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IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOS. 10866-10867 OF 2010

IN THE MATTER OF: -

M. Siddiq (D) Thr. Lrs. ... Appellant

VERSUS

Mahant Suresh Das & Ors. etc. etc. ... Respondents

AND
OTHER CONNECTED CIVIL APPEALS

1. **THE ELEMENTARY PRINCIPLES OF JURISPRUDENCE BY G.W. KEETON**
2. SNELL'S PRINCIPLES OF EQUITY BY THE HON. SIR ROBERT MEGARRY

BY
DR. RAJEEV DHAVAN, SENIOR ADVOCATE

ADVOCATE-ON-RECORD: EJAZ MAQBOOL

THE ELEMENTARY PRINCIPLES OF JURISPRUDENCE

BY

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CHAPTER XIII

LEGAL PERSONALITY

1. The Nature of Legal Personality

The word *person* is derived from the Latin *persona*. This term has a long and interesting history. Originally it meant simply a mask, and particularly the mask worn by an actor. Later, it denotes the part played by a man in life, and still later, the man who plays it. In this sense, every human being was a *persona*. In later Roman law, however, the term acquires a still more specialised meaning, becoming almost synonymous with *caput*. Thus a slave or an *impubes* has an imperfect *persona*. Last of all, the term comes to denote a being capable of sustaining legal rights and duties.[1]

These changes in the meaning of the word are reflected in the history of law. Early law regards all human beings, and them alone, as possessing personality. The development of law necessitates changes. Some human beings, e.g. slaves, cease to have a *persona*, whilst things and groups of people may acquire one. In Roman law, an inanimate object like the *hereditas jacens* was considered capable of assuming rights and duties.[2] In Greek law, we hear of animals and trees being tried for offences to human beings, and obviously, therefore, they are considered capable of having duties, even if they possessed no rights. Trials of animals were well-known in the Middle Ages. In Germany, a cock was solemnly placed in the prisoner's box, and was accused of contumacious crowing. Counsel for the defendant failed to establish the innocence of his feathered client, and the unfortunate bird was accordingly ordered to be destroyed. In 1508, the caterpillars of Contes, in Provence, were tried and condemned for ravaging the fields, and in 1545 the beetles of St. Julien-de-Maurienne were similarly indicted. So late as 1688, Gaspard Bailly, of Chamberg, in Savoy, was able to publish a volume including forms of indictment and pleading in animal trials.[3]

In all these cases, the animal is considered to be capable of sustaining duties, and is, therefore, to this extent a legal person. The same idea is reflected in Jewish law, where it is provided that the ox that gores must not be eaten. English law derived from early

[1] Buckland, *A Textbook of Roman Law*, p. 174. On the meaning of legal personality, see D. Lloyd, *The Law of Unincorporated Associations*, pp. 1–17.

[2] Buckland (*Textbook*, pp. 304–5) emphasises that the *hereditas* was not regarded as a person. It represented a *persona*—whether it was the *persona* of the *heres* or of the deceased was much disputed.

[3] For an interesting account of these animal trials, see "Animals in the Dock," by W. Branch Johnson, in *The Nineteenth Century* for February, 1928.

Aryan custom the conception that an animal or inanimate object which had been the instrument of serious injury, and more especially death, to a human being, must be surrendered to the vengeance of the injured party or his relatives. In later times, this rule was modified so that the implement with which an individual committed a crime was surrendered to the King as a *deodand*. This survived until 1846. It has already been noticed that at the present day animals are deemed incapable of possessing legal rights and duties.[1]

It will thus be apparent that a legal system can personify whatever being or objects it pleases. In modern law, this personification by law is confined within certain definite limits, although this restriction is based, not upon principle, but upon convenience. In law, however, we are concerned with legal persons, whether they are natural, i.e. human beings capable of sustaining rights and duties, or artificial or juristic, i.e. groups or things to which the law attributes the capacity of bearing rights and duties.

