

Article



Criminal liability of Corporate Officers *-Supreme court takes a negative view*

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Introduction

Crime today is no more archetypical where only individuals were considered to be criminals. It now has an overarching making corporate vehicles and legal entities amenable to criminal prosecutions.

For long the view has been that corporates cannot commit crime as they lack *mens rea* or criminal intent-the fundamental ingredient of any criminal prosecution. So under such circumstances the question arises (1) whether corporates could be prosecuted of criminal offences and (2) whether directors or employees could be held vicariously liable for the criminal acts of the company, as the company itself could not be prosecuted criminally.

This write up is an attempt to reflect upon the above questions in light of the recent Supreme Court ruling in case of *Sunil Bharti Mittal v. Central Bureau of Investigation*¹ wherein a similar issue was vehemently dealt with by the Apex Court.

What is Vicarious Liability?

Vicarious liability has its roots in law of torts. A tort is a civil wrong committed against a person (including legal entities and companies) rather than a State. Black's Law dictionary defines vicarious liability as:

“the imposition of liability on one person for the actionable conduct of another, based solely on the relationship between the two persons;”

This concept based on the latin maxim of “*respondeat superior*,” meaning “*let the master answer*”. A prime example of vicarious liability would be the responsibility of the principal for acts done by its agent or the employer's responsibility for acts of its employee. The doctrine could be well applied to civil cases where the likelihood of damages suffered is taken into consideration rather the intent behind the damages, as opposed to criminal cases where intent plays the driving mechanism.

What is Corporate Criminal Liability?

There is no concept of vicarious liability under criminal jurisprudence as crimes require *mens rea* that is - a guilty mind. Early common law had a general belief that corporations or corporates could not be held criminally liable as they has no mind of their own that could have a wicked intent. This sufficiently provided enough cushioning to the corporates as the most challenging obstacle to impose any criminal liability on corporations was the difficulty of attributing *mens rea* to an artificial person.

¹ <http://judis.nic.in/supremecourt/imgs1.aspx?filename=42239>



It was said at common law that “a corporation cannot commit treason, or felony, or other crime, in its corporate capacity: though its members may, in their distinct individual capacities.”² That perception changed over time. First, it was agreed that a corporation might be held criminally liable for its failure to honor certain legal obligations (nonfeasance)³; then for the inadequate manner in which it performed certain legal obligations (malfeasance)⁴. At the dawn of the 20th century, the Supreme Court expressed a more comprehensive view:

It is true that there are some crimes which, in their nature, cannot be committed by corporations. But there is a large class of offenses ... wherein the crime consists in purposely doing the things prohibited by statute. In that class of crimes we see no good reason why corporations may not be held responsible for and charged with the knowledge and purposes of their agents, acting within the authority conferred upon them. If it were not so, many offenses might go unpunished and acts be committed in violation of law where, as in the present case, the statute requires all persons, corporate or private, to refrain from certain practices, forbidden in the interest of public policy.⁵

The Court spoke of “crimes which in their nature, cannot be committed by corporations,” but did not explain what specific crimes it had in mind.

With globalization the presence of corporate vehicle has grown tremendously and one has also witnessed a growth in corporate crimes. Thus the need to make corporates amenable to criminal laws and subject them to criminal liability was prominent. With time, the view that a corporate by virtue of being an artificial person could not have a criminal intent started losing grounds and more evolved judicial precedents brought in application of vicarious liability to criminal cases by way of corporate criminal liability.

Corporate criminal liability is thus the liability imposed upon a corporation for any criminal act done by any natural person. Liability is imposed so as to regulate the acts of a corporation. The principle of corporate criminal liability based on the doctrine of *respondeat superior*, developed through judicial interpretation of common law where the corporation was made liable for any act done by an agent which is actually not authorized by the corporation. (*Washington Gaslight Co. v. Lansden*, 172 U.S. 534, 544⁶.)

² 1 BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 464 (1765)

³ WHARTON, TREATISE ON THE CRIMINAL LAW OF THE UNITED STATES 58 (2d ed. 1852)

⁴ 1 BISHOP, COMMENTARIES ON THE CRIMINAL LAW §420 (7th ed. 1882)

⁵ *New York Central & Hudson River Railroad Co. v. United States*, 212 U.S. 481, 494-95 (1909)

⁶ <https://supreme.justia.com/cases/federal/us/172/534/>



Criminal Corporate Liability- Evolution in India

The usual stand by the Indian courts in the past was that companies could not be criminally prosecuted for offenses requiring *mens rea*. The reasoning was as simple that companies could not possess the requisite *mens rea*, which is an essential element for majority of offences that would entail imprisonment or other penalty for its violation.

The generalized rationale of Indian courts still held that corporates could not be prosecuted for offenses that prescribed a punishment of imprisonment, as they could not be imprisoned.

