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Corporate criminal liability: A comparative analysis of judicial trend

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Abstract

Large scale corporations are reality and determining factor behind the globalized world. Taking undue advantage of corporate veil created by statutory provisions, individuals operating behind this veil often commit crimes. Keeping this in mind, the judiciary around the world has determined the grounds and rules for criminal liability of Corporations. This research article is an attempt to analyse judicial trend in USA, UK and India with respect to the criminal liability of corporations.

Keywords: Corporations, Criminal Liability, Judicial decisions

Introduction

The Corporation may be held responsible, even though its employees or agents acted contrary to express instructions when they violated the law, so long as they were acting for the benefit of the corporation and within the scope of their actual or apparent authority. A corporation is accountable for its employee's conduct if it motivated, at least in part, by desire to serve the Corporation but this need not be the sole motivation. And even if, the employees were acting in their own interests when they committed a crime, the corporation may still be criminally liable for the failure of its supervisors to detect and stop the wrongdoing, either in intentional disregard of the law or in plain indifference to its requirements.

Corporation is defined as, "a large business or organization that under the law has the rights and duties of an individual and follows a specific purpose" [1].

Corporate Criminal Liability in USA

U.S. Supreme Court in New York Central and Hudson River Rail Road Co. v. U.N [2] clearly held that a corporation is liable for crimes of intent.

In H. L Bolton and Co. ltd v. T.J Graham and sons [3]

Lord Denning Observed

A company may in many ways be likened to a human body. They have a brain and a nerve centre, which controls what they do. They also have hands, which hold the tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company and control what they do. The state of mind of these managers is state of mind of company and it treated by law as such. So you will find that in case 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.

Lennard's Carrying Company Ltd v. Asiatic Petroleum Co. Ltd [4]

Lord Haldene held that, in the criminal law, in cases where the law requires a guilty mind of directors or the managers will render the company themselves guilty.

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United Kingdom

The development of holding corporation liable for criminal acts is mainly a western Development. Economic has taken place all around the western countries, after two world wars. Beginning in the 1970s, nations throughout western Europe began creating or expanding corporate criminal liability, rather than contracting or eliminating it^[5]. Some of the legislation affected small nations. For example, legislation in the Netherlands and Denmark provided that corporations are, in general, liable for all offenses within each nation's general criminal code^[6]. In 1995, Finland imposed a new form of negligence-based criminal liability on corporations,^[7] and in 2003 Here in these periods corporate criminal liabilities jurisprudence developed in these nations and by the apex courts of the respective countries where new dimension has been reached. It is important to see some cases which had set precedents to be followed in future.

Moussell v. London and north Western Railway^[8]

This is the first case in UK in which corporate liability was moved beyond the confines of Strict Liability or Nuisance. The company, in this case, was held liable for an offence which required mens rea, the act of its manager in giving a false account with intent to avoid payment of tolls. Lord Atkin made little of the mens rea point: "while prima facie a principal is not to be made criminally liable for the acts of its servants, yet the legislature may prohibit an act or enforce a duty in such words as to make the prohibition or duty absolute; in which case the principal is liable if the act is in fact done by his servants. Williams however regarded that case as belonging to an intermediate stage in the development of corporate criminal responsibility, that is, between vicarious liability for strict liability offences and the restrictive identification doctrine for mens rea offences.

R v. ICR Haulage Ltd^[9]

ICR Haulage had contracted to supply hard core and Ballast to public works contractors, Rice and Son Ltd., the good to be paid per public yard. It was alleged that the defendants who included the company's managing director, two of their lorry drivers, and two of rice and son's employees, in addition to ICR, had agreed to charge Rice & Sons for more hard core than was actually delivered. They were all found guilty of conspiring to defraud. In dismissing their appeals the court of criminal appeal held that there was no reason in law why such an indictment should not lie. On the facts, there was clearly no question that, if corporate liability were to attach in any circumstances, that the dishonesty of managing director of a two-director private family company would be imputable to company. In applying this reasoning to the common law offence of conspiracy to defraud, in this case court took the identification or alter ego theory a step further. Though the judgment remained reserved still it is nevertheless a great development in the criminal liability of corporations. ICR Haulage is also important because, alone amongst three landmark cases at time, it dealt with a non-statutory offence^[10].

