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In the Madras High Court

Case No : Second Appeal No. 779 of 1967

Doraiswamy Gounder — APPELLANT

Vs

State of Madras — RESPONDENT

Date of Decision : 27-08-1971

Acts Referred:
Income Tax Act, 1922 — Section 24B, 46(2)
Madras Revenue Boards Act, 1959 — Section 59

Citation : (1972) 85 LW 436

Hon'ble Judges : Veeraswami, C.J;Raghavan, J

Bench : Division Bench

Advocate : T.S. Subramaniam, for the Appellant; V. Balasubrahmanyan and J. Jayaraman, for the Respondent

Judgement

Raghavan, J.—The above Second Appeal has been referred to us by Kailasam J., as the question of maintainability of the suit against the State as a result of the judgment of the Supreme Court in Kasturilal Ralia Ram Jain Vs. State of Uttar Pradesh, , raised by the standing counsel for Income Tax is one of importance. The facts giving rise to the above Second Appeal are as follows :

The plaintiff is the appellant. The suit is for recovery of Rs. 3,500 as damages. The plaintiff''s case is that he and his brother, Chenraya, as members of a joint Hindu family, owned 1-2 aeres of land and a terraced house, and were cultivating 14 acres of land on lease for five years before the suit, their lessors being Ramachandran and Krishnan, sons of Gengu Reddy. The Tahsildar of Tiruppathur caused No. 1 demand notice issued to the village munsif of Kurizalapattu to realise the Income Tax arrears to the extent of Rs. 2,449.09 due to Government by Gengu Reddy. Gengu Reddy died in or about 1961, leaving behind his aforesaid sons as heirs. A notice was issued to the legal heirs for payment of the said arrears of their father. In spite of their contention that there was a partition in their family in 1950 and that they were not liable for any such arrears, the sugar-cane crops raised by the plaintiff as lessee of Ramachandran and Krishnan

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on land belonging to Gengu Reddy were attached for recovery of the Income Tax arrears. The plaintiff (lessee) filed an objection petition before the Tahsildar, Tiruppathur, stating that he was a lessee from Ramachandran and Krishnan (sons of Gengu Reddy), that the crops raised by him could not be attached for recovery of the Income Tax arrears due by Gengu Reddy. The attached crops were on an extent of 3.16 acres in S.Nos. 385/2, 386/1, 387, 388 and 386/3 in Kurizalapattu, originally belonging to Gengu Reddy. The attachment was effected on January 25, 1962, and the crops were guarded by the Talayari of the village during which time there was a theft of part of the attached crop. On a report by the village munsif relating to the theft and under the direction of the Tahsildar a criminal complaint was lodged with the Alangayam police that the plaintiff committed an offence of theft by removing the attached sugarcane crops. The plaintiff was charge-sheeted for theft before the Sub-Magistrate, Vaniyambadi. The case was transferred to the file of the Sub-Magistrate, Tirupattur, and the plaintiff was convicted. The plaintiff preferred Criminal Appeal No. 200 of 1962 before the Sub-Divisional Magistrate, Tirupattur, who allowed the appeal- Thereupon, the plaintiff filed the above suit claiming damages under the following heads : (1) Rs. 750 towards payment of his counsel fee and conveyance charge for defending in the criminal case, (2) Rs. 250 for obtaining certified copies, for procuring the attendance of witnesses and for his travelling and boarding charges, (3) Rs. 500 as damages for loss of prestige, humiliation and mental anguish due to the criminal proceedings, and (4) Rs. 2,000 being the value of sugarcane crops which he could not reap on account of the illegal attachment and thereby suffered loss to the extent. In all a sum of Rs. 3,500 was claimed by the plaintiff from the State of Madras represented by the District Collector of North Arcot.

2. The defendant filed a written statement contending as follows : Gengu Reddy died on September 2, 1961. For recovery of Income Tax of Rs. 3,937.61, Gengu Reddy was served with the assessment notices even prior to 1954 but only a portion was paid. On March 11, 1955, a certificate was issued to the Collector of North Arcot u/s 46(2) of the Income Tax Act for realisation of the arrears. The Collector thereupon initiated proceedings for recovery of the arrears as per the provisions of the Madras Revenue Recovery Act, 1894. After giving credit to certain realisations, the balance due was Rs. 2,449.09 for which the Tahsildar issued No. 1 demand notice to the village munsif, Kurizalapattu, for attachment of crops standing in S.F. No. 386/1, 385/2, 387 and 388/1 belonging to the defaulter and leased to plaintiff. The attachment was duly effected. As the village headman believed that the plaintiff illegally removed, harvested and crushed the sugarcane crops under attachment, he gave a complaint on March 3, 1962, to the sub-inspector of police and reported the matter to the Tahsildar. The police filed a charge-sheet against the plaintiff u/s 379, Indian Penal Code, and the plaintiff was convicted for the offence by the trial Magistrate. The plaintiff and his brother, Chenraya, preferred a claim petition dated February 3, 1962, before the Sub-Collector, Tirupattur, for cancellation of the said attachment. The Sub-

