PETITIONER:
KASTURILAL RALIA RAM JAIN

Vs.

RESPONDENT:
THE STATE OF UTTAR PRADESH

DATE OF JUDGMENT:
29/09/1964

BENCH:
GAJENDRAGADKAR, P.B. (CJ)
BENCH:
GAJENDRAGADKAR, P.B. (CJ)
WANCHOO, K.N.
HIDAYATULLAH, M.
DAYAL, RAGHUBAR
MUDHOLKAR, J.R.

CITATION:
1965 AIR 1039 1965 SCR (1) 375
CITATOR INFO :
D 1967 SC1885 (7)
R 1971 SC2255 (8)
RF 1974 SC 890 (20)
MV 1975 SC1331 (187)
RF 1990 SC1480 (73)

ACT:
Constitution of India, 1950, Art. 300(1)-State Liability for tortious acts of its servants.

HEADNOTE:
Some police officers of the State seized gold from the appellant in exercise of their statutory powers, but were negligent in dealing with its safe custody. As a result of such negligence the gold was not returned to the appellant and so, he filed the suit against the State claiming the value of the gold. The suit was decreed by the trial court but was dismissed by the High Court on appeal. In the appeal to the Supreme Court,
HELD : The power to arrest a person, to search him. to seize property found with him, are powers conferred on specified officers by statute and are powers which could be properly characterised as sovereign powers. Therefore, though the negligent act was committed by the employees of the respondent-State during the course of their employment, the claim against the State could not be sustained, because, the employment in question was of the category which could claim the special characteristic of sovereign power. [390 G-H; 391 A].
The P. & O. Steam Navigation Co. v. The Secretary of State for India, (1868-69) 5 Bom. H.C.R. App. A. 1, approved.
The Stale of Rajasthan v. Must. Vidhyawati and another, [1962] Supp. 2 S.C.R. 989, distinguished.
The passing of legislative enactments to regulate and control the liability of the State for the negligent acts of its servants, suggested [391 B].

JUDGMENT:

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 105 of 1963.

Appeal from the judgment and decree dated March 18, 1960 of the Allahabad High Court in First Appeal No. 67 of 1950.

M.S. K. Sastri and M. S. Narasimhan for P. Keshava Pillai, for the appellant.

A. V. Viswanatha Sastri and O. P. Rana, for the respondent.The Judgment of the Court was delivered by

Gajendragadkar C. J. The short question of law which arises in this appeal is whether the respondent, the State of Uttar Pradesh, is liable to compensate the appellant, M/s. Kasturilal Ralia Ram Jain for the loss caused to it by the negligence of the police officers employed by the respondent. This question arises

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in this way. The appellant is a firm which deals in bullion and other goods at Amritsar. It was duly registered under the Indian Partnership Act. Ralia Ram was one of its partners. On the 20th September, 1947 Ralia Ram arrived at Meerut by the Frontier Mail about midnight. His object in going to Meerut was to sell gold, silver and other goods in the Meerut market. Whilst he was passing through the Chaupla Bazar with this object, he was taken into custody by three police constables. His belongings were then searched and he was taken to the Kotwali Police Station. He was detained in the police lock-up there and his belongings which consisted of gold, weighing 103 tolas 6 mashas and 1 ratti, and silver weighing 2 maunds and 6 1/2 seers, were seized from him and kept in police custody. On the 21st September, 1947 he was released on bail, and some time thereafter the silver seized from him was returned to him. Ralia Ram then made repeated demands for the return of the gold which had been seized from him, and since he could not recover the gold from the police officers, he filed the present suit against the respondent in which he claimed a decree that the gold seized from him should either be returned to him, or in the alternative, its value should be ordered to be paid to him. The alternative claim thus made by him consisted of Rs. 11,075-10-0 as the price of the gold and Rs. 355 as interest by way of damages as well as future interest.

This claim was resisted by the respondent on several grounds. It was urged that the respondent was not liable to return either the gold, or to pay its money value. The respondent alleged that the gold in question had been taken into custody by one Mohammad Amir, who was then the Head Constable, and it had been kept in the police Malkhana under his charge. Mohd. Amir, however, misappropriated the gold and fled away to Pakistan on the 17th October, 1947. He had also misappropriated some other cash and articles deposited in the Malkhana before he left India. The respondent further alleged that a case under section 409 of the Indian Penal Code as well as s. 29 of the Police Act had been registered against Mohd. Amir, but nothing effective could be done in respect of the said case because in spite of the best efforts made by the police department, Mohd. Amir could not be apprehended. Alternatively, it was pleaded by the respondent that this was not a case of negligence of the police officers, and that even if negligence was held proved against the said police officers, the respondent State could not be said to be liable for the loss resulting from such negligence.

