

Criminal Liability of Corporations

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Abstract : A company can only act through human beings and a human being who commits an offence on account of or for the benefit of a company will be responsible for that offence himself. The importance of incorporation is that it makes the company itself liable in certain circumstances, as well as the human beings. The making of a corporation starts with the Companies Act, declaring it to be a legal "person". The paper will throw light on whether the very existence of the word "person" makes it liable for an act declared as an offence under Indian Penal Code, 1860. The subject was given pressing social importance in the 1980's by series of disasters connected with corporate activities. There have been stages of evolution of Criminal liability of Corporations. The doctrines of Strict Liability & Vicarious Liability derived from law of torts are methods to obviate criminal liability of a corporation. The application of strict liability eliminating the requirement of mens rea, Respondeat Superior dispenses with actus reus working together leads to imposing of Corporations liability. The corporation cannot think of its own due to absence of mind creating difficulties in establishment of mens rea in such crimes. There is a concept of alter ego doctrine that the management was the corporations "brain". Similarly, no bodily punishment can be inflicted into it leading it to incapable of usual punishments. It does not have a soul to be condemned or a body to be hanged. The legal framework will be discussed prevailing in India through explaining Judicial Pronouncements and showing the change in the courts approach at different prospects of the act. The researcher will be dealing with obstacles in attaching criminal liability to corporations. The researcher will be concluding the article with recommendation and deduction of the study.

Keywords: Corporation, Legal person, Criminal liability, Theories, Legal Framework, Judicial Pronouncements.

I. Introduction

Criminal liability is generally made up of two elements: (1) the guilty act or omission known as the "*actus reus*", and (2) the prohibited state of mind or guilty mind known as the "*mens rea*". The mental element generally requires the proof of an intention on the part of the person who commits the criminal act.

Most criminal offences require the co-existence of the above two elements (*i.e. actus reus and mens rea*) at the same time. The concept is derived from the Latin expression "*actus non facit reum nisi mens sit rea*", which means that "*the act will not make a person guilty unless the mind is also guilty*".

Corporations are legal fictions, and legal fictions cannot commit criminal acts. Nor can they possess mens rea, a guilty state of mind. Only people can act and only people can have a guilty state of mind. Corporate criminal liability begins with the premise that corporations are treated as separate legal entities for many purposes.¹ Corporations can enter contracts, sue and be sued and own property in their own name. They even possess a broad range of constitutional rights.²

It has for many years been commonplace for corporation to be prosecuted for criminal offences.³ The parliament has made provisions for numerous acts to make a body corporate liable for offences. The Interpretation Act of 1978 provides that the word "Person" in a statute or subordinate legislation is to be construed as "a body of persons corporate or incorporate" unless a contrary intention appears. Companies may rightly be held liable for statutory as well as common law offences. A corporation to be held liable for criminal state of mind as well as strict liability⁴ needs a proof to be attached. Corporation has no mind of its own and therefore cannot entertain guilt; it has no body and therefore cannot act in *propria persona*; punishing it would violate the fundamental principle that punishment must be imposed only on the actual offender; the regime of penalties does not contemplate possible corporate offenders; and, finally, procedures such as instruction (or rehabilitation) are not well adapted toward dealing with corporate entities.⁵ In general, corporations are held

¹ Daniel R. Fischel and Alan O. Sykes Corporate Crime; ;The Journal of Legal Studies Vol. 25, No. 2 (Jun., 1996), pp. 319-349

² Ibid 1

³ Corporate criminal Liability; Amanda Pinto QC & Martin Evans; Sweet & Maxwell; 3rd Edition; page no 3

⁴ Corporate criminal Liability; Amanda Pinto QC & Martin Evans; Sweet & Maxwell; 3rd Edition; page no 3

