CORPORATE CRIMINAL LIABILITY WITH SPECIAL REFERENCE TO N.I.A., 1881

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"Corporate bodies are more corrupt than individuals, because they have more power to do mischief, and are less amenable to disgrace and punishment. They neither feel shame, remorse, gratitude nor goodwill."

- Hazlitt

Abstract

This paper seeks to analyze Corporate Criminal Liability of Companies in relation to the Negotiable Instruments Act. The concept of a corporation is perhaps the most elaborate legal fiction known to legal systems around the world. In simple language, corporation means a group of individuals coming together to carry on a business. The development of the society, at various points of time, has had a direct influence on the structure and functions of the corporation. This had led to an ever-increasing demand for the law to recognize the change and suit its applications, accordingly.

The paper begins with the origin and history of the concept and proceeds to trace its development in India pre and post Standard Chartered Bank Case. It goes on to analyze the relationship between corporate criminal liability and Section 138 of Negotiable Instruments Act, also discussing the Apex Court's view in various cases on the same. It ends with the author providing suggestions on better remedies and a call for tougher penalties on Corporations.

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INTRODUCTION

The concept of a corporation is perhaps the most elaborate legal fiction known to legal systems around the world. In simple language, corporation means a group of individuals coming together to carry on a business. Corporation is a creation of law, a business entity recognised by law. But, corporations, as we understand today, have not been same in the past. The multitude of roles the corporations play in the present day human life have been necessitated by the demands of the society, as it kept on developing. The development of the society, at various points of time, has had a direct influence on the structure and functions of the corporation. This had led to an ever increasing demand for the law to recognise the change and suit its applications, accordingly.[1] Today, a corporation is an artificial entity that the law treats as having its own legal personality, separate from and independent of the persons who make up the corporation.[2] Over the last few decades nature and form of a corporate sector has grown complex. This means, for example, that a corporation can own and sell property, sue or be sued, or commit a criminal offence because; a corporation is made up of and run by people, acting as agents of the corporation. A corporation has an existence separate from the shareholders constituting it and they cannot be held liable for the wrongs committed by the corporation. The corporations are run by natural persons and these peoples' actions can be criminal in nature and can sometimes even result in great economical as well as human loss to the society. Hence, for a better understanding of the concept of corporate criminal liability, it is necessary to trace the origin and meaning of corporation first.

ORIGIN/HISTORY OF CORPORATE CRIMINAL LIABILITY

The general belief in the early sixteenth and seventeenth centuries was that corporations could not be held criminally liable.[3] English law establishes the origin of Modern Corporation in the fourteenth century. Generally, the common law did not allow a corporation to be convicted of a crime. Apart from certain vicarious liability exceptions, corporations were immune from liability under the criminal law. 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

[1] Balakrishnan. K; "*Corporate Criminal Liability - Evolution of the concept*" (1998) Cochin University Law Review p.255
[2] Salomon v. Salomon (1897) AC 22
[3] 109 Harv. L. Rev. 1477

guilty of crimes requiring malus animus.[4] The courts in early twentieth century began to dismantle the corporate immunity from criminal law by holding that words like everyone in criminal statutes could include corporations. However, the most challenging obstacle to imposing criminal liability on corporations was the difficulty of attributing mens rea to an artificial person - a corporation. The breakthrough came in 1915 when the House of Lords in Lennard's Carrying Co. Limited, v. Asiatic Petroleum Co.[5]laid down the general principle of directing mind (identification theory). In this case Viscount Haldane stated that "corporation is an abstraction. It has no mind of its own any more than it has a body of its own; its active and directing will must consequently be sought in the person of somebody who for some purposes may be called an agent, but who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation".

CORPORATE CRIMINAL LIABILITY IN INDIA

Criminal Liability is attached only 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. The basic rule of criminal liability revolves around the basic Latin maxim actus non facit reum, nisi mens sit rea.

In the modern day world, the strong effect of activities of corporations is incredible on the society. In the day to day activities, not only do the corporations affect the lives of the people as a blessing but also many a times proves disastrous which then falls under the category of crimes. The doctrine of corporate criminal liability turned from its infancy to almost a prevailing rule.[6]

Despite so many disasters, the law was unwilling to impose criminal liability upon corporations for a long time. This was for basically two reasons that are[7] :

I. That corporations cannot have the mens rea or the guilty mind to commit an offence; and

II. That corporations cannot be imprisoned.

[4] *State* v. *Morris & Essex R.R.*, 23 NJ.L. 360, 364 (1852)
[5] (1915) AC 705 at 713 (H.L)
[6] Thiyagarajan, T. Sivanathan; "Corporate Criminal-concept", Available at: http://www.manupatra.com/Articles/artlist.asp?s=Corporate/Commercial (Accessed on: 30.09 2019)
[7] *Motorola Inc.* v. *Union of India*, 2004 Cri LJ 1576