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Collector dismissed the petition on July 19, 1962. The attachment thus duly effected was valid and binding on the plaintiff and on the heirs of Gengu Reddy. The defendant was not aware of the alleged partition between Gengu Reddy and his sons. Even if such a partition had existed, it was created only nominally and coilusively to defeat the claim of the Income Tax department. The said lands belonged to the defaulting assessee on the date of the attachment. The heirs of Gengu Reddy are liable to pay the Income Tax arrears as universal donees and representatives of the defaulter. The Tahsildar and the headman acted legally as public servants in due discharge of their official duty. There was reasonable and probable cause for launching the criminal case. There was no malice on their part. The Income Tax authority and Chenraya are necessary parties to the suit and the suit is bad for non-joinder of parties. The plantiff, not having filed a suit to set aside the claim order passed by the Sub-Collector, is estopped from filing the present suit. The suit is not maintainable and is barred by limitation. The suit is also barred u/s 59 of the Madras Revenue Recovery Act not having been filed within six months from the date of the attachment or the order of the Collector dismissing the plaintiff''s claim. The provisions of Section 80, Civil Procedure Code, have not been complied with and the plaintiff is not entitled to any of the reliefs claimed.

3. The trial court found that the suit not having been filed within six months from the order of the Sub-Collector, dated July 19, 1962, held that the suit was barred u/s 59 of the Revenue Recovery Act. The trial court also found that attachment of the crops was legal, valid and binding on the plaintiff and that the. plaintiff was estopped from filing the present suit, as no suit was filed to set aside the order of dismissal of the claim. The trial court further found that the plaintiff was not prosecuted without reasonable and probable cause and that there was no malice. On other issues the trial court upheld the plaintiff''s contentions. In the result the trial court dismissed the suit. The plaintiff filed A.S. No. 6 of 1966 to the Subordinate Judge, Tirupattur. The learned judge held that the Tahsildar had jurisdiction to proceed under the Revenue Recovery Act in pursuance of the certificate issued u/s 46(2) of the Indian Income Tax Act, 1922, against the assets of Gengu Reddy in the hands of his legal representatives, that the partition set up between Gengu Reddy and his sons was not true and was not binding on the Government, that the crops standing on the land were liable to be attached for arrears of Income Tax due from Gengu Reddy, that the plaintiff is estopped from questioning the attachment, and that the present suit is barred by limitation. The learned judge further found that the plaintiff has not proved that the revenue authorities had acted with malice or that the plaintiff was prosecuted without reasonable and probable cause and with malice. In the result, the appeal was dismissed. The plaintiff has filed the above Second Appeal.

4. Shri T..S. Subramaniam, the learned counsel for the appellant, raised before us the following contentions :

(1) The suit against the Government for recovery of damages for malicious

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prosecution and for recovery of the value of the crop alleged to be stolen is maintainable ;

(2) The suit is not barred u/s 59 of the Madras Revenue Recovery Act ; and

(3) The certificate of the Collector (exhibit B-6) showing Gengu Reddy, who is dead, as the defaulter, does not entitle the Collector to proceed against the legal representatives of Gengu Reddy or the lessee from such legal representatives without the certificate being amended by the Income Tax department.

(4) The plaintiff is entitled to damages claimed.

We shall now take up the first question.

5. In order to appreciate the contention raised we have to recapitulate the English law on the matter and the background under which the constitutional provisions commencing from 1858 came to be enacted.

6. In England at Common Law the immunity of the Crown from legal proceedings at the instance of a subject was based on two maxims : (a) The King by the writ cannot command himself, and (b) the King can do no wrong. The first maxim had its origin in the feudal system under which a Lord could not be sued in his own court where he tried his tenants and the second maxim meant that the King is not personally answerable to any earthly tribunal although the immunity of the sovereign did not incapacitate him from entering into a contract. No remedy lay against the Crown or its officials for breach of contract except by way of a petition or right and that even such a petition of right was not available against the Crown for torts committed by a servant of the Crown (public official) against a subject.

7. Inroads into both the above maxims have been made from time to time and the immunity of the Crown has been finally abolished in England by the Crown Proceedings Act, 1947 (10 & 11 George VI, Chapter 44).

8. The procedure by the petition of right has been abolished and a subject is entitled to bring a regular action. The immunity of the Crown (non-suability for the tort of its servant) has also been abolished by the Crown Proceedings Act, 1947, which makes the Crown liable for the tort of its officers in the same way as a private employer. Notwithstanding the introduction of the liability of the Crown for torts, the individual liability of public officials or ministers where they commit or authorise the commission of a tort is not done away with under the Crown Proceedings Act.