In, Moore v. Bresler^[11]

This case served to confirm that there was indeed a growing movement towards a novel type of corporate liability. Together with two of its officials, the company was prosecuted under the finance Act of which provided that it

was an offence for any person for the purposes of the act to make use of a document which was false in a material particular intent to deceive. In this case the secretary of the company and the sales manager had sold certain goods belonging to the company, fraudulently intending to keep the proceeds of the sale for themselves. They then made certain documents which were false because they certified less than the true amount of transactions which had entered into so as to make the company liable to pay less purchase tax. Thus they embezzled the company and at the same time evaded its tax liability. They were personally convicted of contravening S. 35(2) Finance No.2 Act1940, and the court reversed the Recorder's finding that the sales were no made by them as the agents or with the authority of the company. The contemporary decision of this case is that it confused *respondeat superior and the doctrine of identification*. Williams criticized it that it could appear that the company was being held liable for an act of its officers which was not done in order to advance the company's business to see the development of alter ego notion and the case that give guidance on identification.

India

Some of the important pronouncements of the apex court on the Doctrine of Corporate Criminal Liability in India are as follows;

The question that arose 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 CST v. Parson Tools and Plants^[12]

It was provided that "if legislature willfully omits to incorporate something of an analogous law in a subsequent statute, or even if there is a *causa omissus* in a statute, the language of which is otherwise plain an unambiguous the court is not competent to supply the omission by engraving on it or introducing in it under the guise of interpretation, by analogy or implication, the primary function of court is the duty of the court is to decide what the law is and apply it; nit to make it.

In Velliappa Textiles' case^[13],

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 favor of the construction which exempts a citizen from penalty than the one which imposes the penalty.

In State of Maharashtra v. Jugminder Lal^[14]

It was held that expression, "shall be punishable for imprisonment and also for fine" means that the court is bound to award a sentence comprising both imprisonment and fine. So the court has quashed the prosecution against the corporation. Hence, court provided that unless a statute specifically provides the company can be attributed for the crime of his officers or workers. The next is declined. The best of this case is that the court at least took in to

consideration the law reports and other aspect seriously.

In an old pronouncement State of Maharashtra v. Syndicate Transport ^[15] 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 ^[16] 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.”

But, the approach of judiciary changed in 2005 after the judgment of Apex Court, In A.K. Khosla v. T.S. Venkatesan, ^[17] wherein, two corporations were charged with having committed fraud under the IPC. The Magistrate issued process against the corporations. In the Calcutta High Court, the counsel for the defendants argued, *inter alia*, that the corporations, as juristic persons, could not be prosecuted for offenses under the IPC for which *mens rea* is an essential ingredient. The court agreed. The court pointed out that there were two prerequisites 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. Each of these prerequisites rendered the prosecution of the defendant corporations futile: 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.

On the other hand, in Oswal Vanaspati & Allied Industries v. State of Uttar Pradesh, ^[18] the appellant-company had sought to quash a criminal complaint, arguing that the company could not be prosecuted for the particular criminal offense in question, as the sentence of imprisonment provided under that section was mandatory. The Full Bench of the Allahabad High Court had disagreed in following words:

A company being a juristic person cannot obviously be sentenced to imprisonment as it cannot suffer imprisonment.... It is settled law that sentence or punishment must follow conviction; and if only corporal punishment is prescribed, a company which is a juristic person cannot be prosecuted as it cannot be punished. If, however, both sentence of imprisonment and fine is prescribed for natural persons and juristic persons jointly, then, though the sentence of imprisonment cannot be awarded to a company, the sentence of fine can be imposed on it.... Legal sentence is the sentence prescribed by law. A sentence which is in excess of the sentence prescribed is always illegal; but a sentence which is less than the sentence prescribed may not in all cases be illegal ^[19].

In Kalpanath Rai v. State ^[20]

SC 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* 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.

In Velliappa Textiles, ^[21] a private company was prosecuted for violation of certain sections under the Income Tax Act ("ITA"). Sections 276-C and 277 of the ITA provided for a sentence of imprisonment *and* a fine in the event of a violation. The Indian Supreme Court held that the respondent company could not be prosecuted for offenses under certain sections of the ITA because each of these sections required the imposition of a *mandatory* term of imprisonment coupled with a fine. The sections in question left the court unable to impose only a fine. Indulging in a strict and literal analysis, the Court held that a corporation did not have a physical body to imprison and therefore could not be sentenced to imprisonment. Further, the Indian Supreme Court was of the view that the legislative mandate was to prohibit the courts from deviating from the minimum mandatory punishment prescribed by the Act. The Court also noted that when interpreting a penal statute, if more than one view is possible, the court is obliged to lean in favor of the construction that exempts an accused from penalty rather than the one that imposes the penalty.

