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NEED OF CODIFIED TORT LAW IN INDIA

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Abstract- While some countries like the UK, USA and China have codified law on torts, recognising civil wrongs as grounds for a lawsuit, India does not have one. Indian courts depend on provisions in a variety of statutes to entertain claims arising in cases relating to torts. Indian tort is still based on the pre-independence British model with respect to tortious liability of the State. State can be made liable only under Article 300 of the Indian Constitution that too only for sovereign acts. There are many cases where judges have expressed discomfort in determining state liability based on the thin line difference between sovereign and non-sovereign acts. Due to scattered remedies available for tortious wrongs under various statutes litigation for tort claims are less favoured in India. Tort in spite of being one of the most effective laws to provide remedies for individual injuries is less used and developed law in India as compared to other advanced countries. In India remedies under product liability is provided under The Consumer Protection Act, 1986 which suffers from many lacunas. In India there is no system to deal with high tortious claims as in Bhopal Gas Tragedy case. While most branches of law, e.g., crimes, contracts, property, trusts, etc, have been codified, it is interesting to observe that there is yet no code for torts in India. Most of the development in tort law is the contribution of the Indian Judges and lawyers.The common man in the country is not familiar with the reaches of Tort liability involving governmental administration in the context of a welfare state.

***Keywords*-- Tort Law, State Liability, Product Liability, Sovereign Acts, Non-Sovereign Acts, Tortious Remedies.**

INTRODUCTION

Law is basically a recognized and accepted form of human conduct which is enforced by the State for the wellbeing of the society. In broader perspective it included all types of rules controlling human actions such as religious, political, social or moral. Among these only those which are recognized and enforced by the State are the law of the land which is divided into two main types, namely, civil and criminal. [1]

Tort, which will be the subject matter of this research work, is an important branch of civil law which is defined by *Salmond* as "a civil wrong for which the remedy is an action for unliquidated damages and which is not exclusively the breach of contract or the breach of trust or the breach of other merely equitable obligation". Thus, making it clear that tort claims are more related to individual special right to claim for compensation not merely for the sake to gain meager compensation but more to bring the claimant back to his original position had the injury been not caused.

In simple words, tort law is based on the principle that one who causes harm to another must compensate the other for the harm caused. In other words, it penalizes the wrongful interference with the holdings of another.

Hence, due to the unique nature of tort law and its profound impact on rights of an individual, this research is an attempt to scrutinize the exact position of Indian tort law in providing remedies and determining tortious liabilities and to find out the ambiguities in the present Indian tort system.

DISCUSSION

In this era of globalization and liberalization tort law has evolved and grown tremendously in economically progressive countries like U.K, U.S.A and Australia. Many new species of torts have evolved such as toxic tort or torts affecting the rights of Alien. Hence, countries with developed legal systems have well and sound codified legislation to remove any uncertainty and provide a subtle ground for tort claims making it as one of the favored branch of litigation.India in spite of being one of the countries which presents to the world one of the most comprehensive legal framework has yet to develop and adopt a well profound and subtle codified legislation covering all the aspects of tort law. The present law of torts in India is still modeled on the pre-

[1]Andrew J. McClurg, Adem Koyuncu and Luis Eduardo Sprovieri, 'Practical Global Tort Litigation', Yale.L.J. 105 (1997).

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independent British model which is turn based on the common law principles of England. Indian tort law is still in a developing nascent state mostly dependant on the judicial interpretation. Thus, keeping room for differences of opinions which indicates towards an absence of stable and certain tort system in India.

It would certainly be wrong to say that tort law has been completely ignored. Instances like the development of the absolute liability rule in the M.C. Mehta case and the Supreme Court's direction on Multinational corporation Liability, recognition of Governmental tort by employees of government, principles on legality of State, evolution of tort of sexual harassment, grant of interim compensation to a rape victim, and award of damages for violation of human rights under writ jurisdiction, including a recent Rs.20 crore exemplary damages in the Upahaar Theatre fire tragedy case by the Delhi High Court are some significant application of tort law in India.

There have been a number of enactments such as the Public Liability Insurance Act, 1991, Environment Protection Act, 1986, Consumer Protection Act, 1986, Human Rights Protection Act, 1998, Pre-Natal Diagnostics Techniques Regulations and Prevention of Misuse Act, 1994, embodying the new principles of tortious liability in India. The Motor Vehicles Act, 1988 and judicial interpretation continue to contribute to development of accident jurisprudence. The unfortunate Bhopal Gas Leak disaster has triggered a new path of tort jurisprudence, leading to environment tort, toxic torts, governmental torts, MNCs liability, congenital torts, stricter absolute liability, etc. Still the Indian Law Reports furnish in this respect a striking contrast to the number of tort cases before the Courts.[2]

While most branches of law, e.g., crimes, contracts, property, trusts, etc, have been codified, it is interesting to observe that there is yet no code for torts in India. Most of the development in tort law is the contribution of the Indian Judges and lawyers. Though recommendations for an enactment on tort law were made as early as in 1886 by Sir F Pollock, who prepared a bill known as the *'Indian Civil Wrongs Bill'* at the instance of the Government of India, it was never taken up for legislation. Lack of a code for the law of torts acts as a deterring factor for it to branch out as a favoured form of litigation. The growth of tort law in India does not even compare to other progressive countries which have put it to much better use.