Kelsen, who in many ways is an iconoclast in the sphere of legal thinking, has suggested that legal personality is itself nothing but a fiction, in so far as it is intended to imply no more than that a legal person is simply a complex of legal rights and duties. That being so, the legal order can attribute legal personality at will. If it wishes to personify things or groups, it can do so; if it wishes to deprive classes of human beings of legal personality, it can do so. Thus, in Kelsen's view, "juristic and physical persons are essentially on the same plane. The physical person is the personification of the sum total of legal rules applicable to one person. The juristic person is the personification of the sum total of legal rules applicable to a plurality of persons."[2]

2. Natural Persons

Legal persons may be divided into "natural" and "juristic" persons. The former may be defined shortly as normal human beings. The first necessity for a normal human being to be a legal person is that he must be recognised as possessing sufficient "status" to enable him to possess rights and duties. Thus a slave in Roman law was not a legal person, capable of sustaining rights and duties on his own behalf; yet he certainly "existed" in law, for he could make contracts which, under certain circumstances, were binding on his master, whilst certain natural rights which he possessed might have legal consequences if he were manumitted. Similarly, too, in Roman law, an exile or a captive, imprisoned by the enemy, forfeited his rights, and the capacity for holding new ones, although

[1] The Aryan usage mentioned above is probably exceedingly ancient. The fictitious personality of developed systems of law is much more recent, and is probably unconnected with these earliest personifications.

[2] Lauterpacht, "Kelsen's Pure Science of Law" in *Modern Theories of Law*, p. 113. See also Stone, *Province and Function of Law*, pp. 102–3.

his personality returned to him if he were pardoned, or if he were freed. In English law, an outlaw or a person entering a monastery,[1] lost his legal personality, thereby becoming incapable of having rights and duties.

The second requisite for natural personality is that the individual should be born alive, and further, that he should possess human characteristics. An exception to this rule is that of an infant *en ventre sa mère*, who for some purposes, chiefly connected with the Law of Real Property, is considered, by a legal fiction, as being actually born.

The law recognises various grades of legal personality in a human being, and these are generally presumed to correspond with that human being's mental capacity, although exceptionally the differences may have a political origin. Thus, in Roman law, only the full *civis* possessed a personality which was complete in the sense that all rights and duties were possible for him. The capacity of a Junian Latin, *dediticius*, *impubes*, or woman, for holding rights, was limited in various ways. Similarly in English law, until recently, a married woman was subject to considerable legal incapacity, as a lunatic or infant still is.[2]

3. The Nature of Corporate Personality

Juristic persons may be defined as those things or groups of persons which the law deems capable of holding rights and duties, with a few exceptions, the *hereditas jacens* of Roman law being the chief—although in *Pramatha Nath Mullick* v. *Pradyumna Kumar Mullick*,[3] an idol was recognised by the Privy Council as possessing sufficient legal personality to sustain rights.[4] However, artificial or juristic persons are now usually composed of human beings, the group comprising either human beings associated contemporaneously (the corporation aggregate), or else successively, in occupation of some particular office, e.g. a Bishop, or the Postmaster-General (the corporation sole), in English law, at any rate.

(a) *Hereditas Jacens and Fiscus.* In Roman law, an inheritance into which the heir had not yet entered was considered to be capable of sustaining some legal rights and duties, and thus was incompletely personified.[5] However, it could do nothing involving a conscious act, and so it could neither enter into contracts nor commit delicts nor crimes. Some jurists have also attempted to establish a legal personality in the Roman Imperial Treasury, or *Fiscus*, and others in the charitable funds of the Empire.[6] It is in the highest degree

[1] A monk's personality was considered to return at the moment of death, to permit him to make a valid will.

[2] See also Winfield, "The Unborn Child" in (1942) *Toronto Law Journal*, pp. 76–91.

[3] (1925), L.R. 52 Ind. App. 245.

[4] Duff, in 3 *Cambridge Law Journal*, 42, and S. Vesey-FitzGerald, "Idolon Fori," 41 *L.Q.R.*, 419.

[5] See further, Buckland, *Textbook of Roman Law*, p. 304 *et seq.*

[6] Buckland, *op. cit.*, p. 176 *et seq.*

doubtful whether in these two instances the Roman lawyers recognised the existence of any legal personality, and the whole theory seems to be based on an attempt to trace the connection between these funds in Roman law, and the *Stiftungen*, or legally personified Funds for specified, and mainly charitable, purposes in modern German law, where ownership of the property is vested in the fund itself.

