Supreme Court of India
N.Nagendra Rao & Co vs State Of A.P on 6 September, 1994
Equivalent citations: 1994 AIR 2663, 1994 SCC (6) 205
Author: R Sahai
Bench: Sahai, R.M. (J)

PETITIONER:
N.NAGENDRA RAO & CO.

Vs.

RESPONDENT:
STATE OF A.P.

DATE OF JUDGMENT06/09/1994

BENCH:
SAHAI, R.M. (J)
BENCH:
SAHAI, R.M. (J)
HANSARIA B.L. (J)

CITATION:
1994 AIR 2663 1994 SCC (6) 205
JT 1994 (5) 572 1994 SCALE (3)977

ACT:

HEADNOTE:

JUDGMENT:

The Judgment of the Court was delivered by R.M. SAHAI, J.- Is the State vicariously liable for negligence of its officers in discharge of their statutory duties, was answered in the negative by the High Court of Andhra Pradesh on the ratio laid down by this Court in Kasturi Lal Ralia Ram Jain v. State of U.P1 while reversing the decree for payment of Rs 1,06,125.72 towards value of the damaged stock with interest thereon at the rate of 6% granted by the trial court for loss suffered by the appellant due to non-disposal of the goods seized under various control orders issued under the Essential Commodities Act, 1955 (hereinafter referred to as 'the Act'). But for determining correctness of the view taken by it, the High Court granted certificate under Article 133(1) of the Constitution of India as the case involved "substantial questions of law, of general importance". Although the claim of the appellant was negatived mainly on the sovereign power of the State, but, that was only one of the reasons, as the High Court further held that the goods of the appellant having been seized in the exercise of statutory power for violation of the Control Orders and the seizure having been found, by the appropriate authorities, to be valid at least for part, no

compensation was liable to be paid to the appellant for the goods which were directed to be returned. The further questions, therefore, that arise for consideration are, whether seizure of the goods in exercise of statutory powers under the Act immunises the State, completely, from any loss or damage suffered by the owner. Whether confiscation of part of the goods absolves the State from any claim for the loss or damage suffered by the owner for the goods which are directed to be released or returned to it.

2. Since the High Court did not interfere with the findings recorded by the trial court and decided the appeal as a matter of law, it is not necessary to narrate the facts in detail, except a gist of it so far it is helpful in deciding the issues in question. It has been found and is not disputed that the appellant carried on business in fertiliser and foodgrains under licence issued by the appropriate authorities. Its premises were visited by the Police Inspector, Vigilance Cell on 11-8-1975 and huge stocks of fertilisers, foodgrains and even non-essential goods were seized. On the report submitted by the Inspector, the District Revenue Officer (in brief 'the DRO') on 31-8-1975, in exercise of powers under Section 6-A of the Act, directed the fertiliser to be placed in the custody of Assistant Agricultural Officer (in brief 'AAO') for distribution to needy ryots and the foodgrains and non-essential goods in the custody of Tehsildar for disposing it of immediately and depositing the sale proceeds in the Treasury. The AAO did not take any steps to dispose of the fertiliser. Therefore, the appellant made applications on 17-9-1975 and 1 AIR 1965 SC 1039: (1965) 1 SCR 375 21-9-1975 before the DRO and on 11-2-1976 before AAO that since no steps were being taken the fertiliser shall deteriorate and shall be rendered useless causing huge loss to the appellant. Request was made for diverting the fertiliser either to the places mentioned by the appellant as the demand was more there or to release it in its favour for disposal and deposit of the sale price. But neither any order was passed by the DRO nor any action was taken by the AAO. On 29-6-1976 the proceedings under Section 6-A of the Act were decided and the stock of horsegram (foodgrain) was confiscated as the appellant's licence had been cancelled. As regards fertiliser it was held that the explanation of the appellant for difference in stock was not satisfactory. The only violation of Control Orders found was improper maintenance of accounts. In consequence of this finding, rather in absence of any material to prove that the appellant was guilty of any serious infringement such as black marketing or adulteration or selling at higher price than the controlled price, the Collector was left with little option except to direct confiscation of part of the stock and the rest was released in favour of the appellant. That the confiscated stock was only nominal, shall be clear from a comparative chart of the stock seized and released

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	Stock seized (bags)	Stock confi-scated (bags)
1.Ammonium Sulphate	392	29
2.Ammonium Phosphate	6	2
3.Puskhhal (12-6-6)	787	x
4.Super Phosphate1	1247	x
5. Murate of Potash	15	5

6.	Super Phosphate	135 bags of 40 kgs each	4
7.	"	125 bags of 50 kgs each	12
8.	Urea	2	3
9.	Ammonium Phosphate	581 (19.5; 19.5; 0)	x
10.	Complex 17:17:17	121	x
11.	Complex 14:28:14	36	x
12.	Mixture 0: 12:80	13	x

---------- The appropriate authority while directing release of the stock or equivalent value therefor made it subject to consent of the Vigilance Officer. But this condition was deleted on 15-10-1976 in appeal filed by the appellant.

3. Despite Collector's order and the order passed in appeal by the Sessions Judge, the AAO did not release the stock and the efforts of the appellant with the Chief Minister, Revenue Minister, Agriculture Minister and various other departmental heads did not yield any result. However, the AAO issued a notice in the last week of March 1977 to the appellant to take delivery of the stock released in its favour. But when the appellant went to take delivery it found that the stock had been spoilt both in quality and quantity.. Therefore, after getting its objection endorsed by the officer concerned the appellant came back and made a demand for value of the stock released by way of compensation. When no response came it gave notice and filed the suit for recovery of the amount which has given rise to this appeal. The suit was contested amongst other grounds on sovereign immunity of the State, discharge of statutory duty in good faith, absence of any right to claim damages when seizure has been found to be valid for part of the goods, absence of any right to claim value of the goods as the only right an owner of the goods has to get back the stock irrespective of its condition etc.

4. The trial court did not accept the defence and held that the relationship between the appellant and the respondent was of a bailor and bailee and the bailee could not refuse delivery of the goods nor it could delay it when it was demanded by the appellant. It further held that the deterioration of the goods in the custody of the respondents was not in exercise of sovereign function of the State. The court held that the seizure of the goods was no doubt in pursuance of statutory obligation but once it was seized then it was the responsibility of the State Government to ensure that the goods were maintained in proper condition. But they failed in discharging their obligation and in any case there was no justification for retaining the goods after the order was passed by the Sessions Judge directing the AAO to return the goods without any permission from the Vigilance Inspector. The trial court was also of the opinion that the fertiliser fell in the category of those goods the utility of which deteriorated with lapse of time. The trial court did not believe the AAO, who appeared as witness, that he tried to dispose of the stock as there was nothing on the record to show that any such effort was made. Not only that, even when the higher authorities directed him to sell away the stocks and make a compliance report he did not make any effort nor contacted any cooperative society, depot or super bazar. The trial court found that there was nothing on record to show that any ryot or cultivator had refused to purchase the seized stocks of fertilisers on the ground that its quoted price was higher than the market price. It was further held, after discussing various letters sent by the appellant, that it was evident that the appellant had been repeatedly requesting the AAO

to take prompt and necessary measures to dispose of the seized fertilisers or stocks and to release its value but no steps were taken by him. The trial court believed appellant's version, which stood supported from the evidence of the respondents, that when new fertilisers come in the market the demand for it is more than for old stocks. Therefore, the trial court was of opinion that it was incumbent on the respondents to have taken prompt and immediate steps to dispose of the fertilisers before expiry of the relevant season. The trial court did not believe the AAO that he could not dispose of the stock as the appellant was insisting that the sale should not be made below a particular price, as no such restriction was placed by the DRO, and the AAO who was duty bound to comply with directions of his superior failed to carry it out. In these circumstances the trial court held that the AAO acted negligently in not disposing of the stock in time but also in failing to obtain necessary directions from the DRO if no purchaser was forthcoming or, if any doubt was entertained by him, regarding the right of the appellant for the rates at which the stocks were to be sold. It was in these circumstances and on the findings recorded on the negligence of the AAO that the trial court decreed the suit in part for the loss suffered by the appellant. In appeal the findings recorded by the trial court on negligence were not interfered but the decree was set aside as a matter of law relying on the ratio of Kasturi Lal1 and the Full Bench decision of that Court in State of A.P v. Devarasetty Rama Murthy2.

