Liability of State in Contract and in Torts

Dr. Mohd. Imran
Assistant Professor
School of Law and Constitutional Studies,
Shobhit Institute of Engineering and Technology
(A Deemed to be University), Meerut

Liability of State in Contract and in Torts – Bare Provisions

- **Article 298 provides that the executive power of the Union and of each State shall extend to the carrying on of any trade or business and to the acquisition holding and disposal property and the making of contracts for any purpose.**
- **Article 299 (I) lays down the manner of formulation of such contract. Article 299 provides that all contracts in the exercise of the executive power of the union or of a State shall be expressed to be made by the President or by the Governor of the State, as the case may be, and all such contracts and all assurances of property made in the exercise of that power shall be executed on behalf of the President or the Governor by such persons and in such manner as he may direct or authorize.**
- **Article 299 (2) makes it clear that neither the President nor the Governor Shall be personally liable in respect of any contract or assurance made or executed for the purposes of this Constitution or for the purposes of any enactment relating or executing any such contract or assurance on behalf of any of them be personally liable in respect thereof. Subject to the provisions of Article 299 (1), the other provisions of the general law of contract apply even to the Government contract.**

A contract with the Government of the Union or State will be valid and binding only if the following conditions are followed:

1. **The contract with the Government will not be binding if it is not expressed to be made in the name of the President or the Governor, as the case may be.**
2. **The contract must be executed on behalf of the President or the Governor of the State as the case may be. The word executed indicates that a contract with the Government will be valid only when it is in writing.**
3. **A person duly authorized by the President or the Governor of the State, as the case may be, must execute the contract.**

The above provisions of Article 299 are mandatory and the contract made in contravention thereof is void and unenforceable.

Quasi-Contractual Liability

According to section 70 of ICA 1872:

where a person lawfully does anything for another person or delivers anything to him such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of or to restore, the thing so done or delivered. If the requirements of Section 70 of the Indian Contract act are fulfilled, even the Government will be liable to pay compensation for the work actually done or services rendered by the State.

Section 65 of the Indian Contract Act, 1872:

If the agreement with the Government is void as the requirement of Article 299 (1) have not been complied, the party receiving the advantage under such agreement is bound to restore it or to make compensation for it to the person form whom he has received it. Thus if a contractor enters into agreement with the Government for the construction of go down and received payment therefore and

the agreement is found to be void as the requirements of Article 299 (1) have not been complied with, the Government can recover the amount advanced to the contractor under Section 65 of the Indian Contract act.

Liability of Administration in Tort

- **To what extent the administration would be liable for the torts committed by its servants is a complex problem**
- **The liability of the government and administration in tort is governed by the principles of public law inherited from British Common Law and the Provisions of the Constitution.**
- **The whole idea of vicarious liability of the state for the torts committed by its servants is based on 3 principles.**
  - ***Respondeat Superior*** **(Let the principal be liable).**
  - ***Qui-Facit per Alium Facit per se*** **(He who acts through another does it himself).**
  - **Socialization of Compensation.**

RELATED CASE LAWS

The first judicial interpretation of State Liability during the East India Company was made in -

***John Stauart's case,* 1775.** - It was held for the first time that Governor-General in Council had no

immunity from Court's jurisdiction in cases involving the dismissal of

Government Servants. In ***Moodaly v. The East India Company* 1775 (1 Bro-CC 469),** the Privy Council expressed the opinion that

Common law doctrine of sovereign immunity was not applicable to India.

Some judgments during British Rule India, do tell us, how the law of administrative tortious liability

evolved in Indian conditions.

