

Attributes of A Company as an Incorporated Person and Probable Defences of the Directors Under Different Provisions of Law –A Critical Analysis.

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Abstract

“Memorandum,” the Constitution of the Company and “Article of Association” the internal rules of governance of the company are very important documents. These documents are very important for incorporation of a company in India. However, in New- Zealand, these documents are rarely used or can be said as buried. In India there is a statutory process for incorporation of a company and it has a separate personality that is called corporate veil. Any activity of Company beyond its Constitution is void or Ultra-vires. Director is the brain of the company and if he unknowingly acts beyond the Constitution of a Company, he can get defence (because prosecution related to company law has to satisfy the ingredients of specific sections of IPC or other laws) from the substantive Indian Penal Code and other subject- specific laws like Environmental law, Prevention of Corruption Act etc.

Keywords- Object Clause, Ultra-vires, Tribunal, Offences.

Introduction-Company is not a natural person, but it is an artificial person. The fiction of artificial personality is created by law. In **S. T.C. v C.T.O.**¹ it was decided that company is not a citizen who has no capacity like natural person. As there is legal fiction of personality, company is under an artificial corporate veil. Company is mainly run by its board of directors and its members are shareholders. Obviously company cannot be made liable or enjoy certain rights as for example it can't marry or divorce, or it is not always possible to inflict imprisonment for sin committed by the Company. Again a natural person cannot perform many things like a company, such as drawing capital from the market, through debentures or allotting shares. Company is constituted mainly for business and its purpose is circumscribed by the document memorandum and article of association.

Position in India-

In the **Indian Penal Code**, under section 11, a person has been defined as including a body corporate, and punishable for violation of the Code within India and beyond India. Now the situation is that, if Company commits any fraud, the Company Act shall be applicable but

the ingredients of fraud needs to be proved, as mentioned under Indian Penal Code. The provision related to special Courts mentioned under Companies Act 2013 provide the quantum of punishment. Thus one can say the Indian Penal Code the substantive law is only Magnacarta available to the Directors of a company for fair trial (Criminal Procedure Code) and defence. The section 447 of the Companies Act 2013, again amended in 2016 and 2017 impliedly include *Mens Rea* element.

However, under environmental laws, the Head/Director of a company cannot be made liable, if without his knowledge company commits offences, under laws related to environment.²If we refer to the Environment

²Water Act, Section 47. Offences by companies (1) Where an offence under this Act has been committed by a company, every person who at the time the offence was committed was in charge of, and was responsible to the company for the conduct of, the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly: PROVIDED that nothing contained in this sub-section shall render any such person liable to any punishment provided in this Act if he proves that the offence was committed **without his knowledge** or that he

¹ AIR 1963 SC 1811.

Protection Act 1986, Sec 24, offences committed under the said law and other law, punishment shall be given under the other Act. As for example, ruining the quality of a spring by public nuisance is punishable under section 268 of the Indian Penal Code. Also it is punishable offence under the Environment Protection Act. But by virtue of Section 24(2) of the Act³, fine will be imposed under the section 268 of the Indian Penal Code.

It is well known that **Mens rea** or **knowledge**, these two elements are essential elements for committing a crime, thus a Corporate Head has a defence, if a company without his/her knowledge commits some offences defined under specific laws and beyond the Constitution/ memorandum of the Company. **Constitution/ Memorandum** is also a document which limits the power or nature of business activity of a company. In memorandum the essential clauses are name clause, object clause and ancillary clause. The article of associations is there for internal governance of the company. Entry 44 of the VII th Schedule of the Constitution mention about "Incorporated persons" which include a company and the entry is to receive a purposive construction. There are various types of companies mentioned under Companies Act, 2013'- Subsidiary company, Foreign company, Holding company, Government Company, etc. and are run by directors who are not mere employee; but can

exercised all due diligence to prevent the commission of such offence. (2) Notwithstanding anything contained in sub-section (1), where an offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly. Explanation: For the purposes of this section- (a) "company" means anybody corporate, and includes a firm or other association of individuals; and (b) "director" in relation to a firm means a partner in the firm.