5. Prior to adjudicating upon the legal issues, it appears appropriate to examine in brief the objective of the Act, the provisions dealing with search, seizure and confiscation and the nature of their powers and manner of its exercise as it shall assist in determining if the statutory authorities are responsible for any loss or damage to the stocks and, if so, to what extent. The Act was enacted in 1955 in the interest of the general public for the control of the production, supply and distribution of essential commodities and trade and commerce. In Diwan Sugar & General Mills (P) Ltd. v. Union of India3 it was held that the prime object of the legislation was to secure availability of essential commodities to the general public at fair prices and to protect their interest by way of equitable distribution. "Essential commodity" under clause (a) of Section 2 of the Act means any of the commodities mentioned therein. It extends to such varied items as cattle fodder, coal, component parts and accessories of automobiles, cotton and woollen textiles, foodstuffs, iron and steel, paper, petroleum, raw cotton, jute and any other class of commodity notified by the appropriate Government. Section 3 is the main provision directed towards securing equitable distribution of the essential commodity and its availability at fair prices. To achieve this objective, its various sub-sections confer powers on Government to issue orders regulating or even prohibiting production, supply and distribution of such goods. Clause (j) of sub-section (2) of Section 3 empowers the Government to make any provision for any incidental or supplementary matter including in particular, the entry, search or examination of such premises, aircraft, vessels, vehicles etc. to make seizure by a person authorised to make such entry, search or examination. But the power in respect of the articles has been made subject to reasonable belief that a contravention of the order has been, is being, or is about to be committed. The reach of the sub-section is very wide as it empowers the person authorised to seize even if any contravention is about to be committed. The expression "reason to believe" has been interpreted by this Court to mean that even though formation of opinion may be subjective but it must be based on material on the record. It cannot be arbitrary, capricious or whimsical. It is, thus, a check on exercise of power to seize the goods.

2 (1985) 2 An WR 402 3 AIR 1959 SC 626: 1959 Supp (2) SCR 123 The procedure after seizure is provided for by Section 6-A of the Act. Sub-section (1) of it is extracted below :

> "6-A. Confiscation of essential commodity.- (1) Where any essential commodity is seized in pursuance of an order made under Section 3 in relation thereto, a report of such seizure shall, without unreasonable delay, be made to the Collector of the district or the Presidency town in which such essential commodity is seized and whether or not a prosecution is instituted for the contravention of such order, the Collector, may, if he thinks it expedient so to do, direct the essential commodity so seized to be produced for inspection before him, and if he is satisfied that there has been a contravention of the order may order confiscation of-
>
> (a) the essential commodity so seized;
>
> (b) any package, covering or receptacle in which such essential commodity is found; and
>
> (c) any animal, vehicle, vessel or other conveyance used in carrying such essential commodity;"

It requires a report of seizure of the essential commodity to be made without unreasonable delay to the Collector of the district who is empowered to direct confiscation if he is satisfied that there has been a contravention of the order. This requirement is to ensure that the higher authority shall apply its mind and take necessary steps in accordance with law. For instance, in this case even non-essential goods were seized. If the Collector would have applied his mind and perused the report he would have immediately directed release of such goods instead of directing its sale by Tehsildar as the provision of the Act and the Control Orders do not apply to non-essential goods. The exercise of power was obviously mechanical. This is being mentioned only to demonstrate the nature of power and how it is expected to be exercised. Nothing turns on it so far this appeal is concerned. But what needs to be mentioned is that since the power is very wide as a person violating the Control Orders is to be visited with serious consequences leading not only to the confiscation of the seized goods, packages or vessel or vehicle in which such essential commodity is found or is conveyed or carried, but is liable to be prosecuted and penalised under Section 7 of the Act, it is inherent in it that those who are entrusted with responsibility to implement it should act with reasonableness, fairness and to promote the purpose and objective of the Act. Further, it should not be lost sight of that the goods seized are liable to be confiscated only if the Collector is satisfied about violation of the Control Orders. The language of the section and its setting indicate that every contravention cannot entail confiscation. That is why the section uses the word 'may'. A trader indulging in black marketing or selling adulterated goods etc. should not, in absence of any violation, be treated on a par with technical violations such as failure to put up the pricelist etc. or even discrepancies in stock.

6. However, this appeal is primarily concerned with nature of Power exercised by the Collector under sub-section (2) of Section 6-A of the Act the purpose and objective of which is to make interim arrangement of the goods which are seized. The sub-section is extracted below :

"(2) Where the Collector, on receiving a report of seizure or on inspection of any essential commodity under sub-section (1), is of the opinion that the essential commodity is subject to speedy and natural decay or it is otherwise expedient in the public interest so to do, he may-

(i) order the same to be sold at the controlled price, if any, fixed for such essential commodity under this Act or under any other law for the time being in force; or

(ii) where no such price is fixed, order the same to be sold by public auction: Provided that in the case of any such essential commodity the retail sale price whereof has been fixed by the Central Government or a State Government under this Act or under any other law for the time being in force, the Collector may, for its equitable distribution and availability at fair prices, order the same to be sold through fair price shops at the price so fixed."

When a statute gives a power and requires the authority to exercise it in public interest then the person exercising the power must be vigilant and should take it as a duty to discharge the obligation in such a manner that the object of the enactment is carried into effect. The purpose of sub- section (2) is for protecting the goods seized by the Collector whether they are eatables or they are foodstuffs or they are iron and steel, as, if they are spoilt or they deteriorate then it is a loss not only to the owner but to the society. Loss in value of goods or its deterioration in quality and quantity would be in violation of the purpose and spirit of the Act. Even though the section uses the word 'may' but keeping in view the objective of the Act and the context in which it has been used it should be read as 'shall'; otherwise it would frustrate the objective of the sub-section. Once goods are seized, they are held by the State through the Collector and his agents as custodia society, unless it is found that the detention was illegal in which case it shall be deemed to have been held for the benefit of the person from whom it was seized. In either case, its proper maintenance and early disposal is statutory duty. It is more so as the proceedings do not come to an end quickly. The rationale of the provision appears to be that penalise the person who acts in contravention of the order but protect the goods as they are essential for the society. Loss in value of the goods in quality or quantity is neither in public nor in society's interest. Therefore, the Collector has to form an opinion if the goods seized are of one or the other category and once he comes to conclusion that they fall in one of the categories mentioned in the sub-section then he has no option but to direct their disposal or selling of in the manner provided. The expression "speedy and natural decay" does not need any elucidation. It is not an expression of art and must be understood in a common sense manner. The other expression, "it is otherwise expedient in the public interest" has also to be understood so as to advance the legislative objective of ensuring that the goods do not suffer either in quality or quantity. For instance, fertiliser may not be susceptible to speedy and natural decay but it is expedient in public interest to ensure that it is either sold to the agriculturist or disposed of at least before the next season. This interim arrangement comes to an end once an order of confiscation is passed.

7. But what happens when the goods seized are not confiscated. That has been provided for by sub-section (2) of Section 6-C relevant part of which reads as under :

> "(2) Where an order under Section 6-A is modified or annulled by the State Government, or where in a prosecution instituted for the contravention of the order in respect of which an order of confiscation has been made under Section 6-A, the person concerned is acquitted, and in either case it is not possible for any reason to return the essential commodity seized, such person shall, except as provided by sub-section (3) of Section 6-A, be paid the price therefor as if the essential commodity had been sold to the Government with reasonable interest calculated from the day of the seizure of the essential commodity; and such price shall be determined- "

This sub-section ensures that a person who has been prosecuted or whose goods have been confiscated does not suffer if the ultimate order either in appeal or in any proceeding is in his favour. It is very wide in its import as it statutorily obliges the Government to return the goods seized or to pay the value of the goods if for any reason it cannot discharge its obligation to return it. The circumstances in which the goods are to be returned are-

> (a) an order under Section 6-A is modified or annulled by the State Government;
>
> (b) where the goods were confiscated in consequence of prosecution of the person and he is acquitted;
>
> (c) and in all these cases where it is not possible for any reason to return the essential commodity seized.

