



TORTS IN INDIAN JURISPRUDENCE – AN ENDLESS AND INSOLVABLE DILEMMA

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ABSTRACT

The Law of Torts, the name as a discipline which may be distinct and familiar for law students in Legal Academic curriculum but, for Legal Practitioners, it remains forever the silent player in legal practice but a giant remedy provider in the administration of civil justice. This is the background for the necessity of making of this Article titled, “Torts in Indian Jurisprudence – An endless and insolvable dilemma”. In India, administration of justice according to law, where the law, inter alia, incorporates law of torts is evidenced itself from the use of the name, ‘the law of torts’. The sources of law in Indian Jurisprudence comprise in the outlook Statutory Law (Legislation), Judicial Precedents, etc. There arose a question where the law of torts would find a place in the source is it fit to the Custom, the Precedent or is it legislation? Moreover, is it right for to have the law of torts in form of legislation? In searching the solution to identify a source for the Torts in Indian Jurisprudence, this massive attempt has been made though the task remains a challengeable one.

Key words : Torts, Indian Jurisprudence, Source of law, Judicial Precedent, Specific Relief Act

Introduction

Undoubtedly, as a giant remedy provider, the Torts, even having the nature of law, a question relating to its source remain in various forms in Indian Jurisprudence as below: Is it a Precedent? Is it a Statutory Law? Moreover, is it right for to have law of torts in the form of

statutory law? Is it a customary Law (Common Law)? With these questions, there arose a confusion regarding its source. It is better that the law should be clear than that it should be clever¹ (Salmond and Hueston, 1984) is nothing but an observation made with reference to the Law of Torts. In Indian Legal System, there a question arises whether Law of Torts is clear or clever? For it is to be clever, the application of it would benefit the society directly through the administration of justice. For it is to be clear, the application of it in Indian Legal System be ensured which means it would be one of the sources of law. It is of no doubt, in India Legal System, the existence and applicability of Law of Torts has been upheld. However, its source is remaining in question as stated above. In a move towards finding its source, everyone, without any kind of hesitation, have to accept that there lies a big challenge in identifying its source as law in Indian Jurisprudence. In this most challengeable move, this research is a big attempt to find a solution for this.

The Criminal justice system, in one hand, plays a role in culminating the criminal activities by providing penalty for the criminal wrongs as in earlier; it was felt that the justice indispensable for the protection of physical body and properties of the people was the criminal justice. However, it was found that, Law of Wrongs (Torts) gives rise to civil justice was the earliest.² However, in the other existing social relationship for example, business activities, it was felt certain remedies were in need, for to quote is the case of Contracts, debts etc., there was a demand for unique remedies. Therefore, a result founded upon a profound search for remedies for certain disputes which never stand on the penalty or any other remedy on the same punitive foot, is the tort, which takes the shape of corrective measures as the remedy covers both moral as well as legal wrongs. To split the civil wrongs, criminal wrongs were distinguished from torts vide tort and crime and another aspect of distinguishing the torts from contract and trust vide tort and contract, similarly as tort and trust. Another classification, which bags here, are the civil wrongs which are coming under criminal wrongs that gives rise to both civil and criminal proceedings, e.g., trespass, defamation, etc. and civil wrongs which are not coming under criminal wrongs that gives rise to civil proceedings only, e.g., remedies with the nature of corrective measures, to quote, statutes in India which are having the nature of Law of Torts such as The Consumer Protection Act, 1986, The Right to Information Act, 2005, etc.

The definition for the torts reflect the above discussed nature and scope, therefore, the definition which suit the Torts is, wrongs distinguished from contract and trust, in the same way not treating the wrong as of criminal nature to support the corrective measure as remedy such as compensation, correcting i.e., set right the wrong and as such like. John Salmond has defined the Torts as “It is a civil wrong for which the remedy is a common law action for unliquidated damages, and which is not exclusively the breach of a contract or the breach of a trust or other merely equitable obligation.” A Tort is an act or omission which is unauthorized by law, and independently of contract (i) infringes either – (a) some absolute right of another; or (b) some qualified right of another causing damage; or (c) some public right resulting in some substantial and particular damage to some person beyond that which is suffered by the public generally; and (ii) gives rise to an action for damages at the suit of the injured party.³ A tort is defined in the Common Law Procedure Act, 1852, as “a wrong independent of contract.”⁴ A tort may also be regarded as the breach of a legal duty owed independent of contract, by one person to another for which a common law action for damages may be brought.⁵(P.S. James, 1969)

The Maxim, which receives the reference here is, ‘ubi jus ibi remedium’ – means ‘where there is a right there is also a remedy’. Therefore, it is said that the enforcement of right against the wrongs committed or injuries caused only through civil proceedings for the called civil remedies is a legal action for Tort. A step in identifying wrongs or injuries is the ascertainment of scope of Torts, for which, Lord Holt in the case of Ashby v. White⁶, observed that “if men will multiply injuries actions must be multiplied too; for every man that is injured ought to have recompense”.

Origin and Development of Law of Torts

The law of Tort is in its origin as a part of the common law⁷, as distinguished from equity. It is predominant to state here that, English law is mainly built up of case law. The case laws are nothing but the judicial precedents. It is due to the bold initiative by judicial moralizing that the law of tort has progressed.⁸(P.S. James, 1969)

A Division of Common Law

Without having a separate Legislation for these civil remedies, a civil justice system had been in function in the British Territory, for example, the Court of Chancery, which had equity

jurisdiction where the Common Law was not applied. The Common Law Courts, namely the first Permanent Royal Court named the Court of Exchequer and the Second Royal Court named the Court of Common Pleas followed the Common Law Principles and they act as Law Courts and their function was exclusively judicial⁹ while the Court of Chancery act as Courts of equity and had discretionary powers to administer justice. Out of its discretionary powers, they exercise jurisdiction to administer remedies like injunction, specific performance of a contract, declaration and recovery of possession, etc. It is significant to know here, Common Law Courts had also exercised the compensatory Jurisdiction. Damages are the legal remedy.¹⁰ It is making our thoughts to construe that Compensation is nothing but in the nature of penalty, which is like a punishment for wrongs, as the damages awarded in torts are un-liquidated damages in nature. The jurisdiction of Common Law Courts and Equity Courts got deemed merged and by this, remedial jurisdiction also deemed got merged.¹¹ Thus, apart from compensation, injunction, recovery of possession, etc., became the common law remedy in England and also in India.

Applicability of Law of Torts in India

The law of torts followed in India is mainly the English Law of Torts which is based on the Principles of the Common Law of England. A question in the nature of doubtfulness regarding to the applicability of law of Torts in India is familiar in India among the law students, legal professionals, etc. But, however, the concept which gained significance here to discuss if its applicability in India is ensured then arises another question which is the Law of Torts in India? Firstly, it is felt right here to discuss its applicability in India outweighing all the doubtfulness regarding this issue. Up to the period of Indian Independence, Law of torts was applied in India by the then British India under the jurisdiction Common Law. After Independence, the Constitution of India was brought into force, by which the law of torts made applicable in post independent India through its Article 372. Article 372 of the Constitution of India is having the provisions for the applicability of law of torts in post independent India. It is for our eyes below:

Article 372. Continuous in force of existing laws and their adaptation. – (1) Notwithstanding the repeal by this Constitution of the enactments referred to in Article 395 but subject to the other provisions of this Constitution, all the laws in force in the territory of India

immediately before the commencement of this Constitution shall continue in force therein until altered or repealed or amended by a competent Legislature or other competent authority.

In *Builder's Supply Corporation v. Union of India*¹², the Supreme Court of India has observed as follows: The relevant expression 'law in force' includes not only statutory law, but also custom or usage having the force of law and as such, it must be interpreted as including the common law of England which was adopted as the law of this country before the Constitution came into force. It has thus been held by the Supreme Court that the common law of England which was adopted as the law of this country before the Constitution came into force would be law in force at the relevant time within the meaning of Article 372(1)¹³. The expression "all laws in force" includes not only the enactment of the Indian Legislative but also the Common law of the land which was being administered by the courts in India and this includes the law of torts.¹⁴

Then, it is an attempt to answer the second question, which is the Law of Torts in India? The sources of law in Indian Jurisprudence comprise Custom which is valid in the eye of law, eg. Legislation backs the custom, the Hindu Marriage Act, 1955, Judicial Precedent, eg. Factors to be examined before granting ex parte ad interim injunction, Legislation, the enactments made by the Central and the State Government. There arose a question where the law of torts would find a place, is it fit to the Custom, the Precedent or the Legislation? It is appropriate to quote all these as law of torts, principles based on justice, equity and good conscience, precedents provided compensation as the remedy under the writ as well as appellate jurisdiction as law declared by the Supreme Court under Article 141 of the Constitution of India, 1950, Statutory Enactments resembles the nature of law of torts by providing remedies as compensation and an Enactment provided for certain civil reliefs such as injunction, recovery of possession, specific performance of contract excluding compensatory remedy. This is the overall dilemma prevails about the Law of Torts in the Indian Jurisprudence. Having this in mind, solving the insolvable endless question is a difficult task, this Article on the erudite study on this aspect moves to achieve the possibility at the best.

Common Law

It is more appropriate to take a visit to the English Legal System and its historical development to know the foundation for civil action in India. The administration of civil justice

in India including the present system of civil justice was traced from the British Practice. The Common Law system familiarly called the ‘Judge made Law’ is being practiced in the present scenario in India in the name of Judicial Precedents which was the law in British-ruled India came to India with the British East India Company and the same has been modified for Indian Conditions.¹⁵ Mr. Setalvad in his Hamlyn Lectures on "The Common Law in India", 2nd edn., has dealt with the common law right to have access to Courts if a person can show a cause of action. Dealing with the rise of common law Mr. Setalvad has observed at page 62 as follows: VI. Indian Common Law Common law consists, as we have seen, of customary rules of the realm recognized by the courts. In that sense every country can be said to have its common law, rules of conduct which apply to citizens generally and the rights and privileges which they can enjoy. Some of these customary rules prevailing in India have come to be known as the Indian common law. This was founded on the principle of Justice, Equity and Good Conscience. But in England Equity was opposed to Common Law. So, there were difference of opinion regard to Common Law in India.

With regard to the applicability of the Law of Torts in India, the observation of the Supreme Court and the High Court of Bombay that the expression “all laws in force” includes not only the enactment of the Indian Legislative but also the Common law of the land which was being administered by the courts in India and this includes the law of torts¹⁶ is gained significance here. Therefore, the applicability is made clear but its source is not ascertained.

Precedents

‘Judge made Law’, familiarly called the Law of Torts. It is none other than judicial precedent. It is the foremost priority to arrive at a conclusion, in order to finalise a position of legal system in the world, particularly which is in focus here India, to this endless dispute based on the two theories related to Judicial Precedent, Declaratory theory that the Judges only declare the existing law and the other that the Judges do make law. Without which, a conclusion regarding to whether the Indian Courts can come up with new law of torts cannot be made. In supporting the Declaratory Theory, the Supreme Court of India has observed that, “No doubt, the law declared by this court (Supreme Court of India) binds courts in India, but it should always be remembered that this Court does not enact.”¹⁷ Therefore, it is clear that the Apex

Court also not in the position of enacting law, by this, there remains a question, Can the Supreme Court come up with new torts?

On the other hand, Article 141 of the Constitution of India, 1950 provides for the Judicial Precedent in India.¹⁸ This Article speaks for the binding nature of the judicial precedents of Supreme Court of India. A new question which raises here is that, whether the Supreme Court is playing the role of giving new law of torts. The answer is not 'no' in the complete sense because in some cases the Supreme Court of India has awarded compensation for the victims while exercising the writ jurisdiction. To illustrate, compensation was awarded in to a person who had been under the imprisonment even after release of his imprisonment.¹⁹ A thing which is to be bear in mind is that, writ jurisdiction is only vested in the Supreme Court and the High Court of various states in India. Act of compensating is the tortuous remedy. Though the compensatory jurisdiction exercised by the Supreme Court is discussed under the Compensatory Jurisprudence, Human Rights Jurisprudence, it is in the nature of tortuous remedy, leaving no doubt, it is the law of torts. Even it is precedent, its authoritativeness is under question, because, whether the same Court is ready to provide the same kind of compensatory remedy for other cases and whether other lower courts including High Court treating that as precedent and act on the line of compensatory Jurisprudence. The question which demands the answer is that false imprisonment is the tort under English Common Law, while the Supreme Court of India exercised the remedy of granting compensation to the victim by searching the supporting law to provide the compensation, it stated the provision which supported is Article 32 by giving decision that it can grant compensation under Article 32 while exercising writ jurisdiction instead of simply saying that it is law of torts. So, it appears that there is a strong confusion between the judicial precedent in India and Law of Torts in India even the Article 372 is supporting the applicability of the law of torts in India. This is also need to be quoted here is that there is one kind of precedent called persuasive precedent which means not authoritative in nature. This precedent cannot have the force of law since it is described as persuasive which means, 'considerable'. When law in India is clear and settled no occasion arises rely upon foreign case laws laying down a wider proposition.²⁰

Legislations

While the Precedents are on one hand, the legislations stand on the other hand to support the Law of Torts doubtfully since legislations are not the case laws. In England, law of torts is a division of Common Law, which is not the form of Statutory Law. Legislation also played a role in the progress of Law of Tort.²¹ But in England, legislation has contributed a small part i.e. procedure²² for the action not the law of torts i.e. wrongs.²³ (P.S. James, 1969) For example, The Law Reform (Personal Injuries) Act, 1948, the Defamation Act, 1952 or the Occupiers' Liability Act, 1957. (P.S. James, 1969)

But in India, the legislation itself provides for the tortious remedy by having the nature of law of torts but stand under the category of Statute. To quote, the Acts (statutory enactments) which are worth mentioning here for that they are having the nature of Law of Torts, in India are the Fatal Accidents Act, 1955, the Employees' Compensation Act, 1963, the Consumer Protection Act, 1986, the Motor Vehicles Act, 1988, the Patents Act, 1970, the Trade and Merchandise Act, 1958, The Judicial Officers Protection Act, 1850, The Copy Right Act, 1957, The Easement Act, 1882, The Indian Carriers Act, 1865, the Air (Carriage by Air) Act, 1972, the Specific Relief Act, 1963, Cattle Trespass Act, 1871, the Information Technology Act, 2000, the Right to Information Act, 2005, and the Protection of women from Domestic Violence Act, 2005, etc. The nature of the above enactments carries consistency with the Torts since they are giving rise to civil action for the enforcement of the statutory rights given and compensation, set-right the right as required, as the remedy.

Civil Remedies and Equitable Remedies

Equitable remedies are appropriate when an award of damages will not lead to a fair and good result.²⁴ As an Equitable remedy in tort, a court can issue an injunction to order a party to stop doing something (a prohibitory injunction) or to do something (a mandatory injunction).²⁵ As Pre Independent India witnessed the Specific Relief Act, 1877 while the post Independent India has got a new enactment called the Specific Relief Act, 1963 which provides the civil remedies for the enforcement of civil rights. The Supreme Court of India described the Act of 1963 as in-exhaustive.²⁶ The Preamble of the Specific Relief Act, 1963 is itself shows that the act is not exhaustive of all kinds of specific reliefs by way of the term applied there is 'certain kinds

of reliefs'.²⁷ The Act of 1963, has been described as the procedural in nature even no other legislations in India provides certain rights which are enforceable through civil action under this Act as the substantive rights, for example, trespass for which, the civil action can be made to obtain the relief of injunction, since the same is the crime under the Indian Penal Code, 1860. This is so, why the Act of 1963 could not be described as substantive law.²⁸ The reliefs contained in the Act include, Recovery of Possession of Property, Specific Performance of Contracts, Rectification of Instruments, Rescission of Contracts, Cancellation of Instruments, Declarative Relief, and Preventive Reliefs (Injunctions) which are, in England, earlier termed as equity remedies and then Common Law Remedies. Therefore, it is clear that the remedies for civil wrongs (Torts) were arranged as civil remedies in India by enacting a Statutory Law called the Specific Relief Act, 1963 and a statutory law will never acquire the nature of Torts.

Findings and Evaluation

The first finding is focusing the aspect that , is law of torts a source of Common Law in the present legal scenario in India?, the direct answer would result in negative, i.e., 'no'. Because, even it is made applicable under Article 372 of the Constitution of India, 1950, the law relating to judicial precedents in India no way supports it since the Supreme Court of India is having the power only to declare law as precedent with the binding nature as per Article 141 of the Constitution of India. On an another point, Common Law in England is the Common Law in India, i.e. law of torts is also a part of it, then the law relating to precedent struck it on the basis of foreign case laws are labeled under the category of persuasive precedents, one of the kind of precedents which are not binding in nature. The second finding is on the aspect that, is law of torts a source of Judicial Precedent in India?, the answer would say 'no', because as discussed earlier, the law relating to precedent in India would not in any way support it. The third finding focuses the point that, is law of torts a source of Legislation in India? And this gives rise to another question is it right to have the law of torts in form of statute? The answer would be of 'not' because the law of torts would never acquire the nature of statutory law.

On evaluating the above study, it holds true that the remedies which would be provided by the Law of Torts actually remedied by way of other statutory remedies in Indian Legal System. Therefore, it is appropriate to quote here, Winfield, the giver of a theory 'Tort' cameup with this concept at the earlier times in England itself. Having given a very broad description of

the purposes of the law of tort we can then return to the problem of formal definition and, finally, look at what is currently the most controversial matter in relation to the practical operation of the law – the relation of parts of the tort system with certain other legal and social institutions processing similar ends.(Winfield and Jolowicz on Tort, 1984) The Authors also stated that the Law of Tort tended to be regulated by the development of insurance and social security to play a secondary role in the administration of justice.²⁹ (Winfield and Jolowicz on Tort, 1984)

Conclusion

On having an erudite study on this aspect, the task taken on hand to ascertain the source of law of torts in India is so far as achieved at the best. It is to conclude that the Law of Torts in India is not fit to any of the available source of law in the Indian Legal System. Having in continuance of this issue too in the future, it would led to realize that a flaw lies in the Indian Legal System. No one can deny that this issue is the endless and insolvable one; hence the article labeled as ‘dilemma’ and has visited the selected references for this research profoundly.

¹Parsons v. B.N.M. Laboratories Ltd. (1964) 1 Q.B. 95, 102

² Sir Henry Maine, a follower of Historical School of Jurisprudence in his work, Ancient Law at ,p.379 stated as follows, “The penal law of primitive communities was not the law of crimes but the law of wrongs or torts” cited in Ramaswamy Iyer’s The Law of Torts by A. Lakshminath and M. Sridhar, Tenth Edition, First Reprint 2010 at p.7

³ General Principles of the Law of Torts – P.S. James- Third Edition – 1969 – Butter Worths London

⁴ Cited in General Principles of the Law of Torts – P.S. James- Third Edition – 1969 – Butter Worths London

⁵ ibid

⁶ (1703), 2 Ld. Raym. 938, 955

⁷ In 1154, Henry II institutionalized common law by creating a unified system of law "common" to the country through incorporating and elevating local custom to the national and reinstating a jury system – citizens sworn on oath to investigate reliable criminal accusations and civil claims. The jury reached its verdict through evaluating common local knowledge, not necessarily jurisdictions. Henry II had developed the practice of sending judges from his own court to hear the various disputes throughout the country. His judges would give prima facie decisions according to what they interpreted the customs to be. The king's judges would then return to London and discuss the cases with other judges. These decisions would then be recorded and filed. With the due passage of time, a rule, known as stare decisis (also commonly known as precedent) developed, which is where a judge would be bound to follow the decision of an earlier judge; he was required to adopt the earlier judge's interpretation of the law and apply the same principles adopted by that earlier judge if the two cases had similar facts to one another. By this system of precedent, decisions became binding, and was replaced by an elaborate and consistent system of law that was common throughout the whole country, and hence the name, "common law. Source : Common Law: World and Indian Legal System <http://www.legalservicesindia.com/article/article/legislation-&-common-law-indian-legal-system-587-1.html> Origin of Common law

⁸ Fitfort, Cited in James, General Principles of Law of Torts 2nd Edition 1964 at pp.7-8.

⁹ Oxford Dictionary of Law, Oxford University Press, 7th Edition

¹⁰ Remedies, Translegal, available at <http://www.translegal.com/lets/remedies-2>

¹¹ The Common Law was subsequently supplemented by equity, but it remained separately administered by the three Courts of Common Law (The Court of Exchequer, the Court of Common Pleas and the Court of King’s Bench) until these three courts and the Court of Chancery (all of them sitting in Westminster Hall until rehoused in the Strand in

1872) were replaced by the High Court of Justice under the Judicature Acts of 1873. – quoted in Oxford Dictionary of Law, Oxford University Press, 7th Edition.

¹² AIR 1965 SC 1061

¹³ See also Director of R. & D. v. Corporation of Calcutta, AIR Supreme Court

¹⁴ See, Amina (in re:), AIR 1992 Bom 214.

¹⁵ <http://www.barcouncilofindia.org/about/about-the-legal-profession/legal-education-in-the-united-kingdom>

¹⁶ See, Amina (in re:), AIR 1992 Bom 214.

¹⁷ Rajeshwar Prasad v. State of West Bengal AIR 1965 SC 1987

¹⁸ Article 141. Law declared by Supreme Court to be binding on all courts.- The law declared by the Supreme Court shall be binding on all courts within the territory of India.

¹⁹ Rudal Shah v. State of Bihar, AIR SC

²⁰ BSES Ltd.(Now Reliance Energy Ltd.) v. Fenner India Ltd., AIR 2006 SC 1148.

²¹ Common Law : World and Indian Legal System; www.legalserviceindia.com

²² In a system of law based upon the authority of precedent old rules outlive their uses. Amid all these complexities the categories of torts expand (And are expanding at the present time. For instance Donoghue (or M’Alister) v. Stevenson, 1932 All ER Rep. I form new points of departure in the development of the law of negligence.) and contract (For example actions for the institution of malicious civil proceedings and for malicious arrest are probably now obsolete.) with or without the help of Parliament (Legislation plays a comparatively small part in the law of torts; but sometimes Parliament has been forced to intervene where entrenched precedent has taken a wrong turn. Eg. The Law Reform (Personal Injuries) Act, 1948, the Defamation Act, 1952 or the Occupiers’ Liability Act, 1957) seeking to effect just solutions to disputes.

²³ Nevertheless the law of torts is to some extent a mirror of judicial notions of what represents a ‘wrong’ at any given time; for it is mainly judge-made; cited in General Principles of the Law of Torts – P.S. James- Third Edition – 1969 – Butter Worths London

²⁴ Remedies, Translegal, available at <http://www.translegal.com/lets/remedies-2>

²⁵ Translegal, available at <http://www.translegal.com/lets/remedies-2>

²⁶ Hungerford Investment Trust vs Haridas Mundhra AIR SC 1972 1826

²⁷ The Preamble to the Specific Relief Act, 1963 – An Act to define and amend the law relating to certain kinds of specific relief.

²⁸ The Specific Relief Act, 1963 which supplements the Code and occupies a middle ground between substantive law on the one hand, and procedure on the other found in the Specific Relief Bill, Statement of Objects and Reasons, Gazette of India, 11th December, 1875 cited in Nelson’s Law of Injunctions, Second Edition, 1984, Law Publishers, Allahabad.

²⁹ A century or so ago, the law of tort was probably the primary vehicle of compensation but poverty, ignorance or economic pressure deprived many injured persons of access to the law and threw them back on the Poor Law, Charity or the assistance of a trade union or friendly society. In more recent times the development of insurance and social security have tended to regulated tort law to a secondary role and the process may be carried further in the future with regard to personal injuries. Winfield and Jolowicz on Tort, (1984) London, Sweet & Maxwell p.16

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