Q: Discuss the Principal of vicarious liability with special Reference Master's Liability for Torts committed by the Servents ?

Ans:- Meaning and Definition. —Generally, a man is liable for his own wrongful acts.He is not liable for the wrongful acts of others. But under certain circumstances a man may be held liable for the wrongful acts of others. This is popularly known as 'vicarious liability. The term 'vicarious liability' denotes "the liability which A may incur to C for damage caused to C by the negligence or other torts of B. It is not necessary that A shall have participated in any way in the commission of the tort nor that a duty owed in law by A to C shall have been broken. What is required is that A should stand in a particular relationship to B and B's tort should be referable in a certain manner to that relationship." The common instances of such relationship are liability of master for torts of his servants; liability of partners for forts of each other, and liability of principal for the torts of his agent. The term 'vicarious liability' is aiso often used to describe cases in which A is liable for damage caused to C by the act of B even though A's liability is in truth not vicarious at all but primary. Such is the position, for example, where an employer is held liable for damage caused by the act of independent contractor, for in that case. .....the employer is not liable unless the independent contractor's act is one which has the legal result that some duty is owed directly by the employer to the plaintiff has been broken."

Reasons for Vicarious Liability".-Traditionally it was thought that vicarious liability is based upon the principles of respondent superior * (i.e. the responsibility must be that of the superior) and *quifacit per alium facit per se'* (i.e. he who acts through others is deemed in law as doing it himself). But neither of these two principles explains correctly the reason for vicarious

liability. It is rightly pointed out. "The former merely states the rule badly in two words, and the latter merely gives a functional explanation of it." The maxim respondent superior tells us simply the result and not the reason why employer should be liable for the torts of his servants. The maxim qui facit per alium facit per se also fails to explain correctly the reason for vicarious liability although it is often referred with approval by courts. For example, in *Morgans v. Launchbury and others*, Viscount Dilberne of the House of Lords observed: 'In my view the phrase qui facie per alium facit per se correctly expresses the principles on which vicarious liability is based." But this does not seem to be the correct view because judicial efforts to find a common basis for the maxim have failed. "What was once presented as a legal principle has degenerated into a rule of expediency, imperfectly defined, and changing its shape before one's eyes under the impact of changing social political conditions" 5 It is also pointed out that the reason for vicarious liability is that and the master being richer than the servant should be held liable to pay for the torts of his servants. Thus 'public policy' or social convenience and rough justice can be said to be the correct basis of vicarious liability. To conclude in the words of Lord Pearce: "The doctrine of vicarious liability has not grown from very clear, local or legal principle but from social convenience and rough justice. The master having employed the servant, and being better able to make good any damage which may occasionally result from the arrangement, is answerable, to the world at large for all the torts committed by his servant within the scope of it."

Principal and agent-A person who authorises or procures a tort to be committed by another person is liable for that tort as if he himself has committed it. This is based on the principle expressed in the maxim *qui facit per alium facit per se.* The legal principle was correctly stated by MacKinnon,

L.J. in *Hewitt v. Rowoin*, in the following words: "If A suffers damage by the wrongful act of B and seeks to say C is liable for that damage he must establish that in doing the act B acted as the agent or servant of C. If he says that he was C's agent he must further show that C authorised the act."

The authority need not always be express. It may also be implied from the conduct of the parties and the surrounding circumstances. For example, in Lloyd v. Grace, Smith & Co., Emily Lloyd, a widow woman in humble circumstances, was robbed of her property in the office of Grace, Smith & Co., a firm of solicitors in Liverpool of long standing and repute. She was "robbed" of her property by the solicitor's managing clerk who while acting within the scope of his employment, induced the lady to sign a mortgage-deed in his own name by fraudulently misrepresenting the nature of the deed of assignment. Subsequently he misappropriated the mortgage money. The solicitors, the principal in this case, where held liable for the wrongful act of the managing clerk because the wrongful act was committed not for the benefit of his employer but for his own benefit was regarded as immaterial.

In Briess v. Wooley, Lord Reid of the House of Lords observed: The general principle of vicarious liability for fraudulent misrepresentation is now well settled. His Lordship then quoted two short passages from the speech of Lord Macnaughten in Lloyd v. Grace, Smith & Co., 12 Lord Macnaughten quoted from Lord Blackburn's speech in Houldsworth v. City of Glasgow Bank's this passage, dealing with the case of Barkwick v. English Joint Stock Bank!4. "The substantial point decided was, I think, that an innocent principal was civilly responsible for the fraud of his authorised agent, acting within his authority to the same extent as if it was his own fraud". Then Lord Macnaughten added, "That, my Lords, I think is the true principle." Then Lord

Macnaughten quoted with approval the following passage from the judgment of Bramwell, LJ. in Weir v. Bellis. "every person who authorises another to act for him in the making of contract, undertakes for the absence of fraud in that person in the execution of the authority given, as much as he undertakes for its absence in himself when he makes the contract". That passage from the judgment of Bramwell, LJ. was also quoted with approval by Viscount Haldane L.C. in Mair v. Rio Grande Rubber Estates Lid. 16 and I might add one sentence from the speech of Lord Moulton in that case 17: "Now it is elementary law that no person can take advantage of the fraud of his agent."

The facts of *Briess v. Wooley*, 18 are as follows:

The business of Nutrifood Products Ltd., was the manufacture and sale of synthetic cream. To manufacture this substance they obtained a licence from the Ministry of Food on the condition that they manufactured the cream according to a formula approved by the Ministry. The company undertaking was small and the whole business was conducted by Mr. Rosher, the managing director. From the outset Mr. Rosher disregarded the formula and added much more water to the cream than he was permitted to do. This was a criminal offence, but it produced substantial profits which could not have been made by lawful means. None of the other directors or shareholders were aware. Mr. Rosher concealed his offence from the Ministry by making false returns. When it became difficult to carry on this system Mr. Rosher sought to sell the business. Without informing his co-directors he approached the appellants who he knew were willing to buy the business.

He told them truthfully that the company had a licence and allocation of raw materials and he showed them accounts which were accurate, but he concealed from them the fact that he had been acting illegally and that, if he

complied with the conditions of the licence, the total output of cream would have been so much small that the profits could not have been made. The false picture which he thus presented to them was a fraudulent misrepresentation.

Master and Servant.— The liability of a master for torts committed in the course of employment is joint and several. A master is vicariously liable for the act of his servant acting in the course of his employment. Unless the act is done in the course of employment, the servant's act does not make the employer liable. In other words, for the master's liability to arise, the following essentials must be there:-

(a) The person committing the tort must be servant.

(b) The tort committed by the servant must be in the course of his employment,

(c) The act must be a wrongful act authorised by the master or a wrongful and unauthorised mode of doing some act authorised by master.

