
(3) The act may be either previously sanctioned or subsequently ratified by the State. ²

1.6 Origin

The origin of the capacity of State to sue and be sued in torts lies in the ancient and fundamental principle of the English constitution that the king can do no wrong. This maxim means, first, whatever is exceptionable in the conduct of public affairs is not to be imputed to the king, nor is he answerable for it personally to his people: for this doctrine would destroy the constitutional independence of the crown; and secondly, that the prerogative of the crown extends not to do any injury.³ In accordance with British Jurisprudence no member of the executive can interfere with the liberty or property of a British subject except on the conditions that he can support the legality of action before a Court of justice.⁴ The same principle applies to a friendly alien resident in British territory,⁵ but where the person or the property of a person

¹ Wade and Philips, Constitutional Law, 4th Ed., p.193 quoted with approval in Harilal Singh v. State of Pepsu, A.I.R.1960 Punjab 644, at p.645 “An act injurious to the person or to the property of some person who is not at the time of that act a subject of Her Majesty: which act is done by any representative of Her Majesty’s authority, Civil or Military, and is either previously sanctioned or subsequently ratified by her Majesty. Sir Fitzjames Stephen, History of Criminal Law, ii, pp. 61-62.
² R.K Bangia, Law of Torts, pp. 58.
⁴ Eshugbay Eleko v. Officer Administering, the government of Nigeria, 1931 A C 662 (PC).
who is not a British subject who is not residing in British territory is injured by an act “done by any representative of Her Majesty’s authority, civil or military, and which is either previously sanctioned or subsequently ratified by Her Majesty”, the person injured has no remedy for such an act in an act of State. An act of State is outside the ordinary law; it is essentially an exercise of sovereign power as a matter of policy or political expediency. Its sanction is not that of law, but that of sovereign power, and municipal Courts must accept it without question. Ratification by the sovereign power of the act of one of its officers is equivalent to prior command and may render such act an act of State.

However under the Crown Proceedings Act 1947, though the old maxim “the King can do no wrong” is retained to the extent that no proceedings can be instituted against the sovereign in person, and there are savings in respect of the Crown’s prerogative and statutory powers, but otherwise the act went a long way in equating the Crown with a private person of full age and capacity for the purposes of tortious liability. The Crown cannot, however, be liable in tort except as provided by the act and this cannot be evaded by dressing up the claim as one for a declaration that the crown is behaving wrongfully.

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Ross v. Secretary of State, AIR 1915 Mad 434: 19 IA 253 as to the essentials of ratification.
8 sec.40(1)
9 sec.11(1)
10 But this is not to say that duties owned by the Crown can in all respects be equated with those owned by private person: para,5-41,above.
11 Trawnik v. Lennox [1985] 1 W.L.R 532where the court had no jurisdiction to hear a claim for a nuisance in Berlin because it did not arise in respect of the crown’s activities in the UK: s.40(2)(b).
CHAPTER-II

INDIAN LAW RELATING TO CAPACITY OF STATE AND ITS SUBORDINATES

The Supreme Court has held that “an act of State is not available against a citizen”; it is “a sovereign act which is neither grounded on law nor does it pretend to be so”; it is “catastrophic constituting a new departure”; “in civil commotion, or even in war or peace, the state cannot act catastrophically outside the ordinary law and there is legal remedy for its wrongful acts against its own subjects or even a friendly alien within the state”. The various acts of the government under the name of the President in the course of administration (e.g. allotment of petrol outlets from the discretionary quota of a minister) are not acts of State and are open to judicial scrutiny and their authority, validity and correctness can be examined by the courts.

The Constitution of India in article 300(1) reads: “The government of India may sue and be sued by the name of Union of India and the government of a state may sue or be sued by the name of the State and may, 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 this 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 this constitution had not been enacted.” However it must be noted that the executive heads of the state which includes the President and the governors of states have personal immunity and they are not liable or answerable to any court of law, as enshrined in Article 361, for the exercise of their powers and duties in office.

The extent of liability of the Union and the states under Art. 300(1) of the constitution can be equated with the liability of the East India Company; however this statement is subject to new liabilities imposed by the Constitution.

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2 Common cause v. Union of India, AIR 1999 SC 2979 p.3003.
An illustration of this could be done by citing the case of Peninsular and Oriental Steam Navigation Co. v. Secretary of State of India\(^3\) which was the basis of the construction of section 65 of the 1858 Act. In this case the servant of the plaintiff’s company was driving a carriage drawn by a pair of horses on a highway in Calcutta while the servants of the Government employed in the Government dockyard at Kidderpore were carrying a piece of iron funnel. Subsequently, an accident occurred in which one of the horses of the plaintiff’s carriage was injured and the plaintiff company sued the Secretary of State of India for the damages caused due to the negligence of its servants.

