

## CHAPTER 4

### Analysis of present Tort System in India

#### 4.1 Introduction

India is not an exception when one tries to highlight the importance and effectiveness of tort law in implementing and protecting an individual's civil rights. In this era when on one hand people are more aware of their civil rights they are expected on another hand to act more in civilised manner, as rights and duties are sides of a coin. Any divergence from respecting another individual's civil rights definitely should lead to some consequence. It is at this very sphere where tort law comes into action. Tort helps to restore the victim to his original position when there is infringement of his civil rights irrespective of whether actual injury was caused to him or not. So India like any other Nation cannot be an exception and recognises tort law as an important branch of civil law to provide remedy to the victims.

In India, concept and principles of tortious liabilities have been embodied in crude form in various legislations. So, when one tries to find out if the present form is better or it is time to opt for a well drafted codified law in this filed too, the first thing which is needed is to understand the evolution and present condition of tort law in India, Henceforth in the beginning of this chapter the researcher discusses briefly the evolution of tort law in India in three different eras namely, Pre-British, British India and Independent India.

#### 4.1.1- Tort Law in Pre-British India

Tort in India was also in existence before the British raj. Indian history always speaks of rendering justices to the victims, which was mostly either in the form of giving physical punishment to the culprits or imposing fines on the wrong doer. The concept of giving compensation was not much common but still the existence of the Sanskrit word Jimha meaning 'crooked' in ancient Hindu text on law conveying 'tortious or fraudulent conduct' proves that the concept of tort was present though in different form.<sup>94</sup>

In Pre-British era India tort meant an action imposing civil liability which is evident by the existence of the word 'Vadicrat' which referred to a private action by plaintiff. Under such action the plaintiff could claim compensation as remedy. In ancient India the King

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<sup>94</sup> Dr. Minal H Upadhyay, *Law of Tort in India*, IJRSML, February 2014.

rendered justice mainly in between two types of wrongs. One termed 'Nrapasraya' which were actions taken at the instance of the ruler or the King and second termed 'Vadikrat' which were instituted at the instance of private individuals. Apart from this distinction there was no room for distinct differences between private and public wrongs in the 'Sastras' as both the wrongs have an inclination of merging with each other. This was beneficial for the private individual who could not bear the cost of litigation and in such cases the one could get compensation as the King used to bear the cost. Moreover, law of tort of ancient India was based on the concept of "Dharma" which gave prominent importance to individual's duty toward others.<sup>95</sup>

#### **4.1.2- Tort Law in British India**

With the advent of British in India, came the rules and principles which were to be applied in courts in India established by the British Government. Like any other branch of law, tort law was also started to be applied in India, just making it suitable to the Indian conditions. It is worthy to mention here that the English law of tort was itself based on the 'common law of England', which meant that the principles of 'justice, equity and good conscience' were mostly used to disposing matters in the interest of justice.

It was the Privy Council which was entrusted with the job of interpreting 'justice, equity and good conscience' best suited to the 'Indian society and the circumstances'. The Indian court also had to think twice before applying a English principle in India, as there was a major difference between the need and wants of the two societies and cultures. Hence, it can be said that the application of the English principles and law was limited and selective. However, the Privy Council was of the view that it is the strength of English common law to adapt and fit into the new circumstances that made it possible to apply it into Indian society. Moreover, there was freedom to modify the common law or apply new rules of English statutes if it was the want of 'justice, equity and good conscience'. The Indian courts were then allowed to reject the common law which was outmoded and in place of it to apply new laws. 'For example, the principles of English

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<sup>95</sup> S.K.Purohit, *Ancient Indian Legal Philosophy*, Deep and Deep Publication, 1994

statute, the Law Reform (Contributory Negligence) Act, 1945, had been applied in India although there was still no corresponding Act enacted by Parliament in India.<sup>96</sup>

#### **4.1.3- Tort Law in Independent India**

In the year 1947 when finally India got independence from the British rule, new set of rules and laws in the form of various statutes and enactment started taking shape and then were implemented in India. But most of these statutes were largely based on English Principles or Common law was 'justice, equity and good conscience' played a vital role. To name a few like Indian Penal Code, Indian Evidence Act, Code of Civil Procedure in criminal law and Transfer of Property Act, Indian Contract Act etc in civil law. Fortunately or unfortunately it was the tort law which though in spite of various attempts to get a new act or statute as evident from the first report of Law Commission was left untouched. Still the courts of independent India followed the common law principles in regard to suits where damages were claimed under tort law based on 'justice, equity and good conscience'. They could have a divergent view when a particular rule was found to be unreasonable or not suitable to conditions then prevalent in independent India.

Gradually, with increasing effect of globalisation on India, increased the number of cases where claims for damages started to be made under law of tort. Then, it was time when many jurists have raised concern and expressed their opinion regarding the need of modified law of tort in India.

In this context, in *M.C. Mehta v. Union of India*<sup>97</sup>, Justice Bhagwati observed- "We have to evolve new principles and lay down new norms which will adequately deal with new problems which arise in a highly industrialized economy. We cannot allow our judicial thinking to be constructed by reference to the law as it prevails in England or for the matter of that in any foreign country. We are certainly prepared to receive light from whatever source it comes but we have to build our own jurisprudence."

To mention a few of them 'the development of the absolute liability rule in the M.C. Mehta case and the Supreme Court's direction on Multinational corporation Liability, recognition of Governmental tort by employees of government, principles on legality of

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<sup>96</sup>Dr. Minal H Upadhyay, *Law of Tort in India*, IJRSML, February 2014.

<sup>97</sup>*M.C. Mehta v. Union of India*, AIR 1988 SC 1037

State, evolution of tort of sexual harassment, grant of interim compensation to a rape victim, and award of damages for violation of human rights under writ jurisdiction, including a recent Rs.20 crore exemplary damages in the Upahaar Theatre fire tragedy case by the Delhi High Court are significant changes in the tort law of independent India.<sup>98</sup>

A number of statutes were enacted where the principles of tort law were modified and implemented in scattered form such as the 'Public Liability Insurance Act, 1991', 'Environment Protection Act, 1986', 'Consumer Protection Act, 1986', 'Human Rights Protection Act, 1998', 'Pre-Natal Diagnostics Techniques Regulations and Prevention of Misuse Act, 1994' the new principles of tortious liability were included in India. 'The Motor Vehicles Act, 1988' and judicial interpretation contributed to the development of accident claims. The unfortunate Bhopal Gas Leak disaster also triggered a new path of tort law, leading to environment tort, toxic torts, governmental torts, MNCs liability, congenital torts, stricter absolute liability, etc.

The researcher below has made an attempt to analyse the present Indian Laws on State Liability, Product Liability and Public Nuisance Litigation.

## **4.2- State Liability and Indian Tort Law**

### **4.2.1- Introduction**

The concept of State Liability is one of the most useful aspects of law of tort where the victims can claim damages from the State due to the loss incurred by them from the act of the State while performing its functions. In India the doctrine of State Liability gradually evolved with time. So, before analysing the present Indian law on State Liability under law of torts it becomes necessary to study the gradual moulding of State Liability into its present form.

### **4.2.2- State Liability in Pre-British India**

In Pre-British India where there were rule of Kings in various kingdoms, the doctrine of State liability was not available in its present form where the King could be held vicariously liable for the wrongs of his servants. But since during that era predominance

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<sup>98</sup>Dr. Minal H Upadhyay, *Law of Tort in India*, IJRSML, February 2014.

was given to the 'Rule of Law' more commonly known as 'Dharma' which meant 'justice', even the King was not above law. If the ends of justice required that the victim deserved compensation for the loss incurred the King was not an exception. According to the 'Vedic scriptures' such as 'Puranas' and 'Smritis', the King's power was derived from 'Dharma' and he had no independent authority. The King was also subject to law and his kingship was solely dependent on his performance of duties. There was no room of arbitrariness in ancient India's legal jurisprudence. Any breach of duty towards citizen also resulted to forfeiture of kingship.

'The origin and development of the State as well as the duty of the king to maintain the rule of law has been beautifully explained in Shantiparva of Mahabharat. It discloses that in ancient Indian civilization great importance was attached to Dharma. The goal of polity is the fulfilment of Dharma. Generally, it is used to mean justice, what is right in given circumstance, moral, religious, pious or righteous conduct, being helpful to living beings, giving charity or alms, natural qualities or characteristics or properties of living being and things, law, usages or custom having the force of law and also the royal edict. Dharma constitutes the foundation of all affairs in the world and people respect one who adheres to Dharma. It insulates man against sinful thoughts and actions. Everything in this world is founded on Dharma and therefore it is Supreme Rajdharma which laid down the Dharma of the king was paramount. All Dharmas are merged in Rajdharma and it is, therefore, the Supreme Dharma.'<sup>99</sup>

The two main texts of ancient India law namely the 'Srutis' and the 'Smritis' reflected the doctrine of State liability in crude form. According to these texts the King was held not only responsible for his actions but was also held liable for any violation of duty done by any of his man under the administration. Manu ordains that 'the king must restore the stolen property when recovered and must compensate when not recovered'. *Yajnavalkya Smriti* says that 'in cases where theft could not be detected or the stolen property could not be recovered the king's officers were to be blamed and the victim was to be compensated for the unrecovered stolen property by the king'. Kautilya adds a step forward when he says that 'if the stolen property of the subjects could not be recovered by the officers the king has to compensate the aggrieved person out of his treasure'. The State liability was not only limited to that but it also extended when any officer

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<sup>99</sup>Gyan Prakash Verma, *State Liability in India: Retrospect and Prospects*

appointed by the King to protect his subjects unscrupulously seized the victim's property.<sup>100</sup> Thus, according to the ancient law of the Hindus, not only the king but his servants were also made liable vicariously and severally for wrongs committed against their subjects.