⁵ L. H. Leigh; "The Criminal Liability of Corporations and Other Groups: A Comparative View"; Michigan Law Review; Vol. 80, No. 7, Articles on Corporate and Organizational Crime (Jun., 1982), pp. 1508-1528

liable for crimes that are closely related to their business activities.⁶ The presumption of corporate liability lies on the presumption that a body corporate is a different legal person distinct from its owners, officers, or members. There is no single broadly accepted theory of criminal liability and blaming a company for an offence. “There can be no effectual means for deterring from an oppressive exercise of power for the purpose of gain, except the remedy against individual against those who truly commit it, that is the corporation acting by its majority, and there is no principle which places them beyond the reach of the law for such proceedings.” Earlier there were procedural difficulties to charge a body corporate or corporation of criminal offences. A corporation cannot be arrested or compelled to remain present in the court during criminal proceedings. It is not physically present as well as the mental element gets negated due to absence of mind. There can be no external or bodily punishment imposed on it. All the usual crime punishments cannot be inflicted on a body that is devoid of mind and body. The very fact of the absence of both makes it difficult to impose ordinary criminal punishment. They are bodies without soul that prevents them from being condemned or hanged. Punishing the members on behalf with no contribution will be unjustified for the very basis of law that is to deliver justice and treating the alleged to be innocent until proven guilty. Someone else should not be punished for the fault of others diminishing the very objective of delivering justice.

Any person can be held liable for commission of certain illegal acts and omission of legal acts. If a statutory duty is cast upon a corporation and is not performed, the corporate body is very much liable for the statutory offence.

Viscount Haldane LC in *Lennard's carrying company ltd. Vs. Asiatic petroleum Co. Ltd*⁷ it was laid that⁸ with relation to the concept of Alter Ego concept also known as organic theory of Corporate Criminal Liability said “A corporation is an abstraction. There must be a person or agent who directs the corporation for it doesn't have a mind of its own to carry on a activity. The agent or director must be the very mind and ego on behalf of corporation. The Board of Directors is the brains of the company and helping the co. to work through them.

As far as the current status of the Doctrine of Corporal Legal Liability in India, is concerned, the recent landmark judgment of Apex Court in *Standard Chartered Bank and Ors. etc. v. Directorate of Enforcement and Ors*⁹. etc. had made the scenario crystal clear. It overruled the previous views regarding the Corporate Criminal Liability and had given a new touch to the said doctrine.

The question that arises for consideration was whether a company or a corporate body could be prosecuted for offences for which the sentence of imprisonment is a mandatory punishment? In *Velliappa Textiles' case*¹⁰, by a majority decision it was held that the company cannot be prosecuted for offences which require imposition of a mandatory term of imprisonment coupled with fine. It was further held that where punishment provided is imprisonment and fine, the court cannot impose only a fine. The majority was of the view that the legislative mandate is to prohibit the courts from deviating from the minimum mandatory punishment prescribed by the Statute and that while interpreting a penal statute, if more than one view is possible, the court is obliged to lean in favour of the construction which exempts a citizen from penalty than the one which imposes the penalty.

In *State of Maharashtra v. Syndicate Transport*¹¹ it was held that the company cannot be prosecuted for offences which necessarily entail consequences of a corporal punishment or imprisonment and prosecuting a company for such offences would only result in the court stultifying itself by embarking on a trial in which the verdict of guilty is returned and no effective order by way of sentence can be made. A similar view was taken by Calcutta High Court in *Kusum Products Limited v. S.K. Sinha*,¹²ITO, Central Circle-X, Calcutta were it was clearly stated that:

“...a company being a juristic person cannot possibly be sent to prison and it is not open to court to impose a sentence of fine or allow to award any punishment if the court finds the company guilty, and if the court does it, it would be altering the very scheme of the Act and usurping the legislative function.”

The legal difficulty arising out of the above situation was noticed by the Law Commission and in its 41st Report, the Law Commission suggested amendment to Section 62 of the Indian Penal Code by adding the following lines:

In every case in which the offence is only punishable with imprisonment or with imprisonment and fine and the offender is a company or other body corporate or an association of individuals, it shall be competent to the court to sentence such offender to fine only.

