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because it does not seek to expropriate private property. In a hypothetical case, perhaps, the reserves of the company may have to be drawn upon, but those reserves are not really capital, because they are made up of the accumulation of profits in previous years . If a private company acts *bona fide* and distributes its legitimate profits by means of dividends, paid to its various shareholders, then the danger of the capital being expropriated will never arise.

The *vires* of section 23-A were considered in the Madras case to which I have already made a reference, and the Judges, after a long discussion, held that the section was *intra vires*. With great respect I find myself in complete agreement with the Hon'ble Judges of the Madras High Court. I, therefore, find that the three questions referred to us by the Appellate Income-tax Tribunal and the two points raised before us must all be decided against the assessee. I would answer the three questions referred to us in the negative and hold that the proceedings under section 34 were not barred by time and section 23-A is *intra vires* the Constitution. The Department will recover costs of this reference which we assess at Rs. 250.

Tek Chand, J.

TEK CHAND, J.—I agree.

B.R.T.

FULL BENCH

Before G. D. Khosla, C. J., S. S. Dulat, and Harbans Singh, JJ.

RUP RAM,—*Appellant*

versus

THE PUNJAB STATE AND ANOTHER,—*Respondents*

Regular First Appeal No. 154 of 1953

Tort—Master and servant—Liability of the State for tortious acts of its servants—Nature and extent of—Act done in exercise of executive power—Whether makes the State immune from liability.

1960

Dec., 22nd

Held, that where the liability of the State for the tortious act of its servant does in fact arise, its nature and extent is exactly similar to that of an ordinary employer. If in a set of circumstances sound reasons of public policy demand that an employer be held liable for a tort committed by his servant, the existence of identical reasons in similar circumstances would equally demand that the State be just in the same manner held liable for the tortious act of its servant. The liability would, however, depend not only on the nature of the act in which the servant may have been engaged but also on the nature of the employment and, of course, the nature of the tort committed. The mere fact that the act may or may not have been done in the course of government activity is not, one way or the other, conclusive. The State is not absolutely immune from liability merely because the act complained of may have been done in the exercise of governmental or executive power. What has to be seen is whether the same reasons which would impel a Court to fasten liability on an employer exist or not.

Case law discussed.

Case referred by a Division Bench consisting of Hon'ble Mr. Justice Gosain and Hon'ble Mr. Justice Harbans Singh on the 8th January, 1960, to a larger Bench for authoritative decision on the questions of law involved in the case. The full bench consisting of Hon'ble the Chief Justice, Mr. G. D. Khosla, Hon'ble Mr. Justice Dulat and Hon'ble Mr. Justice Harbans Singh, after deciding the questions of law referred to it, returned the case to the Division Bench on 22nd December, 1960. The Division Bench consisting of the Hon'ble Mr. Justice Tek Chand and the Hon'ble Mr. Justice Gosain finally decided the case on the 15th March, 1961 on merits

Regular First Appeal from the decree of the Court of Shri Jasmer Singh, Sub-Judge, 1st Class, Jullundur, dated the 27th day of April, 1953, granting the plaintiff a decree for Rs. 7,000 and proportionate costs of suit against defendant No. 2, and further ordering that the decree was to be deemed ex parte, *but dismissing the plaintiff's suit against*

defendant No. 1, without allowing any costs of the suit to defendant No. 1.

Y. P. GANDHI, K. C. NAYAR AND S. S. SODHI, ADVOCATE, for the Appellant.

H. S. DOABIA, ADDITIONAL ADVOCATE, for the Respondents.

ORDER

DULAT, J.—Two questions of law have been referred to this Full Bench by a Division Bench of this Court. Dulat, J.

The facts are that on the 15th August, 1950, a truck belonging to the Public Works Department of the Punjab and driven by Durga Dass, driver, in the employment of the Department struck against a motor-cycle ridden by Rup Ram, and in the result Rup Ram was thrown off the motor-cycle and seriously injured and his right leg had later to be amputated. Rup Ram, therefore, brought a suit for recovering compensation for the injuries sustained by him alleging that the injuries were caused by the rash and negligent driving of the motor-truck by its driver, and he claimed that compensation was payable to him not only by the driver but also by his master or employer, being the Punjab State.

In answer to this claim the Punjab State, among other things, pleaded that the truck in question was at the time of this incident engaged in carrying certain material for a road bridge in connection with the exercise of the 'sovereign powers of Government' which Government alone could exercise, and in those circumstances the Punjab State was not liable for the tortious act, if any, of its servant.

