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Corporate Criminal Liability – An Overview

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In the Era of Liberalization, Privatization, and Globalization due to the mushroom growth of the companies, there is also growth in crimes in the corporate sector. Hence, Corporate Criminal Liability has gained importance these days. It is a concept that can be defined as a crime committed by an independent person or a class of persons during their business.’ In USA and UK, the corporations will be liable for Crimes committed with intent by their directing mind and will. In India, corporate criminal liability is regulated by the principle of ‘Vicarious Liability and is based on the legal maxim ‘actus non facit reum nisi mens sit rea’. Unlike other countries in India, there is two corporate criminal liability I.e. Derivative model, which further includes two divisions: Vicarious liability and Identification doctrine, and the Organizational Model. To validate the corporate criminal liability the criminal act should have occurred during employment and for the corporation's benefit. However, corporate criminal liability is a concept that is still in the developing stage and the corporations are creations of Law and laws are different in different jurisdictions, therefore the legislators must come up with fair laws.

Keywords: *liberalization, privatization, globalization, corporate criminal liability, vicarious liability.*

INTRODUCTION

In the eyes of law, Corporations are treated as separate legal entities or a juristic person having perpetual succession that is different from natural persons. The companies are liable for their business conduct that occurs during the business. The company's liability comprises both civil

and criminal liability. The company can be made criminally liable if it violates any penal law and is held responsible for the same. Corporate criminal liability can be defined as a commission of the crime by an independent person or alliance of persons who aim for a collective motive or to gain in the course of their profession and carry out such acts which are prohibited by law. Whenever a corporation is accountable for any criminal act, it not only has an impact on the corporation but also on the board of the corporation who are involved in the criminal conduct.

There are majorly four ingredients of corporate criminal liability:

1. A commission or omission of an act prohibited by law.
2. Committed by the In-charge or the decision-makers of the company
3. During their employment or business
4. Done with a guilty intent in pursuance of a common objective for benefitting or for Undue enrichment of the company.

The concept of corporate criminality emerged in the early phase of the 20th century¹. The traditional approach towards crime never encompassed corporate criminality because of which it is very important to comprehend the criminal liabilities of companies.

LEGAL SCENARIO OF CORPORATE CRIMINAL LIABILITY IN USA & UK

In England and the United States of America, the legal scenario is that the corporation will be liable for the criminal conduct committed with intent. Decades back in the United States corporations were treated as an artificial or fictitious legal entities but the approach in the present era has changed with the change in time. The present notion is that wherever there is an overlapping of state laws and federal statutes, the corporation is governed and prosecuted for both state and federal laws. In the US Supreme Court in 1909 in the case of *New York Central and Hudson River Railroad Co. v United States*² for the first time held that Corporations can be made liable for criminal offences.

¹ Kelly-Kilgore & et. al., 'Corporate Criminal Liability' (2011) 48 (2) American Criminal Law Review, 421-453

² *New York Central and Hudson River Railroad Co. v United States* [1909] 212 U.S. 481

In the UK, the courts have entirely dismissed the concept that a body corporate cannot commit a Criminal offense, which was an end result of an act of will, requiring a particular frame of mind. In one of the celebrated cases *H.L. Bolton (Engineering) Ltd. v T.J. Graham & Sons Ltd.*³ the court held that the will of the managers represents the will of the company. Further, the court observed that the company in many aspects functions like a human body, the agents of the company cannot be held liable for what they do but, others such as directors & managers of the company who represent the directing mind and will of the company and control the affairs can be held liable. The frame of mind of these persons is the frame of mind of the company. Therefore, in criminal law where the law demands a guilty mind as a requisite for a criminal offense, the guilty mind of the directors or managers who operate the company's business will make the company guilty and liable. Further, in *Tesco Supermarkets Ltd. v Natrass*⁴ a similar opinion was established and the court held that the company is only responsible for the acts and knowledge of its directing mind and will.

