CHAPTER 5

Precedents and Judicial Pronouncements on Indian Tort Law

5.1-Introduction

Judiciary had been always protecting the basic rights of human. There are various precedents worldwide where the interest of the general people was given priority. Hence, this study would not have been complete without the analysis of the various case laws in order to determine the actual status of the various laws and regulations on State liability, Product liability and Public Nuisance in India.

5.2- Judicial Pronouncements and State Liability

5.2.1- State Liability in Pre-independent India

The question of liability of the State in cases of torts committed by its servants first came to the attention of the judiciary in the pre-independence era with the famous case of ***P &O Steam Navigation Co. Vs. Secretary of State***[114]. The fact of the case in brief is that the servant of the plaintiff's company was passing by a dockyard which belonged to the East Indian Company by a carriage driven by two horses. At that moment some workers of the dockyard were crossing the road carrying a heavy iron rod. Due to the negligence of the workers the iron rod fell and a loud sound occurred which frightened the horses and they bolted and were injured thereby. The plaintiff company filed a suit claiming compensation from the Government due to the negligence of its servants. In this suit the important question aroused if the State can be held vicariously liable for the tort committed by its servants. Here Sir Barnes Peacock C. J. (of the Supreme Court) observed that "the doctrine that the King can do no wrong, had not application to the East India Company. The company would have been liable in such cases and the Secretary of State was thereafter also liable (He was interpreting section 65, Government of India Act, 1858, which equated the liability of the Secretary of State for India with that of the East India Company)." On this holding, it was not necessary for Peacock C.J. to discuss the distinction between sovereign and non-sovereign functions. **But he made a distinction between the two and observed, that if a tort were committed by a public servant in the discharge of sovereign functions, no action would lie against**

[114](1861) 5 Bom. H.C.R. App. I,p.1.

the Government – e.g. if the tort was committed while carrying on hostilities or seizing enemy property as prize. Thus, this case gave a new dimension to State liability in India by stating that only for non-sovereign acts the State can be held liable and immunity was granted for sovereign acts.

The doctrine of immunity for acts done in the exercise of "sovereign functions", enunciated in the *P & O case*, was applied by the Calcutta High Court in **Nobin Chander Dey Vs. Secretary of State,**[115] In that case, the plaintiff contended that the Government had made a contract with him for the issue of a licence for the sale of ganja and had committed breach of the contract. The High Court held as under:

(i) On the evidence, no breach of contract had been proved.

(ii) **Even if there was a contract, the act was done in exercise of sovereign power and, therefore it was not actionable**. The High Court expressly followed the P & O ruling.

In ***Secretary of State Vs. Hari Bhanji***[116], the Madras High Court held that State immunity was confined to acts of State. In this case C.J.Turner further clearly explained the concept of Sovereign Act and Non-Sovereign Act. He explained that "The act of State, of which the municipal courts of British India are debarred from taking cognisance, are acts done in the exercise of sovereign power, which do not profess to be justified by municipal law ……where an act complained of is professedly done under the sanction of municipal law, and in exercise of powers conferred by that law, the fact that it is done by the sovereign powers and is not an act which could possibly be done by a private individual does not oust the jurisdiction of the civil court".

The Allahabad High Court took a similar view in ***Kishanchand Vs. Secretary of State***[117]**.** The Madras High Court re-iterated this view in ***Ross Vs. Secretary of State***[118]. However, in ***Secretary of State Vs. Cockraft***,[119] **making or repairing a military road was held to be a sovereign function and the Government was held to be not liable, for the negligence of its servants in the stacking of gravel on a road resulting in a carriage accident injuring the plaintiff.**

[115] (1873) ILR 1 Cal.1.
[116](1882) ILR 5 Mad. 273
[117](1881), ILR 2 All 829.
[118]AIR 1915 Mad. 434
[119]AIR 1915 Mad 993; ILR 39 Mad. 35

Analysis of the above cases:

From the above cases the highlighting points that can be inferred are as follows:

- The trend of judiciary under British in most of the cases of pre-independent India was to grant immunity to the state act.
- The fates of the cases were solely decided by differentiating between Sovereign and non-sovereign functions of the State.
- Under the British Rule the doctrine of 'King can do no wrong' was absolutely applicable in deciding cases where liability of the State had to decided for tortuous wrongs committed by the employees or servants of the State.

5.2.2-State Liability in Independent India

Decisions based on determination of Sovereign and Non-Sovereign Functions

When the Constitution of India commenced, the liability of the State in independent India started to be interpreted in various different point of views. Initially in few cases it was decided that the State would be liable just like any private employer for the wrongs committed by its employees during the course of employment provided the act was committed during discharge of private function and not sovereign function. The second controversies aroused while distinguishing the functions of the State into sovereign and non-sovereign functions. The third interpretation was that only immunity should be given to act of State. A study of some of the important decisions on divergent aspects, pronounced by the Supreme Court of India as well as different High Courts would reveal the uncertain and unsatisfactory legal position.

The first landmark case on State Liability after the Constitution was of ***State of Rajasthan Vs. Vidyawati.***[120] The fact of the case in brief is that a person was killed by the rash and negligent driving of the driver of car which was used by the Collector of Udaipur. The legal representatives of the deceased sued the State of Rajasthan and the driver for compensation for the tort of negligent committed by the driver. It was found by the court, as a fact, that the driver was rash and negligent in driving the jeep and that the accident was the result of such driving. The trial court allowed the claim against the

[120]AIR 1962 SC 933

State and the appeal against the verdict of the trial court was rejected by the Rajasthan High Court. Finally, the appeal was also dismissed by the Supreme Court. **The Apex Court expressed that the maxim 'King can do no wrong" is not proper to be used in India and also stressed to the point that even in the United Kingdom this maxim was abrogated by the passing of the Crown's Proceedings Act. Hence, the State like any other private individual should be vicariously liable for the tort committed by its servants in the course of employment.**

But, the uncertainty was evident when the Supreme Court itself gave a divergent view in ***Kasturi Lal vs. State of UP***.[121] In that case, the plaintiff had been arrested by the police officers on a suspicion of possessing stolen property. On a search of his person, a large quantity of gold was found and was seized under the provisions of the Code of Criminal Procedure. Ultimately, he was released, but the gold was not returned, as the Head Constable in charge of the malkhana (wherein the said gold was stored) had absconded with the gold. The plaintiff thereupon brought a suit against the State of UP for the return of the gold (or in the alternative) for damages for the loss caused to him. It was found by the courts below, that the concerned police officers had failed to take the requisite care of the gold seized from the plaintiff, as provided by the UP Police Regulations. The trial court decreed the suit, but the decree was reversed on appeal by the High Court. When the matter was taken to the Supreme Court, the court found, on an appreciation of the relevant evidence, that the police officers were negligent in dealing with the plaintiff's property and also, that they had also not complied with the provisions of the UP Police Regulations in that behalf. In spite of the said holding, the Supreme Court rejected the plaintiff's claim, on the ground that "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. **The power to arrest a person, to search him and to seize property found with him, are powers conferred on the specified officers by statute and in the last analysis, they are powers which can be properly categorized as sovereign powers; and so, there is no difficulty in holding that the act which gave rise to the present claim for damages had 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**

[121]AIR 1965 SC 1039

characteristic of sovereign power, the claim cannot be sustained."However, the Supreme Court made an important observation in the case by expressing that it was high time for the Indian Legislatures to pass legislation which could clearly establish the liability of the State in tortuous claims.

With this case started a new trend of distinguishing sovereign and non-sovereign functions, where it became pertinent to establish that the act for which the tortuous liability aroused was a non-sovereign function of State for a successful claim of compensation. The following few cases which are not exhaustive shall show the prevailing situation at that time.

Similarly, in ***Satyawati Devi v. Union of India***[122], **The Delhi High Court held that the carrying of a hockey team in a military truck to the Air Force Station to play a match is not a sovereign function.** In this case an Air Force vehicle was carrying hockey team of Indian Air Force Station to play a match. After the match was over, the driver was going to park the vehicle when he caused the fatal accident by his negligence. It was argued that it was one of the functions of the Union of lndia to keep the army in proper shape and tune and that hockey team was carried by the vehicle for the physical exercise of the Air Force personnel and therefore the Government was not liable. The Court rejected this argument and held that the carrying of hockey team to play a match could by no process of extension be termed as exercise of sovereign power and the Union of India was therefore liable for damages caused to the plaintiff.

In ***Union of India v. Sugrabai***[123], the Bombay High Court made the Government liable for the negligence of the driver of a military motor truck as the tort was committed during discharge of non-sovereign functions. The Bombay High Court observed in following words:

"Sovereign powers are vested in the State in order that it may discharge its sovereign functions. For the discharge of that function one of the sovereign powers vested in the State is to maintain an army. Training of army personnel can be regarded as a part of the exercise of that sovereign power. **The State would clearly not be liable for a tort committed by an army officer in the exercise of that sovereign power.** But it cannot be said that every act which is necessary for the discharge of a sovereign function and

[122] A.I.R 1967 Delhi 98
[123]A.I.R 1969 Bom 13

which is undertaken by the State involves an exercise of sovereign power. Many of these acts do not require to be carried out by the State through its servants. In deciding whether a particular act was done by a Government servant in discharge of a sovereign power delegated to him, the proper test is whether it was necessary for the State for the proper discharge of its sovereign function to have the act done through its own employee rather than through a private agency."

In ***State of M.P. v. Chironji Lal***[124] a new question came before the court relating to the payment of damages for the loss caused by the lathi-charge of the police in a situation where it was unauthorized and unwarranted by law. It was alleged that the police resorted to lathi-charge wilfully and without any reasonable cause and thus damaged the plaintiff's property **to maintain law and order which is a sovereign function.**

Analysis of the above cases:

The researcher from the above cases can make the following propositions that:

- With the case of ***State of Rajasthan Vs. Vidyawati,*** the judiciary quite evidently expressed its perspective that the English doctrine 'King can do no wrong' should not have any room in Independent India which was a welfare state.
- With ***Kasturi Lal*** case the uncertainty cropped in once again and the judiciary clearly opined that to remove this uncertainty proper legislation is needed to be adopted in India.
- After ***Kasturi Lal*** case, there was a rise in the trend of deciding tortious liability of the State with the litmus paper test of Sovereign and Non-sovereign function of State.
- From the above cases it can be inferred that the State were held liable in those cases only where the tort was committed while discharging Non-Sovereign functions.

Constitutional Tort as a Public Law Remedy

Post independence gradually there came the era which saw increase in number of unlawful detention and custodial death. Such instance were right to life was directly or indirectly infringed compensation started to be claimed and given by way of Writs under Article32 of the Constitution by the Supreme Court and under Article 226 by the High Court. Indian Judiciary again and again through various judgements awarded compensation when remedy for torts committed by State servants were claimed under public law i.e. through writs dues for torts which also infringed the fundamental rights of

[124]A.I.R 1981 M.P. 65

the victims. Below the researcher makes an attempt to study some of the relevant and important case laws on this aspect.

In ***Rudal Shah v. State of Bihar***[125]**,** the Supreme Court awarded an important judgement against the Bihar Government for the wrongful and illegal detention of Rudal Shah in Muzaffarpur jail for as many as 14 yrs after he was acquitted by the Sessions Court in June 1968. **The Court ordered compensation of Rs 30,000 for the injustice and injury done to Rudal Shah and his helpless family.**

In ***Bhim Singh v. State of Jammu And Kashmir***[126], **In this case the Court awarded exemplary cost of Rs 50,000 on account of the authoritarian manner in which the police played with the liberty of the appellant.**

In the judgment of the High Court of Andhra Pradesh in ***Challa Ramkonda Reddy Vs. State of AP***,[127] **it was held that the plea of sovereign immunity was not available, where there was a violation of the fundamental rights of the citizens.** It was a case where a person arrested by the police was lodged in a cell in the jail. He expressed his apprehension to the authority in charge of the jail, that his enemies were likely to attack and kill him in the jail. This apprehension was not given any consideration by the authorities. During the particular night, there were only two persons guarding the jail, instead of the usual six. The enemies of the arrested person entered the jail during the night and shot him dead. The legal representatives of the deceased filed a suit for damages. The trial court found that the authorities were negligent in guarding the jail and that the death of the deceased was attributable to such negligence. However, the suit was dismissed on the ground that the arrest and detention of the deceased in jail was in exercise of sovereign functions of the State. During the hearing of the plaintiff's appeal, the State relied upon the decision of the Supreme Court in *Kasturi Lal*. The High Court, however, held, applying the principle of a decision of the Privy Council in *Maharaj Vs. AG for Trinidad and Tobago*, (1978) 2 All ER 670, **that where the fundamental rights of the citizens are violated, the plea of sovereign immunity, which is (assumed to be) continued by article 300 of the Constitution, cannot be put forward.**

[125](1983) 4 SCC 141
[126]1985 (2) SCC 1117
[127]AIR 1989 AP 235

Saheli v. Commissioner of Police [128] was another milestone in the evaluation of compensation jurisprudence in writ courts. The masterpiece judgement in Vidyawati, which was frozen by Kasturi Lal was rightly quoted in this case. The State was held liable for the death of nine year old child by Police assault and beating. Delhi Administration was ordered to pay compensation of Rs. 75000/-.