In *H.L. Bolton (Engineering) Co. Ltd.* v. *T.J. Graham & Sons Ltd.*[8] Lord Denning, while dealing with the liability of a company stated that in criminal law, in cases where the law requires a guilty mind as a condition of a criminal offence, the guilty mind of the directors or the managers will render the company itself guilty. MacNaghten, J. in *Director of Public Prosecutions* v. *Kent & Sussex Contractors Ltd*[9] observed that, A body corporate is a 'person' to whom, amongst the various attributes it may have, there should be imputed the attribute of a mind capable of knowing and forming an intention. It can only know or form an intention through its human agents, but circumstance may be such that the knowledge of the agent must be imputed to the body corporate. In *Zee Tele films Ltd.* v. *Sahara India Co. Corp. Ltd.*[10], the court dismissed a complaint filed against Zee under Section 500 of the IPC. The complaint alleged that Zee had telecasted a program based on falsehood and thereby defamed Sahara India. The court held that mens rea was one of the essential elements of the offense of criminal defamation and that a company could not have the requisite mens rea. These obstacles were managed to survive till late 20th and very early 21st century. In India, certain statutes like the Indian Penal Code talk about kinds of punishments that can be imposed upon the convict. In certain cases, the sections speak only of imprisonment as a punishment. Thus the problem arises as to how to apply those sections on the companies since a criminal statute needs to be strictly interpreted and in such statutes there is no scope for corporations to be imprisoned. Going with the above viewpoint and with the growing trend of corporate criminality, the Courts in India had finally recognized that a corporation could have a guilty mind but still were reluctant to punish them since the criminal law in India does not allow this action.

In *Assistant Commissioner, Assessment- II, Bangalore & Ors.* v. *Velliappa Textiles Ltd. & Ors.*[11], B.N. Srikrishna J. said that corporate criminal liability cannot be imposed without making corresponding legislative changes. For example, the imposition of fine in lieu of imprisonment is required to be introduced in many sections of the penal statutes. 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*

[8] [1957] 1 WLR 454
[9] (1944) KB 146
[10] (2001) 3 Recent Criminal Reports 292
[11] (2003) (4) RCR (Criminal) 695

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." As per the jurisprudence evolved till then, under the then present Indian law it was difficult to impose fine in lieu of imprisonment though the definition of 'person' in the Indian Penal Code included 'company'. However, the Bill was not passed but lapsed.

The Supreme Court in *Standard Chartered Bank & Others* v. *Directorate of Enforcement & Others*[12], incorporated this when it considered the issue as to whether a company, or a corporation, being a juristic person, could be prosecuted for an offence for which mandatory sentence of imprisonment and fine is provided; and when found guilty, whether the court has the discretion to impose a sentence of fine only. It was of the view that here, the legislative intent to prosecute corporate bodies for the offence committed by them is clear and explicit and the statute never intended to exonerate them from being prosecuted. If an enactment requires what is legally impossible it will be presumed that Parliament intended, it to be modified so as to remove the impossibility element. The Court applied the doctrine of *Lex non cogit ad impossibilia* (impossibility of performance) and decided that as the company cannot be sentenced to imprisonment, the court cannot impose that punishment, but when imprisonment and fine is the prescribed punishment, the court can impose the punishment of fine which could be enforced against the company. This appears to be the intention of the legislature and there must be no difficulty in construing the statute in such a way. 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.

Corporate criminal liability or corporate crime is very difficult to be defined because this phrase in present day scenario covers wide range of offences. But the concept can be said to include *"the conduct of a corporation or of employees acting on behalf of a corporation, which is proscribed and punishable by law"*.[13] The need for proper law relating to corporate criminal liability in a legal system, especially in the developing countries like India was observed by the Supreme Court in the following terms, In India, the need for industrial development has led to the establishment of a number of plants and factories by the domestic

[12] (2005) 4 SCC 530

[13] 2 Braithwaite, John ; Corporate Crime in the Pharmaceutical Industry, 1st Edition, Routledge and Kegan Paul, London, 1984, p.6

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 accident.[14]

