



## PRIVILEGES ENJOYED BY THE GOVERNMENT OF INDIA AS A LITIGANT

*By Divya MB*

*From School of Excellence in Law, The Tamil  
Nadu Dr Ambedkar Law University*

### ABSTRACT:

In any democratic country where the government assumes the role of a 'Welfare and Service State', the question of the government liability evokes a serious response. On the one hand, the concept of an intensive form of government requires an active participation of the State in welfare and service activities but on the other, the concept of governmental liability may have a chilling effect on such participation. Therefore, a very delicate balance has to be drawn. If any person has been wronged or made to suffer participation. Therefore, a very delicate balance has to be drawn. If any person has been wronged or made to suffer any loss there may be two courses open to him. He / She may either proceed against the officer concerned or he may sue the government on whose behalf the officer was acting. Early common law firmly recognised the principles of liability of the officer concerned because they were treated nothing more than as ordinary citizens. With the growth of governmental powers, the shift has been from the 'officer's liability' to 'State liability', on whose behalf he acts. The main reason for such a shift could be the apprehension that the concept of 'officer's liability' may dampen the independence and initiative of the officers. However, the recent trend indicates a judicious mix of both these concepts.

### INTRODUCTION:

The expression "privilege" literally means "a special benefit/right/advantage conferred by the virtue of one's position". The word "government privilege" means the immunity (exemption from liability) of the government from the judicial proceedings. Every individual is liable for any tort or crime committed against any person or government. Likewise, the government is also liable for any tort or crime against any individual. This is called as the government liability. But at certain circumstances, the government and the person who acted on behalf of the government are not liable for the wrong committed against the individuals. Article 298 of the Constitution of India, 1950 provides that the executive powers of every state and the union extends to "the carrying of any trade or business and to the acquisition, holding and disposal of property and also the making of any contracts for any purpose". Article 300 of the Indian Constitution states that a government may sue or may be sued in its name. In addition to that, **Section 79 of the Civil Procedure Code, 1908** contains certain provisions similarly. All these provisions grants immunity for the government to escape from the liability that is, the government is not liable under these provisions when it committed an act of wrong/crime committed against any individual. The author of the article intrudes into the provisions of various legislations where the government is not liable for any acts committed by the government. Though the government is an entity, it cannot act on its own. It is acting through the officials. While committing any crime or offence against any individual, the Government is liable on behalf of its officials.

**KINDS OF LIABILITY:**

Generally, the Government is liable under the following four circumstances. They are:

- (1) Liability of the Administration in Tort
- (2) Liability of the Administration in Contract
- (3) Privileges and Immunities of the Administration in suits
  - (i) Privilege of notice
  - (ii) Privilege to withhold documents
- (4) Immunity from Statute Operation
- (5) Immunity from Estoppel (Promissory Estoppel)
- (6) Other Privileges

**(1) LIABILITY OF THE ADMINISTRATION IN TORT:-**

To what extent the administration would be liable for the torts committed by its servants is a complex problem especially in developing countries with ever widening State activities. The liability of the government in tort is governed by the principles of public law inherited from British common law and the provisions of the Constitution. The whole idea of vicarious liability of the State for the torts committed by its servants is based on three principles such as:

- (i) **Respondeat superior (let the principal be liable).**
- (ii) **Quifacit per alium facit per se (he who acts through another does it himself)**
- (iii) **Socialisation of Compensation.**

In England, before the period of 1967, the principle existed was, "*King can do no wrong*". It means that the King cannot commit any crime and even if he/she has committed any crime, it cannot be considered as an offence. The rule states that its own

laws do not bind the Crown unless by express provision or by necessary implication they are made binding on it. Thus, the statutes are not binding on the crown unless by express provision or by necessary implication, they are made binding thereon. But after 1967, the principle was changed into "King was liable for the wrongs committed". That is, the Crown is liable for the torts committed by its agents or servants. The term '**wrong**' refers to the '**civil wrong**'. Both the individuals as well as the government is liable for the wrongs committed. This is called as the tortious liability.

In United States of America, in early days, the doctrine of sovereign immunity was prevailed. It means that the supreme power that is, the state cannot commit a wrong and is exempted from the civil suit and criminal prosecution. Later **Federal Torts Claims Act, 1946** was passed where it provides that the Federal Government is liable for the torts committed by its servants.

