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A CRITICAL ANALYSIS OF JUDICIAL VERDICTS RELATING TO CORPORATE CRIME IN INDIA

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ABSTRACT

Initially it was argued that corporation being legal person cannot form the mens rea, unlike natural person and cannot be held responsible for criminal offences. Moreover, company does not have body or soul. Hence it cannot be punished like natural persons. Therefore the company ought to be kept outside the jurisdiction of the criminal jurisprudence. However, the doctrine of identification theory was adopted in broader sense. Further, the Courts in India started to attribute company for criminal acts of its directors, or agents or servants, whether they involve mens rea or not, provided they have acted or have purported to act under authority of the company or in pursuance of the aims or objects of the company. However jurisprudence of juristic personality suggests that corporate personality cannot be equated with personality of natural person in respect of all offences mentioned in the law of crimes, which could be committed only by natural persons, e.g. murder, treason, bigamy, rape, perjury etc.

Keyword: *Person, Crime, Punishment, Company*

1. INTRODUCTION

Industrial revolution took place in UK and gradually spread across European Countries and North America. Industrial growth in India was at snail pace up to 1980s. India liberalized its industrial policy during 1990 decade. In the contemporary world, India is forced to reckon in industrial growth. More number of National and International Companies invested huge amounts in India and started more number of businesses which has changed the outlook of India. The volume of company's transaction multiplied by number of times.

Indian companies are not lagging behind in adopting new technology in the business in order to compete with foreign companies and to enhance their reputation as global company in the world. Equally the companies started to show the other face of company that it could employ unfair means to achieve their desired results. Further some persons started to make use of artificial creation of company's personality to commit crime because they took the advantage of loophole in the law that corporate body could not be prosecuted for criminal offence because company cannot be punished effectively.

2. CRIMINAL LIABILITY OF CORPORATION AND THE PROVISIONS OF INDIAN PENAL CODE

Section 2 of the Indian Penal Code refers to offences committed within the territory of India and declares that a person shall be liable to be punished for all acts or omissions which contrary to the provisions of the IPC which he shall be guilty within the territory of India . The section asserts the principle of criminal liability on the basis of the locality and places of the offence committed. According to this section "every person" irrespective of his caste, color, creed, sex or place of birth or his rank, status, will be held liable for punishment for an offence committed within India. The word "every person" includes citizens, as well as non-citizens. Further, Section 11 of IPC defines the word 'person' which includes any company or Association or body of persons, whether incorporated or not. Obviously the literal interpretation of Section 2 read with Section 11 of IPC makes it explicitly clear that juristic person like company or association of persons like partnership firm could be prosecuted or indicted for every offence proscribed in the IPC. However jurisprudence of juristic personality suggests that corporate personality cannot be equated with personality of natural person in respect of all offences mentioned in the law of crimes. This view is endorsed by even eminent authors of criminal law text like K.D.Gaur and Ratanlal and Dhirajlal. Even there is no unanimity among the judiciary in respect of corporate criminal liability on the ground that unlike natural person, legal person is incapable of forming the mens rea and it is impossible to punish legal person.

3. PRESUMPTION OF INNOCENCE OF ACCUSED

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Court will decide a question of fact which is in issue, either by obtaining actual evidence or by prior presumptions. There is a doctrine praesumptiones juris sed non de jure which means, inferences of facts hold good until evidence has been given which contradicts them. It is settled principle that an accused is always presumed to be innocent until his guilt is proved. According to this presumption the prosecution must prove the guilty of accused beyond reasonable doubt and the graver the crime the greater will be the degree of doubt that is reasonable. The golden rule of evidence has emerged from the historical case of Woolmington v. DPP in which the House of Lords verdict that an accused presumed to be innocent is fundamental doctrine of criminal law. Lord Chancellor Viscount Sankey said, "If the jury is left in reasonable doubt whether act was unintentional or provoked, the prisoner is entitled to be acquitted."

Further, the following general statement of Viscount Sankey has affected the entire criminal jurisprudence.

"Throughout the web of English criminal law, one golden thread is always to be seen that it is the duty of the prosecution to prove the prisoner's guilt, subject to the defense of insanity and any statutory exception. If, at the end of and on the whole of the case, there is a reasonable doubt, as to whether the prisoner killed the deceased with malicious intention, the prosecution has not made out a case and the defendant is entitled to acquittal."

The burden of proof so placed upon the prosecution remains throughout the trial. Obviously, it does not shift to the accused merely because the prosecution makes out a prima facie case. The burden of proof in criminal cases is heavier than civil cases because in civil cases there is a balance of probabilities.