On these pleadings, two substantial questions arose between

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the parties; one was whether the police officers in question were guilty of negligence in the matter of taking care of the gold which had been seized from Ralia Ram, and the second was whether the respondent was liable to compensate the appellant for the loss caused to it by the negligence of the public servants employed by the respondent. The trial Court found in favour of the appellant on both these issues, and since the gold in question could not be ordered to be returned to the appellant, a decree was passed in its favour for Rs. 11,430-10-0.

The respondent challenged the correctness of this decree by an appeal before the Allahabad High Court and it was urged on its behalf that the trial Court was in error in regard to both the findings recorded by it in favour of the appellant. These pleas have been upheld by the High Court. It has found that no negligence had been established against the police officers in question and that even if it was assumed that the police officers were negligent and their negligence led to the loss of gold, that would not justify the appellant's claim for a money decree against the respondent. The appellant then moved for and obtained a certificate from the said High Court and it is with the said certificate that it has come to this Court by an appeal. On behalf of the appellant, Mr. M. S. K. Sastri has urged that the High Court was in error in both the findings recorded by it in favour of the respondent. The first finding is one of fact and the second is one of law.

In dealing with the question of negligence, it is necessary to refer to the evidence adduced in this case. The material facts leading to the seizure of gold are not in dispute. The only question which calls for our decision on this part of the case is whether the loss of gold can be legitimately attributed to the negligence of the police officers in charge of the police station where the gold and silver had been kept in custody. Ganga Prasad is the first witness to whose evidence it is necessary to refer. He was Class II Officer in Meerut Kotwali at the relevant time. He swears that Mohammad Amir who was in charge of the Malkhana, had fled away to Pakistan without delivering the keys to any one and without obtaining permission for leaving his post of duty. The Malkhana was accordingly checked and it disclosed that considerable properties kept in the Malkhana were missing. On the 26th October, 1947, Ganga Prasad returned the silver articles to the appellant. Gold was, however, not found in the Malkhana, and so, it could not be returned to it. Ganga Prasad then refers to the investigation carried out against Mohd. Amir for an offence of misappropriation and his evidence shows that Mohd. Amir had absconded, and

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since the police department was unable to apprehend him from Pakistan, the investigation in question became ineffective. According to this witness, the silver and gold of the appellant had not been attached in his presence. He admits that the goods of the .appellant remained in the Malkhana of the Kotwali. No list of these goods was forwarded to any officials. This witness further added that valuables are generally kept in the wooden box and the key is kept by the officer-in-charge of Malkbana. The gold -and silver articles seized from the appellant had not been kept in that box in his presence. He could not explain why the said gold and silver articles were not kept in the Treasury.

The next witness is Mohd. Umar. He was Sub-Inspector II in the Kotwali in September, 1947. He swears to the seizure of the ,gold and silver articles from Ralia Ram and deposes to

the fact that they were not kept in the Malkhana in his presence. Both the arrested person and the seized articles were left in charge of the Head Constable who had been instructed by Mohd. Umar to keep the goods in the Malkhana. This witness admitted that no list was prepared of the seized goods and he was not able to say whether proper precaution were taken to safeguard the goods in the Malkhana.

The third witness is Agha Badarul Hasan. He was station officer of the police station in question in September, 1947. He swears that it was a routine requirement that every day in the morning one Sub-Inspector had to inspect the, Malkhana under his order. He knew that Ralia Ram had been kept in the lock-up and his articles were kept in the Malkhana, but he added that in his presence these articles were neither weighed nor kept in the Malkhana. He claims to have checked up the contents of the Malkhana. but he conceded that he had made no note about this check in the Diary. He purported to say that when he checked the Malkhana, gold and silver were there. He kept the valuables in the Malkhana without any further instructions from the officers, and he was not present when they were kept in the box. This witness claims that valuables are not sent by the police officers to the Treasury unless they got orders to that effect. That is the whole of the material evidence bearing on the question of negligence of the police officers.