9. We shall now refer to the constitutional provisions in India. In 1765, the East India Company obtained a "diwani" from the Moghul Emperor and from that time up to 1858, the company had a dual character, namely, that of a trader as well as of a sovereign inasmuch as it obtained fiscal and general administration of the country from the Crown. By the Charter Act, 1833, the company came to hold Government of India in trust for the British Crown. In 1858, the Crown assumed

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sovereignty over India and took over the administration of India from the hands of the East India Company. Section 65 of the Government of India Act of 1858 ran as follows :

"The Secretary of State in Council shall and may sue and be sued as well in India as in England by the name of the Secretary of State in Council as a body corporate ; and all persons and bodies politic shall and may have and take the same suits, remedies and proceedings, legal and equitable, against the Secretary of State in Council of India as they could have done against the said company ;...."

10. Section 32(2) of the Government of India Act, 1915, carified the above phraseology as follows :

"Every person shall have the same remedies against the Secretary of State in Council as he might have had against the East India Company if the Government of India Act, 1858, and this Act had not been passed. "

11. The Government of India Act of 1935 in Section 176(1) also reproduces the same provision with two modifications : (a) in respect of the Secretary of State, Federation of India and the provincial governments were made liable to be sued in like cases and the Secretary of State in Council might be sued under the provisions of the Acts ; (b) the liability of the Government is, therefore, subject to any provision of any Act that liability based upon the federal legislature or the provincial legislature as the case may be. Article 300(1) of the Constitution and Section 176(1) of the 1935 Act axe mutatis mutandis substantially the same. Section 176(1) refers back to the legal position as it obtained before that Act was enacted, that is to say, as it emerged u/s 32 of the Government of India Act, 1915. As compared to Article 300 it will be seen that part (1) of the article corresponds to Section 32(1) of the 1915 Government of India Act, and part (2) corresponds substantially to Sub-section (2) therein, and part (3) of the article does not find a place in Section 32. We are thus thrown back upon Section 65 of the Government of India Act, 1858. It is thus seen by a series of enactments commencing from 1858, and ending with the present Constitution, that a citizen today has the same rights against the Government as he would have had if such a suit had been brought against the East India Company prior to 1858. That is to say that the Government is liable for damages occasioned by the negligence of its servant if the negligence is such as would render a private employer liable.

12. It may be seen that the East India Company had a dual status. They started their career in India as a trading corporation, but later acquired sovereign functions of administration over extensive territories by the grant of a divani by the Moghul Emperor. The British Government allowed the company to exercise their governmental functions subject to the sovereignty of the Crown by enacting the East India Company Act, 1813 (53 George III, Chapter 155). The company thus came to exercise both trading functions as well as governmental functions subject to the prerogative of the British Crown until 1858. From this dual

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capacity arose the dual principle of liability of the company.

(1) The company was subject to the jurisdiction of the municipal courts in all matters undertaken by them as a private trading company.

(2) The company was not subject to matters undertaken by them in their character as territorial sovereign.

13. It follows that when the suability of the company was substituted by the suability of the Secretary of State for India in Council, the two-fold classifications set out above had to be applied in order to determine under what category the act complained of fell.

14. The vicarious liability of the State for torts committed by its servants has to be considered with reference to the decided cases construing the constitutional provisions.

15. The earliest decision dealing with this question is the leading case of Peninsular and Oriental Steam Navigation Company v. Secretary of State, [1861] 5 Bom. H.C.R. Appendix A-1 [F.B.]. The above case was under a reference made by the Chief Judge of the Court of Small Causes, Calcutta, to the Supreme Court at Calcutta u/s 55 of Act IX of 1850. We have thought it necessary to refer to the above decision at some length as this decision deals with two aspects, first of which is covered by the head-note and the second of which was not necessary to answer the question referred to them. The suit was to recover damages of Rs. 350 on account of the injury caused to the plaintiff''s horse through the negligence of certain servants of the Government. The learned Chief Justice considered that though the reference to them was not specific, yet the question referred was "whether the Secretary of State was liable for the damages occasioned by the negligence of the servants in the service of the Government assuming them to have been guilty of such negligence as would have rendered an ordinary employer liable." The learned Advocate-General who appeared for the Government acquiesced in the above view and the case was argued on that basis. The learned Chief Justice, after referring to the constitutional provisions, observed that in England the Crown cannot be made liable for such damages either by a petition of right or in any other manner. In determining the question whether the East India Company could, under the circumstances, have been liable to an action, the general principles applicable to Sovereigns and States and the reasoning deduced from the maxims of the English law that the King can do no wrong would have no force. The following passage in the judgment of the learned Chief Justice brings out the basis of the judgment ;

"We are of opinion that for accident like this if caused by the negligence of servants employed by the Government, the East India Company would have been liable both before and after the Act of 1833 (3rd and 4th William IV, Chapter 85), and that the same liability attaches to the Secretary of State in Council, who is liable to be sued for the purpose of obtaining satisfaction from the revenues of India. We are of opinion that this is a liability not only within the

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words but within the spirit of the Act, (3rd and 4th William IV, Chapter 85) and (21st and 22 Vict., Chapter 106), Section 65 and that it would be inconsistent with common sense and justice to hold otherwise."

