

MANU/UP/0079/1950

Equivalent Citation: AIR1950All206, (1950) 20 AWR 56

IN THE HIGH COURT OF ALLAHABAD

Civil Revn. No. 92 of 1948

Decided On: 22.08.1949

Appellants: **Ram Gulam and Ors.**

Vs.

Respondent: **Government of U.P.**

Hon'ble Judges/Coram:

Shambhu Nath Seth, J.

Counsels:

For Appellant/Petitioner/Plaintiff: J. Swarup, Adv.

For Respondents/Defendant: Gopalji Mehrotra, Adv.

ORDER

Shambhu Nath Seth, J.

1. The suit giving rise to this application in revision was instituted by the plaintiffs applicants against the Government of United Provinces for the recovery of certain ornaments, and in the alternative for the recovery of Rs. 599.4/- of their price.

2. These ornaments were stolen from the house of the plaintiffs. They were recovered from another house, on a search made by the police and seized as stolen property, in exercise of powers conferred in that behalf by the Code of Criminal Procedure. They were produced as exhibits at the trial of those, who were prosecuted in connection with the theft. They were accordingly kept in the Collectorate Malkhana, from where they were again stolen, and are now untraceable. The plaintiffs applied unsuccessfully to the Magistrate for an order for their restoration to them and then instituted the present suit, which was dismissed on the finding that the Government was not liable to compensate the plaintiffs.

3. It appears that the claim for the return of the ornaments was not pressed before the Court below, as indeed it could not be pressed for want of any cause of action, disclosed in the plaint. After reciting the facts mentioned above, except the theft at the Malkhana, the plaint went on to allege that the plaintiffs have learnt that the ornaments are not available at the Malkhana, on account of the negligence of the defendant's servants, and that they have not been returned inspite of notice and ended with prayer for the aforesaid alternative reliefs.

4. These allegations do not disclose any cause of action for the return of the ornaments. There is no averment of any wrongful detention, but on the contrary there is the suggestion that the ornaments are not in the possession of the defendant. Indeed, it was an admitted fact during the trial that the ornaments were stolen from the Malkhana and were untraceable. The plaintiffs, therefore, pressed the alternative relief only, for the recovery of their price on the ground that the ornaments were lost on account of the negligence of the Government servants, and the Government was liable for their

tortuous conduct. As already stated, this plea was overruled and the suit dismissed.

5. The decree of the Court below has been assailed on two grounds in this revision. The first ground of attack is, that the position of the Government was that of a bailee and it was liable to indemnify the plaintiffs, if the ornaments were lost through its negligence or through the negligence of its servants. The second ground of attack is that the Government is liable to indemnify the plaintiffs in accordance with the rule that a master is liable for the tortious acts of his servants.

6. The first ground is manifestly untenable and does not deserve any serious consideration, for the obligation of a bailee is contractual obligation and springs only from the contract of bailment. It cannot arise independently of a contract. In this case, the ornaments were not made over to the Government under any contract whatsoever; in fact the ornaments were not at all handed over by the plaintiffs to the Government. The Government, therefore, never occupied the position of a bailee and is not liable as such to indemnify the plaintiffs. It was perhaps realised by the learned counsel for the plaintiffs-applicants that this ground could not be supported and the arguments, before me, were, therefore, confined to the second ground only, which does raise a substantial question of law.

7. According to political theory, sovereignty is an essential attribute of a State, which means that it is the supreme and ultimate authority within its territory, and that there is no other authority, to which its citizens may look for redress, if they have any grievance against it. The Courts of law derive their existence, jurisdiction and authority from the State itself; and have, therefore, no jurisdiction over it and no authority to pronounce any binding adjudication against it, except in so far as the State has consented to submit to their jurisdiction and to abide by their decisions. This consent may be found in the Constitution of the State itself, or in the laws enacted by it, or even in the executive orders issued by it; So far as the English law is concerned, this juristic principle, based on the theory of sovereignty, has found expression in such rules as 'The King can do no wrong,' and 'No action lies against the Crown.'

