1

(1) பக்கங்களின் எண்ணிக்கை 8

(2) புதுக்கித் திருப்பிய நாள் 12.90

(3) ஆதாரங்குறிப்பவர் சுருக்கொப்பம்

தமிழ்நாடு ஆவணக் காப்பகம்.

தமிழ்நாடு அரசு

PWD. துறை

அரசாணை எண். மு. கோப்புத் தாள் எண்.	998	அச்சகம் பலவகை

நாள் : 12-4-1893 198

4

மடிக்கவோ கண்டபடி கையாளவோ கூடாது

ஆவண. கா-1—18,006—15-6-87.

928/1

GOVERNMENT OF MADRAS.

JUDICIAL DEPARTMENT.

READ—again the following paper:—

G.O., dated 10th February 1893, No. 321, Judicial.

Read—the following letter from C. H. MOUNSEY, Esq., Acting District Magistrate of Cuddapah, to the Chief Secretary to Government, dated Mydukur, 29th January 1893, Reference on Current No. 1580-Magl.

I have the honour to report that, on the night of 1st July 1891, the office of the Head Assistant Magistrate, a rented building at Cuddapah, was broken into and a wooden box, containing property concerned in criminal cases, worth about Rs. 700, besides bonds covering debts of Rs. 3,000 or even more, was stolen. The box used to be under the charge of the then Magisterial Clerk, T. Munisami Iyer, who seems to have, under the orders of the Head Assistant Magistrate, Mr. Muhammad Raza Khan, instructed, on the eve of theft, the attender and the orderly attached to the office to guard the box for the night. The attender made some arrangement with the masalchi to sleep in the office in his stead, and the orderly did not obey the orders. It formed no part of his duty to do so, the Police Superintendent says (*vide* Superintendent's letter, dated 28th July 1891, No. 653); but I agree with the Head Assistant Magistrate in his remarks on the subject in his letter, dated 30th November 1891, No. 1305. The masalchi too did not go to office till a late hour in the night, by which time the box probably had been removed, and though his suspicion as to this was aroused, he took no steps to verify it. No clue was obtained as to who were the culprits, and the matter ended by the dismissal of the attender and the masalchi.

2. Mr. Wolfe-Murray remarked that the Head Assistant Collector was to blame in not sending the box containing valuable property to the treasury for being guarded, and that the question of restitution of property would have to be considered if parties applied for it, when those who were responsible would have to be reported to Government for orders. The liability of Government (which seems to be taken for granted in the correspondence) depends upon the circumstances of the case under sections 151, 152 and 161 of the Contract Act, I believe. I do not pretend to give an opinion on the point.

3. In November 1891, the Head Assistant Magistrate reported that the parties named below claimed restitution of the property shown against them.

Names.	Property claimed.	Value.	Number of the case in which the property was concerned.
		Rs. A. P.	
1. Gangayya and Venkatesam.	23 silver beads	2 8 0	14 of 1891.
2. Karasimhulu of Ganjikunta.	2 do. armlets	132 8 0	19 of 1891.
	1 do. anklet		
	3 do. zones		
	1 do. billa (head jewel)		
	1 do. armlet		
3. Rajavole Chinnareddi ..	1 gold do.	517 0 0	28 of 1891.
	1 pair of kammal (ear-rings)		
	1 pair bugadalu (do.)		
	1 gold kuppe (head jewel)		
	2 small gold pieces and		
	A bundle of documents, alleged value	1,618 11 0	Do.

As regards 1st and 2nd claimants, the Head Assistant Magistrate stated that they were real owners and that they ought to get the equivalent value of the property lost. As regards the 3rd, he seems to have informed him that he could not get the jewels. In the judgment passed in the case on 1st July 1891 (sent herewith), the Head Assistant Magistrate observed that no offence was committed in respect of the property produced in the case and that the question as to the disposal of it would be referred to the District Magistrate under section 518, Criminal Procedure Code. But before the question was actually referred to the District Magistrate, the property was stolen. Now the question for decision is, is Chinna Reddi, the complainant and 1st witness in the case, entitled to receive the property? The identification of the property is, in the opinion of the Head Assistant Magistrate, by no means satisfactory, the weight of the jewels as given by the complainant in his complaint not corresponding with the actual weight of the jewels, and the difference between them not having been satisfactorily accounted for. The case, he thought, was a concocted one, and he suggests that the property is not Chinna Reddi's. If it is not his, it would be difficult to say whose it is. The Head Assistant Magistrate thought it belonged to Munni Reddi, the 2nd prosecution witness in the case. The facts, as they would appear to a Civil Court in my opinion, do not allow me to agree with him; and I am afraid, if Government is responsible at all, a suit for the recovery of the value by Chinna Reddi would go in his favour. Paragraph 5 of the Head Assistant Magistrate's judgment gives the differences he believed to exist between the articles produced and the articles stolen as set forth in a partition list and recites the articles produced.