16. This is a complete answer to the reference made, and the head-note to the case which runs as follows :

"The Secretary of State in Council of India is liable for the damages occasioned by the negligence of servants in the service of Government if the negligence is such as would render an ordinary employer liable"

brings out the answer to the reference made. The learned Chief Justice then proceeded with a further question which is outside the scope of the reference, in the course of which he observed as follows :

"We are further of opinion that the East India Company were not sovereigns and therefore could not claim all the exemptions of the sovereign and that they were not the public servants of Government and therefore did not fall under the principle of the cases with regard to the liability of such persons, but they were a company to whom sovereign powers were delegated and who traded on their own account and for their own benefit and were engaged in transactions partly for the purpose of Government and partly on their own account, which without any delegation of sovereign rights, might be carried on by private individuals. There is a great and cleat distinction between acts done in the exercise of what are actually 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."

17. The learned Chief Justice referred to Moodaley v. East India Company and Same v. Morton, Bro. C.C. 469, Vol. 1 relating to a lease for 10 years entered into by an individual authorised by the East India Company and dispossessed by the East India Company before the expiry of the term for no fault of the lessee and another person was inducted as the lessee and the East India Company pleaded that the removal of the old lessee and substitution of another lessee is an incident to the character as a sovereign power. The Master of the Rolls (Lord Kenyon) said :

"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 the rule. They have rights as a sovereign power ; they have also duties and obligations as individuals."

18. The learned Chief Justice referred to a number of decisions all of which dealt with acts of State, for example (Political treaty between a foreign State and East India Company, seizure of property, etc.). Therefore, what the learned Chief Justice had in mind when he referred to sovereign powers were functions like acts of State and not any act which the Government could as a private individual have done. It is not every act of the Government that can be protected but only

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acts which are done in exercise of their sovereign powers.

19. Out of the aforesaid judgment of the Supreme Court of Calcutta two sets of decisions arose, the one set placing reliance on the first part of the judgment and the head-note which was the ratio decidendi, and the other set of decisions placing reliance on the later part of the judgment and seeking to find out in each case whether the negligent act complained of is a governmental or sovereign function on the one hand or the nongovernmental function on the other.

20. We shall briefly refer to a few of the decisions rendered on either side. The earliest case following the decisions indicated in the head-note in the P. & O. case is the Secretary of State for India in Council v. Hari Bhanji, ILR [1882] Mad. 273. The head-note therein runs as follews :

"The acts of State of which the municipal courts of British India are debarred from taking cognizance, are acts done in the exercise of sovereign powers which do not profess to be justified by municipal law.

Where an act complained of is professedly done under the sanction of municipal law, and in the exercise of powers conferred by that law, the fact that it is done by the sovereign power and is not an act which could possibly be done by a private individual, does not oust the jurisdiction of the civil courts."

21. The next case of importance is the decision in Secretary of State for India v. Moment, ILR [1913] Cal. 391. The question which arose for consideration in the above decision was about the validity of Section 41(b) of the Lower Burma Town and Village Lands Act (Burma Act IV of 1898). The impugned provision runs as follows :

"No civil court shall have jurisdiction to determine any claims to any right over land as against the Government."

22. Lord Chancellor Haldane delivering the judgment held that the effect of Section 65 of the Act of 1858 was to debar the Government of India from passing any Act which could prevent a subject from suing the Secretary of State in a civil court in any case in which he could have similarly sued the East India Company, and in coming to the aforesaid conclusion, the Lord Chancellor placed considerable reliance upon the decision in P. & O. case.

23. In P.V. Rao Vs. Khushaldas S. Advani, , dealing with the power of acquisition by the Government, the learned Chief Justice referred to the P. & O. case and the observations in the later part of the judgment and observed :

"On the strength of these observations it is urged that no action can lie against the Province of Bombay in respect of an act which is done in the exercise of its sovereign powers. It is said that the act of requisition cannot be done by a private individual, but it can only be done by an authority which is exercising a sovereign power. Now, it is to be noted that Peacock, Chief Justice, made it clear in his judgment that the East India Company was not a sovereign body and it did

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not have any attributes of sovereignty. If the learned Chief Justice was referring to sovereign acts as acts of State, then with very great respect the observations are correct and must be accepted. An act of State is different fundamentally from an act of a sovereign authority. An act of State operates extra-territorially. Its legal title is not any municipal law but the over-riding sovereignty of the State. It does not deal with the subjects of the State but deals with aliens or foreigners who cannot seek the protection of the municipal law. It is difficult to conceive of an act of State as between a sovereign and his subjects. If the Government justifies its act under colour of title and that title arises from a municipal law, that act can never be an act of State. Its legality and validity must be tested by the municipal law and in municipal courts. In this case the Province of Bombay is justifying its requisition order under the Ordinance which is a municipal law, and therefore it cannot claim as a sovereign authority to be exempt from a municipal court and cannot claim immunity from having to justify its act in a municipal court. As I shall presently point out, the position with regard to the East India Company was the same. The East India company could have been sued in all cases except in respect of those which it did not seek to justify on grounds of municipal law."