The major law relating to Corporations in India is codified in The Company Act, 1956 and the definition of "Corporation" as given in the Act under Section 2 (7) includes a company. Hence under Indian law the liability of the corporation is essentially liability of the company only. On incorporation, the company acquires a separate legal entity distinct from and independent of its members. The separate personality of the company is, however, a statutory privilege; it must be used for legal and legitimate business purposes only. Where a fraudulent, dishonest or improper use is made of the legal entity, the concerned individual will not be allowed to take shelter behind the corporate personality. Thus, the protection of separate legal entity cannot be claimed in these cases and the limited liability of the shareholder becomes unlimited if he is engaged in such activities. The concept of "limited liability" restricts the liability of a shareholder to the nominal value of the shares held by him. If he has paid the entire amount which is payable towards his shares, he cannot be held liable for the debts of the company, even if he holds almost the entire share capital of the company. This rule, however, does not apply if the court lifts the corporate veil and finds the shareholder responsible for the wrongful act.[15] Whenever a corporate entity is abused for an unjust and inequitable purpose, the court would not hesitate to lift the veil and look into the realities so as to identify the persons who are guilty and liable thereof.[16] The veil can indisputably be lifted when the corporate personality is found to be opposed to justice, convenience and interest of the revenue or workman or against public interest. The court will break through the corporate shell and apply the principle of "Lifting of the corporate veil". The court will look behind the corporate entity and take action as though no entity separate from the members existed. In other words, the benefit of separate legal entity will not be available and the court

[14] Singh.K.N.J, in *Charan Lal Sahu* v. *Union of India*, AIR 1990 SC 1480
[15] *Kapila Hingorani* v. *State of Bihar*, [2005] RD-SC 35
[16] 2003 (4) SCALE 712

will presume the absence of such separate existence.[17]

At one point of time, 'corporations' were viewed as a convenient shield to evade liability. However, under our present penal structure, for an offence by the corporation, both the corporation and its officer can be made liable. The law on corporate criminal liability is however, not confined to the general criminal law in the penal code but it is, in fact, scattered over a plethora of statutes with specific provisions for the same.

CORPORATE CRIMINAL LIABILITY IN RELATION WITH THE NEGOTIABLE INSTRUMENTS ACT, 1881

Proper and smooth functioning of all business transactions, particularly of cheques as instruments primarily depends upon the integrity and honesty of the parties. Undoubtedly, dishonour of a cheque by the bank causes incalculable loss, injury and inconvenience to the payee and the entire credibility of the business transactions within and outside the country suffers a serious setback. A company is an artificial person created by law acts and acts through its directors and officers who are responsible for the conduct of the business of the company. A criminal liability on account of dishonour of cheque primarily falls on the drawer company and is extended to officers of the Company. Section 138 of the Act creates statutory offence in the matter of dishonour of cheques on the ground of insufficiency of funds in the account maintained by a person with the banker. The actual offence should be committed by the company and then alone the other two categories would also become liable for the offence.[18] Now the question to be determined is who is responsible to the company for the conduct of its business, and who could be said to be in-charge thereof. The examination of the provisions of section 141 of the Negotiable Instruments Act is necessary for this purpose. It reads as follows: (1) If the person committing an offence under section 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

[17] Dalal Praveen, "*Corporate Entity in existing legal system-Its rights and liabilities under the Constitution and other enactments*", (2004) 61 CLA 96 (Mag).

[18] *Anil Hada* v. *Indian Acrylic Ltd.* (2000) 1 Comp LJ 7 (SC); *Mohd. Isaq Gulsani* v. *J. Rajamouli* (2001) 2 Comp LJ 341 (AP) : (2001) 105 Comp Cas 230 (AP) in Criminal Petition No. 3464 of 2000

his knowledge or that he had exercised all due diligence to prevent the commission of such offence. (2) Notwithstanding anything contained in sub-section (i), 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.

ANALYSIS

Section 141 contains conditions, which have to be satisfied before the liability can be extended to officers of a company. Since the provision creates criminal liability, the conditions have to be strictly complied with. The conditions are intended to ensure that a person who is sought to be made vicariously liable for an offence of which the principal accused is the Company, had a role to play in relation to the incriminating act and further that such a person should know what is attributed to him to make him liable. In the case of *S.M.S. Pharmaceuticals Limited* v. *Neeta Bhalla*[19], the Apex Court observed, the key words which occur in the Section are "every person". These are general words and take every person connected with a company within their sweep. Therefore, these words have been rightly qualified by use of the words "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 etc." What is required is that the persons who are sought to be made criminally liable under Section 141 should be at the time the offence was committed, in charge of and responsible to the company for the conduct of the business of the company. Every person connected with the company shall not fall within the ambit of the provision. It is only those persons who were in charge of and responsible for conduct of business of the company at the time of commission of an offence, who will be liable for criminal action. It follows from this that if a director of a company, who was not in charge of and was not responsible for the conduct of the business of the company at the relevant time, will not be liable under the provision. The liability arises from being in charge of and responsible for conduct of business of the company at the relevant time when the offence was committed and not on the basis of merely holding a designation or office in a