³ Section 24(2) where any act or omission constitutes an offence punishable under this Act and also under any other Act, then the offender found guilty of such offence shall be liable to be punished under the other Act and not under this Act.

be termed as trustee, agent, or sometimes the brain of the company, the corporate sole. General public when enter into contract with a Company, which is beyond companies power, in such situation Directors are not personally responsible. Directors have fiduciary duties towards members of a company, as for example, shareholders and Directors need to show duty of care, diligence and skill. Sometimes, when company acts beyond its memorandum, Court may give order of winding up.

Under the Unlawful Activities Prevention Act, 1967, if a company indulges in any offence mentioned under the Act, any person in charge shall be liable. However if the person (Director, Promoter) shows that the act was done beyond his knowledge he shall not be responsible. The burden of proof of innocence lies on the Director or any such person.

In **Prevention of Corruption Act, 1988**, Director of a Government Company if receives illegal gratification, there is requirement of *Mens Rea* on his part for giving him punishment. Because, as per section 7 of the Act it provides,

. Public servant taking gratification other than legal remuneration in respect of an official act :-Whoever, being, or expecting to be a public servant, **accepts or obtains or agrees** to accept or attempts to obtain from any person, for himself or for any other person, any gratification whatever, other than legal remuneration, as a motive or reward for doing or forbearing to do any official act or for showing or forbearing to show, in the exercise of his official functions, favour or disfavour to any person or for rendering or attempting to render any service or disservice to any person, with the Central Government or any State Government or Parliament or the Legislature of any State or with any local authority, corporation or Government company referred to in clause (c) of section 2, or with any public servant, whether named or otherwise, shall be punishable with imprisonment which shall be not less than six months but which may extend to five years and shall also be liable to fine. Explanations.- (a) "Expecting to be a public servant." If a person not expecting to be in office obtains a gratification by deceiving others into a belief that he is about to be in

office, and that he will then serve them, he may be guilty of cheating, but he is not guilty of the offence defined.

“Agrees”, “Accepts”, these phrases surely expose criminal mentality of the Director of a government company.

The Banking Regulation Act, 1949 under section 5(b) and 5(c) provides that, (b) “banking” means the accepting, for the purpose of lending or investment, of deposits of money from the public, repayable on demand or otherwise, and withdrawal by cheque, draft, order or otherwise.

(c) “BankingCompany” means any company which transacts the business of banking.

Explanation-Any company which is engaged in the manufacture of goods or carries on any trade and which accepts deposits of money from the public merely for the purpose of financing its business as such manufacturer or trader shall not be deemed to transact the business of banking within the meaning of this clause;

Under section 6, of the Banking Regulation Act, 1949 Bank can engage in some business mentioned from (a) to (o).⁴ Under sub-

⁴**Section 6 of the Banking Regulation Act. Forms of business in which banking companies may engage (1) In addition to the business of banking, a banking company may engage in any one or more of the following forms of business, namely: -**

(a) the borrowing, raising, or taking up of money; the lending or advancing of money either upon or without security; the drawing, making, accepting, discounting, buying, selling, collecting and dealing in bills of exchange, hundies, promissory notes, coupons, drafts, bills of lading, railway receipts, warrants, debentures, certificates, scrips and other instruments and securities whether transferable or negotiable or not; the granting and issuing of letters of credit, traveller's cheques and circular notes; the buying, selling and dealing in bullion and specie; the buying and selling of foreign exchange including foreign bank notes; the acquiring, holding, issuing on commission, underwriting and dealing in stock, funds, shares, debentures, debenture stock, bonds, obligations, securities and investments of all kinds; the purchasing and selling of bonds, scrips or other forms of securities on behalf of constituents or others, the negotiating of loans and advances; the receiving of all kinds of bonds, scrips or valuables

on deposit or for safe custody or otherwise; the providing of safe deposit vaults; the collecting and transmitting of money and securities;