By the end of 12<sup>th</sup> century India came under rule of Muslim invaders like Ghazni Mohammad and then by Mohammad Ghori by defeating the Hindu rulers which marked the establishment of Muslim rule in India around 1206 A.D. 'The Muslim administration which was started in India by the slave Dynasty was succeeded by many Dynasties namely Khiljis, Tughluques, Sayyads, Lodhis, Sultans and Moghuls. The last Moghul emperor was succeeded by the queen Victoria in the year 1858.'<sup>101</sup>

There was not much difference in Muslim law and Hindu law regarding applicability of State liability. Under Muslim law also the ruler had no separate authority but was subordinate to the rule of law. All the Muslim rulers had to rule according to the tenets of the 'koran', which was the sacred law. The 'supremacy of shar or Islamic Law' was the basis of all Muslim rules. According to it 'it is shar or Islamic law before whom the rulers and the ruled were equal'. According to cases available on records, in ordinary courts of law the subjects were allowed to sue the monarchs. But the remedy in an action against the King (State) varied from one ruler to another and so also the conviction under Islamic Law or 'Shar'. Sher Shah Suri declared that 'the State was not above law and no partiality was to be shown to it in the dispensation of Justice.' The Great ruler Akbar encouraged complaints against his servants following the principle of justice and also issued proclamations in that regard. There are instances where in an action against the executive officers compensation was paid to the victims and in some cases if deserved out of the State treasury, giving room to the principle of State Liability under Muslim Rule in India. In records there are instances where the State was held vicariously liable in Muslim ruled India. As for example, in 'Widow v. King Ghvas (about 1490 A.D) the son of a widow lady was injured by the King mistakenly by an arrow. A complaint was filed by the lady before the 'Kazi'. After initial hesitation the king was summoned by the Kazi before the court. Both the parties were heard and on finding the King guilty, the court passed an order asking the king to pay damages to the widow lady. The King too obeyed the order showing that the king was not above law. But gradually there was a

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<sup>100</sup>N.C Sen Gupta, *Evolution of ancient Indian Law*, (Tagore Law Lectures (1950)-(1953).

<sup>101</sup> M. Rama Jois, *Legal and Constitutional History of India*, Vol. II (1990), p. 2

shift of liability from the King (State) to the servants if the latter could be proved to be personally liable. In such cases the officers were sentenced to imprisonment. 'In *Shiqahdarv. King* it was held that a police officer was personally responsible for the wrongful arrest of a citizen and was liable to pay compensation.'<sup>102</sup> Though there were no established rules or principles of State liability but undoubtedly such instances were an indication that the State was slowly trying to shift its liability by choosing discretionary power in place of justice to decide if the subjects' claim of compensation was to be allowed or not.

#### **4.2.3- Tortious Liability of the State under British Rule**

The next phase of Indian legal jurisprudence started with the advent of East Indian Company, which initially came as a trading company then gradually with grant of certain rights like 'Diwani' rights i.e. the right to deal with civil disputes it lead to the encroachment of the Indian legal system. This in turn meant that the Common Law of England which was based on 'justice, equity and conscience' started to be used as principles in decided disputes in India. Hence, raising a question if the victims were granted relief when the company was held tortuous liable. The first judicial interpretation of State liability during the East India Company was made in 'John Stuart's case, 1775'. It was held for the first time that 'the Governor General-in-Council had no immunity from Court's jurisdiction in cases involving dismissal of Government servants.'<sup>103</sup> In *Moodaly v. The East India Company* 1775 (1 Bro-CC 469) the Privy Council expressed the opinion that Common law doctrine of sovereign immunity was not applicable to India.'

Finally, in 1857 due to the famous 'Sepoys Mutiny' which is also called 'first war of independence by Indians' came the end of the Company's Government and with the enactment of the 'Government of India Act, 1858 (the Act, of 1858)' the British Crown was vested with the authority of the Government of India. The Act of 1858 was not only a turning point in the Indian political and Constitutional History but also in the law relating to vicarious liability of the State.<sup>103</sup>

##### **(i) The Government of India Act, 1858:**

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<sup>102</sup> K.C.Joshi, *Governmental liability in tort with Reference to India*, (1985)

<sup>103</sup> M. Rama Jois, *Legal and Constitutional History of India*, Vol. II (1990), p. 2



Though the administration of Indian Government was taken over by the Crown but while deciding the State's liability the English Common Law doctrine 'The king can do no wrong' was still not implemented. In fact section 65 of the Government of India Act of 1858 laid clearly that the secretary of State in Council can be sued and held liable for its acts and contracts, which declared:

"The Secretary of State in Council shall and may sue and be sued as well in India as in England, by the name of the secretary of State in council as a body corporate; and all persons and Bodies politic shall and may have take the same suits, remedies and proceedings, legal and equitable, against the secretary of State in Council of India as they could have, done against the said Company; and the property and effects hereby vested in Her Majesty for the purposes of the Government of India or acquired for the said purposes, shall be subject and liable to the same judgements and executions as they would, while vested in the said Company have been liable to in respect of debts and liabilities, lawfully contracted and incurred by the said Company".

This meant that the secretary of the State was in the same footing as a body corporate which had the right to sue and also could be sued when held liable. The doctrine of 'King can do no wrong' had no place till then in Indian Tort Law. However, the only immunity which was granted to the members of the council was like any other corporate body was by section 68 of The Government of India Act, 1858, that they would not be personally liable. But, landmark case on this section, *Oriental Steam Navigation v. Secretary to the State of India* (Bombay High Court Reports Vol. V, 1868-69) Appendix I, introduced a new dimension of tortious liability of State by introducing the concept of Sovereign and Non-sovereign functions while deciding the liability of the Company. The Calcutta High Court in the said case held that there was a great and clear distinction between acts done by the public servants while exercising the sovereign authority delegated to them and other actions taken while performing other duties. The Court held that East India Company were not sovereign, drew distinction between sovereign acts in respect of which State was not liable and the other category i.e. non sovereign in respect of which the Secretary of the State was made liable. In the said case due to negligence of a servant of Government working in Dockyard an accident happened and horse of a carriage hired by an individual was injured. Calcutta High Court had in a subsequent decision adhered to the same view but the Bombay and Madras High Courts did not agree with the same. The *Madras High Court in Secretary of State v. Hari Bhanjj* (1882)



ILR Madras 273 held that immunity of East India Company extended only to "Acts of the State".<sup>104</sup>

***(ii) The Government of India Acts, 1915 and 1919:***

The Parliament of Britain with an aim to improve the Constitution and administration of the Indian Government under the Crown later on enacted the Government of India Act, 1915 (the Act of 1915). The Act of 1915 clearly mentions in its Preamble that:

“Whereas it is the declared policy of parliament to provide for the increasing association of Indians in every branch of Indian administration, and for the gradual development of self-governing institutions, with a view to the progressive relation of responsible Government in British India as an integral part of the empire”. The liability of the secretary of State was envisaged in section 32(1) and (2) of the Act of 1915 mentions:

“(1) Secretary of State in council has the right to sue and may also be sued using the name of the secretary in council as a body corporate.

(2) Every person shall have the same remedies against the secretary of State in council as he might have had against the East India Company if the Government of India Act, 1858 and his Act had not been passed”.

Hence, this Act made it quite clear that regarding tortious liability of State, the State lies in the same footing as was of the East India Company. No immunity was granted to the State. Thereafter, ‘The Government of India Act, 1919’ also made no changes in the principle of vicarious liability of the State and section 32 of the Act of 1915 was reproduced as section 32 of the Act of 1919.

***(iii) The Government of India Act, 1935:***

Gradually with the evolution of the society, the involvement of the State in various activities increased so as to also the liabilities for wrongs committed by its servants while discharging their duties. The Crown felt the necessity to provide immunities and certain exemptions to its officers from the claims of the subjects who were mostly the natives Indians. Thus, with the enactment of The Government of India Act, 1935, rights

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<sup>104</sup> Justice U.C.Srivastava, *Tortious Liability Of State Under The Constitution*, 1997.

were granted on the Federal and Provincial legislatures to legislate determining the extent of State liability. Section 176(1) of the Act of 1935 provided:

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

It is needed to be mentioned here that the actual reason for the British Parliament for giving rights to the ‘Federal and Provincial Governments’ to frame laws to govern the liability of the State to be sued was the judgement of the Privy Council in ‘*Secretary of State for India v. Moment*’. In this litigation it was held that ‘the Legislature in India had no power to pass a law which would deprive a subject of the right to sue which he had prior to 1858.’ Lord Chancellor Viscount Haldane observed thus;

‘The effect of section 65 of the Act, 1858 was to debar the Government of India from passing any Act which could prevent a subject from suing the secretary of State in council, in a Civil Court, in any case in which he could have similarly sued the East India Company. They think that the words cannot be construed in any different sense without reading into them a qualification, which is not there and which may well have been deliberately omitted’.