24. The learned Chief Justice referred to a number of cases relating to acts of State and ultimately referred to Secretary of State v. Hari Bhanji and stated that the head-note in that case correctly brought out the effect of the judgment. The learned Chief Justice further observed that the authority of P. & O. case has been considerably shaken by the decision of the Privy Council in AIR 1937 31 (Privy Council) , and that it would be too much to assume that, if the decision in the P. & O. case laid down that the right of the subject to sue the Government was limited by any consideration as to whether the East India Company could or could not have been sued as a trading corporation, that was not the correct statement of the law. This decision was affirmed by the Supreme Court in Province of Bombay Vs. Kusaldas S. Advani and Others, . Mukherjea J. (as he then was) referred to P. & O. case and held that 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 could be sued. The question was answered in the affirmative whether he could be sued in the cases not connected with the conduct of a business or commercial undertaking and not really a question for the court to decide. The next decision is the decision of the Supreme Court in State of Rajasthan v. Mst. Vidhyawati.

25. In The State of Rajasthan Vs. Mst. Vidhyawati and Another, this question again came up for consideration. Sinha C.J., delivering the judgment on behalf of the court, traced the history of the present, Article 300 with reference to prior constitutional provisions and dealt with the question regarding the extent of liability of the State Government for tort in respect of the tortious acts committed by its servants. The facts of that case were that a jeep supplied by the State to the Collector when driven back from the repair shop to the Collector''s office met with an accident and the question arose whether the driver

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of the vehicle while returning back four the workshop, was doing any act in connection with the exercise of sovereign power of the State. Their Lordships held that the State is liable for the damages occasioned and that no protection could be claimed by the State. Sinha C.J. discussed the decision in P. & O. case, in full and held that the head-note in the Peninsular and Oriental Steam Navigation Company''s case correctly brought out the decision. Their Lordships held :

"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 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."

26. The reasons given for governmental immunity from tort such as its being pertinent to a monarchial regime, or taking its origin from the feudal system, are no longer available in a country where there is no king. On the other hand, the balancing of public interest and private claims has today in all progressive countries and especially republican countries like ours striving for a socialistic pattern of society where more stress is laid on the equality before the law between the Government and a private individual arising from operational hazards of governmental functioning negatives governmental immunity.

27. Some of the decisions, which relied on the later part of the judgment in the P. & O. case, are the following :

1. Secretary of State for India in Council v. Cockcraft, ILR [1916] Mad. 351 relating to damages claimed in a carnage accident due to negligent stacking of gravel on a road stated in the plaint as a military road and maintained by the public works department of the Government. And the defence of the Government was a general denial of liability which was upheld.

2. Shivabhajan Durgaprasad v. Secretary of State for India, ILR [1904] Bom. 314 relating to illegal seizure by the chief constable and the Government was held not liable.

3. Secy. of State Vs. Srigobinda Chaudhuri, relating to a suit against the manager appointed by the court of wards in failing to realise the monies due to the ward during his management and the Government held not liable.

4. Mohammad Murad Ibrahim Khan and Another Vs. Govt. of U.P. of Agra and Oudh, relating to the loss of jewellery entrusted to the nazir of the court due to negligence and the suit was held to be not maintainable.

5. Rup Ram Kalu Ram Aggarwal Vs. The Punjab State and Another, relating to damages for injury caused by rash driving of the tractor belonging to the public works department of the Government. (In this case the proper test was laid

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down and the suit was held maintainable).

6. Union of India Vs. Jasso and Others, relating to tort committed by a military driver while transporting coal to the general headquarters at Simla (in this case the correct test was laid down and the suit was held maintainable).

28. The next case of importance is the decision in Kasturi Led Ralia Ram Jain v. State of U.P., relating to damages for illegal arrest and seizure of gold, Gajendragadkar C.J., in delivering the judgment on behalf of the Bench, placed considerable reliance upon the later half of the decision in Peninsular and Oriental Steam Navigation Company''s case, in so far as it related to the distinction drawn therein between the tortious acts committed by public servants in course of the sovereign powers and tortious acts committed by them in respect of non-governmental functions. In other words, Gajendragadkar C.J. adopted the reasoning in the second part of the judgment of Peninsular and Oriental Steam Navigation Company''s case, while referring to the decision in Vidhyawati''s case. Thus, we have two decisions of the Supreme Court, namely, Vidhyawati''s case, and Kasturi Lal''s case, decided by the two Benches of equal strength, both relying on the decision of Sir Barnes Peacock in Peninsular and Oriental Navigation Company''s case, taking contrary views. In the normal circumstances, we ought to follow the latest decision of the Supreme Court. But, we find that the decision in Vidhyawati''s case has been referred to with approval by a Full Bench of nine judges in the Superintendent and Legal Remembrancer, State of West Bengal Vs. Corporation of Calcutta, . In the later judgment of the Supreme Court in Roshan Lal Tandon Vs. Union of India (UOI), , the conflicts between the above decisions were noticed. But, the learned judges did not resolve the conflict and rested their judgment on the facts of the case before them. A further decision of the Supreme Court in Postmaster-General, Nagpur v. Radha Bai, [1969] S.C.D. 777 takes the same view as Vidhyawati''s case. An observation in the judgment of the Supreme Court in H.H. Maharajadhiraja Madhav Rao Jivaji Rao Scindia Bahadur of Gwalior and Others Vs. Union of India and Another, is significant :