8. Every civilised State has, however, to some extent, recognised the moral claim of a citizen to redress against itself and has, therefore, consented to submit to the jurisdiction of Municipal Courts to that extent. In England, these limits are defined by the scope of 'The petition of right,' and in India by the Constitution Act of 1935. A right of action has been conferred by other statutes also. Further, it appears to be an established rule of law that when the State acts under colour of legal title, its claim is justiciable and its consent to submit to the jurisdiction of Municipal Courts has to be presumed; vide *Forester v. Secy. of State*, I. A. Sup. vol. 10 : 12 Beng. L. R. 20

9. Government is the political organizations through which the sovereign will of the State finds expression, and through which the State functions. A suit by a citizen against the Government is thus, in substance, a suit against the State by its own citizen, and is regulated by the principles set out above. It is, therefore, necessary to determine for the decision of this case, whether the Government has incurred any liability for the tortious acts of its servants on the principle embodied in the maxim 'responded superior'

10. The learned counsel for the applicants concedes that a suit cannot be maintained against the Government without the consent of the State, and relies on Section 176, Constitution Act of 1935, (26 Geo., V. C. 2) to prove such consent. The section reads thus:

"(1) The Federation may sue, or be sued by the name of the federation of India and a Provincial Government may sue or be sued by the name of the Province, and, without prejudice to the subsequent provisions of this chapter, may, subject to any provisions which may be made by the Act of the Federal or a Provincial Legislature enacted by virtue of powers conferred on that Legislature by this Act, sue or be sued in relation to their respective affairs in the like cases as the Secretary of State in Council might have sued or been sued if this Act had not been passed.

The Provincial Governments have thus been made liable to be sued, in respect of affairs of the Provinces, to the same extent to which the Secretary of State was liable to be sued before the Constitution Act of 1935. This liability of the Secretary of State is to be found in Section 32, Constitution Act of 1919 (9 and 10 Geo. V., C. 101), according to which:

"Every person shall have the same remedies 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 had not been passed."

11. The result of reading these two sections together is that only such suits are maintainable against the Provincial Governments in respect of affairs of the Provinces, as could be maintained against the East India Company before the Government of India Act, 1858 (21 and 22 Vict. C. 106), that is, before the direct government of this country was assumed by the British Crown. In order to determine, therefore, whether the present suit is maintainable against the Provincial Government it is necessary to determine whether a suit for compensation was maintainable against the East India Company for the tortious acts of its servants.

12. There are several cases in which the liability of the Secretary of State to be sued for tortious acts of Government servants has been judicially considered, and the question that has arisen in this case is not res integra. It is necessary to notice the position of the East India Company, immediately before the direct government of this country was assumed by the Crown, in order to appreciate these decisions, for as already observed above, the liability of the Secretary of State had to be determined and was determined by a reference to the liability of the East India Company as it existed before the Government of India Act, 1858.

13. The East India Company began as a trading corporation. It acquired certain sovereign rights when it obtained the Diwani from the Mogul Emperor Shah Alam in 1165. By reason of the Charter Act, 1833, it held the Government of India in trust for the British Crown. Upto the year 1858 it held a dual character, namely, the character of a trading corporation and the character of a body possessed of certain sovereign rights, although it was not a fully sovereign body. It is necessary to make reference to this dual character of the East India Company, because a distinction has been made in decided cases between the responsibility of the Company or of the Secretary of State for the tortious acts committed in pursuance of commercial undertakings and non-commercial undertakings,

14. The leading case on the point is the decision in the Peninsular and Oriental Steam Navigation Co. v. Secy. of State 6 Bom. H. C. App. 1. In that case, damages were claimed against the Secretary of State for injury sustained by a horse of the plaintiffs due to the negligence of certain Government servants employed in the Dockyard at

Kidderpore. Sir Barnes Peacock C. J. who delivered the judgment of the Court, after pointing out the dual character of the East India Company and the distinction between a mercantile undertaking carried on by the Company whether for its own private or for public benefit and an activity carried on in the exercise of governmental functions, and after referring to Section 65, Government of India Act, 1858, according to which the liability of the Secretary of State was co-extensive with the liability of the East India Company, held that the Secretary of State was liable for damages occasioned by Government servants while they were engaged in a commercial undertaking which could be carried on by a private individual not possessed of any sovereign powers. The learned Chief Justice further went on to observe:

"But where an act is done, or a contract is entered into, in the exercise of powers usually called sovereign powers, by which we mean powers which cannot be lawfully exercised except by a sovereign, or private individual delegated by a sovereign to exercise them, no action will lie."

15. The first rule laid down by Sir Barnes Peacock, namely, that an action is maintainable against the Secretary of State in respect of tortious acts of Government servants committed in connection with an undertaking which could be carried on by a private individual without possession of sovereign powers, has never been disputed and has always been treated to be a correct statement of law. The second rule laid down in the quotation given above has, however, given rise to conflict of judicial opinion. It has been literally followed in some cases, but in others it has been treated as a mere obiter dictum and substantially departed from. In those cases where the second rule has been strictly followed, it has been held that the Secretary of State was liable only if the tort is committed in connection with an undertaking which can be carried on by an individual without possessing sovereign powers, but that the Secretary of State was not liable for anything done in the exercise of sovereign powers. Reference may, in this connection, be made to *Nobin Chunder Dey v. Secy. of State* 1 Cal. 11 : 24 W. R. 309, *Mcinerny v. Secy. of State* 38 Cal. 797 : 13 I. C. 370 and *Secy. of State v. A. Cockcraft* 39 Mad. 351; A. I. R. 1915 Mad. 993.

