

# PATNA HIGH COURT

District Board of Bhagalpur

Vs

Collector of Bhagalpur

A.F.O.D. No. 390 of 1948

(Narayan and Jamuar, JJ.)

22.06.1954

## JUDGMENT

### **Jamuar, J.**

1. This appeal has been brought by the District Board of Bhagalpur from a judgment and decree, dated 10-8-1948, of the Subordinate Judge of Bhagalpur. The District Board of Bhagalpur sued the State of Bihar through the Collector of Bhagalpur for the recovery of a sum of Rs. 18,925/5/6 in circumstances presently to be stated. The learned Subordinate Judge dismissed the suit. The point raised in this appeal is of very considerable importance as it involves the examination of the question whether, if it be found that the officers of the Government attached to the local treasury were negligent in paying out certain sums of money belonging to the plaintiff District Board to the detriment of the plaintiff, the Government is liable to make good the loss as the master or the principal of the officers of the treasury. The answer to the question will depend upon the extent of vicarious liability of the Government for acts or omissions of its subordinate officers or agents.

2. For a proper appreciation of the question in issue, it is necessary to state how a District Board comes to have a fund of its own kept in deposit with the Government treasury. Under Section 52 of the Bihar and Orissa Local Self Government Act (Bengal Act 3 of 1885), as amended by subsequent Acts, there is formed for each district a fund called the "District Fund", and income and proceeds from certain sources are placed to the credit thereof and this District Fund is vested in the District Board and, under Section 53 of the said Act, provisions are made for the application of the District Fund, which it is unnecessary to state at this stage. Under Section 138 of the same Act, the Local Government has been empowered to make rules, consistent with the Act, for any District Board or Local Board for certain purposes. Acting under the provisions of this section, the Local Government have made rules known as the Account and Audit Rules, published in notification No. 2009 T. M. dated 9-11-1901. In these Rules, provisions are made regarding the transactions between the District Board and the treasury. Rule 22 provides that the District Fund shall be lodged with the Collector of the district, who shall keep a separate account thereof; rule 23 provides that all sums due by any person to the District Board and all moneys collected by authorized servants of the Board as well as some other collections should be sent

direct to the treasury to be credited to the District Fund; and rule 25 provides that all moneys remitted to the treasury to the credit of the District Board and all payments made by the treasury on cheques or otherwise on account of the District Board shall be entered in a pass book, and the pass book shall remain in the custody of the Chairman, and it shall be sent to the treasury on the 10th and also on the last working day of every month and on other day on which the District Board may require the posting to be done. Then, on receipt of the pass book by the treasury officials, the receipts and payments up-to-date and certain credits shall be entered therein, and, when the pass-book is received on the last working day of the month, the account shall be balanced and signed by the Treasury Officer. Thereafter, the book shall be returned to the office of the District Board. Rule 26 provides that the pass book is not a District Fund account book but a copy of the accounts kept in the treasury of the money paid to the credit of and disbursed on account of the District Board, and must, therefore, always be written up only by the Government treasury department by whom the original account is kept; rule 27 provides that no entry or mark shall, under any circumstances, be made in the pass book by any one connected with the District Board's office; rule 28 provides that the Chairman shall examine this pass book from time to time and shall immediately call the attention of the Treasury Officer to any discrepancy that may appear between the credits and debits shown in the pass book and those shown in accounts of the District Board's office and Rule 29 prescribes the form of the pass book. Thereafter, there follow certain rules regarding payment of claims. Rule 37 provides that all payments exceeding Rs. 50/- shall be made by cheque unless there be any special circumstances rendering payment in cash desirable. Rule 38 provides that the cheque book shall be supplied by the Treasury Officer only, and no other form shall be used, and further that the cheque books and the counterfoils of used cheques shall be kept in the custody of the Accountant, and rule 40 provides that cheques for sums not exceeding Rs. 500/- shall be signed by the vice Chairman or by the Chairman, or, if both be absent, by a member of the Finance Committee, while cheques for sums exceeding Rs. 500/- shall be signed by the Chairman and the Vice-Chairman, and, if one of them be absent, such cheques shall be signed by the Chairman or the Vice-Chairman present and another member of the Finance Committee. It is not necessary to refer to the other rules.

3. Thus each District Board maintains a treasury pass book which is kept in a particular form, a specimen of which is to be found in exhibit 4. The pass book supplied to the District Board contains a requisition for the supply of cheques which is printed on a red form, a specimen of which is exhibit 7 (a), the requisition form being bound along with the other cheques in the cheque book. A requisition for the issue of a fresh cheque book is made by sending this red requisition form to the treasury under the signature of the Chairman of the District Board, and a sum of Re. 1/- is to be deposited by means of a challan as representing the price of a new cheque book.

4. Now, the case of the plaintiff District Board is that the pass book (exhibit 4) was sent to the Local treasury for making entries of all transactions relating to the District Board for the month of November, 1944, and it was received back by the District Board on 3-12-1944. Then, on an examination of the entries, it transpired that the treasury had made payments to the extent of Rs. 18,229/5/6 for which no cheque had been issued by the Chairman of the District Board. It is common ground that these payments were made under certain cheques, exhibits 6 to 6 (g), purporting to have been issued between 1-11-1944, and 14-11-1944. These cheques are admitted to be forged. The cheques purport to bear the signature of the Chairman of the District Board, Shri Kamaleshwari Sahay, as also the signature of a member of the Finance Committee, Shri

Nakuleshwari Sahay, the cheques having been signed by both of them as the cheques are for sums exceeding Rs. 500/-, as required by rule 40 of the Account and Audit Rules, mentioned above. The signatures of both of them have been found to have been forged. There is a further piece of forgery. The cheque book containing the above-mentioned series of cheques was issued by the treasury after receiving the red requisition form (exhibit 7) for the issue of a new cheque book. It is the practice that, whenever a new cheque book is brought in use, a printed memorandum in the form of exhibit 8 signed by the Chairman of the District Board is sent to the treasury. In the case before us, exhibit 8 was the memorandum received by the treasury intimating that cheque book No. 023710, which contained the cheques exhibits 6 to 6 (g), had been brought into use on 18-10-1944. It is also common ground that the red requisition form (exhibit 7) as also the memorandum (exhibit 8) contain forged signature of the Chairman of the District Board, Shri Kamaleshwari Sahay. Three of the cheques bear the name of Shambhu Saran Prasad as the payee; one of them bears the name of Sheo Narayan Singh as the payee, but he endorsed it in favour of Shambhu Saran Prasad; and another one bears the name of Ganesh Shankar Prasad as the payee, but he also endorsed it in favour of Shambhu Saran Prasad. It has not been disclosed who this Shambhu Saran Prasad was. But it is the case of the plaintiff District Board that this man had never any concern with the District Board, and none of the cheques, exhibits 6 to 6 (g), had been issued by the District Board. It has, however, transpired in evidence that the police, having been informed of these forgeries, had sent up one Chittish Prasad 'alias' Khitish Prasad for trial on the allegation that he had presented these forged cheques before the treasury; but the man was acquitted for want of sufficient evidence of identification.