Who is a servant?- Since one of the essentials for master's vicarious liability is that the tort must be committed by his servants, it becomes necessary to know as to who is a servant. In *Hewitt v. Bonvin*, 38 Mackinnon, L.J., said that the definition of serv in Salmond on Torts 39 could hardly be bettered: "A servant may be defined as any person employed by another to do work for him on terms that respect of the manner in which his work is to be done." This definition emphasises the master's right of control and direction over the servant. It may be noted here that control "can no longer be regarded as the sole determining factor... A distinction is made between a contract of service and contract of services and it is said that a servant is employed under the former, is, a contract of service. According to Lord Thankerton, a contract

of service has the following four elements: (a) master's power to select his servant, (b) payment of wages by master to servant, (c) Master's right to control the method of doing the work, and (d) right of master to suspend or dismiss the servant. But it has been rightly "It is clearly the law that such professionally trained persons as the master of a ship, the captain of an aircraft and the house surgeon at a hospital are all servants for whose torts their masters are responsible, and it is unrealistic to suppose that a theoretical right in a out, master, who is as likely as not to be a corporate and not a natural person, to control how any skilled worker his job, can have much substance. It has, therefore, now been recognised that the absence of such control is not conclusive against the existence of a contract of service " As suggested by Salmond, "Perhaps it would be better to make the test of control depend on the master's right to control the servant's time rather than the manner of doing his job in that time 46 what has been called the 'when' and the "where' rather than 'how of the work". For example, if a surgeon is employed by the Government of U.P. in Gandhi Memorial College and Associated Hospitals, it is unrealistic to suppose that the employer can control the manner in which he operates his patients. The employer can control the time rather than the manner in which the surgeon does his job.

Whose is the servant? or Liability of Master when he lends his servant to another person.-A difficult problem arises when a master lends his servant to another person for some transaction and the servant causes injury to a person, say X. Can X recover damages from the first (general or permanent employer) master or from the person whom the servant has been lent? Such a problem arose is *Mersey Docks and Harbour Board v. Coggins and Griffith (Liverpool) Ltd*., where the respondents hired from the appellants crane along with the driver to load a ship. In the course of loading, a third

party was injured due to the negligence of the driver. Al the material time the driver was under the immediate control of the respondents yet the House of Lords held the appellants liable because they were the general or permanent employer and had the power to direct how the driver should work the crane and manipulate its controls. The decision in such cases depends upon a number of factors. "Who is paymaster, who can dismiss, how long the alternative service lasts, what machinery is employed, have all to be kept in mind". In the present case, the decision on the question, "Where the authority lie to direct or delegate to the workman, the manner in which the vehicle is to be driven?" The answer to this question depends upon the facts and surrounding circumstances of the case. If a general or permanent employer lends his servant to another there is a presumption that he retains the authority to direct the manner of the work. This presumption may be rebutted by the general or permanent employer by proving them otherwise. Lord Porter of the House of Lords pointed out that amongst the many tests suggested, the most satisfactory by which to ascertain who is employer at a particular time, is to ask who is entitled to tell the employee the way in which he is to do the work upon which he is engaged. It is not enough that the task to be performed should be under his control, he should control the method of performing it. It is true that in most cases no orders as to how a job should be done are given or required: the man is left to do his own work in his own way. But the ultimate question is not what specific, or whether any specific orders, were given but who is entitled to give the orders as to how the work should be done.

Liability for casual delegation.-Where X, master of car, allows Y to use his car for his own purpose or for some purpose in which he is interested, but retains his right of control over Y and Y injures Z by negligent car driving, Z can recover damages from X. In Ormrod v. Crossville Motor Services Ltd.,

the owner was attending the Monte Carlo motor car rally. He asked a friend to drive the car from Birekenhead to Monte Carlo. The friend was carrying a suit case belonging to the owner. Later they were to go on a holiday together in the car. While the motor car was being driven it collided with a motor omnibus and the owner of the car was held responsible for the damage. Lord Denning observed: "it has been supposed that the owner of a vehicle is only liable for the negligence of the driver if that driver is his servant acting in the course of his employment. This is not correct. The owner is also liable if the driver is, with the owner's consent, driving the car on the owner's business or for the owner's purposes."

There is a presumption that a vehicle is driven on the master's business and by his authorised agent or servant but the presumption can be met.

The Course of Employment.--As noted above, one of essential conditions for the vicarious liability of master for the tort committed by the servant is that the tort must, have been committed in the course of employment. But it is equally well settled that if the servant at the time of the accident, is not acting within the course of employment but is doing something for himself the master is not liable.57 As pointed out by John Salmond, 58 "a master is not responsible for the negligence or other wrongful act of his servant simply because it is committed at a time when the servant is engaged on his master's business. It must be committed in the course of that business, so as to form a part of it, and not be merely coincident in time with it."

Q:-discuss the defence of volenti non fit Injuria Are there Any Exceptions to it? Discuss.

Answer:-

In an action in tort, the plaintiff is required to prove the essential elements of the ton which the defendant is alleged to have committed. Even when the plaintiff proves the essential elements of the tort, the defendant may avoid his liability if he is able to establish that any of the recognised general defences or exceptions to liability in torn applies in his case. The recognised general defences are the following: -

1. Volenti Non fit Injuria or Leave and Licence.
2. Act of God.
3. Inevitable Accident.
4. Act of State.
5. Private Defence.
6. Mistake.
7. Statutory Authority.
8. Damage Incident to Authorised Acts.
9. Necessity.
10. Plaintiff, a wrong-doer.
11. Exercise of Common Rights.
12. Acts causing slight harm.

13. Judicial and Quasi-Judicial Acts.

14. Parental and Quasi-Parental Acts.

15. Executive Acts, and

16. Contributory Negligence.

1. Volenti non fit injuria or leave and licence.—One of the recognised general defences to liability in tort is that the plaintiff consented or assented to the doing of an act which caused harm to him, the defendant would not be liable. This is known as *volenti non fit injuria*, or Leave and Licence. This defence is founded on good sense and justice. One who has or assented to an act being done towards him cannot, when he suffers from it, complain of it as a wrong. The question of application of the maxim may arise only if it is established that a tort has been committed by the defendant. "To a layman, a person who has consented to the infliction of damage on himself should not be heard to complain thereafter. As a legal profession, this simple statement requires drastic qualification. An important preliminary point is the truism that if a defendant has not committed any breach of duty, he cannot be liable; in which case a defence of consent, or indeed any other defence, is irrelevant." The defendant can avoid his liability if he proves that the plaintiff consented not only to the physical risk or actual damage but also to the legal risk, i.e., the risk of actual damage for which there will be no redress at law. It is easy to prove this consent where the plaintiff has entered into a contract wherein he a undertaking to bear the risk himself. But it may also be inferred from the facts and circumstances of the cases even though there is no contract between the plaintiff and the defendant. For example, if A and B are competitors in a boxing match, it is implied that they have consented to bear the risk usually involved. But if one of the competitors acts against the rule of the game or uses violence beyond