This provision cuts across the argument of the State that where even part is confiscated the person whose goods are seized is not liable to be compensated for the remaining. The section is clear that if only part of the goods are confiscated then the remaining has to be returned. The very first part of the sub-section indicates that where the order of confiscation is modified in appeal meaning thereby if confiscation is confined to part only the Government is bound to release or return the remaining or pay the value thereof. But what is more significant of this sub-section which widens its reach is the expression "and in either case it is not possible for any reason to return the essential commodity seized" then the State shall be liable to pay the market price of the value with interest. The expression "for any reason" should be understood in broader and larger sense as it appears from the context in which it has been used. The inability to return, giving rise to the statutory obligation of deeming it as sale to the Government, may arise for variety of reasons and extends to any failure on the part of the Government. For instance, the goods might have been sold in pursuance of interim arrangement under Section 6-A(2). Or it might have been lost or stolen from the place of storage. The goods might have deteriorated or rusted in quality or quantity. The liability to return the goods seized does not stand discharged by offering them in whatever condition it was. Confiscation of part of the goods thus could not affect the right of owner to claim return of the remaining goods. Nor the owner is bound to accept the goods in whatever condition they are. The claim of the respondent, therefore, that the appellant was bound to accept the goods in whatever condition they were is liable to be rejected.

8. Having discussed the scheme of the Act, the stage is now set for examining whether the High Court was justified, in reversing the decree of the trial court for compensation, and dismissing the suit of the appellant, as the seizure of the goods having been effected under the statutory provisions it was an exercise of sovereign powers, thus, squarely covered by the ratio laid down by this Court in Kasturi Lal1. Immunity of the State from compensating its citizens for a wrong done by it or its officers either for its activities of commercial or private nature or for acts of State or for those for which suit could be brought into Municipal Courts has been through various stages due to reflection of English juristic philosophy that King can do no wrong, and its extension and application to our system of governance. In England it was recognised that the King could not be sued. In illustrating the doctrine that the "Queen can do no wrong" Prof. Dicey gives what he describes as an "absurd example", "if Queen were herself to shoot the Prime Minister through the head", he says, "no court in England could take cognizance of the act". The basis for it in England was both substantive and procedural. The former flowed from the divine right of the Kings and the latter from the feudal principle that the King could not be sued in his own courts. Yet it did not mean that he was above law. The true meaning of the expression "that King can do no wrong" meant "that the King has no legal power to do wrong"3a. Therefore, the institution of the petition of rights was founded upon the theory that the King, of his own free will, graciously orders right to be done. But the petition lay only, to recover unliquidated damages for breach of contract by the Crown. It was not extended by the courts to claims arising out of torts. In Viscount Canterbury v. Attorney General4, one of the questions that arose was whether the Crown was liable to make good the loss for the fire which had been caused by the personal negligence of the Commissioners. The answer given was, that even though the officer who was guilty of negligence was liable personally, the liability did not extend to the Crown. This immunity peculiar to the English system 3a H.W.R. Wade: Administrative Law, 6th Edn. 41 PH 306: 41 ER 648 found its way in our system of governance through various judgments rendered during British period, more particularly after 1858, even though the maxim "lex non protest peccare" that is the King can do no wrong had no place in ancient India or in medieval India as the Kings in both the periods subjected themselves to the rule of law and system of justice prevalent like the ordinary subjects of the States. According to Manu, it was the duty of the King to uphold the law and he was as much subject to the law as any other person.

> "In the Vedic period kingship was purely secular institution. Ancient Indian philosophers were not prepared to recognise the divinity of the unworthy Kings."4a It was said by Brihaspati "Where a servant commissioned by his master does any improper act, for the benefit of his master, the latter shall be held responsible for it."

Even during Muslim rule the fundamental concept under Muslim law like Hindu law was that the authority of King was subordinate to that of the law. It was no different during British rule. The courts leaned in favour of holding the State responsible for the negligence of its officers. (See Narayan Krishna Laud v. Gerard Norman, Collector of Bombay5, a decision which has been approved in State of Rajasthan v. Vidkyawati6.)

9. This principle was statutorily recognised when East India Company was taken over by the Crown. Section 68 of the Government of India Act, 1858 permitted the Secretary of the State in Council to sue or be sued. It was a departure from the English common law that no proceedings, civil or

criminal, could be filed against the Crown. In Peninsular & Oriental Steam Navigation Co. v. Secretary of State for India7 which came up before the Supreme Court of Calcutta, on a reference made by the Subordinate Judge, on the liability of the State for negligence of its officers, Chief Justice Peacock held that since East India Company was not a sovereign, its liability for negligence of its officers would be same as of an employer for acts of its employee. But the observations which were to influence the courts for years to come, both before coming into force of the Constitution and thereafter, were made while deciding the other issue whether the Secretary of the State in Council was personally liable. It was observed that there was a "clear distinction between acts done in exercise of what are usually termed sovereign powers and acts done in the conduct of undertakings which might be carried on by private individuals without having such powers delegated to them". To that extent there could have been little difficulty. But the learned Chief Justice in the next breath went on to observe 4a G.P. Verma : State Liability in India 5 (1868-69) 5 Bom HCR 1 (Bom) 6 AIR 1962 SC 933: 1962 Supp (2) SCR 989 7 (1868-69) 5 Bom HCR (App. A) 1 "It is clear that the East India Company would not have been liable for any act done by any of its officers or soldiers in carrying on hostilities, or for the act of any of its naval officers in seizing as prize property of a subject, under the supposition that it was the property of an enemy, nor for any act done by a military or naval officer, or by any soldier or sailor, whilst engaged in military or naval duty, nor for any acts of any of its officers or servants in the exercise of judicial functions."

Whether this was obiter dicta or not but this concession in favour of East India Company, a trading concern, was both unnecessary and unfortunate. It resulted in clothing the Company with powers which in law it did not have. The observations were irreconcilable with the earlier principle evolved that the Company being not a sovereign it could not claim sovereign immunity. Therefore, even though the Company was not sovereign yet it was made sovereign for carrying on hostilities and seizing the property. And this enunciation of law, even though incorrect and uncalled for, was seized upon and extended further in Nobin Chunder Dey v. Secretary of State of India8, where the English principle of sovereign immunity. of the Crown was applied and plaintiff's claim for recovery of damages against the State for non- issuing of the excise pass and in the alternative for refund of the auction money was rejected as it was an act done by the Government in exercise of sovereign power of the State. This decision and its application in numerous cases led to denial of relief to citizens and different principles were evolved but each revolving round basic doctrine of sovereign immunity. It was dissented to by the Madras High Court in Secretary of State for India in Council v. Hari Bhanji9 and it was observed that Nobin Chunder Dey8 did not properly comprehend the law laid down in Peninsular7. The Chief Justice of the Madras High Court, after dealing with Peninsular7 and its erroneous application in Nobin Chunder Dey8, observed that defence of sovereign immunity was available in those limited cases where the State could not be sued for its acts, such as making war or peace, in Municipal Courts. Relevant observations are extracted below :

> "Acts done by the Government in the exercise of the sovereign powers of making peace and war and of concluding treaties obviously do not fall within the province of municipal law, and although in the administration of domestic affairs the Government ordinarily exercises powers which are regulated by that law, yet there are cases in which the supreme necessity of providing for the public safety compels the Government to acts which do not pretend to justify themselves by any canon of

municipal law.

> Acts thus done in the exercise of sovereign powers but which do not profess to be justified by municipal law are what we understand to be 8 ILR (1875) 1 Cal II: 24 WR 309 9 ILR (1882) 5 Mad 273 the acts of State of which municipal courts are not authorised to take cognizance."

(emphasis supplied) The doctrine or the defence by the "act of State", is not the same as sovereign immunity. The former flows from the nature of power exercised by the State for which no action lies in civil court whereas the latter was developed on the divine right of Kings.

10. When the law was in this fluid state, the Constitution was enforced and in Province of Bombay v. Khushaldas S. Advani10 Justice Mukherjea, one of the members of the seven- Judge Bench, who was in minority made following observations approving the ratio laid down in Hari Bhanji9. On this aspect there was no conflict in majority and minority opinions. The Hon'ble Judge observed: (SCR pp. 694-95 : AIR pp. 248-49, para 11 9) "It is true that the East India Company was invested with powers and functions of a two- fold character. They had on the one hand powers to carry on trade as merchants; on th e other hand they had delegated to them powers to acquire, retain and govern territories to raise and maintain armies and to make peace and war with native powers in India. But the liability of the East India Company to be sued was not restricted altogether to claims arising out of undertakings which might be carried on by private persons; but other claims if not arising out of acts of State could be entertained by civil courts, if the acts were done under sanction of municipal law and in exercise of powers conferred by such law. The law on this point was discussed very ably by the Madras High Court in Secretary of State v. Hari Bhanji9."