In India, before the enactment of Indian Constitution, 1950, the Section 65 of the Government of India Act, 1858, Section 32 of the Government of India Act, 1915 and Section 176 of the Government of India Act, 1935 provides that the State would be liable to the same extent as the East India Company was previously liable. Article 300 of the Constitution of India provides that the Union of India as well as a State is a juristic person and they may sue or be sued by the name of the Union or the State.

In **Nobin Chunder Dey vs. Secretary of State for India**<sup>i</sup>, the court held that the *government is not liable in suit for anything done in exercise of sovereign*



*functions.* Sovereign functions refers to the functions which cannot be done by any ordinary person. In **Peninsular and Oriental Steam Navigation Company vs. Secretary of State**<sup>ii</sup>, the *maintenance of Dockyard was considered to be a non-sovereign function and the government was held liable.* In **State of Rajasthan vs. Vidyawati**<sup>iii</sup>, the Supreme Court held that the **rash and negligent driving is not a sovereign function** where it was held that the State was vicariously held liable and it has to pay compensation. In **Kasturilal Ralia Ram Jain vs. State of Uttar Pradesh**<sup>iv</sup>, the court held that **the State is not liable for the stolen jewellery as the theft was performed only while discharging the sovereign functions.** In **Patil vs. State of Mysore**<sup>v</sup>, the court held that **the State is liable for the stolen goods as it was performed while rendering non-sovereign functions only.**

## (2) LIABILITY OF THE ADMINISTRATION IN CONTRACT:-

Article 294, 298, 299 and 300 complete the constitutional code of contractual liability of the government. Article 294 makes provision for the succession by the present governments of the Union and the States to property, assets, rights, liabilities and obligations vested in the former governments. Article 298 lays down that for the purpose of carrying out the functions of the State, government can enter into contracts. Article 299 contains essential formalities which a government contract under must fulfil. Article 300 provides the manner in which the suits and proceedings against or by the government may be instituted. Sections 10 and 70 of Indian Contract Act, 1872 contains provisions relating to contractual liability of the State.

Section 10 of the Indian Contract Act, 1872 deals about essentials of a valid contract. The three conditions are the essentials of a valid contract except capacity of parties in the Governmental contracts, free consent, lawful consideration and lawful object. A government cannot enter into a contract with a minor. Section 70 of the Indian Contract Act, 1872 deals about the doctrine of unjust enrichment. It means that the government should not unfairly gets a benefit by chance, mistake, etc or for which the one has enriched has not paid or worked and morally and ethically should not keep where it has to repay the benefit. The fundamental elements of unjust enrichment are an enrichment, an impoverishment, connection between enrichment and impoverishment, absence of justification for the enrichment and impoverishment and an absence of a remedy provided by law.

In **Karam Chand Thapar Bro Limited vs. State of Bihar**<sup>vi</sup>, the court held that the executive engineer was specifically authorised by the Governor to enter into an arbitration agreement. In **State of Bihar vs. Karam Chand Thapar**<sup>vii</sup>, the court held that the government enjoyed some privileges and enriched unjustly. So, it must compensate the victim according to section 70 of the Indian Contract Act, 1872.

In **Fernandes vs. State of Karnataka**<sup>viii</sup>, a contract which was entered into by the parties was held as invalid as it failed to satisfy one of the essential conditions to be satisfied. The requirements to be fulfilled for entering into the governmental contracts are: authorised by the President/Governor of the State, competent officer duly authorised to execute it on behalf of the President/Governor, the contract to be enforced in the name of the



President/Governor. In **Union of India vs. Ralia Ram**<sup>ix</sup>, the court held that the contract which emerge through correspondence as a valid contract only as there is no prescribed and letter of acceptance. In **Union of India vs. NK Private Limited**<sup>x</sup>, the court held that as the director of purchases is the only authorised person to sign and not the Secretariat is not an authorised person and therefore the contract was held as invalid contract. In **Bhikraj Jaipura vs. Union of India**<sup>xi</sup>, the court held that the Division of Superintendent of Purchases is impliedly authorised by the Railway Administration and therefore it is held as a valid contract. In **New Marine Coal Company Limited vs. Union of India**<sup>xii</sup>, the court viewed that the government must pay for its consumption of the coal supplied by a company as it has enjoyed some privileges. In **State of West Bengal vs. B.K.Mandal**<sup>xiii</sup>, the Supreme Court directed the Government to pay the compensation to the contractor on basis of Section 70 of the Indian Contract Act, 1872.