No. 1 (the most valuable) is a piece cut off a gold armlet valued at Rs. 376-12-0. Two of these were stolen, valued at Rs. 473 and Rs. 616, and the piece is sworn to be part of one of these.

No. 2.—There is no statement to enable us to check if this article was really one formerly in complainant's possession or not.

No. 3.—*Gold ear-rings.*—The actual value of these agreed with the value of a pair known to be in possession of complainant, but the weight was three-eighths of a tola more when produced before the Head Assistant Magistrate. This, the Inspector of Police declares, was due to their being weighed with wax adhering to them, whereas the former weight was the weight of pure gold.

No. 4.—*Silver armlet.*—This had no wax on it; so there is a clear discrepancy as to weight of five-eighths of a tola, but the value tallies.

No. 5.—No argument can be drawn from the weight and value of this. One-sixteenth of a tola and Rs. 3 value, as the partition list only stated approximately, the weight and value.

No. 6.—No argument can be gathered from these articles, as only pieces of these alleged to be stolen were recovered. That is to say, in only one case was a difference in weight found and in no case a difference in value.

Under the above circumstances, I do not see how Government can resist the claim, if responsible.

4. Besides Rs. 517, the value of the jewels lost, the complainant in the above case claims Rs. 1,618-11-0, being the amount of the loans covered by the bonds, the executors of which, he says, flatly refuse to repay without the production of the bonds themselves. He was allowed a long time to come to some settlement of his debts. It is an unfortunate circumstance that no list of the documents lost was made out either when the case was instituted or when the documents were said to have been found in the threshing floor of the complainant, and none of them were registered. We have to rely on the lists now produced by the complainant Chinna Reddi. He produces two lists, one said to have been prepared more than two years ago when he and his cousins divided their property in bonds. According to this he got for his share bonds covering debts of Rs 3,218-9-8. Out of this amount he has recovered Rs. 1,722-12-8, and some debtors acknowledge their indebtedness to the amount of Rs. 527-2-0, so that the balance to be collected is Rs. 968-11-0. In the second list he gives the names of his debtors to whom he lent money after he became divided

998/2

from his cousins. This covers debts of Rs. 850, of which Rs. 200 have been collected, leaving a balance of Rs. 650. The full amount of the bonds now claimed thus comes up to Rs. 1,618-11-0 (Rs. 650 *plus* Rs. 968-11-0). The present Sub-divisional Magistrate is of opinion that, even in the absence of documents, the party can successfully sue his debtors and recover his loans on the strength of the oral evidence of the persons who have either witnessed the transactions or at least are aware of them. It may be so, but every case would have to be examined to see if there was corroborative evidence. Presuming there was, it seems rather hard on the man that he should have to go to the expense and costs of doubtful law suits. The equitable course would be to pay the amount of the bonds to the man and then sue against the debtors, as I presume that that remedy would be open to Government under section 180 of the Contract Act.

5. From one of the Head Assistant Magistrate's reports (paragraph 11 of his letter A-B, dated 12th July 1891), it might be supposed that only some of the bonds were recovered, but the evidence is not to that effect. The Police Inspector declares to me that the bundle was handed to him at once, that he went through all the bonds, of which there were some 30, totalling up their values as he went on and they came to about Rs. 3,000 in value.

6. I have the honour to request orders as to the course to be followed.

7. I regret the delay in reporting this, and append here a chronological précis to show the cause thereof.

* * * * *

Order—dated 10th February 1893, No. 321, Judicial.

The papers will be referred to the Government Pleader for early opinion.

2. The delay in reporting the case is most reprehensible.

(True Extract.)

(Signed) C. A. GALTON,
Ag. Chief Secretary.

To the Government Pleader.
" District Magistrate, Cuddapah.

READ—also the following paper:—

From Divan Bahadur S. SUBRAMANIA IYER, C.I.E., Acting Government Pleader, to the Chief Secretary to Government, dated Madras, 28th February 1893, No. 197.