The learned Judge also considered the Peninsular case7 and observed as under: (SCR pp. 696 : AIR p. 249, para 132) "Much importance, cannot in my opinion be attached to the observations of Sir B. Peacock in Peninsular and Oriental Steam Navigation Co. v. Secretary of State7. In that case the only point for consideration was whether in the case of a tort committed in the conduct of a business the Secretary of State for India could be sued. The question was answered in the affirmative. Whether he could be sued in cases not connected with the conduct of a business or commercial undertaking was not really a question for the court to decide."

11. But it was not till 1962 that an occasion arose for this Court to examine the tortuous act by servant of the State and whether a citizen who was wronged by it was entitled to claim compensation. In Vidhyawati6, the driver of a government vehicle while driving the jeep along a public road knocked down a person who was walking on the footpath by the side of the public road in Udaipur city causing him multiple injuries, including fractures of the skull and backbone, resulting in his death three days later in the hospital where he had been removed for treatment. The suit of his widow, minor daughter and mother was decreed, on the finding that the driver was guilty of negligence. But the decree was granted against the driver only. In 10 AIR 1950 SC 222: 1950 SCR 621 appeal, however, the High Court decreed the suit against the State as well. This Court after examining in detail the scope of Article 300 of the Constitution of India and the earlier provisions in the Government of India Act beginning from Section 68 of the Act of 1858, approved decision in

Narayan Krishna Laud5 and observed that the decision in Viscount Canterbury4 being based upon the principle that "the King cannot be guilty of personal negligence or misconduct and consequently cannot be responsible for the negligence or misconduct of his servants" was not applicable as held in Peninsular case7 as the liability of the Secretary of State in place of East India Company was specifically provided for. The Court further held : (SCR p. 1002 : AIR p. 938, para 10) "This case also meets the second branch of the argument that the State cannot be liable for the tortious acts of its servants, when such servants are engaged on an activity connected with the affairs of the State. In this connection it has to be remembered that under the Constitution we have established a welfare State, whose functions are not confined only to maintaining law and order, but extend to engaging in all activities including industry, public transport, State trading, to name only a few of them. Insofar as the State activities have such wide ramifications involving not only the use of sovereign powers but also its powers as employers in so many public sectors, it is too much to claim that the State should be immune from the consequences of tortious acts of its employees committed in the course of their employment as such. In this respect, the present set-up of the Government is analogous to the position of the East India Company, which functioned not only as a Government with sovereign powers, as a delegate of the British Government, but also carried on trade and commerce, as also public transport like railways, posts and telegraphs and road transport business."

The Court after dealing with case law and Article 300 proceeded further to hold : (SCR p. 1007 : AIR p. 940, para

15) "Viewing the case from the point of view of first principles, there should be no difficulty in holding that the State should be as much liable for tort in respect of a tortious act committed by its servant within the scope of his employment and functioning as such, as any other employer. The immunity of the Crown in the United Kingdom was based on the old feudalistic notions of justice, namely, that the King was incapable of doing a wrong, and, therefore, of authorising or instigating one, and that he could not be sued in his own courts. In India, ever since the time of the East India Company, the sovereign has been held liable to be sued in tort or in contract, and the Common Law immunity never operated in India. Now that we have, by our Constitution, established a Republican form of Government, and one of the objectives is to establish a Socialistic State with its varied industrial and other activities, employing a large army of servants, 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. This Court has deliberately departed from the Common Law rule that a civil servant cannot maintain a suit against the Crown. In the case of State of Bihar v. Abdul Majid11, this Court has recognised the right of a government servant to sue the Government for recovery of arrears of salary. When the rule of immunity in favour of the Crown, based on Common Law in the United Kingdom, has disappeared from the land of its birth, there is no legal warrant for holding that it has any validity in this country, particularly after the Constitution. As the cause of action in this case arose after the coming into effect of the Constitution, in our opinion, it would be only recognising the old established rule, going back to more than 100 years at least, if we uphold the vicarious liability of the State. Article 300 of the Constitution itself has saved the right of Parliament or the Legislature of a State to enact such law as it may think fit and proper in this behalf. But so long as the Legislature has not expressed its intention to the contrary, it must be held that the law is what it has been ever since the days of the East India Company."

(emphasis supplied) But this Constitution Bench decision was distinguished in Kasturi Lal1 by another Constitution Bench as, "the facts in Vidhyawati case6 fall in a category of claims which is distinct and separate from the category in which the facts of the present case fall". The Bench, therefore, relying on the observation in Peninsular case7 which were held to be obiter in Province of Bombay 10 proceeded to hold: (SCR pp. 386-87 : AIR p. 1046, para 21) "Thus, it is clear that this case recognises a material distinction between acts committed by the servants employed by the State where such acts are referable to the exercise of sovereign powers delegated to public servants, and acts committed by public servants which are not referable to the delegation of any sovereign powers. If a tortious act is committed by a public servant and it gives rise to a claim for damages, the question to ask is : Was the tortious act committed by the public servant in discharge of statutory functions which are referable to, and ultimately based on, the delegation of the sovereign powers of the State to such public servant? If the answer is in the affirmative, the action for damages for loss caused by such tortious act will not lie. On the other hand, if the tortious act has been committed by a public servant in discharge of duties assigned to him not by virtue of the delegation of any sovereign power, an action for damages would lie. The act of the public servant committed by him during the course of his employment is, in this category of cases, an act of a servant who might have been employed by a private individual for the same purpose. This distinction which is clear and precise in law, is sometimes not borne in mind in discussing questions of the State's liability arising from tortious acts committed by public servants."

The Bench did not avert to Hari Bhanji case9 which was approved by this Court in Province of Bombay10. 11 1954 SCR 786: AIR 1954 SC 245

12. However, since 1965 when this decision was rendered the law on vicarious liability has marched ahead. The ever increasing abuse of power by public authorities and interference with life and liberty of the citizens arbitrarily, coupled with transformation in social outlook with increasing emphasis on human liberty resulted in more pragmatic approach to the individual's dignity, his life and liberty and carving out of an exception by the court where the abuse. of public power was violative of the constitutional guarantee. Such infringements have been held to be wrong in public law which do not brook any barrier and the State has been held liable to compensate the victims. (See Rudul Sah v. State of Bihar12, Sebastian M. Hongray v. Union of India13, Saheli, A Women's Resources Centre v. Commissioner of Police, Delhi Police Headquarters14, State of Maharashtra v. Ravikant S. Patil15.) In Nilabati Behera v. State of Orissa16 Hon'ble Mr Justice J.S. Verma observed as under: (SCC p. 758, para 10) "It may be mentioned straightaway that award of compensation in a proceeding under Article 32 by this Court or by the High Court under Article 226 of the Constitution is a remedy available in public law, based on strict liability for contravention of fundamental rights to which the principle of sovereign immunity does not apply, even though it may be available as a defence in private law in an action based on tort."

In the same decision, it was observed by Hon'ble Dr Justice A.S. Anand : (SCC p. 768, para 34) "The purpose of public law is not only to civilize power but also to assure the citizen that they live under a legal system which aims to protect their interests and preserve their rights."

13. Sovereign immunity as a defence was, thus, never available where the State was involved in commercial or private undertaking nor it is available where its officers are guilty of interfering with life and liberty of a citizen not warranted by law. In both such infringements the State is vicariously liable and bound, constitutionally, legally and morally, to compensate and indemnify the wronged person. But the shadow of sovereign immunity still haunts the private law, primarily, because of absence of any legislation even though this Court in Kasturi Lal1 had expressed dissatisfaction on the prevailing state of affairs in which a citizen has no remedy against negligence of the officers of the State and observed : (SCR pp. 391-92: AIR p. 1049, para 30) "In dealing with the present appeal, we have ourselves been disturbed by the thought that a citizen whose property was seized by process o f law, has to be told when he seeks a remedy in a court of law on the ground that his property has not been returned to him, that he can 12 (1983) 4 SCC 141: 1983 SCC (Cri) 798 13 (1984) 3 SCC 82: 1984 SCC (Cri) 407 14 (1990) 1 SCC 422:1990 SCC (Cri) 145: AIR 1990 SC 513 h 15 (1991) 2 SCC 373: 1991 SCC (Cri) 656 16 (1993) 2 SCC 746: 1993 SCC (Cri) 527 make no claim against the State. That, we think, is not a very satisfactory position in law. The remedy to cure this position, however, lies in the hands of the Legislature."