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The trial Court found that the driver of the truck was negligent and his negligence had resulted in injuries to the plaintiff and the plaintiff was entitled to receive compensation by way of damages which the Court assessed at Rs. 7,000. Regarding the liability of the Punjab State, the Court found that the truck was actually carrying some iron angles to a godown but that material was later to be used in building a bridge on a public highway and the building of such a highway was the exercise of sovereign powers, and, in view of the authorities, the Punjab State could not be held liable for the negligence of its servant. The result was that the plaintiff's suit was decreed against Durga Dass, driver, to the extent of Rs. 7,000 and proportionate costs, while the suit as against the Punjab State was dismissed.

Rup Ram appealed to this Court and the appeal came up for hearing before a Division Bench of which one of us was a member. The Bench, being satisfied that the truck driver had been negligent and had committed a tort, held that the plaintiff was entitled to receive compensation for the injuries suffered by him. The main question in the appeal, however, concerned the liability of the Punjab State and on that question the Division Bench found that there was some conflict in the decided cases and it was not clear if the truck driver's act was done in the course of the exercise of the State's sovereign powers. The Division Bench, therefore, framed the following questions to be decided by a Full Bench :—

(1) Does the tortious act of defendant No. 2 (Durga Dass, driver) in the present case fall within the category of acts done in the course of exercise of what are usually called sovereign powers of the State ?

(2) Can the Punjab State be held liable for damages for the tortious act in question ?

The two questions are inter-connected, and it is agreed before us that if we can directly answer the second question the first would be of no consequence. The wording of the first question was apparently suggested by the decision in *The Peninsular and Oriental Steam Navigation Company* v. *The Secretary of State for India* (1), which has been accepted as the leading authority in such cases. It was a decision by the then Supreme Court at Calcutta. A servant of the plaintiff-Company, that is, the Peninsular and Oriental Steam Navigation Company, was going in a carriage along a road in Calcutta where certain workmen working at a Government dockyard happened to be carrying a piece of iron casing which these workmen negligently dropped on the road and in the result the horses drawing the carriage were frightened and one of the horses was seriously injured. The suit was brought by the plaintiff Company to recover Rs. 350 on account of the damage, and the claim against the Secretary of State was on the ground that the negligent act was done by a servant of the Government. Sir Barnes Peacock, Chief Justice, delivering the judgment of the Court held that the Government of India, through the Secretary of State, were liable to the same extent as the East India Company would have been liable prior to the Constitution Act of 1858 by which the Crown took over the Government of India from the East India Company. He then posed the question, whether the East India Company would have been liable in the circumstances of the case. One objection raised against the suggested liability was that

(1) 5 Bom. H.C.R. Appendix A.

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the East India Company were a sovereign power and, like the Crown in England not liable for the tortious acts of their servants. The learned Chief Justice overruled that objection holding that the East India Company were not the sovereign but certain sovereign powers had been delegated to them and they could not, therefore, claim immunity in every case. He then went on to hold that 'where an act is done in exercise of sovereign powers', there would be immunity and no action would lie, but since the East India Company had a dual capacity and were at one time actually trading on their own account and were thus engaged in transactions partly for the purposes of government and partly on their own account, they would be liable for the wrongful act of any servant of their if such act was done in the course of a transaction unconnected with the exercise of sovereign functions. Considering the facts of that case the learned Judge concluded that the workmen employed by Government at the dockyard were not doing anything in the exercise of sovereign powers, but that the Act was done in the conduct of an undertaking which might be carried on by a private individual without having sovereign powers delegated to him, and that the East India Company would have been liable, and consequently the Secretary of State for India was also liable for the negligent acts of his servants. The plaintiff's claim against the Secretary of State was thus allowed to succeed.

Before us both counsel accept the correctness of this decision, but each has placed his own interpretation on it. For the plaintiff it is contended that this particular decision only decided that, if an act is done in the course of an ordinary undertaking not involving the exercise of sovereign powers, the employer or the master, even if it be the State, would be liable, but that it did not

decide and was not concerned with deciding whether a similar liability would not attach to the State if in fact the exercise of any governmental or sovereign power was involved, while on behalf of the State the contention is that the decided case is good authority for saying that as soon as the exercise of any sovereign or governmental power is involved the State is not liable for the tortious act of its servant.