### (3) PRIVILEGES AND IMMUNITIES OF THE ADMINISTRATION IN SUITS:

Though the equality clause of the Constitution envisages absence of any special privileges to any one including government, but since government is a government in contradistinction to a private individual, law allows certain privileges to the government as a litigant. The following are some of the important privileges available to the government under various statutes.

#### (i) Privilege of notice:-

Section 80(1) of the Civil Procedure Code, 1908 provides that no suit shall be instituted against the government or against a public officer in respect of any act purporting

to be done by such public officer in his official capacity, until the expiration of two months next after notice in writing the manner provided in the section has been given. The main aim of the section is to settle the disputes amicably and to reconsider the position. The Law Commission has also recommended the abolition of this rule as it causes greater inconvenience to the litigants particularly, when they seek immediate reliefs against the government. Therefore, section 80(2) of the CPC, 1908 provides that if immediate or urgent relief is necessary, the court may grant leave to the person to file a suit against the government or a public officer without serving two month prior notice. In **Mohammed Sadiq Ahmad vs. Panna Lal**<sup>iv</sup>, it was held that the notice is unnecessary when a public officer acts in a mala fide manner.

#### (ii) Privilege to withhold documents:-

Section 123 of the Indian Evidence Act, 1872 states that no one shall be permitted to give an evidence derived from the unpublished official records relating to the affairs of the State except with the permission of the head of the department concerned, who shall give or withhold such permission as he thinks fit. Section 124 extends this privilege to confidential official communication also.

#### (iii) Immunity from Statute Operation:-

The general principle of the common law is that the King is not bound by a statute unless a clear intention appears to that effect from the statute or from the express terms of the Crown Proceedings Act, 1947 or by necessary implication. This principle is based on two well-known maxims: (i) The King can do no wrong; and



(ii) the King cannot be tried in the courts of his own creation. In *Province of Bombay vs. Municipal Corporation of Bombay*<sup>xv</sup>, the Privy Council held that the government is not bound by the statute.

**(iv) Immunity from Estoppel (Promissory Estoppel):-**

Doctrine of promissory estoppel is premised on the conduct of the party making a representation to the other so as to enable him to arrange his affairs in such a manner as if the said representation would be acted upon. In **U.P. Power Corporation vs. Sant Steel & Alloys Private Limited**<sup>xvi</sup>, it was held that the core of the doctrine is 'faith of the people' in governance which has assumed tremendous importance in this era of global economy.

**(v) Other Privileges:-**

Besides the privileges and immunities mentioned above, the government enjoys various other privileges through the medium of statutes. Section 46(2) of the Indian Income Tax Act allows precedence to State claims for arrears of income tax over private debts. The Limitation Act, 1963 provides for a longer period of 30 years under Article 112 for government suits. The same Act denies the benefit of Section 6 to a person who has been dispossessed of immovable property against the government. Also Rule 5-B of Order 27 of Civil Procedure Code, 1908 casts a duty upon the court to

assist in arriving at a settlement in suits against the government and Rule 8-A of Order 27 provides that no security shall be required from the government.

**CONCLUSION:-**

The privileges and immunities of the government have a social function to perform. These privileges are not so much for the protection of the government as for the benefit of the people. The privileges and immunities available to the officials of the government doesn't provide any development of law. The real problem with the development of law relating to governmental liability in contracts in India is that the courts try to apply the principles of private law of contracts to the public area. In the area of governmental liability in India, the principle of sovereign and non-sovereign functions of the State is a justice blasphemy which leads to absurd and arbitrary results. One among the suggestion to avoid the misuse of the privileges and immunities is to restrict the privileges and immunities provides by various legislations.

\*\*\*\*\*

<sup>i</sup> (1876) ILR 1 Cal 11

<sup>ii</sup> (1861) 5 Bom.H.C.R.App.I.p.1.

<sup>iii</sup> AIR 1962 SC 933

<sup>iv</sup> AIR 1995 SC 1039

<sup>v</sup> 1971 CriLJ 566

<sup>vi</sup> 1962 SCR (1) 827

<sup>vii</sup> ibid

<sup>viii</sup> 2001 (2) KarLJ 324

<sup>ix</sup> 1964 SCR (3) 164

<sup>x</sup> 1972 SCR (3) 437

<sup>xi</sup> 1962 SCR (2) 880

<sup>xii</sup> 1964 SCR (2) 859

<sup>xiii</sup> 1962 SCR Suppl. (1) 876

<sup>xiv</sup> Appeal (civil) 1215-1216 of 2001

<sup>xv</sup> AIR 1947 PC 34

<sup>xvi</sup> (2008) 2 SCC 777