PEACOCK, C.J., who delivered the judgment in this case, pronounced that there existed a distinction between the acts done by public servants in delegated exercise of sovereign powers and the acts done by them in conducting other activities. As the East India Company were not Sovereigns, therefore they could not claim all the exemptions of a Sovereign; neither were they public servants of the Government, so they did not fall under the principle of cases with regard to the liabilities of such persons. They were engaged in transactions partly for the purpose of government and partly on their own account, which without having delegated sovereign rights could have been undertaken by private individuals too.

Therefore, it was summed up that the tort in this case of Peninsular and Oriental Steam Navigation Co. v. Secretary of State of India\(^4\) was committed by servants of the Government in the course of their trading activity and the case was not directly concerned with the acts done in the exercise of sovereign powers. Henceforth, the Madras\(^5\) and Bombay\(^6\) High Courts, did not accept the reservation made by PEACOCK, C.J., that the Government was not liable if a tort was committed in the exercise of sovereign powers; the view expressed by the High Courts was that the Government would also be liable for the torts committed in the exercise of sovereign powers except in cases when the act complained of amounted to an act of State. The Calcutta High Court,\(^7\) however, followed the views of PEACOCK, C.J.

\(^3\) (1868-1869) 5 Bom HCR App 1 P. 1 (this case is not reported in any Calcutta Law Journal).
\(^4\) Ibid.
\(^5\) Secretary of State for India v. Hari Bhanji, ILR (1882) 5 Mad 273.
\(^6\) Rao v. Advani, AIR 1949 Bom 277.
\(^7\) Nobin Chunder Dey v. Secretary of State of India, ILR (1875-76) 1 Cal 11:24 CWR 309.
CHAPTER-III

SOVEREIGN IMMUNITY AND ITS LIMITS

3.1 Police Officers

In the case of Kasturilal Ralia Ram Jain v. State of U.P.\(^1\) the question of liability arose before the Supreme Court. In this case a partner of Kasturilal Raliram, a jewellery firm of Amritsar, went to Meerut to sell gold and silver. The Meerut police constables, on suspicion of him carrying stolen property took him into custody. Consequently he was kept in police lock-up and the gold and silver was recovered from him on search were deposited in the police Malkhana. On the next day he was released and the silver seized was returned to him, however the gold could not be returned to him because the Head-constable-in-charge of the Malkhana had misappropriated the gold and had fled to Pakistan. Thereafter, a suit was filed by him against the State of U.P. for the return of ornaments or in the alternative for compensation.

The Supreme Court held that the State was not liable on the view that the tort committed by the police officers was in their capacity of delegated sovereign powers. GAJENDRAGADKAR, C.J., fully approved the decision of PEACOCK, C.J., in the case of Peninsular and Oriental Steam Navigation Co.,\(^2\) stating per incuriam that it “enumerated a principle which has been consistently followed in all subsequent decisions.” It also observed that “It must be borne in mind that when the States pleads immunity against claims for damages resulting from injury caused by negligent acts of servant, the area of employment referable to sovereign powers must be strictly determined. Before such a plea is upheld, the Courts must always find that the impugned act was committed in the course of an undertaking or an employment which is referable to the exercise of delegated sovereign power”.\(^3\) In this case the power to arrest a person, to search him, and to seize property found with him, are powers conferred on the specified officers by statute. Therefore the employment in the present case is a category which can claim the special characteristic of sovereign power; therefore the claim is not acceptable.

\(^1\) AIR 1965 SC 1039.
\(^2\) Note 2, p.10, supra.
\(^3\) Note 1,Op.cit.
3.2 Judicial Officers

Under the Judicial Officers Protection Act, 1850, no judge, Magistrate, Justice of Peace, Collector, or any other person acting judicially, can be held liable in any Court for any act done by him in the discharge of his judicial functioning, whether or not it’s within the limits of his jurisdiction, provided the act done by him is in good faith. Similarly, officers of any Court or other person bound to execute the law, warrants or orders of any such judge, Magistrates or any other person acting judicially, cannot be sued in any civil court for the execution of any warrant or order, which he would be bound to execute.