When a question arose as to the legality of such awards, it was clarified by the Supreme Court in ***Nilabati Behera Vs. State of Orissa***[129]**,** that it is always open to the Supreme Court (under article 32 of the Constitution) and to the High Court (under article 226 of the Constitution), to award compensation in the exercise of its constitutional power. **It was clarified that such an award did not finally specify, or put an end to, the claim for damages and that such an award is only a provisional award, which shall be taken into account by the civil court, while awarding the damages according to law.** In this case, however, the distinction between sovereign and non-sovereign functions and liability of the State for the tortious acts of its servants was not gone into details.

This distinction between sovereign and non-sovereign functions was considered at some length in ***N. Nagendra Rao Vs. State of AP,***[130] earlier Indian decisions on the subject were referred to. The court enunciated the following legal principles, in its judgment:

"**In the modern sense, the distinction between sovereign or non-sovereign power thus does not exist**. It all depends on the nature of the power and manner of its exercise. Legislative supremacy under the Constitution arises out of constitutional provisions. The legislature is free to legislate on topics and subjects carved out for it. Similarly, the executive is free to implement and administer the law. A law made by a legislature may be bad or may be *ultra vires*, but, since it is an exercise of legislative power, a person affected by it may challenge its validity but he cannot approach a court of law for negligence in making the law. Nor can the Government, in exercise of its executive action, be sued for its decision on political or policy matters. **It is in (the) public interest that for acts performed by the State, either in its legislative or executive**

[128]AIR 1990, SC 513
[129](1993) 2 SCC 746
[130]AIR 1994, SC 2663; (1994) 6 SCC 205

capacity, it should not be answerable in torts. That would be illogical and impracticable. It would be in conflict with even modern notions of sovereignty".[131]

The court in the above case suggested the following tests –

"One of the tests to determine if the legislative or executive function is sovereign in nature is, whether the State is answerable for such actions in courts of law. For instance, acts such as defence of the country, raising (the) armed forces and maintaining it, making peace or war, foreign affairs, power to acquire and retain territory, are functions which are indicative of external sovereignty and are political in nature. Therefore, they are not amenable to jurisdiction of ordinary civil court. No suit under Civil Procedure Code would lie in respect of it. The State is immune from being sued, as the jurisdiction of the courts in such matters is impliedly barred." [132]

The court proceeded further, as under:

"But there the immunity ends. No civilized system can permit an executive to play with the people of its county and claim that it is entitled to act in any manner, as it is sovereign. The concept of public interest had changed with structural change in the society. No legal or political system today can place the State above (the law) as it is unjust and unfair for a citizen to be deprived of his property illegally by negligent act of officers of the State without any remedy. From sincerity, efficiency and dignity of (the) State as a juristic person, propounded in nineteenth century as sound sociological basis for State immunity, the circle had gone round and the emphasis now is more on liberty, equality and the rule of law. The modern social thinking of progressive societies and the judicial approach is to do away with archaic State protection and place the State or the Government on a par with any other juristic legal entity. **Any watertight compartmentalization of the functions of the State as "sovereign and non-sovereign" or "governmental and non-governmental" is not sound. It is contrary to modern jurisprudential thinking.** The need of the State to have extraordinary powers cannot be doubted. But with the conceptual change of statutory power being statutory duty for (the) sake of society and the people, the claim of a common man or ordinary citizen cannot be thrown out, merely because it was done by an officer of the State; duty

[131]AIR 1994, SC 2663; (1994) 6 SCC 205
[132]Ibid

of its officials and right of the citizens are required to be reconciled, so that the rule of law in a Welfare State is not shaken".

The court emphasised the element of Welfare State in these words:

"In (a) Welfare State, functions of the State are not only defence of the country or administration of justice or maintaining law and order, but it extends to regulating and controlling the activities of people in almost every sphere, educational, commercial, social, economic, political and even marital. The demarcating line between sovereign and non-sovereign powers, for which no rational basis survives, had largely disappeared. Therefore, barring functions such as administration of justice, maintenance of law and order and repression of crime etc. which are among the primary and inalienable functions of a constitutional Government, the State cannot claim any immunity."[133]

The Court linked together the State and the officers:

"The determination of vicarious liability of the State being linked with (the) negligence of its officers, if they can be sued personally for which there is no dearth of authority and the law of misfeasance in discharge of public duty having marched ahead, there is no rationale for the proposition that even if the officer is liable, the State cannot be sued."[134]

The court also distinguished the judgment in Kasturi Lal, in these words:

"Ratio of Kasturi Lal is available to those rare and limited cases where the statutory authority acts as a delegate of such functions for which it cannot be sued in court of law. In Kasturi Lal case, the property for damages of which the suit was filed was seized by the police officers while exercising the power of arrest under section 54(1) (iv) of the Criminal Procedure Code. The power to search and apprehend a suspect under Criminal Procedure Code is one of the inalienable powers of State. It was probably for this reason that the principle of sovereign immunity in the conservative sense was extended by the Court. But the same principle would not be available in large number of other activities carried on by the State by enacting a law in its legislative competence."

[133]AIR 1994, SC 2663; (1994) 6 SCC 205
[134]Ibid

In this context, the court (in *Nagendra Rao*) offered the following distinction. "A law may be made to carry out the primary or inalienable functions of the State. Criminal Procedure Code is one such law. A search or seizure effected under such law could be taken to be an exercise of power which may be in domain of inalienable function. Whether the authority to which this power is delegated is liable for negligence in discharge of duties while performing such functions, is a different matter. But, when similar powers are conferred under the other statute as incidental or ancillary power to carry out the purpose and objective of the Act, then, it being an exercise of such State "function which is not primary or inalienable, an officer acting negligently is liable personally and the State vicariously. Maintenance of law and order or repression of crime may be inalienable functions, for (the) proper exercise of which, the State may enact a law and may delegate its functions, the violation of which may not be sueable in torts, unless it trenches into and encroaches on the fundamental rights of life and liberty guaranteed by the Constitution. But that principle would not be attracted where similar powers are conferred on officers who exercise statutory powers which are otherwise than sovereign powers as understood in the modern sense. The Act (Essential Commodities Act) deal with persons indulging in hoarding and black marketing. Any power for regulating and controlling the essential commodities and the delegation of power to authorized officers to inspect, search and seize the property for carrying out the object of the statute cannot be a power, for (the) negligent exercise of which the State can claim immunity. No constitutional system can, either on State necessity or public policy, condone negligent functioning of the State or its officers."[135]

By this case the judicial perspective on State Liability for torts committed became quite clear as it was evident that for those torts committed by State servants those which infringed fundamental rights the public law remedy of granting ex-gratia compensation by writs was encouraged and permitted. But the doctrine of Sovereign immunity still was uncertain and existed while seeking remedies under private law.

Further the view of the Andhra Pradesh High Court in ***Challa Ramkonda Reddy Vs. State of AP*** was approved by Supreme Court in ***State of A.P. v. Chella Ramakrishna Reddy*[136].**

[135]AIR 1994 SC 2663; (1994) 6 SCC 205
[136]AIR 2000 SC 2083

Analysis and highlights of important inferences from the above discussed cases:

- From the cases like ***Rudal Shah v. State of Bihar, Bhim Singh v. State Of Jammu And Kashmir*** and ***Challa Ramkonda Reddy Vs. State of AP*** one thing becomes quite clear that post independence the approach of the judiciary was to grant compensation to the victims for those torts like custodial death, false imprisonment etc, where there were infringement of fundamental rights.
- In ***Challa Ramkonda Reddy Vs. State of AP*** it was clearly stated that plea of sovereign immunity was not available, where there was a violation of the fundamental rights of the citizens. This also means that the concept of sovereign immunity existed in other torts where no fundamental rights can be curtailed. This proves the dependency of getting compensation and establishing tortious liability of State sole on the establishment of the fact that the tort involved infringement of Fundamental Right.
- From the landmark judgement pronounced in ***N. Nagendra Rao Vs. State of AP*** two points emerged. First was that 'In the modern sense, the distinction between sovereign or non-sovereign power thus does not exist' and second was 'Any watertight compartmentalization of the functions of the State as "sovereign and non-sovereign" or "governmental and non-governmental" is not sound. It is contrary to modern jurisprudential thinking' which mean that any State liability established by analysing the function of State as 'Sovereign' or 'Non-Sovereign' was something which was not beyond doubts.
- From the above cases it can be inferred that for those torts committed by State servant that infringed fundamental rights the public law remedy of granting ex-gratia compensation by writs was encouraged and permitted. But the doctrine of Sovereign immunity still was uncertain and existed while seeking remedies under private law.

Recent Judgements on State Liability under tort

In the decision reported in ***Darshan v. Union of India*** [137], the said principle was invoked. That was a case in which the deceased had fallen into a man hole left uncovered by the authority concerned and the authority was held responsible. In the said case it was observed as follows:

"Coming to the instant case, it is one of res ipsa loquitur, where the negligence of the instrumentalities of the State and dereliction of duty is writ large on the Red Fort in

[137] 2000 ACJ 578

leaving the manhole uncovered. The dereliction of duty on their part in leaving a death trap on a public road led to the untimely death of Skattar Singh. It deprived him of his fundamental right under Article 21 of the Constitution of India. The scope and ambit of Article 21 is wide and far reaching. It would, undoubtedly, cover a case where the State or its instrumentality failed to discharge its duty of care cast upon it, resulting in deprivation of life or limb of a person. Accordingly, **Article 21 of the Constitution is attracted and the petitioners are entitled to invoke Article 226 to claim monetary compensation as such a remedy is available in public law, based on strict liability for breach of fundamental rights."**

In ***State of Haryana v. Santra***[138], the ratio of the case was on the principles of state liability for negligence. Here it was clearly established that the doctor while performing the operation was acting as a government servant and acting in the course of employment of the government. Hence when there was negligence, it amounted to acting in bad faith, and so the defence of sovereign immunity could not be used by the state. Moreover it was also held that such negligence which could have been perceived by a professional who had a duty to do so should take into consideration these matters and cannot escape liability by claiming defence of consent by the petitioner.

On the other hand in ***Sube Singh v. State of Haryana***[139] it was laid down that compensation is not to be awarded in all cases. This case limited the award of compensation to cases where:

(i) the violation of Article 21 is patent and inconvertible; (ii) the violation is gross and of a magnitude to shock the conscience of the court; or (iii) the custodial torture alleged had resulted in death, or the custodial torture is supported by medical report or visible marks or scars or disability.

In this case, the petitioner alleged illegal detention, custodial torture and harassment to the family members of the petitioner. Applying the foregoing criteria, the Court did not award any compensation in this case on the ground of lack of clear and incontrovertible evidence.

[138]2000 (1) CPJ 53 (SC)
[139](2006) 3 SCC 178

In another case of ***Marakkar vs State Of Kerala***[140]**,** while allowing the appeal claiming compensation against the State, the High Court of Kerala made the following observation:

"The matter has been so elaborately considered with a view to sound a note of caution to the public authorities. They seem to remain under the impression that they cannot be made liable for their culpable acts and omissions. Things have gone to such a state that it has become necessary to issue orders from courts to the authorities concerned to repair the roads. In such a state of affairs the court has to invoke its jurisdiction to come to the rescue of the public. Let the authorities' note that they cannot be get away with their culpable acts or omissions with impunity. They may have to pay for their apathy. They are alerted that unless they bestow sufficient care in discharging their social obligations, they may be in peril."

