

THE INDIAN LAW INSTITUTE

Seminar

on

The Problems of Law of Torts

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CORPORATE LIABILITY IN INDIA
FOR ULTRA VIRES TORTS.

by

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Despite its incapacity to enforce fundamental rights under the Constitution as a Citizen,¹ a

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1. "neither the provisions of the Constitution Part II nor of Citizenship Act, either confer the right of citizenship on, or recognise as citizen, any person other than a natural person." Per Sinha, C.J., (for the majority) in State Trading Corporation of India v. Commercial Tax Officer, (1963) 2 S.C.J. 605 at p. 611. Per Hidayatullah J. (now C.J.) "...if all of them (the members) are citizens of India the Company does not become a citizen of India any more than if all are married the company would be a married person." Shah, J., contra at p. 647. "By reason of their constitution, artificial persons are incapable of rendering service - military or civil - but that may not by itself be a ground for holding that they cannot be citizens. If the corporations or artificial persons can be regarded as nationals of the State where they are incorporated and if they are permitted to exercise the various functions for which they are constituted and no prohibition is imposed upon them in the enforcement of the rights similar to those which are enforceable by natural persons who are citizens, notwithstanding the special character of the corporations and their incapacity to perform duties or to exercise such other rights which natural persons may possess, it will not be a ground for depriving them of the rights of citizenship for enforcing the fundamental rights under Article 19." (majority view followed in Tata Engg., and Locomotive Co., Ltd., v. State of Bihar, A.I.R. 1965 S.C. 40;

corporation has been consistently² recognised in India, since long,⁴ as a distinct and separate legal entity vis-a-vis the members who constitute it.⁵ It is, like any other natural person, clothed with almost similar rights and obligations.⁶ By its constitution, the scope of its activities is confined to the objects set out in the memorandum of association as originally framed⁷ or as altered from time to time.⁸ It does not mean that the powers¹ to be exercised in pursuing its objects are the same as the 'objects' themselves. A distinction between the two, the 'powers' and the 'objects' has always to be drawn. Powers are not required to be, and ought not to be, specified in the memorandum. The Act intended

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2. 'A corporation is a body politic which constituted by or composed of one or more individuals is distinct from them, and which is vested by the policy of law with continuous identity and with the capacity of acting in certain respects as an individual.' Satya Ranjan 'Law of Ultra vires in British India (T.L.L.) p. 171.
 3. M. Abdul Haq v. Dasmal, (1910) 19 I.C. 596;
Ram Kanai Singh v. Kathewson L.R. 42 I.A. 97;
A.I.R. 1915 P.C. 27; J.N. Pattison v. Bindhya Devi
A.I.R. 1933 Pat. 196; T.R. Pratt (Bom) Ltd., v.
E.D. Sassoon & Co., Ltd. A.I.R. 1936 Bom. 62;
Dhulia - Amalner Motor Transport Ltd, v. Roychand
Rupsi-Dharamsi A.I.R. 1952 Bom., 337; Hyderabad
Sindh Elec., Supply Co., Ltd v. Union of India
A.I.R. 1959 Punj. 199; Commissioner of Income Tax,
Calcutta v. Associated Clothier Ltd., A.I.R.
1963 Cal. 629.
 4. In re Kondoli Tea Co., Ltd., (1886) I.L.R. 13 Cal.
43 note that the decision is an earlier one than
that of Salomon v. Salomon L.R. (1897) A.C. 22.
 5. Except where the doctrine of 'Lifting the Corporate Veil' is applied by the Courts.
 - 6... 'The corporation in law is equal to a natural person and has a legal entity of its own.' Per Gajendragadkar, C.J., in Tata Engg., & Locomotive Co., v. State of Bihar, A.I.R. 1965 S.C. 40(46);
Paton, G.W., A Text Book of Jurisprudence (1964)
Third Edn. at p. 375, "The Law is wise to treat
corporations as far as possible as if they were
natural men."
 7. Sec. 13, The Companies Act, 1956.
 8. Sec. 16, The Companies Act, 1956.

that the company, if it be a trading company, should by its memorandum define the trade, not that it should specify the various acts which it should be within the power of the company to do in carrying on the trade.⁹ In other words, a distinction has to be maintained between the 'capacity' and the 'authority' of a corporation. If the law recognises it as capable of doing acts¹⁰ which a natural person can do, does it appeal to reason that a corporation would never traverse beyond the 'authority' granted under the statute incorporating it? In fact, it does. It embarks upon activities wholly incapable of being ushered in or what are understood as 'ULTRA VIRES'¹¹ undertakings. It is these situations which open new avenues for the law courts to express their unbiased opinion. In India, the truth is otherwise.¹² Still the problems is not as difficult in the field of contracts as in that of torts.