⁶ Ibid 5

⁷ [1915] AC 705

⁸ K.N. Chandrasekharan Pillai; General Principles of Criminal Law; 2nd Edition; page number 231

⁹ AIR 2005 SC 2622

¹⁰ *The Assistant Commissioner, Assessment-II, Bangalore and Ors. Vs. Velliappa Textiles Ltd. and Ors.*; AIR 2004 SC 86

¹¹ 1963 Bom. L.R. 197

¹² [1980] 126 ITR 804 (Cal)

This recommendation got no response from the Parliament and again in its 47th Report, the Law Commission in paragraph 8(3) made the following recommendation:

In many of the Acts relating to economic offences, imprisonment is mandatory. Where the convicted person is a corporation, this provision becomes unworkable, and it is desirable to provide that in such cases, it shall be competent to the court to impose a fine.

But the Bill prepared on the basis of the recommendations of the Law Commission lapsed and it did not become law. However few of these recommendations were accepted by the Parliament and by suitable amendment some of the provisions in the taxation statutes were amended.

A similar approach was taken by the Allahbad High Court in 1993, in case of *Oswal Vanaspati & Allied Industries v. State of Uttar Pradesh*¹³ where an entirely distinctive observation was given by the judges. But, after the 2005 judgment of Apex Court, i.e., *Standard Chartered Bank and Ors. etc. v. Directorate of Enforcement and Ors.*¹⁴ etc. the law has taken a settled position and it is basically much more logical and good judgment. It was expressly stated in this case that the company is liable to be prosecuted even if the offence is punishable both with a term of imprisonment and fine. In case the company is found guilty, the sentence of imprisonment cannot be imposed on the company and then the sentence of fine is to be imposed and the court has got the judicial discretion to do so. This course is open only in the case where the company is found guilty but if a natural person is so found guilty, both sentence of imprisonment and fine are to be imposed on such person. There is no dispute that a company is liable to be prosecuted and punished for criminal offences. Although there are earlier authorities to the effect that corporations cannot commit a crime, the generally accepted modern rule is that except for such crimes as a corporation is held incapable of committing by reason of the fact that they involve personal malicious intent, a corporation may be subject to indictment or other criminal process, although the criminal act is committed through its agents.

If a corporate body is found guilty of the offence committed, the court, though bound to impose the sentence prescribed under law, has the discretion to impose the sentence of imprisonment or fine as in the case of a company or corporate body the sentence of imprisonment cannot be imposed on it and as the law never compels to do anything which is impossible, the court has to follow the alternative and impose the sentence of fine. This discretion could be exercised only in respect of juristic persons and not in respect of natural persons. There is no blanket immunity for any company from any prosecution for serious offences merely because the prosecution would ultimately entail a sentence of mandatory imprisonment. The corporate bodies, such as a firm or company undertake series of activities that affect the life, liberty and property of the citizens. Large scale financial irregularities are done by various corporations. The corporate vehicle now occupies such a large portion of the industrial, commercial and sociological sectors that amenability of the corporation to a criminal law is essential to have a peaceful society with stable.¹⁵

Doctrine of Alter-Ego and Establishment through Judicial Pronouncements

Any governing body of the company is the *alter ego*¹⁶. The intent of managers and agents of corporation is attributed to the corporation.¹⁷ A corporation, therefore, can be held criminally responsible for committing, and offence by a "person" who, at the relevant time, was 'the directing mind and will' of the corporation.¹⁸

The English rule concerning the attribution of mental state to the corporation as a mental state personal to it. This brings in the doctrine of alter ego. The English courts consider the alter ego as that a corporation has a mind and can will, whereas it originally served only as the basis on which a state of mind could be imputed to a corporation for the purposes of limiting civil liability. The alter ego notion has not been restricted to officers enjoying power.¹⁹