Other Case Laws

- *P.and O.Steam Navigation Co.v.Secy.Of State for India* **[(1861) 5 Bom HC Report, Appendix 'A']**
- *State of Rajasthan v.Vidyawati (Mst.)* **[AIR 1962 SC 933]**
- *State of India-in-Council* **v.** *Hari Bhanji.* **[(1882) ILR 5 Mad 273].**
- *State of Rajasthan v.Vidyawati (Mst.)* **[AIR 1962 SC 933]**
- *Kasturi Lal v.State of U.P.* **[AIR 1965 SC 1039]**
- *Khatri (II) v.State of Bihar* **[AIR 1981 SC 928]**
- *Rudul Shah v.State of Bihar,* **[AIR 1983 SC 1086],**
- *Nilabati Behra v.State of Orissa* **[AIR 1993 SC 1960]**
- *Bhim Singh v.State of J.K.* **[1985 4 SCC 677],**
- *Mahavir Singh v.State of Rajasthan* **[1987 2 SCC 342]**
- *SAHELI, A Women's Resource Centre v.Commr.Of Police* **[1990 1 SCC 422]**
- *N.Nagendra Rao & Co.v.State of A.P.* **[1994 6 SCC 205],**
- *Lucknow Development Authority v.M.K.Gupta* **[1994 1 SCC 243]**
- *Chairman Railway Board v.Chandrima Das* **[2000 2 SCC 465]**

- **For Details of the case laws, please refer the supplementary notes**

FREEDOM OF TRADE, COMMERCE AND INTERCOURSE

Introduction

- **Part XIII of the Indian Constitution deals with the trade, commerce and intercourse with in the territory of India**
- **Trade, commerce and intercourse can be of domestic and international nature.**
- **The provisions relating to trade, commerce and intercourse in the Indian Constitution relates to the Domestic trade and commerce alone which is restricted to the territory of India.**
- **Domestic trade and commerce hence includes :**
  1. **Intra – state**
  2. **Inter - state**

- ✓ **Aim of any federal structure is to minimize the inter-state barriers so that people may feel they are residents of any units of the Union.**
- ✓ **All states are not self- sufficient. Some may be depending solely upon agriculture or industry.**
- ✓ **Some states may have the raw materials and hence they may enter into transactions with other states which have cheap labour, better energy resources ad facilities.**
- ✓ **In cases like this some states due to their narrow and parochial view may impose restrictions through legislations. Due to this there is a trade barrier.**

Such legislations hamper the national economy also.

- ❖ **Constitution framers also desired to promote free, flow of trade and commerce in India. This desire could be found from the following :**

  - **Guaranteeing to any citizen the freedom of movement and residence throughout the country [Art. 19 (1) (d) & (e)]**

  - **Guaranteeing to all citizens the right to practice any profession/ carry on any occupation or trade [Art. 19(1) (g)]**

Trade, Commerce & Intercourse

The main provisions relating to the trade and commerce is dealt from Arts 301- 307

According to these provisions:

- **Trade : buying or selling of goods**
- **Commerce: all forms of transportation of those goods**
- **Intercourse: movement of goods from one place to another Art. 301 – Subject to the other provisions of this Part, trade, commerce and intercourse throughout the territory of India shall be free**

Atiabari Tea Co v. State of Assam AIR 1961 SC 232

- ✓ The company carried on the business of growing of tea, and sending it to Calcutta via Assam.
- ✓ The legislature of Assam passed a law, the Assam Taxation Act, 1954, which provided for the
- ✓ imposition of a tax on goods carried by road or inland waterways in the State of Assam
- ✓ The Supreme Court held that the tax imposed on the goods directly restricted their transport or movement in an unreasonable manner, hence the motive behind the legislation was found to be faulty.
- ✓ Hence it was held that the legislation was void as it was against the purpose of the Art. 301

Atiabari Tea Co v. State of Assam AIR 1961 SC 232

- ✓ Gajendragadkar J, explained the kind of restriction from which the freedom is given under Art. 301 adopting the Direct & Immediate Test.

- ✓ Restrictions in the sense those which are directly and immediately restricting or impeding the free flow of trade / movement

- ✓ Indirect and remote restrictions are possible for application like traffic regulations, licensing of vehicles, prescribing minimum wages of the employees etc.