In appreciating the effect of this evidence, it is necessary to refer to some of the relevant provisions, in regard to the custody of the goods seized in the course of police investigation. Section 5 4 (I) (iv) of the Code of Criminal Procedure provides that any police officer may, without an order from a Magistrate and without

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a warrant, arrest any person in whose possession anything is found which may reasonably be suspected to be stolen property and who may reasonably be suspected of having committed an offence with reference to such thing. It is under this provision that Ralia Ram was arrested at midnight. It was apprehended by the police officers that the gold and silver articles which he was carrying with him might be stolen property, and so, his arrest can be said to be justified under section 54 (I) (iv). Section 550 confers powers on police officers to seize property suspected to be stolen. It provides inter alia, that any police officer may seize property which may be suspected to have been stolen; and so, gold and silver in the possession of Ralia Ram were seized in exercise of the powers conferred on the police officers under s. 550 of the Code. After Ralia Ram was arrested and before his articles were seized, he was searched, and such a search is justified by the provisions of s. 51 of the Code. Having thus arrested Ralia Ram and searched his person and seized gold and silver articles from him under the respective provisions of the Code, the police officers had to deal with the question of the safe custody of these goods. Section 523 provides for the procedure in that behalf. It lays down, inter alia, that the seizure by any police officer of property taken under s. 51 shall be forthwith reported to a Magistrate, who shall make such order as he thinks fit respecting the disposal of such property or the delivery of such property to the person entitled to the possession thereof, or, if such person cannot be ascertained, respecting the custody and production of such property. These are the relevant provisions of the Code in respect of property seized from a person who has

been arrested on suspicion that he was carrying stolen property.

That takes us to the U.P. Police Regulations. Chapter XIV of these Regulations deals with the custody and disposal of property. Regulation 165 provides a detailed procedure for dealing with the disposal of movable property of which the police takes possession. It is not necessary to refer to these provisions; it would be enough to state that these provisions indicate that when property is seized by the police officers, meticulous care is required to be taken for making a proper list of the property seized, describing it, weighing it, and taking all reasonable steps to ensure its safety. Clause (5) of Regulation 165 provides that when the property consists of gold, silver, jewellery or other valuables, it must be sent in a sealed packet after being weighed, and its weight must be noted in the general diary and on the list which accompanies the packet. It requires that a set of weights and scales should

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be kept at each police station. Regulation 166 is important for our purpose. It reads thus :-

> "Unless the Magistrate otherwise directs, property of every description, except cash exceeding Rs. 100 and property of equal value and_property pertaining to cases of importance, which will be kept by the Prosecuting Inspector in a separate box under lock and key in the treasury, will remain in the custody of the malkhana moharrir under the general control and responsibility of the Prosecuting Inspector until it has been finally disposed of."

The wording of the Regulation is somewhat complex and confusing, but its purport and meaning are clear. In substance, it provides that property of every description will remain in the custody of the malkhana moharrir under the general control and responsibility of the Prosecuting Inspector until it has been finally disposed of. This provision is subject to the instructions to the contrary which the Magistrate may issue. In other words, unless the Magistrate directs otherwise, the normal rule is that the property should remain in the Malkhana. But this rule does not apply to cash exceeding Rs. 100 and property of equal value and property pertaining to cases of importance. Property falling under this category has to be kept by the Prosecuting Inspector in a separate box under lock and key in the treasury._ If the Magistrate issues a direction that property not falling under this category should also be kept in the treasury that direction has to be followed and the property in such a case cannot be kept in the custody of the malkhana moharrir. It is thus clear that gold and silver which had been seized from Ralia Ram had to be kept in a separate box under lock and key in the Treasury; and that, admittedly, was not done in the present case. It is in the light of the provisions contained in Regulation 166 that we have to appreciate the oral evidence to which we have already referred. Unfortunately, in dealing with Regulations 165(5) and 166, the High Court has erroneously assumed that there was no obligation on the police officers to deposit Ralia Ram’s property in the Treasury. This conclusion is apparently due to the fact that the words used in Regulation 166 are not as clear as they should be and their effect has been misconstrued by the High Court. It is in the light of this position that the oral evidence in the case has to be considered.

