

CRIMINAL LIABILITY OF CORPORATION: AN INDIAN PERSPECTIVE

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ABSTRACT:

Current Supreme Court's decision have made the stand apparently clear in India that the Corporation can be prosecuted as a separate legal entity even in the offences where the punishment is imprisonment. This Paper explains the present status of India on Corporate Criminal Liability and how judicial decision is inconsistent with the legal provisions. It further provides the current situation about the corporate criminal liability in the International scenario. The apex court's decision under various matters reflects the gravity of the concerned problem i.e being faced by the aggrieved parties. The Concept of "No soul to kick" has become obsolete and applicability of lifting the corporate veil has unveiled the sheath. The current research on this subject has been included and it is substantiated with the effect of recent Supreme Court's judgement and also focused on the dilemmatic situation of the Court's decision.

KEYWORDS: Corporation, Criminal Liability, Judicial Decision, Legal provision, International Scenario, Dilemmatic Situation.

INTRODUCTION:

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.

-Glanville Williams

The basic rule of criminal liability revolves around the Latin maxim *actus non facit reum, nisi mens sit rea*. It means that to make one liable it must be shown that act or omission has been done which was forbidden by law and has been done with guilty mind. Hence every crime

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has two elements one physical known as actus reus and other mental known as mens rea. This is the rule of criminal liability in technical sense but in general the principle upon which responsibility is premised is autonomy of the individual, which states that the imposition of responsibility upon an individual flows naturally from the freedom to make rational choices about actions and behaviour. Although, there is an exception to it i.e. Rule of Absolute Liability in which one can be made liable even in the absence of mens rea³.

A corporation was not indictable for any crime under early common law, but the broad general rule is now well established that a corporation can be subjected to indictment for violating a statutory or common-law duty. At the present, most countries agree that corporations can be sanctioned under civil and administrative laws. However, the criminal liability of corporations has been more controversial. While several jurisdictions have accepted and applied the concept of corporate criminal liability under various models, other law systems have not been able or willing to incorporate it. Criminal Liability is attached only to those acts in which there is violation of Criminal Law i.e. to say there cannot be liability without a criminal law which prohibits certain acts or omissions.

There has been a gradual and structural shift in stance taken by Indian Courts. Indian courts, like western courts, now recognise criminal liability of a corporate. Prime Minister Dr. Manmohan Singh recently referred about trying corporates indulging in criminal activities. A company has a distinct legal personality. It can sue or be sued, can own and sell assets, or commit an offence that is of civil or criminal in nature.

HISTORICAL EVOLUTION

The general belief in the early sixteenth and seventeenth centuries was that corporations could not be held criminally liable. Legal thinkers did not believe that corporations could possess the moral blameworthiness necessary to commit crimes of intent. It was the common intent of the people that a corporation has no soul, hence it cannot have "actual wicked intent". It cannot, therefore, be guilty of crimes requiring "malus animus." "Treason, felony, perjury, and violent crimes against the person could be committed only by natural persons. Courts in England drew some distinctions, however, between crimes requiring specific intent and those for which general intent would suffice. In one sense the acts of the corporation are the acts of its officers, directors, and employees. During the early twentieth century courts

³ Assn. of Victims of Uphaar Tragedy v. UOI, 104 (2003) DLT 234, See also: Rule of Strict Liability Rylands v. Fletcher, (1868), L.R. 3 H.L. 330.s

began to hold corporations criminally liable in various areas in which enforcement would be impeded without corporate liability. Indeed, courts were soon willing to hold corporations criminally liable for almost all wrongs except rape, murder, bigamy, and other crimes of malicious intent.

The old school of thought was that the corporate acts through its directors and officers, and should not attract criminal liability. It has been argued that punishment for criminal offences such as imprisonment cannot be conferred on companies and, hence, there cannot be criminal liability on companies. Major hurdles that faced the attribution of criminal liability on corporates were factors such as artificial juristic personality and absence of mens rea on the part of the corporate.

CRIMINAL LIABILITY OF CORPORATION IN INDIA:

All the Penal liabilities are generally regulated under the IPC, 1860 in India. It is this statute which needs to be pondered upon in case of criminal liability of corporation⁴. Corporations play a significant role not only in creating and managing business but also in common lives of most people. That is why most modern criminal law systems foresee the possibility to hold the corporation criminally liable for the perpetration of a criminal offence.

The doctrine of corporate criminal liability turned from its infancy to almost a prevailing rule. In India, the need for industrial development has led to the establishment of a number of plants and factories by the domestic companies and under-takings as well as by Transnational Corporations. Many of these industries are engaged in hazardous or inherently dangerous activities which pose potential threat to life, health and safety of persons working in the factory, or residing in the surrounding areas.

Though working of such factories and plants is regulated by a 614 number of laws of our country, there is no special legislation providing for compensation and damages to outsiders who may suffer on account of any industrial accident⁵.