what is necessarily required, the maxim of volenti non fit injuria will not apply. The consent may also be inferred from the conduct of the parties. For example, *in Imperial Chemical Industries Ltd. v. Shatwell* the respondent and his brother, James, were employed in the appellant's quarry. In total disregard of the defendant's order and also some statutory regulations, they decided to test some detonators without taking the requisite precautions. Consequently, the respondent was injured in an explosion due to the negligence of James. He brought an action against the appellants (defendant in the trial court) on the ground that they were vicariously liable for the negligence of James and breach of statutory duty in the course of employment. It was held that the appellants were not liable because James would not have been liable had he been sued. The maxim volenti non fit injuria, applied because it was clear from the conduct of the respondent that he had consented to the risk or injury involved. Lord Reid of the House of Lords observed:

"If the plaintiff invited or freely aided and abetted his fellow servant's disobedience, then he was volens in the fullest. He cannot complain of the resulting injury either against the fellow-servant or against the master on the ground of his vicarious responsibility for his fellow-servant's conduct. "

As regards the argument that at least as between master and servant, volenti non fit injuria, is a deed or dying defence, Lord Reid observed :

"That I think is because in most cases where the defence would now be available it has become usual to base the decision on contributory negligence. Where the plaintiff's own disobedient act is the sole cause of the injury, it does not matter in the result whether one says 100 per cent contributory negligence or volenti non fit injuria. If we adopt the inaccurate habit of using the word 'negligence' to denote a deliberate act done with full knowledge of the risk it is not surprising that we sometimes get into difficulties..... there is a world of difference between the

two fellow servants collaborating carelessly so that the acts of both contribute to cause injury to one of them, and two fellow servants combining to disobey an order deliberately though they knew the risk involved. It seems reasonable that the injured man should recover some compensation in the former case but not in the latter. If the law treats both as merely cases of negligence it cannot draw a distinction. But in my view the law does and should draw a distinction. In the first case only the partial defence of contributory negligence is available. In the second volenti non fit injuria, in a complete defence if the employer is not himself at fault and is only liable vicariously for the acts of the fellow servant."

It was also argued on behalf of the respondent that there is a general rule that the defence of volenti non fit injuria, is not available where there has been a breach of a statutory obligation. Lord Reid entirely agreed that an employer who was himself at fault in persistently refusing to comply with a statutory rule could not possibly escape liability because the injured workman had agreed to waive the breach. But in the present case the prohibition of testing except from a shelter had been imposed by the appellants before the statutory prohibition was made. Lord Reid, therefore, held:

I can find no reason at all why the facts that these two brothers agreed to commit an offence by contravening a statutory prohibition imposed on them as well as agreeing to defy their employer's orders should affect the application of the principle volenti non fit injuria, either to an action by one of them against the other or to an action by one against their employer based on his vicarious responsibility for the conduct of the other."

Since the defendant can avoid his liability on the ground that the plaintiff consented or assented to the risk involved, it is necessary that the consent must be based on full knowledge of the facts. For example, in White v. Blackmore the

plaintiff's husband had signed on as a competitor in an old car race organised by the defendant. For admission spectators it was one of the conditions that in case of any accident, the defendants who not be liable. Since plaintiff was one of the spectators, he was allowed admission free charge but had to pay for the admission of his family. After taking part in the race plaintiff joined his family to witness another race. Then he stood just outside the spectator's rope near the place where two safety ropes were tied. The wheel of a racing ca having got entangled in a safety rope, he was catapulated about twenty feet and died as result of the injury. The plaintiff brought an action to recover damage for negligence in respect of the death of her husband. The defendant pleaded that the maxim volenti non fir injuria applies and he was not liable. The court did not accept this argument and held that the maxim of volenti non fit injuria did not apply in this case because when the plaintiff signed as a competitor he did not have full knowledge of the risk which might arise from the defective lay out of the ropes and that he had not willingly accepted the risk of injury which could arise from the fault of the defendants.

The maxim applies in the first place, to intentional acts which would otherwise be tortious. For example, a person who trespasses on the land of another with the knowledge that there are spring guns in the wood or dangerous spots, cannot claim damages for an injury suffered by accidentally treating on the latent wire communicating with the gun and thereby letting it off. In the second place, the maxim applies to consent to run the risk of accidental harms which would otherwise be actionable. In such type of harms, in the absence of consent of the plaintiff, the defendant would be liable for a breach of duty of care. Consent exempts the defendants from the duty of care and hence excludes his liability for negligence. Thirdly, consent must be real, consent under protest or duress is no consent.

Consent to be a valid ground for avoiding the liability of the defendant must contain certain essential requisites. Consent must be in respect of some legal act. Consent to illegal act is no consent at all. Besides this consent must be voluntary. Moreover, consent must be to bear the legal risk. Mere knowledge of the risk is not the same thing as consent to run the risk. In other words, there are certain limitations of the maxim.

Limitations of the maxim.-The limitations of the maxim are the following:

(i) Consent must be voluntary and free.

(ii) Knowledge does not necessarily imply assent or consent.

(iii) Consent must not generally be to illegal acts.

(iv) The maxim does not apply to cases of negligence.

(v) The maxim does not apply to rescue cases.

(vi) Unfair Contract Terms Act, 1977.

It will be desirable to discuss below each of these limitations in a little greater detail :

(i)Consent Must be voluntary and free.-One of the limitations of the maxi that the consent must be freely given. If the plaintiff has no free choice or the consent has been obtained by fraud, coercion, misrepresentation, undue influence or mistake, the maxim volenti non fit injuria will not apply. Thus free choice or consent is one of the prerequisites for the application of the maxim because "a man cannot be said to be truly willing unless he is in a position to choose freely and freedom of choice predicates not only full knowledge of the circumstances on which the exercise of choice is conditional, so that he may be able to choose wisely, but the absence of

any feeling of constraint so that nothing shall interfere with the freedom of his will."7 This observation was quoted with approval by *Lord Hudson in Imperial Chemical Industries Ltd. v. Shatwell.*

In Osborne v. London & North Western Rly Co., Wills, J. observed : "...If the defendants desired to succeed on the ground that the maxim volenti non fit injuria is applicable, they must obtain a finding of facts that the plaintiff freely and voluntarily, with full knowledge of the nature and extent of the risk he ran, impliedly agreed to incur it". This dicta was applied by the Queen's Bench Division in *Burneti v. British Waterways Board*. The facts of the case are the following:

The plaintiff was a lighterman employed by the defendants who owned a barge. The defendants had excluded their liability for injury, loss or damage from whatever cause arising. The barge was being towed with other barges to a dock. The plaintiff admitted that he had known the notice relating to exclusion of liability but did not think that it applied to the work he was doing at the time of the accident. The defendants admitted their negligence but contended that their liability was excluded on the ground of volenti non fit injuria because the plaintiff had consented to the risk of injury. It was held that the maxim volenti non fit injuria did not apply. Waller, J. observed : "The plain fact, as I see it, is that the plaintiff was not really in a position to exercise a free choicell" Further, "He was not free in the sense in which I think the words must be used in circumstances like these. He was an employee sent by his employer with a barge to this particular place. By the time the incident took place his barge was part of a train. If he ever had free choice it was when he became a lighterman, because his employer at the time was frequently going to send him to this particular dock. In my view, that imposes restrictions on the plaintiff's freedom of choice...I think that the reality of this case is that the plaintiff had no free choice. He had to do the job that he was sent to, and he was not

voluntarily incurring the risk of negligence on the part of the defendant. Accordingly...the defence of volenti non fit injuria fails in this case and that the plaintiff is entitled to judgment."

(ii) Knowledge does not necessarily imply assent or consent.- It is said, and rightly too, that the maxim is volenti non fit injuria and not scienti non fit injuria. That is to say, mere knowledge of the risk or danger is not sufficient, knowledge of the risk is necessary but it alone cannot attract the application of the maxim. For application of the maxim the plaintiff must not only have the knowledge, but also the consent to run the risk. That is to say, ".....to be sciens is not enough. The plaintiff must also be volens, that is to say a real consent to the assumption of the risk without compensation must be shown by the circumstances."13 Thus, "the maxim..... is not volenti non fit injuria but volenti. It is plain that mere knowledge may not be a conclusive defence. There may be perception of the existence of the danger without comprehensive of the risk: as where the workman is of imperfect intelligence or though he knows the danger, remains imperfecily informed to its nature and extent. There may again be concurrent facts which justify the injury whether the risk though known was really encountered voluntarily."

This was observed by Bowen, L.J. *in Thomas v. Quartermain*. The facts of the case are the following :-

The plaintiff was an employee in the defendant's brewery and worked in the cooling room. The passage between a boiling vat and a cooling vat was very narrow, just three feet. The rim of the cooling vat stood about sixteen inches-above that passage. The plaintiff traversed the passage to get aboard from under the boiling vat. The board was used as a lid. While the plaintiff was tugging the board, it came out so suddently that the plaintiff lost balance and fell in the cooling vat and was seriously injured. He brought an action against the defendant to recover

damages. The court held that the defendant was not liable because the plaintiff had the knowledge of the risk and under the circumstances of this case ".....Knowledge such as this amounts to voluntarily encountering the risk.

Thus, it is necessary to prove that the plaintiff not only had the knowledge but also consented to run the risk. This was clearly recognised by the House of Lords in Smith y Baker15 the facts of which are briefly stated below :

The appellant, Smith, was an employee of the respondents and worked in a cutting on the top of which a crane swung heavy stones over his head. He was engaged in drilling the rock face in the cutting. The risk that heavy stones might fall upon him was known to him as well as to his employer. But no warning was given to him when the crane swung heavy stones over his head. The appellant was injured when a stone from the crane fell upon him. He brought an action to recover damages against his employers and they were held liable. While holding that the maxim volenti non fit injuria did not apply in this case, Lord Herschell observed : "The principle embodied in the maxim has sometimes, in relation to cases of employer and employed, been settled thus : A person who is engaged to perform a dangerous operation takes upon himself the risks incidental thereto. To the proposition just stated, there is no difficulty in giving an assent provided that what is meant by engaging to perform a dangerous operation, and by the risks incidental thereto, be properly defined. Where a person undertakes to do work which is intrinsically dangerous, notwithstanding that reasonable care has been taken to render it as little dangerous as possible, he no doubt voluntarily subjects himself to the risks inevitably accompanying it, and cannot, if he suffers, be permitted to complain that a wrong has been done to him even though the cause from which he suffers might give to the other a right of action... But that is not the sort of case with which we have to deal here. It was a mere question of risk which might never

eventuate in disaster. The plaintiff evidently did not contemplate injury as inevitable-not even, I should judge as possible. When then a risk to the employed, which may, or may not result in injury, has been created or enhanced by the negligence of the employer does the mere continuance in service, with knowledge of the risk, preclude the employed if he suffers-from such negligence from recovering in respect of his employer's breach of duty? I cannot assent to the proposition that the maxim volenti non fit injuria applies to such a case, and that the employer can invoke its aid to protect him from liability for his wrong.."

Yet another illustrative case on the point is Dann. v. Hamilton. In this case, the plaintiff, a lady, was injured due to the negligent driving of Hamilton. She had entered te car of Hamilton knowing that he was under the influence of drink to the extent as mg increase the chances of collision due to his negligence. But the court held that the defendant was liable because mere knowledge to run the risk does not necessarily imply assent to run the risk. It may be noted here that although Hamilton was under the influence of the drink, he was not dead drunk. Giving the reasons for the decision, Asquith J, observed : "There may be cases in which the drunkenness of the driver at the material time is so extreme and so glaring that to accept a lift from him is like engaging in an intrinsically and obviously dangerous occupation, intermeddling with an unexploded bomb or walking on the edge of an unfenced cliff. It is not necessary to decide whether in such a case the maxim 'volenti non fit injuria' would apply for the present case, I find as i act that the driver's degree of intoxication fell short of this degree. I, therefore, conclude that the defence fails and the claim succeeds. 18 It may be noted here that contributory negligence on her part could have been a defence, but it was not pleaded.

Thus, along with the knowledge of the risk, it is also necessary to establish that the plaintiff consented to bear the risk. This consent may either be express or

implied. It may be implied or inferred from the conduct of the parties and circumstances of the case.

Illustrations

(i) 'X' and Y were together invited for dinner at a place. At the time of dinner 'X got too much drunk. 'Y" also knew this fact. After the dinner X' offered a lift to 'Y in his car with a view to leave Y at his residence. Y accepted the offer, on the way due to the negligence there was an accident in which 'Y' got injured. The car was being driven by X' himself.

The maxim volenti non fit Injuria will apply in this and "X' will not be liable because Y knew that X' was too much' drunk. The case of Dann v. Hamilton discussed above will not apply because in that case though the driver was drunk, he was not so drunk as to be incapable of taking care. In the present case the defendant was too much drunk' and was thus incapable of taking care and this fact was known to 'Y". |

(ii) The conductor of an overcrowded bus invited passengers to travel on the roof. In course of its journey, the bus while trying to overtake a cart, swerved to the right. A passenger X' travelling on the roof fell down, sustained injuries and died next day. Determine the liability of the driver, conductor and the passenger 'X.