Lord Reid in *Tesco Supermarkets Ltd. Vs. Natrass*²⁰ and dictum being followed in *Meridian Global Funda Management Asia Ltd. Vs. Securities Commission*²¹, held "A living person or human being has knowledge, intention, capacity to think, be negligent, cautious, frame the situation, create conspiracies, intention to constitute a act of criminal nature unlike the corporation who are not of the same nature. The corporation must act like a living person, or through a living person. The person who is acting on behalf of the company must think like the company, he has to act keeping the mind of the company. He is acting as the company and

¹³ [1992] 75 Comp Cas 770(All)

¹⁴ AIR 2005 SC 2622

¹⁵ http://www.legalserviceindia.com/articles/cor_dr.htm; last visited on 16th October, 2015

¹⁶ This doctrine sets that the management of the corporation worked as the "brain" giving it a exception to hold the corporation liable.

¹⁷ KI Vibhute; Criminal Law; PSA Pillai's; tenth edition ; Lexis Nexis Butterworths; page number 77

¹⁸ Ibid page no 77

¹⁹ L. H. Leigh; "The Criminal Liability of Corporations and Other Groups: A Comparative View" ; Michigan Law Review; Vol. 80, No. 7, Articles on Corporate and Organizational Crime (Jun., 1982), pp. 1508-1528

²⁰ [1971] 2 All ER 127 (HL)

²¹ [1995] 3 WLR 413 (PC)

the mind which directs it to work will be considered as mind of the company. There is no question of the company for being vicariously liable. He is an embodiment of the company and not being just a delegate, agent, representative and a servant of the company. If it is a guilty act, the guilty mind will be considered of the company not of the person acting. The question to be seen is person doing that particular thing is to be regarded as company or merely as the company's servant or agent.

The corporate body wasn't exempted from criminal liability for crime committed by its directors, agents or servants while acting for or on behalf of the company as laid down in *State of Maharashtra Vs. Syndicate Transport Company Limited*²². It is a generally accepted modern rule that except for acts that involve personal malicious intent, and making the company incapable of such act, a corporation may be subjected to indictment or other criminal process even if the criminal act is done by its agents or others.²³ It was held that a company can be prosecuted for an offence for which mandatory punishment is imprisonment and fine.

In *Assistant Commissioner Vs. Velliappa Textiles Ltd.*²⁴ it was held by majority holding that the company cannot be prosecuted for offences which requires imposition of mandatory term of imprisonment coupled with fine. It was further held that where punishment is expressly mentioned that will be fine and imprisonment both, fine alone cannot be imposed. There is no discretion on the part of the court to impose only fine. The court interprets statutes and creates lacunas in them.²⁵ The company can be very well being held liable and can be prosecuted for criminal acts and offences.

The leading case of *Rex v. Huggins*²⁶ decided that the principal is not answerable criminally for the act of his agent without the principal's authorization, consent or knowledge.

In *C. I. T. Corp. v. United States*,²⁷ a corporation was convicted of conspiracy to defraud the United States by presenting documents known to be false for the purpose of securing insurance of loans under the National Housing Act.²⁸

Corporations or body corporate commit crimes to further their business enterprises by increasing profits and enhancing their competitive position and power. The corporations are not just limited to crimes related to finance rather also get indulged in price-fixing, stock-misrepresentation and fraud.²⁹ Fixing the responsibility for a dispersed corporation is complicated task. Establishing *mens rea*³⁰ for a corporation is a difficult task. For establishing the guilty mind, the intention of the office holders, agents etc are considered to measure the attribution.