In, Standard Chartered Bank and Ors. etc. v. Directorate of Enforcement and Ors. etc. ^[22] the SC 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.

In this case, Standard Chartered Bank was being prosecuted for violation of certain provisions of the Foreign Exchange Regulation Act of 1973 ("FERA"). Ultimately, the Indian Supreme Court held that the corporation could be prosecuted and punished, with fines, regardless of the mandatory punishment of imprisonment required under the respective statute.

The Court initially pointed out that, under the view expressed in *Velliappa Textiles*, the Bank could be prosecuted and punished for an offense involving rupees one lakh ^[23] or less as the court had an option to impose a sentence of imprisonment or fine. However, in the case of an offense involving an amount exceeding rupees one lakh, where the court is not given discretion to impose imprisonment or fine, that is, imprisonment is mandatory, the Bank could not be prosecuted.

The Court also referred to the recommendations made by the Law Commission; ^[24] which had noticed the legal conundrum arising out of the aforementioned situation. The Law Commission recommended the following provision to be inserted in the Penal Code:

- 1) In every case in which the offense is punishable with imprisonment only or with imprisonment and fine, and the offender is a corporation, it shall be competent to the court to sentence such offender to fine only.
- 2) In every case in which the offense is punishable with imprisonment and any other punishment not being fine, and the offender is a corporation, it shall be competent to the court to sentence such offender to fine.
- 3) In this section, "corporation" means an incorporated company or other body corporate, and includes a firm and other association of individuals.

Of course, Standard Chartered Bank argued that the Indian Parliament enacted laws knowing well that a corporation cannot be subjected to custodial sentence, and, therefore, the legislative intention was *not* to prosecute the companies or corporate bodies. According to the defendant, when the sentence prescribed cannot be imposed, the very prosecution itself is futile and meaningless, and, thus, the majority decision in *Velliappa Textiles* had correctly laid down the law.

The Supreme Court in this case also observed that the view of different High Courts in India was very inconsistent on this issue. For example, in *State of Maharashtra v. Syndicate Transport*,^[25] the Bombay High Court had held that the company could not be prosecuted for offenses which necessarily entailed corporal punishment or imprisonment; prosecuting a company for such offenses would only result in a trial with a verdict of guilty and no effective order by way of a sentence.

The SC also referred to an old decision of the United States Supreme Court, *United States v. Union Supply*.^[26] In that case, a corporation was indicted for willfully violating a statute that required the wholesale dealers in oleomargarine to keep certain books and make certain returns. Any person who willfully violated this provision was liable to be punished with a fine of not less than fifty dollars and not exceeding five hundred dollars and imprisonment for not less than 30 days and not more than six months. It is interesting to note that for the offense under Section 5 of the statute at issue, the Court had discretionary power to punish by either fine *or* imprisonment, whereas under Section 6 of the statute (the section that was actually violated in *Union Supply*), both types of punishment were to be imposed in all cases. The corporation moved to quash the indictment, and the District Court quashed it on the grounds that Section 6 was not applicable to the corporations. The United States Supreme Court reversed the District Court's judgment. Justice Holmes held:

It seems to us that a reasonable interpretation of the words used does not lead to such a result. If we compare Section 5, the application of one of the penalties rather than of both is made to depend, not on the character of the defendant, but on the discretion of the Judge; yet, there, corporations are mentioned in terms. And if we free our minds from the notion that criminal statutes must be construed by some artificial and conventional rule, the natural inference, when a statute prescribes two independent penalties, is that it means to inflict them so far as it can, and that, if one of them is impossible, it does not mean, on that account, to let the defendant escape^[27].