(iii) Consent to Illegal acts.-If a person is charged with a criminal offence, he cannot avoid his liability on the ground that the victim consented to the commission of the crime. That is to say, the maxim of volenti non fit injuria should not apply such a case. But such a general or wide proposition cannot be accepted in the field of law of tort. It has been rightly written, "Certainly it cannot be true that the maxim is excluded whenever the act constitutes a crime as well as a tort, for every assault is criminal and so are some libels, and yet it is possible, by assent, to negative

tortious liability for many kinds of assault and libel. Winfield took the view, however, that whenever the act is contrary to public policy, an admittedly vague conception, volenti non fit injuria is inapplicable, but he did not conclude from this that in such cases the plaintiff can succeed. It is true that the maxim ex turpi causa non oritur actio is of extremely limited application in the law of tort, but it does have its place, and it is submitted, is sufficient to defeat a plaintiff whose consent to a tort is invalidated on the grounds of public policy."

(iv)Application of the maxim in cases of negligence.-As noted earlier, the plea of volenti non fit injuria can succeed if the defendant establishes that the plaintiff consented to run the risk. But even when it is shown that the plaintiff assented to bear the risk usually it does not include the negligence of the defendant. For example, in Slater v. Clay Cross Co. Ltd. 24 the plaintiff was struck by a train while she was lawfully waiking along a narrow tunnel on a narrow railway track owned and occupied by the defendants. She was struck and injured due to the negligence of the driver. The defendants were held liable. Denning, L.J. observed : "..... When this lady walked in the tunnel, although it may be said that she voluntarily took the risk of danger from the running of the railway in the ordinary and accustomed way nevertheless she did not take the risk of negligence by the driver."

(vi) *Unfair Contract Terms Act, 1977.*—Yet another exception to the maxim volenti non fit injuria has been provided in Section 2 of the Unfair Contract Terms Act, 1977. Section 2 provides the following:

(1) A person cannot by reference to any contract term or to notice given to persons generally or to a particular person exclude or restrict his liability for death or personal injury resulting from negligence.

(2) In the case of loss or other damage, a person cannot so exclude or restrict his liability for negligence except in so far as the term or notice satisfied the requirement of reasonableness.

Q:Discuss the liability of the Government for the tort committed its public seravet of due statement that "the Distinction between the sovereign And Non sovereign function no more Exists?

Answer:-

VICARIOUS LIABILITY OF GOVERNMENT FOR THE TORTS COMMITTED BY ITS SERVANTS

English Law.-Before the Crown Proceedings Act, 1947, no action in tort lay against the Crown for wrongful acts authorised by the Crown or for wrongful acts committed by its servants in the course of their employment. Its historic and jurisprudentially support lies in the oft-quoted words of Black-stone: "The king can do no wrong. .The king, moreover, is not only incapable of doing wrong; he can never mean to do an improper thing: in him is no folly or weakness". In modern times, the chief proponent of sovereign immunity doctrine has been Mr. Justice Holmes who declared for an unanimous Supreme Court in *Kawankea v. Polybank'*: "A sovereign is exempt from suit, not because of any formal conception or obsolete theory but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends". But as pointed out by the Supreme Court of India :"Today hardly anyone agrees that the stated ground for exempting the sovereign from suit is either logical or practical."

Probably, being motivated by these considerations, the British Parliament enacted the Crown Proceedings Act, 1947 which came into force on January 1, 1948. Section 2 (1) lays down the following:

"Subject to the provisions of this Act the Crown shall be subject to all these liabilities in tort to which if it were private person of full age and capacity, it would be subject:

(a) in respect of torts committed by its servants or agents;

(b) in respect of any breach of those duties which a person owes to his servants or agents at common law by reason of being their employer;

(c) in respect of any breach of the duties attaching at common law to the ownership. occupation, possession or control of property".

Proviso to the above section, however, adds that no proceeding shall lie against the Crown by virtue of a servant or agent of the Crown, unless the act or omission would, apart, from the provisions of the Act, have given rise to a case of action in tort against the servant or agent or his estate. Besides this limitation on the Crown's general liability in tort, there are three other limitations. In the first place, Crown is liable only for the torts of officers or servants who are appointed directly or indirectly by the Crown and whose salary etc. are paid out of the fund or moneys provided by the Parliament. 138 Secondly, the Crown is not liable for acts of persons performing judicial functions. 139 Thirdly, the Crown is also immune from liability in respect tort comprising of death or personal injury caused by a member of the armed forces on duty to another member of the armed forces,

Indian Law. -In India, Article 300 of the Constitution of India deals with the liability of Government. It provides the following:

(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.

(2) If at the commencement of this Constitution

(a) any legal proceedings are pending to which the Dominion of India is a party, the Union of India shall be deemed to be substituted for the Dominion in those proceedings; and

(b) any legal proceedings are pending to which a Province or an Indian State is a party, the corresponding State shall be deemed to be substituted, for the Province or the Indian State in those proceedings.

It would be noticed that Article 300 as noted above, consists of three parts. The first part deals with the question about the form and cause-title for a suit, intended to be filed by or against the Government of India, or the Government of a State. The second part provides, inter alia, that a State may sue or be sued in relation to its affairs in cases like those in which a corresponding province might have sued or been sued if the Constitution had not been enacted. In other words, when a question arises as to whether a suit can be filed against the Government of a State, the enquiry has to be: could such a suit have been filed against a corresponding province of the Constitution had not been passed? The third part of the article provides that it would be competent to the Parliament or the Legislature of a State to make appropriate provisions in regard to the topic covered by Article

300 (1). Since no such law has been passed by the Parliament or any State Legislature, the question as to whether the Government is liable to be sued for damages for torts committed by its servants in the course of their employment, has to be determined by reference to another question and that is, such a suit would have been competent against the corresponding Province.

In order to know the present position we will have to know the position that existed before the enactment of the Constitution. Thus the liability of State for any tortious act committed by its servant while discharging a duty assigned to him by virtue of delegation of sovereign power is historical in its evaluation. The East India Company which started as a trading concern acquired territories and started exercising sovereign functions. When the British Crown took over the administration of the territories administered by the East India Company, Government of India Act, 1858, was passed. The liability of the State being sued was embodied in Section 65 of the Act which provided the following:

"The Secretary of the 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 make 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 East India Company"

Section 65 of the Government of India Act, 1858, was re-enacted as Section 32 of the Government of India Act, 1915, and as Section 176 of the Government of India A 1935. In the Constitution of India, the corresponding provision in Article 300 (1), which has been noted above. Thus the liability of the State will be same as that of the F India Company before the enactment of Government of India Act, 1858.