5. It is abundantly clear that the treasury had issued the cheque book No. 023710 on the basis of a forged requisition form (exhibit 7), that the treasury had also received a forged memorandum (exhibit 8) conveying the intimation that this new cheque book had been brought into use on 18-10-1944, and further that the treasury had made payments on the basis of certain cheques, exhibits 6 to 6 (g), bearing forged signatures of Sari Kamaleshwari Sahay and Shri Nakuleshwari Sahay. Now, it is the plaintiff's case that ail the payments under these forged cheques were made because of negligence and want of proper care on the part of the officers of the local treasury as they failed to compare the signature of the Chairman, Shri Kamaleshwari Sahay, appearing either on the red requisition form (exhibit 7), or on the cheques, exhibits 6 to 6 (g), with the specimen signature of the Chairman kept in the custody of the Accountant of the treasury. The plaintiff therefore, sued the state of Bihar through the Collector of Bhagalpur for the recovery of the amount paid by the treasury upon those cheques along with interest for a certain period.

6. The main defense of the State of Bihar was that the cheque book bearing No. 023710 was issued and that the cheques, exhibits 6 to 6(g), were cashed in the ordinary course of business without any suspicion that forgery had been committed, and it was alleged that everything had been done under a 'bona fide' belief that the aforesaid documents were genuine. The further defense was that, even if there was negligence on the part of the employees of the treasury, the State of Bihar was not liable to make good the loss suffered by the plaintiff.

7. Two points were raised in this appeal : (1) whether the payments by the treasury upon the admittedly forged cheques, exhibits 6 to 6 (g), were made by reason of negligence on the part of the officers of the treasury, and (2) if that be so, whether the State of Bihar can be held to be vicariously liable for the negligence of the officers of the treasury.

8. The learned Subordinate Judge, in respect of the first point, found in favour of the plaintiff by holding that it had been well established that the monies under the forged cheques were paid on account of gross negligence of the treasury staff of Bhagalpur, but, on the second point, which is purely a point of law, he held that the defendant was not liable for the conduct of the treasury staff in making those payments, even supposing that the payments were made negligently.

9. The learned Subordinate Judge was clearly right in finding negligence on the part of the officers of the treasury. There were examined at the trial two witnesses on the side of the defendant. The first witness was Tarkeshwar Prasad Mishra, who was working as the Sectional Clerk at the treasury during the relevant period, and the second, witness was Padumjang Bahadur who was at the time Stamp Clerk at the treasury. The Sectional Clerk stated in his evidence in chief that it was his duty to deal with the cheques which used to be received at the treasury from the Bhagalpur District Board. Speaking about the cheque exhibit 6, the witness said that, when some one had gone to him with this cheque, it was after the treasury hours, and he told him that he would not accept the cheque and that he must bring the cheque next day along with an identifier. This cheque was then presented to him on the following day with an endorsement, exhibit 6 (h), from which he thought that the man bringing the cheque had been identified by one Ugra Mohan Babu who was the Cashier at the District Board office. He was then satisfied that it was a genuine cheque. The man who handed over the cheque to him gave out his name as Shambhu Saran Prasad.

Having obtained his signature on the back of the cheque, he wrote out the words "Pay. T. O." and put his initials and date in red ink and passed it over to the Accountant, Babu Sitabi Sahu, for verification of the signature of the drawing officer. The Accountant affixed the rubber stamp "To Imperial Bank of India" and put his initial and returned the cheque to him. The witness then entered it in the register of payment orders and took it to the Treasury Officer who signed the cheque as also the entry in the register of payment orders. The cheque was then made over to the party for encashment from the Imperial Bank of India. The witness said that he followed the same procedure with regard to all the other cheques in question. The witness further explained that, after such a cheque is paid, the Imperial Bank sends an intimation the next day about the payment and then a posting is made in the District Board ledger account. The entries were accordingly made in the District Board passbook (exhibit 4) by the witness himself. In cross-examination, the witness deposed to the practice that, after checking a cheque, he sends it with the intimation register to the Accountant who keeps the specimen signature of the drawing officers and after comparing the signature on the cheque with the specimen signature he returns the cheque and the intimation register to him. The Treasury Officer does not verify the signature on the cheque with the specimen signature; but, if the Accountant entertains any doubt, he refers the matter to the Treasury Officer. It is clear from the evidence of this witness that he never compared the signature of the drawing officer upon the cheques in question with the specimen signature kept at the treasury. It would appear from his evidence that this duty of comparing the signatures is cast upon the Accountant. The Accountant was not examined to depose that he had compared the signatures of the Chairman of the District Board on the cheques with his specimen signature kept in the treasury office, nor is there any evidence that the Accountant had made any such comparison.

10. The second witness examined for the defendant, as stated above, was the Stamp Clerk of the Bhagalpur Treasury. According to the first witness, it is the duty of the Stamp Clerk to receive the requisitions for the issue of a new chequebook. The Stamp Clerk deposed to have received

the requisition (exhibit 7), and he dealt with this requisition. When a requisition, according to his evidence, is handed over to him by the agent of a drawer, he examined whether the book No. given on the top of the requisition, is correctly noted. Then, after passing the challan for Re. 1/- as the price of a new cheque book, he makes over the same to the presenter for depositing the amount in the treasury. After this deposit, the challan is made over to him. Thereafter, he makes certain entries in the indent register, and then he goes with the Treasury Officer to the strong room and a cheque book is taken out and then made over to the party. The witness deposed, that, though there is no rule, as a matter of practice, he has to see that the signature of the drawer on the requisition form is genuine; but he explained that, as he had no specimen signature of the drawer with himself he had no chance of examining the signature on the requisition with reference to the specimen signature of the Chairman while passing the requisition (exhibit 7) in question; but to a question from the Government Pleader, who was examining him, he replied that he was satisfied that the signature of the Chairman on exhibit 7 was a genuine signature. In cross-examination, he made the admission that he is the officer expected to receive the requisition directly and he also admitted, "I have to determine the genuineness of the signature of the requisitioner on the red requisition." He further said that he did not keep any specimen signature of the requisitioner. Now, if it was his duty to determine the genuineness of the signature of a requisitioner, it would be natural to expect that he would himself compare such a signature with the specimen signature kept with the Accountant, or get it compared by the Accountant. According to his evidence also, it is the Accountant who keeps the specimen signature. According to the evidence of the Stamp Clerk, a requisition is not sent to the Accountant, and he admitted that he had no occasion to compare the signature on the requisition (exhibit 7) with the specimen signature of the Chairman.