4. JUDICIAL RESPONSE IN INDIA

Initially it was argued that company being artificial person, unlike natural person cannot be held liable for criminal offences. Moreover, company does not have body or soul. Hence it cannot be punished like natural persons. Therefore the company ought to be kept outside the jurisdiction of the criminal jurisprudence. These are the issues raised in the Ananth Bandu v. Corporation of Calcutta. The Hon'ble High Court has laid down the following important ratio of corporate criminal liability.

i. If there is anything in the definition of a particular section in the Statute, which prevent the application of the section to a limited company, definitely a limited company cannot be proceeded against. There are heaps of sections in which it will be physically impossible by limited company to commit the offence.
ii. Then again a limited company cannot be generally tried when mens rea is an essential ingredient.
iii. Company cannot be tried for the offences, where the punishment for the offence is only imprisonment. Because it is not possible to send a limited company to prison.
iv. Where other sentences than imprisonment or death is provided, that does not prevent the Court from inflicting a suitable fine. And a sentence of fine need not carry with it any direction of imprisonment in default.

State government based its argument on the common law theory that "committed for trial means committed to prison with a view to being tried before the judge." Therefore, company cannot be committed to prison for trial, hence it cannot be prosecuted under Criminal law. However, the Court rejected the argument and held that, except above stated class of cases there is nothing to prevent Indian criminal law to apply to the limited company.

In State of Maharashtra v. Messrs Syndicate Transport Co. (P) Ltd and others, Hon'ble High Court held that "it is not disputed that there are several offences which could be committed only by individual human being, for instances, murder, treason, bigamy, rape, perjury etc." Further court held that where the offence imposes only corporeal punishment, then company cannot be held guilty because, prosecuting a company for such offence would only result in the Court "stultifying itself by embarking on a trial in which a verdict of guilty is returned, no effective order by way of sentence can be made"

Therefore, Court observed in a broad sense that, 'a person which included a corporation will be read as being subject to some kind of limitation'. Court said that person under Section 11 of IPC is subjected to "unless there is anything repugnant in the subject or context." Section 420 of IPC imposes mandatory punishment of imprisonment hence, company cannot be held liable for criminal offences.

Though Section 403 and 406 of IPC require the element of mens rea, they do not impose the mandatory punishment of imprisonment. Therefore, corporation being juristic person incapable of forming the mens rea and cannot be held liable for criminal offences. However, the doctrine of identification theory was adopted in broader sense. Further, the Court observed that a corporate body ought to be attributed for criminal acts or omissions of its

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directors, or agents or servants, whether they involve mens rea or not. Provided they have acted or have purported to act under authority of the corporate body or in pursuance of the aims or objects of the corporate body. It means that officials of the company acting during the course of the employment for the benefit of the company makes company criminally liable even though the concerned officials might not have formed the mens rea of individual benefit. Someone may say that the decision seems to create some kind of contradiction because it says that even corporate officials are not having mens rea still the company could be held for offence. If the officials acted honestly, naturally the company also acted honestly. Therefore, the offence which requires mens rea ingredient is not complied. Hence it amounts punishing the honest company in the absence of mens rea. Here, the benefiting the company by illegal means itself is equivalent to the mens rea.

In Giridhar Lal Gupta v. D.H. Mehta and Another, Supreme Court of India faced the important question of interpretation of the word "in charge" under the Section 23-C of the Foreign Exchange Regulation Act,1947. Then the Chief Justice Sikri S.M speaking through Supreme Court interpreted the phase "a person in-charge and responsible for the conduct of the affairs of the company". It means, it is noticed that the word "company includes a firm or other association whether incorporated or not and the same test must apply to a director-in-charge of the company and an active partner of a firm who is in-charge of a business. In that context a person "in-charge" must mean that the person should be in overall control of the day to day business of the company or firm. Further Hon'ble Court clarified that when a partner in-charge of a business proceeds abroad, it does not mean that he ceases to be in-charge unless there is evidence that he gave up charge in favor of another person.

The ratio decedendi of the Court in respect of absence from the duty of office due to various other reasons unless the in-charge was given to others do not ceases to be in-charge, is worthy to be appreciated because it creates sense of obligation on the part of the concerned officer to give charge to others otherwise he would be held liable for the acts of his subordinate officers. That ultimately increases the quality of supervision and also control over the acts of subordinate officers and it reduces the scope of committing the offence.

However, the interpretation of the word "in-charge" must mean that he should have a control over the day to day business of the company or firm is not rational and appropriate in reducing the crimes of the company. Today's structures of the company are very complicated. Moreover, the powers of the officer of the company for running business of company are decentralized and distributed among the various officers from top to bottom. Under such circumstances identifying the person who is over-all in-charge of company is a hilarious task and some time the officers of the company can escape the liability on this ground also. Therefore this interpretation requires reconsideration that any officer who is in-charge of that concerned subordinate officers alleged act of offence should be held criminally liable even though officer may not have over-all control of the company's day to day affairs. This kind of interpretation is conducive for better implementation of deterrent philosophy of criminal justice system.

The Supreme Court had to deal with questions whether partnership firm is person or not and whether currency is goods or not under Sea Customs Act 1878 in M/s Agarwal Trading Corporation and others v. The Assistant Collector of Customs, Calcutta.