In this context, Justice Bhagwati's observation in M.C.Mehta vs. Union of India can be cited:

"We have to evolve new principles and lay down new norms which will adequately deal with new problems which arise in a highly industrialized economy. We cannot allow our judicial thinking to be constructed by reference to the law as it prevails in England or for the matter of that in any foreign country. We are certainly prepared to receive light from whatever source it comes but we have to build our own jurisprudence."

Some of the valid and vital lacunas of the Indian tort law around which this research shall revolve are stated below:

LACK OF DEFINITE LAW TO TACKLE HIGH TORTIOUS CLAIMS

There is absence of any definite law to handle cases with high tortious claims in India. One of the most appropriate cases is that of the Bhopal Gas Tragedy case. Everyone is aware of the devastating harm caused to the victims. But still when one studies this case, the most offensive and dishonouring act which adds to the misery of the victims is the compensation awarded that too after a span of time elapsed. Lack of a comprehensive tort system which includes the benefits of having expertise to handle the case, definite adjudicating body and a well-defined model to determine the amount of compensation, dragged the case from India to American court at the first instance. Finally, after being rejected to be heard there and decreed first by the District Court then by High Court, was appealed in the Supreme Court. Under the social pressure, Supreme Court told both sides to come to an agreement in November 1988. Eventually, the alleged company agreed to

[2]Chavan, Bhagwan Narayanrao, 'Tortious liability of Government of India enshrined under Article 300 of the Constitution', L.Q. Vol.7 No.3, (1999).

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pay 470 million dollars which is just the 15% of the original claim. To add on value to the argument that the award of compensation was determined without any specific scheme but mere on the basis of bargaining skill, the Government of India had to provide an explanation in an official statement.[3]

Had there been a well evolved written law determining tortious liabilities of transnational corporation, the time frame of the Bhopal Gas Case would have been substantially lessened. The Bhopal gas tragedy proved two things. Firstly, in the absence of a written law a class action (even one with governmental support) would not survive as an alien claim against the bedrock of judicial precedent in a country like America. Secondly, that the damages paid highlight the unequal bargaining power that developing countries have against corporations operating out of developed nations. Both these lacunae can be leveraged if a detailed tort law exists. One of the reasons that Union Carbide chose to set up operations in India was because India's legal system did not have a system accommodating corporate accountability. Class action suits, a principle regulator of corporate ethics, were entirely absent. While this disaster prompted a number of legislations, the law of torts was conspicuously ignored. As a result India stands judicially unable to litigate major tort claims from large scale industrial accidents.[4]

ABSENCE OF EFFECTIVE REMEDIES IN PRODUCT LIABILITIES

Any sound tort system encourages people to file suits for assured monetary damages and promise of better service in future. But, the existing system in India has place for remedies based on discretion to determine the amount of compensation or better termed 'ex gratia' with no guarantee that the wrong would not be repeated. This is mainly the result of the principle of the present Indian tort system which concentrates mainly to correct the past wrongs caused.

In this context, qua-product liability in India needs to be discussed which is mainly covered by The Consumer Protection act, 1986. Under this Act, a consumer has only one remedy i.e. to file a civil suit before a district court or a Consumer Disputes Redressal Commission under the Consumer Protection Act, 1986. The Act has been established for the purposes of safeguarding consumer interests by setting up Consumer Councils and other authorities for the settlement of consumer disputes. Consumer Councils set up at the District, State and National Level function as quasi-judicial bodies that seek to promote settlement in an informal fashion. Proceedings before the same do not qualify as being competent to act as a *sub judice* bar to cognizance by a Civil Court. These Councils are also prohibited from exercising jurisdictions in cases "involving complex questions of law and fact" since the councils can only exercise summary jurisdiction. This in essence disqualifies the same from hearing any class action suits and ensures that only petty cases can be adjudicated before the same. This is a principal disincentive to litigate, since Torts requires a separate circuit given its specialized nature qua determining causation, modes of liability, *locus standi*, unliquidated damages and the enunciation of objective calculation parameters for the same. Further, when dealing with product, including service, liability cases, tort law operates on the rationale that the cost of the damage must be passed on to the manufacturer with such effect that it acts as an insurance against similar complaints in the future. Manufacturers have better information about dangerous products and better means to address the problem than the consumers. Manufacturers or sellers of products can also spread the loss across society through increased purchase prices for products, or pass on the costs to others in the distribution chain. As can be observed, this rationale is not served in any way by the existing system.