11. There is thus no evidence that the signature of the Chairman of the District Board as appearing on the cheques in question was ever compared with his specimen signature kept at the treasury office, and there can be no manner of doubt that there has been an omission in that regard. It was also disclosed in evidence that departmental proceedings had been drawn up by the Collector against both the witnesses examined at the trial for the defendant as also against Sitabi Sahu, the Accountant. The charges framed against Sitabi Sahu, the Accountant, contain the allegations that the forgery could have been easily detected had ordinary care been taken and

"that, though the specimen signatures of disbursing officers are kept in your custody, you failed to compare and verify the genuineness of the signatures of the Chairman and the member of the Finance Committee of the District Board"

as found on the forged cheques. Similar charges were framed against Tarkeshwar Prasad Mishra, the Sectional Clerk, and charges of negligence were also brought against Padumjang Bahadur, the Stamp Clerk. It was, therefore, argued that even the Collector was of the opinion that the payments on the forged cheques had been made on account of negligence of the treasury staff.

12. There was imposed an obligation upon the treasury staff to honour the District Board's cheques. To that end they were bound to know the signature of the Chairman of the Board. If in any way a member of the treasury staff is deceived without any fault on the part of the District Board, the Board cannot be made to suffer the loss caused by an amount having been paid without authority. I am of the opinion that in circumstances of this nature and where the issue is

confined to negligence though good faith be not challenged the onus of proving absence of negligence is cast upon the treasury. There can be, therefore, no doubt that the various amounts were paid upon the forged cheques by reason of negligence on the part of the treasury staff.

13. The more important question, however, which arises for consideration is the second one, namely, whether, even if the employees of the treasury be found guilty of negligence, the State of Bihar can be made liable for that negligence. Mr. Rajkishore Prasad, appearing for the appellant District Board, contended that, as the Act complained of was committed by the Government officers concerned in course of their employment and in the discharge of their duties which were incidental to the conduct of a business in the nature of a commercial undertaking which even a private individual may equally well undertake, the State of Bihar would be liable because such undertakings are more of a character of private business than affairs of the State. An examination of a "number of authorities, since they have been cited at the Bar, is inevitable.

14. The liability of a State to be sued for negligence of its servants first came up for consideration in the case of - '*Peninsular and Oriental Steam Navigation Co. v. Secretary of State*', (A). In this case, a servant of the Peninsular and Oriental Steam Navigation Company was proceeding in a carriage drawn by a pair of horses belonging to the Company and driven by a coachman in their employ. An accident occurred near Kideerpore dockyard. Certain workmen in the Government employ were engaged in work there. The accident resulted in injuries to a horse belonging to the plaintiff, the Peninsular and Oriental Steam Navigation Company, by reason of the negligent conduct of these workmen, who were employed under the Government in connection with the dockyard at Kidderpore. It was an action in tort. The plaintiff Company sued the Secretary of State for India in Council. It was contended that the Secretary of State for India in Council was not liable. Sir Barnes Peacock, C.J., held that the plaintiff had a right to sue the Secretary of State for India in Council because the Act done was done in carrying on an ordinary business and not in the exercise of governmental power. Mr. Rajkishore Prasad, who appeared for the appellant District Board in this appeal, has contended that, where the Government carries on a business or a mercantile concern, the Government will be liable for the negligent act of its servants. He also cited the case of - '*Secretary of State v. Moment, J.*', where their Lordships of the Judicial Committee approved of the decision in the case of the '*Peninsular and Oriental Steam Navigation Co.*', and held, on the facts of that case, that a suit of the - character out of which that appeal arose lay against the Secretary of State for India in Council. In that suit the respondent, who had by process of law recovered possession of certain land and buildings, sued to recover damages against the appellant for wrongful interference therewith.

15. The case of '*Peninsular and Oriental Steam Navigation Co.*', came in for consideration in the case of - '*Secretary of State v. Shree Gobinda Chaudhuri*<sup>3</sup>', where Sir George Rankin, C.J., observed in connection with that case as follows :

"The only question was whether, in the case of a tort committed in the conduct of a business, the Secretary of State for India in Council could be sued. Whether he could be sued, in cases not connected with the conduct of a business or commercial undertaking, was not really a substantive question before the Court. But there are dicta in the judgment of Sir Barnes Peacock to the effect that where an act is done or a contract entered into in the course of the exercise of powers which cannot be lawfully exercised save by the

Sovereign, no action would lie against the Secretary of State for India in Council."

The case of 'Peninsular and Oriental Steam Navigation Co. (A)' also came in for consideration before the Supreme Court of India in the case of - '*Province of Bombay v. Khusaldas S. Advani*'<sup>4</sup>, and Mukherjea, J., while discussing this case, observed as follows :

"Much importance cannot in my opinion be attached to the observations of Sir B. Peacock in '*Peninsular and Oriental Steam Navigation Co. v. Secy. of State (A)*'. In that case the only point for consideration was whether in the case of a tort committed in the conduct of a business the Secretary of State for India could be sued. The question was answered in the affirmative. Whether he could be sued in cases not connected with the conduct of a business or commercial undertaking was not really a question for the court to decide."

The decision in the 'Peninsular and Oriental Steam Navigation Co. (A)' turned upon the liability of the Secretary of State for India for damages occasioned by negligence of servants in the service of Government if the negligence is such as could render an 'ordinary employer' liable.

16. The question mooted in the present appeal is whether the State of Bihar can be sued, on the facts of the present case, as one engaged in the conduct of a business or commercial undertaking or whether it is exempted from liability on the ground that its activities were governmental. The learned Government Advocate did not deny the liability of the Government to be sued in proper circumstances, but he contended that, on the facts of the present case, no suit can lie.

17. Sovereignty is an essential attribute of a State. It is supreme authority within its own territory. The Courts derive their jurisdiction and authority from the State itself. Unless the State consents to submit to the jurisdiction of its own Courts, the Courts have no jurisdiction over it. This consent is to be found in the Constitution of the State itself. In India, the liability of the State to be sued in its own Courts is contained in Article 300 (1) of the present Constitution Act. The Article is as follows :

"(1) 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 is, therefore, relevant to examine the legal position prior to the Constitution Act.

18. The history and origin of the liability of the Government to be sued has been well analysed by Sir George Rankin, C.J., in - '*AIR 1932 Calcutta 834*'. In 1765, the East India Company obtained the 'Dewani' from the Moghul Emperor Shah Alam. Thus the Company acquired the fiscal administration of that part of the country which it covered, and, in connection with the fiscal administration, it was given also in substance the power of civil justice. From that time

down to a date which may be put at 1858, the East India Company clearly had a dual character, the character of sovereign and the character of trader and, in 1833, came what is called the Charter Act by which it ceased to be mercantile corporation altogether and really held the Government of India in trust for the Crown. In 1858, came the Government of India Act (Acts 21 and 22 Victoria, Chap. 103), on the transfer of the Government of India from the East India Company to the Crown. In that statute, Section 65 was incorporated creating the right and liability of the Secretary of State for India to sue or to be sued for the first time. Section 65 is 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."

The possession and government of the British territories in India which, prior to that Act, had vested in the East India Company in trust for the Crown were transferred, by that Act, to Her Majesty the Queen. And, as the Queen could not be sued in her own Court, the Act provided that any suit that could have been brought against the East India Company prior to the Act of 1858 could be brought properly against the Secretary of state for India in Council.