It is common ground that by virtue of Article 300 of our Constitution and the corresponding provisions in the previous Constitution Acts since 1858, the liability of the Punjab State is exactly the same as that of the East India Company prior to 1858 and there has been no change in the substantive law relating to tortious liability. Although, therefore, the decision in *The Peninsular and Oriental Steam Navigation Company's* case was made in 1861, that decision is still relevant. At the same time it is pointed out that there has in fact been considerable change in the complexion of governmental activity particularly since the Constitution and still more change is likely to take place, and that the Courts ought not to ignore these facts. Also it is, I think, worth noticing that while Sir Barnes Peacock thought of sovereignty and sovereign powers in terms of the Crown in England and the delegation of sovereign powers by the Crown, the framers of our Constitution have not accepted that theory and all sovereign power is now supposed to reside in the people.

To go back to the judgment of Sir Barnes Peacock, it is clear from the facts involved that the Court in that case was actually concerned with deciding wheher the negligent act of certain servants of Government engaged in an ordinary undertaking, which undertaking might have been carried on by any private individual, made the Government liable, and the Court decided that it did

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Nothing else required determination in that case and the question, whether in a case involving the exercise of governmental power any liability on the part of the State would or would not arise, was not before the Court. That is how the decision was understood by Rankin, C.J., in the Calcutta High Court (with whom C. C. Ghose, J., agreed) in *Secretary of State* v. *Srigobinda Chaudhuri* (1). The learned Chief Justice said—

> "In the *P. and O. case* already referred to, the only question was whether in the case of a tort committed in the conduct of a business the Secretary of State for India in Council could be sued. Whether he could be sued in cases not connected with the conduct of a business or commercial undertaking was not really a substantive question before the Court."

Similarly Mukerjee, J., in the Supreme Court speaking of this particular matter in *Province of Bombay* v. *Khushaldas* (2), said—

> "Much importance cannot in my opinion be attached to the observation of Sir Barnes Peacock in *Peninsular and Oriental Steam Navigation Company* v. *Secretary of State* (3). 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.

(1) A.I.R. 1932 Cal. 834.
(2) A.I.R. 1950 S.C. 222.
(3) 5 Bom.C.R. Appendix A.

That decision, therefore, does not support the contention that the State is totally immune from liability for the acts of its servants if governmental activity involved in those acts, as is Mr. Dobia's suggestion. On the other hand, it appears that in the *P. and O. case* the Court held the Secretary of State for India liable on facts very closely resembling the present case, for there is, it seems to my mind, very little difference, if any, between the act of a Government servant engaged in carrying a piece of iron casing for the repair of a Government dock and that of a Government driver carrying material for the repair or construction of a bridge. Mr. Doabia, therefore, goes further and says that under our Constitution all government activity is the exercise of the executive power of the State, and since a servant of the State is employed by the State in the exercise of such executive power, everything done by a State servant while discharging his duties must be deemed to be the exercise of such power, and, if any tortious act is done by the servant, the State is not vicariously liable. This contention, however, finds no support from any settled principle, nor are the decided cases in accord with it.

It is agreed that where the liability of the State for the tortious act of its servant does in fact arise, its nature and extent is exactly similar to that of an ordinary employer. It seems to follow that the basis of such liability must in both cases be the same. To put it in another way, if in a set of circumstances sound reasons of public policy demand that an employer be held liable for a tort committed by his servant, then the existence of identical reasons in similar circumstances would equally demand that the State be just in the same manner held liable for the tortious act of its servant. I am aware that in the case of the State employing various servants the circumstances in

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many cases differ in important respects from those existing in the case of a private employer, and I am, therefore, saying that to make the State liable, there must be identity of circumstances. Now the basis of the vicarious liability of the master, as I understand it, is this, that he has absolute power and discretion in the matter of employment and is able to get rid of his servant at will, and further that the servant acts, in the course of his employment, for the benefit of his master. Should it, therefore, appear that a servant employed by the State has acted for the benefit of the State and has in the process committed a tort, there seems no reason why the State should not be held liable to make good the damage. This was recognised in *Secretary of State* v. *A. Cockcraft* (1), where Seshagiri Aiyar J., sitting with the Chief Justice of the Court, apparently accepted the suggestion that "whenever a State has been benefited by the wrongful act of its servants, it is liable to be sued for the restitution of the profit unlawfully made". Such a case actually arose in the Madras High Court in *The Secretary of State for India in Council* v. *Hari Bhinii and another* (2). The plaintiff in that case complained that he had been overcharged on account of salt duty by the Excise authorities. The claim was actually dismissed on the merits. The Government of Bombay, however, took an appeal to the High Court expressly for the purpose of determining whether on such an allegation, if true, the claim against the Secretary of State could succeed, and the High Court found that such a claim did lie. More recently the Assam High Court had to deal with such a matter in *Union of India* v. *Muralidhar* (3). A large quantity of earth had in that case been removed from a piece of land belonging to the