14. Necessity of the legislation apart, which shall be adverted later, it is necessary to mention that in subsequent decisions rendered by this Court the field of operation of the principle of sovereign immunity has been substantially whittled down. In Shyam Sunder v. State of Rajasthan17 where the question of sovereign immunity was raised and reliance was placed on the ratio laid down in Kasturi Lal case1, this Court after considering the principle of sovereign immunity as understood in England and even applied in America observed that there was no "logical or practical" ground for exempting the sovereign from the suit for damages. In Pushpa Thakur v. Union of India18, this Court while reversing a decision of the Punjab & Haryana High Court (Union of India v. Pushpa Thakur19) which in its turn placed reliance on a Full Bench decision of that very Court in Baxi Amrik Singh v. Union of India20 held that where the accident was caused by negligence of the driver of military truck the principle of sovereign immunity was not available to the State.

15. That apart, the doctrine of sovereign immunity has no relevance in the present-day context when the concept of sovereignty itself has undergone drastic change. Further, whether there was any sovereign in the traditional sense during British rule of our country was not examined by the Bench in Kasturi Lal1 though it seems it was imperative to do so, as the Bench in Vidhyawati6 had not only examined the scope of Article 300 of the Constitution, but after examining the legislative history had observed : (SCR p.997 : AIR p. 937, para 7) "It will thus be seen that by the chain of enactments beginning with the Act of 1858 and ending with the Constitution, the words 'shall and may have and take the same suits, remedies and proceedings' in Section 65 above, by incorporation, apply to the Government of a State to the same extent as they applied to the East India Company."

16. Therefore, the liability of the Secretary of State in Council till 1947 was and of the State thereafter is coterminous with the liability that the East India Company would have had for the negligence of its officers. That the East India Company was not sovereign was recognised by the Privy Council in more than one decision both before and after the Government of India Act, 1858. In Moodalay v. East India Co.21 (referred in Peninsular case7), it was observed by the then Master of Rolls 17 (1974) 1 SCC 690: AIR 1974 SC 890 18 1984 ACJ 559 (SC): AIR 1986 SC 11 99 19 1984 ACJ 401 (P&H) 20

(1973) 75 Punj LR 1: 1974 ACJ 105 (P&H) 21 1 Bro CC 469: 28 ER 1245 "I admit that no suit will lie in this Court against a sovereign power, for anything done in that capacity; but I do not think the East India Company is within that rule."

This was a decision when the Company, under the Charter issued by the British Government, carried on only trading activity. The Secretary of State in Council of India v. Kamachee Boye Sahaba22 was rendered when the Company had been invested with dual power, one, carrying on trade and other, to acquire and retain territory, wage war and negotiate peace etc. It was held that for such latter acts the Company could not be sued in Municipal Courts. It was described as delegated power of sovereign. All these decisions were rendered before the Government of India Act of 1858 was enacted. Once Section 65 permitted Secretary of State in Council to sue or be sued, the concept of sovereign immunity, even if it was there, ceased to have any relevance. The decisions in Moodalay 21 and Kamachee22 furnished foundation in Peninsular case7 for deciding that the Crown having taken over from East India Company which was not a sovereign it could not claim that the Secretary of State in Council shall be immune for negligence of officers of the State. The decision in Viscount Canterbury4 which formed the basis of sovereign immunity in English law was held to be inapplicable as, " action against the Secretary of State in Council having been expressly given by the-55th Section of the Act in lieu of that which formally existed against the East India Company". The learned Chief Justice held :

> "In determining the question whether the East India Company would, under the circumstances, have been liable to an action, the general principles applicable to Sovereigns and States, and the reasoning deduced from the maxim of the English law that the King can do no wrong, would have no force. We concur entirely in the opinion expressed by Chief Justice Grey in the case of Bank of Bengal v. East India Co.23 which was cited in the argument that the fact of the Company's having been invested with powers usually called sovereign powers did not constitute them sovereigns."

The Company ceased to exist after the Government of India Act, 1858 came into force. The administration was taken over by the Crown. But Section 65 of the Government of India Act of 1858 expressly provided that all persons and body politic shall and may take the same suits, remedies and proceedings, legal and equitable, against the Secretary of State in Council in India as they could have done against the East India Company. The effect of it was that the liability of the East India Company and its extent prior to 1858 became the foundation and furnished basis for determining liability of the Secretary of State in Council. If the East India Company was not a sovereign and the rights that vested in the Crown under Government of India Act, 1858 were no more than what was possessed by the Company then where was the question of sovereign power and sovereign immunity? East 22 7 Moo IA 476: 1 Suther 373: 13 Moo PC 22 (also known as Rajah of Tanjore case) 23 Bignell Rep 120: 12 ER 473: 2 Knapp 245 (1834) India Company was not sovereign de jure. Sovereignty could not be extended to it by analogy. The grant of power to the Company in the Charters issued from time to time for enforcing discipline in its staff or for administration of justice initially for British subjects extended later to Indians, and even for acquisition of territory and retaining it or making peace and war, could not result in making it sovereign. In any case, "in the

East India Company's affairs, 'sovereign' and 'non-sovereign' activities were so tangled up that even if the distinction between such activities does make sense, it could not sensibly be applied to the Indian Government."23a

17."(The) emergence of the British empire in India stands out as a unique event in the history of the world. Unlike many other empires, the huge edifice of this empire was created by merely a company which was organised in England for furthering British commercial interests in overseas countries."23b But no less greater event was the projection of the doctrine of sovereignty and sovereign immunity for acts done by a trading company by the Judges presiding in higher courts.

"English law never succeeded in distinguishing effectively between the King's two capacities personal and political."23c No such difficulty existed in our system of governance either during British rule or thereafter. The Indian law beginning from Government of India Act, 1858 and ending with Article 300 of the Constitution did not acknowledge the English principle of sovereign immunity. In England, "the judges had set their faces against any remedy in torts" (Wade) because of the "unfortunate by-product of the law of master and servant in the nineteenth century" (Wade). This misfortune was thrust upon our system, a typical judicial innovation, unparalleled anywhere in the world, where a commercial company was deemed to have such powers that it could not be "held liable for any act done by any of its officers and soldiers in carrying on hostilities or for the act of any of its naval officers in seizing the property of a subject under the supposition that it was the property of an enemy". The practical effect of it was that the officers of the Company acting negligently and causing damage to the people were rendered immune from any action in a court of law. This was contrary both to English and Indian law. Truly speaking the concept of sovereign immunity in the English sense, was nonexistent during British rule.

18.Though the Company was not a sovereign but it did exercise some power as a delegate of the Crown. What was the nature of this power? In the Charter issued during what is known as, "double Government period" the Company was permitted, in addition to carrying on trading activities, power to carry on war, inflict hostilities, seize property, negotiate peace, etc. with 23a A.R. Blackshield : Tortious Liabilily of Government, Journal of the Indian Law Institute, Vol. 8 (1966), p. 642 23b M.P. Jain : Outlines of Indian Legal History, 5th Edn., 23c H.W.R. Wade: Administrative Law, 6th Edn.

the Indian States. The activities such as these are indicia of what is legally known as "act of State". It 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."23d But the Company was not a State itself. It was a delegate only. The power granted to it was limited in its scope as its purpose was to enable the Company to use it while dealing with Indian States. In fact the power granted to it was political in nature. In Sir Anthony Musgrave v. Jose Ignacio Pulido24, which was a case from Jamaica where the plaintiff claimed damages for unlawful detention of the ship by the Governor-in-Chief of the island and reliance was placed on decisions given by the

Privy Council on disputes which arose between the Company and the rulers of the Indian States, this aspect was explained and it was held that those were the decisions in which the suit filed by Raja or Nabab was dismissed as the cause of action was political in nature. It would be worthwhile extracting the observation :