19. Then came the Government of India Act, 1915, and, in Section 32, it was provided as follows:

"(1) The Secretary of State in Council may sue and be sued by the name of the Secretary of State in Council as a body corporate.

(2) 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."

20. And, when the Government of India Act, 1935, was enacted, Section 176 (1) provided :

"(1) The Federation may sue or be sued by the name of the Federation of India and a Provincial Government may sue or be sued by the name of the Province, and, without prejudice to the subsequent provisions of this chapter, may, subject to any provisions which may be made by Act of the Federal or Provincial Legislature enacted by virtue of powers conferred on that Legislature by this Act, sue or be sued in relation to their respective affairs in the like cases as the Secretary of State in Council might have sued or been sued if this Act had not been passed."

21. And now in the present Constitution of India there is to be found Article 300 (1) which has already been quoted. The scope and extent of the liability remains as it was prior to the Constitution subject to such legislative enactments as referred to in the Article.

22. Hence the question is whether an action of the kind that has been brought against the State of Bihar could have been brought against the East India Company prior to the Act of 1858.

23. Governmental powers may be divided into three broad categories : (1) act of State, (2) governmental activities or sovereign powers, and (3) commercial activities. The expression "act of State" is used to denote an exercise of sovereign powers by an independent State or potentate or by its duly authorized agents or officers (though the expression is used in different senses by different authorities; (Halsbury: Laws of England). One class of acts of State includes acts, such as making treaties, commandeering private property for purposes of war or quelling disturbances by force. In a matter of an act of State, a Court cannot enquire into it, as the matter is not justiciable in a Court of law; and, since the State itself is not answerable for such act in its Courts, it cannot be made answerable for the acts of its officers or subordinates. If a civil wrong has been committed and damage has been suffered as a result of governmental or commercial activities, a plaintiff will be entitled to sue for relief by way of damages, but the question will be against whom will the suit lie - against the person who commits the wrong or against his employer vicariously? There is a right to sue the State if the act causing the wrong or damage was done in carrying on an ordinary business which might be carried on by private individuals and not in the exercise of governmental power, i.e., a power which could not be lawfully exercised save by the sovereign authority or persons to whom the sovereign authority might delegate those powers. Acts of the former class are mercantile operations of the kind in which the East India Company actually engaged itself before and even after it had acquired sovereignty. Whereas in the former case, the State may be held responsible for the acts of its servants, in the latter, it will not. In the former class of cases, the common example is that of master and servant. In order that this rule of vicarious responsibility may apply, two conditions must co-exist :

- "(1) There must exist the relationship of master and servant between the person sued and the person who has committed the wrong; and
- (2) The person committing the wrong, that is, the servant must have been at the time acting in the course of his employment."

Such a servant must be subject to the control and directions of his employer in respect of the manner in which the work is to be done. The test is the existence of a right of control in respect of the manner in which the work is to be done; he works under the supervision and direction of the employer, and he is to obey his employer's orders from time to time. Sir John Salmond, in his Law of Torts, has pointed out the distinction between a servant and one who is not a servant, otherwise known as an independent contractor. A servant, he has explained, is a person engaged to obey his employer's orders from time to time; an independent contractor is a person engaged to do certain work, but to exercise his own discretion as to the mode and time of doing it - he is bound by his contract, but not by his employer's orders. Thus one's coachman is one's servant, but the taxi driver, engaged for a particular journey, is not.

24. The distinction which the learned Government Advocate sought to make in the present case is that here if the treasury staff have been negligent, that was because they had committed a breach of statutory duty. There was no relationship of master and servant between the State and them. The test mentioned above does not apply to them. They were not at the time under the control or direction of the State. They had to conform to certain rules, and they have been

negligent in the observance of these rules. Obedience to the law is not obedience to the master. The law binds both the subject and the State equally. The will of the master - and obedience to that will - does not exist; it is obedience to the law which they had to observe. The reason behind this rule is that, in the absence of special authorization by the State, and in the absence of such proof, the act is considered to have been done in exercise of the power or the discretion vested in the officer by the relevant rule or law and not in pursuance of any implied authority derived from the Government. In the present case, the treasury staff have been found guilty of negligence in their failure to compare the signatures of the Chairman on the cheques with his specimen signature kept with the Accountant. A statutory duty had been cast upon them to honour, in proper circumstances, the cheques issued by the Chairman, and this duty carried with it the implied obligation to take care and, as the evidence stands, the obligation to compare the signatures. The treasury staff was, therefore, negligent in the performance of this duty which was cast upon them, and, therefore, guilty of disobedience of the rules, and not of disobedience of the will of the employer.

25. In - *Tobin v. The Queen*<sup>4</sup>, a petitioner claimed damages sustained by him from the loss of his vessel. The vessel had been seized as being engaged in the slave-trade by Captain Douglas who was the Commender of a ship of Her Majesty's Navy, and was employed for the suppression of the slave-trade, according to the statutes relating thereto. The vessel of this petitioner, after its seizure, was destroyed by Captain Douglas in the supposed performance of his duty. The petitioner alleged that the vessel had been wrongly seized and destroyed and it had not been engaged in the slave-trade. It was held that, on the statement of the petitioner's case, the petitioner may bring an action for the wrong suffered by him against Captain Douglas, but he could not maintain a petition of right against the Queen. The argument in support of the petition to hold the Queen liable for the act of a Captain in Her Majesty's Navy was rested upon the analogy of the liability of a principal or master for the act of his servant, and the Queen was sought to be made responsible for any wrong done by a Captain of the Navy in the course of his employment.

Erle, C.J., pointed out that the argument failed,

"because in our opinion there is no analogy between the relation of the captain of a Queen's ship to the Queen and the relation of servant to master or bailiff to sheriff, so as to create the liability here in question."

His Lordship, at page 1163, observed as follows :

"The liability of a master for the act of his servant attached in the case where the will of the master directs both the act to be done and the agent who is to do it. The act of the servant is then held to be the act of the master; and the servant acting in the course of his employment is a general agent in that employment, and makes his principal liable for all that he does within the scope of his authority as such general agent; and, further, in respect of all his acts within the scope of that authority, they are the acts of the principal, notwithstanding any private arrangement to the contrary between the principal and such agent.

This doctrine is frequently exemplified in cases of collision, either on land or water. The master is liable for the act of the coachman employed by him to drive his horses, whether he was so employed for a single drive or in constant service, and notwithstanding the orders were to drive slowly and on the proper side, and the coachman drove fast or on the wrong side. The master is held responsible, upon the ground that he has put the servant in his place to perform a service ordered by himself and over which he has absolute control at all times. It is needless to cite the cases shewing where the liability attaches : but we refer to some classes of decisions in which the limits of the liability are defined, in order to shew that the analogy supposed by the suppliant does not exist. When 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. On this principle it has been declared that superior public officers, such as the Post-Master General, the lords commissioners of the Treasury, the commissioners of Customs and Excise, the auditors of the Exchequer, and the like, are not responsible for the negligence or misconduct of inferior officers in their several departments, though the superior officers appointed them and had the power of dismissing them : see - "*Whitfield v. Lord De Despencer*<sup>5</sup>", ". Then it was further observed at page 1164 :

"Upon this view of the cases, we think that the supposed analogy between the relation of the Queen to a captain in Her Majesty's navy, and the relation of a master to a servant, fails in the following respects : First, that the Queen does not appoint a captain to a ship by her own mere will, as a master chooses a servant, but through an officer of state responsible for appointing a man properly qualified : and, secondly, that the will of the Queen alone does not control the conduct of the captain in his movements, but a sense of professional duty : and thirdly, because the act complained of was not done by the order of the Queen, but by reason of a mistake in respect of the path of duty."