As a result section 176 of the Government of India Act, 1935 was enacted, to omit the limitation on the legislature which was imposed by the *Moment’s* case. This liability position laid down in section 176 continued till India became Republic.

Hence, in British India, liability of State for wrongs under law of torts became a subject of conflict in Indian Courts. Subsequently, State liabilities started to be decided depending on the nature of the action and type of power exercised, to be more precise if the wrong was committed while discharging Sovereign function or Non-Sovereign functions became the litmus paper to establish the State liable under tort law. ‘Sovereign powers of the State were never defined and in the absence of any clear cut distinction between sovereign and non-sovereign powers of the State Courts of law were faced

some times with difficulties in resolving the disputes. The plank for defence by State in cases pertaining to State liability used to be that the acts of omission or commission complained of were within the realm of sovereign powers of the State and as such State was not liable.<sup>105</sup>

#### **4.2.4- Tortious Liability of the State under Indian Constitution**

The Constitution of Independent India is mostly based on the Government of India Act, 1935. Consequently the doctrine that 'King can do no wrong' managed to gain a room in the Indian Constitution. As far as Tortious liability of the State is concerned, Article 294 and Article 300 of the Constitution of India contain both explicit and implicit provisions on it. Chapter III, Part III of the Constitution titled 'Property Contracts, Rights, Liabilities Obligations and Suits' contain both the articles. Article 294 (b) of the Constitution of India provides that the Union Government at the Centre or Government of various States may be held liable under any contractual obligation or otherwise.' The word "otherwise" would include 'various liabilities including tortious liability also.' This Article thus constitutes and transfers the liabilities of Government of India and Government of each governing province in the Union of India and corresponding States. Article 300 of the Constitution of India provides that State can sue or be sued as juristic personality. It reads as under: "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."

Thus, it is quite evident that the position of tortuous liability of the State in Independent India was quite similar to what was there under the Crown with enactment of the Government of India Act as discussed earlier. So, as it prevailed in British India, the State was started to be given immunity from tortuous liability in Sovereign functions and were held liable as a corporate body if the wrong was committed while performing non-sovereign functions. Now, as there was no or still absence of clear cut definition of sovereign functions and non-sovereign functions, the question was left to be decided by

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<sup>105</sup>Justice U.C.Srivastava, *Tortious Liability Of State Under The Constitution*, 1997

the judiciary which had to first decide the nature and type of function that the alleged servant of the State was discharging when the wrong was committed. Then if it is found from the facts that it was a non-sovereign function than only the State could be held liable.

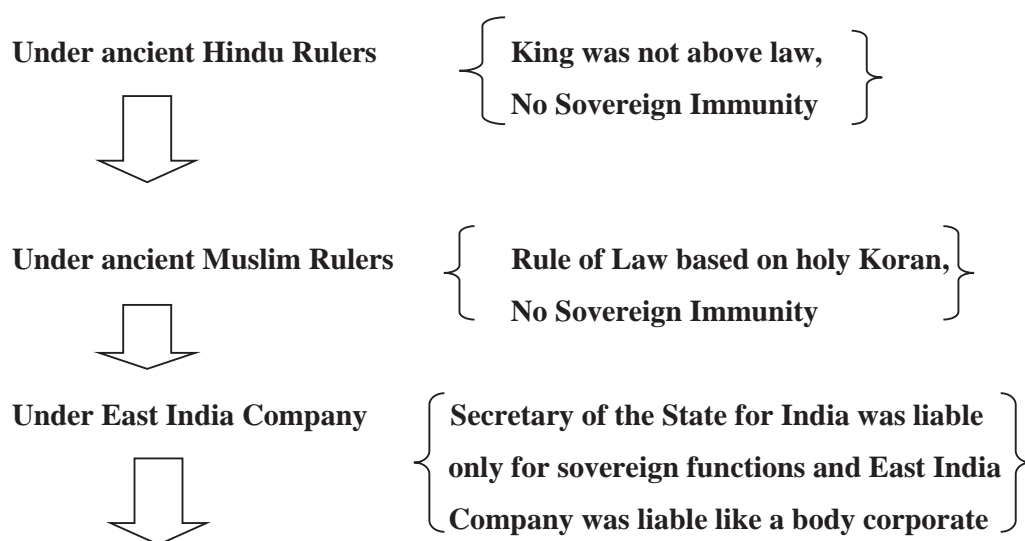
These in turn gave rise to conflicting decisions in the past which will be discussed in the next chapter. The reason behind it may be with the passage of time the welfare activities of the State started increasing and with this it became difficult to differentiate the functions of State as Sovereign or Non-Sovereign. Moreover, for the ends of justice the Indian courts made a constant effort to overcome this fallacy of 'Sovereign Immunity' by giving decisions where extreme efforts is evident at their end to exclude the alleged act from the realm of sovereign function. It was done so that the victim could claim compensation from the State and making the latter liable for its tortuous action.

'Moreover, the liability of the State has gone beyond the traditional principles in view of changing laws and the Constitutional mandates in this country too. Negligence and carelessness of the employees are words of great importance and the State would be liable to pay compensation to aggrieved persons because of the negligent and careless act done by its employees during the course of employment. Even if an employee was doing an unauthorised act but not in a prohibited way, the employer is liable for such acts because such employee was acting within the scope of his employment and in acting did something negligent or wrongful. A master would be liable even for acts which he has not authorised if the same can be connected with the acts so authorised. Article 21 of the Constitution of India forbids State to deprive a person of his life and liberty except in accordance with a procedure established by law. To expand the word 'life', it includes every aspect of life which makes life meaningful, complete and living, and even culture, tradition, heritage and personal liberty which have a very expanded meaning impose negative deed on the State and in view of Constitutional provisions including Directives Principles of State Policy it has been interpreted to be imposing positive obligation upon the State which is to ensure better enjoyment of life and dignity of individual. The Fundamental Rights which have been guaranteed and are enforceable by the Supreme Court. Under Article 32 and High Court, under Article 226 have not only made the defence of sovereign immunity completely inapplicable but have overthrown it altogether as it cannot go with constitutionally guaranteed rights. In view of complete ouster of sovereign immunity in regard to fundamental rights particularly Article 21,

right to award money compensation for violation of the law is justified. The Union and State governments become liable for tortious wrongs done by their servants during the course of employment for violation of Article 21. The Supreme Court awarded monetary compensation in a large number of cases. In the case of *Nibati Behera v. State of Orissa*, AIR 1993 SC 1960, the Court spelt out the principles on the liability of the State in case for payment of compensation and the distinction between this liability and the liability in law for the payment of compensation for the tort so committed. If no other practicable mode of redress is available the Court would award monetary compensation for breach of fundamental rights by State or its employees based on the principle of strict liability.<sup>106</sup>

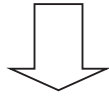
Thus, practically the distinction of Sovereign function and Non-sovereign function while holding the tortious liability of the State makes no sense as there is a constant endeavour to provide relief to the victims for the ends of justice. Then definitely the question arises regarding the logic of not abrogating the doctrine of 'King can do no wrong' in the form of Sovereign immunity even after more than 70 years of Independence.

The following flowchart showing the changes in the concept of tortious liability of the State in India would further make the inferences gathered from the above discussion clear



<sup>106</sup> 'Tortious Liability Of State Under The Constitution', Justice U.C.Srivastava, 1997.

**Under British Government**



**Introduction of the doctrine of ‘King can do no wrong’ with the enactment of the Government of India Act, 1935 and granting of Sovereign immunity**

**Under Independent India**

**Existence of the application of the doctrine of ‘King can do no wrong’ and solely depending on the interpretation given by judges of ‘sovereign’ and ‘non-sovereign’ functions.**

### **4.3- Product Liability and Indian Law**

#### **4.3.1- Introduction**

Product liability which is also known as ‘products liability’ basically deals with ‘the liability of manufacturers, wholesalers, distributors, and vendors for injury to a person or property caused by dangerous or defective products’. The main purpose of product liability is to provide redressal to consumers by making the ‘manufacturers, distributors, and retailers responsible for putting into the market products that they knew or should have known were dangerous or defective.’

In India the law governing product liability are the followings:

- a) ‘The Consumer Protection Act, 1986’
- b) ‘The Sales of Goods Act, 1930’
- c) ‘Specific statutes governing specific goods’
- d) Criminal Liability imposed under ‘Indian Penal Code’ and ‘Prevention of Food Adulteration Act 1954’ and other special Act.

As the scope of the present research is limited only to Product Liability under Indian Law of Torts, the researcher would analyse below the two major laws governing this field, namely, ‘The Consumer Protection Act, 1986’ and ‘The Sales of Goods Act, 1930’.

#### **4.3.2- The Consumer Protection Act, 1986**

The Consumer Protection which came into effect from 15<sup>th</sup> March, 1987, was enacted to protect the consumer's interest in India. The purpose of this Act is to impose liability on the 'manufacturer', in case he supplies 'defective' goods and on 'service providers' in case of 'deficiency' in service following the principle of Strict Liability. While interpreting the terms 'defect' and 'deficiency' the ambit is extended to a wide field to include 'any kind of fault, imperfection or shortcoming'. 'Furthermore, the standard, which is required to be maintained, in services or goods is not restricted to the statutory mandate but extends to that claimed by the trader, expressly or impliedly, in any manner whatsoever.'