(b) acting as agents for any Government or local authority or any other person or persons; the carrying on of agency business of any description 16 including the clearing and forwarding of goods, giving of receipts and discharges and otherwise acting as an attorney on behalf of customers, but excluding the business of a 1[Managing Agent or Secretary and Treasurer] of a company;

(c) contracting for public and private loans and negotiating and issuing the same;

(d) the effecting, insuring, guaranteeing, underwriting, participating in Managing and carrying out of any issue, public or private, of State, municipal or other loans or of shares, stock, debentures, or debenture stock of any company, corporation or association and the lending of money for the purpose of any such issue;

(e) carrying on and transacting every kind of guarantee and indemnity business;

(f) Managing, selling and realising any property which may come into the possession of the company in satisfaction or part satisfaction of any of its claims;

(g) acquiring and holding and generally dealing with any property or any right, title or interest in any such property which may form the security or part of the security for any loans or advances or which may be connected with any such security;

(h) undertaking and executing trusts;

(i) undertaking the administration of estates as executor, trustee or otherwise;

(j) establishing and supporting or aiding in the establishment and support of associations, institutions, funds, trusts and conveniences calculated to benefit employees or ex-employees of the company or the dependents or connections of such persons; granting pensions and allowances and making payments towards insurance; subscribing to or guaranteeing moneys for charitable or benevolent objects or for any exhibition or for any public, general or useful object; 1 Substituted by Act 33 of 1959, Section 4, for "Managing Agent "w.e.f. 1-10- (k) the acquisition, construction, maintenance and alteration of any building or works necessary or convenient for the purposes of the company;

(l) selling, improving, managing, developing, exchanging, leasing, mortgaging, disposing of or turning into account or otherwise dealing with all or any part of the property and rights of the company;

(m) acquiring and undertaking the whole or any part of the business of any person or company,

clause(2) of the same section the limitation of banking business can be called as application of Ultravires doctrine and Directors or Chairman are responsible if they knowingly engage in such work.

Section 46 of the Banking Regulation Act, 1949 provides that,⁵Director of a bank if engaged in Ultravires types of business, then he/she shall be responsible only when knowingly, wilfully does such business. Section 2 of the Banking Regulation Act, 1949 provides that **Application of other laws not barred-** The provisions of this Act shall be in addition to, and not, save as hereunder expressly provided in derogation of the [Companies Act, and any other law for the time being in force. Recently, in 2013 some percentage of the management positions in the

when such business is of a nature enumerated or described in this sub- section;

(n)doing all such other things as are incidental or conducive to the promotion or advancement of the business of the company;

(o) any other form of business which the Central Government may, by notification in the Official Gazette, specify as a form of business in which it is lawful for a banking company to engage. **(2) No banking company shall engage in any form of business other than those referred to in sub-section (1).** 1[7.Use of words "bank", "banker", "banking".

(2) No banking company shall engage in any form of business, other than those referred to in sub- section (1).

⁵ Section 46 of the Banking Regulation Act. **Penalties (1) Whoever in any return, balance-sheet or other document 1[or in any information required or furnished] by or under or for the purposes of any provision of this Act, wilfully makes a statement which is false in any material particular, knowing it to be false, or wilfully omits to make a material statement,** shall be punishable with imprisonment for a term which may extend to three years 2[or with fine, which may extend to one crore rupees or with both and five hundred rupees" 119 (6) Notwithstanding anything contained in sub-section (5),where a contravention or default has been committed by a company, and it is proved that the same was committed with the consent or connivance of, or is attributable to any gross negligence on the part of, any Director, manager, secretary or other officer of the company, such Director, manager, secretary or other officer shall also be deemed to be guilty of that contravention or default and shall be liable to be proceeded against and punished accordingly

company board was reserved for women, as per section 149 the Companies Amendment Act, 2013, there is a requirement of one woman director in the board. The Companies, those were incorporated before 2013, will have to implement this provision or otherwise penalty shall be imposed by the Reserve bank. **Under Negotiable Instrument Act,** it has been provided that, under section 141 :-**of the Offences by companies-**if any person including director in charge of the company knowingly commit some offence ,he will be punished as per the Act.