26. "Tobin's case" received the approval of the Privy Council in - '*Nireaha Tamaki v. Baker*<sup>6</sup>', on the ground that the naval officer in that case in seizing the vessel was not acting in obedience to a command of Her Majesty, but in the supposed performance of a duty imposed upon him by Act of Parliament, and in such a case the maxim "respondent superior" did not apply.

27. The principles laid down in "Tobin's case" were followed in - '*A. M. Boss v. Secretary of State*<sup>7</sup>', which was a decision on appeal from the judgment of Wallis, J., on the Original Side of the High Court and reported in - '*A. M. Ross v. Secy. of State*<sup>8</sup>', The facts giving rise to that suit were these. The plaintiff representing the Assam Labour Supply Association in Ganjam sued the Secretary of State for India for damages in respect of certain orders passed by the District Magistrate of Ganjam suspending and dismissing the local agent of the Association in Ganjam and closing his depot. It was held that the District Magistrate had passed his orders under the Assam Labour and Emigration Act and, in doing so, he was not the agent of the Government and, as the act was not done on Government's behalf, the Government could not ratify the same, nor could Government be liable even if it had ratified the same.

28. In the case of - '*Ram Shankar v. Secretary of State*<sup>9</sup>', the plaintiff's claim was that one Damodar Das, proprietor of a printing press, had been adjudicated insolvent and the Official

Receiver was appointed receiver of the insolvent's assets, and that the Official Receiver had taken possession of the press and premises which had been leased at a rent of Rs. 55/- to Damodar Printing Press by the plaintiff. It was then alleged that the Official Receiver, on 1-4-1927, agreed to pay that rent and kept possession of the house until 19-2-1928. Hence a certain sum was due to the plaintiff for the use and occupation of these premises, as the Official Receiver had failed to pay the same. The only issue which had been framed in the suit was regarding the amount for which the defendant was liable. The claim made in the Small Cause Court was decreed. Thereafter, the Government Pleader made an application to the Small Cause Court Judge stating that in that suit a most crucial issue had not been framed, namely, whether the Official Receiver was an agent or servant of the Secretary of State and whether the Secretary of State was liable for the acts of the Official Receiver. A review was, therefore, prayed for and it was allowed. The suit was again tried by the learned Judge of the Small Cause Court and then dismissed. The case, ultimately, came to the High Court at Allahabad, and their Lordships stated that they found it incumbent upon themselves to see whether there was any liability on the Secretary of State for the alleged acts of the Official Receiver. After having considered certain provisions of the Provincial Insolvency Act (5 of 1920), their Lordships stated as follows:

"It is settled law that where the duty to be performed is imposed by law and not by the will of the party employing the agent, the employer is not liable for the wrong done by the agent in such employment. We would point out that in the present case the Official Receiver was appointed by Government to perform certain duties under the Provincial Insolvency Act. Those duties were imposed by statute and therefore the Government had no liability for whatever the Official Receiver has done in the discharge or supposed discharge of his duty or supposed duty".

29. Their Lordships placed reliance upon the case of - '*Shivabhajan Durga Prasad v. Secretary of State*'<sup>10</sup>, in which case the plaintiff had sued to recover a sum of money from the Secretary of State on the allegation that a large number of bundles of hay had been attached by a chief constable while the hay was in the possession of the plaintiff, and, when the plaintiff served notice upon the District Superintendent of Police for the delivery of possession of his hay, only a small quantity of the hay was delivered while the remainder was not made over to him. The plaintiff's case was that his hay had been attached by the chief constable in his capacity as a Government servant, and Government, being the principal, was liable for the act of its agent. It was held that the suit was not maintainable, inasmuch as the chief constable had seized the goods not in obedience to any order of the executive Government but in performance of a statutory power vested in him by the legislature, and, for that proposition '*Tobin's case*' was relied upon.

30. The same proposition was enunciated in the case of - '*Ram Gulam v. Government of U. P*'<sup>11</sup>., namely, that the rule embodied in the maxim "respondent superior" is subject to the well-recognised exception that a master is not liable for the acts of his servants performed in discharge of a duty imposed by law, and, amongst other cases, reliance was placed on '*Tobin's case*' and '*Shivabhajan's case*', referred to above.

31. In the - '*Secretary of State v. Ramnath Bhatta*'<sup>12</sup>, surplus of sale proceeds was paid by an order of the Deputy Collector to the recorded proprietor in spite of an order of the Collector passed before the revenue sale to make the payment to the purchaser of the taluk in execution of

a mortgage decree. There was thus an error made on the part of the clerical staff who apparently did not bring the proper facts to the notice of the Deputy Collector, and the Deputy Collector committed an error in ordering payment of the surplus sale proceeds to the recorded proprietor. Hence the question for decision was whether the Secretary of State for India in Council was liable to make good the loss to the plaintiff, or, in other words, whether the Government revenues were liable for the alleged losses. It was pointed out that the surplus sale proceeds were held in the interest of the late recorded proprietor. It was not held by the Collector for the profit of the Government. By the order to make payment to the wrong person, the Government did not derive any benefit. The act was done by the Deputy Collector entirely in the exercise of his statutory duties; and, if he committed an error in his duty, the Secretary of State for India in Council could not be held liable for that act.

32. The appellant also referred us to a recent decision of the Supreme Court in the - *'State of Bihar v. Abdul Majid'*<sup>13</sup>, In my opinion, that decision does not help the appellant in the present appeal. In that case, the respondent sued the State of Bihar for a declaration that an order of the Deputy Inspector General of Police dismissing him from service was illegal and void and that he should be regarded as continuing in office and he also claimed a sum of money on account of arrears of salary. The major point in issue in that suit was whether a public servant could sue the State for recovery of arrears of salary, and, in support of the case for the State, reliance was placed upon certain English decisions. Their Lordships said :

"We think that the rule of English law that a civil servant cannot maintain a suit against the State or against the Crown for the recovery of arrears of salary does not prevail in this country and that it has been negated by the provisions of the Statute law in India."

Their Lordships held that the plaintiff was entitled to maintain his suit against the State, and the State's liability was confirmed. The action there arose in contract. It was not an action in tort as is the case in the suit out of which the present appeal has arisen. Indeed, their Lordships stated in the concluding paragraph as follows :

"As regards torts of its servants in exercise of sovereign powers, the Company was not, and the Crown in India was not, liable unless the act had been ordered or ratified by it. Be that as it may, that rule has no application to the case of arrears of salary earned by a public servant for the period that he was actually in office. The present claim is not based on tort but is based on 'quantum meruit' or contract and the court is entitled to give relief to him".