In ***Kanti Devi & Others vs State Of U.P. & Others***[141]**,** the High Court of Allahabad while allowing the appeal to grant compensation to the victims' family who had died in lathi charge by U.P Police personals, made the following observations:

"....**It was observed that award of compensation in a proceeding under Article 32 by the Apex Court or by the High Court under Art.226 of the Constitution is a remedy available in public law, based on strict liability for contravention of fundamental rights to which principle of sovereign immunity does not apply, even though it may be available as a defence in private law in an action based on tort. In view of the fact, the defence of sovereign immunity is not available in the constitutional remedy under writ jurisdiction.** The writ petition is maintainable to exemplary cost in cases of violation of Constitutional right enshrined under Article 21 & 22 for the negligent act of the Police of Sate of U.P. in exercise of the power on behalf of State. **The defence of sovereign immunity may be applicable in Appropriate Cases in private law, wherein vicarious liability of State in tort may arise.** Our State is a welfare State. The Government and its employees have to protect the fundamental and Constitutional right of our citizen. High Court being the protector of civil liberties, has not only power and jurisdiction under Article 226 to entertain the petition but there is obligation also to grant appropriate relief to the victim or heir of the victim for violation

[140] 2009 CriLJ 1703.
[141] Civil Writ Jurisdiction Case No. 18500 of **2011**. Decided On, 22 February 2012 a*vailable at* https://indiankanoon.org/doc/31838786/

of fundamental right of life and liberty, notwithstanding the remedy available for filing civil suit for damages for vicarious liability in tort and further to prosecute for offence. Hence in view of the aforesaid discussion, it is clear that the objection raised by the learned Government Advocate in the present case that the action of the appellant was in exercise of sovereign power and the petition is not maintainable for compensation against the State, is misconceived and the same cannot be accepted."

In another case of ***Adambhai Sulemenbhai Ajmeri & Ors. v. State of Gujarat (the Akshardham Temple case)***[142], the accused persons spent more than a decade in prison; the Supreme Court acquitted the accused persons with a specific noting as to the perversity in the conduct of the case from investigation to conviction to sentencing but did not award any compensation to those wrongfully convicted; despite also noting that the police instead of booking the real culprits caught innocent people and subjected them to grievous charges.

However, when a separate petition praying for compensation came up before another bench of the Supreme Court, the plea for compensation was rejected on the grounds **that acquittal by a court did not automatically entitle those acquitted to compensation and if compensation is to be awarded for acquittal, it will set a dangerous precedent".**

The foregoing is in contrast to the other cases where under similar circumstances the court held the State accountable and awarded compensation. Perhaps it was owing to this kind of variance in the decisions on otherwise similar facts that the High Court of Delhi in its Reference to the Commission noted that **"these (awards of compensation for wrongful incarceration under public law) are episodic and are not easily available to all similarly situated persons."**[143]

In ***Ram Lakhan Singh v. State Government of Uttar Pradesh***[144] it was highlighted by the Apex Court that **"In cases of wrongful incarceration, prosecution involving infringement or deprivation of a fundamental right, abuse of process of law, harassment etc., though it had evolved as a judicial principle that the Supreme Court and the High Courts have the power to order the State to pay compensation**

[142](2014) 7 SCC 716
[143] Law Commission Report, *available at:* https://lawcommissionofindia.nic.in/reports/Report277.pdf (Last visited on 05.02.18)
[144] (2015) 16 SCC 715

to the aggrieved party to remedy the wrong done to him as well as to serve as a deterrent for the wrongdoer; but there is no set framework(statutory or otherwise) within which the right to compensation or the quantum of compensation is determined. Compensation for violation of fundamental rights in aforementioned cases is a public law remedy but there is no express provision in the Constitution of India for grant of compensation by the State in such cases.[145] It is a remedy determined and decided on case-to-case basis dependent on the facts of each case, the disposition of the court hearing the case etc. which makes this remedy arbitrary, episodic and indeterminate[146]..."

Vohra Sadikbhai Rajakbhai & Ors. Vs. State of Gujarat & Ors [147], is a recent case where again the Supreme Court while deciding the liability of the State **determined the nature of the function of the State and relied on a previous judgement which granted compensation as the function for which damage was caused was a non-sovereign function.**

The appellants herein are the owners of land, which is proximate to the Mazum dam that had been built over river Mazum. They had grown hybrid berry trees over the said land which, they claim, belong to their ancestors and were earning their livelihood from the fruits of the said trees. Respondents have built a dam over River Mazum in the nearby area for supplying water for irrigational purpose and thereby to earn revenue. In June 1997, there were heavy rains in the said area which resulted in overflowing of the water in the dam.

In order to save the dam, the respondents released nearly 60,000 cusecs of water. This release of water flooded the fields of the appellants. With the submerging of the land of the appellants, all the trees standing on the land got uprooted resulting in destroying the whole cultivation of hybrid berries. According to the appellants, there entire 8 bighad of agricultural land became part of the river Mazum and the only source of livelihood was lost. The appellants claimed compensation for the damage done to the trees standing on the said land by serving legal notice to the respondents under Section 80 of the Code of Civil Procedure, 1908. Damages and compensation to the extent of 21,50,000 was

[145]Vibin P.V. v. State of Kerela, AIR 2013 Ker 67
[146]State of Orissa v. Duleshwar Barik, 2017 (I) OLR 824
[147]AIR 2016 (SC) 2429

claimed alleging that it happened due to gross negligence and lack of administration on the part of the respondents.

In this case though compensation was granted establishing the liability of the State but the relevant point is that while deciding the matter the Court considered the nature of the act on line of sovereign and non-sovereign functions and for that it quoted the following passage from the judgement in *S.Vedantacharya & Anr. v. Highways Department of South Arcot & Ors*, SC, (1987) 3 SCC 400:

"State Government erected a reservoir adjoining the plaintiff's land in order to provide drinking water facilities to a village in the State.

The State acquired a part of the plaintiff's land for the purpose of constructing a channel for carrying the overflow of water from the reservoir to a Nalla which was at a distance of about 1500 feet from the waste-weir of the reservoir. This channel was however not constructed except to the extent of 250 feet on the side of the Nalla. Due to very heavy rainfall the water from the reservoir overflowed into the waste-weir and thereafter flowed over the plaintiff's land, causing considerable damage to the land and the crops standing thereon. In a suit by the plaintiff for damages they alleged that due to the negligence of the State in not taking proper precautions to guard against the overflow of water they had sustained the loss.

The State inter alia contended that the loss was due to heavy rain which was an act of God and therefore they were not liable and further that the construction of the reservoir was an act of the State in the sovereign capacity and, therefore, it was not liable for the tortious or negligent acts of its servants. It was held that the fact that the danger materialised subsequently by an act of God was not a matter which absolved the State from its liability for the earlier negligence in that no proper channel for the flow or overflow of water from the waster- weir was constructed by it in time; **that the act of the State in constructing the reservoir for the supply of drinking water to its citizens at best could be considered a welfare act and not an act in its capacity as a sovereign; and that, therefore, the State was liable in negligence for the loss caused to the plaintiff."**

In ***Babloo Chauhan @ Dabloo v. State Government of NCT of Delhi*** [148], the High Court of Delhi, while dealing with an appeal on the issues of fine and awarding of default sentences without reasoning, and suspension of sentence during pendency of appeal, expressed its concerns about wrongful implication of innocent persons who are acquitted but after long years of incarceration, and the lack of a legislative framework to provide relief to those who are wrongfully prosecuted. **The Court, vide its order dated 30 November 2017,specifically called for the Law Commission of India ("the Commission") to undertake a comprehensive examination of issue of relief and rehabilitation to victims of wrongful prosecution, and incarceration" ("the Reference"), noting that:**

There is at present in our country no statutory or legal scheme for compensating those who are wrongfully incarcerated. The instances of those being acquitted by the High Court or the Supreme Court after many years of imprisonment are not infrequent. They are left to their devices without any hope of reintegration into society or rehabilitation since the best years of their life have been spent behind bars, invisible behind the high prison walls. The possibility of invoking civil remedies can by no stretch of imagination be considered efficacious, affordable or timely……The decisions in Khatri v. State of Bihar (1981) 1 SCC627; Veena Sethi v. State of Bihar AIR 1983 SC 339;RudulSah v. State of Bihar AIR 1983 SC 1086; Bhim Singh v. State of Jammu and Kashmir (1985) 4 SCC 6771 247 (2018) DLT 31.2 and Sant Bir v. State of Bihar AIR 1982 SC 1470, are instances where the Supreme Court had held that compensation can be awarded by constitutional courts for violation of fundamental right under Article 21 of the Constitution of India. These have included instances of compensation being awarded to those wrongly incarcerated as well. **But these are episodic and are not easily available to all similarly situated persons.**

There is an urgent need, therefore, for a legal (preferably legislative) framework for providing relief and rehabilitation to victims of wrongful prosecution and incarceration… Specific to the question of compensating those wrongfully incarcerated, the questions as regards the situations and conditions upon which such relief would be available, in what form and at what stage are also matters requiring deliberation...

[148] 247 (2018) DLT 31

The Court, accordingly, requests the Law Commission of India to undertake a comprehensive examination of the issue highlighted in paras 11 to16 of this order and make its recommendation thereon to the Government of India."

Analysis and inferences of the above cases to understand the present condition:

From the above discussion the inferences which can be drawn regarding State liability in India are as follows:

- The Judiciary is proactive in providing relief to the victims in cases where the damage is caused due to the negligence of the Government employee. But in doing so as there is absence of any specific statute making the State liable equally like any other individual for the tort committed by its servants, the Indian courts have to time and again justify themselves as in the case of ***State of Haryana v. Santra***
- The judgement by the Apex Court in ***Vohra Sadikbhai Rajakbhai & Ors. Vs. State of Gujarat & Ors***, where while deciding the tortious liability of the State, the nature of the function of the State was determined is a indicator that the concept of demarking function of the State into Sovereign and Non-Sovereign still exists in India. In this case compensation was allowed only after establishing that the impugned act was a non-sovereign function of the State.
- From the above cases it can be inferred that compensation can be claimed against State for tort committed by its servants only in cases where there is violation of fundamental right or gross damage which is evident ipso facto. Thus, in cases of torts where there is no infringement of fundamental right or where gross damage is not caused the situation in unclear if the State can be held vicariously liable.
- Further, it has been clearly stated by the Supreme Court in ***Ram Lakhan Singh v. State Government of Uttar Pradesh*** that "Compensation for violation of fundamental rights in aforementioned cases is a public law remedy but there is no express provision in the Constitution of India for grant of compensation by the State in such cases. It is a remedy determined and decided on case-to-case basis dependent on the facts of each case, the disposition of the court hearing the case etc. which makes this remedy arbitrary, episodic and indeterminate ...". This means that even though the approach of the Indian Courts are to grant compensation to the victims for torts committed by the servants of the State by establishing the State liable for infringement of fundamental rights but it also suffers from uncertainties in absence of any express provisions.

Thus, from the above discussion it can be summed up that the concept of State liability in India has yet to be evolved to give a clear concept beyond ambiguities and gaps due to absence of any express provision or statute.

5.3- Judicial Pronouncements highlighting the loopholes of law on Product Liability

In India the prime law which covers issues related to product liability is The Consumer Protection Act, 1986 and Amendment Bill, 2018 of the said Act expressly includes Product liability. Thus, it becomes important for this research to highlight cases which in turn will show the gaps which are still persistent in the Consumer Protection Act.

5.3.1- Conflict of Jurisdiction and no Sub-judice bar

To protect the interest of consumers in India number of consumer protection legislations were enacted under which number of administrative and quasi-judicial authorities were constituted. This had created a situation in which many aspects covered by the Consumer Protection Act also falls under the various legislations which in turn make those aspects fall within the jurisdiction of civil courts thus resulting in conflict of jurisdiction.

While disposing of a revision application in the case of ***Union of India & Anr v. M. Adai Kalam II***[149]**,** the National Commission held that **"it had no jurisdiction to entertain complaints of loss, destruction, damage or non-delivery of goods by railway on account of deficiency in service since such claims fell within the exclusive jurisdiction of the Railway Claims Tribunal constituted under the Railway Claims Tribunal Act, 1987**. Yet it is difficult to comprehend how it exercised jurisdiction in the present case."