M/s Agarwal Trading Corporation was registered partnership firm carrying on business of import- export, brokers, commission agents and general merchants. Giridhari Lal and Pooran Mal Jain were partners of the firm. Bhagawan Tiwari servant of firm gave a consignment of wooden case to the Swiss Airways at Dum Dum Airport to be sent by airfreight to Hongkong. Sender and receiver name were fictitious. The shipping bill stated that consignment purported has contained Rassogolla, Achar, Papar and dried vegetables but in fact wooden case contained cash worth of Rs 51000. Custom authorities seized the wooden case and confiscated the cash under Section 8 of the Foreign Exchange Regulation Act,1947 1947 and punished the firm and Giridhar Lal under Section 23 of the Foreign Exchange Regulation Act,1947. Section 19 of the Sea Customs Act 1878 has been incorporated under the Section 23 of Foreign Exchange Regulation Act,1947.

Supreme Court speaking through Justice P. Jagan Mohan Reddy held that perusal of these provisions would show that neither gold or silver or any currency notes or coin, whether Indian or foreign can be sent to or brought into India, nor any gold, precious stones or Indian currency or foreign exchange other than foreign exchange obtained from an authorized dealer can be sent out of India without the permission of the RBI. These restrictions by virtue of Section 23-A of the Foreign Exchange Regulation Act,1947

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are deemed to have been imposed under Section 19 of The Sea Customs Act,1878.

The Second issue is that the partnership firm is not legal entity and therefore, it cannot be a person within the meaning of Section 8 of Foreign Exchange Regulation Act,1947 and The Sea Customs Act,1878. There is no definition of person either under Foreign Exchange Regulation Act,1947 or The Sea Customs Act,1878. However, person is defined under Section 2(42) of The General Clauses Act,1897 which means and includes any company or association or body of individuals whether incorporated or not. No doubt the registered company has a separate legal entity of its own which is different from its shareholders. But same norm will not be applied to partnership firm because firm does not enjoy separate legal existence from its partners. Partnership firm and partners are one and the same. But this general principle cannot be applied to present case because section 23C of Foreign Exchange Regulation Act,1947 negates this proposition.

For the purpose of section 23C, Company is defined as any corporation or a firm or other association of individuals and the Director in relation to a firm means a partner in the firm. Therefore, Supreme Court rightly pointed out that if there has been a contravention of any provisions of the Foreign Exchange Regulation Act,1947 and/or Sea Custom Act by a firm the partner who is in-charge of its business or is responsible for the conduct of the same cannot escape from the liability unless it is proved by him that the contravention took place without his knowledge or he exercised all due diligence to prevent such contravention.

The Supreme Court also rejected the third contention that it is only a particular partner against whom there is evidence of guilt should be held liable but not firm or partner of firm. The sufficient evidence has been produced by the prosecution that partner of the firm was interested in and involved in attempting to export currency notes out of India. Therefore the partner is also liable for the same. It means that any servant of the firm with intention to benefit the firm does any illegal act during the course of his employment; the firm becomes accountable to law. The ratio decedendi of the case is that unlike Company Partnership firm does not enjoy the separate legal existence but this can be negated only by the explicit provision of any particular legislation.

In M.V. Javali v. Mahajan Borwells & Co. the Supreme Court allowed the appeal of Income Tax Authority and directed the High Court of Karnataka to decide the case in light of interpretation of section 276-B and 278-B of Income Tax Act 1962 made by this Court.Division Bench of Supreme Court consisting Mukherjee, M.K.J, and Jagannatha Rao, JJ held that plain reading of above sections without any confusion manifestly makes inference that if an offence under the Act is committed by a company the persons who are liable to proceeded against and punished are: (i) the company (which includes firm),(ii) every person who at the time the offence was committed, was in charge of, and was responsible to the company for its conduct of business, and (iii) any director,(in relation to firm means partner), managers, secretary or other officer of the company with whose consent or connivance or because of neglect attributable to whom the offence has been committed.

The Supreme Court by exercising its power of interpretation through its innovative idea and dynamic judicial creativity observed that,

"we are of the opinion that the only harmonious construction that can be given to Section 276-B is that the mandatory punishment of imprisonment and fine is to be imposed where it can be imposed, namely on persons coming under categories (ii) and (iii) above, but where it cannot be imposed, namely on company, fine will be the only punishment. We hasten to add, two other interpretation could also be given: (i) that a company may be prosecuted, or (ii) a company may be prosecuted and convicted but not punished, but these interpretation will be dehorns Section 278-B or wholly inconsistent with its plain language."

The Supreme Court substantiated its finding on the following reasons,

". . . [T]hough the company had no physical body and traditional punishment might thus prove ineffective, the real penalty could be inflicted upon its respectability, that is by way of stigma. Therefore, it was appropriate that the company itself be punished so that in the public mind the offence would be linked with the name of the corporation and not merely with the name of the director or manager who might be a non-entity. Punishment of fine in substitution of imprisonment could solve the problem in this behalf."