(1) A.I.R. 1915 Mad. 993.
(2) I.L.R. 5 Mad. 273.
(3) A.I.R. 1952 Assam 141.

respondents and used by Government servants for Government purposes. The claim was decreed, and on appeal it was contended that the Union of India, being a sovereign power, was not liable for the tortious act committed by its servants. The Assam High Court did not accept that view. It is, therefore, clear that the State is not absolutely immune from liability merely because the act complained of may have been done in the exercise of governmental, or, as Mr. Doabia puts it, 'executive' power. What has to be seen is whether the same reasons, which would impel a Court to fasten liability on an employer, exist or not. This point is illustrated by decisions involving the exercise of statutory powers by State servants. As very often happens, certain state servants are entrused with certain powers by law or rules having the force of law. The exercise of such powers by State servants is not susceptible to that control which an ordinary employer exercises over his servants, and the decided cases have, therefore, uniformly held that in such circumstances no vicarious liability attaches to the State. Thus in *Shivabhajan* v. *Secretary of State for India* (1), *Jenkins* C. J., observed at page 325—

> "But it is settled law that 'where the duty to be performed is imposed by law and not by the will of the party employing the agent, the employer is not liable for the wrong done by the agent in such employment.' ".

and he relied for this on the decision in *Tobin* v. *The Queen* (2). More recently in the Allahabad High Court Raghubar Dayal and Brij Mohan Lall JJ., took the same view in *Mohammad Murad*

(1) IL.R. 28 Bom. 314.
(2) (1864) 33 L.J.C.P. 199.

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Ibrahim Khan and another v. *Government of U.P. of Agra and Oudh* (1), where certain certain jewellery belonging to two minors was entrusted for safe custody to the Nazir of a Court and that Nazir committed default in the performance of his duty and the jewellery happened to be stolen. It was held that the Nazir had been negligent, but the claim against the State was negatived. Brij Mohan Lall, J., said—

> "The reason is obvious. Although the presiding officers of the Courts of justice may be Government servants in the sense that their salaries are paid by Government and their appointment and removal rest with the Government, yet it goes without saying that once appointed they are independent of the Government. The Government cannot dictate, nor even suggest, to them in what manner they should decide a particular case.
>
> "Since they are totally independent of the Government in the discharge of their duties, the Government is not liable for their acts on the ground that it cannot control the said acts."

In the Punjab Chief Court Sir Henry Rattigan C.J., sitting with Raoof J., made a similar observation in *James Symonds Evans* v. *Secretary of State for India* (2)—

> "Apart from this objection the suit must also fail on the ground that the Secretary of State cannot be held civilly liable for

(1) A.I.R. 1956 All. 75.
(2) 143 P.R. 1919.

tortious acts committed by police officers in the performance of duties imposed upon them by the Legislature."

The broad basis for this view, of course, is that a State although employing a servant, has not in every case that power of control over him which an ordinary employer exercises over his servants, and it is consequently not wise to burden the State with vicarious liability if the control is limited or non-existent as would be the case where the State servant acts in exercise of statutory authority.

In the course of arguments before us a large number of decisions were cited, but I have only referred to those representative of the different points of view, and it seems to me unnecessary to go into them all. One case particularly relied upon on behalf of the State arose in 1875, *Nobin Chunder Dey* v. *The Secretary of State for India*, (1). The plaintiff in that case claimed that the Government had contracted with him to give him a licence for the sale of *ganja*, but had later refused it resulting in the closure of his business and he was entitled to damages. It was held on the evidence that, there was no contract, and it was also held as a matter of law that, even assuming a contract, the suit was not maintainable as the act was done in the exercise of sovereign powers. Reliance was placed in that case on the decision in *P. and O. Company's case.* The view of law adopted in the case was not wholly accepted in later decisions, and in the Madras High Court in *The Secretary of State for India in Council* v. *Hari Bhinji and another* (2), the learned Judges doubted the correctness of the view. So did Wallis J., in *A. M. Ross* v. *Secretary of State* (3). The decided cases thus show that the State is in

(1) I.L.R. 1 Cal. 11.
(2) I.L.R. 5 Mad. 273.
(3) A.I.R. 1915 Mad. 434.