9. Per Lord Wrenbury, in Cotman v. Brougham, L.R. (1918) A.C. 514 (522).
10. "It is true that a corporation is a creature of the law; but so too are all legal rights and duties creatures of law; and when the law creates a corporation, an artificial being, why should it not, so far as its nature permits, be capable of enjoying, and being affected by, all the rights and duties which have been previously created by the law. Why assume the necessity of another special creation of rights and duties for the corporation supplementary to the creation of the corporation, and of rights and duties in general." G.H.W., Ultra Vires (1878) 6 Cent. L. Jour. 34, quoted in 35 Yale L.J. 13 (14).
11. 'The term "Ultra Vires" in its proper sense denotes some act, or transaction on the part of a corporation which although not unlawful or contrary to public policy if done by an individual, is yet beyond the legitimate powers of the corporation as defined by the statute under which it is formed, or the statutes which are applicable to it, or by its charter or memorandum of association.' quoted in 6 (1954) Halsbyry's Laws of England, S.802 p. 414 from Machen's Modern Law of Corporations, S.1012.
12. Sharma, G.S., "... the Indian tradition, at its best, has been content to imitate the English legal tradition." 'Horizons of Indian Legal Philosophy' published in Essays in Indian Jurisprudence, (1964) p.1.

A corporation being a metaphysical entity¹³ can only act through its directors, servants or agents.¹⁴ It is the acts or omissions of these agents or servants, which give rise to actions of tort. Generally speaking, to determine the liability of a corporation in torts it is to be considered:-

- i) whether or not the act or omission complained of is within the scope of the general authority of duty of such servant or director;
- ii) whether the tortious act is a mere excess in the exercise of corporate powers or is something altogether outside the scope of those powers.¹⁵

In matters of tort committed or being incident of act 'intra vires' the corporation, it is now established that a corporation could be held liable as an individual.¹⁶ Contrary views, however, exist about the principle to be adopted in torts committed by the servants or agents of the corporation in 'Ultra Vires' undertakings.

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13. "It is an abstract person, invisible, intangible and existing only in contemplation of law"
Laski : The Personality of Associations, 29 Harv. L. Rev. 404.
 14. "In as much as a Corporation is a fictitious person distinct in law from its members, it is not capable of acting in propria persona, but only through its agents or servants." Salmond on Torts, XIII Edn. at p. 611; "A corporation is an abstraction. It has no mind of its own any more than it has a body of its own; its active and directive will must consequently be sought in the person of some body who for some purposes may be called an agent, but who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation." Per Lord Haldane in Lennard's Carrying Co., v. Asiatic Petroleum Co., (1915) A.C. 705 at p. 713.
 15. Underhill's Law of Torts (1948) p. 38; 39.
 16. "A company is liable to be sued for a tort committed by its agents if an action in respect of tort would lie against an individual and the agent is acting in the course of his employment or within the ostensible scope of his authority, and the act complained of is one which the company might possibly be authorised by its constitution to

In England, recourse could be had to the dictum dictum in Foulton v. London & South Western Railway Co.,¹⁷ which may be treated as the starting point of controversy. The station-master of the defendants' Railway Company, in this case, had detailed in custody the plaintiff for non-payment of charges for his horse; the plaintiff being permitted under the arrangement with the defendants to take the horse back free of charges. The question before the Court was whether the act of the station-master in giving the plaintiff in custody was within the scope of his employment. It was held that as the defendants themselves could not lawfully have done the act, it could not be within the scope of their servant's employment to do it. Mellor, J., said:

"If the station-master had made a mistake in committing an act which he was authorised to do, I think in that case the company would be liable, because it would be supposed to be done by their authority. Where the station-master acts in a manner in which the company themselves would not be authorised to act, and under a mistake or misapprehension of what the law is, then I think the rule is very different, and I think that is the distinction on which the whole matter turns."¹⁸

This pronouncement gave rise to a widespread tendency to call any tort committed by the agents or servants of a corporation as Ultra Vires and thus escape the liability. It accordingly found its expression in Ormiston v. Great Western Railway Co.,¹⁹ Here, the plaintiff was the holder of a first-class season ticket between certain stations upon the defendant's

.....commit.' 6 Halsbury's Laws of England, p. 422 and the authorities cited thereunder; For American citations see 13 Am., Jur., 0 Corporations 0 118. For Indian cases Gupta, J.P., A Treatise on The Principles of the Law of Torts (1965) p. 209.