16. The view that the Secretary of State is not liable for anything done in the exercise of sovereign powers was dissented from in the *Secretary of State v. Hari Bhanji*, 5 Mad. 273, where it was held that the jurisdiction of Court was ousted in respect of acts of State and not with respect to acts done under colour of Municipal law, that the *Peninsular Company's case* 5 Bom. H. C. App. 1, does not decide anything beyond this that no character of sovereignty attached to the commercial operations of the Company and that it was liable to be sued in respect of wrongs done in the course of such operations, that it does not decide that no suit could be maintained in respect of wrongs done in the operation of sovereign rights, that every act performed in the exercise of sovereign rights is not an act of State and that acts of State are only such acts which do not pretend to justify themselves by any canon of Municipal law.

17. Similarly, it was pointed out in *A. M. Ross v. Secy. of State* 37 Mad. 55 : A. I. R. 1915 Mad. 434, in a very well-considered judgment of Wallis J. (as he then was) that the *Peninsular Company's case* 5 Bom. H. C. App. 1, only established that the East India Company or that the Secretary of State did not enjoy immunity in respect of torts committed in transactions that could be carried on by private individuals and that whether the immunity extended in respect of torts committed in the performance of transactions in the exercise of sovereign authority was not finally decided in that case.

18. It was pointed out in *Shivabhajan Durgaprasad v. Secy. of State* 28 Bom. 314 : 6

BomLR 65 that the Secretary of State could be held liable only if the liability was incurred on account of the Government of India. The facts of Shivabhajan's case 28 Bom. 314 : 6 BomLR 65, were that certain bundles of hay were attached by the Chief Constable of Mahim, because they were believed to be stolen property; the plaintiff, from whose possession the bundles of hay were attached, was prosecuted, and acquitted, but did not get back all the bundles attached because they were lost. He sued the Secretary of State for compensation for loss due to the negligence of the Chief Constable. It was held on these facts that in order to be maintainable against the Secretary of State the suit must be one in which the East India Company could have been held liable, subject to this further condition that the liability must be one incurred on account of the Government of India. It was pointed out that the executive Government of Bombay was carried on by the Governor of Bombay, and that the Chief Constable not having been appointed by the Governor of Bombay, the liability could not be held to have been incurred on account of the Government of India.

19. The decision in Peninsular Company's case 5 Bom. H. C. App. 1 (ubi supra) was quoted with approval by their Lordships of the Judicial Committee in Secretary of State v. Moment J. 40 Cal. 391 : 40 I. C. 48 P. C.. Lord Haldane, the Lord Chancellor, delivering the judgment of their Lordships of the Judicial Committee, observed :

"Their Lordships are satisfied that a suit of this character would have lain against the Company. The reasons for so holding are fully explained in the judgment of Sir Barnes Peacock, C. J., in the Peninsular and Oriental Co. v. Secretary of State. 5 Bom. H. C. App. 1."

Even after this pronouncement of their Lordships of the Privy Council, approving the decision in the Peninsular Company's case 5 Bom. H. C. App. 1. there still remains a conflict of judicial opinion about the scope of that decision, for while the Secy. of State v. A. Cockcraft 39 Mad. 351: A. I. R. 1915 Mad. 993, take the view that the Privy Council has accepted that part also of the Peninsular Company's case 5 Bom. H. C. App. 1 wherein the Chief Justice specifically exempts cases in which an act is performed in the course of an undertaking carried on in the exercise of sovereign powers, Rankin, C. J., observes in the Secretary of State v. Gobinda Chaudhuri MANU/WB/0094/1932 : AIR1932Cal834 :

"It remains, however, so far as one can see, open to the consideration of the Judicial Committee whether or not a suit lies against the Secretary of State for India in Council in respect of an act of a subordinate in connection with the exercise of sovereign or governmental power".