In *A.K. Khosla v. T.S. Venkatesan*⁷, 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 pre-requisites for the prosecution of corporate bodies, the first being that of *mens rea* and the other being the ability to impose the mandatory sentence of imprisonment and that 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.

Similarly, in *Zee Telefilms Ltd. v. Sahara India Co. Corp. Ltd.*,⁸ 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*.

However, the assumption stood rebuked with the decision of Supreme Court in case of *Standard Chartered Bank*. In *Standard Chartered Bank and Ors v. Directorate of Enforcement* A.I.R. 2005 S.C. 2622⁹, it was held that 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 with stable economy.* The Court explained its view *inter-alia* in paragraph 29 of the judgment.

⁷ <http://indiankanoon.org/doc/998961/>

⁸ <http://indiankanoon.org/doc/512651/>

⁹ <http://indiankanoon.org/doc/1915525/>



It was obvious to the Indian Supreme Court in *Standard Chartered Bank (supra)* that 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.

Similarly in *Iridium India Telecom Ltd. v. Motorola Inc*¹⁰ it was held that “*the Courts in England have emphatically rejected the notion that a body corporate could not commit a criminal offence which was an outcome of an act of will needing a particular state of mind. The aforesaid notion has been rejected by adopting the doctrine of attribution and imputation. In other words, the criminal intent of the "alter ego" of the company / body corporate, i.e., the person or group of person that guide the business of the company, would be imputed to the corporation. A corporation is virtually in the same position as any individual and may be convicted of common law as well as statutory offences including those requiring mens rea. The criminal liability of a corporation would arise when an offence is committed in relation to the business of the corporation by a person or body of persons in control of its affairs. In such circumstances, it would be necessary to ascertain that the degree and control of the person or body of persons is so intense that a corporation may be said to think and act through the person or the body of persons. These observations leave no manner of doubt that a company / corporation cannot escape liability for a criminal offence, merely because the punishment prescribed is that of imprisonment and fine.* “

The current case

Facts of the case

The current case pertains to the grant of Unified Access Services Licenses (“UASL”) granted in year 2008 to private persons and companies that resulted in huge losses to the public exchequer, also popularly known as the *2G Spectrum Case*. A special court was set up for trial in the said matter. The Special Judge after taking into consideration the documents and evidences produced by the Central Bureau of Investigation (CBI) vide order dated March 19, 2013 issued summons to the person accused in the investigation and further incriminating other 3 persons prima treating them to be alter ego of the respective companies in essence controlling the affairs of `the respective companies and represent the directing mind and will of each company. Thus the special judge issued summons against the three as well. Feeling aggrieved, the said order insofar as it proceeds to implicate the additional three as accused persons has been challenged.

The moot question in the case thus was whether such persons would be considered as *alter ego* of the companies and whether law duly backs such a proposition.

¹⁰ (2011) 1 SCC 74; <http://indiankanoon.org/doc/18288042/>



Judgment

The Apex Court while dealing with the said issue at hand held, in light of various precedents held that *“the principle which is laid down is to the effect that the criminal intent of the “alter ego” of the company, that is the personal group of persons that guide the business of the company, would be imputed to the company/corporation. The legal proposition that is laid down in the aforesaid judgment is that if the person or group of persons who control the affairs of the company commit an offence with a criminal intent, their criminality can be imputed to the company as well as they are “alter ego” of the company. However, this principle is applied in an exactly reverse scenario. Here, company is the accused person and the learned Special Magistrate has observed in the impugned order that since the appellants represent the directing mind and will of each company, their state of mind is the state of mind of the company and, therefore, on this premise, acts of the company is attributed and imputed to the appellants. It is difficult to accept it as the correct principle of law.”*

The court further detailed the circumstances when Director/person in charge of the affairs of the company can also be prosecuted, when the company is an accused person. In this regard the court held that *“an individual who has perpetrated the commission of an offence on behalf of a company can be made accused, along with the company, if there is sufficient evidence of his active role coupled with criminal intent. Second situation in which he can be implicated is in those cases where the statutory regime itself attracts the doctrine of vicarious liability, by specifically incorporating such a provision”*.

Authors' view

The case can be divided into two parts- one whether corporates can be convicted of criminal offences or precisely whether corporates can have a criminal liability and second- if the answer to the first is in affirmative- whether directors and officers of such companies can be vicariously held liable for the same.

The applicability of criminal jurisprudence to corporates has always been a vexed issue for courts as the cardinal principle of criminal law involves *mens rea*. The old school principle had been that corporates, being artificial persons couldn't commit criminal offences as they do not have a mind of their own and thus they cannot have a criminal intent. However, with gradual evolution of judicial principles, precedents have been set to hold corporations and companies guilty of criminal offences, irrespective of it being an artificial person. The Allahabad Court in case of *Oswal Vanaspati & Allied Industries v. State of Uttar Pradesh*¹¹ held that

¹¹ <http://indiankanoon.org/doc/1782171/>



“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 may not in all cases be illegal.”