Automobile Transport Ltd. v St. of Rajasthan AIR 1962 SC 1406

- **By virtue of Sec 4 of Rajasthan Motor Vehicles Taxation Act, 1951, no one could use or keep for use a motor vehicle in Rajasthan without paying an appropriate tax for it and anyone failing shall be made liable to the penalties imposed under Sec. 11 of the Act.**
- **The Supreme Court held that the Tax is compensatory in nature hence did not violate Art. 301.**
- **Das J, speaking for the majority said that they accept the Direct and Immediate Test and said that regulatory measures or compensatory taxes for the use of trade will not / do not come within the purview of restrictions in Art. 301.**
- **Art. 301 is best possible in an orderly society. The other provisions mentioned in the Part XIII must considered as a means to that order mentioned in Art. 301.**
- **Justice Das, laid down certain tests for adjudicating the validity of a law on the grounds of Art. 301:**

1. A measure which operates on trade, commerce and intercourse indirectly and remotely is not violative of Art. 301 **(Contd………)**

2. A measure which operates which directly and immediately is violative of Art. 301.

3. A measure which operates which directly and immediately may not be violative of Art. 301 provided if it is,

A) a Regulatory measure B) a Compensatory measure

- So now we have to determine when a tax will become Compensatory in nature:
  - 1. Whether the traders were having the use of facilities for better conduct of their business?
  - 2. Whether they are paying through the penalty a huge amount more than what will be for providing the facilities?
  - 3. Re-compensate Theory or the Wear and Tear Theory was accepted by the court. Here the court accepted the argument that the taxes could be levied for the purpose of maintaining the roads which are used by the public.

The limitations imposed upon the above freedom by the other provisions of Part XIII are:

1.Art. 302 – Non- discriminatory restrictions may be imposed by Parliament in public interest

2.Art. 303 (1) – Neither Parliament nor the State legislature shall have power to make any law

giving or authorizing the giving of any preference to one State

over another or making or authorizing the making of any

discrimination between one State and another.

Art. 301 was inspired by the Sec. 92 of the Australian Constitution regarding the free trade,

commerce and intercourse

1. **Art. 301 also keeps certain reservations by using the terms 'Subject to the other provisions of this Part'to the free trade, commerce and intercourse. These reservations were borrowed from the American Constitution.**
2. **Hence Part XIII is an amalgamation of two constitutions. This amalgamation brings out the difference between regulatory and taxing powers. This is how the concept of 'Payment for revenue' and 'Payment for Regulation' arose.**

(Contd…….)

3 **Art. 303 (2): Discriminatory/ preferential provisions may be made by Parliament for the purpose of dealing with a scarcity of goods arising in any part of India.**

4 **Art. 30 4(a): Non- discriminatory taxes may be imposed by a state on goods imposed from other States / UTs similarly as on intra- state goods.**

5 **Art. 304 (b): Reasonable restrictions may be imposed by a State ‘in the public interest’**

Art. 304 (b) 3 conditions need to be satisfied in passing an Act

1. Previous sanction of the President must be obtained
2. The legislation must be in the public interest
3. It must impose restrictions which are reasonable. **Khyerbari Tea Co. v. St. of Assam AIR 1964 SC 925**

Difference between he two decisions was noted regarding the use of Art. 304 (b)

1. Atiabari Tea Co. Case
   - Tax imposed under Art. 304 (b) – validity if is impeached- state can plea for public interest, Reasonable Restriction, Compensatory Taxes etc.
2. Automobiles Transport Case:
   - Compensatory taxes do not fall under Art 301 hence application of Art. 304 need not be inserted

State of Bombay v. RMDChamarbaughwala AIR 1957 SC 699

- **Supreme Court held that gambling not trade but res extra commericium**
- **Bombay Lottery and Prize competition Control & Tax (Amendment) Act, 1952 was impugned.**
- **The Act was challenged on the ground that it put restrictions on prize competitions, and thus violate of Art. 19 (1) (g) & 301**
- **The Court held that prize competitions being of gambling nature they could not be regarded as trade or commerce hence it is not protected under Art. 19 (1) (g) or 301**
- **The RMDC case is applied and followed in case of state run lotteries.**

B.R. Enterprizes v State of UP AIR 1999 SC 1867

- **State run lotteries are no different from private run lotteries- gambling nature**

Assignment:

What do you mean by freedom of trade commerce and intercourse? Compare this freedom with other federal countries. Also discuss the restrictions on freedom of trade under a state law? Is the restriction of freedom of trade, commerce and intercourse prevailed in the present scenario duo to COVID -19 is reasonable? Give your opinion?