

CORPORATE CRIMINAL LIABILITY AND PUNISHMENT

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Abstract

In India, Companies are incorporated as per the Companies Act, 2013. As of now and as per Law, Companies are legal entities and have different identity altogether separate from the management who is running the Company. We however know that Companies don't have their own brain and are run by the management personnel who think about the activities of the Company and do all activities whether legal or illegal. So, it is believed that out of two main ingredients of a crime i.e. actus reus and mens rea, mens rea is not present in case of Corporate Crimes on part of the Company. Then the question arises who is responsible for the acts done by the Company or we can say done on behalf of the Company by the management. In the eyes of law, Company being separate legal entity, should be held liable for the acts done by it but practically it cannot be done all the time. As we know that a Company has no body or soul or brain of its own, hence it cannot be put behind the bars nor can't it be bodily punished; so the management behind the show is held liable and is punished. In this Paper, we will discuss the Doctrine of Strict Liability or Vicarious Liability which talks about the methods to make the Corporates liable for the crimes done by them. We will also discuss the Doctrine of Alter Ego which invoked the personal liability of management and shareholders for the acts done by the Corporates. In nutshell, we can say that although all crimes are the outcome of human brain and is responsible for such crimes but Corporates are also held liable for some crimes and we shall try to discuss different aspects of the existing Laws under which Corporates can or cannot be held liable or in other words we shall discuss the aspects of Corporate Criminal Liability through application of prevailing Laws.

Keywords: Corporate, Criminal Liability of Corporates, Company as Legal Person, Companies Act.

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INTRODUCTION

Criminal Liability in general is said to exist when following conditions are fulfilled:

1. **actus reus** i.e. the guilty act; and
2. **mens rea** i.e. the guilty mind

As a general rule, there should be a criminal mind behind any criminal act to prove the person guilty. Always all criminal offences need the concurrence of both the elements in any criminal act done i.e. mens rea and actus reus and without the existence of both, the same is not proved. This was derived from the doctrine of “*actus non facit reum nisi mens sit rea*”, which means that “*only criminal act shall not make the person guilty unless there is guilty mind behind it.*”

Even though Companies or Corporations are legal entities but cannot do any act nor can perform any criminal act by themselves except through Director or any other authorized person/s only. At the same time, they cannot have any mens rea i.e. any guilty mind. Only human being can perform any action and only human beings can have a guilty mind. Corporates are treated as a separate legal entity for all acts done by it.¹ As a separate legal entity, Corporates can enter into contract, own assets and liabilities. Corporates even have Constitutional Rights.² Since many years Corporates have been prosecuted for criminal offences done by it and the same has been in practice.³ The Parliament has also made many Acts and provisions so that a Company can be held liable for such offences. The Interpretation Act, 1978 says that the word person in any Law has to be read as “a body of person Corporate or incorporate” unless there is any contrary intention. Companies may rightly be held accountable for statutory as well as Corporate Law Crimes. A Corporation to be held responsible for criminal state of mind as well as strict liability⁴ needs an evidence to be attached. Company has no mind of its own and therefore cannot commit guilt; it has no body, therefore, cannot perform 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,

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

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

⁴ Ibid

procedures such as instruction (or rehabilitation) are not well adapted toward dealing with Corporate entities.⁵ In general, Corporations are held answerable for crimes that are closely related to their business activities.⁶ The presupposition 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 effective means to dissuade an exercise of unjust power for the purpose of making a profit, except the remedy against the individual against those who really do, that is, the Company that acts by a majority, and there is no principle formed that locate them outside the scope of the Law for such procedures.” Earlier there were many problems to punish a body Corporate or Corporation for such criminal activities or offences. A Corporation cannot be arrested physically or forced to remain physically present in Court during criminal proceedings. It is not physically present and because of absence of mind, the mental element gets negated. There can be no physical 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 caste 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. v. Asiatic Petroleum Co. Ltd.*,⁷ it was laid that with relation to the concept of Alter Ego also known as Organic Theory of Corporate Criminal Liability “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 an 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 Company to work through them.

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

⁶ Ibid 5

⁷ [1915] AC 705

In India, we know that the current status of Doctrine of Corporate Criminal Liability is not as clear as it should be. We can see the recent landmark judgment of Apex Court in *Standard Chartered Bank and Ors. v. Directorate of Enforcement and Ors.*⁸ which had made the scenario crystal clear. This case overrules all the previous laws and views in respect to the Criminal Liability of the Corporates and gave a new aspect to this 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*⁹, 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*¹⁰ 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, ITO, Central Circle-X, Calcutta*,¹¹ where 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, it 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

⁸ AIR 2005 SC 2622

⁹ *The Assistant Commissioner, Assessment-II, Bangalore and Ors. v. Velliappa Textiles Ltd. and Ors.*; AIR 2004 SC 86

¹⁰ 1963 Bom. L.R. 197

¹¹ [1980] 126 ITR 804 (Cal-HC)

association of individuals, it shall be competent to the court to sentence such offender to fine only.’

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. However the Bill, prepared on the basis of the recommendations of the Law Commission, lapsed and it did not become Law but a few of the 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*¹², where an entirely distinctive observation was given by the Judges.