Thus considered, there can be no escape from the conclusion that the police officers were negligent in dealing with Ralia Rani's property after it was seized from him. Not only was the property
not kept in safe custody in the treasury, but the manner in which it was dealt with at the Malkhana shows gross negligence on the part of the police officers. A list of -articles seized does not-appear to have been made and there is no evidence that they were weighed either. It is true that the respondent's case is that these goods were misappropriated by Head Constable Mohd. Amir; but that would not assist the respondent in contending that the manner in which the seized property was dealt with at the police station did not show gross negligence. Therefore, we are satisfied that the trial Court was right in coming to the conclusion that the loss suffered by the appellant by the fact that the gold seized from Ralia Ram has not been returned to it, is based on the negligence of the police officers employed by the respondent; and that raises the question of law which we have set out at the commencement of our judgment.

Mr. M. S. K. Sastri for the appellant has argued that once he is able to establish negligence of the police officers, there should be no difficulty in our decreeing the appellant's claim against the respondent, because he urges that in passing a decree against the respondent in the present case, we would merely be extending the principle recognised by this Court in State of Rajasthan v. Mst. Vidhyawati and Anr. (1). In that case, respondent No. 1's husband and father of minor respondent No. 2 had been knocked down by a Government jeep car which was rashly and negligently driven by an employee of the State of Rajasthan. The said car was, at the relevant time, being taken from the repair shop to the Collector's residence and was meant for the Collector's use. A claim was then made by the respondents for damages against the State of Rajasthan and the said claim was allowed by this Court. In upholding the decision of the High Court which had granted the claim, this Court observed that the liability of the State for damages in respect of a tortious act committed by its servant within the scope of his employment and functioning as such was the same as that of any other employer. In support of this conclusion, this Court observed that the immunity of the Crown in the United Kingdom on which basically the State of Rajasthan resisted the respondents' claim, was based on the old feudalistic notions of justice, namely that the King was incapable of doing a wrong, and, therefore, of authorising or instigating one, and that he could not be sued in his own courts. Such a notion, it was said, was inconsistent with the Republican form of Government in our country, particularly because in pursuit of their welfare and socialistic objectives, States in India undertook various industrial

(1) [1962] Supp. 2 S.C.R. 989.

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and other activities and had to employ a large army of servants. That is why it was observed that there would be no justification, in principle, or in public interest, why the State should not be held liable vicariously for the tortious acts of its servants. It is ,on these observations that Mr. M. S. K. Sastri relies and contends that the said observations as well as the decision itself can be ,easily extended and applied to the facts in the present case.

It must be conceded that there are certain observations made in the Vidhyawati case(1) which support Mr. Sastri's

argument and make it prima facie attractive. But, as we shall presently point, out, the facts in the Vidhyawati case fall in a category of claims which is distinct and separate from the category in which the facts in the present case fall; and that makes it necessary to ,examine what the true legal positionis in regard to a claim for damages against the respondent for loss caused to a citizen by the tortious acts of the respondent' servants.

This question essentially falls to be considered under Art. 300 (1) of the Constitution. This article reads thus :-

> "The Government of India may sue or be sued by the name of the Union of India and the Government of a State may sue or be sued by the name of the State and may, subject to any provisions which may be made by Act of Parliament or of the Legislature of such State enacted by virtue of powers conferred by this Constitution, sue or be sued in relation to their respective affairs in the like cases as the Dominion of India and the corresponding Provinces or the corresponding Indian States might have sued or been sued if this Constitution had not been enacted."

It would be noticed that this article consists of three parts. The first part deals with the question about the form and the causetitle for a suit intended to be filed by or against the Government of India, or the Government of a State. The second part provides, inter alia, that a State may sue or be sued in relation to its affairs in cases like those in which a corresponding Province might have sued or been sued if the Constitution had not been enacted. In other words, when a question arises as to whether a suit can be filed against the Government of a State, the enquiry has to be : could such a suit have been filed against a corresponding Province if the Constitution had not been passed ? The third part of the article provides that it would be competent to the Parliament or

(1) [1962] Supp. 2 S.C.R. 989.

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the Legislature of a State to make appropriate provisions in regard to the topic covered by Art. 300(1). Since no such law has been passed by the respondent in the present case, the question as to whether the respondent is liable to be sued for damages at the instance of the appellant, has to be determined by reference to another question and that is, whether such a suit would have been competent against the corresponding Province.

This last enquiry inevitably takes us to the corresponding provisions in the respective Constitution Acts of India; they are s. 65 of the Government of India Act, 1858, S. 32 of the Government of India Act, 1915 and s. 176 of the Government of India Act, 1935. It is unnecessary to trace the pedigree of this provision beyond s. 65 of the Act of 1858, because the relevant decisions bearing on this point to which we will presently refer, are ultimately found to be based on the effect of the provisions contained in the said section. For convenience, let us cite s. 65 at this stage :

> "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; and the property and effects hereby vested in Her Majesty for the purposes of the Government of India, or acquired for the said purposes, shall be subject and liable to the same judgments and executions as they would while vested in the said Company have been liable to in respect of debts and liabilities lawfully contracted and incurred by the said Company."