I have the honour to acknowledge the Proceedings of the Government, No. 321, of the 10th instant, and to submit the following opinion.

2. The circumstances which have given rise to the present reference seem to be as follows.

3. Certain jewels and documents, said to be bonds for money lent, had been produced before the Head Assistant Magistrate of Cuddapah as evidence, or for the purpose of being put in evidence in certain criminal cases, which were pending before him. They were secured in a box in the office of the Magistrate and were stolen on the night of the 1st of July 1891.

4. It is suggested that the box, which contained these valuable properties, should not have been kept during night in the Magistrate's office, but sent for safe custody to the Collector's treasury, which was close by. It also appears that the Head Assistant's attender and police orderly, who had been directed to guard the box that night, failed to do so and thereby facilitated the commission of the theft.

5. The parties, to whom the said properties are alleged to belong, claim compensation on the ground that the loss of the properties was due to the negligence of the Head Assistant Magistrate or his subordinates.

6. The question is whether the Government is legally liable to satisfy the claims thus preferred. In other words—put in an abstract form—the point is whether the Government is liable to compensate the individuals for loss caused to them by the tortuous acts or negligence of servants or officers of Government employed in the discharge of public or sovereign functions.

7. The question is a large and important one, and, so far as I am aware, it has been considered only in two Indian cases, viz., *P. and O. Company* versus *The Secretary of State for India* (Bourke's Reports, Part VII, page 166) and *Vijayaragavachari* versus *The Secretary of State for India* (Indian Law Reports, VII, Madras, page 466).

8. In the former case the Calcutta High Court held that the Government was liable for the damages caused to the horses of the P. and O. Company by the negligence of Government servants employed in one of its dockyards. The ground of decision was that the negligence complained of was that of servants employed in carrying on the ordinary business of ship-builders (unconnected altogether with the exercise of sovereign powers) and which any firm or individual might have carried on for the same purpose. (Per Sir R. Garth, Chief Justice, Indian Law Reports, I, Calcutta, page 25.) In the course of his elaborate judgment in the case, Sir B. Peacock took care to point out that "there is a great and clear distinction between acts done in the exercise of what are usually termed sovereign powers and acts done in the conduct of undertakings which might be carried on by private individuals without having such powers delegated to them," and "where an act is done on a contract entered into in the exercise of powers usually called sovereign powers, by which we mean powers which cannot be lawfully exercised except by a sovereign or private individual delegated by a sovereign to exercise them, no action will lie."

9. It was necessary to point out the distinction herein laid down as the East India Company occupied a peculiar position. In addition to the powers delegated to it by the Crown for the purpose of government, it carried on commercial and other business in its private capacity. Consequently the rule that a sovereign is not subject to the jurisdiction of his own courts did not apply to the East India Company with reference to all its transactions. It was hence liable to be sued in our courts in certain cases, and when the country was transferred to the Crown, the Government of India was, by Act of Parliament, placed in the same position as the East India Company.

10. In the case of Vijayaragavachari, the Secretary of State was held liable to pay damages for the wrongful dismissal of a Municipal Commissioner by the Governor in Council of Madras, and I am by no means certain that the Judges that decided this case had in their view the distinction drawn by the Calcutta Court. As the decision now stands it would seem to lay down that Government is liable for the negligence of every class of its servants without any distinction whatever; but I venture to think that it can hardly be so. With the utmost deference to the learned Judges who decided the case, I must say that such a view would be opposed to the fundamental principle of law as to the non-liability of Government for *wrongs* committed by such servants as are employed to carry out the legitimate functions belonging to the supreme power in the land, and I should hesitate to advise Government to act on the footing that that view is correct. The current of decisions, both in England and America, is directly opposed to such a view. All the authorities lay down that the maxim *Respondeat superior* is inapplicable to the relation existing between the Government and its servants acting in matters appertaining to it in its public capacity. In other words, they hold that the Crown is not responsible for the negligence or tortuous acts committed by such public servants.

11. Considering the importance of the question raised, I consider I ought to draw the attention of Government to some of the leading decisions bearing on the point so as to place it beyond doubt.