Imposition of Criminal Responsibility is done in two ways³¹:

- Imposition of Strict Liability eliminating the requirement of *Mens rea*
 - Imposition of Vicarious Liability dispensing with the *Actus reus*
- Corporate Liability arises out of business relationship in circumstances like³²:
1. Involvement of strict liability statutes
 2. Difficulty arising for proving involvement of an employer's corporate official
 3. Difficulty on the prosecutors to gather evidence to convict
 4. Prohibited Conduct causing public harm

The dogma of *respondeat superior* and *qui facit per alium facit per se* is now found to be quite as usefully vague as the dogma of *actus non facit reum, nisi mens rea*.³³

The belief long obtained that since a corporation is only a fictitious person created and invested with certain functions by the state, it was capable of doing only acts expressly permitted in its charter; that anything further, being *ultra vires*, was not the act of the corporation; and hence that there could be no corporate.³⁴

In case of torts the corporation can be held criminally liable for the act of the agent. This is a derivation from the assumption that any act done by him during exercising of powers is with approval of the corporation. In statutes defining crimes and the acts by 'persons' who commits the prohibited act, includes corporations therefore there is no doubt that a corporation can be punished for a criminal act.

²² AIR 1964 Bombay 195

²³ K.N Chandrasekharan Pillai; General principles of Criminal Law; 2nd Edition; Eastern Book Company; page number 248

²⁴ (2003) 11 SCC 405

²⁵ *State of Maharashtra Vs. Jugamender Lal*; AIR 1966 SC 940

²⁶ 2 Strange 882, 93 Eng. Rep. 915 (K. B. 1730).

²⁷ 150 F.(2d) 85 (C. C. A. 9th, 1945).

²⁸ Criminal Liability of Corporations for Acts of Their Agents; Harvard Law Review Vol. 60, No. 2 (Dec., 1946), pp. 283-289

²⁹ Supra note 4

³⁰ Supra Note 4

³¹ Supra Note 4

³² K.N. Chandrasekharan Pillai; General Principles of Criminal Law; 2nd Edition; Page number 232

³³ K.N. Chandrasekharan Pillai; General Principles of Criminal Law; 2nd Edition; page number 232

³⁴ K.N. Chandrasekharan Pillai; General Principles of Criminal Law; 2nd Edition; page number 232

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The difficulty of being *ultra vires* is removed by the doctrine of *respondeat superior* a corporation becomes liable civilly for even the malicious acts of its officers and other agents, if done in the discharge of their official duty or in the scope of their employment. Thus it has been held that a corporation may be liable for deceit, fraud, libel, conspiracy, malicious prosecution, and other torts where wrongful motive is the gist of the action.

Indeed, a corporation is so far treated as a natural person that exemplary damages are allowed just as against an individual, provided the wrongful act is authorized or ratified. The difficulty is in determining to what extent the analogy of civil liability shall be applied to crimes. It was soon felt reasonable to punish by fine for the criminal neglect of officers or agents. Corporate business is necessarily transacted through agents, and if the corporation, as principal, is held criminally liable for the omissions of its agents, there seems good reason to punish it also for their affirmative acts.

But in the decisions which first took this step there were strong dicta that corporate criminal liability extended only to those misfeasance's the simple doing of which was prohibited regardless of motive, intending thereby to exclude all crimes in which mens rea is essential.³⁶

II. Conclusion

A corporation can act only through its agents. And as the shareholders are the persons punished when a corporation is convicted, corporate criminal liability are necessarily vicarious the liability of shareholders for acts of their agents. Where criminal intent is immaterial, corporate criminal responsibility for the physical acts of agents has long been clear. It should be equally obvious that the distinction between physical acts and mental states of agents presents no logical barrier to imposing vicarious responsibility. Instead of regarding the problem as one of vicarious liability, however, the courts have stumbled over the theoretical difficulties of ascribing criminal intent to a corporation. It has been affirmed repeatedly that corporations by their very nature are incapable of committing such crimes as bigamy, perjury, rape, and murder. But courts have now progressed to the position of recognizing that corporations can be guilty of crimes involving criminal intent.³⁷ The increase in number of prosecutions reveals that the corporate crimes are increasing day by day. Lawyers study new danger zones as prosecutions increase with related to corporate criminal acts and fixing their liabilities.³⁸

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