In ***Chairman T. T. Corporation v. Consumer Protection Council*** **[150]** a claim for compensation in respect of fatal accident of a motor vehicle was made before the Consumer Disputes Redressal Forum. When challenged in the Hon'ble Supreme Court it was held that, compensation for injuries sustained in fatal accident arising out of use of motor vehicles shall be claimed only before the Motor accident claim tribunal set up for that purpose by a special statute namely the Motor Vehicles Act, 1988.[151]The Apex Court gave an explanation to this conflict of jurisdiction by stating that:

[149](1993) CPJ145(N.C.)
[150] AIR 1995, SC 1384
[151]*Chairman T. T. Corporation v. Consumer Protection Council*, AIR 1995, SC 1384

"The question which then arises for consideration is whether the National Commission had jurisdiction to entertain the claim application and award compensation in respect of an accident involving the death of Shri K. Kumar caused by the use of a motor vehicle. Clearly the Claims Tribunal constituted for the area in question, had jurisdiction to entertain any claim for compensation arising out of the fatal accident since such a claim application would clearly fall within the ambit of section 165 of the 1988 Act. The 1988 Act can be said to be a special Act in relation to the claims of compensation arising out of the use of a motor vehicle. The 1986 Act being a law dealing with the question of extending protection to consumers in general, could, therefore, be said to be a general law in relation to the specific provisions concerning accidents arising out of the use of motor vehicles found in Chapter XII of the 1988 Act. **Ordinarily the general law must yield to the special law**."[152]

Further in the case of ***State of Karnataka v. Vishwabharati House Building Coop. Society***[153], 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.

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***[154], had interpreted the above provision to mean that **'the remedies provided under the CP Act are in addition to the remedies provided under other statutes.'** The fact in brief is that the respondents, being the members of the appellant-society, had pledged paddy bags for obtaining loan. The appellant-society issued notices to the respondents demanding payment of loan amount with interest thereon. The respondents filed petitions in the District Consumer Disputes Redressal Forum, Thiruchirapally seeking direction to the appellant to release the paddy bags pledged on receipt of the loan amount or in the alternative to direct the appellant to pay the market value of the baddy bags with interest thereon from the date of pledging till the date of release and also to pass an

[152] AIR 1995, SC 1384
[153] (2003) 2 SCC 412
[154] (2004) 1 SCC 305

order for compensation for mental agony and suffering. The appellant contested the claims of the respondents before the District Forum raising a preliminary objection that Consumer Forum had no jurisdiction to decide the dispute between members and cooperative society in view of Section 90 of the Tamil Nadu Cooperative Societies Act, 1983 (for short `the Act'). The District Forum, in the light of the pleadings of the parties, raised the following points for determination:-

"1) Whether the complainants are consumers and whether there is any consumer disputes within the meaning of the Consumer Protection Act and whether this Forum had no jurisdiction to entertain the complaints of this nature and decide the issue?

2) Whether there is any deficiency in service and negligence on the part of the opposite party in all the complaints?

3) Whether the complainants in all the complaints are entitled to the reliefs prayed for?"

The District Forum answered the points 1 and 2 in favour of the respondents and granted relief. The appellant took up the matters in appeal before the State Consumer Disputes Redressal Commission. The respondents also filed appeal to the extent they were aggrieved in regard to payment of interest from 14.9.1992. The State Commission, by the common order, allowed the appeals filed by the appellant and dismissed the appeals filed by the respondents. The State Commission held that complaints filed by the respondents were themselves not maintainable having regard to Section 90 of the Act. Hence, the State Commission did not deal with the other contentions. Aggrieved by the order of the State Commission, the respondents approached the National Consumer Disputes Redressal Commission by filing revision petition. The National Commission, after hearing the learned counsel for the parties and dealing with the contentions advanced by them, found fault with the order of the State Commission. Consequently, the revision petition was allowed. The order of the State Commission was set aside restoring the order passed by the District Forum. Hence, the appeal was filed before the Supreme Court.

The Supreme while allowing the appeal held that **“The preamble of the Act declares that it is an Act to provide for better protection of the interest of consumers and for that purpose to make provision for the establishment of consumer councils and other authorities for the settlement of consumers disputes and matters connected**

therewith. In Section 3 of the Act in clear and unambiguous terms it is stated that the provisions of 1986 Act shall be in addition to and not in derogation of the provisions of the any other law for the time being in force."[155]

In ***National Seeds Corpn. Ltd. vs Pv Krishna Reddy***[156], the National Commission while deciding a matter made the following observations on section 3 of CPA:

"Accordingly, it must be held that the provisions of the Act are to be construed widely to give effect to the object and purpose of the Act. It is seen that Section 3 envisages that the provisions of the Act are in addition to and are not in derogation of any other law in force. It is true, as rightly contended by Shri Suri, that the words in derogation of the provisions of any other law for the time being in force would be given proper meaning and effect and if the complaint is not stayed and the parties are not relegated to the arbitration, the Act purports to operate in derogation of the provisions of the Arbitration Act. Prima facie, the contention appears to be plausible but on construction and conspectus of the provisions of the Act we think that the contention is not well founded. **Parliament is aware of the provisions of the Arbitration Act and the Contract Act, 1872 and the consequential remedy available under Section 9 of the Code of Civil Procedure, i.e., to avail of right of civil action in a competent court of civil jurisdiction. Nonetheless, the Act provides the additional remedy.**

This judgment of the Supreme Court has been followed in a number of subsequent cases. Similarly, Supreme Court in Indochem Electronic and Another case (supra), Secretary, Thirumurugan Cooperative Agricultural Credit Society case (supra), CCI Chambers Coop. Hsg. Society Ltd. case (supra) and Vishwabharthi House Building Coop. Society and Others case (supra), has held that **Consumer Protection Act, 1986 seeks to provide remedy in addition to the remedy provided under other Acts."**

In ***National Seeds Corpn. Ltd. v. M. Madhusudhan Reddy***[157]**,** it was once again asserted by the National Commission while deciding the jurisdiction of Consumer Forum in a case where remedy was also available under Seeds Act that '**S. 3, Consumer Protection Act makes it clear that compensatory remedy available under Consumer Protection Act is in addition to and not in derogation of provisions of any other existing law**....'

[155] AIR 2004, 1 SCC 305

[156] Revision Petition No. 1029 OF 2004 decided on 18 November, 2008 *available at* https://indiankanoon.org/doc/98792984/

[157] (2012) 2 SCC 506

It was also so said by the National Commission, in ***Lt. Col. Anil Raj & anr. Vs. M/s. Unitech Limited, and another***[158], that"

"In so far as the question of a remedy under the Act being barred because of the existence of Arbitration Agreement between the parties, the issue is no longer res-integra. In a catena of decisions of the Hon'ble Supreme Court, it has been held that even if there exists an arbitration clause in the agreement and a Complaint is filed by the consumer, in relation to certain deficiency of service, then the existence of an arbitration clause will not be a bar for the entertainment of the Complaint by a Consumer Fora, constituted under the Act, since the remedy provided under the Act is in addition to the provisions of any other law for the time being in force. The reasoning and ratio of these decisions, particularly in Secretary, Thirumurugan Cooperative Agricultural Credit Society Vs. M. Lalitha (Dead) Through LRs. & Others - (2004) 1 SCC 305; still holds the field, notwithstanding the recent amendments in the Arbitration and Conciliation Act, 1986. [Also see: Skypak Couriers Ltd. Vs. Tata Chemicals Ltd. - (2000) 5 SCC 294 and National Seeds Corporation Limited Vs. M. Madhusudhan Reddy & Anr. - (2012) 2 SCC 506.] **It has thus, been authoritatively held that the protection provided to the Consumers under the Act is in addition to the remedies available under any other Statute, including the consentient arbitration under the Arbitration and Conciliation Act, 1986."**

5.3.2- Remedies restricted to Section 14 [159] and no inherent power of the adjudicating authorities

Tarsem Lal Goyalv. Union of India[160], is one of the landmark cases where it was held that **'no relief beyond the reliefs provided under sub section (1) of section 14 of the Act can be granted'**.

There are judgements from which it can be ascertained that determination of Product liability under CPA is very much influenced by contractual liability. Some of the cases on this point are discussed briefly below:

In ***Bharathi Knitting Company v DHL Worldwide Express Courier***[161]**,** the Apex Court upheld limitation of liability clauses, that are agreed by the parties specifically while

[158] Consumer Case No.346 of 2013, decided on 02.05.2016
[159] S.14 of CPA
[160] (1993) 2 CPR 191 (Punj.)

entering into a contract. The appeal by special leave aroused from the appellate order of the National Consumer Disputes Redressal Commission, New Delhi dated 17.1.1996 made in FA No.317 of 1993 which in turn reversed the order of the State Forum Commission, Madras in O.P. No.364/93 dated June 9, 1993. The admitted facts were that the respondent-plaintiff manufacturer appeared to have an agreement with a German buyer for summer season, 1990 and consigned certain goods with documents sent in a cover on May 25, 1990 Containing (1) invoice No.32; (2) packaging list; (3) Original Export Certificate and certificate of origin No.T/WG/001316 dated 24.5.90; and (A) Original GSP Form A No.E1. It appeared that the cover did not reach the destination. Consequently, though the duplicate copies were subsequently sent by the date of receipt of the consignment, the season was over. Resultantly, the Consignee agreed to pay only DM 35,000/- instead of invoice value DM 56,469.63. As a result, the appellant laid the complaint before the State Commission for the difference of the loss incurred by the respondent in DM 21,469.63 equivalent to Rs.4, 29,392.60 which was ordered. The respondent carried the matter in appeal. The National Commission in the impugned order held that since the liability was only of an extent of US $ 100 as per the receipt, the appellant is entitled for deficiency of service only to that extent which is equivalent to Rs.3, 515/- with interest at 18% from May 25, 1990 till date of realisation with cost.[162] Thus, this appeal by special leave was filed which was dismissed by the Apex court stating that **"It is true that the Act is a protective legislation to make available inexpensive and expeditious summary remedy. There must be a finding that the respondent was responsible for the deficiency in service, the consequence of which would be that the appellant had incurred the liability for loss or damages suffered by the consumer due to deficiency in service thereof. When the parties have contracted and limited their liabilities, the question arises: whether the State Commission or the National Commission under the Act could give relief for damages in excess of the limits prescribed under the Contract?**

It is true that the limit of damages would depend upon the terms of the contract and facts in each case..... in view of the above consideration and findings we are of the opinion that the national Commission was right in limiting the liability

[161] (1996) 4 SCC 704
[162] (1996) 4 SCC 704

undertaken in the contract entered into by the parties and in awarding the amount for deficiency service to the extent of the liability undertaken by the respondent."[163]

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 mission to replace the defective goods and held that 'the liability of the manufacture was confined if any. In view of this clause, the Supreme Court reversed the findings of the National Commission 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.'

In ***Scooter India Ltd., And Anr. vs Momna Gaur And Anr***[164]**,** the National Commission made the following observations:

".....We have carefully considered the submissions of the learned counsel for the parties and perused the records. There is no doubt that the chassis of the brand new three wheeler motor vehicle broke down within a short period. Whether this was due to the alleged over-loading could not be clearly established by the petitioners merely on the strength of the challans of fines under the M. V. Act, produced by them. **However, we are inclined to agree with Ms. Kohli that in view of the law on the subject laid down by the Apex Court in a catena of judgments (including that in the case cited by Mrs. Kohli above), replacement of the defective chassis by a new one is the legally available relief to the respondent. We, therefore, direct the petitioners to replace the chassis of the vehicle with a brand new one and provide the requisite fresh warranty therefore. In addition, any repairs that may be necessary to make the vehicle completely road-worthy shall be carried out by the petitioners free of charge to the respondent.** These directions shall be complied with within two weeks of the respondent bringing the vehicle in question to the premises of the authorised dealer. In addition, considering the specific facts and circumstances of the case, the petitioner shall pay a sum of Rs.10, 000/- to respondent no. 1 towards the cost of the proceedings all through, within four weeks from the date of this order. It is, however, clarified that this award of cost is in the context of the special features of this case and shall not be treated as a precedent against the petitioners."

