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The doctrine of Sovereign Immunity – An Analysis

Nakshatra Gujrati[a]

[a]National Law University, Odisha, India

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The doctrine of Sovereign immunity means while performing sovereign functions the state is exempted from the liability if something goes wrong while doing that function. This is also known as the principle of 'King Can Do No Wrong. This paper traces how the doctrine of sovereign immunity in India got developed, the very first case which established this doctrine in India is also described. Various sources critically point out that it is still in practice in India but the purpose of this paper is to argue that although it is still in practice the doctrine has lost its essence and the principle of 'King Can Do No Wrong' has now become obsolete. The paper tries to substantiate that argument via the use of some landmark cases which contributed to making the colonial era doctrine obsolete.

Keywords: *doctrine, immunity, sovereign immunity.*

INTRODUCTION

From ancient times India faced numerous invasions which though dented its economic position, but in spite gave it a developed judicial system. This judicial system also has a concept embedded in it known as the doctrine of sovereign immunity. It seems that the maternal aunt is much more concerned about the child of her sister who brought him into the world. This is the position of "Doctrine of Sovereign Immunity in India". It arrived in

India in the year 1861. Learned people in this field argue that it hasn't left India, but it's known that

"Old habits don't die any soon, but it remains to be seen whether it occupies the same prominence as it did in the past". The concept emerged in England from the well-known maxim "King can do no wrong" and it traveled miles via sea to reach India. The British East India Company which came to India during the reign of Jahangir and settled in Surat brought this doctrine via sea in 1861.

SECRETARY OF STATE FOR INDIA GETS SUED

One day a servant of the plaintiff company was driving a horse carriage during his employment with the EIC. To save time he brought carriage near the persons carrying iron bars, who on watching the speedy carriage dropped the iron bar and ran for their lives. As the iron touched the ground it made a noise that irritated the horse and they ran and injured themselves with the iron rods. It is known that the people carrying rods were employees of the defendant company. The offended company sued the defendants. The plaintiffs made Secretary of State for India a party because of the East India Company's sovereign activities."

This case is remarkable for a distinction of sovereign and non-sovereign functions for the very first time in the history of India. These were the facts of *Peninsular & Oriental Steam Navigation Company v Secretary of State for India*[1]. Prior to this,[2] the "Govt of India Act 1858"[3] was introduced which contained the provision to sue Secretary of State which was carried into the constitution of India in article 300[4] which states the suability and capacity to sue of the Indian Govt. This case remains remarkable because even after the introduction of the constitution the ratio laid in this judgment was being followed.[5]

[1] *Peninsular & Oriental Steam Navigation Company v Secretary of State for India* [1863] 5 Bom HCR App I
[2] *Ibid*
[3] Government of India Act 1858
[4] Constitution of India, art 300
[5] *Ibid*

SOVEREIGN AND NON-SOVEREIGN POWERS

In the *Peninsular & Oriental Steam Navigation Company v Secretary of State for India,* Peacock C J observed –

"The East India Company was a corporation to whom sovereign powers were delegated and who traded on their account and for his or her benefit and were engaged in transaction partly for the aim of State and partly on their account which with none delegation of sovereign rights can be carried on by private individuals. There's a good and clear distinction between acts tired exercise of what are usually termed sovereign powers, and acts exhausted the conducts of undertakings which could be carried on by private people without having such powers designated to them."

In the *Shivbhajan Durga Prasad v Secretary of State*[6] the petitioner got wronged by the constable, the petitioner sued the Secretary of state for compensation.[7] The court held that performance of statutory duty is a part of the sovereign function and hence was absolved from the charges.[8] In another case of *McInerny v Secretary of State*[9], it was held that maintenance of public paths, routes are for public welfare and therefore do fall under the ambit of sovereign functions. Similarly, "*maintenance of military roads, commandeering goods during the war,*[10] *training for defense, arrest, and detention, the performance of military duties, maintenance of law and order, administration of justice and collection of revenues are a part of sovereign functions as laid down through various cases*[11]".

On contrary to these functions, the non-sovereign functions are those functions that can't be considered as peculiar functions which state carries, or those functions which can be performed by anyone and the state doesn't reserve monopoly on those functions. These

[6] *Shiv Prasad v Durga Prasad & Anr* 1975 AIR 957
[7] *Ibid*
[8] *Ibid*
[9] *McInerny v Secretary of State* [1911] ILR 38 Cal 797
[10] *Ibid*
[11] Ayush Verma, "Sovereign & Non-Sovereign Functions of State" (*Blog iPleaders*, 24 August 2020) https://blog.ipleaders.in/sovereign-non-sovereign-functions-state/ accessed 21 November 2021

functions if done in a way that infringes the rights of people or any person, the state will be liable to compensate.[12]