(b) *The Corporation Sole.* Maitland's well-known dictum that the corporation sole is a juristic abortion, succinctly describes the position in modern English law. The conception of separate personality attaching to the successive occupants of a particular office is as valid juristically as the conception of incorporation of the members of a group. Moreover, it is not a conception which is peculiar to English law.[1] The difficulty is that English law has introduced this useful conception, but has allowed it to remain a trap for the unwary. The expected consequences rarely follow, and when the attributes of a corporation sole are analysed the personality is found to be so attenuated that it seems doubtful whether any really useful purpose is served by continuing to regard the institution as a legal person. Oddly enough, statute law has been a little bolder in recognising the corporation sole than the Common Law, although it is noteworthy that the Property Acts of 1925 treat the corporation sole very inadequately. They have more to say about trust corporations. The Administration of Estates Act, 1925, Sect. 3 (5) observes, a little obviously, that "on the death of a corporator sole his interest in the corporation's real and personal estate shall be deemed to be an interest ceasing on his death, and shall devolve to his successors," and after adding that the subsection applies on the demise of the Crown, it hastily turns to the more familiar topic of the duties of personal representatives. The Law of Property Act, 1925, Sect. 180 contents itself with adding briefly that a corporation sole may now hold personal property, and states further:

> (1) That when any interest in property is vested in the corporation sole, then it shall devolve to and vest in the successors from time to time *of such corporation*. (This obviously means the successive natural persons who sustain the character of the corporation sole.)
>
> (2) Where there is a vacancy in the office of a corporation sole, and an interest in or charge on property would have vested in the corporation but for the vacancy, such interest shall be deemed to vest in the successor on his appointment.
>
> (3) Any contract or other transaction expressed to be made with a corporation sole (or any appointment of a corporation sole as a custodian or other trustee) during a vacancy shall take effect as if the vacancy had been filled when the contract or other transaction was made or was capable of taking effect.

[1] Salmond, *Jurisprudence*, 10th Ed. p. 328. Maitland, it should be emphasised, was criticising the English rules, which, as is pointed out in the text, have failed to develop the conception as the jurist might have anticipated.

SNELL'S PRINCIPLES OF EQUITY

TWENTY-SEVENTH EDITION

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(c) *Constructive trust*: a trust imposed by equity, irrespective of the intention of the owner of the property, when it would be an abuse of confidence for him to hold the property for his own benefit, as where a trustee obtains a renewal in his own name of a lease held by him as trustee. This is called a constructive trust.

It should be noted, however, that there is no general agreement on the proper classification of trusts,[97] and, in particular, that the term "constructive trust" is sometimes used so as to include the second as well as the third of these classes.

2. Private and public. Trusts may also be divided, according to their end and purpose, into private and public (or charitable). A trust is private if it is for the benefit of an individual or class, irrespective of any benefit which may be conferred thereby on the public at large; it is public or charitable if the object thereof is to promote the public welfare, even if incidentally it confers a benefit on an individual or class. A private trust may be enforced by any of the beneficiaries, a public trust by the Attorney-General.

3. Perfect and imperfect obligation. Trusts which are not enforceable by or on behalf of any *cestui que trust* or object are known as trusts of imperfect obligation, or honorary trusts.[98] In general, trusts for mere abstract and impersonal purposes[98a] are not recognised as valid. Thus the courts have declared void the trusts of a large fund expressed for purposes such as the maintenance of good understanding between nations and the preservation of the independence and integrity of newspapers,[99] a trust to devote funds to pursuing inquiries into a new alphabet,[1] and a bequest "for the purpose of providing some useful memorial" to the testator.[2]

On the other hand, the courts have upheld testamentary trusts limited in duration to the perpetuity period[3] for the maintenance of individual animals,[4] or a tomb,[5] or to further foxhunting.[6] These cases

[97] See, *e.g.*, *Cook* v. *Fountain* (1676) 3 Swans. 585; Nathan No. 17; *Soar* v. *Ashwell* [1893] 2 Q.B. 390; Nathan No. 16; *Re Llanover S.E.* [1926] Ch. 626; Nathan No. 18; G. P. Costigan (1914) 27 Harv.L.R. 437.

[98] See *Dawson* v. *Small* (1874) L.R. 18 Eq. 114.

[98a] See *Re Denley's Trust Deed* [1969] 1 Ch. 373.

[99] *Re Astor's S.T.* [1952] Ch. 534; Nathan No. 27.

[1] *Re Shaw* [1957] 1 W.L.R. 729; Nathan No. 29 (will of George Bernard Shaw); an appeal was dismissed by consent on terms allowing for a sum of money to be devoted to the inquiries into the new alphabet: [1958] 1 All E.R. 245n. Mrs. Shaw's will was more fortunate: see *post*, p. 146, n. 37.

[2] *Re Endacott* [1960] Ch. 232; Nathan No. 28; and see *Re Wood* [1949] Ch. 498 ("This Week's Good Cause").