##### **The salient features of the Act are:**

(I) The Consumer Protection Act is applicable to every individual. Private, public or co-operative personality stands on equal footings. This Act provides remedies which can be for compensation or prevention or to punish. The scope of this Act is extended vastly so as to include all goods which are covered by 'The sales of goods Act'.

(II) Rights of the consumers which are enshrined in this Act are as follows:

- (a) 'right to be protected against the marketing of goods and services which are hazardous to life and property;
- (b) right to be informed about the quality, quantity, potency, purity, standard and price of goods or services so as to protect the consumers against unfair trade practices;
- (c) right to be assured, wherever possible, access to a variety of goods and services at competitive prices;
- (d) right to be heard and to be assured that consumers' interests will receive due consideration at the appropriate fora;
- (e) right to seek redressal against unfair trade practices or unscrupulous exploitation of consumers; and



(f) right to consumer education;'<sup>107</sup>

(III) 'Consumer Protection Councils' are established under this Act at the central, state and district levels, with an objective to promote and protect the consumers' rights.

(IV) 'To provide a simple, speedy and inexpensive redressal of consumer grievances, the Act envisages three-tier quasi-judicial machinery at the national, state and district levels. These are: National Consumer Disputes Redressal Commission known as National Commission, State Consumer Disputes Redressal Commissions known as State Commissions and District Consumer Disputes Redressal Forum known as District Forum; and

(V) The Act is in addition to and not in derogation of the provisions of any other law for the time being in force.'

According to section 2 (d) of The Consumer Protection Act, 'Consumer' means any person who—

(i) buys any goods for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment, and includes any user of such goods other than the person who buys such goods for consideration paid or promised or partly paid or partly promised, or under any system of deferred payment when such use is made with the approval of such person, but does not include a person who obtains such goods for resale or for any commercial purpose; or

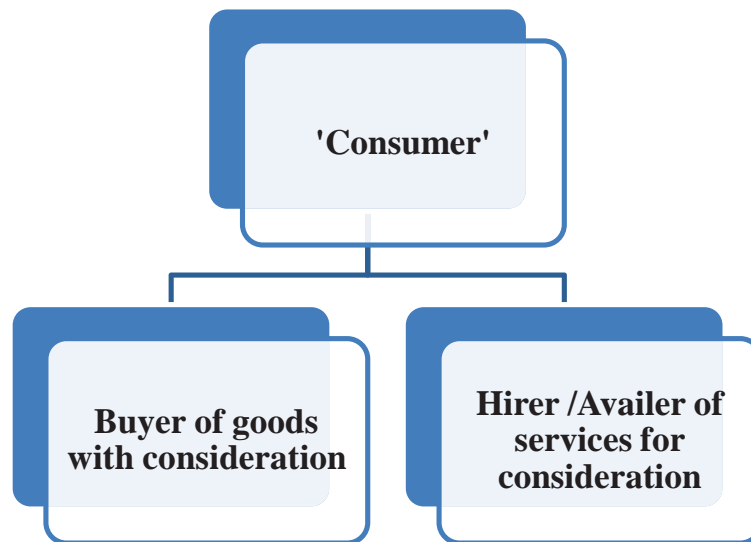
(ii) hires or avails of any services for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment, and includes any beneficiary of such services other than the person who hires or avails of the services for consideration paid or promised, or partly paid and partly promised, or under any system of deferred payment, when such services are availed of with the approval of the first mentioned person;

*Explanation.*—For the purposes of the sub-clause (i), "commercial purpose" does not include use by a consumer of goods bought and used by him exclusively for the purpose of earning his livelihood, by means of self-employment.'

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<sup>107</sup>Product Liability in India, *available at*: <https://www.sethassociates.com/wp-content/uploads/Product-liability-in-India.sethassociates2.pdf> ( last visited on 23.06.18)

To make it simple the researcher infers the following chart



Hence, the liability of the manufactures under product liability is basically covered in the section 2 (d) (1) of the Consumer Protection Act, as here the consumer includes the buyer of goods for consideration.

Now, to make one liable under product liability the goods purchased should have some 'defect' which has been defined in 2(1) (f) of the Act as *“any fault, imperfection or shortcoming in the quality, quantity, potency, purity or standard which is required to maintained by or under any law for the time being in force or under any contract, express or implied, or as is claimed by the trader (which includes the manufacturer) in any manner whatsoever in relation to any goods.”*

Under the Act, a 'complain' means any of the following allegations:

- i. any unfair trade practice or a restrictive trade practice has been adopted by a trader,
- ii. the goods hired or bought suffer from one or more defects
- iii. The goods hired or availed of are deficient in any respect
- iv. A trader has charged price in excess of price fixed by law or displayed on the goods or any package containing goods

v. Goods which will be hazardous to life and safety when used, are being offered for sale to the public in contravention of the provisions of any law requiring traders to display information in regard to the contents, manner and effect or use of such goods.’

**Remedies under CPA:**

According to Section 14 of the Consumer Protection Act, the authorities may direct one or more of the following

- (i) ‘to remove the defect;
- (ii) to replace the goods with new goods of similar description which shall be free from any defect;
- (iii) to return to the complainant the price;
- (iv) to pay such amount as may be awarded as compensation to the consumer for the loss or injury suffered by the consumer due to the negligence of the opposite party;
- (v) to discontinue the unfair trade practice or the restrictive trade practice or not to repeat them;
- (vi) to cease and desist manufacture of hazardous goods;
- (vii) to pay such sums as orders if injury/loss is suffered by a large number of consumers not identifiable conveniently;
- (viii) to issue corrective advertisement for neutralizing effect of misleading advertisement;
- (ix) not to offer the hazardous goods for sale;
- (x) to withdraw the hazardous goods from being offered for sale;
- (xi) to provide for adequate costs to parties (the Complainant).’

This means that if an aggrieved party files a suit claiming an unliquidated damage under CPA which is the essential attribute of tort law, then the authorities have number of alternatives to substitute the relief claimed. Secondly, according to the foregoing section, compensation can be awarded for the loss or injury suffered by the victim only if there is negligence on the part of the defendant. On this it becomes necessary to mention that the

Apex Court of India, the Supreme Court is yet to give a clear judgement determining if the liability is strict or based of fault under this Act.

#### **Availability to limit the liability by clauses:**

Determination of Product liability under CPA is very much influenced by contractual liability. 'It was in *Bharathi Knitting Company v DHL Worldwide Express Courier* (1996) 4 SCC 704 that the Apex Court upheld limitation of liability clauses, that are agreed by the parties specifically while entering into a contract. However, such clauses may be struck down if found to be unconscionable in nature. In *Maruti Udyog v. Susheel Kumar Gabgotra*, [(2006) 4 SCC 644], the manufacturer of the vehicle had stipulated a warranty clause limiting its liability to merely repair the defects found if any. In view of this clause, the Supreme Court reversed the findings of the National Commission to replace the defective goods and held that the liability of the manufacture was confined to repairing the defect. Compensation was, however, awarded for travel charges to the complainant, which was incurred due to the fault of the car manufacturer.' The legal implication of this is that in a suit for compensation against the manufacture, if there is a clause in the contract between the parties whereby the liability of the manufacturer is limited only to repair of the goods and a nominal compensation can be granted for other expenses incurred by the seller.

#### **No Sub-judice bar**

Under section 3 of the Consumer Protection Act it is mentioned that this Act is in addition to and not in derogation of any other law. The Supreme Court in *Secretary, Thirumurugan Co-operative Agricultural Credit Society v. M. Lalitha*, [(2004) 1 SCC 305] has interpreted the above provision to mean that 'the remedies provided under the CP Act are in addition to the remedies provided under other statutes.' Further in the case of *State of Karnataka v. Vishwabharati House Building Coop. Society*, (2003) 2 SCC 412, a three judge bench of the Supreme Court held that '.....the said Act supplements and not supplants the jurisdiction of the civil courts or other statutory authorities'. It means that filing of a suit before consumer forum does not act as sub judice bar on filing on same cause of action in a civil court. This often leads to duplicity of proceedings and multiplicity of litigation on same cause of action.

### **Redressal Agencies under CPA**

The CPA has established three tier of redressal agencies namely, District Forum in district level, State Commissions in each State and the National Commission. 'The District Forum has the jurisdiction to entertain complaints where the value of the goods or services and the compensation, if any, claimed, is less than INR 50,000. A State Commission has the jurisdiction to entertain complaints where the value of the goods or services and the compensation, if any, claimed exceeds 500,000 rupees but does not exceed 2 million rupees. It is also appellate forum for orders of the District forum. The National Commission has the jurisdiction to entertain complaints where the value of goods and services and the compensation exceeds two million rupees and also hears the appeals against the orders of the State Commission.' The redressal agencies established under the Consumer Protection Act are **quasi judicial** in nature which means that the well settled procedural laws are not applicable by the adjudicating authorities under this Act. These agencies only have to follow the 'natural principles of justice' and the already settled principles of law which means that they lack authority to decide any 'question of law'.

Secondly, the consumer forums have to follow summary procedure which means that the redressal agencies under CPA has power to settle matters that are 'the matters of summarily nature' only. Hence, in cases where examination of witnesses and large amount of evidence is required to be obtained from parties, these forum have no power to try those matters.

Moreover, the quasi –judicial nature of these forums means that they will lack any inherent power and can only grant those reliefs which are embodied under section 14 of the Consumer Protection Act.