Supreme Court negated the philosophy of Blackstone theory that courts merely interprets the law but does not make law. Judiciary is empowered by its power of interpretation that it may plug the loopholes or cure the defects by filling the gaps in the legislation where

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"casus omissus" is existed. This is well accepted norm of judiciary in the interest of justice based on the philosophy of "realism theory of law." The nutshell of this judgment is that the words "imprisonment and fine" will be read as "imprisonment or fine" in appropriate cases.

Therefore, judiciary has some extent modified the rule of punishment which is worthy to be applauded by considering the fact that legislature failed to carry necessary changes to IPC and other statutes which was overdue long ago. The judgment makes ratio that merely company cannot be imprisoned it does not mean that company is not guilty of such offences. Conviction and punishment are two different things. Supreme Court explicitly and loudly makes it clear that company cannot escape from its criminal liability on the technicality of law. Therefore, what matters for justice is substance not technicality.

Supreme Court of India faced the crucial question whether company could be prosecuted for terrorist offences under Section 3(4) of Terrorist and Disruptive Activities (Prevention) Act, 1987. In Kalpanath Rai v State (Through CBI), the Court held that TADA 87 is penal statute which prescribes heavy punishment with mandatory minimum punishment; therefore it should be construed strictly. Section 3(1) of TADA 87 being principal offences which constitute terrorist act unless done with mens rea, therefore section 3(4) which depends upon section 3(1) should also be read with implied requirement of mens rea. The company is being juristic person incapable of forming the mens rea and hence acquitted for the offence of harboring the offenders under the said provision.

Judgment was delivered by division bench of Supreme Court. Justice Thomas J who authored the judgment observed that,

"[t]he company is not a natural person. Mens rea being an essential ingredient of offence under Section 3(4), there is no question of prosecuting it for the same. In many recent penal statutes, companies or corporations are deemed to be offenders on the strength of the acts committed by persons responsible for the management or affairs of such companies or corporations. But there is no such provision in TADA which makes the company liable for the acts of its officers. Hence, there is no scope whatsoever to prosecute a company for the offence under section 3(4) of TADA."

Ratio of judgment makes inference that unless penal Statute explicitly makes company criminally liable for the acts of its officers who are responsible for the affairs of the company, and company could not be prosecuted for criminal offence on whatsoever reason is untenable. TADA had not defined the word "person".

However definition of person under General Clause Act is very clear that it includes the company also. General definitions defined under the General Clause Ac are applicable to all Central laws on those matters on which Central legislation is silent. Therefore section 3(4) of TADA read with definition of person under General Clauses Act is very clear that TADA offences are applicable to even company also.

High Court bench of Nagpur of Maharashtra in State of Maharashtra v. Messrs Syndicate Transport Co. (P) Ltd and others has empathically stated that mens rea can be attributed to company, if the act is committed by its servant during their discharge of their duty. Justice Paranjape J in that case observed that "ordinarily a corporate body like a company acts through its managing director or board of directors or authorized agents or servants and the criminal act or omission of an agent including his state of mind, intention, knowledge or belief ought to be treated as the act or omission including state of mind, intention, knowledge or belief of the company." United States of America's Supreme Court in the beginning of 19th century itself has held that corporation could be prosecuted for the criminal offences which require ingredient of mens rea based upon the theory of vicarious liability principles. Even the Common law legal system has also acknowledged during the middle of 19th century that corporation could not escape from the criminal liability on the ground that it is being juristic person and having incapacity to form the mens rea which is essential to constitute crime. Common law legal system adopted the doctrine of identification theory (alter ago) to make company accountable for criminal offences.

The Supreme Court of India, in, M.V. Javali v. Mahajan Borwells & Co has held that corporation shall be prosecuted for all those offences for which mandatory punishment is imprisonment. Further it observed that in case of company the Court has discretionary power to impose fine. In the light of these developments in the law, Supreme Court of India by adopting vicarious liability or identification theory should have held that corporation could be prosecuted for criminal offences even though such offences require mens rea. The only issue in this case should have been whether the person who is in charge of that Hotel, who gave shelter to the hard core terrorist has knowledge that accused are hard core terrorist. Secondly,

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question is, whether a person who gave shelter to those accused has intention of benefiting company than his personal benefit. If answers to these questions are in affirmative, then company should have been held criminally liable under section 3(4) of TADA.

In Assistant Commissioner, v. Velliappa Textiles Ltd, Division Bench of Supreme Court consisting of Justice S Rajendra Babu, Justice B.N. Srikrishna and Justice G.P. Mathur had to answer three issues,

1. Whether it is incumbent on the part of the authority to hear the accused before the authorization of sanction.
2. Whether the Mens rea of the person who is in charge of the affairs of the company could be attributed to the company.
3. Whether company could be prosecuted for all those offences for which mandatory punishment is imprisonment.