The first decision which is treated as a leading authority on this point was pronounced by the Supreme Court at Calcutta in 1861 in the case of the Peninsular and Oriental Steam Navigation Company v. The Secretary of State for India(1). It is a remarkable tribute to the judgment pronounced by Chief Justice Peacock in that case that ever since, the principles enunciated in the judgment have been consistently followed by all judicial decisions in India, and except on one occasion, no dissent has been expressed in respect of them. It seems somewhat ironical that the judgment of this importance should not have been reported in due course

(1) 5 B. H.C.R. Appendix A, p. 1

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in Calcutta, but found a place in the Law Reports in 5 Bom. H.C.R. 1868-69.

Let us then consider what this case decided. It appears that a servant of the plaintiff company was proceeding on a highway in Calcutta driving a carriage which was drawn by a pair of horses belonging to the plaintiff. The accident which gave rise to the action took place on the highway, and it was caused by the negligence of the servants of the Government who had been employed in the Government dockyard at Kidderpore. 'Me said servants were carrying a piece of iron funnel, and the manner in which they were carrying the Said funnel caused an injury to one of the horses that were drawing the plaintiffs carriage. It is this injury caused by the negligence of the servants of the Government employed in the Government dockyard that gave rise to the action. The. plaintiff company claimed damages against the Secretary of State for India for the damage caused by the said accident. The suit was tried by the Small Cause Court Judge at Calcutta. He found that the defendant's servants were wrongdoers inasmuch as they carried the iron funnel in the centre of the road. According to the learned Judge, the servants were thus liable for the injury caused by their negligence. He was, however, not clear on the question of law as to whether the defendant Secretary of State could be held liable for the tortious act of the Government servants which led to the accident. That is why he referred the said question to the Supreme Court of Calcutta, and the Supreme Court held that the Secretary of State in Council of India would be 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.

This question was considered by the Supreme Court in the light of s. 65 of the Act of 1858. "The main object of that section," observed Peacock C.J., "was to transfer to Her Majesty the possession and government of the British territories in India, which were then vested in the East India Company in trust for the Crown, but it does not appear to have been the intention of the Legislature to alter the nature or extent of liabilities with which the revenue of India should be chargeable." The learned Chief Justice then considered the scheme of the other relevant provisions of the said Act and posed the question thus: would the East

India Company have been liable in the present action, if the 21st and 22nd Vict., c. 106, had not been passed ? Dealing with this question, the learned Chief Justice observed that "the origin and progress of the East India Company are too well-known to require any detail

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for the purpose of the present case. It is sufficient to state that after the passing of the 3rd and 4th Wm. IV., c. 85, they not only exercised powers of government, but also carried on trade as merchants." It was then observed by the learned Chief Justice that in determining the question whether the East India Company would, under the circumstances, have been liable to an action, the general principles applicable to Sovereigns and States, and the reasoning deduced from the maxim of the English Law that the King can do no wrong, would have no force, because he concurred entirely in the opinion expressed by Chief Justice Grey in the earlier case of The Bank of Bengal v. The East India Company(1) that the fact of the Company's having been invested with powers usually called sovereign powers did-not constitute them sovereign. That is one aspect of the matter which was emphasised in that judgment.

Proceeding to deal with the question on this basis, the learned Chief Justice remarked that if the East India Company were allowed, for the purpose of Government, to engage in undertakings, such as the bullock train and the conveyance of goods and passengers for hire, it was only reasonable that they should do so, subject to the same liabilities as individuals; and in that view of the matter, the Chief Justice expressed the opinion that for accidents like the one with which the Court was dealing, if caused by the negligence of servants employed by Government, the East India Company would have been liable, both before and after the 3rd and 4th Wm. IV., c. 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 out of the revenues of India. "We are of opinion," said the learned Chief Justice emphatically, "that this is a liability, not only within the words, but also within the spirit, of the 3rd & 4th Wm. IV., c. 85, s. 9, and of the 21st and 22nd Vict., c. 106, S. 65, and that it would be inconsistent with commonsense and justice to hold otherwise."