[3]Charu Sharma, 'Civil Liability for Environmental Damage: An Assessment Of Environmental Claims Under Private And Public Law In India', Macquarie Law School: August (2012)

[4]Dr. C.S.Patil, 'Tortious Liability Of The State With Emphasis On Constitutional Torts', L.Q. Vol.4 No.8, (1998)

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PUBLIC INTEREST LITIGATION (P.I.L) FAVOURED AGAINST PUBLIC NUISANCE LITIGATION IN ENVIRONMENTAL DAMAGES

Class action covering the concept of tortious liability is allowed by P.I.L in India mostly in cases involving environmental damages instead of Public Nuisance Litigation as used in America. It has been mostly seen that damages awarded in this P.I.L involving interest of a class are mostly limited to repair the damages caused and compensating the damages caused at large. The gravity of individual damage is mostly ignored. On the other hand, a well-defined tort law would place such a high cost on repeating the behaviour that it would operate as an insurance against the same being repeated.[5]

STATE LIABILITIES FOR TORTIOUS ACTS

The waters of judicial interpretation become even murkier as one moves to the liability of the State for tortious acts. Since the State acts through its agents, it is primarily held liable through the doctrine of vicarious liability, a doctrine that holds the commanding superior liable. The Indian position is moulded on the British position, as it is adopted by most countries in the commonwealth. The British position granted the Crown unquestioned immunity until the enactment of the Crown Proceedings Act in 1947 to bring it in line with the accepted idea of the 'Rule of law'. In India, this position of qualified immunity still prevails.

Currently, the only provision that an aggrieved party can rely upon to hold the Government liable is Article 294(b) of the Constitution, which provides for the liability of the Union Government or State Government as it may arise 'out of any contract or otherwise'. The word 'otherwise', in its broad sweep, is meant to include tortious acts. Article 300(1) fixes the extent of such liability as being co-extensive with that of the Dominion of India and the Provinces prior to the commencement of the Constitution. This iteration refers to the distinction being made between sovereign and non-sovereign functions with the State being held liable for any liability incurred in the exercise of the latter.

But as often happens with an uncodified maxim, this principle is subjected to judicial interpretation.[6] While interpreting the same, the Supreme Court in the case of *State of Rajasthan v. Vidhyawati* following the *Stemship Navigation Co.* case, diluted the principle considerably by its judgment in the case of *Kasturilal v. State of UP*. In this case a police officer misappropriated and ran off with confiscated goods belonging to the plaintiff. The bench applying what can at best be said to be specious reasoning said that the same was in exercise of a sovereign act (confiscation) and, therefore, not open to challenge in a court of law.

This decision is recognized as being bad in law and has been departed from in subsequent judgments. Unfortunately, little cause exists for relief for two reasons. Firstly, in most cases the lower courts including the High Courts have decided the matter in favour of the government, the same being amended by the Supreme Court on appeal. Secondly, the decision in *Kasturiala* is still a valid law since the matter was decided by a Constitutional Bench of five judges, a number that has not been equalled since. Thus, in the absence of a legislation providing clear cut guidelines on the liability of the State, the judgment still subsists as a binding precedent.

However, it is also impracticable to continue with a distinction depending solely upon sovereignty. No civilized system can permit an executive to play with the people of its country and claim that it is entitled to act in any manner as long as it is sovereign in nature. The illusory and ill-defined distinction between sovereign and non-sovereign functions has resulted in a notorious lack of uniformity in judicial interpretation. Matters arising from similar cause of actions have been treated differently by different High Courts. Given the expanding nature of State functions it is best to do away with an inhibiting distinction to truly safeguard public interest. This in itself is not a novel suggestion. It was put forward as early as 1956 in the First Law Commission Report. The Report

[5]Dr. Usha Ramanathan, 'Tort law in India', I.B.R. Vol. 11(1) (2008)

[6]Jayakumari, P K, 'Liability of the State in Torts: With special reference to human rights violations', School of Indian Legal Thought, Mahatma Gandhi University (2006).

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suggested that the distinction between sovereign and non-sovereign acts be removed on the ground that there existed "no convincing reason" for its continuance. A more apt test would be one that determines liability based on the "nature and form" of the activity undertaken.

CONCLUSION

In sum, the argument in favour of legislating definitions and guidelines can be summarized in the following terms: One that such a classification will nullify the effect of the *Kasturilal* decision and will put an end to arbitrariness in terms of interpretation. Two, that such legislation will clearly delineate the realm of sovereign and non-sovereign acts if not do away with such distinction entirely.

Any law to be effective must be adaptable to changing circumstances and the law of torts is no different. Changes in policy need to be reflected in the implementation which is not possible if the law exists in a vacuous state. The law of tort has the potential to empower individuals, to instil respect for the consumer in unscrupulous corporate concerns. It is a law that protects personal autonomy and dignity, even in the absence of appreciable harm or condemnable wrongdoing. In a society that is increasingly fraught with consumer disputes given the growing nature of such transactions, the legislature needs to awaken and take action because now more than ever codification of tort law is needed in India.