12. In *Viscount Canterbury* versus *The Attorney-General*, Lord Lyndhurst, Lord Chancellor, observed: "It is admitted that for the personal negligence of the sovereign neither this nor any other proceedings can be maintained. Upon what ground, then, can it be supported for the acts of the agent or servant? If the master or employer is answerable upon the principle that *qui facit per alium, facit per se*, this would not apply to the sovereign, who cannot be required to answer for his own personal acts. If it be said that the master is answerable for the negligence of his servant, because it may be considered to have arisen from his own misconduct or negligence in selecting or retaining a careless servant, that principle cannot apply to the sovereign to whom negligence or misconduct cannot be imputed, and for which, if they occur in fact, the law affords no remedy" (*vide* Vol. I, Phillips' Reports, page 321). And in a later portion of the judgment the Lord Chancellor observed: "Now, assuming that the fire had been caused by the personal negligence of the Commissioners (of Woods and Forests), would the Crown in such case have been liable to make good the loss? They are, indeed, styled servants of the Crown, but they are, in truth, public officers appointed to perform certain duties assigned to them by the legislature, and for any negligence in the discharge of such duty, and any injury that may be sustained, they alone are, I conceive, liable. It is supposed that the Crown is responsible for the conduct of all persons holding public offices and appointments, and bound to make good any loss or injury which may be occasioned by their negligence or delinquency? At least some authority should be cited in support of such a doctrine. But then it is said these officers are appointed by the Crown, and are removable at the pleasure of the Crown. That circumstance alone will not, I conceive, create any such liability. The Keeper of the Great Seal and other persons holding high situations in the State have authority to appoint to many offices and also to remove the persons so appointed at their pleasure. But they are not on that account subject to make compensation for injury occasioned by the neglect or misconduct of the persons so appointed. The mere selection of the officers does not create a liability. But if the Crown would not be responsible for the act done, had it been done by the superiors, it follows that it cannot be held liable for the negligence of their subordinate agents whom they appoint and remove and with the selection or control of whom the Crown has no concern" (*vide* Vol. I, Phillips' Report, pages 323 and 324).

13. In *Queen* versus *McFarlane*, decided in 1882 in Canada, the Chief Justice lays down the law in the following terms: "The claim set forth in the petition is a tort pure and simple, and it is clear beyond all dispute that a petition of right in respect of a wrong in the legal sense of the word shows no title to legal redress against the sovereign. In contemplation of law the sovereign can do no wrong, and is not liable for the consequence of her own personal negligence, so she cannot be made answerable for the tortuous acts of her servants. The doctrine of '*Respondeat superior*' has no application to the Crown, it being a rule of the Common Law that the Crown cannot be prejudiced by the wrongful act of any of its officers, for, as it has been said long ago, no laches can be imputed to the sovereign, nor is there any reason that the king should suffer by the negligence of his officers or by their compacts or combinations with the opposite party" (cited in page 60 in Clode's Petition of Right).

14. These two decisions were no doubt pronounced on claims preferred by way of Petition of Right—a form of remedy unknown in this country. But I do not think that this difference in the procedure detracts from their value as precedents for the purpose relied on by me. However this may be, no such objection can be raised to the case of *Langford* versus *United States* where the question arose in an action instituted under the Statute of 1855 in the Court of Claims constituted to hear and determine claims against the State. There the Court made the following observations: "The jurisdiction of the Court of Claims has received frequent additions, but the principle originally adopted of limiting its general jurisdiction to cases of contract remains. There can be no reasonable doubt that this limitation to cases of contract, express or implied, was established in reference to the distinction between actions arising out of contracts as distinguished from those founded on torts, which is inherent in the essential nature

of judicial remedies under all systems and especially under the system of Common Law. The reason for this restriction is very obvious on a moment's reflection. While Congress might be willing to subject the Government to the judicial enforcement of valid contracts, which could only be valid as against the United States, when made by some officer of Government acting under the authority with power vested in him to make such contracts or to do acts which implied them, the very essence of a tort is that it is an unlawful act done in violation of the legal rights of some one. For such acts, however high, the position of the officer or agent of the Government who did or commanded them, Congress did not intend to subject the Government to the results of a suit in that court. This policy is founded in wisdom, and is clearly expressed in the Act defining the jurisdiction of the court, and it would ill-become us to fritter away the distinction between actions *ex delicto* and actions *ex contractu*, which is well understood in our system of jurisprudence, and thereby subject the Government to payment of damages for all wrongs committed by its officers or agents under a mistaken zeal or actuated by less worthy motives" (cited in Clode's on Petition of Rights, pages 61 and 62). The view enunciated here was recently endorsed by the United States Legislature, which, by section 1 of the Statute of 1887, expressly excluded claims for damages sounding in tort from the category of claims for which the State could be sued (see Supplement to United States Revised Statutes, Vol. I, page 559).