### **Lack of power to Review or Recall of Order**

Since there is no provision under CPA for review or recall of orders other than section 22 (2) and 22A, which expressly provides that only National Commission is vested with power of Review or Recall of its own order, all the other adjudicating authorities lack power to review or recall orders under this Act. The consumer forums also cannot stay the execution of its own order.

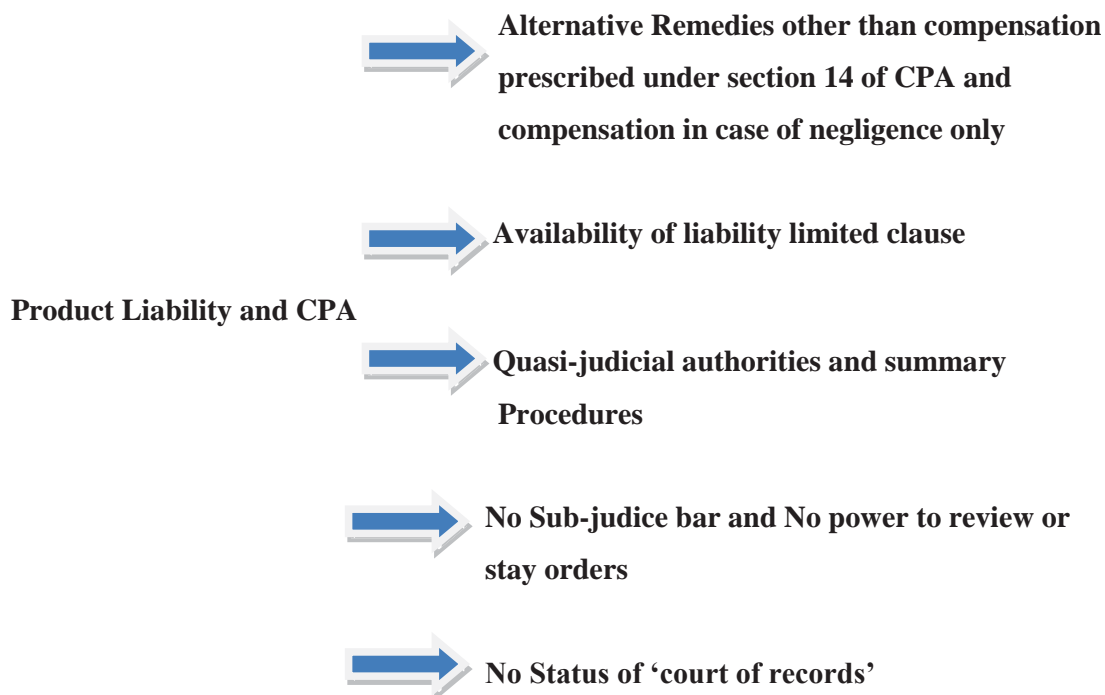
### **Lack of status of ‘Court of Record’**

The State Commissions and the National Commissions are not vested with the status of ‘court of record’ which means that the higher consumer forum lacks the power of creating precedent. This may lead to situations where lower forums may not follow the ratio decidendi of a judgement given by higher forums. This may be considered as one of the largest loopholes of the Act.

### **Finality of order**

According to provision of CPA ‘Every order of a District Forum, State Commission or the National Commission shall, if no appeal has been preferred against such order under the provisions of this Act, be final. ‘Thus this provision implies that non- preferment of appeal renders the order final. Conversely, preferring an appeal means that order is not final. Hence once an appeal is preferred by the judgment debtor, he gets a stay against the execution and thus there cannot be any execution. The judgment debtors can certainly misuse this provision of the Act.’

Hence, the researcher has drawn the following inferences from the above analysis of the Consumer Protection Act, which is the major legislation governing Product liability under tort on India.



#### 4.3.3- The Consumer Protection Bill, 2018

The recent Consumer Protection Bill of 2018 has made certain landmark positive changes in the Consumer Protection Act, 1986 and if it is passed in the Parliament it shall replace the Consumer Protection Act, 1986. The changes have definitely filled certain gaps which earlier existed in CPA of 1986 as highlighted above by the researcher. To mention a few, the Bill of 2018 has specific provisions dealing product liability which earlier was missing and by this bill the consumer forums have been granted power to review their order. But some of the loopholes are still in existence and bill itself has certain gaps which are discussed below:

- **Consumer Forums are still quasi-judicial authorities:** The District, State and National Consumer Disputes Redressal Commissions will adjudicate complaints on defective goods and deficient services of varying values. They have been given the powers of a civil court. The State and National Commissions act as appellate bodies on the decisions of the District and State Commissions, respectively. Appeals from the National Commission will be heard by the Supreme Court. Therefore, these Commissions are quasi-judicial bodies with the National Commission being on par with High Courts. This in turn means that the gaps like summary process, lack of inherent power etc are still present.
- **Violates the Principle of Judicial Independence:** The 1986 Act contains provisions on selection committees that would appoint members on these Commissions. This method of selection was also specified in the 2015 Bill. These selection committees were chaired by a judicial member. The 2018 Bill does not set up such selection committees and leaves it to the central government to appoint members of the Commissions. The Bill permits the central government to notify the method of appointment of members of the Commissions. There is no requirement that the selection involve the higher judiciary. It may be argued that allowing the executive to determine the appointment of the members of Commissions could affect the independent functioning of the Commissions. With regard to Appellate Tribunals, such as the National Tax Tribunal, the Supreme Court has held that they have similar powers and functions as that of High Courts and hence matters related to appointment and tenure must be free from executive involvement. The Bill is not in line with this direction of the Supreme Court.



- **Violates the Principle of Separation of Power:** The Bill specifies that the Commissions will be headed by a ‘President’ and will comprise other members. However, the Bill delegates to the central government the power of deciding the qualifications of the President and members. In particular, the Bill does not specify that the President or members should have minimum judicial qualifications. This is in contrast with the existing Consumer Protection Act, 1986, which states that the District Commission will be headed by a person qualified to be a district judge. Similarly, the State and National Commissions are headed by a person qualified to be a High Court or a Supreme Court judge, respectively. The 1986 Act also specifies the minimum qualification of members. The earlier 2015 Bill too specified judicial members to head the State and National Commissions, though it permitted the District Commission to be headed by the district magistrate in addition to a person qualified to be a district judge. If the Commissions were to have only non-judicial members, it may violate the principle of separation of powers. One may also argue that prescribing the qualifications through Rules may be an excessive delegation of powers. The Supreme Court has held that ‘in the absence of standards, criteria or principles on the contents of rules, the powers given to the executive may go beyond the permissible limits of valid delegation’<sup>108</sup>.
- **Uncertainties in Composition and role of the Consumer Protection Councils:** The Bill establishes Consumer Protection Councils (CPCs) at the district, state and national levels, as advisory bodies. The Councils will advise on promotion and protection of consumer rights. Under the Bill, the Central Council and the State Council will be headed by the Minister-in-charge of Consumer Affairs at the central and state level, respectively. The District Council will be headed by the District Collector. The Bill states that these bodies shall “render advice on promotion and protection of consumer rights”. It is unusual for a body headed by a Minister or the District Collector (who are implementing authorities) to be given an advisory role. Further, the Bill does not specify whom the CPCs will render the advice to.
- **Conflict of Jurisdiction:** like the Consumer Protection Act of 1986, there still exists the gap of conflict of jurisdiction due to absence of specific provision mentioning that the proposed Bill will apply to any matter covered under a special law, unless the special law excludes the application of the proposed Bill.

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<sup>108</sup>Consumer Protection Bill, 2018 *available at:* <https://www.prsindia.org/billtrack/consumer-protection-bill-2018> (Last visited on 23.08.2018)

Although, the Bill is a welcome piece of legislation as it has expressly introduced the concept of product liability for the first time and conferred review powers, but still there are many gaps that haven't been filled. So, it can be said for this legislation, is an half-baked attempt of the parliament.

#### **4.3.4- The Sales of Goods Act, 1930**

The Sales of Goods Act, 1930 among other statutes covering India's mercantile law is one of the oldest. The Act is based on the English Sales of Goods Act, 1893. The statute is based on law of contract and personal property law. All the main provisions of Indian Contract Act were kept unrepealed in this Act. According to section 3 of the Sales of Goods Act, all the provisions of the Indian Contract Act continue to apply for sale of goods such as 'offer and acceptance, legally enforceable agreement, mutual consent, parties competent to contract, free consent, lawful object, consideration etc.'

Some of the important provisions which are related to establish product liability in India is discussed below:

##### **Goods**

Section 2 (7) of the Sales of Goods Act defines 'Goods' as 'every kind of movable property other than actionable claims and money; and includes stock and shares, growing crops, grass, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale.'

Thus by defining goods as 'every kind of movable property', the Act brings within its ambit any product which may be sold by the manufactures or retailer. This turn definitely makes it a legislation to establish product liability in India.

##### **Contract of sale**

According to section 4(1) of the Act, 'A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a price. There may be a contract of sale between one part-owner and another.'

Section 4(2) of the Act further adds that 'A contract of sale may be absolute or conditional.'