Hence, in my view, 'Abdul Majid's case' is not relevant in the present case.

33. The learned Government Advocate, accordingly, contended that when the duty to be performed is imposed by law, and not by the will of the employer, the employer is not liable for the wrong done by the agent in such employment, and he proceeded to show that in the present case the officers of the treasury were performing duties imposed upon them by law and not by the will of their employer. Powers and duties, which are fixed by law, are governmental and not commercial, and acts done in the exercise of these

powers or in the purported fulfilment of those duties are not within the rule of vicarious liability. There is some justification for this rule. The liability of the State reacts on its subjects, and any damages awarded against the State must be paid out of the public revenues. Hence the public at large will be made liable to pay for the wrong done to one of them by an officer employed by the State.

34. It was argued that, in the present case, the act of negligence was committed while performing duties cast upon the treasury staff under a statute, namely, the Bihar and Orissa Local Self-Government Act. The act complained of was neither authorized nor subsequently ratified by the Government, nor did the Government profit any thing thereby.

35. Certain sections of the Bihar and Orissa Local Self-Government Act, 1885, as amended by subsequent Acts, may again be noticed. It is now well settled that the preamble of a statute is a good means of finding out its meaning, and as it were it is a key to the understanding of the statute. The preamble states the general object and intention of the legislature in passing the enactment. It is clear from the preamble that the Act was brought into being in order to extend the system of local self-government to Bihar and Orissa. Section 59 of the Act has given powers to District Boards over (a) pounds, (b) education, (c) medical, (d) public works and (e) sanitation. These are the spheres of activities of a District Board. The District Board will need money in order to carry out the various spheres of its activities. Accordingly, by Section 52 of the Act, a "District Fund" has been formed, and to the credit of this Fund, income from certain sources has been placed including

"all sums which may be allotted to the District Board from the Provincial Revenue by the local Government for any of the purposes mentioned in Part III of this Act, or for any other purposes" (item No. 6)

The income is derived from revenue or fees collected. Its activities are not commercial. The last paragraph of Section 52 provides that the District Fund shall be vested in the District Board, and the balance standing to the credit of the Fund shall be kept in such custody as the Local Government from time to time directs; and I have already referred to rule 22 of the Account and Audit Rules by virtue of which the District Fund is lodged with the Collector of the district and is kept in the local treasury. How the District Fund is to be applied is also a matter of statute and is to be found in Section 53 of the Act. The District Board cannot apply any part of this Fund apart from the purposes mentioned in Section 53. The Act also provides for the allotment of money by the Local Government and, if the District Board is unable to carry on its affairs, for supersession. By Section 73 of the Act, the State has vested certain properties in the District Board, such as roads, bridges, channels, buildings, etc., and under Section 74 other properties may also be placed under the District Board. The Government, However, has retained control over the proceedings of the local authorities; for example, Section 120 provides that it shall be the duty of the Local Government and of all Commissioners and Magistrates of districts, acting under the orders of the Local Government, to see that the proceedings of local authorities are in conformity with law and with the rules in force thereunder, and the Local Government may set aside any resolution or order of any local authority if, in its opinion, the resolution or order is in excess of the powers conferred by law.

Section 122 provides that the Commissioner or the Magistrate of a district or such other person

as the Local Government may authorize shall have power of inspection; under Section 123 the Local Government may appoint an officer to be Inspector of Local Works etc.; under Section 124 the Magistrate of the district, in certain circumstances, may suspend the execution of any order or resolution of a local authority or the doing of any act which is about to be done, or is being (sic, done?), by such local authority; under Section 125, if a District Board makes default in the performance of any duty imposed upon it under the Act, the Local Government may order the performance of that duty within a fixed period; under Section 131 the Local Government may, in certain circumstances, declare a District Board, Local Board or Union Committee to be incompetent and dissolve or supersede it; and Section 132 provides for the consequences on supersession. It is unnecessary to quote further. Certain properties are made over to a District Board and fund is placed at their disposal but control is retained by the Government; that is to say, a part of governmental power has been transferred to the District Board. The District Board, as also the treasury are to function according to certain rules and procedure as laid down. If the District Board is unable to run its business, say, for want of funds, it may become the duty of the State to supersede it and take over its management. No District Board can claim to be allowed to continue as of right or compel the State to provide funds for the expenditure involved in the management of its affairs. The suit of the nature brought by the District Board and out of which the present appeal has arisen, it is argued, in effect, amounts to compelling the State to allot more money to the extent of the amount withdrawn on forged cheques to enable the District Board to carry on, that is to say, to allot more revenue under Section 52 of the Act out of the general revenue. The State cannot be bound to make any such allotment in order to enable the District Board to function.

36. In the case of - *'Uday Chand v. Province of Bengal'*<sup>44</sup>, the facts were that the Collector holding a sale under the Patni Regulation, 1819, had negligently paid out 'the sale proceeds' thereof to a person who was not entitled to the same, and, on an application by the landlord for the payment of the same to him, he declined to do so. The plaintiff landlord then sued for the recovery of that amount the Province of Bengal as defendant No. 1, the decree-holder who had taken away the money on the footing that it belonged to defendant No. 3, and defendant No. 3 who was the defaulting patnidar. The plaintiff's case was that the sum of money taken away by defendant No. 2 was not the property of defendant No. 3, and the Collector had been grossly negligent in paying out the sum to defendant No. 2. Accordingly, he sought to recover the money from the three defendants, both jointly and severally. Their Lordships had to consider the question whether, it having been found that the Collector was negligent in paying out the money to defendant No. 2 to the detriment of the appellant, the Province of Bengal was liable to make good the loss as the master or the principal of the Collector. After referring to a number of decisions beginning from the case of the - *'Peninsular and Oriental Steam Navigation Co. v. Secretary of State'*, referred to above, their Lordships proceeded to observe as follows "A distinction must be made between acts done by the Crown in pursuance of ventures which a private individual might undertake equally well, and acts done in exercise of Governmental powers which could not be lawfully exercised save by the sovereign authority or persons to whom the sovereign authority might delegate those powers. Acts of the former class are mercantile operations or operations of like kind in which the East India Company actually engaged itself before and even after it had acquired sovereignty. The reason why an action lies against the Crown with reference to acts of this type is, on the one hand, a historical reason, because actions could, in fact, be brought against the East India Company at the relevant time, and, on the other hand, a statutory reason, because a specific provision, saving the right of action

in such cases, has been made in all the successive Government of India Acts.