THE SIEGE BEGINS

In Kasturilal v State of UP[13]–

The police officers seized the silver and gold of a trader while traveling going to sell the same in the market. They took him as well as the materials in their custody. But they were negligent in keeping it safely; hence the gold got misappropriated by one of the officers.[14] Since it wasn't a case under part 3 of the Indian constitution so Kasturilal had to move to a trial court which, later on, ruled in favor of Kasturilal.[15] Subsequently, the state moved to the high court who reversed the decision of the trial court. An appeal was then moved to the supreme court and the issue was marked as a question of law.[16]

The supreme court revisited the ruling in *"Peninsular & Oriental Steam Navigation Company v Secretary of State for India"*[17] and went by the distinction as laid down in this case. But the point to consider was the ruling of a trial court that favored the petitioner. The matter could have come to an end outrightly if the trial court had followed the precedent but it highlighted the changing attitude towards the maxim "Rex Non-Potest Peccare" or infamously known as "King can do no wrong".[18]

Now, here above our arguments aren't that courts suddenly became cognizant of the fact that the maxim "King can do no wrong" has become obsolete, rather it was a slow and gradual process. Case by case the courts noticed the lacunae created by the interpretation of various judgments that we're extending the sovereign functions which actually can't be called sovereign functions. In another case of *State of Rajasthan v Mst Vidhyawati* – Lokumal

[12] *Ibid*
[13] *Kasturilal v State of UP* 1987 AIR 27
[14] *Ibid*
[15] *Ibid*
[16] *Ibid*
[17] *Peninsular & Oriental Steam Navigation Company* (n 1)
[18] *Ibid*

was a temporary employee of the State of Rajasthan, as a motor driver on probation. In February 1952, he was employed as the driver of a Government jeep car, registered as No. RUM 49, under the Collector of Udaipur. The said car was given for necessary repairs at a workshop.

After the repairs were finished, Lokumal, while driving the car back along a public road, in the evening of February 11, 1952, knocked down one Jagdishlal, who was walking on the footpath by the said 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.[19] The high court ruled in favor of the petitioner stating that *'State was liable, for the State is in no better position in so far as it supplies cars and keeps drivers for its Civil Service'.*

When the appeal was filed to the Supreme Court, it also took the same view of the case and upheld the ruling of the High court.[20] In another case, "*Rudul Shah v the State of Bihar*[21]" Rudul was charged with the offense of murder of his wife and was kept in jail for 14 years without trial. The Supreme court widened the scope of article 32 and restored the enforceability of article 21 of the Indian constitution. The petitioner was compensated for the wrong done by public service which was the first-ever in Indian history. This case is remarkable because it laid down the bricks for the principle that 'fundamental rights are inalienable and even sovereign immunity cant absolve the liability if they are breached'.[22]

After citing these cases one can easily observe how the siege began from the *Kasturilal v State of U.P case* and gradually the ambit of sovereign functions was reduced. The theory of sovereign power is no longer available in a welfare state in which government has several functions to perform. Running of a railway is now a commercial activity, establishing the yatri Nivas at various stations to provide for lodgings after taking consideration can also be termed as the commercial activity which cannot be equated with the sovereign acts of a

[19] *Ibid*
[20] *Ibid*
[21] *Rudul Shah v State of Bihar* 1983 AIR 1086
[22] *Ibid*

state as it was previously considered. If any such employee of government-employed either in railways or your Nivas, injuries someone, that 'someone' is entitled to get compensation and the UOI can be held liable.[23]

After the Kasturilal case precedent witnessed a downward trend, a new principle was thus established in *UOI v Ramphal*[24]. The Court upheld the award against the railways of compensation of 10 lakh rupees by the high court to a foreign passenger, victim of gang rape committed by the railway employees in a room of a Railway Yatri Niwas booked in their name.[25] In 2017 an article published in "*The Times of India*"[26] in a case Gujarat HC remarked – "*Although the maintenance of Army is a sovereign function of the Union of India, yet it does not follow that the Union is immune from all the liability for any tortious act committed by an army personnel*" and said it's the time that India must forget the maxim "King can do no wrong" as India isn't a monarchy rather it is a democracy whose ultimate authority rests with the people.[27]

CONCLUSION

We saw how the doctrine of sovereign immunity was brought to India via sea, yes pun intended indeed! The case of the P&O steam navigation company distinguished the sovereign and non-sovereign functions for the first time on the soil of India. Later on, various cases brought new functions under the sovereign which ultimately increased the immunity of the state for no reason. Yes, indeed, the "Doctrine of sovereign immunity" never left India but at the same time, the developments of the law force us to rethink that it doesn't bear the same value as it did in the past. From time to time Indian courts restricted the sovereign functions which have made stateless immune as it was before.

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[23] *Ibid*
[24] *UOI v Ramphal* AIR 1996 SC 1500
[25] *Ibid*
[26] Editors, "Forget King Can Do No Wrong: Gujarat HC" (*Times of India*, 5 August 2017) https://timesofindia.indiatimes.com/city/ahmedabad/forget-king-can-do-no-wrong-this-is-india-hc-tells-govt/articleshow/59921884.cms accessed 21 November 2021
[27] *Ibid*