[19] (2005) 8 SCC 89

company. Conversely, a person not holding any office or designation in a Company may be liable if he satisfies the main requirement of being in charge of and responsible for conduct of business of a Company at the relevant time. Liability depends on the role one plays in the affairs of a Company and not on designation or status. If being a Director or Manager or Secretary was enough to cast criminal liability, the Section would have said so. Instead of "every person" the section would have said "every Director, Manager or Secretary in a Company is liable".... etc. The legislature is aware that it is a case of criminal liability which means a serious consequence so far as the person sought to be made liable is concerned. Therefore, only persons who can be said to be connected with the commission of a crime at the relevant time have been subjected to action." In *National Small Industries Corp. Ltd.* v. *Harmeet Singh Paintal*[20], the Court held that: if the accused is not one of the persons who falls under the category of "persons who are responsible to the company for the conduct of the business of the company" then merely by stating that "he was in-charge of the business of the company" or by stating that "he was in-charge of the day-to-day management of the company" or by stating that "he was in-charge of, and was responsible to the company for the conduct of the business of the company", he cannot be made vicariously liable under Section 141(1) of the Act. To put it clear that for making a person liable under Section 141(2), the mechanical repetition of the requirements under Section 141(1) will be of no assistance, but there should be necessary averments in the complaint as to how and in what manner the accused was guilty of consent and connivance or negligence and therefore, responsible under sub-section (2) of Section 141 of the Act. Section 141 does not make all the Directors liable for the offence. The criminal liability can be fastened only on those who, at the time of the commission of the offence, were in charge of and were responsible for the conduct of the business of the company. The Supreme Court in various cases held that the words "was in-charge of, and was responsible to the company for the conduct of the business of the company" refer to a person who is in overall control of the day-to-day business of the company. The Court pointed out that, though a person may be a director and, thus, belongs to the group of persons making the policy followed by the company, yet may not be in-charge of the business of the company; that a person may be a manager who is in-charge of the business but may not be in overall charge of the business; and that a person may be an officer who may be in-charge of only some part of the business It is, however, observed by the

[20] Criminal Appeal no. 320-336 OF 2010

Supreme Court that the words in section 141(1) of the Act need not be incorporated in a complaint as magic words. But, at the same time, the substance of the allegations read as a whole, should answer and fulfil the requirements of the ingredients of the said provision.[21]

In *K.K. Ahuja* v. *V.K. Vora*[22], it was propounded that if a mere reproduction of the wording of section 141(1) in the complaint is sufficient to make a person liable to face prosecution, virtually every officer / employee of a company without exception could be impeded as on accused by merely making an averment that at the time when the offence was committed he was in-charge of and was responsible to the company for the conduct and business of the company. This would mean that if a company had 100 branches and the cheque issued from one branch was dishonoured, the officers of all the 100 branches could be made accused by simply making an allegation that they were in-charge of and were responsible to the company for the conduct of the business of the company. That would be an absurd thing and not intended under the Act. As the trauma, harassment and hardship of a criminal proceedings in such cases can be more serious than the ultimate punishment, it is not proper to subject all and sundry to be impleaded as accused in a complaint against a company, even when the requirements of section 138, read and section 141, are not fulfilled.

In *Aneeta Hada* v. *M/s. Godfather Travels & Tours Pvt. Ltd*[23], the question that arose was whether an authorized signatory of a company would be liable for prosecution under Section 138 of the Negotiable Instruments Act, 1881 without the company being charged as an accused. The Court referred to *Anil Hada* v. *Indian Acrylic Ltd*[24] and expressed that a company has to be made an accused but applying the principle lex non cogit ad impossibilia, i.e., if for some legal snag, the company cannot be proceeded against without obtaining sanction of a court of law or other authority, the trial as against the other accused may be proceeded against if the ingredients of Section 138 as also 141 are otherwise fulfilled. In such an event, it would not be a case where the company had not been made an accused but would be one where the company cannot be proceeded against due to existence of a legal bar. A distinction must be borne in mind between cases where a company had not been made an accused and the one where despite making it an accused, it cannot be proceeded against

[21] K. P. G. Nair v. Jindal Menthol India Ltd, [2001] 104 Comp Cas 290
[22] [2001] 104 Comp Case 290
[23] Criminal Appeal No. 838 of 2008
[24] AIR 2000 SC 145

because of a legal bar. The language of Section 141 of the Act being absolutely plain and clear, a finding has to be returned that the company has committed the offence and such a finding cannot be recorded unless the company is before the court, more so, when it enjoys the status of a separate legal entity. That apart, the liability of the individual as per the provision is vicarious and such culpability arises, ipso facto and ipso jure, from the fact that the individual occupies a decision making position in the corporate entity. It is patent that unless the company, the principal entity, is prosecuted as an accused, the subsidiary entity, the individual, cannot be held liable, for the language used in the provision makes the company the principal offender.