CORPORATE CRIMINAL LIABILITY: PRE-STANDARD CHARTERED BANK CASE LAW

⁴Indian Penal Code, 45 of 1860, Sec.11: The word "Person" includes any Company or Association or body of persons, whether incorporated or not.

⁵Singh.K.N.J, in Charan Lal Sahu v. Union of India, AIR 1990 SC 1480.

Until recently, Indian courts were of the opinion that corporations could not be criminally prosecuted for offenses requiring mens rea as they could not possess the requisite mens rea. Mens rea is an essential element for majority, if not all, of offenses that would entail imprisonment or other penalty for its violation. Adopting an overly generalized rationale, pre-Standard Chartered decision, and Indian courts held that corporations could not be prosecuted for offenses requiring a mandatory punishment of imprisonment, as they could not be imprisoned.

In *A. K. Khosla v. S. Venkatesan*,⁶ two corporations were charged with having committed fraud under the IPC. The Magistrate issued process against the corporations. The Court in this case pointed out that there were two pre-requisites for the prosecution of corporate bodies, the first being that of mens rea and the other being the ability to impose the mandatory sentence of imprisonment. A corporate body could not be said to have the necessary mens rea, nor can it be sentenced to imprisonment as it has no physical body.

In *Kalpanath Rai v State (Through CBI)*⁷, a company accused and arraigned under the Terrorists and Disruptive Activities Prevention (TADA) Act, was alleged to have harbored terrorists. The trial court convicted the company of the offense punishable under section 3(4) of the TADA Act. On appeal, the Indian Supreme Court referred to the definition of the word "harbor" as provided in Section 52A of the IPC and pointed out that there was nothing in TADA, either express or implied, to indicate that the mens rea element had been excluded from the offense under Section 3(4) of TADA Act.

The Indian Supreme Court referred to its earlier decisions in *State of Maharashtra v. Mayer Hans George*⁸ and *Nathulal v. State of M.P.*⁹ and observed that there was a plethora of decisions by Indian courts which had settled the legal proposition that unless the statute clearly excludes mens rea in the commission of an offense, the same must be treated as an essential ingredient of the act in order for the act to be punishable with imprisonment and/or fine. There is uncertainty over whether a company can be convicted for an offence where the punishment prescribed by the statute is imprisonment and fine.

⁶(1992) Cr.L.J. 1448

⁷(1997) 8 SCC 732

⁸A.I.R. 1965 S.C. 722

⁹A.I.R. 1966 S.C. 43

This controversy was first addressed in *MV Javali v. Mahajan Borewell & Co and Ors*¹⁰ where the Supreme Court held that mandatory sentence of imprisonment and fine is to be imposed where it can be imposed, but where it cannot be imposed, namely on a company then fine will be the only punishment.

It is clear from the above stated cases that Indian court never felt about inclusion of company on certain criminal liability. But what if a corporation is accused of violating a statute that mandates imprisonment for its violation?

CORPORATE CRIMINAL LIABILITY: POST-STANDARD CHARTERED BANK CASE:

There is no immunity to companies from prosecution merely because the prosecution is in respect of offences for which punishment prescribed is mandatory imprisonment. In *Iridium India Telecom Ltd. v. Motorola Incorporated and Ors*, the apex court held that a corporation is virtually in the same position as any individual and may be convicted under common law as well as statutory offences including those requiring mens rea.

The criminal liability of a corporation would arise when an offence is committed in relation to the business of the corporation by a person or body of persons in control of its affairs and relied on the ratio in *Standard Chartered Bank Case*. In *Iridium*, the Supreme Court held:

“The criminal liability of a corporation would arise when an offence is committed in relation to the business of the corporation by a person or body of persons in control of its affairs. In such circumstances, it would be necessary to ascertain that the degree and control of the person or body of persons is so intense that a corporation may be said to think and act through the person or the body of persons.

The apex court held that corporations can no longer claim immunity from criminal prosecution on the grounds that they are incapable of possessing the necessary mens rea for the commission of criminal offences. The notion that a corporation cannot be held liable for the commission of a crime had been rejected by adopting the doctrine of attribution and imputation.

¹⁰AIR 1997 SC 3964

In another judgment in July 2011 of CBI v. M/s Blue-Sky Tie-up Ltd and Ors¹¹, the apex court reiterated the position of law held that companies are liable to be prosecuted for criminal offences and fines may be imposed on the companies. This case appeal arose from criminal applications quashed by the Calcutta High Court.

The Appellant filed criminal applications against the Respondents for committing criminal offences under the provisions of the Indian Penal Code and under Section 13(2) read with 13(1)(c) and (d) of the Prevention of Corruption Act, 1988. Pursuant to that, the Respondents filed applications under Section 482 of the Criminal Procedure Code for quashing of the said proceedings.

The Calcutta HC quashed the proceedings against the Respondent No. 1 on the false premise that the company being a body corporate cannot be prosecuted. The Supreme Court relying on the Standard Chartered Bank Case has held that offences committed by the Respondent No. 1 being grave in nature, fines may be imposed upon them and set aside the quashing of the proceedings.