LEGAL POSITION OF CORPORATE CRIMINAL LIABILITY IN INDIA

Under the Indian Criminal Law, Corporate Criminal Liability has stipulated the degree to which a company as a juristic person can be made liable for the acts committed by its employees. The Concept in India is determined by the principle of Vicarious Liability, discrete from the framework where the statutory offense particularly makes the company liable for a specific offense. The question that is to be analyzed on corporate liability in criminal conduct is whether a corporation being an artificial person established by law is possible for it to commit the crime. It is a well-known fact that a corporation cannot commit a crime as the main test for establishing criminality is the intention, which the companies lack on the point that they are artificial persons.

The legal maxim upon which the basic rule of criminality is established is '*actus non facit reum nisi mens sit rea*' which means that an act is not wrongful unless it is done with wrongful intent. Therefore, corporations are criminally liable only for the offenses that are committed during the business. Hence, Intention is immaterial in deciding cases against the corporation.

³ *H.L. Bolton (Engineering) Ltd. v T.J. Graham & Sons Ltd.*, [1957] 1 QB 159

⁴ *Tesco Supermarkets Ltd. v Natrass* [1972] UKHL 1

CORPORATE CRIMINAL LIABILITY: COMPANIES ACT, 2013

Companies Act, 2013 has enlarged the scope of corporate liability of the directors. There is also an enhancement in the quantum of punishments. The 2013 Act holds the director criminally liable and also includes officials in default under the ambit of this notion in India. The provisions recognizing corporate criminal liability under the Companies Act, 2013 are given under the following sections –

53⁵. Prohibition on the issue of shares at discount⁶. Minutes of proceedings of general meeting, meeting of Board of Directors, and other meeting and resolutions passed by postal ballot,⁷ Books of account, etc., to be kept by the company⁸. Financial statement⁹. Related party transactions¹⁰. Punishment for personation of shareholders¹¹. Refusal of registration and appeal against refusal¹². Prohibitions and restrictions regarding political contributions¹³. Disclosure of interest by director¹⁴. Investments of the company are to be held in its own name¹⁵. Punishment for fraud.

LIABILITY UNDER THE INDIAN PENAL CODE

There are offences in the Indian Penal Code, 1860 which describe the offenses of serious nature where a corporate body is also found to be guilty. Section 11¹⁶ of the Indian Penal Code states that any company or association or body of persons whether incorporated or not is considered as a ‘person’. Hence, companies can be held liable for criminal acts under IPC, 1860 too.

In *Standard Chartered Bank v Directorate of Enforcement*¹⁷, the court held in this particular case that the company is liable to be prosecuted and penalized for the criminal offenses. The

⁵ Companies Act, 2013, s 53

⁶ Companies Act, 2013, s 118(12)

⁷ Companies Act, 2013, s 128(6)

⁸ Companies Act, 2013, s 129(7)

⁹ Companies Act, 2013, s 188(5)

¹⁰ Companies Act, 2013, s 57

¹¹ Companies Act, 2013, s 58(6)

¹² Companies Act, 2013, s 182(4)

¹³ *Ibid*

¹⁴ Companies Act, 2013, s 187(4)

¹⁵ Companies Act, 2013, s 447

¹⁶ Indian Penal Code, 1860, s 11

¹⁷ *Standard Chartered Bank v Directorate of Enforcement* (2006) Appeal (Civil) No. 1748/1999

contention that the company can seek exemption from criminal prosecution in a circumstance where imprisonment is mandatory was rejected by the court. As the company can never be imprisoned, the court cannot impose such punishment, but when both fine and imprisonment are authorized, the court has the authority to impose fines on the company.

In *Aneeta Hada v Godfather Travels and Tours Pvt. Ltd*¹⁸, the contention was pertaining to determining the accountability of the corporation in dishonor of cheque. The scale of vicarious liability in the case of corporations was discussed by the court. A corporation is a juristic person, it will bear the responsibility for the acts of its employees.

In *Iridium India Telecom Ltd v Motorola Inc*¹⁹, the Supreme Court of India held that the companies can no further profess exemption from criminal prosecution on the contention that they cannot possess *mens rea*.