Acts of the second class fall under two categories. One class are acts of State, properly so called, such as making a treaty, commandeering private property for war purposes, or quelling civil disturbances by force. Such acts are never justiciable in Courts of law, and since the Crown itself is not answerable for such acts in its Courts, there is no principle upon which it could be made liable for the acts of its officers or subordinates. The immunity is absolute. The other class of acts are those which are done under the sanction of some municipal law or statute and in exercise of powers thereby conferred. This class can be sub-divided further into two classes : (i) those consisting in detention by the Crown of land, goods or chattels belonging to the subject, and (ii) those done by officers of the Crown in the discharge of their official duties. With regard to acts of the first sub-class, an action would lie in the Courts in India, and it would seem that even in England, a Petition of Right would lie. With regard to acts of subclass (ii), however, no action would lie except in cases where it can be proved that the impugned act had been expressly authorized by the Crown or that the Crown had profited by its performance. The reason why no right of action lies except on proof of special authorization by the Crown is that, in the absence of such proof the act is considered to have been done in exercise of the power or the discretion vested in the officer by the relevant law and not in pursuance of any implied authority derived from the Government. These principles can be enlarged or curtailed by statute in the Dominions and Colonies, and so far as India of the present day is concerned, the Government of India Act of 1935 makes the rule contained in Section 176 expressly subject 'to any provisions which may be made by an Act of the Federal or a Provincial Legislature' ".

37. Reference may also be made to Section 319 in Story on Agency which is as follows :

"It is plain that Government itself is not responsible for the misfeasances, or wrongs, or negligence's, or omissions of duty of the subordinate officers or agents engaged in the public service, for it does not undertake to guarantee to any persons the fidelity of any of the officers or agents whom it employs, since that would involve it, in all the operations, in endless embarrassments and difficulties and losses which would be subversive of the public interests."

38. In - 'Uday Chand's case, their Lordships held that the act of the Collector in holding the patni sale and dealing with the sale proceeds could not be said to have been an act which a private individual could also do. The act of the Collector was an act done by an officer of the Government in the exercise of powers conferred on him by a statute, and the statute in that case was the Patni Regulation, and it was done in the course of his official duties, and it was held that the Secretary of State was not liable to make good the loss caused.

39. This case was relied upon in the case of - '*Maharaj Bose v. Governor-General in Council*<sup>15</sup>, where again it was repeated that there is a clear distinction between acts done by the Crown in pursuance of ventures which a private individual might undertake equally well and acts done in exercise of governmental powers which could not be lawfully exercised save by the sovereign authority or persons to whom the sovereign authority might delegate such powers.

40. Mr. Rajkishore Prasad also referred to the case of - '*Vijaya Ragava v. Secretary of State*<sup>16</sup>', In

that case, the Government had removed a Municipal Commissioner for misconduct and the act which was treated as tort was held to be an act of the Government itself and not of one of its servants. As was pointed out in the case of - '*Secretary of State v. Somayya*<sup>17</sup>', the soundness of that decision has been doubted. In the latter case, a District Magistrate, who was authorised under the Madras Motor Vehicles Rules to issue or cancel licences to motor buses, had cancelled the plaintiff's licence, and it was contended that the cancellation was improper. It was held that the District Magistrate, both in issuing a licence and in cancelling a licence, was acting in performance of a statutory authority vested in him, and that the Government was not liable for the conduct of its servants who had acted in exercise of a statutory power and not as agent of the Government.

41. Mr. Rajkishore Prasad also strongly contended for the proposition that the treasury staff had acted negligently in course of their employment under the state and the state had employed them to discharge duties which were incidental to the conduct of a business in the nature of commercial undertaking which even a private individual could equally well undertake as a private business, inasmuch as the relationship between the Government treasury and the District Board is that of a banker and customer or debtor and creditor, and the Government is vicariously liable for the negligent act of the treasury staff. I think the analogy fails.

42. The argument is based upon the supposition that the treasury is a bank, and its functions are those of a commercial bank. We were referred to certain passages from "Banking Law and Practice in India" by M. L. Tannah, 7th Edition: Chapter II deals with "Banker and Customer", and in the very opening paragraphs it is explained that neither term has yet been defined and even the English law has failed to provide a satisfactory definition. We have only been given what are the characteristics of banking business. Reference was also made to the functions of commercial banks, and they were compared with the functions of the treasury. These functions are stated at page 7 of the book as being : (1) Receiving of money in deposit; (2) Issuing of notes; (3) Sending of money; and (4) Transferring money from place to place, as, e. g., from one country to another, by means of drafts drawn upon their branches or agents. The treasury does not exercise all these functions, and I do not think that the argument is supported by these references.

43. On the other hand, the relative situation of a banker and customer was well indicated by the Lord Chancellor in the case of - '*Foley v. Hill*<sup>18</sup>', He said :

"Money, where paid into a bank, ceases altogether to be the money of the principal (see - '*Parker v. Merchant*<sup>19</sup>', it is then the money of the banker, who is bound to return an equivalent by paying a similar sum to that deposited with him when he is asked for it. The money paid into the banker's, is money known by the principal to be placed there for the purpose of being under the control of the banker; it is then the banker's money; he is known to deal with it as his own, he makes what profit of it he can, which profit he retains to himself, paying back only the principal, according to the custom of bankers in some places, or the principal and a small rate of interest, according to the custom of bankers in other places.

The money placed in the custody of a banker is, to all intents and purposes, the money of the banker, to do with it as he pleases; he is guilty of no breach of trust in employing it; he is not answerable to the principal if he puts it into jeopardy, if he engages in a hazardous speculation; he is not bound to keep it or deal with it as the property of his principal; but he is of course answerable for the amount, because he has contracted, having received that money to repay to the principal, when demanded, a sum equivalent to that paid into his hands."

44. It was suggested in the course of the argument that the word "bank" or "banker" should be given a liberal and wide meaning and ought not to be limited to the meaning which it is usually given. Such an argument was advanced in the case of - *Halifax Union v. Wheelwright*<sup>20</sup>, and rejected by Baron Cleasby in the following words:

"It was said that.....the word 'bankers' was not to be restricted to persons regularly engaged in the business of banking, but that any person who receives the money of another into his charge, and, according to the course of business between them, pays it out by having drafts drawn upon him payable to order, ought to be considered a banker.....We cannot accede to that argument."

I am of the opinion that the word 'bankers' has reference to a particular class, namely, persons carrying on the business of bankers.

45. The position of a Government treasury with reference to a District Board appears to have come for a direct decision in a Madras case reported as - *Rangaswami Pillai v. Sankaralingam Ayyar*<sup>21</sup>, Whereas, on the one hand, it was contended that the treasury is a bank, on the other, it was contended that it was not. The case was heard

by a Division Bench consisting of Oldfield and Seshagiri Ayyar, JJ., While Oldfield, J., did not desire to commit himself to a decision on that point, Seshagiri Ayyar, J., gave his definite opinion; and, relying upon the two English cases referred to above, he held that the treasury was not a bank. Although there is considerable difficulty in giving a definition of the term 'bank', it seems to me on a consideration of these cases that the element of making a profit by the business must exist. It must be in the nature of commercial business. The treasury does not make any profit in the sense of utilising the money kept in the name of the District Board for purposes of profit. What the treasury does is to receive money for the District Board and honours its cheques (which word is said to be a misnomer in the above Madras case) in the sense that the treasury respects orders issued to it by the District Board for payment.