INTERNATIONAL SCENARIO

In the modern day world, the impact of activities of corporations is tremendous on the society. In their day to day activities, not only do they affect the lives of people positively but also many a times in a disastrous manner which come in the category of crimes. For instance, the Uphar Cinema tragedy or thousands of scandals especially the white collar and organized crimes can come within the categories that require immediate concern. Despite so many disasters, the law was reluctant to impose criminal liability upon corporations for a long time. A basic principle of German law is *societas delinquere non potest*, which means that a corporate body cannot be liable for a criminal offence.

The argument is that the human element is missing and that the creation and operation of slush funds, as well as giving bribes, are all human acts and not the acts of the company itself. But Germany has developed an elaborate structure of administrative sanctions, which includes provisions on corporate criminal liability. These so called *Ordnungswidrigkeiten* are handed down by administrative bodies.

¹¹, CrI. Appeal No(s). 950 of 2004

The key provision for sanctioning the corporation is Section 30 Ordnungswidrigkeitengesetz, which calls for the imposition of fines on corporate entities.

The criminal sanctions are quite high and criminal liability of a company is recognized by the **Australian Legislation**. Moreover, the Australian legislature has introduced criminal liability of directors. For more than fifty years, most criminal law and corporate scholars in the United States have been opposed to corporate criminal liability, arguing that it should be eliminated or at least strictly limited. In the US and the UK, it has been a settled principle that corporates can be held criminally liable. Companies have been open to manslaughter proceedings since 1965.

Until then, English law abided by the principle laid out by a 17th century judge, who deemed, "Companies have a soul to damn, but no body to kick". Way back in 1909, in *New York Central and Hudson River Rail Road Co v. United States*, Supreme Court in the US had held that a corporation is liable for crimes of intent and stated:

"We see no good reason why corporations may not be held responsible for and charged with the knowledge and purposes of their agents, acting within the authority conferred upon them.

Recognizing that the rights of corporations should be respected, as are the rights of natural persons, the Court nonetheless stated that the law "cannot shut its eyes to the fact that the great majority of business transactions in modern times are conducted through these bodies, and particularly that interstate commerce is almost entirely in their hands.

In *HL Bolton (Engg) Co Ltd vs TJ Graham & Sons*, Lord Denning stated that, "The state of mind of these managers is state of mind of company, and it is treated by law as such. So, in cases where the law requires personal fault as a condition of liability in tort, the fault of the manager will be the personal fault of company." Beginning in the 1970s, nations throughout western Europe began creating or expanding corporate criminal liability, rather than contracting or eliminating it.

France had also not recognized corporate criminal liability since the French Revolution, the new Code Pénal of 1992 makes specific mention of this concept in section 121(2)61. The resistance to not including corporate criminal liability in the criminal code had increased over the years, and in 1982 the "Conseil Constitutionnel" had made it clear that the French Constitution did not prohibit the imposition of fines on a corporation.

Corporate criminal liability is an integral part of Japanese law. There are currently more than 700 criminal provisions on the national level alone, which can punish entities other than individuals, and this number is likely to increase in the coming years. China's Criminal Code, which was first introduced in 1979, did not contain a provision on corporate criminal liability until 1997. Prior to the introduction of "unit crime" into the Criminal Code in Article 30.

The Concept of Criminal liability of Corporation is also mentioned under various International documents. A number of conferences have dealt with the same issues since the end of World War II. Among them are the 8th International Conference of the Society for the Reform of Criminal Law in 1994 in Hong Kong and the International Meeting of Experts on the Use of Criminal Sanctions in the Protection of the Environment in Portland, in 1994.

The Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders of 1985 in Milan mentioned that "due consideration should be given by Member States to making criminally responsible not only those persons who have acted on behalf of an institution, corporation or enterprise, or who are in a policy-making or executive capacity, but also the institution, corporation or enterprise itself, by devising appropriate measures that could prevent or sanction the furtherance of criminal activities.

" In 1998, the Council of Europe passed the Convention on the Protection of the Environment through Criminal Law, which stipulated in Article 9 that both "criminal or administrative, sanctions or measures" could be taken in order to hold corporate entities accountable .

CONCLUSION:

India is hunting to curb the incessant pace of corruption in its governance, which is generally being hit by a spate of large-scale corporate scandals. In this context, to fix liability for corruption and bribery offences, it becomes relevant to examine criminal liability, not just of individual directors or agents of a corporation, but also of the company itself. Although considerable debate surrounds society's increasing reliance on criminal liability to regulate corporate conduct, few have questioned in depth the fundamental basis for imposing criminal liability on corporations.

Accordingly Courts is based on the maxim *lex non cogit ad impossibilia*, which tells us that law does not contemplate something which cannot be done. The statutes in India are not in pace with these developments and the above analysis shows that they do not make corporations criminally liable and even if they do so, the statutes and judicial interpretations impose no other punishments except for fines. It is apparent from the current action that some serious measures must be taken in relation to the criminal liability of corporation of India so that it could be stopped from the multiple dimensions of the court's decision.