After the 2005 judgment of the Apex Court in *Standard Chartered Bank and Ors. v. Directorate of Enforcement and Ors.*¹³, 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 and the sentence of fine is to be imposed, 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

¹² [1992] 75 Comp Cas 770(All)

¹³ AIR 2005 SC 2622

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.

DOCTRINE OF ALTER-EGO AND ESTABLISHMENT THROUGH JUDICIAL PRONOUNCEMENTS

The Doctrine of **Alter Ego** sets that the management of the Corporation worked as the brain giving it an exception to hold the Corporation liable. The intent of managers and agents of corporation is attributed to it.¹⁴ A Corporation, therefore, can be held criminally responsible for committing offence by a “person” who, at the relevant time, was the directing mind and will of the Corporation.¹⁵

This formulation, the Alter Ego Doctrine, underlies the English rule concerning the attribution of mental state to the Corporation as a mental state personal to it. In this process, the English Courts treat the Alter Ego notion as if it asserted 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 by virtue of corporate character or by delegation from the primary managerial organ. Rather, Courts have adapted the Doctrine to take account of the realities of power in large, decentralized Corporations.¹⁶

Lord Reid in *Tesco Supermarkets Ltd. v. Natrass*¹⁷ and dictum being followed in *Meridian*

¹⁴ KI Vibhute; Criminal Law; PSA Pillai's; tenth edition; Lexis Nexis Butterworths; page number 77

¹⁵ Ibid 15

¹⁶ 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

¹⁷ [1971] 2 All ER 127 (HL)

*Global Funda Management Asia Ltd. v. Securities Commission*¹⁸, held “A living person or human being has knowledge, intention, capacity to think, be negligent, cautious, frame the situation, create conspiracies, intention to constitute an 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 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 whether the 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 v. Syndicate Transport Company Limited*¹⁹. 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.²⁰ It was held that a Company can be prosecuted for an offence for which mandatory punishment is imprisonment and fine.

In *Assistant Commissioner v. Velliappa Textiles Ltd.*²¹, 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.²² The Company can be very well being held liable and can be prosecuted for criminal acts and offences.

¹⁸ [1995] 3 WLR 413 (PC)

¹⁹ AIR 1964 Bombay 195

²⁰ K.N Chandrasekharan Pillai; General principles of Criminal Law; 2nd Edition; Eastern Book Company; page number 248

²¹ (2003) 11 SCC 405

²² *State of Maharashtra v. Jugamender Lal*; AIR 1966 SC 940

The leading case of *Rex v. Huggins*²³ 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*,²⁴ 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.²⁵

Corporations or body Corporate commit crimes or criminal activities to further their business enterprises by increasing profits and enhancing their competitive position and power. The Companies are not just limited to crimes related to finance rather also get indulged in price-fixing, stock-misrepresentation and fraud.²⁶ Fixing the responsibility for a dispersed Corporation is a complicated task. Establishing *mens rea*²⁷ 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 ways²⁸:

- 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 like²⁹:

- Involvement of strict liability statutes.
- Difficulty arising for proving involvement of an employer's Corporate official.
- Difficulty on the prosecutors to gather evidence to convict.
- 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*.³⁰

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

²⁴ 150 F.(2d) 85 (C. C. A. 9th, 1945)

²⁵ Criminal Liability of Corporations for Acts of Their Agents; Harvard Law Review Vol. 60, No. 2 (Dec., 1946), pp. 283-289

²⁶ Supra note 4

²⁷ Supra note 4

²⁸ Supra note 4

²⁹ K.N. Chandrasekharan Pillai; General Principles of Criminal Law; 2nd Edition; Page number 232

³⁰ K.N. Chandrasekharan Pillai; General Principles of Criminal Law; 2nd Edition; Page number 232

The belief long obtained that since a Company 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.³¹ 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 commit the prohibited act, includes Corporations, therefore, there is no doubt that a Corporation can be punished for a criminal act.

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. It is pertinent to note that 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.³²

CONCLUSION

A Company being an artificial person cannot act by itself and only the directors or agents of the Company do all acts on its behalf. That is why the directors or other authorised persons are punished on behalf of the Company whenever it is convicted as they are the guilty mind behind those acts; hence Corporate Criminal Liability is necessarily vicarious liability of

³¹ K.N. Chandrasekharan Pillai; General Principles of Criminal Law; 2nd Edition; Page number 232

³² The Criminal Liability of Corporations; Harvard Law Review; Vol. 20, No. 4 (Feb., 1907), pp. 321-323

shareholders for acts of their agent. Where criminal intent is immaterial, Corporate Criminal Liability for the physical acts of agents has long been clear. It is very clear fact that the difference between physical acts and mental state 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. This is also the established fact that corporations itself cannot commit crimes like bigamy, perjury, rape or murder. But courts have now progressed to the position of recognizing that corporations can be guilty of crimes involving criminal intent.³³ There have been an increase in the number of prosecutions on the Companies and this shows that corporate crimes are increasing very speedy. Lawyers study new danger zones as prosecutions increase with related to corporate criminal acts and fixing their liabilities.³⁴

³³ The Criminal Liability of Corporations; Harvard Law Review; Vol. 20, No. 4 (Feb., 1907), pp. 321-323

³⁴ Gary A. Hengstler; CORPORATIONS UNDER THE GUN: Lawyers study new danger zones as prosecutions increase; ABA Journal; Vol. 73, No. 8 (JUNE 1, 1987), pp. 32-33