In the end, for the SC, the legislative intent to prosecute corporate bodies for the offenses committed by them was clear and explicit. The statute in question never intended to exonerate corporations from being prosecuted. To follow *Velliappa Textiles* would be to presume that the legislature intended to punish the corporate bodies for minor and silly offenses while it extended immunity of prosecution for major and grave economic crimes. As a specific illustration, the court pointed out that in the case of cheating and dishonestly inducing delivery of property covered under Section 420 of the IPC, the punishment prescribed is imprisonment, which may extend to seven years and fine. However, for the offense under Section 417, that is, simple cheating, the punishment prescribed is imprisonment for a term which may extend to one year, a fine, or both. If

Standard Chartered Bank's argument were accepted, it would mean that for the offense under Section 417 of the IPC, which is a minor offense, a company could be prosecuted and punished with a fine, whereas for the offense under Section 420, which is an aggravated form of cheating, the company could not be prosecuted as there is a mandatory sentence of imprisonment. This interpretation clearly produced an illogical result.

The Indian Supreme Court in *Standard Chartered Bank* finally held that,

"We do not think that the intention of the Legislature is to give complete immunity from prosecution to the corporate bodies for these grave offenses. The offenses mentioned under Section 56(1) of the FERA Act, 1973... for which the minimum sentence of six months' imprisonment is prescribed, are serious offenses and if committed would have serious financial consequences affecting the economy of the country. All those offenses could be committed by company or corporate bodies. We do not think that the legislative intent is not to prosecute the companies for these serious offenses, if these offenses involve the amount or value of more than one lakh, and that they could be prosecuted only when the offenses involve an amount or value less than one lakh."

The Indian Supreme Court also pointed out that, as to criminal liability, the FERA statute does not make any distinction between a natural person and corporations. Further, the Indian Criminal Procedure Code, dealing with trial of offenses, contains no provision for the exemption of corporations from prosecution when it is difficult to sentence them according to a statute. The court held that the FERA statute was clear: corporations are vulnerable to criminal prosecution, and allowing corporations to escape liability based on the difficulty in sentencing would do violence to the statute. The Court did not develop its reasoning far enough so as to specifically hold that a corporation is capable of forming *mens rea* and acting pursuant to it. However, the Court held that corporations are liable for criminal offenses and can be prosecuted and punished, at least with fines. Many of the offenses, punishable by fines, however do have *mens rea* as a necessary element of the offense.

2. Conclusion

After analyzing all these pronouncements, it can be said that post *Standard Chartered* decision, corporations are capable of possessing the requisite *mens rea*. Going in tune with this judicial trend, the newly enacted Companies act 2013 has also imposed separate penalties on companies and upon the individuals acting behind such corporations^[28].

3. Reference

1. Available at, <http://www.merriam-webster.com/dictionary/corporation>, accessed on 15th Sept. 2015.
2. 53 L Ed; 613; 212 U.S 481, 1908.
3. 3 ALL ER 624 at, 1956, 632.
4. 1915 AC 705: 113 LJ 195.
5. For details, see Beale & Safwat, *supra* note 1, at 110-26. See also Thomas Weigend, *Soecietas delinquere no potest? A German Perspective*, 6 J. INT'L CRIM. JUST. 927, 928 (noting quick spread of corporate criminal liability to the Netherlands, Switzerland, Austria, and Italy), 2008.

6. Sara Sun Beale, Is Corporate Criminal Liability Unique? 44 AM. CRIM. L. REV. 110-112, 2007.
7. Id. at 113.
8. 1917 2 KB 845.
9. [1944] KB 551, 559.
10. 1944 KB 551 (CA).
11. 1944 2 All ER 515.
12. AIR 1975 SC 449.
13. AIR 2003 SC 721.
14. AIR 2005 SC 380.
15. 1963 Bom. L.R, 197.
16. 126 ITR 804 Cal, 1980.
17. Cr LJ. 1448, 1992.
18. 1 Comp LJ. 172, 1993.
19. Id.
20. 8 S.C.C 732, 1997.
21. 1 Comp. L.J. 21, 2004.
22. AIR 2005 SC 380.
23. One Lakh = Rs. 100,000. Approximately \$2320.
24. After independence, the Constitution of India with its Fundamental Rights and Directive Principles of State Policy gave a new direction to law reform geared to the needs of a democratic legal order in a plural society. Though the Constitution stipulated the continuation of pre- Constitution Laws (Article 372) till they are amended or repealed, there had been demands in Parliament and outside for establishing a Central Law Commission to recommend revision and updating of the inherited laws to serve the changing needs of the country.
25. Bom LR. 197, 1963.
26. 215 U.S. 50, 1909.
27. Id. at 55.
28. See for e.g. sec. 48, 53, 59, 66, 68, 447 etc., the Companies Act, 2013.