Thus, following are essentials of contract of sale – (i). It is contract, i.e. all requirements of ‘contract’ must be fulfilled (ii). It is of ‘goods’ (iii) Transfer of property is required (iv) Contract is between buyer and seller (v) Sale should be for ‘price’ (vi) A part owner can sale his part to another part-owner (vii) Contract may be absolute or conditional (viii) Payment and delivery are concurrent conditions.

### **Conditions and warranties**

According to Section 12 of the Sale of Goods Act, ‘a buyer is conferred with the right to repudiate the contract and sue for damages in case of breach of a condition, whether relating to quantity, quality or description. Breach of warranty, on the other hand, entitles the buyer, to sue for damages but not repudiate the contract.’

Further section 12(4) adds that where a stipulation was not included as a condition, it is must for it to turn into a warranty.

Although the parties have used no express words that would create a stipulation of a condition or a warranty, the law annexes to sale of goods contracts many conditions, breach of which may be treated by the buyer as avoiding the contract or giving a right to damages. These are called implied conditions and are enforced on the grounds that the law infers from all circumstances of the case that the parties intended to add such a stipulation to their contract but did not put it in express words.<sup>109</sup>

### **Implied condition as to quality or fitness**

According to section 16 of Sale of Goods Act, it is a requirement that ‘the goods shall be reasonably fit for the purpose made known to the seller by the buyer expressly or by implication. Section 16(2) requires only that the goods should be of merchantable quality.’ One more important aspect of section 16(1) is that it does not cover those cases where the buyer is not dependant on the skill and knowledge of the seller. On the other hand section 16(2) is not limited on this ground but it shall not be applicable when the examination of the goods is done by the buyer. Hence the principle of Caveat emptor is reflected in this section, under which it is the buyer who has to satisfy himself regarding the quality and efficiency of the product purchased.

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<sup>109</sup>*The Moorcock* (1889) 14PD64,68,per Bowen LJ

In Section 16, the first exception to the rule of Caveat emptor is that of question of fact whether the buyer did rely on the skill or judgement of the seller, and no presumption is raised against him by reason of the fact that the goods were in else and he had the opportunity of examining them .Nor is it necessary that he should rely on the sellers skill and judgement only and nothing else.

### **Remedies under this Act for Product Liability**

Remedies under this can be broadly divided into two grounds, first for *breach of conditions* and secondly for *breach of warranty*. Remedies for breach of condition can be claiming of damages or returning the goods. Whereas remedies for breach of warranty is only provided under section 59 of the Sale of Goods Act., namely to set up against the seller the breach of warranty in diminution or extinction of the price or to sue the seller for damages for breach of warranty. According to Section 13 of the Act, a buyer may treat a breach of condition as a breach of warranty and claim damages instead of rejecting the goods.

Measure of damages is governed by Section 73 of the Contract Act, 1872. In the case of warranty of quality, the presumption is that the measure of damages is the difference between what the goods are intrinsically worth at the time of delivery, and what they would have been worth, if they had been according to contract<sup>110</sup>, and this must be ascertained by reference to the market price at that time, whether it has fallen or risen since the date of the contract. However, the buyer has a duty to act reasonably in mitigating the loss or damage.

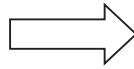
Thus, speaking of remedies available to a victim against a manufacture or seller in case of product liability is either to return the product that too only in case of breach of condition or to claims damages. Damages which again will be according to contract law that means liquidated damages which definitely is not as effective in bringing the victim back to his normal condition which is the main motive of tort law by providing unliquidated damages.

Hence, the researcher has drawn the following inferences from the above analysis of the Sales of Goods Act

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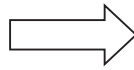
<sup>110</sup>CW Simson v koka Jagannadha Row Naidu, AIR 1914, Mad 633.

**Product Liability and Sales of Goods Act**



**Remedies are returning of the  
goods or to claim damages**

**(Mostly liquidated)**



**Principle of Caveat emptor limits  
the seller's/manufactures' liabilities.**

#### **4.3.5- Special Statutes on product liability**

The other relevant Indian Laws on Product Liability are discussed below:

##### **Product Liability Insurance**

‘There is no enactment for compulsory insurance to cover supply of defective products in India. It is voluntary on the part of a seller or vendor to take this form of insurance in best interests of his business. The prevalent legislation Public liability Insurance Act, 1991 aims at providing for public liability insurance for the purpose of providing relief to the persons affected by accident occurring while handling any hazardous substance for matters connected therewith .Every owner i.e. a person who has control over handling any hazardous substance, has to take insurance policy so that he is insured against liability to give relief in case of death or injury to a person , or damage to any property , arising from an accident occurring while handling any hazardous substance. Further, the Motor Vehicles Act, 1988 makes the insurance of motor vehicles against third party risks, compulsory.

##### **Criminal Liability for Manufacturing or Distributing a Defective Product in India**

The product liability law, in India, apart from the civil liability, also imposes criminal liability in case of non-compliance with the provisions of each of the below mentioned Acts. The said Acts are in addition to and not in derogation of any other laws in force, which implies that an action imposing penal liability can be simultaneously initiated along with a claim under civil law. Some of these are special Acts pertaining to sale of specific goods such as food, drugs, cosmetics etc. The provisions of these enactments are

preventive in form, though the relief envisaged is an action for breach in civil or criminal court.

- The Foods Adulteration Act, 1954
- The Food Safety and Standards Act, 2006
- The Drug & Cosmetics Act, 1940
- The Criminal Procedure Code, 1973
- The Standards of Weights and Measures Act, 1956
- The Agricultural Produce (Grading and Marking) Act, 1937 for marking and grading of commodities like vegetables, butter, etc.
- The Indian Standards Institution (Certification Marks) Act , 1952 to formulate a number of standards for different products by ISI
- The Bureau of Indian Standards Act, 1986

Each of the aforesaid Acts provides for imposition of fine and/or imprisonment in case of supply of defective products or adulterated consumables.

The Food Safety and Standards Act, 2006 is the most recent legislation which comprehensively deals with food and safety standards which are to be complied with by manufacturers and producers, non-compliance of which imposes a liability, upon defaulters, of fine, extending up to Rs. Ten Lakhs and/or imprisonment.'

The provisions of Indian Penal Code (IPC), on the other hand, in respect of product liability, are attracted when the element of cheating and fraud can be attributed to such defects. Provisions of IPC are also attracted to provide punishment to offenders for false weights and measures , adulteration of goods ( food, drugs etc -6 months imprisonment, fine of 1000 rupees or both), and false property marks ( one year imprisonment, fine or both). The period of limitation as per Section 468 of the Criminal Procedure Code is 6 months if offence is punishable with fine only , and one year if offence is punishable with upto one year imprisonment and three years if offence is punishable with imprisonment of above one year and up to three years.

The provisions of the Standards of Weights and Measures Act, 1976 are attracted in case of any false packaging, weight or measure which does not conform to the standards established by or under the said Act and breaches the mandatory declaratory requirements on a package. If any mandatory declaration is found missing on the package a fine of up to 2000 rupees shall be levied as per Rule 39 of the Standards of weights and measures packaged commodity rules.

The Drugs and Cosmetic Act, 1940 also provides for criminal liability for manufacturers and producers of medicinal products or cosmetics etc, which do not adhere to the prescribed standards.<sup>111</sup>

To sum up the above legislation only punishes the offender and provides for no damages or compensation to the victim for product liability in India.

#### **4.4- India and Public Nuisance Legislation**

##### **4.4.1-Introduction-**

Public Nuisance like other concepts under tort also is derived from the English Common Law. No exact definition is accepted worldwide for term 'nuisance'. The gist of this wrong is that 'there must be an unlawful interference with the use or enjoyment of land, or some right over or in connection with it, causing damage to the plaintiff.' Halsbury defines it as 'an injury to the right of a person in possession of property to undisturbed enjoyment of it and results from an improper use by another of his own property'. According to Blackstone, it is something that "worketh hurt, inconvenience or damage". An actionable nuisance only generates when the act causes danger and injury. Public Nuisance is that 'which seriously interfere with the health, safety, comfort or convenience of the public generally or which tend to degrade public morals have always been considered public nuisances and wrongful acts affecting public. Speaking generally, such acts arise from callous disregard of other people's welfare and interest.'

Some of the most frequent instances of Public nuisances are loud noise of the loudspeakers, damaged roads, unnecessary hocking of the vehicle's horns, throwing garbage's on public way, blocking public way by illegal construction or piling up of construction materials on roads. There are innumerable instances of public nuisances that

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<sup>111</sup>Karnika Seth, *Product liability in India*, , King's college , University of London



an individual faces in Indian society. Few years back also nuisance claims were largely filed by individuals for compensation of their personal injuries. But Public nuisance actions by way of Class litigation and public interest litigations are gradually gaining quantum. The biggest type of public nuisance in India is environmental pollution which is mostly ignored by citizens and instead of claiming compensation through class litigation; the victims mostly depend on meagre compensation obtained through public interest litigations.