17. L.R. (1867) 2 Q.B. 534.

18. Ibid at p.

19. L.R. (1917) 1 K.B. 598.

railway. Upon the plaintiff's arrival at a station at which the ticket was available, after he had passed the ticket barrier and had shown his ticket to a ticket collector but before he had reached the exit from the station, a porter in the employment of the defendants took him by arm and in the presence of other persons charged him with having travelled first-class with a third class ticket. In an action against the defendants for false imprisonment etc., it was held that as the defendants had no power to arrest the plaintiff for the offence with which the porter charged him, they could not be taken to have impliedly authorised the porter to arrest him, and that the action must be dismissed. Following Poulton's case, Rowalitt, J., observed:

"... but there is the question whether he (the porter) had implied authority. To answer that question it is necessary to ascertain exactly what are the powers of the railway company itself, because the principle which is applicable is that they are not to be held to have impliedly given authority to their servants to do something which would be unlawful for them to do themselves."²⁰

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It was felt that the ratio given in Poulton's case could be distinguished from situations where either whole or majority of the members or the shareholders of a corporation expressly authorise the doing of an act which is beyond the powers conferred by the statute incorporating it. The Courts, after Poulton's verdict did not have to wait for

20. op.cit. 601-2.

21. 'The last case (Poulton v. L.& S.W. Co.) decided only that no implied authority as to detention was possessed or could be possessed by the station-master. He might have had express authority to act as he did, and if so, though perhaps the liability of the corporation under such circumstances is a little doubtful, yet it seems that the corporation would be liable. Such authority would have been Ultra Vires of the company purporting to confer it, yet upon principle it would seem that they would have been responsible for the results thereof.' Brice on the Doctrine of Ultra Vires (Third Edition) p.436.

long. The matter once again came in for a threadbare discussion in Gampbell v. Paddinton Borough Council.²² This suit arose out of the defendant's erecting a stand across the highway obstructing a free view from the plaintiff's house, of a public procession which was to have passed that way. The defendants had erected the stand in pursuance of a resolution of their council to that effect. The corporation was held liable in damages, although it had no legal right to erect the stand. Explaining Poulton's dictum, Lush, J., expressed:

"That case was only an illustration of the principle that where the wrongful act is done without the express authority of the corporation, an authority from the corporation to do it cannot be implied if the act is outside the statutory powers of the corporation. That principle has no application to a case where the corporation has resolved to do and has, in the only way in which it can do any act, actually done the thing which is unlawful and which causes the damage complained of.... The resolution was the resolution of the corporation and the act which caused the damage, no matter for whose benefit it was done, was the act of the corporation and not of the individual councillors who resolved to do it."²³

It may be mentioned here that this was not the earliest decision to have expressed the view about the liability of corporations in such situations. Kelly, C.B., in Mill v. Hawker²⁴ had already shown his inclination in unequivocal terms regarding the liability of a corporation in ultra vires torts in his dissenting note.²⁵

22. L.R. (1911) 1 K.B. 869.

23. Ibid at p. 878.

24. L.R. 9 Ex. (1909) 309.

25. 'It was argued that no action could be maintained against the board on the ground that the resolution and the order to the surveyor (who was alleged to have trespassed on the plaintiffs premises) were ultra vires. If the board, by resolution or otherwise had accepted a bill of exchange, directing their clerk or other officer to write their corporate name or title across a bill drawn upon them for a debt, this would have been ultra vires, and no holder of the acceptance could have recovered the amount against them. It would have been void upon the fact of it, and it

The above consideration of some of the oft-quoted English decisions²⁶ exhibit a tendency to hold a corporation liable even for ultra vires torts; irrespective of the fact whether the act or omission complained of was the result of express authority of its governing body or not. The principle adopted in England seems to have best summarised by Prof. Salmond in his treatise on Torts,²⁷ when he concludes:

"Every act done, authorised, or ratified on behalf of a corporation by the supreme governing authority of that corporation, or by an person or body of persons to whom, the general powers of the corporation are delegated, is for the purpose of the law of torts the act of the corporation itself, whether intra vires or Ultra vires of the corporation, and the corporation is liable accordingly for that act or for any tort committed in respect of it by any agent or servant of the corporation within the scope of his authority or employment."²⁸

The position in the United States of America is definite. After initial differences there, the law courts are unanimous in declaring that a corporation cannot escape liability for the torts which are the outcome of ultra vires undertaking by

..... is immaterial to consider whether the individuals who had written or authorised the acceptance would have been liable to any, and, if any, to what action at the suit of a holder for value. But is otherwise with an act merely unlawful or unauthorised, as a trespass or the conversion of a chattel. If such an act is to be deemed ultra vires and therefore no action would lie against the corporate body by whom it had been authorised it is clear that a corporation would not be liable for any tort at all committed or authorised by them, and the decisions above cited would be contrary to law." Per Kelly, C.B. op. cit. 323-324.