The Supreme Court per curiam held that permission for sanction is being administrative in nature and therefore, authorities are under no statutory obligation to comply the natural justice principles before authorizing the sanction for prosecution. Supreme Court affirmatively answered the second issue by saying that mens rea could be attributed to the corporation but negated the third issue by saying that corporation could not be prosecuted for all those offences for which punishment is imprisonment. Thus it has not followed the ratio decedendi of M.V. Javali v. Mahajan Borwells & Co in which it was held that corporation could be prosecuted for those offences for which imprisonment is a mandatory punishment.

Constitutional Bench of the Supreme Court in the Standard Chartered Bank v. Directorate of Enforcement explicitly affirmed the ratio decedendi of M.V. Javali case that corporation could be prosecuted for those offences for which mandatory punishment is imprisonment and overruled the ratio of Velliappa Textiles Ltd case. Court held that Section 56 of FOREIGN EXCHANGE REGULATION ACT,1947 read with the definition of "person" in General Clause Act where it is clearly mentioned that there is no immunity to the corporation from prosecution merely because the mandatory punishment is imprisonment. If prescribed punishment is imprisonment and fine the court can impose only the punishment of fine which could be enforced against the company. Such discretion is to be read into the Section. The ratio of Court suggested that word "imprisonment and fine" is applicable to natural person and the same should be read as "imprisonment or fine" in case of corporation.

The Supreme Court acknowledged that there is no dispute relating to the liability of corporation for the criminal offences even though there are authorities to the effect that corporations cannot commit crimes. Further, Court admitted the exception to the criminal liability of corporation that some of the crimes cannot be committed by the corporation as it is incapable of committing the crime by reason of the fact that they involve personal malicious intent. Here court observed that a corporation may be subjected indictment of other criminal process, though the criminal act is committed by its agent. As usual the Court failed to elaborate the principles or doctrines on which the company could be held criminally liable.

At one point they admitted that word "and" may be read as "or" or vice versa, then it must be uniformly applied. Under such circumstances, the Court may either impose fine or imprisonment. That would be contrary to the intention of the Legislators because legal person would not be subjected to punishment of imprisonment.

The Supreme Court of India categorically stated that in exceptional situation, whenever justice demands, the Court may over rule previous precedent and create new precedents. Judgment is logical, rational and appreciable because it is based upon the factual situation. Moreover their ratio is running close to the real life of the contemporary society. Whereas minority judgment resolving around the technicality of law based upon the ideology and philosophy which has no utility would not be certainly appreciated.

Even though the constitutional bench of Hon'ble Supreme Court firmly established the principle that corporation could be prosecuted for criminal offences for which mandatory punishment is imprisonment but yet that judgment is not free from criticisms. The Court reasoning that fine could be imposed on company instead of imprisonment is plausible. What the Supreme Court omitted to answer vital question is about the quantum of fine. In case of company imprisonment punishment of imprisonment is replaced by fine. Primary object of criminal law is being deterrent; therefore it prescribes imprisonment and fine as supplementary to that. Further, the word "fine" is not quantified by the figures except in the Securities and Exchange Board of India Act, 1992. Moreover, the concept of fine under criminal law, unlike compensation under civil law, does not involve of huge amount. Generally Court imposes meager amount in the

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form of fine on the offenders of the crime in the criminal justice system. If the judiciary imposes the fine on these lines on the company for its criminal liability, then it would be futile attempt on the part of judiciary to achieve the object of criminal law.

Therefore the Supreme Court should have laid down specific criteria for determining the fine amount objectively which should be in the nature of deterrent based upon the financial position of the offender of the company. Hence the discretionary power of judiciary to impose fine on offending company needs to be explicitly regulated based upon well-established parameters otherwise it would leads for subjective determination of fine which creates confusion and uncertainty and that may not work as deterrent factor.

Finally the Supreme Court of India decided to adjudicate the matter upon the rational principles rather than pragmatic and ad-hoc basis in Iridium India Telecom Ltd v, Motorola Inc. There were two issues before the Supreme Court of India to determine,

1. Whether non-disclosures of information amounts to deception.
2. Whether company could be prosecuted for criminal offences which mens rea is required.

The Apex Court has categorically stated that corporation could not be prosecuted for the offences unless the statute explicitly provides and mens rea which is an essential ingredient of crime cannot be attributed to company as it is juristic person. However the Supreme Court in this case noticed the developments which have taken in other country's legal system and differed from its earlier precedent.

Supreme Court has rejected the earlier view that corporation could not be prosecuted for criminal offences by referring the judgment of the Supreme Court of USA in New York Central & Hudson River Rail Road Co v United States

"We see no valid objection in law, and every reason in public policy, why the corporation, which profits by the transaction, and can only act through its agent and officers, shall be held punishable by fine because of the knowledge and intent of its agents to whom it has entrusted authority to act in the subject matter of making and fixing rates of transportation, and whose knowledge and purposes may well be attributed to the corporation for which the agents act. While the law should have regard the rights of all, and those of corporations no less than to those of individuals, it cannot shut its eyes to the fact that the great majority of business transactions in modern times are conducted through these bodies, and particularly that interstate commerce, is almost entirely in their hands, and to give them immunity from all punishment because of the old and exploded doctrine that a corporation cannot commit a crime would virtually take away the only means of effectively controlling the subject matter and correcting the abuses aimed at."