The Researcher has discussed the present Indian Laws under which one can seek remedies against public nuisance as follows:

#### **4.4.2- The Criminal Procedure Code, 1973 (Cr.P.C), Indian Penal Code (I.P.C) and Public Nuisance**

According to section 133 of the Criminal Procedure Code, 1973, there can be urgent removal of public nuisances. Section 133 of Cr.P.C states that ‘whenever a District Magistrate or a Sub-Divisional Magistrate or any other Executive Magistrate specially empowered in this behalf by the State Government, on receiving the report of a police officer or other information and on taking such evidence (if any) as he thinks fit, considers—

- (a) that any unlawful obstruction or nuisance should be removed from any public place or from any way, river or channel which is or may be lawfully used by the public; or
- (b) that the conduct of any trade or occupation, or the keeping of any goods or merchandise, is injurious to the health or physical comfort of the community, and that in consequence such trade or occupation should be prohibited or regulated or such goods or merchandise should be removed or the keeping thereof regulated; or
- (c) that the construction of any building, or, the disposal of any substance, as is likely to occasion conflagration or explosion, should be prevented or stopped; or
- (d) that any building, tent or structure, or any tree is in such a condition that it is likely to fall and thereby cause injury to persons living or carrying on business in the neighborhood or passing by, and that in consequence the removal, repair or support of such building, tent or structure, or the removal or support of such tree, is necessary; or

(e) that any tank, well or excavation adjacent to any such way or public place should be fenced in such manner as to prevent danger arising to the public; or

f) that any dangerous animal should be destroyed, confined or otherwise disposed of,

such Magistrate may make a conditional order requiring the person causing such obstruction or nuisance, or carrying on such trade or occupation or keeping any such goods or merchandise, or owning, possessing or controlling such building, tent, structure, substance, tank, well or excavation, or owning or possessing such animal or tree, within a time to be fixed in the order—

(i) to remove such obstruction or nuisance; or

(i) to desist from carrying on, or to remove or regulate in such manner as may be directed, such trade or occupation, or to remove such goods or merchandise, or to regulate the keeping thereof in such manner as may be directed; or

(iii) to prevent or stop the construction of such building, or to alter the disposal of such substance; or

(iv) to remove, repair or support such building, tent or structure, or to remove or support such trees; or

(v) to fence such tank, well or excavation; or

(vi) to destroy, confine or dispose of such dangerous animal in the manner provided in the said order;

or, if he objects so to do, to appear before himself or some other Executive Magistrate subordinate to him at a time and place to be fixed by the order, and show cause why the order should not be made absolute.

No order duly made by a Magistrate under this section shall be called in question in any civil court.’

This section is thus used only to stop the ongoing public nuisance and in some cases also to restore the original condition of the damaged public property. Hence, it nowhere provides compensation to the victims.

The Punjab & Haryana High Court on the nature and consequences of orders made under Section 133. The Court observed—

“The proceedings are just to maintain peace and tranquility and the orders rendered under these sections are merely temporary orders. The orders of the courts are coterminous with the judgment or decree of the civil court. No sooner the civil court declares the right of the parties the temporary orders rendered by the courts under Sections 133, 145 and 147 of the Code come to an end.”

Section 133(1) (a) can be invoked only if the nuisance is public nuisance in nature i.e. it affects the interest of public at large. ‘The phrase “public nuisance” has been defined in Section 268 of the Indian Penal Code and this definition is used for the purposes of Section 133. According to that definition, in order to constitute a public nuisance, ‘the injury, danger or annoyance must be caused to the public, or to the people in the vicinity or to persons who may have occasion to exercise any public right.’ The object and public purpose behind Section 133 is to prevent public nuisance that if the magistrate fails to take immediate recourse to Section 133, irreparable damage would be done to the public. However, under Section 133 ‘no action seems possible if the nuisance has been in existence for a long period’. In that case the only remedy open to the aggrieved party is to move the civil court.

According to Section 12 of the Indian Penal Code, the word “public” includes ‘any class of the public or community; but that class must be numerically sufficient to be designated “the public”. Therefore, if a particular individual or his family is only affected by the nuisance, such nuisance cannot be considered to be a public nuisance and hence its removal from any public place cannot be ordered under Section 133. It has been held that a place in order to be public must be open to the public, i. e., a place to which the public have access by right, permission, usage or otherwise.

Clause (b) of Section 133(1) is applicable only in such cases where the conduct of any trade or occupation, etc., is injurious to the health or physical comfort of the community.’

### **Service or notification of order**

‘The order shall be served on the person against whom it is made in the manner provided for service of a summons. If it cannot be so served, it shall be notified by proclamation duly published, and a copy thereof shall be stuck at such place as may be fittest for conveying the information to such person. [S. 134]

Person to obey the order or to show cause —The person against whom such an order is made shall—

- (a) perform, within the time and in the manner specified in the order, the act directed thereby; or
- (b) appear and show cause against the order. [S. 135]

**Consequence of his failing to do so**—If such person does not perform such act or appear to show cause, he shall be punishable under Section 188, Cr.P.C and the order shall be made absolute. [S. 136]

### **Procedure Where Existence of Public Right is Denied**

Where an order is made under Section 133 for the purpose of preventing obstruction, nuisance or danger to the public in the use of any way, river, channel or place, the Magistrate shall, on appearance of the person against whom the order was made, question him as to whether he denies the existence of any public right in respect of the way, river, etc., and if he does so, the Magistrate shall inquire into the matter. If in such inquiry the Magistrate finds reliable evidence in support of such denial, he shall stay the proceedings until the matter of the existence of such right has been decided by competent court; and if he finds no such evidence, he shall proceed in accordance with Section 138. A person who has failed to deny the existence of such a public right or who even after such denial has failed to adduce reliable evidence in its support, shall not be allowed to make any such denial in the subsequent proceedings. [S. 137]

The inquiry as contemplated by Section 137 above is confined only to the denial of the public right and it has nothing to do with the inquiry made for determining whether or not the conditional order made under Section 133(1) is reasonable or proper. This latter inquiry can be made after the inquiry contemplated by Section 137 has resulted in a finding against the person to whom the conditional order was issued.

The object of Section 137 is that if the denial of the public pathway, etc. involves a bona fide claim on the part of the person denying the public right, the matter should be decided by a competent civil court and not by a Magistrate in a summary inquiry provided under Section 137.

### **Procedure Where He Appears to Show Cause**

If the person against whom an order under Section 133 is made appears and shows cause against the order, the Magistrate shall take evidence in the matter as in a summons case. If the Magistrate is satisfied that the order is reasonable and proper the order shall be made absolute; if he is not so satisfied, no further proceedings shall be taken in the case. [S. 138]

It is imperative for the Magistrate to take evidence in the matter and therefore he cannot just dispose of the matter without taking any evidence. His inspection of the site will not be of any use. It is not permissible to adduce evidence by way of affidavits and the Magistrate is bound to record evidence in the same manner as is recorded in a summons case.<sup>112</sup>

### **Local Investigation and Expert Evidence**

The Magistrate may for the purposes of an inquiry under Section 137 or Section 138 (i. e., as mentioned in para 2 and 3 above) — (a) direct a local investigation to be made; or (b) summon and examine an expert. [S. 139]

Where the Magistrate directs a local investigation by any person under Section 139, the Magistrate may—

- (a) furnish such person with such written instructions as may seem necessary for his guidance;
- (b) declare by whom the expenses of the local investigation shall be paid. The report of such person may be read as evidence in the case. [S. 140(1) and (2)]

Where the Magistrate summons and examines an expert, he may direct by whom the costs of such summoning and examination shall be paid. [S. 140(3)]

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<sup>112</sup>R V Kelkar, *Lectures on Criminal Procedure Code*

### **Procedure on Order Being Made Absolute and Consequences of Disobedience**

When an order has been made absolute under Section 136 or Section 138, the Magistrate shall give notice of the same to the person against whom the order was made, and shall require him to perform the act directed by the order within the time fixed in the notice, and inform him that, in case of disobedience, he shall be liable to punishment under Section 188, IPC. [S. 141(1)]

If such act is not performed within the time fixed, the Magistrate may cause it to be performed, and may recover the costs of performing it, either by the sale of any building, goods or any other property removed by his order, or by the distress and sale of any other movable property of such person. [S. 141(2)]

No suit shall lie in respect of anything done in good faith under the above provisions. [S. 141(3)]

It has been held that the order passed by a court cannot be reviewed by itself. Nor could the order be amended without giving notice to the parties.

### **Injunction Pending Inquiry**

If a Magistrate making an order under Section 133 considers that immediate measures are necessary to prevent imminent danger or injury of a serious kind to the public, he may issue such an injunction to the person against whom the order was made, as is required to obviate or prevent such danger or injury pending the determination of the matter. In default of such person forthwith obeying such injunction, the Magistrate may himself use such means as are necessary to obviate such danger or to prevent such injury. [S. 142(1) & (2)]

Though there is no specific provision to give notice to the person concerned before an injunction is issued, justice and fairness demand that an order of injunction should ordinarily be issued only after affording an opportunity to the affected person of being heard.

No suit shall lie in respect of anything done in good faith by a Magistrate under the above provision. [S. 142(3)]

### **Magistrate may Prohibit Repetition or Continuance of Public Nuisance**

A District Magistrate or Sub-Divisional Magistrate, or any other Executive Magistrate duly empowered in this behalf, may order any person not to repeat or continue a public nuisance as defined in the Indian Penal Code or any special or local law [S 143]<sup>113</sup>

Such an order can be passed only if the matter has been adjudicated by a competent court. Disobedience of the order is punishable under Section 291 of the IPC.’

### **Provisions under Indian Penal Code dealing with Public Nuisances**

Chapter IV of Indian Penal Code deals with offences relating to public health, safety, decency, convenience, morals under Sections 268, 269, 270, 279, 280, 287, 288, 290 291 294.