This act protects the judicial officers, and also officers acting under their order. However it only protects judicial officers from being sued in respect to acts done by them in their judicial capacity and not ministerial capacity. The principle behind such a privilege provided to the judiciary is that the person in such an important position can exercise his powers with independence and without fear of consequences. In cases where a Magistrate fails to act reasonably and carefully in the exercise of his duties, in other words recklessly in contravention of well known rules of law and procedure, and if thereby, he does those acts which is not backed by any legal authority, he is not permitted to say that he acted in good faith and believed himself to have jurisdiction to do the act complained of. The abuse of authority by the judge amounts to a good cause of action by the party who is injured and he is not protected by the Judicial Officers Protection Act.

Secondly, another legislation was enacted for the protection of the authority of the judges, The Judges (Protection) Act, 1985. Section 3 of the act provides that “no court shall entertain or continue any civil or criminal proceeding against any person who is or was a judge for any act, thing or word committed, done or spoken by him when, or in the course of acting or purporting to act in the discharge of his official or judicial duty or function.” The act also enlarges the meaning of the term “judge” and includes not only people who are officially designated as judge, but also every person who is empowered by law to give in any legal

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4 Venkat v. Armstrong, (1865) 3BHC (ACJ) 47.
6 Per WESTROPP, J, in Vinayak v. Bai Itcha, (1865) 3 BHC (ACJ) 36,46.
7 Amminappa v. Mohamad, (1865) 2 MHC 443.
proceeding a definitive judgment. It confers a very wide protection which is not limited to only judicial functions, but also covers official functions.

Apart from these two acts, judges of a court of record, such as Supreme Court and the High Court enjoy immunity from any action for acting judicially within their jurisdiction even if the order is erroneous and unsustainable on merits.\(^8\)

3.3 Executives

In India, generally the executive government and the executive officers do not enjoy any protection except those conferred by legislative enactments which will be discussed under the title Statutory Authority. The State and its officers are, however, not liable when the wrongful act falls within the purview of Acts of State, but the executive officers are always liable for torts committed by them or authorized by them. The state is also vicariously liable for the torts committed by its officers in the course of employment except when they are committed while discharging traditional sovereign functions.

3.4 Administrative Bodies

There are administrative bodies or authorities in every state which are required to deal with matters within their jurisdiction in an administrative manner and their decisions are described as administrative decisions. It is likely that in the process of reaching administrative decisions, the administrative bodies are required to act fairly and objectively and would in many cases have to follow the principles of natural justice; but the authority of these administrative bodies is different from judicial powers conferred on courts.\(^9\) The question as to what are the limitations on their powers or in other words what are the grounds on which their act can be challenged are matters of administrative law. In cases of tort committed by these bodies, mere invalidity of order it does not follow is for which the authority is liable in an action to the aggrieved party.\(^10\)

Administrative bodies also include Governing bodies. When a Governing body acts in bad faith, e.g. expulsion of a member from a club, association, or professional organisation, it

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may give rise to claim for damages but such action will be based on contract and not Tort.\textsuperscript{11} Exactly same will be the position in respect to expulsion of a student from an educational institution.

### 3.5 Statutory Authority

No action can be maintained for an act which the legislature authorizes to do, on the ground that no court can treat that as wrong, and consequently the person who has sustained a loss by the doing of that act is without remedy unless so far as the legislature has thought it proper to provide for compensation to him. The Statutory authority extends not only to those authorized by Statutes but to all inevitable consequences of that act.\textsuperscript{12} Though the powers conferred by the legislature should be exercised with judgment and caution so that no unnecessary damage is done.

\textsuperscript{11} T.P Daver v. Lodge Victoria, AIR 1963 SC 1144.

\textsuperscript{12} Manchester Corpn v. Farnworth, (1930) AC 171.
CHAPTER- IV

CONCLUSION

As to conclude, the researcher holds the opinion that irrespective of cases where the State and its subordinates are held liable for torts committed or whether it’s protected on the doctrine of sovereign immunity, in most cases the public servant committing the tort is not protected\(^1\). For a public servant to use the defense that the wrong was committed in the process of discharging of statutory functions or saying that the act was committed during carrying out the orders of the superior does not hold good.

Though superior officers are not liable on the basis of vicarious responsibility because the relationship of master-servant does not exist between them and their subordinates, but they are liable directly if the wrong committed by the subordinate is expressly authorized by him.

In cases where a statutory discretion is conferred, the person entrusted with the discretion is not liable if the discretion is exercised with due care and there is merely an error of judgment; however he would be held liable if he ‘either unreasonably failed to carry on his duty to consider the matter or reached a conclusion so unreasonable as to show failure in his performance to do his duty.

\(^1\) State of U.P v. Tulsi Ram, AIR 1971 all 162.
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