46. On a consideration of the authorities cited at the Bar and having regard to the particular circumstances disclosed in this case, I am clearly of the opinion that the State cannot be said to be engaged in the conduct of a business or commercial undertaking as suggested by the learned Advocate for the appellant as though the State is conducting a sort of business of banking in opening treasuries. It is impossible to hold that the State is engaged in an undertaking which is of a character of private business and it is liable for damages as the act of negligence was committed by its servants in the course of employment and in the discharge of duties which are incidental to the conduct of a private business.

47. The arguments advanced in support of this appeal must, therefore, fail. I am, accordingly, of

the opinion that the suit was rightly dismissed. I would dismiss the appeal with costs.

**Narayan, J.**

48. I agree, but I should like to point out that the authority of the well-known decision of Sir Barnes Peacock in - '5 Bom HC App. 1, has now been shaken to some extent. The Judicial Committee in - *Venkata Rao v. Secretary of State*<sup>22</sup>, observed that their Lordships were not disposed to think that Section 32 of the Government of India Act, which was a section relating to parties and procedure.

"had an effect to limit or bar the right of action of a person entitled to a right against the Government, which would otherwise be enforceable by action against it merely because an identical right of action did not exist at the date when the East Indian Company was the body if any to be sued".

My learned brother has referred to the similar provisions in the Government of India Act, 1935, and also to Article 300 of the Constitution of India, The effect of all these provisions is to preserve the rights which the subject had against the Crown in the days of the East India Company just before the enactment of the Government of India Act, 1858. And even after our Sovereign Republic has come into existence, the question arises :

"Could such a suit lie against the East India Company if it would have been instituted prior to the year 1858?"

The old doctrine of the immunity of the sovereign is still being carried forward, though there is no more any royal Prerogative in existence, and it is possible that the whole position may some day be reviewed by the highest Court of the land. Mukherjea, J., has already observed that much importance should not be attached to the observations of Sir Barnes Peacock, that in the case which Sir Barnes Peacock had to decide the only point for consideration was whether in the case of a tort committed in the conduct of a business the Secretary of State for India could be sued, and that

"whether he could be sued in cases not connected with the conduct of a business or commercial undertaking was not really a question for the Court to decide".

This observation was made by Mukherjea, J., in the well-known case of - 'AIR 1950 SC 222', which was an appeal to the Supreme Court from a decision of the High Court of Bombay in - '*P. V. Rao v. Khushaldas S. Advani*<sup>23</sup>, We are not concerned with the actual decision that was arrived at in that case, but the above-mentioned passage in the judgment of his Lordship Mukherjea, J., has got some importance and it cannot be said that the view which Mukherjea, J., took of the decision of Sir Barnes Peacock was in any way dissented from in the judgments of the other learned Judges. But, certainly, this case is not a decision in point for our present purpose. On the other hand, Fazl Ali, J., in - *State of Tripura v. Province of East Bengal*<sup>24</sup>", after quoting Section 65 of the Government of India Act, 1858, Section 32 of the Government of India Act 1915, and Section 176 (1) of the Government of India Act, 1935, observed as follows :

"Such being the law, the question has been posed in a number of cases from very early days as to whether, and, if so, in what cases, the Secretary of State would be liable for a wrong or a tort committed by the servants of the Crown, and it has now been definitely held that he may be liable in certain cases. So far as the present discussion is concerned, the following three points which emerge from a careful perusal of a large number of cases bearing on the subject, seem to be material :

(1) The principles of the law of torts have been consistently applied in all cases dealing with the liability of the Secretary of State for wrongs committed by the servants or agents of the Crown or the Government.

(2) It is settled law that the Secretary of State cannot be held liable for wrongs committed by the servants of the Crown in the performance of duties imposed by the Legislature: ( See - '28 Bom 314; - '*James Symonds Evans v. Secretary of State*<sup>25</sup>', - '(1864) 16 CBNS 310; - 'AIR 1915 Madras 434', in which this principle is fully explained and the reasons upon which it is based, are clearly set out).

(3) It is also well-settled that where a statute specially authorizes a certain act to be done by a certain person, which would otherwise be unlawful or actionable, no action will lie for the doing of the act."

The decision in - '(1864) 143 ER 1148' which has been dealt with exhaustively in the judgment of my learned brother, and the decision of the Madras High Court in - 'AIR 1916 Madras 1157' have been referred to with approval by his Lordship and the position which emerges from these decisions is that as regards liability to be sued the Secretary of State for India was and the present Government of India is in no way different from the old East India Company before the passing of the Government of India Act, 1858, and even now a plaintiff who comes forward with a suit of the nature which has been instituted by the District Board of Bhagalpur has to show that he had a cause of action against the East India Company if the case had arisen before 1858; and on the decisions there does not also seem to be any doubt that the Government of India cannot be held liable for wrongs committed by its servants while they are performing a statutory duty. If, therefore, the officers of the treasury were performing their duties as imposed by the legislature, then there is a complete immunity of the supreme power (now the Sovereign Indian Republic) for tortious acts committed by them during the course of their duties. I am in absolute agreement with my learned brother that the treasury cannot be regarded as a bank, and the tortious acts cannot be deemed to have been committed by the ministerial officers while they were discharging any commercial business on behalf of the Government. What has been done can in no sense be regarded as an act done while conducting a commercial business, and my learned brother has referred to all the important sections of the statute from which it can easily be gathered that whatever was done was done in the discharge of a statutory duty under the existing law. The Government can in no case be liable for tortious acts done by its officers during the course of their statutory duties, and, therefore, this appeal must be dismissed with costs.  
Appeal dismissed.

Cases Referred.

<sup>15</sup> Bom HC App 1  
<sup>240</sup> Ind App 48 (PC)  
<sup>3</sup> AIR 1932 Cal 834  
<sup>4</sup>(1864) 143 ER 1148  
<sup>4</sup> AIR 1950 SC 222  
<sup>5</sup>(1878) 2 Cowp 754  
<sup>6</sup>(1901) AC 561 at p. 575 )  
<sup>7</sup> AIR 1916 Mad 1157  
<sup>8</sup> AIR 1915 Mad 434  
<sup>9</sup> AIR 1932 All 575  
<sup>10</sup>28 Bom 314  
<sup>11</sup> AIR 1950 All 206  
<sup>12</sup> AIR 1934 Cal 128  
<sup>13</sup> AIR 1954 SC 245  
<sup>14</sup>51 Cal WN 537  
<sup>15</sup> AIR 1952 Cal 242  
<sup>16</sup>7 Mad 466 (FB)  
<sup>17</sup> AIR 1928 Mad 1084  
<sup>18</sup>(1848) 2 HLC 28  
<sup>19</sup>(1843) 1 Ph 356 at p. 380  
<sup>20</sup>((1875) 10 Ex 183)  
<sup>21</sup> AIR 1920 Mad 1011  
<sup>22</sup> AIR 1937 PC 31  
<sup>23</sup> AIR 1949 Bom 277  
<sup>24</sup> AIR 1951 SC 23  
<sup>25</sup> AIR 1920 Lah 362