"Several cases were cited during the argument of actions brought against the East India Company, and the Secretary of State for India in which questions have arisen whether the acts of the Indian Government were or were not acts of sovereignty or State, and so beyond the cognizance of the Municipal Courts. The East India Company, though exercising (under limits) delegated sovereign power, was subject to the jurisdiction of the Municipal Courts in India, and it will be found from the decisions that many acts of the Indian Government, though in some sense they may be designated 'acts of State', have been declared to b e within the cognizance of those courts. Thus, in the Rajah of Tanjore case22, the question to be declared was thus stated by Lord Kingsdown in giving the judgment of the Committee :

"What is the real character of the act done in this case? Was it a seizure by arbitrary power on behalf of the Crown of Great Britain of the dominion and property of a neighbouring State, an act not affecting to justify itself on grounds of municipal law, or was it in whole or in part a possession taken by the Crown under colour of legal title of the property of the late Rajah, in trust for those who by law might be entitled to it? If it were the latter, the defence set up, of course, has no foundation.' This Committee, in deciding the questions thus raised, held that the seizure was of the former character, and therefore not cognizable by a Municipal Court. The answer of the East India Company in that case did not rest on the simple assertion that the seizure was an act of State, but set out the circumstances under which the Rajah's property was taken. 23d E.C.S. Wade : Act of State in English Law : British Year Book of International Law, extracted in State Liability in India, p. 257, by G.P. Verma.

24 (1879-80) 5 AC 102 After referring to the treaties made with the Rajah, it averred that in entering into these treaties, and in treating the sovereignty and territories of Tanjore as lapsed to the East India Company in trust for the Crown, the Company acted in their public political capacity, and in exercise of the powers (referring at length to them) committed to them in trust for the Crown of Great Britain, and that all the acts set forth in the answer 'were acts and matters of State'. As far as their Lordships are aware, it will be found that in all the suits brought against the Government of India, whether in this country or in India, the pleas and answers of the Government have shewn, with more or less particularity, the nature and character of the acts complained of, and the grounds on which, as being political acts of sovereign power, they were not cognizable by the Courts. (See Nabob of Carnatic v. East India Co.25; Ex- Rajah of Coorg v. East India Co.26; Rajah Salig Ram v. Secretary of State for India27, in which judgment was given by this Committee on the 27-8-1872.)"

It was thus judicially recognised that the activities of the Company apart from trading were limited and no more than political in character. Such activities carried on by a State are "acts which concern some matter of State; and 'the type of "matter of State" is the matter between States which, whether it be regulated by international law or not, and whether the acts in question are or are not in accord with international law, is not a subject of municipal jurisdiction'."27a In Salaman v. Secretary of State for India28, it was explained "An act of State is essentially an exercise of sovereign power and hence cannot be challenged, controlled or interfered with by municipal courts. Its sanction is not that of law, but that of sovereign power and whatever it be municipal courts must accept it as it is without question."

19. 'Sovereignty' and "acts of State" are thus two different concepts. The former vests in a person or body which is independent and supreme both externally and internally whereas latter may be act done by a delegate of sovereign within the limits of power vested in him which cannot be questioned in a Municipal Court. The nature of power which the Company enjoyed was delegation of the "act of State". An exercise of political power by the State or its delegate does not furnish any cause of action for filing a suit for damages or compensation against the State for negligence of its officers. Reason is simple. Suppose there is a war between two countries or there is outbreak of hostilities between two independent States in course of which a citizen suffers damage. He cannot sue for recovery of the loss in 25 1 Ves Jun 371: 30 ER 391 26 29 Beav 300: 54 ER 642 27 LR IA Supp 119: 12 Beng LR 167: 18 WR 389 (1872) 27a William Harrison Moore: Acts of State in English Law, quoted in 1941 Columbia Law Review, Vol. XLI, p. 1313 28 (1906) 1 KB 613, 619: 75 LJKB 418: 94 LT 858 local courts as the jurisdiction to entertain such suit would be barred as the loss was caused when the State was carrying on its activities which are politically and even jurisprudentially known as 'acts of State'. But that defence is not available when the State or its officers act negligently in discharge of their statutory duties. Such activities are not acts of State. In Sir Anthony Musgrave24 the Privy Council, while determining liability of the Governor, observed that it cannot "be assumed that he possesses general sovereign power. His authority is derived from his commission, and limited to the power s thereby expressly or impliedly entrusted to him. Let it be granted that, for acts of power done by a Governor under and within the limits of his commission, he is protected, because in doing them he is the servant of the Crown, and is exercising its sovereign authority; the like protection cannot be extended to acts which are wholly beyond the authority confided to him. Such acts, though the Governor may assume to do them as Governor, cannot be considered as done on behalf of the Crown, nor to be in any proper sense acts of State."

The Company was, thus, immune from being sued in courts only in those limited cases where its activities were political and mainly in relation to the Indian State. It did not enjoy any sovereign immunity like the Crown in England.

20. Even otherwise the concept of sovereign immunity and the distinction between sovereign and non-sovereign powers were neither relevant either before or after the Constitution came into force. The doctrine of sovereignty as propounded by theorists in medieval period has radically changed. The earlier theory was an outcome of old thinking, in the social setup then prevailing, where the monarch was the sovereign and all powers legislative, executive or judicial vested in him. It was

observed by Laski "that sovereignty was the supreme coercive power and it was by possession of sovereignty that the State was distinguished from all other forms of human association". The original concept of sovereignty was of a unitary State. Hibert in his book on Jurisprudence explained the term 'sovereign' as, " a political superior who is not subject to any other political superior". Holland explained sovereignty to mean, "the sovereignty of the ruling part has two aspects. It is 'external', as independent of all control from without; 'internal' as paramount over all action within". A State or a country or a nation which does not enjoy independence of control from other State or external power, cannot be considered to be a sovereign in the ordinary sense as understood either in medieval period or in the modem period. Manifestation of former is freedom to protect its border, negotiate peace, enter into treaty, etc., whereas latter is the liberty to enact laws, provide machinery for enforcing it, maintain law and order, administer justice etc. "The modem doctrine of sovereignty which heralded the end of the medieval period ... was the rise of the new national States anxious to assert their total independence in a new age of economic expansion and to reject all feudal notions of overlordship or papal interference ... virtually unlimited capacity to make new law.

Austin's sovereign was postulated as an illimitable, indivisible entity. ... From a conceptual standpoint there is no necessity for a sovereign to be undivided and unlimited. Indeed, in the complex societies that have developed since Bentham's day, particularly th e modem collectivist States and federal systems, quite the reverse is true. Bentham thus accepts divided and partial sovereignty."28a According to Dias-

"the attributes of sovereignty are interesting. Such power is indefinite unless limited by express convention or by religious or political motivations. The sovereign may consist of more than one body, each of which is obeyed in different respects. Habitual obedience may thus be divided and partial, i.e., owed in certain areas of conduct. When divided in this way the power of each is limited by the other and each has a limited power to prescribe for the other."28b

21. This change in outlook is consequence of gradual growth of the concept that sovereignty vests in the people. Its roots germinated with the rise of federalism in America. The English doctrine of parliamentary sovereignty was superseded in America by the doctrine of popular sovereignty. Wills in the book on Constitutional Law of the United States observed : "Who then is in the United States, the sovereign? It is the people." It was said by Pt. Jawaharlal Nehru while moving the Objective Resolution in the Constituent Assembly on 13-12-1946, "all power and authority of the sovereign independent India, its constituent and part and organs of the Government are derived from the people". Justice Douglas in his book from Marshall to Mukherji observed : "India and the United States both recognise that people are the basis of all sovereignty."

22. The old and archaic concept of sovereignty thus does not survive. Sovereignty now vests in the people. The legislature, the executive and the judiciary have been created and constituted to serve the people. In fact the concept of sovereignty in the Austinian sense, that king was the source of law and the fountain of justice, was never imposed in the sense it was understood in England upon our country by the British rulers. In Maganbhai Ishwarbhai Patel v. Union of India29, where the question was if the Government was justified in agreeing to transfer certain village to Pakistan without approval of Parliament, it was observed by a Constitution Bench (SCC p. 42 1, para 44)

"[T]he question is one of authority. Who in the State can be said to possess plenum dominium depends upon the Constitution and the nature of the adjustment."