The reason for holding the corporation criminally liable and making criminal law to be applied is that now a day corporation is interacting with every person in the society and major commercial activities of the states are carried by the corporation itself. This being the situation, relying on the old doctrine and stating that corporation could not be prosecuted for criminal offences would be death note for criminal laws. Because they are only the means to control and regulate the discipline in the society.

Apex Court justified the application of law of crimes on the reasons cited in the above mentioned American case. But the Apex Court refused to relay upon the theory of "vicarious liability" of USA legal system to make corporation criminally liable but it thought that common law doctrine of "identification" or "alter ago" would be more appropriate to the Indian legal system because Indian legal system is the legacy of common law. Supreme Court approved the principles laid down by Lord Denning in the Bolton (H.L.) (Engg) Co. Ltd v T.J. Graham & Sons Ltd and quotes,

"A company may in many ways be likened to human body. They have brain and a nerve centre which controls what they do. They have also hands which hold the tools and act in accordance with directions from the centre. Sum 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 the will of the company, and control what they do. The state of mind of these managers is the state of mind of company and is treated by the law as such. So you will find that in cases where the law requires personal faults as condition of liability in tort, the fault of the manager will be the personal fault of the company. That is made clear in Lord Hldane's speech in Lennard's Carrying Co Ltd v. Asiatic Petroleum Company Ltd, (AC at pp 713, 714). So also in the criminal law, in cases where the law requires a guilty mind as a condition of criminal offence, the guilt mind of the directors or the managers will render the company themselves guilty."

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Further Supreme Court observed that afore said principles is firmly established by the House of Lords in Tesco Supermarkets Ltd v, Nattrass and it quotes,

"I must start by considering the nature of the personality which by a fiction the law attributes to a corporation. A living person has a mind which can have knowledge or intention or be negligent and he has hands to carry out his intentions. A corporation has none of these: it must act through living person, though not always one or the same person. Then the person who acts is not speaking or acting for the company. He is acting as the company and his mind which directs his acts is the mind of the company. There is no question of the company being vicariously liable. He is not acting as servant, representative, agent or delegate. He is an embodiment of the company or, one could say, he hears and speaks through the persona of the company, within his appropriate sphere, and his mind is the mind of company. If it is guilty mind then that guilt is the guilt of the company. It must be a question of law whether, once the facts have been ascertained, a person in doing a 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 statutory or vicarious liability."

The Lord Denning theory of "organic" has firmly established the criminal liability of corporation. Principles says that in case of natural person it is the brain which form the intention and regulates the hands, legs, and other organs of the body, therefore, guilty intention of brain is attributed to that person. In the same way the board of directors and managers are considered as the brain of the company. Because, they only regulate and control the activities of the company. Other servants and agents of the company will follow the instructions of such board of directors and managers of the company. Therefore, mind and thought of board of directors and managers is to be considered as the mind and thought of company.

Always the company is identified through the board of directors and managers. This is called the doctrine of "identification" or "alter ago" theory. Hence the mens rea of directors and mangers is imputable and attributable to the company. The Supreme Court of India by applying the theory of alter ago held that corporation could be prosecuted for the criminal offence even it requires the mens rea as an ingredient. Therefore it overruled the judgment given by Bombay High Court and paved the way for trial of Motorola Inc for the offence of cheating under Section 420 of IPC.

The doctrine of identification is applied by the common law in relation to the directors of company with company. It means that personality of company is identified with personality of directors of the same company. But in the case Motorola, the personality of directors of Iridium Inc is not identified with Iridium Inc but with Motorola Inc because it is who they appointed the board of directors and exercise control over them. Therefore Apex Court of India in fact has extended alter ago theory invented by the common law. Even in case of subsidiary company, the personality of directors is merged with personality of company in which they are appointed not with persons who have appointed them and regulates them. This kind of extension may likely to lead some kind of problem.

Further the theory of identification works out to be efficiently where the sole director is in charge of the company or board of directors have taken unanimous decisions. But that does not happen in reality. The Board of Directors is the body responsible for framing and implementing the policy for the company. The question is what about the honest directors who have opposed the guilty decision of the majority of directors. Under such circumstances honest mind of directors is clubbed with dishonest mind of directors and attributed to the company looks law is crude. But there is no alternative solution to this for holding company as one unit for criminal liability because company cannot be spilt for such liability and the only way for such honest director is to demit the office.

Even though the Supreme Court of India has evolved criminal liability of corporation upon the premises of principles of identification, yet it has not addressed one important issue where the directors and managers have taken the decision not with intention to benefit the company but to benefit themselves. The Board of Directors and managers in fact have two identities; one is in the capacity of individual and another in the capacity of directors. Suppose that person in capacity of individual abuses the position of directors and intended to benefit himself, takes decision on behalf of the company, would that circumstances warrants the application of doctrine of identification is another question which ought to have been answered by the judiciary. Logic suggests that company cannot be held criminally liable for such acts.