The classic decision on the subject is *Peninsular and Oriental Steam Navigation Co. v. Secretary of State for India*, rendered by Peacock, C.J. The facts of this case are & follows:-)

A servant of the plaintiffs was proceeding from Garden Beach of Calcutta in a carriage drawn by a pair of horses belonging to the plaintiffs, and driven by a coachman in their employ. While the coach was passing along Kidderpore Dockyard which is a government dockyard of which the Superintendent of Marine is the head certain workmen in Government employ who had been engaged in rivetting a piece of iron funnel casing, weighing about 300 hundredweight and being 8 or 9 feet long and about 2 feet high were carrying the rod along the road. The men carrying the load were walking along the middle of the road. The coachman called out to warn the men who were carrying the iron. The men attempted to get out of the way, those in front tried to go the one side and those behind tried to go the other. The consequence of this was a loss of time, which brought the carriage close up to them, before they had left the centre of the road. They got alarmed at the proximity of the carriage and the horses suddenly dropped the iron and ran away. The iron fell with a great noise which started the plaintiff's horses which thereupon rushed forward violently and fell on the iron resulting in injuries to one horse. That the injuries to the horse were due to negligence of the defendant's servants was not disputed before the learned judge, and the case proceeded on that basis. The learned judge after elaborately considering several decisions referred to the commercial business indulged in by the company observed that the commercial business was continued to be carried on by the Government. Referring to the Bengal Marine & the Bullock train which were established by the East India Co., and continued by the Government for conveyance by sea, by river and land not merely of public officers and of Government stores but also of private passengers and goods for hire, the learned judge held that while indulging in such

activities the East India Company and the Government would be subject to the same liabilities as individuals. In this connection, the learned Judge observed as follows:

"We are of the opinion that for accidents like this, if caused by the negligence of servants by Government, the East India Company, would have been liable. both before and after the 3rd & 4th Wm IV, C. 85, and that the same liability attaches to the Secretary of State in Council, who is liable to be sued for the purpose of obtaining satisfaction out of the revenues of India". Chief Justice Peacock further observed: "There is a great and clear distinction between acts done in exercise of what are usually termed sovereign powers, and act done in the conduct of undertakings which might be carried on by private individuals without having such powers delegated to them". Having thus enunciated the basic principle, the Chief Justice stated another proposition flowing from it. He observed that "where an act is done, or a contract is entered into, in the exercise of powers usually called sovereign powers, by which we mean powers which cannot be lawfully exercised except by sovereign, or private individuals delegated by a sovereign exercise then, no action will lie.

The above observation was quoted with approval by Gajendragadkar, C.J., in *M/s Kasturi Lal Ralia Ram Jain v. The State of* U.P. Gajendragadkar, C.J., observed that it follows naturally that where an act is done or contract is entered into, in the exercise of powers which cannot be called sovereign powers action will lie. Thus, it is clear that the case of P. & O. Steam Navigation Co., recognises a material distinction between acts committed by the servants employed by the State where such acts are referred to the exercise of sovereign powers delegated to the public servants which are not referable to the delegation of any sovereign powers. If a tortious act is committed by a public servant and it gives rise to a claim for damages, the question to ask is: was the tortious act committed by public servant in

discharge of statutory functions which are referable, and ultimately based on the delegation of the sovereign powers of the State to such public servant? If the answer is in the affirmative, the action for damages for loss caused by such tortious act will not lie. On the other hand, if the tortious act has been committed by a public servant in discharge of duties assigned to him not by virtue of delegation of any sovereign power, an action for damages would lie. The act of the public servant committed by him during the course of his employment is, in this category of cases, an act of a servant who might have been employed by a private individual for the same purpose. This distinction which is clear and precise in law, is sometimes not borne in mind in discussing question of the State liability arising from tortious act committed by public servant. That is why the clarity and precision with this distinction was emphasised by Chief Justice Peacock as early as 1861 has been recognised as a classic statement on this subject.

Reference may be made here to the case of The Secretary of State for India in Council V. Hari Bhanji. in which a contrary view was taken. It was held: "The acts of State of which the municipal courts of British India are debarred from taking cognizance, are acts done in the exercise of sovereign powers which do not profess to be justified by municipal law". Further, "where an act complained of is professedly done under the sanction of municipal law and in the exercise of powers conferred by that law, the fact that it is done by the sovereign power is not an act which could possibly be done by a private individual, does not oust the jurisdiction of the civil court." This view seems to be the correct one in view of the modern conditions and times. The Law Commission in its first report in 1956, also expressed the view that the law laid down in Hari Bhanji's case is correct and recommended its adoption. A bill was in fact introduced in the Parliament to give effect to the recommendation of the Law Commission but was not pursued further by the Government.

In *State of Rajasthan v. Mst. Vidyawati,* the question relating to the liability of the Government for the torts committed by its servants in the course of employment was considered by the Supreme Court of India. In this case, respondent No. I's husband and father of minor respondent No. 2 had been knocked down by a Government jeep car which was rashly and negligently driven by an employee of the State of Rajasthan. The said car was, at the relevant time, being taken from repair shop to the Collector's residence and was meant for Collector's use. A claim was then made by the respondents for the damages against the State of Rajasthan and the said claim was allowed by the Supreme Court. Speaking for the Court Sinha, C.J. observed: "In this connection it has to be remembered that under the Constitution we have established a welfare State, whose functions are not confined only to maintaining law and order, but extend to engaging in all activities including industry, public transport, State trading, to name only a few of them. In so far as the Sate activities have such wide ramifications involving not only the use of sovereign powers but also its powers as employers in so many public sectors, it is too much to claim that they should be immune from the State consequences of tortious acts of its employees committed in the course of their employment as such."

Further, "It was impossible, by reason of the maxim 'the King can do no wrong' to sue the Crown (in England) for the tortious act of its servant. But it was realised in the United Kingdom that the rule had become outmoded in the context of modern developments in State Craft, and Parliament intervened by enacting the Proceedings Act, 1947, which came into force on January 1, 1948. Hence the very citada of the absolute power *of the sovereign has been blown up."* The Court therefore concluded as follows: "Viewing the case from the point of view of first principles, there should be no difficulty in holding that the State should be as much liable for tort in respect of a tortious act committed by its servant within the scope of his employment and function as any other employer. The immunity of the Crown

in United Kingdom, was based on the old feudalistic notions of justice, namely, that the King was incapable of doing a wrong, and therefore of authorising or instigating one, and that he could not be sued in his own courts. In India, ever since the time of the East India Company, the sovereign has been held liable to be sued in tort or in contract, and the common law immunity never operated in India."