20. It would appear from this review of case law that the conflict of judicial opinion was not set at rest even by the decision of their Lordships of the Judicial Committee in Moment's case 40 Cal. 391: 40 I. C. 48 P. C.. Some observations about the liability of the Crown for the tortuous acts of Government servants are to be found in High Commissioner for India and High Commissioner for Pakistan V. I. M. Lal MANU/PR/0012/1948. Mr. I. M. Lal was a member of the Indian Civil Service and was dismissed from that service on 10th August 1940. He, thereupon, brought a suit claiming certain declarations, The Federal Court of India gave him a declaration to the following effect : ;

"...That the plaintiff Mr. I. M. Lal was wrongly dismissed from the Indian Civil Service on 4th June 1940, and has further ordered that the High Court aforesaid do take such action in regard to any application duly made by or on behalf of

Mr. I. M. Lall for leave to amend, to claim damages as the High Court shall seem right."

The Secretary of State for India, for whom the two High Commissioners were substituted as appellants under the Indian Independence Act of 1947, appealed against the decision of the Federal Court. The respondent, Mr. I. M. Lall, did not press his claim for damages before their Lordships of the Judicial Committee, but on the other hand, maintained that he was entitled to recover his arrears of pay from the date of the proposed order of dismissal upto the date of action. Before dealing with the altered claim their Lordships observed with regard to the claim for damages mentioned in the order of the Federal Court.

"It is unnecessary to" cite authority to establish that no action in tort can lie against the Crown" and therefore, any right of action must either be based on contract or conferred by statute."

It is claimed that these observations conclusively set at rest the conflict of judicial opinion in favour of the view expressed in Nobin Chunder Dey's case 1 Cal. 11: 24 W. R. 309 (ubi supra).

21. There are certain considerations which militate against this contention. The observations made by their Lordships are quite general in nature and taken literally apply to every case brought against the Crown for the tort of its servants. It is to be borne in mind that their Lordships themselves had approved of the decision in the Peninsular Company's case 5 Bom. H. C. App. 1 (Ubi supra) where it was held that the Secretary of State was liable for torts committed by Government servants while engaged in commercial undertakings of the Government. I find it difficult to conclude that their Lordships intended to overrule the Peninsular Company's case 5 Bom. H. C. App. 1 and to dissent from the view expressed in Moment's case: too Cal. 391: 40 I. C. 48 P. C (ubi supra) without giving this matter any serious consideration. It is, therefore, obvious that the observations of their Lordships were not intended to be of such general application as may be inferred if attention is confined only to the wording of those observations. If I am right in assuming that their Lordships did not intend to overrule the Peninsular Company's case 5 Bom. H. C. App. 1 and that they did not intend to hold that the Secretary of State or the Crown could not be sued in respect of torts committed in the course of commercial undertakings of the Government, I fail to discover any reason why it should be inferred from these observations that their Lordships intended to extend the immunity to all such functions as could be performed in the exercise of sovereign powers. This precise question did not call for their Lordships' decision and the observations are obiter dicta. I am aware that the obiter dicta of their Lordships have the same binding authority as their well considered rulings, but as observed in the well-known case of Quinn v. Leathern (1901) A. C. 495: 70 L. J. P. C. 76 observations in a judgment should be interpreted with the reference to the facts of the particular case in which those observations were made. I, therefore, conclude that all that their Lordships intended to say in this case was that no action was maintainable against the Crown in tort if the tort was of the description alleged by Mr. I. M. Lall.

22. I have thus reached the conclusion that whereas it is settled law that an action lies against the State in respect of torts committed by Government servants when engaged in undertakings carried on by the Government but which could be carried on by a private person without possessing sovereign powers judicial opinion is divided on the point whether the immunity extends in respect of torts committed in the performance of all transactions carried on in the exercise of sovereign powers or is confined to

particular kinds of transactions only. It is not necessary for me to express any opinion on this vexed question for the decision of this case, for, even if it be assumed that the State has consented to submit to the jurisdiction of the Municipal Courts in such matters, the suit is liable to fail on the ground that the alleged tortuous act was performed in discharge of an obligation imposed by law.

23. The rule embodied in the maxim 'respondent superior is subject to the well-recognized exception that a master is not liable for the acts of his servants performed in discharge of a duty imposed by law. Authority for this proposition is to be found in *Viscount Canterbury v. Queen* (1843) 4 St. Tr. N. S. 767, *Tobin v. The Queen* (1864) 16 C. B. (N. S.) 310: 33 L. J. P. C. 199 and *Shivabhajan Durgaprasad v. The Secy. of State* 28 Bom. 314: 6 Bom. L. R. 65.

24. I have, therefore, come to the conclusion that the finding of the Court below that the Government is not liable to answer the plaintiffs' claim is correct and should be upheld.

25. This application in revision is accordingly dismissed, but in view of all the circumstances of the case I direct the parties to bear their own costs of this application in revision.

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