It then appears to have been urged before the Court in that case that the Secretary of State in Council must be considered as the State or as a public officer employed by the State, and the question of his liability determined on that footing. This argument was rejected on two grounds, that the relevant words of the statute did not justify it, and that "the East India Company were not sovereigns, and therefore, could not claim all the exemption of a sovereign." That is how the learned Chief Justice took the view that the case "did not fall under the principle of the cases with regard to the liabilities of such persons--[that is to say, public

(1) Bignell, Rep. p. 120.

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servants employed by the Sovereign]; 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 purposes of government, and partly on their own account, which, without any delegation of sovereign rights, might be carried on by private individuals."

It is in respect of this aspect of the matter that the Chief

Justice enunciated a principle which has been consistently followed in all subsequent decisions. Said the learned Chief Justice : "there is a great and clear distinction between acts done in the exercise of what are usually termed sovereign powers, and acts done in the conduct of undertakings which might be carried on by private individuals without having such powers delegated to them." Having thus enunciated the basic principle, the Chief Justice stated another proposition as flowing from it. He observed that " where an act is done, or a contract is entered into, in the exercise of powers usually called sovereign powers; by which we mean powers which cannot be lawfully exercised except by sovereign, or private individual delegated by a sovereign to exercise them, no action will lie." And, naturally it follows that where an act is done, or a contract is entered into, in the exercise of powers which cannot be called sovereign powers, action will lie. 'Mat, in brief, is the decision of the Supreme Court of Calcutta in the case of the Peninsular and Oriental Steam Navigation Co. (1).

Thus, it is clear that this case recognises a material distinction between acts committed by the servants employed by the State where such acts are referable to the exercise of sovereign powers delegated to public servants, and acts committed by public servants which are not referable to the delegation of any sovereign powers. If a tortious act is committed by a public servant and it gives rise to a claim for damages, the question to ask is : was the tortious act committed by the public servant in discharge of statutory functions which are referable to, and ultimately based on, the delegation of the sovereign powers of the State to such public servant ? If the answer is in the affirmative, the action for damages for loss caused by such tortious act will not lie. On the other hand, if the tortious act has been committed by a -public servant in discharge of duties assigned to him not by virtue of the delegation of any sovereign power, an action for damages would lie. The act of the public servant committed by him during the course of his employment is, in this category of cases, an act of a servant who might have been employed by a private individual for the same

(1) 5 B.H.C.R. Appendix A, p. 1.

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purpose. This distinction which is clear and precise in law, is sometimes not borne in mind in discussing questions of the State's liability arising from tortious acts committed by public servants. That is why the clarity and precision with which this distinction was emphasised by Chief Justice Peacock as early as 1861 has been recognised as a classic statement on this subject.

We have already indicated that this distinction has been uniformly followed by judicial decisions in India. In that connection, we will refer to a few representative decisions. In The Secretary of State for India in Council v. Moment(1), the Privy Council had occasion to consider the effect of the provisions of s. 41 (b) of Act IV of 1898 (Burma), which is similar to the provisions of s. 65 of the Government of India Act, 1858. While holding that a suit for damages for wrongful interference with the plaintiff's property in land would have lain against the East India Company, the Privy Council has expressly approved of the principles enunciated by Chief Justice Peacock in the case of Peninsular & Oriental Steam Navigation Co.(2).

In Shivabhajan Durgaprasad v. Secretary of State for India, this point arose for the decision of the Bombay High Court.

In that case, a suit had been instituted against the Secretary of State in Council to recover damages on account of the negligence of a chief constable with respect to goods seized; and the plaintiffs claim was resisted by the Secretary of State in Council on the ground that no action lay. The High Court upheld the plea raised by the defence on the ground that the chief constable seized the goods not in obedience to an order of the executive Government, but in performance of a statutory power vested in him by the Legislature. The principle on which this decision was based was stated to be 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. In discussing this point, Jenkins C.J., referred to the decision in the case of Peninsular and Oriental Steam Navigation Co.(2) and observed that though he entertained some doubt about its correctness, the said view had stood so long unchallenged that lie thought it necessary to accept it as an authority binding on the Court. It is on this solitary occasion that a whisper of dissent was raised by Chief Justice Jenkins, but ultimately, the learned C. J. submitted to the authority of the said decision.

(1) (1912-13) 40 I. A. 48. (2) 5 B. H.C. R. Appendix A p.1.