26. For discussion of other cases, see Ashton Cross: 'Suggestions Regarding the Liability of Corporations for the Torts of their Servants' (1950)¹⁰ Camb.L.J. 419 and Brice: The Doctrine of Ultra Vires (third edition) p. 437.

27. Salmond on Torts, XIV Edition at p. 613.

28. Salmond on Torts at p. 613 (XIV) Edn.

pleading that the business or transaction is beyond the corporate powers. The general rule is now that a corporation is liable for its torts despite the ultra vires nature of the transaction in which they occur, and that the doctrine of ultra vires has no proper application in a consideration of the liability of a corporation for its torts. This view is taken even in jurisdictions which allow corporations the greatest latitude in defending on ultra vires contracts.²⁹

This statement of law, however, finds a severe refutation in the criticisms of Prof. A.L. Goodhart.³⁰ He says, 'To hold a company liable for an ultra vires tort, when it is not held bound by an ultra vires contract, would be contrary to the established principles of the law of agency and of master and servant. It would bring the law into confusion and could not be justified on the dangerous ground that public policy demanded this anomaly. On the other hand to hold the governing body, which has authorised the undertaking, liable, would merely require the development of a principle which has been found reasonable and just. This rule would protect shareholders, creditors, and third parties alike. Nor would it be unfair to the governing body, for, if they have exceeded their authority, it would be in accordance with public policy and sound law that they, and they alone, should be held liable.'³¹

In matters of tort, Indian courts have not made much headway than to follow the footsteps of their predecessors. The present controversy came very recently before the Madras High Court in Tiruveriamuthu Pillai v. Municipal Council, Shencottah.³² Brief facts out of which an action in tort in this case arose were: The plaintiff owned a dog of Fox Terrier Species. One of the employees of the Municipal Council killed it while the dog was out on the street accompanied by plaintiff's servant. It was established that the plaintiff's dog was killed by

29. 13 Am., Jur., Corporations., 1121 and the citations thereunder.

30. Corporate Liability in Tort and the Doctrine of Ultra Vires. (1926) 2 Camb. L.J. 350.

31. op. cit., 363.

32. A.I.R. 1961 Mad. 230.

the employee in the course of the discharge of his functions of killing stray dogs in Municipal town of Shencottah expressly authorised by the Municipal Council. The trial court found that the plaintiff's dog was destroyed by the servant of the Municipal Council in pursuance of the direction of the Council and decreed the claim against the Municipal Council. On appeal, the first appellate court reserved the findings of the lower court and held that although the Municipal Council had the power to direct destruction of the dogs straying in public streets yet the employee had acted in excess of the authority conferred upon him which was confined only to the killing of stray dogs without owners, and that therefore, the Municipal Council was not liable. Aggrieved, the plaintiff went in second appeal to the High Court. One of the important questions before the Court was whether the Municipal Council is liable for the act of killing of the plaintiff's dog brought about by its employees who acted at the instance of the Council. The Court after quoting extensively Prof. Salmond, Prof. Winfield and Halsbury's Laws of England dwelled upon to ascertain the law applicable to situations where the act of the corporation complained of is an ultra vires act. The court mindful of conflicting theories on the legal basis of this liability, came to the conclusion that the Municipal Council was liable for the unlawful act of having brought about the destruction of the plaintiff's dog. The fact that the Municipal Council acted in excess of its statutory power was not considered a valid defence but was treated as an aggravating circumstance.