"In our country the executive cannot exercise any sovereignty over the citizens. The legal sovereignty in this country vests with the Constitution and the political sovereignty is with the people of this country."

29. We have, therefore, no hesitation in coming to the conclusion that the view expressed in Vidhyawati''s case, by reason of its approval in later decisions of the Supreme Court, is the better view.

30. There are later decisions of various courts following either Vidhyawaii''s case or Kasturi Lal''s case. They are as follows :

1. Satya Wati Devi Vs. Union of India and Others, , relating to damages for the death due to negligent driving of an air force vehicle. (Vidhyawati''s case followed).

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2. Union of India Vs. Sugrabai and Others, , relating to damages for the death due to rash and negligent driving of a motor truck (Correct tests were applied and the Union of India held liable).

3. The State of Madhya Pradesh Vs. Devilal Shivlal Palliwal and Another, related to seizure and confiscation of cut wood and misappropriation of such wood by supratdar. The State was held not liable, following Kasturi Lal Ralia Ram fain v. State of U.P.

4. State of Uttar Pradesh Vs. Tulsi Ram and Others, , where a magistrate wrongfully arrested the acquitted persons. The Magistrate was held liable in damages following State of Rajasthan v. Mst. Vidhyawati Devi.

5. Government of India v. Jeevaraj Alva, AIR 1970 Mys. 13, relating to damages for the negligence of the driver of a postal van.

31. In every case filed against the Government, the test in our opinion should be following the decision in State of Rajasthan v. Smt. Vidhyawati, whether such a suit, if laid before 1858, against the East India Company would have been maintainable. If the answer is yes, the suit will lie.

32. In the present case, the talayari was put in charge of the attached sugarcane crops. He was negligent in safeguarding the same which resulted in a theft of a portion of the attached crop. This resulted in the filing of a criminal case against the plaintiff, who was in possession of the crop prior to attachment and his acquittal on appeal. In this case the person who was put in charge happened to be a Government servant who was negligent in the discharge of his duties and a prosecution at his instance was thrown out and the present suit is filed for damages for malicious prosecution which will undoubtedly lie. We are not, however, saying that the suit should be decreed.

33. We find support for our conclusion from the view of Shri H.M. Seervai in his book on Constitutional Law of India, at page 816, where the learned author states as follows :

"Again the observation in the judgment that the distinction made in the P. & O. case between the trading and sovereign functions of the company had been consistently followed is clearly wrong and is made per curiam. Thirdly, the judgment is self contradictory. Gajendragadkar C.J., rightly observed that in England the immunity of the Crown from liability for tort was based on the maxim that the King can do no wrong, but the P. & O. case had in terms said that in determining the liability of the East India Company that maxim had no force. It is submitted that the judgment in Kasturi Lot''s case is that whereas under the law, as rightly declared in Vidhyawati''s case a citizen would have complete remedy against the State in tort, the legislation which Gajendragadkar C.J. exhorted the legislature to pass would make the citizen''s position much worse."

34. Further, we also had the advantage of perusing the Articles (25) and (26) in the Journal of the Indian Law Institute criticising the decision in Kasturi Lal''s

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case.

35. The second question raised is whether the suit is barred u/s 59 of the Madras Revenue Board''s Act. Section 59 relates to suits by persons aggrieved by any proceedings taken under this Act. The present suit is not in respect of any proceedings taken under the Act, but it is a suit for recovery of damages in respect of a criminal case filed by Alangayam Police against the plaintiff for theft of the attached sugarcane crops. The short period of 6 months provided in Section 59 has to be applied only to the cases where proceedings are taken by the authorities undent the Act relating to the sale of his property. In Marukkolandayammal Vs. The Secretary of State for India in Council and Another, , the head-note correctly brings about the position. The head-note runs as follows :

"There is a clear distinction between irregularities in publishing and conducting the sale in which case a suit must be brought within six months prescribed by Section 59 and the essential preliminary steps which are necessary to give the revenue authorities jurisdiction to conduct the sale, the omission of which makes the sale null and void. In the latter case Section 59 does not apply.

The whole procedure in connection with the sale of immovable property is based on the assumption that there is a defaulter living who can receive the notices and avail himself of a chance to avoid the sale of his property by payment of the arrears. So where the village officers knew that the pattadar had long ago died but had not corrected the register and on default of payment, notices of demand, attachment and sale were sent addressed to the dead man and affixed to the property, the sale is void. A suit to set it aside is riot subject to the period of limitation prescribed by Section 59 of the Act."