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certain circumstances liable for the tortious act of its servant, but that the circumstances must be such as make the relation between the State and that particular servant identical with the circumstances of private employment. The liability would depend not only on the nature of the act in which the servant may have been engaged, but also on the nature of the employment and, of course, the nature of the tort committed. The mere fact that the act may or may not have been done in the course of governmental activity, is not, one way or the other, conclusive.

It now remains to consider whether on the facts of the present case the State is liable for the negligent act of the truck driver. It is not suggested that the truck driver had any peculiar duties assigned to him by any law or rule, nor that here was anything special about his employment. On the face of it, therefore, there seems no reason why his employer, although the State, should not shoulder the responsibility for his negligent act committed in the course of his employment just as an ordinary employer would. No consideration of public policy points to the contrary. All that Mr. Doabia is able to urge is that the State, when employing servants to do work for it, enjoys special immunity without however indicating any sound reason for such a claim, and there is in my opinion no clear authority to support it. A recent case resembling the present arose in the Rajasthan High Court, *Mt. Vidyawati* v. *Lokumal* (1). A person walking along a public road was hit by a car belonging to the State of Rajasthan and driven by a driver in State employment. The question was whether the State was liable for the negligence of the driver. The Rajasthan High Court, held that the State was

(1) A.I.R. 1957 Raj. 305.

liable. Dave J., with whom Wanchoo C.J., agreed, considered the relevant authorities including, of course, the *P. and O. case,* and found that they did not assist the State's claim to immunity, and in concluding the learned Judge observed—

> "It may be added that the State is no longer a mere police state and this country has made vast progress since the above decision was made. Ours is now a welfare State and it is in the process of becoming a full-fledged socialistic State. Every day, it is engaging itself in numerous activities in which any ordinary person or group of persons can engage himself or themselves. Under the circumstances, there is all the more reason that it should not be treated differently from other ordinary employers when it is engaging itself in activities in which any private person can engage himself".

Mr. Daobia's main contention regarding the facts of the present case is that the Public Works Department of the State is not a commercial department in the sense that it is not concerned with making profits. That matter is, in my opinion, too far removed from the tortious act complained of in the present case, to be of any help. As I have said, there was nothing peculiar about the employment or about the act in which the driver was at the moment engaged. Neither on principle, therefore, nor on authority am I persuaded that the State should not be held liable for the tortious act of its servant in the same way as an ordinary employer would be. I would, in the result, answer the second question referred to us in the affirmative. The first

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question then would not arise. This case can now go back to the Division Bench for disposal of the appeal.

Dulat, J.

G. D. Khosla, C.J.
Harbans Singh, J.

G. D. KHOSLA, C. J.—I agree.

HARBANS SINGH, J.—I agree.

K.S.K.

FULL BENCH

Before Mehar Singh, K. L. Gosain and S. B. Capoor, JJ.

CHARAN SINGH,—*Appellant.*

versus

GURDIAL SINGH AND OTHERS,—*Respondents.*

Regular First Appeal No. 137 of 1954.

1960

Dec., 26th

Custom—Jats—Widow remarrying her deceased husband's brother—Whether entitled to collateral succession in the family—Rights of the widow under custom.

Held, by majority (per K. L. Gosain and S. B. Capoor).

That in the case of Jats governed by custom in matters of succession, a widow, by remarrying her deceased husband's brother, does not disentitle herself from collateral succession in the family. A widow who succeeds collaterally in her husband's family, does so only as a representative of her deceased husband by reason of the rule of representation generally prevailing amongst the agriculturists of the Punjab in matters of succession and whatever property she gets by such succession really forms an accretion to her husband's estate and remains a part and parcel of that estate. It would be anomalous, incongrouous and arbitrary to hold that a widow who has remarried her first husband's brother should be allowed to retain her first husband's estate, but should not be allowed to make accretions to the same.

Held, (Per Mehar Singh, J.).

The ordinary rule is that the remarriage of a widow causes forfeiture of her life-interest in her first husband's estate which then reverts to the nearest heirs of the husband, and the exception to it, as the special custom in this respect, being that among Sikh Jats of the Punjab widow does not forfeit her life-estate in her deceased husband's