(3) (1904) I.L.R. .28 Rom. 314.

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In the Secretary of State for India in Council v. A. Cockcraft & Anr.(1), a claim for damages against the Secretary of State arose in respect of injuries sustained by the plaintiff in a carriage accident which was alleged to have been due to the negligent stacking of gravel on a road which was stated in the plaint to be a military road maintained by the Public 'Works Department of the Govern-ment. The Madras High Court held that the plaintiff had in law no cause of action against the Secretary of State for India in Council in respect of acts done by the East India Company in the exercise of its sovereign powers. This conclusion was based on the finding that the provision and maintenance of roads, especially a military road, is one of the functions of Government carried on in the exercise of its sovereign powers and is not an undertaking which might have been carried on by private persons.

In the Secretary of State for India in Council v. Shreegobinda Chaudhuri(2), it was held by the Calcutta High Court that a suit for damages does not lie against the Secretary of State for India in Council for misfeasance, wrongs, negligence or omissions of duties of managers appointed by the Court of Wards, because the acts giving rise to the claim, were done by officers of Government in the course of exercise of powers which cannot be lawfully exercised save by the sovereign power. It is in this connection that Rankin C.J., enunciated the principle that no action in tort lies against the Secretary of State for India in Council upon the 'respondent superior'. The learned C. J., however, recognised that a suit may lie against the Secretary of State for India in Council for torts committed by the Government in connection with a private undertaking or an undertaking not in exercise of sovereign power. The same view has been taken by the Allahabad High Court in Mohammad Murad Ibrahim Khan & Anr. v. Government of United Provinces. (3)

In Uma Parshad v. The Secretary of State(4), certain property which had been stolen from the plaintiff was recovered by the police and was thereafter kept in the

Malkhana under orders of the Magistrate during the trial of the thieves. It appears that the receiver, H. A., the man in charge of the Malkhana, absconded with it. That led to a suit by the plaintiff for the recovery of the property, or in the alternative, for its price. The Lahore High Court held that the liability in the case having clearly arisen under the provisions of the Criminal Procedure Code, the defence plea that the act was an act of State could not succeed. Even so, the Court

(1) (1914) I.L.R. 39 Mad. 351.
(3) I.L.R. [1957] 1. All. 94.
(2) (1932) I.L.R. 59 Cal. 1289.
(4) (1936) I.L.R. 18 Lah. 380.

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came to the conclusion that the Secretary of State could be held liable only under circumstances in which a private employer can be rendered liable. The Court then examined the question as to whether in circumstances like those which led to the claim for damages in the case before it, a private employer could have been made liable; and this question was answered in the negative on the ground that no liability attached to the Secretary of State on account of the criminal act of the man in charge of the Malkhana; the said act was a felonious act unauthorised by his employer. We would like to add that some of the reasons given by the High Court in support of its conclusion may be open to doubt, but, in substance, the decision can be justified on the basis that the act which gave rise to the claim for damages had been done by a public servant who was authorised by a statute to exercise his powers, and the discharge of the said function can be referred to the delegation of the sovereign power of the State, and as such the criminal act which gave rise to the action, could not validity sustain a claim for damages against the State. It will thus be clear that the basic principle enunciated by Peacock C. J. in 1861 has been consistently followed by judicial decisions in dealing with the question about the State's liability in respect of negligent or tortious acts committed by public servants employed by the State.

Reverting then to the decision of this Court in the Vidhyanati case(1), it would be recalled that the negligent act which gave rise to the claim for damages against the State of Rajasthan in that case, was committed by the employee of the State of Rajasthan while he was driving the jeep car from the repair shop to the Collector's residence, and the question which arose for decision was : did the negligent act committed by the Government employee during the journey of the jeep car from the workshop to the Collector's residence for the Collector's use give rise to a valid claim for damages against the State of Rajasthan or not? With respect, we may point out, that this aspect of the matter has not been clearly or emphatically brought out in discussing the point of law which was decided by this Court in that case. But when we consider the principal facts on which the claim for damages was based, it is obvious that when the Government employee was driving the jeep car from the workshop to the Collector's residence for the Collector's use, he was employed on a task or an undertaking which cannot be said to be referable to, or ultimately based on, the delegation of sovereign or governmental powers of the State. In dealing with such cases, it must

(1) [19621 Supp. 2 S.CR. 989.
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be borne in mind that when the State pleads immunity against claims for damages resulting from injury caused by negligent acts of its servants, the area of employment referable to sovereign powers must be strictly determined. Before such a plea is upheld, the Court must always find that the impugned act was committed in the course of an undertaking or employment which is referable to the exercise of sovereign power, or to the exercise of delegated sovereign power; and in the Vidhyawati case(1), this Court took the view that the negligent act in driving the jeep car from the workshop to the Collector's bungalow for the Collector's use could not claim such a status. In fact, the employment of a driver to drive the jeep car for the use of a civil servant is itself an activity which is not connected in any manner with the sovereign power of the State at all. That is the basis on which the decision must be deemed to have been founded; and it is this basis which is absent in the case before us.