Jagadisan, J., opined:

"Whatever difference of opinion there may be on the question of the abstract legal doctrine as to how far an agent or servant of a corporation can be said to act within the scope of his employment in respect of a tort which is ultra vires the corporation, it seems to be clear that there is consensus of authority for holding that a corporation cannot be immune from liability in respect of torts brought about by its instance on the ground that the act was not ultra vires the corporation." 33

One major point which precipitates out of this brief study is, whether presence or absence of the power conferred by the governing body on the servants or agents of the corporation in undertakings or transactions which are ultra vires the corporation, would make any difference on the liability of the corporation? In none of the English cases discussed above, except in Campbell's³⁴ case (although insufficiently) the courts gave much thought to this aspect of the matter particularly. The law in England, therefore, on this controversy remains the same as expressed by Prof. Salmond earlier³⁵ and later put forth by Prof. Winfield,³⁶ In America, it seems it was considered futile to distinguish between the two situations. In the words of Prof. Brice, "Every tort in a manner is ultra vires, and it is no defence to legal proceedings in tort merely to set up this argument, if the torts which have been done by the corporation or by their direction, express or implied, are incidental to the business, the powers, or the duties of the corporation."³⁷

It is submitted that in situations where no express power is conferred by the governing body on the servants or agents of the corporation, it could be implied from their course of conduct and consequences similar to those applicable in situations of express power should ensue. The reason being, in the absence of the codified law of torts, every person could be presumed to know the reasonable and probable

34. supra n.22.

35. supra p.10.

36. "Today, however, so long at least, as the view is accepted that a master's liability for his servant's torts is truly vicarious, there is no need for this technical argument to succeed. It will, no doubt, be comparatively rare for an ultra vires tort to be committed by a servant of a corporation in the course of his employment, but if such a case arises there is no valid reason why the corporation should not be liable." Winfield on Torts (Eighth Edition)p. 730.

37. Brice: The Doctrine of Ultra Vires (III Edn.) p.436.

consequences of his conduct, whether it relates to the exercise of his capacity or power conferred by the State. Otherwise, if corporations³⁸ are allowed to take a defence of Ultra Vires undertaking, a great mischief would be perpetuated.³⁹ The inevitable inference, therefore, is that irrespective of the nature of tort, (whether intra vires or ultra vires) committed by the agents or servants of the corporation, it could be held liable even in those situations where the tort complained of is the outcome of an undertaking or transaction which may be devoid of express power conferred by its governing body.

As matters stand today, in India, in the absence of a decision of the Supreme Court the law on the problems under consideration seems to be uncertain. Although in Tiruveriamuthu Pillai v. Municipal Council, Shencottah⁴⁰ the Madras High Court dealt with a situation where express power was conferred on the employee of the corporation, yet the principle of law laid down therein is of persuasive value only so far.

38. 'If the law allows men to form permanently organised groups, those groups will be for common opinion right-and-duty bearing units; and if the lawgiver will not openly treat them as such he will misrepresent, or, as the French say, he will "denature" the facts: in other words, he will make a mess and call it law.' F.W. Maitland, Collected Papers, iii.341 quoted in Paton: A Text Book of Jurisprudence, p.375.

39. "It would indeed be an anomalous result in legal science if a corporation should be permitted to set up that inasmuch as a branch of business prosecuted by it was wrongful, therefore all the special wrongs done to individuals in the course of it were remediless." New York, L.E. & W.R. Co. v. Haring 47, N.J.L. 137: 52 Am. Rep. 358, note quoted in 13 Am., Jur., Corporations 1121.

40. supra n.32.

as other High Court jurisdictions are concerned. On the subject, therefore, the possibility of the development of law in different directions cannot be ruled out. To achieve uniformity in the administration of justice on this aspect of the matter, is necessary that there must be an authoritative pronouncement of the Supreme Court at the earliest possible opportunity.

None can deny that India today is passing through a crucial stage of social, economic and industrial progress. Strenuous efforts are being made to keep pace with the foremost nations of the World. This zeal to attain the objectives is exhibited in most of the industrial enterprises and important undertakings carried on by the corporate bodies. This has, of necessity resulted in creating great hazards to the person and property of the individuals. Of particular concern here, are undertakings which these Corporate bodies float beyond their scope of authority conferred by the Statute incorporating them. This aggravates the perils to which an individual is thrown open. It is therefore, submitted⁴¹ that in case the Law Courts here come to the unanimous view in declaring a corporation liable even for Ultra Vires torts, the State should introduce some scheme like Compulsory Insurance Risk Scheme. Under it, the Corporations should be directed to collect a fund for the purpose of satisfying the claims of those individuals who could be victims of Ultra Vires torts committed by the agents or servants of the corporation.

41. For relevant material see, 'The Impact of Insurance on the Law of Torts': Fleming James, Jr., and John v. Thornton, 15 (1950) Law and Contemporary Problems, p. 430; 'Insurance against Tort Liability - An Approach to the Cosmoloty of the Law.', George K. Gardner, 15 (1950) Law and Contemporary Problems, p. 455; Friedman, Social Insurance and the Principles of Tort Liability, 63 Harv. L. Rev. 241 (1949).

