

B Sudheendra Kumar, J

Crl. M. C. No. 3799, 3801, 3804, 3827, 3832, 3843, 3844, 3847, 3852 of 2018

Dated this the 6th day of February, 2019

ORDER

1 . The petitioners are accused in C. C. No. 731 of 2017 on the files of the Court of the Judicial Magistrate of First Class - I, Kothamangalam. The 2nd respondent in the above said Crl.M.Cs filed a complaint before the Court below against the petitioners and other persons alleging offence under S.138 of the Negotiable Instruments Act, 1881 (for short "The N.I. Act"). The petitioners are the trustees of a Trust, namely, Indira Gandhi Memorial Trust, Nellikuzhy. The Trust is arraigned as the first accused in the above said complaint.

2 . The above Crl.MCs have been filed praying for quashing the complaint and further proceedings against the petitioners in the above said case.

3 . Considering the nature and importance of the question of law involved in these Crl.MCs, this Court appointed Adv. Sri. Jamshed Hafiz as Amicus Curiae.

4 . Heard the learned counsel for the petitioners, the learned counsel for the 2nd respondent, the learned Public Prosecutor and the learned Amicus Curiae.

5 . The learned counsel for the petitioners Adv. Sri. Shaji Chirayath has argued that since "Trust" is not an "association of individuals", no successful prosecution against the petitioners, invoking the provisions under S.141 of the N.I.Act, can be sustained. Per contra, the learned Standing Counsel for the 2nd respondent Advocate Sri. Salil Narayanan K. A. has argued that the "Trust" is an "association of individuals" and hence the petitioners, who are the trustees, are vicariously liable under S.141 of the N.I.Act.

6 . The learned Amicus Curiae has submitted that the "Trust" will not come within the ambit of "Association of individuals" and hence the provisions of S.141 of the N.I.Act cannot be made applicable to prosecute the trustees under S.138 of the N.I.Act.

7 . In this context, it is profitable to read S.141 of the N.I.Act, which is extracted hereunder:

"141. Offences by companies. - (1) If the person committing an offence under S.138 is 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 person liable to punishment if he proves that the offence was committed without his knowledge, or that he had exercised all due diligence to prevent the commission of such offence:

Provided further that where a person is nominated as a Director of a company by virtue of his holding any office or employment in the Central Government or State Government or a financial corporation owned or controlled by the Central Government or the State Government, as the case may be, he shall not be liable for prosecution under this Chapter.

(2) Notwithstanding anything contained in sub-section (1), where any 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 purpose of this section, -

(a) "company" means any body corporate and includes a firm or other association of individuals; and

(b) "director", in relation to a firm, means a partner in the firm."

The explanation to S.141 of the N.I.Act provides that "Company" means any body corporate and includes a firm or other association of individuals for the purpose of S.141 of the N.I.Act.

8 . There is no dispute that "Trust" is not a firm. Now, the question to be considered is as to whether the 'Trust' is a body corporate or not. For that purpose, it is necessary to go through the relevant provisions of the Indian Trusts Act, 1882 (for short "the Act") to ascertain as to whether the "Trust" is a juristic person or not.

9 . A juristic person is also known as a legal person or a legal entity. A juristic person is one to which law attributes legal personality. The legal personality is an artificial creation of law, conferred upon entities other than individual human beings. A juristic person is capable of suing and being sued in a Court of law. A body corporate is undoubtedly a juristic person identified by a particular name. Body corporate is also called Corporation, Corporate body or Corporate entity. There can be no dispute that a 'Company' is a body corporate. The 'Corporate Veil' is a legal concept which separates the identity of the company from its members / shareholders.

10 . S.3 of the Act provides that a "Trust" is an obligation annexed to the ownership of property, and arising out of a confidence reposed in and accepted by the owner, or declared and accepted by him, for the benefit of another, or of another and the owner. The person who reposes or declares the confidence is called the author of the Trust, the person who accepts the confidence is called the trustee and the person for whose benefit the confidence is accepted, is called the beneficiary. The subject - matter of the trust is called trust - property.

11 . S.11 of the Act provides that the trustee is bound to fulfill the purpose of the trust, and to obey the directions of the author of the trust given at the time of its creation, except as modified by the consent of all the beneficiaries being competent to contract.

12 . S.13 of the Act provides that the trustee is bound to maintain and defend all such suits, and (subject to the provisions of the instrument of trust) to take such other steps as, regard being had to the nature and amount or value of the trust - property, may be reasonably requisite for the preservation of the trust - property and the assertion or protection of the title thereto.

13 . S.47 of the Act provides that a trustee cannot delegate his office or any of his duties either to a cotrustee or to a stranger, unless (a) the instrument of trust so provides, or (b) the delegation is in the regular course of business, or (c) the delegation is necessary, or (d) the beneficiary, being competent to contract, consents to the delegation.

14 . S.48 of the Act provides that all trustees must join in the execution of the trust, except where the instrument of trust otherwise provides.

15 . Thus, it is clear from the above provisions that all the trustees are the owners of the property, but they are obliged to use the same in a particular manner. If a number of trustees exist, they are the joint owners of the property. The trustees are bound to maintain and defend all suits, for the preservation of the trust - property and the assertion or protection of the title thereto. Thus it appears that the "Trust" is not capable of suing and being sued in a Court of law, even though the trustees can maintain and defend suits for the preservation and protection of the trust - property. Therefore, a "Trust" is not a juristic person or a legal entity, as the juristic person has a legal existence of its own and hence it is capable of suing and being sued in a Court of law. Thus it appears that a "Trust" is not like a body corporate, which has a legal existence of its own and therefore can appoint an agent. The above discussion would make it clear that a "Trust" is not a body corporate.