The clarity with regard to position and intention of law to charge corporates with criminal liability came in further with the judgment of Apex Court in case of *Iridium India Telecom Ltd. v. Motorola Incorporated and Ors (supra)*, where it was held that a corporation is virtually in the same position as any individual and may be convicted under common law as well as statutory offences including those requiring *mens rea*. The criminal liability of a corporation would arise when an offence is committed in relation to the business of the corporation by a person or body of persons in control of its affairs.

The international perspective of corporate criminal liability or the principle of alter ego was summed in case of *Bolton (H.L.) (Engg.) Co. Ltd. v. T.J. Graham & Sons Ltd*¹² wherein Lord Denning held that *“the state of mind of these managers is the state of mind of the company and is treated by the law as such. 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 themselves guilty.”*

Thus the law as it stands today is that companies enjoy no immunity from criminal prosecution, however, cannot be convicted of imprisonment sentences. A corporation is virtually in the same position as any individual and may be convicted of common law as well as statutory offences including those requiring *mens rea*. *Mens rea* is attributed to corporations on the principle of “alter ego” of the company. The criminal intent of the “alter ego” of the company, that is the personal group of persons that guide the business of the company, would be imputed to the company/corporation. The criminal liability of a corporation would arise when an offence is committed in relation to the business of the corporation by a person or body of persons in control of its affairs.

Once it is clear that criminal liability is attributable to corporates, the second question that arises is that whether directors and officers could be held vicariously liable for criminal prosecution of the corporate. The complexity further scales when application of vicarious

¹² [1957] 1 QB 159 at 172, <http://judis.nic.in/supremecourt/imgs1.aspx?filename=42239>



liability principle to criminal laws is in question. The concept of vicarious liability per se is a civil concept- holding the principal/master liable for the acts of the agents/servants. When the directors and officers commit offences that involve *mens rea*, the company being the master and the directors and officers being employees or servants, is held vicariously liable for the acts of its employees. The difficulty arises when the situation is reverse- whether directors and officers being employees would be held to be criminally liable where the company is guilty of a criminal offence.

It is well admitted that a company is an artificial person that acts through its officers, directors and employees. If such a company commits an offence involving *mens rea*, it would normally be the intent and action of that individual who would act on behalf of the company, for example and act of conspiracy.

The Apex Court in the case in question laid down two situations where an individual would also be held guilty along with the company. First a situation where there is sufficient evidence of the individual's active role and criminal intent on record to prove commission of an offence on behalf of a company. Second –where the statutory regime itself attracts the doctrine of vicarious liability, by specifically incorporating such a provision.

In case of *Tesco Supermarkets Limited v. Natrass*¹³, Lord Reid held that *“It must be a question of law whether, once the facts have been ascertained, a person in doing particular things is to be regarded as the company or merely as the company's servant or agent. In that case any liability of the company can only be a statutory or vicarious liability”*

South Africa vide section 332 of the Criminal Procedure Act, 1977 makes an express provision holding the director or representative of the corporate body as the offender, and thereupon such a person shall be dealt with as if he were the person accused of having committed the offence in question. It further provides that if the said representative of the corporate body, is convicted, the court convicting him shall not impose upon him in his representative capacity any punishment, whether direct or as an alternative, other than a fine, even if the relevant law makes no provision for the imposition of a fine in respect of the offence in question, and such fine shall be payable by the corporate body and may be recovered by attachment and sale of property of the corporate body.

In pretext of the above the position becomes abundantly clear that vicarious liability can be fastened only by reason of a provision of a statute and not otherwise. Even under a special statute when the vicarious criminal liability is fastened on a person on the premise that he was in- charge of the affairs of the company and responsible to it, all the ingredients laid down under the statute must be fulfilled. The Managing Director or the

¹³ <http://www.bailii.org/uk/cases/UKHL/1971/1.html>



directors of the Company, thus, in absence of express legal provision cannot be said to have committed an offence only because they are holders of offices.

Conclusion

The judgment reaffirms and strengthens the view that criminal liability is attributable to corporates and that companies and corporates could be prosecuted of criminal offences. It however, saves that directors and employees who even though being the alter ego of the company are not criminally liable unless there is an express statute prescribing the same.

Even though the decision might be in line with the principles of criminal jurisprudence, however, it feels very counter intuitive to say that an artificial person would only be charged with criminal liability and the natural persons actually in control of the affairs of the company could scot free. Further, the theory of separation of powers of the wings of government, empower courts in India only interpretation of laws, which finally are to be considered and embodied as statutes by the legislative. The hands of justice are further chained by the cardinal principle of strict interpretations of criminal laws. With corporate scandals in flurry, the need of the hour is to revamp the regulatory regime and statutes to make corporate criminal liability sturdy and purposeful.

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