[3] See *Re Clifford* (1911) 106 L.T. 14 (omitted from [1912] 1 Ch. 29); *Re Wightwick's W.T.* [1950] Ch. 260.

[4] *Re Dean* (1889) 41 Ch.D. 552; *Pettingall* v. *Pettingall* (1842) 11 L.J.Ch. 176.

[5] *Re Hooper* [1932] 1 Ch. 38; *Mussett* v. *Bingle* [1876] W.N. 170 (£300 to be applied in erecting monument to first husband of testator's wife held good though gift of interest of £200 to maintain it was admittedly bad); and consider *Re Conner* [1960] I.R. 67; see *post*, p. 159.

[6] *Re Thompson, Public Trustee* v. *Lloyd* [1934] Ch. 342.

have been characterised as "anomalous and exceptional" and, perhaps, "concessions to human weakness or sentiment," [7] or even "merely occasions when Homer has nodded," [8] and the decisions upholding them must now be regarded as being of doubtful authority.[9] Moreover, an invalid trust of imperfect obligation cannot be construed as creating a mere power to carry out the specified purpose, subject to a resulting trust in favour of the settlor, residuary legatee or next-of-kin [10]; "an invalid trust cannot be tortured into a valid power," even though more careful drafting, creating a power and not a trust, could, it seems, achieve the settlor's or testator's purpose.[11] Yet an apparent trust for a mere purpose may in reality amount to a trust for ascertainable individuals subject to a power for the trustees to apply the trust property for purposes at least in part beneficial to the individuals, *e.g.*, by providing a sports ground for the use of them and others. Such a trust, if sufficiently certain, will be valid.[11a]

Charitable trusts are not trusts of imperfect obligation, for they are enforceable by the Attorney-General.[12]

4. Simple and special. A simple (or bare [13]) trust is one in which property is vested in one person on trust for another, the nature of the trust not being prescribed by the settlor but being left to the construction of the law, as where property is transferred to T "on trust for B absolutely." In such a case, T must permit B to enjoy the trust property, and must obey his instructions as to disposing of it. But if B in turn becomes a bare trustee of his equitable interest for C, T will hold directly in trust for C [14]; whereas if B holds for C on a special trust for which the legal estate is requisite, B can call for the legal estate from T.[15] A custodian trustee [16] is not a bare

[7] *Re Astor's S.T., supra*, at p. 547, *per* Roxburgh J.

[8] *Re Endacott, supra*, at p. 250, *per* Harman L.J.

[9] *Ibid.* at pp. 246, 250, 251; and see *Leahy* v. *Att.-Gen. for New South Wales* [1959] A.C. 457 at 478, 479, 484; Nathan No. 30.

[10] *I. R. C.* v. *Broadway Cottages Trust* [1955] Ch. 20 at 36; *Re Endacott, supra*, at p. 246. Yet consider *Gott* v. *Nairne* (1876) 3 Ch.D. 278 (trust to purchase an advowson and present to the living).

[11] See (1960) 76 L.Q.R. 20. See generally L. A. Sheridan (1953) 17 Conv.(N.S.) 46; (1958) 4 U. of West.Austr.Ann.L.R. 235; O. R. Marshall (1953) 6 *Current Legal Problems* 151; L. H. Leigh (1955) 18 M.L.R. 120 (the conclusion at p. 136 that the courts "will not treat, as a misapplication, any application of funds *already* made" under an invalid trust seems unjustified, and is contradicted on p. 132).

[11a] *Re Denley's Trust Deed* [1969] 1 Ch. 373. See P. A. Lovell (1970) 34 Conv.(N.S.) 77 generally, and especially on the relationship between this case and *Leahy* v. *Att.-Gen. for New South Wales* [1959] A.C. 457.

[12] *Post*, p. 168.

[13] See *Re Cunningham and Frayling* [1891] 2 Ch. 567 at 572; *Tomlinson* v. *Glyns Executor and Trustee Co.* [1970] Ch. 112 at 125, 126.

[14] *Head* v. *Lord Teynham* (1783) 1 Cox Eq. 57.

[15] *Angier* v. *Stannard* (1834) 3 My. & K. 566; *Poole* v. *Pass* (1839) 1 Beav. 600; *Onslow* v. *Wallis* (1849) 1 Mac. & G. 506; and see *Grey* v. *I. R. C.* [1958] Ch. 375 at 382 (in C.A. at p. 690; in H.L. [1960] A.C. 1; Nathan No. 20), where this distinction does not appear to have been taken. See also *ante*, p. 88.

[16] See *post*, p. 200.