36. In The Secretary of State for India in Council Vs. Nagaraja Aiyar and Another, , it is held that the period of limitation for a suit to recover a sum of money alleged to have been illegally levied and collected by the Government from the plaintiff as water cess on his land is one year from the date of payment under Article 16 of the Limitation Actand not 6 months from the date of the distraint of the plaintiff''s crop u/s 59 of the Revenue Recovery Act. In Saminatha Aiyar Vs. Govindasami Padayachi and Others, , Section 59 of the Act was held to have applied to the sale for arrears of revenue, which are illegal as contravening Section 2 of the Regulation X of 1831 which prohibit the sale of estates of minors inherited by them for arrears of revenue accruing during the minority.

37. In the present case the sale has not been held and the objection was taken, when notice demanding payment was issued to the defaulter''s sons, that they were not defaulters and therefore Section 59 of the Madras Revenue Recovery Act has no application.

38. Our attention was drawn by the standing counsel for Income Tax to Section 67 of the Indian Income Tax Act, 1922, and the learned standing counsel contended that no suit could be brought in any civil court to set aside or modify

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an assessment made under this Act. Section 67 is inapplicable, as no suit was filed to set aside or modify the assessment.

39. The next contention of the learned standing counsel for Income Tax is that, on the forwarding of a certificate issued by the Income Tax Officer to the Collector specifying the amount due from an assessee, the Collector shall proceed to recover from such assessee the amount specified therein as if it were an arrear of land revenue. In the present case the certificate was in the name of the assessee, who died prior to the date of the issue of the certificate. The question which, therefore, falls for consideration is whether the Collector is bound to take steps in pursuance of a certificate issued in the name of a dead person. Our attention was drawn to Section 24B of the Income Tax Act, 1922, which provides that where a person dies, his executor, administrator or other legal representative shall be liable to pay out of the estate of the deceased person to the extent to which the estate is capable of meeting the charge the tax assessed as payable by such person, or any tax which would have been payable by him under this Act if he had not died. Gengu Reddy died at about 1961. He was assessed to Income Tax prior to March 11, 1955, and it is after, the issue of the certificate u/s 46(2) of the Income Tax Act, 1922, subsequent to March 11, 1955, that he died. On January 12, 1962, the Tahsildar would appear to have attached the properties for recovery of the arrears of Rs. 2,449.09 due by the assessee (Gengu Reddy). It is after the said attachment duly effected and during the period they were under the control of the revenue authorities, the crops were stolen. The correspondence between Tahsildar, Tirupattur and Sub-Collector, Tirupattur, and the reports of the village munsiff and the letter of the sub-inspector of police, Alangayam, to Tahsildar, Tirupattur, had been marked as exhibits B-9 to B-13. Subsequent thereto, the lessees of the lands filed an application before the. Sub-Collector, Tirupattur, for cancellation of the order of attachment and for the release of the properties attached and that petition was dismissed on July 19, 1962, by the Sub-Collector, Tirupattur, as per exhibit B-13. Therefore, the position is that for the recovery of the arrears due from the assessee, the Tahsildar attached the properties in the possession of the lessee and belonging to the sons of the defaulter and the attached crops which were under the control of the thalayaris were stolen during such period. The learned counsel for the appellant contends that the recovery proceedings are bad, as the certificate stood only in the name of the defaulter and without an amendment of the certificate, the revenue authorities cannot proceed to realise the amount due by the defaulter. The contention on behalf of the revenue is that there is no need to amend the certificate issued by the Collector u/s 46(2) and that the correspondence for recovery were- legally iGon-tinued by the Tahsildar against the properties of the deceased delaulter. The learned counsel referred us to Section 24B of the Income Tax Act, 1922. Section 24B was inserted in 1932. Prior to that, the Act contained no procedure for assessment of the income of a deceased person. In the present case on the date of the assessment order the defaulter, Gengu Reddy, was alive. When the certificate u/s 46(2) was issued, the

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defaulter was alive and only in the process of recovering the tax the defaulter died. The question raised is whether without an amendment of the certificate issued u/s 46(2), recovery proceedings could be proceeded with. Section 24B(1) makes an assessee immortal and provides that where a person dies, his executor, administrator or other legal representatives shall be liable to pay out of the estate of the deceased person, the tax assessed. The contention now is that this provision will not apply to recovery proceedings, u/s 46(2). This matter has been considered in a few decisions and we shall refer to them. In The Additional Income Tax Officer, Salem Vs. E. Alfred, , the Supreme Court held that the definition of "assessee" in Section 2(2) of the Act is sufficient to include even a legal representative who is to pay the tax, though out of the assets of the deceased person. By Section 24B(1) of the Indian Income Tax Act, a legal representative was made liable to pay the tax which might have been assessed but not paid by the deceased person or which might be assessed after his death. It covers all situations and contingencies, and makes the liability absolute, limited however to the extent to which the estate of the deceased is capable of meeting the charge. In First Additional Income Tax Officer, Karaikudi, and Another Vs. T.M.K. Abdul Kassim, , the Supreme Court held that the legal representative of the deceased ''person against whom proceedings were taken u/s 24B of the Income Tax Act, 1922, must be deemed to be an assessee not only for the purposes of assessment, but also for the purposes of the levy and recovery of tax, and proceedings tinder sections 45, 46(1) and 46(2) of the Act can, therefore, be taken against legal representatives. In Estate of Late Rangalal Jajodia Vs. Commissioner of Income Tax, Madras, , to which one of us was a party, the scope of Section 24B was fully considered. The following passage therein brings out the effect of Section 24B :