16 . The next question to be considered is as to whether the "Trust" is an "Association of Individuals" or not. The three Judge Bench of the Apex Court in Commissioner of Income Tax v. Smt. Indira Balkrishna, 1960 KHC 737 construed the meaning of the expression "association of persons" in the context of the Income Tax Act and held that an "association of persons" must be one in which two or more persons join in a common purpose or common action.

17 . The Apex Court in Ramanlal Bhailal Patel and Others v. State of Gujarat, 2008 KHC 4197 held that an "association of persons / body of individuals" is one in which

two or more persons join in a common purpose and common action to achieve some common benefit.

18 . The Apex Court in Ramanlal Bhailal Patel (supra) observed in paragraph 27 thus:

"The terms "association of persons" and "body of individuals" (which are inter - changeable) have a legal connotation and refer to an entity having rights and duties. They are not to be understood literally. For example, if half a dozen people are travelling in a car or a boat, or standing in a bus stop, they may be a group of persons or a "body of individuals" in the literal sense. But they are not an association of persons / body of individuals in the legal sense. When a calamity occurs or a disaster strikes, and a band of volunteers or doctors meet at the sight and associate or co - operate with each other for providing relief to victims, and not doing anything for their own benefit, they may literally be an association of persons, but they are not an "association of persons / body of individuals" in the legal sense. A mere combination of persons or coming together of persons without anything more, without any intention to have a joint venture or carry on some common activity with a common understanding and purpose would not convert two or more persons into a body of individuals / association of persons."

19 . Thus it is clear that a mere combination of persons or coming together of persons, without any intention to have a joint venture or carry on some common

activity with a common understanding and purpose to achieve some common benefit, would not convert two or more persons into a "body of individuals / association of persons."

20 . It appears from S.3 of the Act that a "Trust" is created for the benefit of another, or of another and the owner of the property / author of the Trust. The trustees are not the beneficiaries of the Trust. S.51 of the Act would also show that a trustee cannot use or deal with the trust - property for his own profit. Therefore, there can be no doubt that the trustees are not the beneficiaries and hence the trustees do not have any common benefit. The duty of the trustee is to utilise the trust property for the benefit of the beneficiaries in accordance with the terms of the agreement of Trust.

21 . Thus it is clear from S.3 of the Act that the trustees do not get any benefit out of the trust - property and the benefit will be obtained individually by the beneficiaries or the beneficiaries and the author of the trust. Therefore, it cannot be said that the trustees are persons join together for a common action to achieve some common benefit. It is true that the beneficiaries get the benefit. However, the beneficiaries do not become the beneficiaries by their own volition. Since the common purpose of the "Trust" is not to achieve benefit to the trustees, the "Trust" cannot be said to be an "association of persons / body of individuals".

22 . The proposition that a "Trust" is not an "association of persons" gains support from the decision of the Apex Court in *Pratibha Pratisthan and Others v. Manager, Canara Bank and Others*, 2017 (2) KHC 420. The Apex Court held in *Pratibha Pratisthan* (supra) that a "Trust" is not a person as defined in the Consumer Protection Act, 1986. S.2(m) of the Consumer Protection Act defines a person as follows:

(m) "person" includes, -

(i) a firm whether registered or not;

(ii) A Hindu undivided family;

(iii) A co - operative society

(iv) every other association of persons whether registered under the Societies Registration Act, 1860 (21 of 1860) or not.

23 . The Apex Court, after considering the definition of the term 'person' in S.2(m) of the Consumer Protection Act, held that the "Trust" is not a person, which means that the "Trust" is not an "association of persons". It is thus clear from the ratio of the Apex Court in *Pratibha Pratisthan* (supra) that the "Trust" is not an "association of persons", whether registered under the Societies Registration Act, 1860 (21 of 1860) or not. In view of the above ratio of the Supreme Court also, there can be no dispute that the "Trust" is not an "association of persons". The Apex Court in *Ramanlal Bhailal Patel* (supra) observed that the terms "association of persons" and "body of individuals" are inter - changeable. There cannot be any dispute that the terms "body

of individuals" and "association of individuals" are inter - changeable. Therefore, the "Trust" cannot be said to be an "association of persons / association of individuals".

24 . The above discussion would make it clear that the "Trust" is not a "body corporate" or an "association of individuals" as provided in the explanation to S.141 of the N.I. Act. Therefore, no prosecution against the trustees, invoking the provisions under S.141 of the N.I. Act, can be maintained. Consequently, no successful prosecution against the petitioners, invoking the provisions of S.141 of the N.I. Act, can be sustained.

25 . Now it is necessary to go through the allegations against the petitioners in the above said case. As per the complaint, accused Nos.2 and 6 alone signed the cheque. The second accused is Sri. K. M. Pareeth and accused No.6 is Smt. P. Shereena. Accused Nos.2 and 6 are not before me. The petitioners did not sign the cheque involved in this case as per the averments in the complaint. Since the petitioners did not sign the cheque, no successful prosecution against the petitioners under S.138 of the NI Act can be sustained and consequently, no purpose will be served even if the prosecution against the petitioners is permitted to be continued. In the said circumstances, I am inclined to quash the complaint and further proceedings against the petitioners in the above said case, invoking the inherent power under S.482 CrPC, to secure the ends of Justice. It is ordered accordingly.

In the result, these Crl.M.Cs stand allowed.

Before parting with the case, this Court places on record the appreciation of this Court to Adv. Sri. Jamshed Hafiz, for the valuable assistance rendered by him in disposing of these cases.

B Sudheendra Kumar, Judge