It is not difficult to realize the significance and importance of making such a distinction particularly at the present time when, in the pursuit of their welfare ideal, the Governments of the States as well as the Government of India naturally and legitimately enter into many commercial and other undertakings and activities which have no relation with the traditional concept of Governmental activities in which the exercise of sovereign power is involved. It is necessary to limit the area of these affairs of the State in relation to the exercise of sovereign power, so that if acts are committed by Government employees in relation to other activities which may be conveniently described as non-governmental or nonsovereign. citizens who have a cause of action for damages should not be precluded from making their claim against the State. That is the basis on which the area of the state immunity against such claims must be limited; and this is exactly what has been done by this Court in its decision in the Vidhyawati case(1).

In the present case, the act of negligence was committed by the police officers while dealing with the property of Ralia Ram which they had seized in exercise of their statutory powers. Now, the power to arrest a person, to search him, and to seize property found with him, are powers conferred on the specified officers by statute and in the last analysis, they are powers which can be properly characterised as sovereign powers; and so, there is no difficulty in holding that the act which gave rise to the present claim for damages 'has been committed by the employee of the

(1) [19621 Supp. 2 S.C.R. 989.

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respondent during the course of its employment; but the employment in question being of the category which can claim the special characteristic of sovereign power, the claim cannot be sustained; and so, we inevitably hark back to what Chief Justice Peacock decided in 1861 and hold that the present claim is not sustainable.

Before we part with this appeal, however, we Ought to add that it is time that the Legislatures in India seriously consider whether they should not pass legislative enactments to regulate and control their claim of immunity in cases like this on the same lines as has been done in England by the Crown Proceedings Act, 1947. It will be recalled that this doctrine of immunity is based on the Common Law principle that the King commits no wrong and that he cannot be guilty of personal negligence or misconduct, and as such cannot be responsible for the negligence or misconduct Of his servants. Another' aspect of this doctrine was that it

was an attribute of sovereignty that a State cannot be sited in its own courts without its consent. This legal position has been substantially altered by the Crown Proceedings Act, 1947 (10 & I I Geo. 6 c. 44). As Halsbury points Out, "claims against the Crown which might before 1st January, 1948 have been enforced, subject to the ,-rant of the royal flat, by petition of right may be. enforced as of right and without a fiat by legal proceedings taken against the Crown."(1) That is the effect of s. I of the said Act. Section 2 provides for the liability of the Crown in tort in six classes of cases covered by its clauses (I) to (6). Clause (3), for instance, provides that where any functions are conferred or imposed upon an officer of the Crown as such either by any rule of the common law or by statute, and that officer commits a tort while performing or purporting to perform those functions, the liabilities of the Crown in respect of the tort shall be such as they would have been if those functions had been conferred or imposed solely by virtue of instructions lawfully given by the Crown. Section 11 provides for saving in respect of acts done under prerogative and statutory powers. It is unnecessary to refer to the other provisions of this Act. Our only point in mentioning this Act is to indicate that the doctrine of immunity which has been borrowed in India in dealing with the question of the immunity of the State in regard to claims made against it for tortious acts committed by its servants, was really based on the Common Law principle which prevailed in England; and that principle has now been substantially modified by the Crown Proceedings Act. In dealing with the present appeal, we have ourselves been disturbed by the thought that a citizen

(1) Halsbury’s Laws of England, 3rd ed., Vol. II, p. 8.

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whose property was seized by process of law, has to be told when he seeks a remedy in a court of law on the ground that his property has not been returned to him, that be can make no claim against the State. That, we think, is not a very satisfactory position in law. The remedy to cure this position, however, lies in the bands of the Legislature.

The result is, the appeal fails, but in the circumstances of this case, we direct that the parties should bear their own costs throughout.

Appeal dismissed.

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