15. The doctrine laid down in these cases is not peculiar to the law of England, but a proposition of general law well recognised in England, in America and in the Colonies and rests upon broad grounds of public policy. It may not be out of place to quote the apt words of Justice Story on this subject: "It is plain that the Government itself is not responsible for the misfeasances, or wrongs, or negligences, or omissions of duty of the subordinate officers or agents employed 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 its operations, in endless embarrassments, and difficulties and losses, which would be subversive of the public interests, and indeed, laches are never imputable to the Government" (Story's Law of Agency, section 319).

16. Nor is there any reason to suppose that such a rule is not applicable to the Government of this country. In *Rogers* versus *Rajendra Dutt* (Bengal), which came before the Privy Council, their Lordships observed that "The civil irresponsibility of the supreme power for tortuous acts could not be maintained with any show of justice, if its agents were not personally responsible for them; in such cases the Government is morally bound to indemnify its agents and it is hard on such agents when this obligation is not satisfied; but the right to compensation in the party injured is paramount to this consideration" (VIII, Moore's Indian Appeals, page 131).

17. No doubt the Privy Council had not in the above case to decide the point now under consideration as they were only dealing with the question of the liability of an officer of Government. But the reasoning of their Lordships clearly implies that the irresponsibility of Government for a tort committed by its agent is unquestionable; for this immunity of Government is urged as a strong argument for refusing to extend a similar privilege to the agent also.

18. The above remarks deal with the contention based on the general ground that the negligence was that of a public servant in the performance of his official duties and apart and distinct from the further question as to whether such negligence amounted to violation of any special legal duty on the part of Government with respect to the particular matter to which such negligence related. Nor can it, I think, be contended that Government was under any special legal duty in connection with the properties that have been stolen so as to be answerable for their loss to the owners thereof. The properties were produced before the Head Assistant Magistrate in his judicial capacity, and were under his complete control pending his orders for their disposal in due course of law. I am not aware of any rule of Common or Statute Law which casts on Government, in respect of such articles, any duty as to their

custody or preservation or otherwise before or after the trial of the cases in which they were produced. This being so, an action against Government for damages must, in my opinion, fail.

19. I have only to add that the sections of the Contract Act quoted by the Collector in support of the alleged liability of Government do not bear on the present question. These provisions of law relate to the responsibilities arising out of a *contract of Bailment*, but it is impossible to contend that a court should imply from the facts of the present case an intention on the part of Government to enter with the alleged owners into a contract respecting the properties in question; nor can it be said that the circumstances are such as to constitute the Government a bailee thereof.

ORDER—dated 9th March 1893, No. 512, Judicial.

The Opinion of the Government Pleader will be communicated to the District Magistrate of Cuddapah, to all other District Magistrates, to all Departments of the Secretariat, and to all Heads of Departments under the Judicial Department.

2. With reference to this Opinion, the Government repudiates liability for the loss, and the party will be left to sue the Head Assistant Magistrate, Muhammad Raza Khan Sahib Bahadur, if so advised.

3. It will be decided after the suit, if any, is brought whether the cost of defending it shall be borne by Government or not.

(True Extract.)

Ag. Chief Secretary.

To the District Magistrate, Cuddapah.
" the Government Pleader.
" the " Solicitor.
" all District Magistrates
" the Chief Presidency Magistrate.
" the Inspector-General of Police.
" the " of Jails.
" the " of Registration.
" the Chief Commissioner of Police, Madras.
" all Departments of the Secretariat.

Exd. J. Moses.

P. W. CURRENT No. 2776

Govt. of {1893} Madras.

JUDICIAL.

998/1

B No. 995 dated Apl 12, 1893

Communicated to officers of the Public Works Dept.

F 23/5/93 24/5 25/5/93

Issued

Recd. 23.3.93 Encl.

G.O., 9th March 1893, No. 512.

MARCH.

C.E for I 24/5/93
C.E for Rys.
S. Engrs.
C.A.
S. of W. P.
Ex P.W.D.
Ex Ry Accts. 15/4/93
R.S.

Theft of property from custody of a Magistrate.

Directing that the opinion of the Government Pleader on the question whether Government is liable to satisfy claims on account of —, be communicated, with remarks, to the District Magistrate of Cuddapah, with reference to the case reported by him, and to all other District Magistrates.

Remarks 3/4

J. P. 1/5

P.C. 15/4
with order.