MODELS OF CORPORATE CRIMINAL LIABILITY IN INDIA

- **Derivative Model** - By carefully perusing the word derivative, it can be said that under this model, the accountability of a corporation is derived from accountability. The criminal liability of a company results due to the acts or conducts of an independent person who is employed in or associated with the corporation and perpetrates wrongful conduct. The accountability is on the institution/ corporation because the independent person is related to the company. This model is further subdivided into two facets-(i) Vicarious Liability, and (ii) Identification Doctrine.
- **Vicarious Liability** - This doctrine is constructed with the help of the two Latin maxims the first maxim is '*Qui facit per alium facit per se*' which means, he who acts through another is considered to have acted on his own, and the second, the maxim is '*respondeat superior*' which signifies, the master is answerable to the acts of his agent. Vicarious liability is the notion that is pertinent usually in civil matters but at present, the various courts have interpreted that, since the corporations are an artificial person

¹⁸ *Aneeta Hada v Godfather Travels and Tours Pvt. Ltd.*, (2012) Criminal Appeal No. 838/2008

¹⁹ *Iridium India Telecom Ltd v Motorola Inc.*, (2010) Criminal Appeal No. 688/2005

with a separate legal entity having perpetual succession, it is compulsory to put it under the ambit of vicarious liability.

- **Identification Doctrine** - This doctrine identifies certain key persons of the company who represents the institution, and whose comportment and intent are ascribed to that of the corporation. The key individuals who are associated with the company must have acted within the purview of their profession. The act must have occurred within the stipulated area of business. The purview of identification doctrine is limited.
- **Organizational Model** - The instant model cynosure on the structure of the corporation while describing the accountability of the corporation in criminal matters. In order to constitute that the crime has happened the presence of *men's rea* and *actus reus* is essential but at the same time, the issue that appears while sustaining a corporation criminally accountable is because of the question, how can an artificial person commit a crime with intention? The culture or atmosphere of the corporation may help in the commission of an offence requiring intent by-

Firstly, providing a favourable environment for the offender to commit such offence; secondly, it is quite possible that the corporation has created an environment, which led to the commission of the crime. Either way, it was the corporation and its working culture that led to the commission of such offences.

ESSENTIALS FOR INSTITUTING CORPORATE CRIMINAL LIABILITY IN INDIA

- **Criminal conduct should have occurred during the course of employment:** The personnel, by whom the criminal act has been committed, should have attempted it or done it during the course of his employment. It is assumed that when an act is carried out in the course of profession the company assumes the place of the principal and thus established a principal-agent relationship between the company and the personnel of the company, as a result, it attracts corporate criminal liability.
- **Of merit to the corporation:** The criminal conduct of the person ought to be of some benefit or merit to the organization, directly or indirectly. It would be enough to

establish that the company is being benefited if the illegitimate or unlawful act of the personnel of the company is not contrary to the corporation or institution.

NEED FOR THE CONCEPT IN INDIA

This concept has invited conflicting opinions in India. The actual issue concerning this is that, Are we dealing with the 'corporate criminals' when we say Corporate Criminal Liability? Or the 'criminal institutions'? There is a conflict of opinion in this regard. Hence, it is criticized that penalizing the corporations doesn't make any sense as it is the personnel of the company who indulge or commit such acts. Further, all the fines are imposed it is to be paid by the shareholders of the company, which makes no sense or is of no merit. Hence, this aspect cannot be neglected and needs attention and innovative ways to tackle this issue. The concept is much needed in this era of LPG, but with certain modifications as per the need of the changing corporate world.

CONCLUSION

Corporate criminal liability is a concept that is still in its developing stage. There are various new dimensions of corporate crimes which are emerging. The statutes in many of the countries are still not following these developments and the corporations are not held criminally liable. The 47th Law Commission report has also suggested some reforms like giving discretionary power to the judges in such kinds of matters but it was never implemented. According to the Fraud survey taken up by Deloitte India, it said that the country could witness emerging crimes like E-Commerce Fraud, Cloud Computing Fraud, Crypto-Currency Fraud, etc. However, corporations are the creation of law and the laws are different in different jurisdictions, therefore the legislators and the judiciary must come up with the proper legislation.