[163](1996) 4 SCC 704

[164] Revision Petition No. 3642 of 2009 on 4 April, 2012, *available at* https://indiankanoon.org/doc/197126822/

5.3.3-Limitations of Quasi-judicial Redressal Forums

It is well settled by judicial approaches and trends that the Redressal Forum under the Act had power to decide matter which are 'the matters of summarily nature' only.[165]

Summary Procedure not adequate to deal with all cases:

In ***Procalor Photographics Pvt. Ltd v. OCL Photo Industries Pvt. Ltd*** [166] **,** the Chandigarh State Commission set aside order of District Forum on the ground that, **'…. A huge amount of evidence will be required to be laid by the parties … …invoking the summary procedure is not appropriate….'**

Similarly in ***Synco Industries v. State Bank of Bikaner and Jaipur & others***[167]**,** Hon'ble Supreme Court dealt with similar matter saying that '…the matter cannot be disposed of in summary manner hence not within the jurisdiction of Consumer Forums.' The facts of the case are that the appellants moved to the National Consumer Disputes Redressal Commission alleging that the respondents had been guilty of deficiency in service in that they had, without good reason, frozen the sanctioned working facilities of the appellant without prior intimation. In this behalf, the appellant sought a direction to the first respondent to prepare a funding package to re-start the appellant's oil division and to grant waiver of interest, damages in the sum of Rupees fifteen crores and an additional sum of Rupees sixty lakhs to cover cost of travelling, man days lost and other expenses incurred by the appellant in pursuing the matter with the respondents. The National Consumer Disputes Redressal Commission dismissed the complaint saying, "The complaint is against the bank, whether the bank is entitled to reduce the loan facilities or not. We do not consider it to be a fit case to be tried under the Consumer Protection Act. The Original Petition is dismissed. However, the complainant is at liberty to go (to) the Civil Court or any other forum, if so advised."

Against this order of dismissal of the complaint, the appellant had filed appeal and it had been referred to a Bench of three Judges because it was felt that the question raised was one of importance. The Apex Court held that:

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[165] Dr.SudhirTarote, *Critical Evaluation of the Effectiveness of Consumer Complaint Redressal Agencies under The Consumer Protection Act, 1986*, November 22, 2013.
[166] 1992 CPC 201 (Chandigarh)
[167] (2002 (46) ALR 54 (SC)

'Given the nature of the claim in the complaint and the prayer for damages in the sum of Rupees fifteen crores and for an additional sum of Rupees sixty lakhs for covering the cost of travelling and other expenses incurred by the appellant, it is obvious that very detailed evidence would have to be led, both to prove the claim and thereafter to prove the damages and expenses. It is, therefore, in any event not an appropriate case to be heard and disposed of in a summary fashion. The National Commission was right in giving to the appellant liberty to move the Civil Court."

Hon'ble Supreme Court reiterated the same view in ***Trai Foods Ltd. v. National Insurance Company and Ors. (III)*** [168] and hence now it is undisputable that the Consumer Dispute Redressal Agencies falls short of jurisdiction if the matter cannot be decided summarily.

Lack of Inherent power:

Another major drawback of present CPA is that the redressal agencies are quasi-judicial bodies which mean that they lack inherent power like normal courts. This was clearly stated by the National Commission while discussing powers of Consumer Complaint Redressal Agencies established under the Act in ***Andhra Pradesh State Electricity Board v. Andhra Pradesh State Electricity Consumer Association, (I)*** [169], that:

'The consumer dispute redressal Fora have been set up under the Consumer Protection Act, 1986 and the jurisdiction and powers of these Fora have to be gathered only from the provisions of the said Act and *since these Fora are not court* there cannot be any concept of inherent powers.' [170]

Similarly, the redressal agencies under CPA lack power to review or recall order. Some of the cases on this are as follows:

The Hon'ble Supreme Court held in ***Indian Bank v. M/s. Satyam Fibres (India) Pvt. Ltd.*** [171] that:

[168] (2012) CPJ 17 (SC)
[169] (1992) CPJ 148 (151) (NC)
[170] (1992) CPJ 148 (151) (NC)).
[171] AIR 1996 SC 2592: (1996) 5 SCC 550

"…the Authorities be they Constitutional, Administrative or Statutory (and particularly those who have to decide a *lis*, i.e. litigation) possess the power to recall their judgments or orders *if they are obtained by fraud* as fraud and justice never dwell together."[172]

State Commissions and the National Commission are nowhere declared as the 'Courts of Record', nor is there any provision, which invests these *higher consumer forums* with precedent creating power.[173]

In ***Mahabubnagar Citizens Council (Regd. Society) v. District Consumer Disputes Redressal Forum*[174]**, Mahabubnage, the circular issued by District Forum, Mahabubnage was challenged in the Hon'ble High Court of A. P. The Circular declared that a complaint can be filed by the consumer activists' organisation on behalf of its members alone, but for none else. This circular was based on the decision of State Consumer Disputes Redressal Forum reported in *Telephone Services Society* v. *Calcutta Telephone* (1995 (2) CPR). While dealing with the applicability of the said decision the Hon'ble High Court held that **'a decision of the West Bengal Forum, though may be available for reference by the respondent, yet it had no precedent value as the West Bengal forum is not a Court of Record.** Hence the Court had taken help of statutory provision and the circular is declared as *void ab initio*.'

In ***Ghaziabad Development Authority* v. *Nishi Agarwal* (II)[175]** the District Forum decided the complaint and subsequently modified its order. When challenged in Uttar Pradesh State Commission the order was set aside. The Commission opined that **the subsequent order of District Forum amounts to 'review of its earlier order' There being no provision for Review under the Act, the subsequent order needs to be set aside.** Similarly as held in ***Smt. Manju Nag* v. *CESC Ltd***, (I)[176] according to West Bengal State Commission, **the Commission had not been vested with any power to review its own order.**

In ***Ambrish Kumar Shukla & 21 ors. v. Ferrous Infrastructure Pvt. Ltd*.[177],** the National Commission while taking up the issue tried to decide whether a complaint

[172] AIR 1996, SC 2592
[173], Dr. Sudhir Tarote, *Critical Evaluation of the Effectiveness of Consumer Complaint Redressal Agencies under The Consumer Protection Act, 1986'*, November 22, 2013.
[174] 1996-LAWS(APH)-8-13 : 1997-ALT-1-60 : 1997-ALD-1-40
[175] (1998) CPJ 138
[176] (2001) CPJ 174
[177] 2016 SCC On Line NCDRC 1117

under Section 12(1)(c) of the Consumer Protection Act filed on behalf of or for the benefit of only some of the numerous consumers having a common interest or a common grievance is maintainable or it must necessarily be filed on behalf of or for the benefit of all the consumers having a common interest or a common grievance against same person?

While deciding the issue the National Commission elucidated on the object of "class action suit" as under:

- That a suit in terms of order 1 Rule 8 of the Code of Civil Procedure commonly termed as a class suit is intended on behalf or for the benefit of all the persons having a common grievance against the same party and seeking the same relief not on behalf of or for the benefit of only some of them.

- A complaint under Section 12(1)(c) of the Consumer Protection Act can be instituted only by one or more consumers, as defined in Section 2(1)(d) of the Consumer Protection Act. Therefore, a group of Cooperative societies, Firms, Association or other Society cannot file such a complaint unless such society etc. itself is a consumer as defined in the aforesaid provision.

- That more than one complaints under Section 12(1)(c) of the Consumer Protection Act are not maintainable on behalf of or for the benefit of consumers having the same interest i.e. a common grievance and seeking the same / identical against the same person.

- That in case more than one such complaints have been instituted, it is only the complaint instituted first under Section 12(1)(c) of the Consumer Protection Act, with the requisite permission of the Consumer Forum, which can continue and the remaining complaints filed under Section 12(1)(c) of the Consumer Protection Act are liable to be dismissed with liberty to join in the complaint instituted first with the requisite permission of the Consumer Forum.

- That individual complaints instituted before grant of the requisite permission under Section 12(1)(c) of the Consumer Protection Act can continue despite grant of the said permission but it would be open to such complainants to withdraw their individual complaints and join as parties to the complaint instituted in a representative character. However, once the requisite permission under Section 12(1)(c) of the Consumer

Protection Act is granted, an individual complaint, expressing the same grievance will not be maintainable and the only remedy open to a consumer having the same grievance is to join as a party to the complaint instituted in a representative character.

Directions to exercise due care and caution while considering such a complaint to grant the requisite permission, only where the complaint fulfils all the requisite conditions in terms of Section 12(1)(c) of the Consumer Protection Act read with Order I Rule 8 of the Code of Civil Procedure .[178]

The Bench should either give individual notices or an adequate public notice of the institution of the complaint to all the persons on whose behalf or for whose benefit the complaint is instituted. Such a notice should disclose *interalia*

- the subject matter of the complaint including the particulars of the project if the complaint relates to a housing project / scheme,
- the class of persons on whose behalf or for whose benefit the complaint is filed
- the common grievance sought to get redressed through the class action,
- the alleged deficiency in the services and
- the reliefs claimed in the complaint.

Further below are some of the recent judgements given by the Apex Court that proves the existence of loopholes in the existing CPA and the limitations of the redressal agencies.

In ***Om Prakash v. Reliance General Insurance*[179]*,*** the Appellant insured his truck with the Respondent. The Appellant's vehicle was stolen and consequently, an FIR was also lodged. The theft of the vehicle had taken place on 23.03.2010, the FIR was lodged on 24.03.2010 and the claim petition with the Respondent Company was filed on 31.03.2010. On lodging the insurance claim, the Investigator appointed by the Respondent confirmed the factum of theft and consequently, the Corporate Claims Manager approved an amount of Rs.7,85,000/- for the said claim of the appellant. Thereafter, the Appellant made several requests to the respondent, seeking speedy

[178] 2016 SCC OnLine NCDRC 1117; *available at* https://indiankanoon.org/doc/28342935/
[179] (2017) 9 SCC 724

processing and disposal of his insurance claim. However, on non-payment the Appellant served a legal notice to the Respondent but the Respondent repudiated the Appellant's insurance claim citing breach of condition of terms of Insurance by the Appellant. The impugned term was that there should be immediate information to the Insurer about the loss/theft of the vehicle. Aggrieved by the aforesaid, the Appellant filed complaint before the, District Consumer Disputes Redressal Forum ('District Forum'), seeking a direction to the respondent-company for payment of claim amount with an interest @ 18% per annum, along with compensation of Rs.1,00,000/-. However, the District Forum dismissed the complaint of the appellant. The Appellant met with a similar fate in State Commission as well as National Commission, wherein his appeals were dismissed. In the instant case, the Appellant approached the Supreme Court against National Commission's order and challenged the legality and correctness of the said order.

The Supreme Court allowed the Appellant's appeal and made the following observations **'that the Consumer Protection Act, 1986 is a beneficial legislation that deserves liberal construction. This laudable object should not be forgotten while considering the claims made under the Act.'**

In the recent case, ***M/S Emaar MGF Land Limited & Anr. v. Aftab Singh*** [180], the Two-Judge Bench of the Supreme Court agreed with NCDRC's holding in July 2017 whereby, the National Commission ruled that **an Arbitration Clause in Buyer's Agreement cannot circumscribe the jurisdiction of a Consumer Fora, notwithstanding the amendments made to Section 8 of the Arbitration Act.**

Analysis and Inferences of the above cases:

- There is conflict of jurisdiction of Consumer Protection Act specific statutes like Sales of Goods Act, Motor Vehicle Act, Railway Tribunal Claims Act etc.
- There is no Sub-Judice Bar which 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.
- Remedies are restricted to Section 14 and there are alternative remedies available other than unliquidated compensation.
- Product liability under CPA is very much influenced by contractual liability. The limit of damages depends upon the terms of the contract and facts in each case.

[180] Civil Appeal No. 23512-23513 of 2017 (Unreported Order, Supreme Court) (India)

- The Redressal agencies under CPA being a quasi-judicial forum suffers from limitations like it can try only those matters which are of summarily nature. The Consumer Dispute Redressal Agencies falls short of jurisdiction if the matter cannot be decided summarily.
- The Redressal Agencies under CPA lack of inherent power**.**
- Class action suits under CPA are only permitted on the fulfilment of all the requisite conditions in terms of Section 12(1)(c) of the Consumer Protection Act read with Order I Rule 8 of the Code of Civil Procedure .
- It is only after the intervention of the Apex Court that the deserved liberal interpretation is made, CPA being a beneficial legislation which is often not done by the forums.

5.4- Judicial Pronouncements and Public Nuisance

The researcher has discussed cases on public nuisance and the available remedies in India. Presently, the available remedies are mainly under the criminal law. Had the remedy been codified under tort law, the litigants in the event of public nuisance could avail unliquidated damages as well. In Many environmental law cases, public nuisance was seen.

5.4.1- Cases dealing with Public Nuisance under Criminal Procedure Code (Cr.P.C) and Indian Penal Code (I.P.C)

The remedies which are generally provided while adjudicating cases of public nuisances under criminal laws are preventive and punitive in nature. To prove this the researcher discusses below few recent cases.

In ***Ramachandra Malojirao Bhonsle vs Rasikbhai Govardhanbhai Raiyani***[181], the petitioner had purchased a flat on the ground floor of Shubh Apartments, 51-Vishwaas Colony, behind National Plaza, Alkapuri, Baroda. When he purchased the flat there was no provision of electricity, nor for supply of water and no electric motor was installed for lifting water to supply it to other flats in the complex. Subsequently, the builder installed water pump run by electricity for lifting water so as to make it reach to other flats in the complex. In this process, the electric motor used to be operated by various occupants of different flats according to their convenience at various times causing nuisance to the petitioner. He was suffering from ailment so also his wife. Apprehending nuisance to

[181] 2001 CriLJ 866

himself and his wife, the petitioner approached the learned Executive Magistrate with an application under sec. 133 of the Code of Criminal Procedure for removal of this nuisance. Thereafter, an order was passed on July 20, 1998 wherein, the learned Sub-Divisional Magistrate directed that the respondent should remove the electric motor installed below the flat to eliminate noise pollution and electric motor pump should be shifted and installed within the premises so that it causes no noise pollution. Feeling aggrieved, a revision was preferred and the revisional Court, through the impugned order, allowed the revision and set-aside the order of the learned Sub-Divisional Magistrate. Hence, this revision petition was filed by the petitioner. The High Court while deciding the matter held that "the respondent no.1 appeared before the Executive Magistrate and denied that it was a case of public nuisance. **In case of such denial, the Executive Magistrate was required to enquire into the matter about the existence of right in the nature of public nuisance or private nuisance. And, if in such inquiry the Executive Magistrate found that there was some reliable evidence, on such denial he was bound to stay the proceedings and he was further bound to direct the complainant or the parties to approach competent Civil Court for adjudication of their rights. If, on the other hand, he found that there was no reliable denial evidence then he should have proceeded under sec. 138 of the Code of Criminal Procedure and then only, the conditional order which was passed under sec. 133(1) of the Code of Criminal Procedure could be made absolute."**[182]

Deciding the question of applicability of section 133 of Cr.P.C. the Kerala High Court held in ***Ganapathy v. State of Kerela***[183]**,** held that "where the people of the locality were drawing water during draught i.e. the public had a right for using the well for drawing drinking water and thus there was a public right and as such the Sub Divisional Magistrate had jurisdiction to invoke S. 133 Cr.P.C."[184]

In ***Kachrulal Bhagirath Agrawal v. State of Maharashtra***[185]**,** the Supreme Court while explaining the section 133 of Cr.P.C made the following observations:

"The object and purpose behind Section 133 of the Code is essentially to prevent public nuisance and involves a sense of urgency in the sense that if the Magistrate

[182]*Ramachandra Malojirao Bhonsle vs Rasikbhai Govardhanbhai Raiyani*, 2001 CriLJ 866
[183] 2001(1) Klt 574
[184]*Ganapathy v. State of Kerela*, 2001(1) Klt 574
[185] SC 2004, Crl.L.J (14634)

fails to take recourse immediately irreparable danger would be done to the public. It applies to a condition of the nuisance at the time when the order is passed and it is not intended to apply to future likelihood or what may happen at some later point of time. It does not deal with all potential nuisances and on the other hand applies when the nuisance is in existence.

Section 133 of the Code as noted above appears in Chapter X of the Code which deals with maintenance of public order and tranquillity. It is part of the heading public nuisance. The term nuisance as used in law is not a term capable of exact definition and it had been pointed out in Halsbury's Law of England.

Even in the present day there is no entire agreement as to whether certain acts or omissions shall be classed as nuisance or whether they do not rather fall under other divisions of the law of tort."[186]

The Apex Court also noted that the trade must be injurious in present to the health or physical comfort of the community.

***Shri Peter Fernandes vs State Of Goa Through Mapusa Police*[187]-** The facts of the case in brief is that the petitioner was the owner of a property that had several trees and the respondent no.2 who was also the informant had a house in the adjoining property which belongs to her bhatkar and both these properties are separated by a water drain. On or about 16.5.2005 the said informant filed an application to the Executive Magistrate, inter alia, stating that there were two mango trees and two jackfruit trees leaning on the roof of her residential house in a dangerous situation and that the petitioner in spite of requests to cut down/trim down the branches of said trees, several times, had not cut the said branches and as the monsoon was arriving, action was to be initiated to cut down the branches of the trees. It is also stated that in the monsoon of the year 2005 one branch had collapsed and damaged the roof tiles and other household articles. Presumably the said information of the said informant was referred to the police for inquiry and report and it appears that a panchanama was drawn on 3.6.2006. In the said panchanama it was stated that there were four trees at the site of said informant at a distance of about 3 mts. and it was stated that the said four trees had become old. It was

[186] *Kachrulal Bhagirath Agrawal v. State of Maharashtra* , SC 2004, Crl.L.J (14634)
[187] 2007(2) GLR 228

also opined that during heavy rains the said trees may get uprooted or their branches may break and fall.

Although the initial information filed by the said informant was essentially for the cutting down or trimming of the branches of the said trees, the Learned Executive Magistrate by his conditional order directed the petitioner to cut down two mango trees and two jackfruit trees belonging to the petitioner or show cause as to why the same should not be ordered to be cut. Against this order the petitioner filed a revision petition which came to be dismissed by the learned Additional Sessions Judge, by order dated 30.12.2006. Against this order, a petition was filed before Hon'ble High Court of Bombay. The High Court made the following observations while setting aside the impugned orders:

"This Court in unreported judgment dated 23.11.2006 in Criminal Writ Petition No. 25 of 2006 in the case of *Mr. Vyanjkatesh Y. Gaonkar v. State* had noted **that proceedings under Section 133 of the Code are not meant to settle private disputes between two parties. Section 133 of the Code provides for a summary and quick remedy,** inter alia, for cutting down of a tree which was likely to fall. The word 'likely' is otherwise not defined in the Code but its ordinary dictionary meaning as per Concise English Dictionary, is such as well might happen or be true, promising, probably. There is no doubt whether a particular tree or its branch are likely to fall cannot be foretold with any degree of accuracy but certainly some evidence must be produced to show that a particular tree is likely to fall either because it had developed a crack or is infested with insects or suffers a disease or weakness or other infirmity, etc. which would make it fall. The danger of falling must be in present, as observed by the Apex Court in Kachrulal (supra) and in normal weather conditions and not in distant future since one cannot foretell as to what could happen in abnormal weather conditions. Only because the informant feared that the branches of the said trees might fall in the ensuing monsoon season was insufficient to have given any jurisdiction to the Learned Executive Magistrate who had initiated the proceedings under Section 133(1)(d) of the Code. Likewise a mere allegation that the trees had become old was insufficient for the Learned Executive Magistrate to conclude that they were likely to fall and invoked his jurisdiction under the said Section. **In case the said branches of the trees belonging to the petitioner caused any nuisance to the informant, her remedy was clearly by way of a civil suit. It was necessary for the informant who approached the Executive**

Magistrate for initiation of proceedings under Section 133(1) (d) to have shown that the danger was imminent i.e. in present that the tree was likely to fall.

It is also to be noted that proceedings under Section 133 of the Code are not meant to settle private disputes between two members of the public or members of two households and for public authorities to waste their time in trying to settle such disputes. A Magistrate under Section 133 of the Code exercises a public duty and he can exercise it only when jurisdictional facts are present. There were none present in this case."[188]

In ***Metro Life Line Hospital vs Sub Divisional Magistrate***[189] which was decided on 10 December, 2015**,** the following observations were made by the Learned Judge:

"In the instant **c**ase, admittedly in the **c**ase of patient Ms. Kirti, a wrong report regarding blood group and platelet count was given by the petitioner Doctors Diagnostic Center which was sought to be acted upon by the petitioner Metro Life Line Hospital. Any such wrong report could have proved fatal. However, the same is not covered within the provisions of Section 133 Cr. P.C. or the term 'public nuisance', as defined in section 268 IPC. The running of a Crl. Revision No. 21/15, Metro Life Line Hospital Vs. Sub Divisional Magistrate, Najafgarh and Crl. Revision No. 20/15 Hemant Kapoor Vs. Sub Divisional Magistrate, Najafgarh 10-12-2015 22 of 24 hospital i.e. Metro Life Line Hospital or a Diagnostic Center, i.e., Doctors Diagnostic Center is not in itself a nuisance, although a mistake had been committed by the aforesaid Diagnostic Center while reporting about the result of blood test of patient Ms. Kirti. By the running of the aforesaid hospital and Diagnostic Center, there is no imminent danger to the physical comfort of the community at large. **The trade/profession of the petitioners, by itself is not causing any injury/danger or nuisance to the public or people in general who have property in the vicinity. The acts of the petitioner in exercise of their profession does not per-se amount to nuisance.** The grievan**ce** of informant/**c**om**p**lainant Sh. Sushil Kumar is more in the nature of a private dispute. Any likelihood of such a mistake in future will not fall within the ambit of section 133 Cr. P.C. **To attract the provision of section 133 Cr. P.C., nuisance has to be in existence and not a potential nuisance. It is well settled that a**

[188] *Shri Peter Fernandes vs State Of Goa Through Mapusa Police*, (2007(2) GLR 228)
[189] **C**rl. Revision No. 21/15 *available at:*
h ttps://indiankanoon.org/docfragment/86033530/?formInput=section%20133%20Cr.P.C

lawful trade or profession ought not to be interfered with unless it is proved to be injuries to the health or physical comfort of the community. In the im**p**ugned order dated 08-10-2015, it has not been specified as to what "necessary clearance" is required to be obtained by the petitioners from the Health Department, Govt. of NCT of Delhi or as to how the case was covered within the ambit of section 133 Cr.P.C."

Analysis and inferences from the above cases

The limitations of section 133 Cr.P.C dealing with public nuisances under criminal law can be drawn as follows:

- The proceedings under Section 133 Cr.P.C are just to maintain peace and tranquility and the orders rendered under these sections are merely temporary orders.
- 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.
- 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.

5.4.2- Cases dealing with Public Nuisance under Code of Civil Procedure (C.P.C)

The remedies of removal of nuisance or injunctions are available under Section 91 of C.P.C and the study of the following cases would help to understand the applicability of this provision further.

In ***Parameswaran vs Bangalore Mahanagara Palike***[190]**,** Karnataka High Court while disposing the matter of public nuisance caused to the petitioner due to unauthorised construction on pavement held that **'Section 91 of C.P.C clearly indicates that, in a case where no special damage is caused to the person concerned by reason of other person's wrongful act or public nuisance in respect of a public property, the suit can be filed either by the Advocate General or two or more persons with the permission of the Court. It means where no special damage is alleged and proved or shown to have been caused by a wrongful act or by an act of some amounting to**

[190] ILR 1994 KAR 2972

public nuisance of an individual, suit under Section 91 can be filed and be maintained in case of public nuisance by two persons or more with the permission of the Court. But if special damage or loss is alleged and proved as well in matters relating to public nuisance the plaintiff's suit is maintainable and the suit is, on proof of case pleaded, entitled to be decreed.'[191]

In ***Mohinder Singh vs Surmukh Singh And Others***[192]**,** High Court of Punjab and Harayana made the following observations on section 91 of C.P.C:

"Section 91 of the Code of Civil Procedure is an enabling provision. Under Section 91(1) of the Code of Civil Procedure, the scope of locus standi to file a suit had, in fact, been enlarged. **Even persons to whom special damage had been caused on account of a wrongful act or public nuisance may institute a suit upon complying with the conditions stipulated in Section 91(1) of the Code of Civil Procedure**. However, such provisions cannot be construed to restrict the right of a person to file a suit in view of a wrong cause independently of such provision."[193]

Further, the scope of Section 91 of the Code of Civil Procedure was considered by the same Court in ***Satnam Singh v. Smt.Jondo***[194], and it was held as under:

"I have carefully considered the aforesaid contention, but find no merit therein, although apparently the contention sounds very forceful. Section 91(1) CPC is an enabling provision and it had enlarged the scope of locus standi to file a suit. **Normal rule of law is that a person, having right or being effected by a wrongful act of the opposite party, had locus standi to file the suit. However, under Section 91(1) CPC, even persons to whom no special damage had been caused by the public nuisance or other wrongful act, may also file the suit by complying with the conditions stipulated in Section 91(1) CPC. However, this provision does not, in any manner, restrict the right of a person, who independently of this provision, had right or locus standi to file the suit in view of wrong caused to him.** This fact is made further clear by Section 91(2) CPC, which provides that nothing in this Section shall be deemed to limit or otherwise affect any right of suit, which may exist independently of its provisions. The net result of Section 91 CPC is that a person otherwise having right to

[191] *Parameswaran vs Bangalore Mahanagara Palike*, ILR 1994 KAR 2972
[192] RSA No.3554 of 2011
[193] *Mohinder Singh vs Surmukh Singh And Others*, RSA No.3554 of 2011
[194] 2011(1) Civil Court Cases 86 *available at:* https://indiankanoon.org/doc/1134493/ (Last visited on 24.07.18)

file a suit may do so and nothing in Section 91 CPC would affect his said right. **However, in the case of public nuisance, two or more persons, with the leave of the Court, may also file suit, although no special damage had been caused to them by the public nuisance or other wrongful act. Thus, Section 91 CPC is an enabling provision enlarging the scope of locus standi to file the suit, but it does not, in any manner, inhibit or restrict the right or locus standi of a person to file the suit, which exists independently of the provisions of Section 91 CPC."**

In ***Surinder Singh vs Pritam Singh And Ors***[195]**,** the High Court of Punjab And Haryana At Chandigarh made the following observations:

"In the instant case having resorted to the process of **Section** 133 Cr.P.C., the suit came to be filed later on because provisions in terms of **Section** 133 Cr.P.C are of emergency nature. **Existing nuisance cannot be made subject matter of Section 133 Cr.P.C. proceedings, therefore, a regular remedy was maintainable and that can only be in the form of seeking injunction.** Even as per the statement of DW3, the workshop was started by the defendant on 1.1.2003 and the witness did not know as to what provision was made by the defendant for disposal of dirty water. However, he admitted that there is no sewerage system in the locality. The suit itself came to be filed on 7.1.2003, therefore, permanent injunction is the appropriate remedy which could have been resorted to by the plaintiffs in seeking restraint against such installation which was in offing at the relevant time. **Even the application in terms of applicability of Section 91 CPC is not mandatory in nature in terms of Section 91 (2) CPC. A public nuisance can be remedied at the instance of the inhabitants of the locality which have their own right of suit independently of provision in terms of Section 91 CPC...**..... Plea of **Section 91** CPC has been raised for the first time in appeal. **Even if the suit could have been filed by the Advocate General or by the two or more persons even though no special damage has been caused to them by reasons of such public nuisance, sub- Section (2) of Section 91 fully provides that nothing can affect any right of suit of any person which may exist independently of the provision of Section 91 CPC.** "

[195] RSA-3025-2010 (O&M) decided on 21.12.2015

In a very recent case of ***M/S.Adani Wilmar Ltd vs Mr.A.S.Hansraj***[196]**,** Hon'ble Madras High Court made an important observation regarding the scope and interpretation principle of section 91 of CPC, which is as follows:

"The scope of a suit filed under Section 91 CPC by the very language used in the provision gives very wide amplitude. A plain reading of the Section would go to show that in case of a 'public nuisance' or 'other wrongful acts' affecting, or likely to affect the public, false within the scope of Section 91(1) CPC. **The word 'other' also assumes significance as it clearly drawn a distinction from the word 'public nuisance'. Similarly the words 'likely to affect' taken within its sweep will include any possible act in future.** Thus, the overwhelming factor is that of public interest. This is once again made clear by dispensing with the personnel injury termed 'special damage'. Two or more persons can file a suit on this nature with the leave of the Court even though no special damage had been caused to such persons by reason of such 'public nuisance' or 'other wrongful acts'. In our considered opinion, even an advertisement which is likely to affect the public at large can fall within the scope of Section 91 CPC. Taking into consideration the intention of the legislature enabling the filing of a suit by any two persons, after getting the leave of the Court, whenever any act causes 'public nuisance' or 'other wrongful acts' affecting or likely to affect the public and also taking into consideration the wide amplitude of the language used under Section 91 CPC, this Court cannot give a restricted meaning as sought to be projected by the learned senior counsel for the appellants. **The provision of Section 91 CPC is an important tool for remedying the grievances of a large number of individuals who cannot file independent suits. Such an important right guaranteed under the said provision cannot be defeated by giving it a restrictive interpretation."**[197]

Analysis and inferences of the above cases

From the above cases where while deciding the matter the Courts discussed the scope and purpose of Section 91 C.P.C, the researcher can draw the following inferences:

- Where no special damage is alleged and proved or shown to have been caused by a wrongful act or by an act of some amounting to public nuisance of an individual, suit

[196] Appeal No.251 of 2017

[197] *M/S.Adani Wilmar Ltd vs Mr.A.S.Hansraj*, Appeal No.251 of 2017, Before Madras High Court, *available at:* https://indiankanoon.org/doc/135126044/ (Last visited on 12.06.18)

under Section 91 can be filed and be maintained in case of public nuisance by two persons or more with the permission of the Court.

- If special damage or loss is alleged and proved as well in matters relating to public nuisance the plaintiff's suit is maintainable and the suit is, on proof of case pleaded, entitled to be decreed.
- Section 91 of CPC only deals with procedural provisions and puts no bar on alternative remedies available under criminal law or civil law.
- Any claim for public nuisance made under this section by a class representation only paves way to file civil claims, which in turn provides for damages which are ex-gratia in nature.

Thus, it can be concluded that undoubtedly section 91 of CPC had gradually emerged to be an important tool to remove the public nuisances by issue of mandatory orders and injunctions. But it still never can be a substitute for exemplary remedies that are possibly available by opting for private law in for public nuisances as well.

5.4.3- Cases dealing with Public Nuisance under Public Interest Litigation (P.I.L)

Public Interest Litigation by large had become a choice against public nuisances caused mainly due to environmental pollution. But by observing the following landmarks judgments, the researcher makes an attempt to analyse if Public Interest Litigation is the only option to grant the victims with the remedies in the form of compensation that they actually deserve.

Indian public interest litigation frequently centers on the issuance of broad writs of mandamus or other equitable relief that require governmental agencies to take actions to halt or alleviate violations of fundamental constitutional rights. Some of the landmark and also recent cases are discussed below:

5.4.3.1- Evolution of Principle of Absolute Liability

***M.C. Mehta vs. Union of India*[198]**, is one of the first cases where PIL was used against environmental pollution. The fact in brief is that Shriram Food and Fertilizers Industry a subsidiary of Delhi Cloth Mills Limited was producing caustic and chlorine. On December 4th and 6th 1985, a major leakage of petroleum gas took place from one of the units of Shriram Food and Fertilizers Limited in the heart of the capital city of Delhi

[198] AIR 1987, SC 1086

which resulted in the death of several persons that one advocate practicing in the Tis Hazari Courts died.

The leakage was caused by a series of mechanical and human errors. This leakage resulted from the bursting of the tank containing oleum gas as a result of the collapse of the structure on which it was mounted and it created a scare amongst the people residing in that area. Hardly had the people got out of the shock of this disaster when, within two days, another leakage, though this time a minor one took place as a result of escape of oleum gas from the joints of a pipe. Shriram Foods and Fertilizer Industries had several units engaged in the manufacture of caustic soda, chlorine, hydrochloric acid, stable bleaching powder, super phosphate, vanaspati, soap, sulphuric acid, alum anhydrous sodium sulphate, high test hypochlorite and active earth. All units were set up in a single complex situated in approximately 76 acres and they are surrounded by thickly populated colonies such as Punjabi Bagh, West Patel Nagar, Karampura, Ashok Vihar, Tri Nagar and Shadtri Nagar and within a radius of 3 kilometres from this complex there is population of approximately 2, 00,000.

On 6th December, 1985 by the District Magistrate, Delhi under Section 133(1) of Cr.P.C, directed Shriram that within two days Shriram should cease carrying on the occupation of manufacturing and processing hazardous and lethal chemicals and gases including chlorine, oleum, super-chlorine, phosphate, etc at their establishment in Delhi and within 7 days to remove such chemicals and gases from Delhi. At this juncture M.C.Mehta moved to the Supreme Court to claim compensation by filing a PIL for the losses caused and pleaded that the closed establishment should not be allowed to restart.

The Supreme Court delivered its judgement on the 19th of December 1986 and on the basis of absolute liability deemed Shriram responsible for the accident and resultant compensation of the victims. The court also instructed Shriram to comply with all the recommendations of the Nilay Choudhary and Manmohan Singh Committees and issued a strict notice that failure to do so will result in the immediate closure of the plant. The court also instructed the victims of the Oleum gas leak to file their complain for compensation in the Tis Hazari lower court of Delhi.

5.4.3.2- Cases on Polluters Pay Principle

In ***Rural Litigation and Entitlement Kendra vs. State of U.P***[199]**,** **the Supreme Court prohibited continuance of mining operations** terming it to be adversely affecting the environment.

In landmark case ***Vellore Citizens' Welfare Forum vs. Union of India***[200]**,** the Supreme Court allowed standing to a public spirited social organization for protecting the health of residents of Vellore. In this case the tanneries situated around river Palar in Vellore (T.N.) were found discharging toxic chemicals in the river, thereby jeopardising the health of the residents. **The Court asked the tanneries to close their business**.

In ***Church of God (Full Gospel) in India vs. KKR Majestic Colony Welfare Association***[201]**,** the questions involved were that in a country having multiple religions and numerous communities or sects, whether a particular community or sect of that community can claim right to add to noise pollution on the ground of religion? Whether beating of drums or reciting of prayers by use of microphones and loudspeakers so as to disturb the peace or tranquility of neighbourhood should be permitted? The facts of the case in brief was that a petition was filed by Majestic Colony Welfare Association stating therein that prayers in the Church of God (Full Gospel)were recited by using loudspeakers, drums and other sound producing instruments which caused noise pollution thereby disturbing and causing nuisance to the normal day life of the residents of the said colony. In this matter the learned Single Judge referred to other decisions and directed respondent Nos.5 and 6 **to follow the guidelines issued in Appa Raos case and to take necessary steps to bring down the noise level to the permitted extent by taking action against the vehicles which make noise and also by making the Church to keep their speakers at a lower level. Against this order an appeal was made before the Supreme Court which was dismissed.**[202]

[199] AIR 1985 SC 6522
[200] AIR 1996 SC 2715
[201] AIR 2000 SC 2773
[202] *Vellore Citizens' Welfare Forum vs. Union of India*, AIR 1996 SC 2715

5.4.3.3- Cases on Nuisances due to Environmental Pollution

In another case ***M.C. Mehta vs. Union of India***[203]**,** the Supreme Court held that air pollution in Delhi caused by vehicular emissions violates right to life under Art. 21 and directed all commercial vehicles operating in Delhi to switch to CNG fuel mode for safeguarding health of the people.[204]

In ***Common Cause (A Regd. Society) vs Union Of India And Others***[205]**,** the Apex Court held that **'public interest litigation which was conceived and created as a judicial tool by the courts in this country for helping the poor, weaker and oppressed sections of society, who could not approach the court due to their poverty, had over the years grown and grown, and now it seems to have gone totally out of control, and had become something so strange and bizarre that those who had created it probably would be shocked to know what it had become.'**

In this case the petitioner had referred to the rising number of road accidents in the country which are taking place in cities, towns and on national highways causing deaths, injuries etc. The petitioner had referred to the defects in the licensing procedure, the training of drivers, and the need for suspending licences in case of negligent driving, and driving under the influence of alcohol, which cause accidents etc. He had also referred to the inadequate infrastructure relating to roads and inadequate provisions of traffic control devices including traffic signals, traffic signs, road devices and other road safety measures. It had been stated in the petition that there should be proper and continuous coordination between various authorities which are connected with roads and control of traffic, and for this purpose the only appropriate remedy is to establish Road Safety Committees. The petitioner had also emphasized the need for having readily available ambulances for shifting the injured persons in road accidents to hospitals for immediate treatment. The petitioner had also stated that there should be road safety education for the users of roads, pedestrians, traffic participants including cyclists, handcarts men, bullock- cart drivers etc., who generally have low socio-economic and educational background and do not know traffic rules and regulations. The petitioner had alleged that pedestrians and non- motorized traffic face enormous risks as they account for 60% to 80% of road traffic fatalities in the country. All non-motorized traffic need to be given

[203] AIR 2001 SC 1948
[204]M.C. Mehta vs. Union of India, AIR 2001 SC 1948
[205] Writ Petition (civil) 580 of 2003

thorough and repeated orientation in observance of road traffic rules and avoidance of any situations which can cause accidents. These road safety education programmes can include written material for those who are literate and also illustrations, slides, specially prepared films, and also publicity though the medium of TV and radio. The petitioner had also alleged that there is a paramount need for enactment of a Road Traffic Safety Act to lay down regulations dealing with specific responsibilities of drivers, proper maintenance of roads and traffic- connected signs and signals etc., and all rules and regulations for observance by all concerned including pedestrians and non-motorized traffic. The Road Traffic Safety Act should contain all the regulations and the requirements relating to avoidance of accidents, responsibilities of respective Departments of State Governments, Municipal bodies, Police authorities, and the penalty for non-observance of prescribed regulations. The Act should specify the duties, responsibilities, rights, directives and punishments in case of failures by any one e.g. driver, vehicle, road user, etc.

The Apex Court while dismissing the PIL made an observation that 'These are instances of judicial excessivism that fly in the face of the doctrine of separation of powers which has been broadly (though not strictly), envisaged by the Constitution vide Divisional Manager, Aravali Golf Club & Anr. vs. Chander Hass & Anr. JT 2008 (3) SC 221, Asif Hameed vs. State of Jammu & Kashmir JT 1989 (2) SC 548 etc. In other words, while expansion of the meanings of statutory or constitutional provisions by judicial interpretation is a legitimate judicial function, the making of a new law which the Courts in this country have sometimes done, is not a legitimate judicial function. The Courts of the country have sometimes clearly crossed the limits of the judicial function and have taken over functions which really belong either to the legislature or to the executive. This is unconstitutional. **If there is a law, Judges can certainly enforce it. But Judges cannot create a law by judicial verdict and seek to enforce it.**

Moreover, it must be realized by the courts that they are not equipped with the skills, expertise or resources to discharge the functions that belong to the other co-ordinate organs of the government (the legislature and executive). Its institutional

equipment is wholly inadequate for undertaking legislation or administrative functions.'[206]

In ***Poovakkulam Parishithy ... vs The State Of Kerala***[207]***,*** the petitioners' grievance was against the functioning of quarries and crusher units operated by respondents. They alleged that the functioning of the quarries and crusher units caused nuisance and damage to their families and public. The nuisance alleged was twofold - one being the plying of trucks carrying the products from the quarry and crusher units, through the village roads; and the second being blasting and other operations of the units. The Court while dismissing the petition held that 'The petitioners essentially are canvassing their individual grievances, which may, at the most, be the grievance of an ascertainable group of people and that too against the activities carried on by named respondents allegedly in violation of statutory rules and regulations. We are afraid, the same does not constitute a "PIL" and it is for the petitioners to ventilate their individual grievances before the appropriate forum, individually or as a group. **Every right that could be sought to be protected under Article 226 of the Constitution of India does not become a public interest merely because a group of people are involved.** Administrative defiance representing callous indifference to statutory provisions do not at all stages give rise to a public interest, though it may affect many. Nor is there any averment that the persons who are affected are of the weaker and marginalized section of the society and that by their status in life, both economic and social, they are deprived of access to legal remedies."[208]

In ***Rajendra Kumar Verma vs The State Of M.P. And Ors.***[209] the petitioner was a well-known social worker and was actively associated with many NGOs fighting for the cause of human dignity, civil liberty and social justice. He had filed the public interest petition for direction to the State Authorities to prevent the environmental noise pollution caused during the festive seasons, religious and social ceremonies spread over the year, by use of various sound amplifiers and other devices besides the noise pollution by factories, trains and aeroplanes. Further direction was sought to prevent other atrocities committed on the society in the name of religious festivals such as (a) traffic

[206] *Common Cause (A Regd. Society) vs Union Of India And Others*, Writ Petition (civil) 580 of 2003 *available at* https://indiankanoon.org/doc/1670134/
[207] W.P.(C).No.5727 of 2013 (S)
[208] *Poovakkulam Parishithy ... vs The State Of Kerala*, W.P.(C).No.5727 of 2013 (S)
[209] 2015 (2) MPLJ 120

hazards by putting Pandals on busy streets (the number proliferating each year) in an indiscriminate manner, (b) theft of electricity with impunity for lighting and decoration of Pandals, resulting in loss to public exchequer and (c) extortion and intimidation of public by unscrupulous elements in the name of donation for the Pandals.

The Hon'ble High Court of Madhya Pradesh disposed of the petition with certain observations. As regards the use of loudspeakers at any religious place or premises where it is being used as a tradition, the sound level restrictions provided under the Central Legislation will have to be adhered to without any exception. .....The State Authorities, however, shall not grant permission/licence for use of sound producing instruments beyond the permissible limits and also ensure that any violation of the Central Rules of 2000 should be proceeded strictly and in accordance with law.' The Court also held that 'when any application for permission to put up a Pandal on a busy street is received, that must be considered with utmost circumspection and should not be granted mechanically. The competent Authority, before granting permission, must keep in mind the extant Regulations and must consider all aspects including the period for which the Pandal will be put up, the likelihood of any inconvenience to public and in particular obstruction to smooth traffic flow and also about the security and safety of the nearby (2009) 15 SCC 351 (2004) 13 SCC 61 W.P. No.4792/2005 (PIL) residents, pedestrians and vehicle operators.....that if violation of noise levels is brought to the notice of the police, Revenue or Municipal Authorities, they must report that matter to the Electricity Board with recommendation to disconnect the electricity connection forthwith**. In any case, all the duty-holders must work in tandem to ensure that the nuisance caused on account of such noise pollution or because of theft of electricity is not ignored, but proceeded against the members of the Committee individually and vicariously in accordance with law - for recovery of damages /compensation for such unauthorized activity, in addition to criminal action.'**[210]

In ***Smt Sumithra vs The State Of Karnataka*[211], t**he petitioner was before High Court invoking its extraordinary jurisdiction under Article 226 of the Constitution of India. The petitioner alleged that the respondent have unauthorisedly opened a shop selling pooja items in front of Sri Lakshmi Narasimha Temple, Balepet and the said action is causing nuisance to the general public. The petitioner had produced along with this writ petition

[210]Rajendra Kumar Verma vs The State Of M.P. And Ors., 2015 (2) MPLJ 120
[211] W.P.No.9584/2018, (unreported)

copies of her representation made to the Commissioner, Hindu Religious and Endowment Department, stating that the petitioner was doing business of selling pooja items in the same premises for the past few years.

The Court held that **'the extraordinary jurisdiction of public interest litigation is meant for redressal of causes of public at large and not for resolution of individual disputes.** This Court is convinced that the instant petition is filed for settling personal scores between the petitioner and respondent Nos.6 and 7. Hence, the petition deserves to be dismissed with exemplary costs.'[212]

5.4.3.4- Violation of an environmental norm automatically does not results in environmental damage

Further there are certain recent judgements where the Supreme Court has shown less willingness to assume that any violation of an environmental norm automatically results in environmental damage or requires a judicial response. Such as:

In ***Deepak Nitrite Ltd. v State of Gujarat*[213]*,*** appeals arise out of a series of orders made by the High Court of Gujarat. A petition was filed before the High Court in public interest alleging large scale pollution caused by industries located in the Gujarat Industrial Development Corporation (GIDC) Industrial Estate at Nandesari. It is alleged that effluents discharged by the said industries into the effluent treatment project had exceeded certain parameters fixed by the Gujarat Pollution Control Board (GPCB) thereby causing damage to the environment. Some of the industries have set up their own effluent treatment plants in their factory premises, while some of them have not. The High Court, by an order made on 17.4.1995, directed that the chemical industries in Nandesari should be made parties to the proceedings thereby 252 industrial units located in the Nandesari Industrial Estate, Baroda were made parties to the proceedings, apart from the State of Gujarat, Central Pollution Control Board, Gujarat Industrial Development Corporation and Nandesari Industries Association. The High Court also issued notices to the financial institutions or banks in respect of these proceedings.

[212]*Smt Sumithra vs The State Of Karnataka*, W.P.No.9584/2018, (unreported) *available at* https://indiankanoon.org/doc/79386038/ (Last visited on 07.03.18)
[213] 6 S.C.C. 402, 407 (2004)

On May 5, 1995 the High Court appointed a Committee under the Chairmanship of Dr. V.V. Modi to ascertain the position with regard to the extent of pollution in Nandesari Industrial Estate. A Common Effluent Treatment Plant (CETP) was erected by the GIDC in Nandesari Industrial Estate on the contribution made by the industrial units in the Nandesari Industrial Estate to the extent of about Rs. 300 lakhs. In as much as CETP was not achieving the required parameters laid down by the GPCB, the High Court, by an order made on 7.8.1996, appointed NEERI as a consultant to assess the treatment facilities and to provide suitable rectification measures for upgrading the CETP and effluent treatment plant facilities. Dr. Committee made a report on 7.9.1996. The High Court restrained several industries from removing their products from their plant without prior permission of the High Court and thereafter, by an order made on 13.9.1996, the High Court permitted them to dispatch materials by depositing a certain sum of money which was the value of the materials. NEERI submitted its report on 31.10.1996. The High Court, while granting permission to some of the industries to carry on their activities, called for turnover figures and profitability data. On 9.5.1997 the High Court passed an order directing the industries to pay 1% of the maximum annual turnover of any of the preceding three years towards compensation and betterment of environment within a stipulated time. Against this order an appeal was filed before Supreme Court.

The Apex Court disposed the matter with the following observations:

"The fact that the industrial units in question have not conformed with the standards prescribed by GPCB cannot be seriously disputed in these cases. But the question is whether that circumstance by itself can lead to the conclusion that such lapse has caused damage to environment. No finding is given on that aspect which is necessary to be ascertained because **compensation to be awarded must have some broad co-relation not only with the magnitude and capacity of the enterprise but also with the harm caused by it.** May be, in a given case the percentage of the turnover itself may be a proper measure because the method to be adopted in awarding damages on the basis of 'polluter to pay' principle has got to be practical, simple and easy in application. The appellants also do not contest legal positions that if there is a finding that there has been degradation of environment or any damage caused to any of the victims by the activities of the industrial units certainly damages have to be paid. **However, to say that mere violation of the law in not observing the norms would result in degradation of environment would not be correct.**

Therefore, we direct the High Court to further investigate in each of these cases and find out broadly whether there has been any damage caused by any of the industrial units by their activities in not observing the norms prescribed by the GPCB as reported by the Modi Committee appointed by the High Court or by an expert body like NEERI and that exercise need not be undertaken by the High Court as if the present proceeding is an action in tort but an action in public law. A broad conclusion in this regard by the High Court would be sufficient. We, therefore, direct the High Court to re-examine this aspect of the matter as to whether there is degradation of environment and as a result thereof any damage is caused to any victim, and what norms should be adopted in the matter of awarding compensation in that regard. In this process it is open to the High Court to consider whether 1% of the turnover itself would be an appropriate formula or not as applicable to the present cases."[214]

Analysis of the above cases

From the above cases the inferences which can be drawn regarding the limitations of PIL when compared to prospect of better remedies in terms of compensation under tort law are as follows:

- Public Interest Litigation has been mostly used till date only against those public nuisances which degrades the environment causing pollution. As PIL can be filed only in event of infringement of fundamental right.
- Remedies under PIL are mostly in the form of some mandatory orders to stop the nuisance and follow directions to prevent any future nuisance.
- The compensation awarded by PIL is only limited to repair the damages caused to the victims at large.
- The gravity of individual damage is mostly ignored under Public Interest Litigation.

Hence, it can be inferred from these various cases that though PIL hands over certain power to general public to curb public nuisances mostly in the form of environmental pollution, but still the remedies provided are not with the view of putting the victims to their original position but mostly to prevent the nuisances.

[214]Deepak Nitrite Ltd. v State of Gujarat, 6 S.C.C. 402, 407 (2004)

To sum up, this chapter with the help of some important and landmark judgements has highlighted the gaps such as uncertainties, ambiguities, limitation of remedies and absence of proper adjudicating authorities along with a well comprehensive legislation in deciding tortious liabilities in India. In the concluding chapter, the researcher has made an attempt to examine the chances of getting alternative and better remedy in the above cases had there been a codified tort law to deal with the respective tortious liabilities.