Public Nuisance has been defined in section 268 as, a person is guilty of a public nuisance who does any act or is guilty of illegal omission which causes any common injury, danger or annoyance to the public or to the people in general who dwell or occupy property in the vicinity, or which must necessarily cause injury, obstruction, danger, or annoyance to persons who may have occasion to use any public right. The section further explains that a common nuisance is not excused on the ground that it causes some convenience or advantage. The public nuisance covers all types of pollutions i.e. pollution of land, water, air, noise pollution etc.

Section 290 of the Indian Penal Code (I.P.C.) provides punishment for public nuisance (which includes pollution cases also) in cases not otherwise provided for. These offences are punishable with fine which may extend to 200 rupees.

Section 277 provides that “whoever voluntarily corrupt or fouls the water of any public spring or reservoir so as to render it less fit for the purpose for which it is ordinarily used, shall be punished with simple or rigorous imprisonment for a term extending to three months or fine of five hundred rupees or with both.

Section 269 of I.P.C. also could be invoked against a water polluter. The section provides, “whoever unlawfully or negligently does any act which is, and which he knows or has reason to believe to be, likely to spread the infection of any disease dangerous to life, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.”

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<sup>113</sup> R V Kelkar, *Lectures on Criminal Procedure Code*



Section 278 of the Act, provides that whoever voluntarily vitiates the atmosphere in anyplace so as to make it noxious to health of the person in general dwelling or carrying on business in the neighbourhood or passing along a public way, shall be punished with fine which may extend to five hundred rupees.

The water polluter can also be punished under section 425 of I.P.C. for mischief. If his act causes wrongful loss or damage to public or to any person or if his act causes the water pollution could be brought under section 511 of the Act. Section 440 of the Act deals with mischief caused by killing maiming animals and cattle.

Section 286 of the I.P.C. provides punishment for negligent conduct with respect to explosive substance. Similarly Sections 284 and 285 provide punishments for negligent conduct with respect to poisonous substance and negligent conduct with respect to fire or combustible matter respectively.

To sum up the gist of inferences that the Researcher can gather from the above discussion of the provisions on Public Nuisance under the **Criminal Procedure Code, 1973 and Indian Penal Code** is as follows:

1. First, any order made under section 133 of the Criminal Procedure Code, 1973 is to meet with emergency situation and provides remedies such as removable of nuisance or prohibition of nuisance by stopping it. Hence, it nowhere provides damages (compensation) for the nuisance caused to the victim.
2. Secondly, the order passed under this section is temporary and are subject to further orders of civil courts. The remedies available are only in the form of penalties. No civil remedy like compensation is provided.
3. Thirdly, under this section there is no room for any nuisance which might be in existence since long. So it becomes insufficient to deal with environment pollution related cases, where the damage may be slow and its effect will come to the fore after a long time.
4. Fourthly, public nuisance mostly is connected with environmental issues. Thus, those acts become subject to specific legislation of environmental protection, making its application limited.

#### **4.4.3- Code of Civil Procedure (C.P.C) and Public Nuisance**

Public nuisance derives support from section 91 of CPC that ‘lays down the procedure for initiation of a civil suit for the offense of public nuisance. The marginal note of section 91 reads: public nuisance and other wrongful acts affecting the public. Inclusion of ‘other wrongful acts affecting public’ besides public nuisance widens the scope of the section to incorporate various situations which although do not fall under the accepted straitjacket definitions of nuisance, yet are a cause of discomfort and inconvenience to the public. For instance, courts have read slaughtering of cattle on a public street or encroachment upon a public street by construction of buildings as legitimate cause of action for a claim for public nuisance by the virtue of it being a wrongful act against public.’

As per the General Clauses Act 1897, the definition of nuisance for the purpose of section 91, CPC has to be borrowed from section 268 IPC. The definition of nuisance excludes from its ambit the instances of legalized nuisance. Legalized nuisance are cases when the nuisance cause is statutorily approved and in the interest of greater good and social welfare. For instance, the running of railway engines and trains or establishment of the yard, despite being a legitimate cause of nuisance, is not punishable under IPC or a valid ground for invoking Section 91.

For instance, a suit against a religious procession is maintainable under Section 91 only if the infringement of some right and even if the consequent damage caused is not proved. Similarly, member of the public can maintain a suit for removal of obstruction of a public highway, if his right of passage through it is obstructed, without proof of special damage.’

#### **Applicability of Section 91 CPC**

**Section 91 of CPC states that**

**(1) in the case of a public nuisance or other wrongful act affecting, or likely to affect, the public, a suit for a declaration and injunction or for such other relief as may be appropriate in the circumstances of the case, may be instituted,—**

**(a) by the Advocate General, or**

**(b) with the leave of the Court, by two or more persons, even though no special damage has been caused to such persons by reason of such public nuisance or other wrongful act**

**(2) Nothing in this section shall be deemed to limit or otherwise affect any right of suit which may exist independently of its provisions.**

Though much hasn't been said about the inclusion of clause 1 in section 91, it is believed that inclusion of the Advocate General as the initiator of the suit for public nuisance was to act as a safety check arrangement to the expansive and broad definition of nuisance and the subjectivity of 'wrongful acts against the public'. Later the 1976 amendment changed the position as under:

The present position is that for instituting a suit for public nuisance now the permission of the Advocate general or the Court is to be taken. Such active involvement of the Advocate General and consent of court in public nuisance suits was to ensure that suits are not initiated with malicious intentions, with the sole purpose of creating impediments for the party alleged with causing nuisance.

This rule however does not extend to representative cases when a member of the community whose rights are being restricted by the act of public nuisance files the claim. In such suits, the leave of the court is not necessary. Even in cases when certain rights are provided to the entire community, but immediate damage by the nuisance occurs to an individual, leave of court is not mandatory.

Clause 2 of Section 91 permits the existence of another suit for the same cause of action in through a PIL or as a civil suit for private claims. It also allows an individual aggravated by the nuisance to file for damages his individual suit.

This is primarily so because section 91 in its entirety does not create any rights or deprive anyone of their existing rights. It merely states the procedural guidelines for instituting a civil suit when the cause of action is public nuisance. Consequently, it does not control representative suits under **Order I, Rule 8** or modify the right of a person to sue apart from the provision of this section.

Hence, the researcher can get the following inferences from the above discussion:

1. Section 91 of CPC only deals with procedural provisions and puts no bar on alternative remedies available under criminal law or civil law. This is violative of the principle of Res Judicata.

2. The definition which is accepted to interpret the nature of act as nuisance excludes legal nuisances like accident or damages caused by railways or road construction etc. Hence, for greater good or welfare, the interest of few gets ignored under this section.
3. Any claim for public nuisance made under this section by a class representation would only pave way to file civil claims, which in turn would provide for damages which are ex-gratia in nature.

#### **4.4.4- Public Interest Litigation (P.I.L) and Public Nuisance**

The rapid development of the society and the fast speed with which is the human life is progressing has definitely increased the acts which may interfere with the rights of others. This in turn has largely increased the cases of public nuisances. In India, most of the acts which causes disturbances to the public in general also degrade the environment to a greater extend. Thus, Public Interest Litigations recently, have assumed the importance of being the primary tool for bringing to the notice of judiciary, causes of action against public nuisance damaging the environment.

‘Public Interest Litigation’ also known as ‘social interest litigation’ is basically the suit filed by a person whose rights might not have been damaged directly but he may claim representing the poor and weak class of the country. The main purposes of Public interest litigation can be said to provide remedies in case of injuries caused to public at large, in non performance of public duties and lastly to claim enforcement of public duties. In Indian legal arena, ‘Public Interest Litigation’ is largely filed under Article 32 or Article 226 of the Indian Constitution as remedy for infringement of fundamental rights.

Since, right to live in pollution free or healthy environment also is considered to be a fundamental right so in most of environmental pollution cases ‘Public Interest Litigation’ is filed to seek remedies. However, it can also be filed as a civil suit under class action as provided under order 1, rule 8 of CPC or under section 91 of the CPC as discussed earlier as Public Nuisance Suit.

The key requirement of ‘Public Interest Litigation’ is that there should be infringement of fundamental rights. The key facets of public interest litigation include:

- a relaxation of standing requirements so that plaintiffs need not satisfy typical burdens of proving injury, causation or redress ability;
- a willingness of the Indian courts to order the executive branch to undertake discretionary functions that normally fall outside the scope of judicial review;
- an allowance of representation by proxy, where a person with “sufficient interest” can seek judicial review on behalf of poor and vulnerable segments of the general population.

Hence, it can be inferred that class action under the concept of tortious liability is allowed by P.I.L in India largely in cases which involve environmental degradation instead of Public Nuisance Litigation as used in America. The compensation awarded under Public Nuisance Litigation is not ex-gratia in nature i.e. it is not only limited to repair the damages caused to the victims at large. Thus, ignoring individuals’ interest in a class action as done in Public Interest Litigation. The gravity of individual damage is mostly ignored under Public Interest Litigation.

After studying and analysing the various legislations dealing with State Liability, Product Liability and Public Nuisance, the researcher shall study and analyse the judicial view point in this regard in the next chapter. The researcher has tried to find out and study the important and landmark judgements in the next chapter, wherein the judiciary has dealt with the State Liability, Product Liability and Public Nuisance.