But the question is could company be prosecuted for all the offences prescribed in IPC. Supreme Court of India on previous occasions in align with decisions of the Supreme Court of USA held that company could not be prosecuted for offences like theft, treason, rape, sexual offences,

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bigamy, and murder etc but has not given comprehensive list. The question is, is it possible for the judiciary to answer the question. The Indian Judiciary has adopted the adversary system of adjudication which does not allow the courts to adjudicate the matter on hypothetical bases unless the matter is raised before the court through some kind of petition. To what offences company could be prosecuted can be answered only through comprehensive legislation enacted by legislators. Moreover it is domain of legislature because it is the matter of policy. Further it is domain of legislator to decide whether such kind of policy is appropriate in given circumstances or period.

Even though the Supreme Court has adopted the principles of alter ago on which company could be prosecuted for criminal offences in Iridium India Telecom limited case would not settle the matter of corporate criminal liability conclusively because it is given by the division bench of Supreme Court not by Constitutional Bench.

The Standard Chartered Bank case was decided by constitutional bench of Supreme Court but issue in that case was whether company could be prosecuted for those offences which carries imprisonment as mandatory punishment under the specific legislation of Foreign Exchange Regulation Act 1973 and Income tax Act 1963. But Supreme Court in Iridium case was decided under general law of Indian Penal Code which does not have specific provisions like Foreign Exchange Regulation Act, 1947 and Income Tax Act. Therefore, the ratio of Standard Chartered Bank case is not applicable to the crimes under Indian Penal Code. Further the another division bench of Supreme Court in Kalpanth Rai case held that corporation could not be prosecuted for those offences for which mens rea required. Hence, there are two conflicting decisions of Supreme Court of same hierarchy which needs to be resolved by the constitutional bench of Supreme Court otherwise the uncertainty or chaos in respect of criminal liability of corporation in the absence of specific provision in the IPC continues to be unabated which is not good in the larger interest of society as well as in the interest of the company.

5. CONCLUSION

Initially the judiciary in India was reluctant to impose criminal liability on the company on the ground that it was juristic person, therefore it was incapable of forming the mens rea. Gradually it changed the attitude and tried to hold the company liable for those criminal offences which do not require the mens rea ingredients.

However, it made clear that company could not be indicted for those offences which can be committed by only natural persons. Indian judiciary is akin to common law legal system therefore it adopted the common law theory of “alter ago” or “identification theory.”On the other hand whether company could still be indicted for criminal offence even when the officer intended to benefit him rather than benefit company. The theory of alter ago creates more problems when think tank of the company is consisting of multi member body. If there is unanimity among the board of directors, then it would not be problem to make company criminally liable. But, where the board of directors was divided over the decision, the problem is which directors brain would represent the company is difficult to determine it.

Another gray area about corporate criminal liability is about which Offence Company could be indicted. The judiciary is very firm that certain offence could be committed by only natural person not company like murder, rape, bigamy, adultery, theft and dacoity etc. It is very difficult to illustrate exhaustively for which offence company could be made liable.

So far Indian judiciary has exercised the option of imposing fine on company as punishment but never thought about the other option of punishments like winding up of the company, cancellation of license of company for particular business, disqualification of company for certain benefits, forfeiture of illegally earned profit by the company, probation of company, and the publication of company name in the newspaper or Tele Vision.

Another area in which judiciary is not made much inroad is whether the company is being accused person, can it claim the right of accused from the perspective of fair trial under the Article 14, 20, and 21 of the Indian Constitution. The question is about whether company could raise issue that its trial procedure is discriminatory because it is not allowed to take defense provided in the IPC which are available to natural persons. All these questions look very philosophical but sooner it would become reality.

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company, because a company cannot be indicted and charged for offences such as murder, dacoity, robbery adultery bigamy and rape etc., as these can only be committed by a human being. See, Gaur, K.D., The Indian Penal Code 35 (Universal Law Publishing Co. Pvt .Ltd, New Delhi, 4th edn., 2008). Further, Ratanlal and Dhirajlal also says that a company cannot be indictable for offences which can be committed by a human individual alone, like treason, murder, perjury etc., or for offences which are compulsory punishable with imprisonment or corporeal punishment. See, Ratanlal and Dhirajlal, The Indian Penal Code 3(LexisNexis Butterworths Wadhwa , Nagpur, 33rd edn., 2010).