"The whole of Section 24B was intended to a cover a lacuna in respect of all situations arising out of the death of a person at any stage, before or after filing of return by him. While liability to pay tax is fixed by Sub-section (1), on the procedural matter it is only for purposes of sub section (2), a legal representative is to be regarded or to be deemed an assessee quoad the estate of the deceased, but not necessarily for the pur pose of Sub-section (3), In fact Sub-section (3) does not say that a legal representative, for purposes of assessment, shall be deemed to be an assessee. The first part of Sub-section (3) enables the Income Tax Officer to deal with a return submitted by the deceased which he believes to be incorrect or incomplete and make an assessment of his total income and determine the tax payable by him on the basis of such assessment. In other words, it is within the contemplation of the first part of sub section (3) that the assessment is made on the estate of the deceased and it is only for the purpose of representation, the procedure in the second part of Sub-section (3) has been prescribed and that if the procedure prescribed therein has already been followed, it is not contemplated by Sub-section (3) that it should be reiterated in the presence of the legal representative. Where the procedure has already been followed, all that remains to be done is to bring the legal representative on

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record and proceed with the assessment proceedings from the point at which they were left at the death of the deceased assessee. On this view there is a continuity in the assess ment proceedings from the standpoint of the estate of the deceased. The liability as contemplated by Sub-section (1) is after all on the estate though the legal representative is made liable, his liability being limited to the extent of the es,tate and the taxes assessed or to be assessed. On these premises, learned counsel almost suggests without stating so that the estate of the deceased should in a sense be regarded as the assessee and the legal representative is but a formality for purposes of Sub-section (3) of section 24B. We have carefully considered this argument, but we are unable to accept it."

40. We are, therefore, of opinion that the revenue authorities were in order in proceeding with the recovery in pursuance of the certificate issued u/s 46(2) of the Act and that there is no need to amend the certificate either by the Income Tax authorities or by the Collector showing the legal representatives as the assessee.

41. The Collector is entitled to proceed under the provisions of the Madras Revenue Recovery Act, 1884, for recovery of the amount mentioned in the certificate without any amendment of the certificate. In C. DHANALAKSHMI AMMAL Vs. Income Tax OFFICER, MADRAS., , Rajamannar C.J. and Panchapakesa Aiyar J. pointed out the procedure to be adopted in such cases. The Collector is entitled to proceed against any of the properties of the defaulter standing in his name. The recovery can be made in different ways : (1) by the seizure and sale of movable property, (2) by attachment and sale of immovable property, and (3) in execution against the person of the defaulter. Section 59 of the Act provides that the right of the parties aggrieved by any proceedings taken under the Act is to apply to the civil court for redress although a shorter period of limitation is provided. In the present case the Tahsildar (D. W. 1) and the karnam (D. W. 3) have been examined on behalf of the State. The Tahsildar stated that he had issued the "I" Form notice to the village munsiff of Kurizalapattu, specifying the amount as per the Collector''s certificate for collection from the defaulter. As the defaulter was dead by that time the village munsiff served notice on the son of the defaulter and the lessee (plaintiff) in possession of the property of the defaulter. As the lessee and the defaulter''s son failed to comply with the demand, the village munsiff attached the sugarcane crop standing on the land of the defaulter. Meanwhile, the lessee (plaintiff) filed a claim petition before the Sub-Collector. The Sub-Collector passed final orders on July 19, 1962. But, the plaintiff did not follow it up. The attached sugar-cane crop was put in possession of the village munsiff. Before the attached crops could be sold there was a theft of a portion of the crop and the lessee (plaintiff) was arrested in that connection. The police filed a Case against him and he was convicted. On appeal the plaintiff was acquitted. The plaintiff has filed the present suit claiming damages for malicious prosecution. The courts below dismissed the suit as the attachment was validly made and the revenue authorities acted in accordance with law and there is no proof of malice. We are of opinion that the revenue authorities acted

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according to law and in the absence of malice the claim for damages under the various heads claimed cannot be sustainable. This answers the fourth point raised by the appellant''s learned counsel. We have no hesitation in dismissing the appeal. As the plaintiff has succeeded on the questions of law put forward by the respondent, there will be no order as to costs.

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