In *Iridium India Telecom Ltd.* v. *Motorola Inc & Ors.*[25] it was held that companies and corporate houses can no longer claim immunity from criminal prosecution on the ground that they are not capable of possessing the necessary mens rea for commission of criminal offences. The word 'deemed' used in Section 141 of the Act applies to the company and the persons responsible for the acts of the company. It primarily falls on the drawer company and is extended to officers of the company. Section 141 of the Act is an instance of specific provision which in case an offence under Section 138 is committed by a company, extends criminal liability for dishonour of a cheque to officers of the company. There is almost unanimous judicial opinion that necessary averments ought to be contained in a complaint before a person can be subjected to criminal process. A liability under Section 141 of the Act is sought to be fastened vicariously on a person connected with a Company, the principal accused being the company itself.

SUGGESTIONS & CONCLUSION

Companies in India have been accused of everything from corrupt practices and fraud to causing environmental damage and loss of lives. There is a lack of clarity over how companies should be held accountable for their wrongdoings and such ambiguity has sometimes created sufficient wiggle-room for offending entities to get off scot-free. Corporate criminal liability is recognized by Indian law but the issue which is yet to be effectively settled is how a company should be penalized for malpractice.

Call for tougher penalties

[25] 2004 (1) BomCR 479

There is a need to evolve new forms of punishment which could effectively deter the corporate from engaging in any criminal activity. Economic and social sanctions should be encouraged against corporate houses, such as winding up of the company, temporary closure of the corporation and heavy compensation to the victims; depending on the gravity of the offence companies could be blacklisted and barred from participating in government sponsored projects or their operations should be temporarily suspended. Better remedies Aside from the absence of effective laws to deal with corporate criminal liability, there is a worrying tendency of courts to impose liability solely on the board of directors or officers of a company. Today, judiciary has to take the pain of looking into the facts and circumstances of each case independently rather than considering laid down fluctuating judicial principles on this topic. But the impediment then involves is in the corporate menace, where uncertainty can lead into high instability in the market. In order to avoid the situation, question still remains whether the judiciary can lay down certain broad principles on the issue of corporate veil which can be treated as that of universal character and which can bring some consistency and uniformity within the corporate world. The author is of the view that in cases involving community interest where there arise human rights and environmental hazards issues of public nature, the legislature has to lay down flexible test and factors and judiciary to take a stern action against such conglomerates on the facts and circumstances of each case. Courts should be more flexible in such cases while ascertaining the corporate veil issue. While in all other cases, author is of the view that the fundamental of a separate legal personality has to be considered vital in every case except for special circumstances. The legislation through its statutory application ought to mention these special circumstances which should to be viewed as universal in nature. Hence, any case which comes for the determination before judiciary has to by-pass the special circumstances laid down by the legislature and subsequently narrow down the observation of that case on its facts and circumstances. Thus, legislature with the aid of aforesaid two important issues should develop a test along with factors (to satisfy the test) in order to come within the ambit of an exception rule i.e. special circumstances to the general fundamental principle of separate legal personality. The principle of equity and interest of justice can ruin legislative intent and hence the discretionary power of judiciary under the garb of equitable remedy can lead to a discourse of unending solution. Hence, courts ought to restrain itself from stretching its arms and focus only on the legislative laid down test and factors to pierce the corporate veil in exceptional

circumstances.

Our country has several hazardous activities going on as part of the development process and often these are being conducted in residential areas which can be termed as 'potential high risk areas'. However even in this state of affairs the government seems to be in deep slumber and is not reacting as it should be. The government is concentrating only on the financial aspect of development. What it has forgotten is that, alongside financial development socio-legal development is also a major factor. Both these areas go hand in hand and if they do not then the development remains only pertly fulfilled. So it is high time the government attends to the wakeup call that has been ringing for years now. The author sincerely hopes and prays that the government does not get a rude awakening like the Bhopal tragedy and then gets on with its job of actually doing something about the liability of the company. In the meantime, the general public of this country has only one option, that is to hope that another tragedy of such magnitude does not hit them because there won't be any laws in the country that will actually prosecute the culprits for the crime they have really done, though there will be other legislations which will definitely punish them but at a much smaller scale.