28a Lloyd's Introduction to Jurisprudence, 5th Edn.

28b Dias : Jurisprudence, 5th Edn., 1985 29 (1970) 3 SCC 400 In America the power vests in the court. Therefore, even such actions of the Government which are solely concerned with relations between two independent States are now amenable to scrutiny by courts to be examined on the anvil of constitutional provisions and exercise of authority under constitutional framework.

23. In Federated State School Teachers' Assn. of Australia v. State of Victoria3O, the distinction between sovereign and non-sovereign functions was categorised as regal and non-regal functions. The former was confined to legislative power, the administration of the laws and exercise of the judicial power. In respect of non-regal functions, which could be assumed by legislative power, the State was held as a corporation analogous to a private company. The learned Judge observed as under:

> "Regal functions are inescapable and inalienable. Such are the legislative power, the administration of the laws, the exercise of the judicial power. Non-regal functions may be assumed by means of the legislative power. But when they are assumed the State acts simply as a huge corporation, with its legislation as the charter. Its action under the legislation, so far as it is not regal execution of the law is merely analogous to that of a private company similarly authorised."

This decision reflects modem thinking. The State is treated in performance of its functions like a private company. It would obviously be answerable for negligence of its employees.

24. In the modem sense the distinction between sovereign or nonsovereign power thus does not exist. It all depends on the nature of power and manner of its exercise. Legislative supremacy under the Constitution arises out of constitutional provisions. The legislature is free to legislate on topics and subjects carved out for it. Similarly, the executive is free to implement and administer the law. A law made by a legislature may be bad or may be ultra vires, but since it is an exercise of legislative power, a person affected by it may challenge its validity but he cannot approach a court of law for negligence in making the law. Nor can the Government in exercise of its executive action be sued for its decision on political or policy matters. It is in public interest that for acts performed by the State either in its legislative or executive capacity it should not be answerable in torts. That would be illogical and impractical. It would be in conflict with even modem notions of sovereignty. One of the tests to determine if the legislative or executive function is sovereign in nature is whether the State is answerable for such actions in courts of law. For instance, acts such as defence of the country, raising armed forces and maintaining it, making peace or war, foreign affairs, power to acquire and retain territory, are functions which are indicative of external sovereignty and are political in nature. Therefore, they are not amenable to jurisdiction of ordinary civil court. No suit under Civil Procedure Code would lie in respect of it. The State is immune from being sued, as the jurisdiction of the courts in such matter is impliedly barred.

30 (1928-29) 41 CLR 569, 5 85

25. But there the immunity ends. No civilised system can permit an executive to play with the people of its country and claim that it is entitled to act in any manner as it is sovereign. The concept of public interest has changed with structural change in the society. No legal or political system today can place the State above law as it is unjust and unfair for a citizen to be deprived of his property illegally by negligent act of officers of the State without any remedy. From sincerity, efficiency and dignity of State as a juristic person, propounded in nineteenth century as sound sociological basis for State immunity the circle has gone round and the emphasis now is more on liberty, equality and the rule of law. The modern social thinking of progressive societies and the judicial approach is to do away with archaic State protection and place the State or the Government on a par with any other juristic legal entity. Any watertight compartmentalization of the functions of the State as "sovereign and non-sovereign" or "governmental and non-governmental" is not sound. It is contrary to modem jurisprudential thinking. The need of the State to have extraordinary powers cannot be doubted. But with the conceptual change of statutory power being statutory duty for sake of society and the people the claim of a common man or ordinary citizen cannot be thrown out merely because it was done by an officer of the State even though it was against law and negligent. Needs of the State, duty of its officials and right of the citizens are required to be reconciled so that the rule of law in a Welfare State is not shaken. Even in America where this doctrine of sovereignty found its place either because of the "financial instability of the infant American States rather than to the stability of the doctrine's theoretical foundation", or because of "logical and practical ground", or that "there could be no legal right as against the State which made the law" gradually gave way to the movement from, "State irresponsibility to State responsibility". In Welfare State, functions of the State are not only defence of the country or administration of justice or maintaining law and order but it extends to regulating and controlling the activities of people in almost every sphere, educational, commercial, social, economic, political and even marital. The demarcating line between sovereign and non-sovereign powers for which no rational basis survives has largely disappeared. Therefore, barring functions such as administration of justice, maintenance of law and order and repression of crime etc. which are among the primary and inalienable functions of a constitutional Government, the State cannot claim any immunity. The determination of vicarious liability of the State being linked with negligence of its officers, if they can be sued personally for which there is no dearth of authority and the law of misfeasance in discharge of public duty having marched ahead, there is no rationale for the proposition that even if the officer is liable the State cannot be sued. The liability of the officer personally was not doubted even in Viscount Canterbury4. But the Crown was held immune on doctrine of sovereign immunity. Since the doctrine has become outdated and sovereignty now vests in the people, the State cannot claim any immunity and if a suit is maintainable against the officer personally, then there is no reason to hold that it would not be maintainable against the State.

26. In the light of what has been discussed, it can well be said that the East India Company was not a sovereign body and therefore, the doctrine of sovereign immunity did not apply to the activities carried on by it in the strict sense. Since it was a delegate of the Crown and the activities permitted under the Charter to be carried on by it were impressed with political character, the State or its officers on its analogy cannot claim any immunity for negligence in discharge of their statutory

duties under protective cover of sovereign immunity. The limited sovereign power enjoyed by the Company could not be set up as defence in any action of torts in private law by State. Since the liability of the State even today is same as was of the East India Company, the suit filed by any person for negligence of officers of the State cannot be dismissed as it was in exercise of sovereign power. Ratio of Kasturi Lal1 is available to those rare and limited cases where the statutory authority acts as a delegate of such function for which it cannot be sued in court of law. In Kasturi Lal case1 the property for damages of which the suit was filed was seized by the police officers while exercising the power of arrest under Section 54(1)(iv) of the Criminal Procedure Code. The power to search and apprehend a suspect under Criminal Procedure Code is one of the inalienable powers of State. It was probably for this reason that the principle of sovereign immunity in the conservative sense was extended by the Court. But the same principle would not be available in large number of other activities carried on by the State by enacting a law in its legislative competence.

27. A law may be made to carry out the primary or inalienable functions of the State. Criminal Procedure Code is one such law. A search or seizure effected under such law could be taken to be an exercise of power which may be in domain of inalienable function. Whether the authority to whom this power is delegated is liable for negligence in discharge of duties while performing such functions is a different matter. But when similar powers are conferred under other statute as incidental or ancillary power to carry out the purpose and objective of the Act, then it being an exercise of such State function which is not primary or inalienable, an officer acting negligently is liable personally and the State vicariously. Maintenance of law and order or repression of crime may be inalienable function, for proper exercise of which the State may enact a law and may delegate its functions, the violation of which may not be sueable in torts, unless it trenches into and encroaches on the fundamental rights of life and liberty guaranteed by the Constitution. But that principle would not be attracted where similar powers are conferred on officers who exercise statutory powers which are otherwise than sovereign powers as understood in the modem sense. The Act deals with persons indulging in hoarding and black marketing. Any power for regulating and controlling the essential commodities and the delegation of power to authorised officers to inspect, search and seize the property for carrying out the object of the State cannot be a power for negligent exercise of which the State can claim immunity. No constitutional system can, either on State necessity or public policy, condone negligent functioning of the State or its officers. The rule was succinctly stated by Lord Blackburn in Geddis v. Proprietors of Bonn Reservoir31:

> "No action will lie for doing that which the Legislature has authorised, if it be done without negligence, although it does occasion damage to anyone; but an action does lie for doing that which the Legislature has authorised if it be done negligently."

28. Matter may be examined from yet another angle. Article 300 of the Constitution of India is extracted below :

> "300. Suits and proceedings.- (1) 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 and may, subject to any provisions which may be made by 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. (2) If at the commencement of this Constitution
>
> (a) any legal proceedings are pending to which the Dominion of India is a party, the Union of India shall be deemed to be substituted for the Dominion in those proceedings; and
>
> (b) any legal proceedings are pending to which a Province or an Indian State is a party, the corresponding State shall be deemed to be substituted for the Province or the Indian State in those proceedings."