The above observation may apparently give the impression that the State may also be liable for the tortious acts committed by its employees in the course of their employment which may be referable to the exercise of sovereign functions delegated to them but this was dispelled by the Supreme Court of India in a subsequent case, namely, *M/s Kasturi Lal Ralia Ram Jain v. The State of U.P.*, Ganjendragadkhar, C.J., speaking for the Full Bench, pointed out that in *State of Rajasthan v. Mst. Vidyavati,* the negligent act which gave rise to the claim for damages against the State of Rajasthan was committed by the employee of the State while he was driving the jeep car from the repair shop to the Collector's residence and the question which arose for the decision was: did the negligent act committed by the Government empluyee during the journey of the jeep car from the workshop to the Collector' residence for the Collector's use give rise to a valid claim for damages against the State of Rajasthan or not? With respect we may point out that this aspect of the matter has not been clearly or emphatically brought out in discussing the point of law which was decided by the court in that case. But when we consider the principal facts on which the claim for damages was based, it is obvious that when the Government employee was driving the jeep car from the workshop to the Collector's residence for the Collector's use, he was *employed on a task or an undertaking which cannot be said to be referable to, or ultimately based on the delegation of sovereign or governmental powers of the State*" His Lordships cautioned: "In dealing with such cases, it must be borne in mind that when the State pleads immunity against claims for damages resulting from injury caused by

negligent acts of its servants, the area of employment referable to sovereign powers must be strictly determined. Before such a plea is upheld, the court must always find that the impugned act was committed in the course of an undertaking or employment which is referable to the exercise, of sovereign power, or to exercise of delegated sovereign power, and in the case of State of Rajasthan, [1962 Supp. (2) SCR 989: AIR 1962 SC 933], this court took the view that the negligent act in driving jeep car from the workshop to the Collector's bungalow for the Collector's use could not claim such a status. In fact, the employment of a driver to drive the jeep car for the use of a civil servant is itself an activity which is not connected in any manner with the sovereign power of the State at all. That is the basis on which the decision must be deemed to have been founded.

His Lordship further added, "It is not difficult to realize the significance and importance of making such a distinction particularly at the present time when, in pursuit of their welfare ideal, the Government of the State as well as the Government of India naturally and legitimately enter into many commercial and other undertakings and activities which have no relation with the traditional concept of governmental activities in which the exercise of sovereign power is involved. It is necessary to limit the area of these affairs of the State in relation to the exercise of sovereign power, so that if acts by Government employees in relation to other activities which may conveniently be described as non-governmental or non-sovereign, citizens who have a cause of action for damages should not be precluded from making their claim against the State. That is the basis on which the area of the State immunity against such claims must be limited; and this is exactly what has been done by the court in its decision in the case of State of Rajasthan [1962 Supp. (2) SCR 989: AIR 1962 SC 933].

Thus the scope and effect of the observation in *State of Rajasthan v. Mst. Vidyavati* was not only diluted but nullified by the Supreme Court in Kasturi Lal's case. But this was not proper because it obstructed the healthy development of the law in this respect especially when the Parliament has turned a deaf ear to all the recommendations for the amendment of Article 300 of the Constitution. In Vidyavati's case the Supreme Court rightly remarked that the very citadel of the absolute power of the sovereign has been blown up". There is therefore no justification of retaining the same in India. Despite the clarification made by Supreme Court in Kasturi Lal's case, the importance of the observations made in *Vidyavati's case* still remains. This has been acknowledged by the Supreme Court itself. For example, in *Saheli*, a Women's Resources Centre v. Commissioner of Police, Delhi, 152 the Supreme Court quoted with approval the abovementioned observation in *Vidyavati's case*.

It will be desirable here to refer briefly the facts in *M/s Kasturi Lal Ralia Ram Jain v. The State of U.P.* In this case, the question was whether the State was vicariously liable for the tort committed by certain police constables. The claimant who was a dealer in bullion was taken into custody by three police constables who seized gold and silver from him. Although silver was returned to him after he was released, the gold could not be traced as it had been misappropriated by one of the constables who had escaped to Pakistan. The Supreme Court held that the trial court was right in finding that the loss suffered by the claimant was on account of tortious act of police officers. It was, however, held that since the act was committed by public servants in the discharge of their statutory duties which were referable to the exercise of sovereign powers, the State could not be held vicariously liable for the consequences of such acts. Gajendragadkar, CJ., observed: "In the present case, the act of negligence was committed by the police officers while dealing with the property of Ralia Ram which they had seized in exercise of their statutory powers.

Now, the power to arrest a person to search him, and to seize property found with him, are powers which can be properly characterised as sovereign powers, so, there is no difficulty in holding that the act which gave rise to the present claim for damages has been committed by the employee of the respondent during the course of its employment; but the employment in question being of the category which can claim the special characteristic of sovereign power, the claim cannot be sustained;. ..

Reference may also be made to Shyam Sundar and others v. The State of Rajasthan. The facts of this case are as follows:-

Navnitlal, an employee of the State of Rajasthan was, at the material time, working in the office of the Executive Engineer, Public Works Department, Bhilwara, as a storekeeper. In connection with the famine relief work undertaken the department, he was required to proceed to Banswara. For that purpose, he board a truck owned by the department from Bhilwara and reached Chittorgarh in the evening. After having travelled for 4 miles, the engine of the truck caught fire. The driver cautioned the occupants (i.e., Navneetlal and three other persons) to jump out of the truck. While doing so, Navneetlal struck against a stone lying by the side of the road and died instantaneously. Parwati Devi, widow of Navneetalal, brought a suit against the State of Rajasthan for damages. The Supreme Court held 56: ". .as the law stands today it is not possible to say that famine relief work is a sovereign function of the State as it has been traditionally understood. It is a work which can be and is being undertaken by private individual. There is nothing peculiar about it so that it might be predicated that State alone can legitimately undertake the work." Thus the State of Rajasthan was held liable.

Thus the position remains the same today as was laid down by the Supreme Court in Kasturi Lal's case. 157 That is to say, the State is not liable for the tortious

acts of its servants committed in the course of employment if the same are referable to the exercise of some sovereign or delegated sovereign functions. The State is, however, liable for non sovereign functions. Therefore, when the State pleads immunity from liability High Courts generally confine themselves to the determination as to whether tortious act in question is referable to the exercise of sovereign functions or not. For example, in Thangarajan v. Union of India, 158 the appellant minor Thangarajan, aged about 10 years at the time of the accident, was walking along a road. He was knocked down by a military lorry belonging to the Defence Department of the Union of India as a result of which he sustained serious injuries. He brought an action to recover compensation. A Division Bench of the Madras High Court held: "the driver of the lorry was himself a defence personnel was driving the lorry for taking Co. 2 gas from the factory to the ship INS Jamuna and on the way the accident happened. .we cannot resist the conclusion that the lorry was being driven in the exercise of sovereign functions. This finding would exclude the liability of the defendant and the appeal will have to be dismissed."