Mens Rea generally remain or it is incorporated in a statute or Act; expressly. Apart from Companies Act, the Directors are responsible for an act which he knowingly does or involved in any offence or with his connivance an offence is committed or there is illegal omission by him. Directors are not strictly called as agent, trustee, but the brain of the organic company. In Companies Act, 2013, there is a mentioning of special court and Tribunal where criminal and civil cases are conducted respectively. Generally Criminal Court like Magistrate's Court try offences punishable up to 2 years imprisonment and offences punishable above 7 years imprisonment are triable by the appellate Court. From the appellate Court, one can reach High Court for the judgment in favour and against the appellant. The Procedural law Criminal Procedure Code shall be applicable for trial of the criminal cases.

Taking cue from Salmond's definition "Corporate personality" is nothing but having legal rights and duties of a body corporate. Director is not a mere employee, but the very sole of a company. Even companies have certain duties to the society, such as making contribution for educational purpose, or providing environmental cess to the State. Criminal Procedure Code, 1973 applicable from 1st April, 1974 is a procedural law, which is applicable for trial of some offences described in Companies Act.⁶

As per Companies Amendment Act, 2020- the Compoundable offences under the Act are decriminalized. However, the *Mens rea* or *Knowledge* is still required to prove the criminal liability of the Director of a company.

⁶Section 447 -454 of the Companies Act, 2013.

In India the doctrine of constructive notice and Indoor management are part of common law doctrine prevailing independent of statutory provisions, and continued through Article 13(1) and 372(1) of the Constitution.⁷ Now it is incorporated in the statutory framework like Companies Act, 2013 and Amending Act of 2016, 2017 and 2018.

Position in Newzeland---Newzeland is a common law country, and here the Constitution is like England where specific statutes, customs, convention prevail to protect the right of the citizens. The Companies in Newzeland have separate constitution and generally there the object clause contains no limitations. There is no specific requirement of having object clause. We can say memorandum and article of associations are buried. Only Government Companies incorporated by statute, there is mention of object clause. Having an object clause save the outsiders from any financial or other type of fraud committed by the company ,though common law doctrine of constructive notice and indoor management no longer exist. Section 16 of the Companies Act 1993 provides that,

Section 16- Capacity and powers

(1) Subject to this Act, any other enactment, and the general law, a company has, both within and outside New Zealand, —

(a) full capacity to carry on or undertake any business or activity, do any act, or enter into any transaction; and

(b) for the purposes of paragraph (a), full rights, powers, and privileges.

The Constitution of a Company may contain a provision relating to the capacity, rights, powers, or privileges of the company, only if the provision restricts the capacity of the company or those rights, powers, and privileges. In *Communities Economic Development Fund v Canadian Pickles Co.*,⁸ a Canadian case involving an Act with provisions very similar to the Companies Act 1993(NewZeland), the statutory corporation was given the powers of a natural person but in another section of the Act was prohibited from making loans in contravention of the Act.. The Canadian Court declared the act of making lones void.

Conclusion-Section 4 of the Companies Appointment and Qualification of Director Rules 2014 provide that, any company having paid up capital of 10 crores shall appoint two directors. Directors should have a separate DIN no, which have to be informed to the company within 2 months as per 2017 Amendment of Companies Act. As per S. T.C. v C.T.O, company is not a citizen. Some Articles of the Constitution(As for example Article 21 of the Constitution) are applicable to non-citizens also. Companies have some duty to the society and have some rights too .Company can have property under its seal and can sue and be sued. Even in the Constitution and other procedural laws, the legal, artificial personality is granted to the Company, which can be used in favour or against the body corporate of the company.

⁷Article 372-Continuance 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

Article 13(1)-All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void.

⁸[1991] 3 SCR 388.