29. In Vidhyawati6 it was held that this article consisted of three parts (1) that the State may sue or be sued by the name of the State;

(2) that the State may sue or be sued in relation to its affairs in like cases as the corresponding Provinces or the corresponding Indian States might have sued or been sued if the Constitution had not been enacted; and (3) that the second part is subject to any provisions which may be made by an Act of the Legislature of the State concerned, in due exercise of its legislative functions, in pursuance of powers conferred by th e Constitution.

In Vidhyawati6 and Kasturi Lal1 it was held that since no law had been framed by the legislature, the liability of the State to compensate for negligence of officers was to be decided on general principle. In other words, if a competent legislature enacts a law for compensation or damage for any act done by it or its officers in discharge of their statutory duty then a suit for it would be maintainable. It has been explained earlier that the Act itself 31 (1878) 3 AC 430, 435 provides for return of the goods if they are not confiscated for any reason. And if the goods cannot be returned for any reason then the owner is entitled for value of the goods with interest.

30. In this case after conclusion of proceedings the authorities intimated the appellant to take the goods as they having not been confiscated, he was entitled for return of it. The appellant in response to the intimation went there but it refused to take delivery of it as, according to it, the commodity had deteriorated both in quality and quantity. This claim has been accepted by the lower courts. What was seized by the authority was an essential commodity within the meaning of clause (d) of sub-section (2) [sic Section 2(a)]. What the law requires under sub-section (2) of Section 6-C to be returned is also the essential commodity. Any commodity continues to be so, so long as it retains its characteristic of being useful and serviceable. If the commodity ceased to be of any use or is rendered waste due to its deterioration or rusting, it ceases to be commodity much less essential commodity. Therefore, if the commodity of the appellant which was seized became useless due to negligence of the officers it ceased to be an essential commodity and the appellant was well within its rights to claim that since it was not possible for the authorities to return the essential commodity seized by them, it was entitled to be paid the price thereof as if the essential commodity had been sold to the Government. The fiction of sale which is incorporated in sub-section (2) is to protect the

interest of the owner of the goods. It has to be construed liberally and in favour of the owner. The respondents were thus liable to pay the price of the fertiliser with interest, as directed by the trial court.

31. In State of Gujarat v. Memon Mahomed Haji Hasam32 where the confiscation by the customs authorities was set aside in appeal and the goods were directed to be returned which order could not be complied as the goods had been disposed of under order of a Magistrate passed under Section 523 of Criminal Procedure Code, it was held by this Court that the suit for recovery of the goods or value thereof was maintainable and it was held (SCR pp. 944-45 : AIR pp. 1888- 89, para 7) "On the facts of the present case, the State Government no doubt seized the said vehicle s pursuant to the power under the Customs Act. But the power to seize and confiscate was dependent upon a customs offence having been committed or a suspicion that such offence had been committed. The order of the Customs Officer was not final as it was subject to an appeal and if the appellate authority found that there was no good ground for the exercise of that power, the property could no longer be retained and had under the Act to be returned to the owner. That being the position and the property being liable to be returned there was not only a statutory obligation to return but until the order of confiscation became final an implied obligation to preserve the property intact and for that purpose to take such care of it as a reasonable person in like 32 AIR 1967 SC 1885: (1967) 3 SCR 938 circumstances is expected to take. Just as a finder of property has to return it when its owner is found and demands it, so the State Government was bound to return the said vehicles once it was found that the seizure and confiscation were not sustainable. There being thus a legal obligation to preserve the property intact and also the obligation to take reasonable care of it so as to enable the Government to return it in the same condition in which it was seized, the position of the State Government until the order became final would be that of a bailee. If that is the correct position once the Revenue Tribunal set aside the order of the Customs Officer and the Government became liable to return the goods the owner had the right either to demand the property seized or its value, if, in the meantime the State Government had precluded itself from returning the property either by its own act or that of its agents or servants. This was precisely the cause of action on which the respondent's suit was grounded. The fact that an order for its disposal was passed by a Magistrate would not in any way interfere with or wipe away the right of the owner to demand the return of the property or the obligation of the Government to return it."

32. Similarly, in Basavva Kom Dyamangouda Patil v. State of Mysore33, the question arose regarding powers of the Court in indemnifying the owner of the property which is destroyed or lost whilst in the custody of the Court. The goods were seized from the possession of the accused. They were placed in the custody of the Court. When the appeal of the accused was allowed and goods were directed to be returned it was found that they had been lost. The Court, in the circumstances, held : (SCC pp. 361-62, para 6) "It is common ground that these articles belonged to the complainant/appellant and had been stolen from her house. It is, therefore , clear that the articles were the subject- matter of an offence. This fact, therefore, is sufficient to clothe the Magistrate with the power to pass an order for return of the property. Where the property is stolen, lost or destroyed and there is no prima facie defence made out that the State or its officers had taken due care and caution to protect the property, the Magistrate may, in an appropriate case, where the ends of justice so require, order payment of the value of the property. We do not agree with the view of the High

Court that once the articles are not available with the Court, the Court has no power to do anything in the matter and is utterly helpless."

33. Therefore, where the goods confiscated or seized are required to be returned either under orders of the court or because of the provision in the Act, this Court has not countenanced the objection that the goods having been lost or destroyed the owner of the goods had no remedy in private law and the court was not empowered to pass an order or grant decree for payment of the value of goods. Public policy requires the court to exercise the power in private law to compensate the owner where the damage or loss 33 (1977) 4 SCC 358: 1977 SCC (Cri) 598: AIR 1977 SC 1749 is suffered by the negligence of officers of the State in respect of cause of action for which suits are maintainable in civil court. Since the seizure and confiscation of appellant's goods was not in exercise of power which could be considered to be act of State of which no cognizance could be taken by the civil court, the suit of the appellant could not be dismissed. In either view of the matter, the judgment and order of the High Court cannot be upheld.

34. Before parting with this case, the Court shall be failing in its duty if it is not brought to the attention of the appropriate authority that for more than hundred years, the law of vicarious liability of the State for negligence of its officers has been swinging from one direction to other. Result of all this has been uncertainty of law, multiplication of litigation, waste of money of common man and energy and time of the courts. Federal of Torts Claims Act was enacted in America in 1946. Crown Proceedings Act was enacted in England in 1947. As far back as 1956 the First Law Commission in its Report on the liability of the State in tort, after exhaustive study of the law and legislations in England, America, Australia and France, concluded :

> "In the context of a Welfare State it is necessary to establish a just relation between the rights of the individual and the responsibilities of the State. While the responsibilities of the State have increased, the increase in its activities has led to a greater impact on the citizen. For the establishment of a just economic order industries are nationalised. Public utilities are taken over by the State. The State has launched huge irrigation and flood control schemes. The production of electricity has practically became a Government concern. The State has established and intends to establish big factories and manage them. The State carries on works departmentally. The doctrine of laissez-faire which leaves everyone to look after himself to his best advantage has yielded place to the ideal of a Welfare State which impli es that the State takes care of those who are unable to help themselves."

The Commission after referring to various provisions in the. Legislation of other countries observed :

> "The old distinction between sovereign and non-sovereign functions or governmental and nongovernmental functions should no longer be invoked to determine the liability of the State. As Professor Friedman observes : 'It is now increasingly necessary to abandon the lingering fiction of a legally indivisible State, and of a feudal conception of the Crown, and to substitute for it the principle of legal liability where

> the State, either directly or through incorporated public authorities engages in activities of a commercial, industrial or managerial character. The proper test is not an impracticable distinction between governmental and non-governmental functions, but the nature and form of the activity in question'."

Yet unfortunately the law has not seen the light of the day even though in wake of Kasturi Lal1 "Government (Liability in Tort) Bill, 1965" was introduced but it was withdrawn and reintroduced in 1967 with certain modifications suggested in it by the Joint Committee of Parliament but it lapsed. And the citizens of the independent nation who are governed by its own people and Constitution and not by the Crown are still faced, even after well-nigh fifty years of independence, when they approach the court of law for redress against negligence of officers of the State in private law, with the question whether the East India Company would have been liable and, if so, to what extent for tortuous acts of its servants committed in course of its employment. Necessity to enact a law in keeping with the dignity of the country and to remove the uncertainty and dispel the misgivings, therefore, cannot be doubted.

35. For these reasons, the appeal succeeds and is allowed. The judgment and order of the High Court is set aside and that of the trial court decreeing the suit of the appellant is restored with costs.