In a recent case Mrs. Pushpinder Kaur Sekhon v. Corporal Sharma & another, wherein a military vehicle was involved in an accident, it was held, in fact of the case, that the Union of India cannot escape liability on the plea of immunity on the ground that accident had occurred in discharge of sovereign functions of State. In this case a military vehicle, a missile carrier movement broke down and parked on the road when a car came from behind and dashed into it. Captain H.S. Sekhon, the driver of the car and ca wife Mrs. Pushpinder Kaur Sekhon who was sitting beside him were both injured, hile their only son Ibadat, who was a year and a half old, and mother died as a result of no injuries sustained. Section 81 of the Motor Vehicles Act provides that no person in range of a motor vehicle shall cause or allow the vehicle or any trailer to remain at rest any road in such a position or in such a condition or in such circumstances as to cause ar be likely to cause danger,

obstruction or undue inconvenience to other users of the road. The Punjab High Court held that considered in the totality the circumstances of the case and the evidence on record, the irresistible conclusion is that the accident here must be attributed wholly to negligence of the driver of the military vehicle, leaving it parked on the main highway without taking proper precautions for the safety of road users as required by law. In the absence of pleadings and proof, it is not open to the State to raise a plea of immunity at the stage of arguments and nor would the Court be justified in giving such a finding on a plea raised at this stage. There is judicial precedent to support this view. The Union of India could not therefore escape liability in the present case on the plea that the accident had occurred in the discharge of the sovereign functions of the State.

In The 'Ad Hoc' Committee, the Indian Insurance Company Association Pool Bombay v. Smt. Radhabai, a Division Bench of the Madhya Pradesh High Court pointed out that traditional sovereign functions are the making of laws, the administration of Justice, the maintenance of order, the repression of crime, carrying on of war, the making of treaties of peace and other consequential functions. Whether this list be exhaustive or not, it is at least clear that the socio-economic and welfare activities undertaken by a modern State are not included in the traditional sovereign functions. " In this case a motor vehicle belonging to the State and at the relevant time allotted to the Primary Health Centre, Nainipur, was involved in an accident in which one Babulal died. Babula's widow and son, namely, Radhabai and Ravishanker brought an action to recover damages. At the relevant time the vehicle was proceeding to a place where some children were seriously ill with a view to bring them for treatment at Nainipur. It was held that the medical relief work undertaken by the State through the Primary Health Centre, Nainipur, in which the vehicle in question was engaged at the time when the

accident happened, is not a sovereign function in the traditional sense. The defence of immunity must therefore fail.

In *The State of Kerala v. Cheru Babu*, the respondent, a student of St. Joseph's College, Devagiri, Calicut, was knocked down by a jeep car belonging to the Government of Kerala and driven by its servant. The Revenue Divisional Officer, Calicut, was travelling in the jeep. The jeep was escorting the Advisor to the Governor, who was proceeding to Sultan's Battery after attending a college function at the B.T. College, Calicut. An action was brought against the State to recover damages. State was held liable for the negligent and rash driving by its servant on the ground that the driver of the jeep car escorting the Adviser was not performing any act which was referable to the exercise of a sovereign power.

Similarly in Pushpa Thakur v. Union of India, 168 due to the negligence of the driver of the military truck an accident took place resulting in the fracture of both the legs and amputation of the right leg of the appellant. The Union of India was held liable to pay compensation to appellant. Having regard to the nature of the injuries suffered by the appellant the Supreme Court fixed the amount of Compensation at the figure of Re 1,00,000/- (Rs. one lakh).

In *State of Orissa v. Mst. Amruta Devi* on the morning of 9th January, 1977, the Regional Transport Officer, Sudargarh, proceeded to Purunapani via-Birmitrapur in the Government Jeep being driven by the officer driver for checking of vehicles. He was accompanied by the Junior Motor Vehicle Inspector and Enforcement Inspector. Lingaraj Behera and Bipin Behari Pradhan (both office Assistants) and two constables were also in the Jeep. After the day's duty, the party after taking their food at about 11.30 A.M. was returning. The Enforcement Inspector sat on the driving wheel asking the office driver to go to the back seat. When the Jeep had reached 2-3 Kilometers before Paramdihi, it dashed against a

tree resulting in the instantaneous death of the Enforcement Inspector and the two office Assistants. Before the Claims Tribunal, the State of Orissa, while admitting the act of the accident, took a plea that the accident had taken place due to the bursting of the rear tyre of the jeep and, in any case, it was not liable for any damage as the accident took place while the jeep was engaged in discharging a sovereign function. The Tribunal accepted the defence pleas and dismissed the claim petitions. The claimants filed appeal in the High Court. The learned Judge of the High Court recorded the following finding:

(i) The Enforcement Inspector was driving the jeep in a rash and negligent manner;

(ii) The accident occurred not as a result of the bursting of the tyre, but it took place on account of the impact of the jeep with the tree and wheel going out of the jeep ;and

(iii) It could not be said that the accident took place while the jeep was engaged in discharging the sovereign function.

The learned single Judge thus decreed a sum of Rs. 74,834/- to the claimants in M.A. No. 51 of 1979 and a further sum of Rs. 49,680/- to the claimants in M.A. No. 52 of 1979. The present appeal was directed against the judgment of the single Judge. The Division Bench of the Orissa High Court held:

"On an analysis of the principles and the law on the subject, it leaves no room for doubt that the plea of sovereign immunity can be available where the powers can be exercised only by a sovereign or a person by virtue of delegation of such powers to him. Carrying on a transport operation is in the nature of a commercial venture and by no stretch of imagination can be called a sovereign act, much less a sovereign function."

The Division Bench, therefore dismissed and appeal with costs.

In Saheli, a Women's Resources Centre through Mr. Nalini Bhanot & others v. Commissioner of Police, Delhi and others. on account of police atrocities, a child of 9 years, Naresh, died. He was done to death on account of the beating and assault by S.H.O. Lal Singh, an agency of the sovereign power acting in violation and excess of the power vested in such agency. On writ petitions filed by Saheli, a Women's Resources Centre, the Supreme Court held that the "mother of the child, Kamlesh Kumari is so entitled to get compensation for the death of her son from the respondent No. 2, Delhi Administration."172

The Supreme Court quoted with approval the observations in the cases of Joginder Kaur v. The Punjab State, 173 State of Rajasthan v. Mst. Vidyavati, 174 (same observation as has been referred earlier) and Peoples Union for Democratic rights through its Secretary and Anr. v. Police Commissioner, Delhi Police Headquarters and Anr.175 Delivering the judgment of the Supreme Court, B.C. Ray, J held: