

A TREATISE ON FASTENING LIABILITY FOR LOSS OF SEIZED ITEMS
AFTER FILING OF CHARGESHEET.

Prepared By:

Saptarshi Das

Judicial Magistrate 1st Class, Hojai

TABLE OF CONTENT

<u>CHAPTER 1 : INTRODUCTION.....</u>	3
<u>CHAPTER 2: VICARIOUS LIABILITY: FASTENING LIABILITY ON THE STATE FOR ACTS OF ITS OFFICERS.....</u>	4
<u>CHAPTER 3 : MALKHANA AND ENTRUSTMENT OF RESPONSIBILITY OF MALKHANA</u>	6
3.1 Inspection of Malkhana.....	6
3.1 Rule 63: Custody of property in the Court office; the Malkhana and its Register.....	6
<u>CHAPTER 4: ANALOGY OF CASE LAWS PERTAINING TO LOSS OF SEIZED PROPERTY FROM THE CUSTODY OF COURT/POLICE.....</u>	8
4.1 Procedure for realizing the amount.....	9
4.2 The conundrum of one malkhana for investigation and trial stage.....	9
<u>CHAPTER 5 : CONCLUSION & THE WAY FORWARD.....</u>	10
5.1 The Way Forward.....	10

LIST OF REFERRED CASES

1. ***Basava Kom Dyamogouda Patil v. State of Mysore*** reported in AIR 1977 SC 1749
2. ***Basavva Kom Dyamangouda v. State Of Mysore*** reported in AIR 1977 SC 1749
3. ***Chairman, Railway Board v. Union of India*** reported in AIR 2000 SC 465
4. ***Common Cause v. Union of India*** reported in 1996(4) SCC 33
5. ***Khatri v. State of Bihar*** reported in (1981) 1 SCC 627
6. ***M. Satyamma v. Govt. of Andhra Pradesh*** reported in (2003) 4 Andh LT 356
7. ***N. Nagendra Rao v. State of A.P.*** AIR 1994 SC 2663.
8. ***Peninsular & Oriental Steam Navigation Co. v. Secretary of State*** (1861) 5 Bom HCR App I
9. ***Prithwiraj v. State*** reported in 1979 Cr LJ
10. ***Rudul Shah v. State of Bihar*** reported in (1983) 4 SCC 141
11. ***Selvam v. State by Inspector of Police Criminal R.C. Nos. 1766 and 1699 of 2012***
12. ***State of Maharashtra v. Deepak. R Shah & Anr. Criminal Petition No. 75/1992***
13. ***State of Rajasthan v. Vidyawati*** AIR 1962 SC 933
14. ***Umeshwar Sahu v. State of Jharkhand*** reported in AIR 2002 Jhar HCR 896

CHAPTER 1 : INTRODUCTION

At the very outset, it would be apposite to sketch a picture of the moot issue underlying the purpose of this research. At the stage of investigation, if a seized item, the seizure of which is reported to the Eleka Magistrate is lost, it would not be a hassle for the Court for making the concerned police personnel who had the custody of the property criminally culpable. But many a times, courts are impeded with a conundrum which manifests itself in a delicate situation as in many districts of Assam, there is no separate court malkhana for custody of seized property after filing of chargesheet. So, this research is an endeavor to answer the questions enunciated hereunder:

1. After filing of chargesheet, if a seized item is lost, on whom can the Court fasten liability?
2. If there is no separate court malkhana, will the answer to the above question remain unwavering?

With this premise, this treatise is set into motion.

CHAPTER 2: VICARIOUS LIABILITY: FASTENING LIABILITY ON THE STATE FOR ACTS OF ITS OFFICERS

The concept of vicarious liability has been germinated and gradually evolved by judicial pronouncements thereby cloaking it with a definitive connotation. A simpliciter explanation of vicarious liability posits that one person is liable for the acts of others. So in a case of vicarious liability, both the person at whose behest the act is done as well as the person who does the act are liable. A facet of vicarious liability is State being vicariously liable for the torts of the government officers that are committed during the discharge of official work.

Article 300(1) of The Constitution of India encapsulates the concept of vicarious liability and provides as under:

“The Governor of India may sue or be sued by the name of the Union and the Government of a State may sue or be sued by the name of the State and may, subject to any provisions which may be made by Act of Parliament or of the Legislature of such State enacted by virtue of powers conferred by this Constitution, sue or be sued in relation to their respective affairs in the like cases as the Dominion of India and the corresponding Provinces or the corresponding Indian States might have sued or been sued if this Constitution had not been enacted.”

The distinction between ‘sovereign’ and ‘non-sovereign’ functions as demarcated in the case of ***Peninsular & Oriental Steam Navigation Co. v. Secretary of State (1861) 5 Bom HCR App I*** was upheld in ***State of Rajasthan v. Vidyawati*** reported in **AIR 1962 SC 933** but the maxim ‘*The King can do no wrong*’ was held to be a blatant manifestation of colonial heritage.

The Hon’ble Apex Court very aptly noted that:

“Acts done in the course of employment but not in connection with sovereign powers of the State, State like any other employer is vicariously liable.”

In the aforesaid case, the Hon’ble Apex Court while approving the distinction made in Steam Navigation Co.’s case between the sovereign and non-sovereign function observed that the immunity of crown in the United Kingdom was based on the old feudalistic notions of Justice, namely, that the King was incapable of doing a wrong. The said common law immunity never operated in India.

However, the distinction between sovereign and non-sovereign was obliterated in *N. Nagendra Rao v. State of A.P.* reported in AIR 1994 SC 2663. In this case, the Hon'ble Supreme Court held that when due to the negligent act of the officers of the State, a citizen suffers any damage, the State will be liable to pay compensation and the principle of sovereign immunity of state will not absolve him from this liability. The court held that in the modern concept of sovereignty, the doctrine of sovereign immunity stands diluted and the distinction between sovereign and non-sovereign functions no longer exists.

Other notable cases include:

- A. *Khatri v. State of Bihar* reported in (1981) 1 SCC 627
- B. *Rudul Shah v. State of Bihar* reported in (1983) 4 SCC 141
- C. *Common Cause v. Union of India* reported in 1996(4) SCC 33
- D. *Chairman, Railway Board v. Union of India* reported in AIR 2000 SC 465

CHAPTER 3: MALKHANA AND ENTRUSTMENT OF RESPONSIBILITY OF MALKHANA

3.1 Inspection of Malkhana: -

During the stage of investigation, after seizure is reported to a Magistrate, the police keeps the seized articles in the safe custody of a Malkhana. Similarly, property which comes into the custody of Court during inquiry or trial of a criminal case has to be kept in a Court Malkhana. Prudence demands that the said Court Malkhana should be under the aegis of the Prosecuting Inspector. However, the Code of Criminal Procedure is conspicuously silent as to how a Malkhana it is to be maintained, who is entrusted with the responsibility of inspection/maintenance and on whom liability can be fastened if property is lost. It is also apposite to note that the Criminal Rules and Orders of the Hon'ble Gauhati High Court are also silent about provisions relating to Malkhana.

The only text where there is an ostensible manifestation of Malkhana is the Assam Police Manual. The **Assam Police Manual Part –IV from Rules 63 to 65** deals with the **Custody of property relating to a case.** Rule 63 (a) of the Assam Police Manual, Part-IV provides as follows:-

3.2 Rule 63: Custody of property in the Court office; The Malkhana and its register

(a) The Malkhana.- *A secure room known as Malkhana will be provided for the safe custody of property **for which the Court police are responsible**, such as stolen property sent up for identification; property found on under-trial prisoners; property forwarded as exhibits in criminal trial; unclaimed property taken possession of by the police under Section 25 of the Police Act. (Act V of 1861); suspicious property sent in under Section 523, Cr. P.C. and all other property which may be taken charge of the police and sent to Court, or for the custody of which in a Malkhana Magistrates may pass orders.*

The keys of Malkhana should kept by the Court officer who is responsible for the safe custody of its contents. He is also answerable that no one tampers with the exhibits of cases sent to Court. In the room which should be kept scrupulously clean, there should be a strong box with a good lock for valuables, such as ornaments, money or documents. Every article kept in a Malkhana

should be neatly labeled to tally with the number in the register. To avoid the mixing up of articles the year of the register will be entered on the label below the number of Malkhana register entry, thus, M.R. 40/25 on the label of an article will indicate that the article in the Malkhana register of 1925 is entered as No.40. No private property belonging to a Court officer or anybody also should be kept in a Malkhana. Court officers who are in charge of Government money are authorized to keep their cash boxes in district and sub-divisional treasuries.

So, there is not even an iota of doubt that the Prosecuting Inspector is entrusted with the responsibility of court makhana.

(b) The Malkhana Register- *All properties received in a Malkhana should be entered in the book called the Malkhana register - Form No.116 XL(A), (Part I).*

When property is sent to Court, full information concerning it should be furnished so as to enable the Court officer to fill in the register.

As soon as the property comes in the Magistrate's order concerning it should be obtained and recorded in Column 9 of the register. Similarly the disposal order of a property should be initiated by the Magistrate in Column 10 of the Register, which should be put in routine cases along with Fundamental Rules to Magistrate.

It is also provided in Rule 63 (c) that Malkhana register shall be thoroughly checked up once in a month by the Superintendent of Police at the headquarters and by the Sub-Divisional Police Officer or Circle Inspector, as the case may be at Sub-Divisional headquarters.

CHAPTER 4: ANALOGY OF CASE LAWS PERTAINING TO LOSS OF SEIZED PROPERTY FROM THE CUSTODY OF COURT/POLICE

In this chapter, the endeavour will be to succinctly highlight an analogy of case laws to lucidly posit an answer to the questions raised in the introduction.

- A. ***M. Satyamma v. Govt. of Andhra Pradesh*** reported in (2003) 4 Andh LT 356: In this case, the Division Bench of the Hon'ble Andhra Pradesh High Court in clear and unambiguous terms held that "*Where the case property is lost from the strong room of the Court – room, the court would direct the State to pay the value thereof to the person found entitled to get the same.*"
- B. ***Basava Kom Dyamogouda Patil v. State of Mysore*** reported in AIR 1977 SC 1749: In this case, the Apex Court held that the court has power to order payment of value of property which has been lost or destroyed during the pendency of trial. The Court further observed that the object of the Code of Criminal Procedure is that any property which is in the control of the court either directly or indirectly should be disposed of by the court and a just and proper order should be passed by the court regarding its disposal. In a criminal case, the police always acts under the direct control of the court and has to take orders from it at every stage of an inquiry or trial. In this broad sense, therefore, the court exercises an overall control on the actions of the police officers in every case where it has taken cognizance. The Court further observed that where the property is stolen, lost or destroyed and there is no prima facie defence made out that the State or its officers had taken due care and caution to protect the property, the Magistrate may, in an appropriate case, where the ends of justice so require, order payment of the value of the property.
- C. ***Prithwiraj v. State*** reported in 1979 Cr LJ 96 : In this case, the Division Bench of the Calcutta High Court held that "*When the court Sub-Inspector has misappropriated the seized article which was ordered to be returned after conclusion of trial, the State Government is liable for the conduct of its servant.*" This is nothing but a manifestation of vicarious liability which was receded in the previous chapter.
- D. ***Umeshwar Sahu v. State of Jharkhand*** reported in AIR 2002 Jhar HCR 896 : This is a case relating to section 457 of Code of Criminal Procedure, 1973 when the seized property was still in the custody of police as the case was at the stage of investigation. In

this case, it was held that where the seized property has been misappropriated and cannot be returned to the petitioner, the petitioner would be entitled to recover compensation for the articles of property seized at the rates prevalent at the time of seizure.

4.1 Procedure for realizing the amount

In all the abovementioned terms, the Hon'ble Courts in unanimous and unequivocal terms had exhorted that the State would be liable to pay the property to the rightful owner of the seized goods. In *State of Maharashtra v. Deepak. R Shah & Anr. Criminal Petition No. 75/1992*, the Hon'ble Bombay High Court went a step further and stated that amount of the lost property (in this case it was gold) can be realized from the estate of the erring officers. I hasten to add that in the humble view of the researcher, this approach should not be availed of unless dearth of due care and attention and subsequent ancillary negligence of the erring officer is established with impeccable clarity.

So, the normal recourse which can be resorted to is to direct the State government to pay the value of the property lost. In the cases mentioned in this chapter, the State government was directed to pay compensation to the rightful owner of the lost goods. The procedure for realizing the said amount was not sketched. In my humble opinion, the market value of the property coupled with the number of years of depreciation can be accounted into for arriving at a reasonable sum which can be accorded as compensation. The assistance of a government approved valuer may be pivotal for the courts to arrive at a just satisfaction.

4.2 The conundrum of one malkhana for investigation and trial stage

As pointed out earlier, the state of Assam is impeded with a peculiar problem as there is no separate Court malkhana in many districts. The same will have no bearing as the State will be vicariously liable. So notwithstanding the fact that there may be no separate malkhana for deposit of seized goods after filing of chargesheet, the State can be made vicariously liable. The thread of reasoning is that the custody of articles after chargesheet is with the Prosecuting Inspector and for convenience; the same may be kept with the custody of the police at a police station. So after filing of chargesheet, if the judicial officer doesn't keep the seized articles inside the court-room with the custody of the bench assistant, as a necessary corollary, it only implies that the Prosecuting Inspector is entrusted with the property and necessary culpability will entail.

CHAPTER 5 : CONCLUSION & THE WAY FORWARD

The upshot is enunciated in the form of the answers to the 2 questions raised at the very inception of this discussion.

1. *After filing of chargesheet, if a seized item is lost, on whom can the Court fasten liability?*

Ans: The State Government. But as already mentioned in Chapter 4.1, the value of the lost goods can also be realized from the estate of the erring officer if gross negligence can be proved.

2. *If there is no separate court malkhana, will the answer to the above question remain unwavering?*

Ans: The answer is an emphatic and assertive yes. Ultimately, the liability gets shifted to the State government because the State is vicariously liable for acts of its officers. So, the fact whether the Court has a separate malkhana or not is relegated to a discussion bearing futile results.

5.1 The Way Forward

A. What is flabbergasting to note is that there is no explicit provision for a Judicial Magistrate to inspect the Malkhana either in the Cr. P.C., Criminal Rules and Orders or any other law. Rule 64-A (VI) of Assam Police Manual Part IV provides that the Magistrate in charge of licenses shall inspect the Court Malkhana twice a year and shall compare the arms in stock of armed register of the Malkhana with his arms register. But the same does not encompass inspection by Judicial Magistrates. Considering the indispensable significance of property seized during investigation and inherently used during trial, explicit provisions empowering Judicial Magistrates to inspect Malkhana may be incorporated in the Criminal Rules and Orders or any other law. This is the pressing need of the hour. Periodical inspection of the Malkhana will go a long way in obliterating any dereliction of duty by human agencies in maintenance of Malkhana which often results in loss of property.

B. In the state of Assam, most districts do not have a separate Court Malkhana and seized property is kept at police stations even after submission of chargesheet. The malkhana should be subject to periodical inspections. In *Selvam v. State by Inspector of Police Criminal R.C. Nos. 1766 and 1699 of 2012*, the Hon'ble Madras High Court had directed that all the State

Governments/Union Territories/Director Generals of Police shall ensure macro implementation of the statutory provisions and further directed that the activities of each and every police station, especially with regard to disposal of the seized property be taken care of by the Inspector General of Police of the division/Commissioner of Police concerned of the cities/Superintendent of Police concerned of the district concerned. Similar approach can be adopted by our State. It is pertinent to note that it is provided in Rule 63 (c) of Assam Police Manual Part IV that Malkhana register shall be thoroughly checked up once in a month by the Superintendent of Police at the headquarters and by the Sub-Divisional Police Officer or Circle Inspector, as the case may be at Sub-Divisional headquarters. The same should be effectively and strictly complied with.

C. If the seized articles are not huge in size, the same can be kept in separate wardrobes inside the Court-room. The keys will be with the respective bench assistants. This will ensure negating any inconvenience actuated by loss of property as the chances of property being misplaced will considerably dwindle.