4. J. W. C. Turner (ed.), Kenny's Outlines of Criminal Law 455 (Cambridge University Press, 19th edn., 1966).
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6. (1935) AC 462 (HL).
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11. King v. Daily Mirror News Paper Ltd (1922) 2 K.B. 530:(91 L.J.K.B.712)
12. AIR 1964 Bom 195.
13. Id. at 196.
14. State of Maharashtra v. Messrs Syndicate Transport Co. (P) Ltd and others, AIR 1964 Bom at 197.
15. SCC (3) 189.
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17. AIR 1972 SC 648.
18. Section 8(1) of Foreign Exchange Regulation Act,1947 Act says that the Central Government may by notification in the Official Gazette, order that subject to such exemptions, if any, as may be contained in the notification, no person shall except with the general or special permission of the RBI and on payment of the fee, if any prescribed bring or send into India any good or silver or any currency notes or bank notes or coin whether Indian or Foreign.
19. Section 23(1-A) of Foreign Exchange Regulation Act,1947 says whoever contravenes (a) any of the provisions of this Act or of any rule, direction or order made there under, other than those referred to in sub-section (1) of this section and section 19 shall upon conviction by a court, be punishable with imprisonment for term which may extend to two years or with fine or with both. Further section 23-A of Foreign Exchange Regulation Act,1947 says that without prejudice to the provisions of Sections 23 or to any other provisions contained in this Act, the restrictions imposed by sub-sections (1) and (2) of section 8, sub-section (1) of Section 12 and clause (a) of sub-section (1) of Section 13 shall be deemed to have been imposed under S 19 of the Sea Customs Act 1878 and all the provisions of that Act shall have effect accordingly …..
20. Section 19 of the Sea Customs Act 1878 says that the Central Government may from time to time by notification in the official Gazette, prohibit or restrict the bringing or taking by sea or by land goods of any specified descriptions into or out of India across any custom frontier as defined.
21. The Sea Customs Act,1878 (Act 8 of 1878).
22. The General Clauses Act,1897 (Act 10 of 1897).
23. A.T.Corpn v. Astt.Collector, Customs, AIR 1972 SC 654.
24. (1997) 8 SCC 72 at 75.
25. M.V. Javali v. Mahajan Borwells & Co (1997) 8 SCC 72 at 75
26. Id. at 76.
27. It is application of principle that a matter which should have been, but not been provided for in a statute cannot be supplied by courts, as to do will be legislation and construction. But equally there is opposite school of thought that such casus omissus can be cured by the judiciary in the interest of justice otherwise judiciary would be failing in its statutory obligation of discharging its duty.
28. Terrorist and Disruptive Activities (Prevention) Act, 1987 (Act 28 of 1987).
29. Kalpanath Rai v. State (Through CBI) (1997) 8 SCC 732.
30. AIR 1964 Bom 195.
31. Id. at 200.
32. New York Central & Hudson River Railroad Co v. United States 53 L Ed 613 : 212 US 481 (1908)
33. Lord MacNaghten held that circumstances may force us to acknowledge that knowledge of agent may be imputed to the body of corporate in, Director of Public Prosecutions v. Kent and Sussex Construction Ltd (1944) 1 All ER 119 : 1944 LJ KB 88 : 170 LT 41, Lord Denning in 1956 itself admitted that state of mind of directors and managers of the company is the state of mind of company on the basis of organic theory in H.L. Bolton (Engg) Co Ltd v. T.J. Graham &Sons (1956) 3 All ER 624 : (1957) 1 OB 159 (CA), finally House of Lords adopted the doctrine of identification theory and held that state of mind of high responsible officer is treated

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34. (1997) 8 SCC 72 at 75.
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36. Assistant Commissioner v. Velliappa Textiles Ltd (2003) 11 SCC 405 at 416.
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41. Id. at 42.
42. Standard Chartered Bank v. Directorate of Enforcement, AIR 2005 SC 2622.
43. Bengal Immunity Co v. State of Bihar, AIR 1955 SC 661.
44. S.15G, s.15H, and s.15H of the Securities and Exchange Board of India Act, 1992 have prescribed two modalities for imposing fine on companies for contravention of the Act. These sections use the words, "penalty of twenty five cores rupees or three times the amount of profits made out of such failure whichever is higher."
45. Iridium India Telecom Ltd v. Motorola Inc (2011) 1 SCC 74.
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52. 1972 AC 153: (1971) 2 WLR 1166 ; (1971) 2 All ER 127 (HL).
53. Iridium India Telecom Ltd v. Motorola Inc (2011) 1 SCC 74 at 99.
54. Ananth Bandu v. Corporation of Calcutta, AIR 1952 Cal 759. The Nagpur Bench of Bombay High Court in State of Maharashtra v. Messrs Syndicate Transport Co. (P) Ltd, AIR 1964 Bom 195, held that it is not disputed that there are several offences which could be committed only by individual human being, for instances, murder, treason, bigamy , rape, perjury etc. The Supreme Court in Kalpanath Rai v. State (Through CBI) (1997) 8 SCC 732, held that company could not be prosecuted for the offence related to terrorist offence under TADA 87. Further Supreme Court of India in Assistant Commissioner v. Velliappa Textiles Ltd (2003) 11 SCC 405, held that company could not be prosecuted for those offences which mandates the mandatory punishment of imprisonment. Even Constitutional Bench of Supreme Court in Standard Chartered Bank v. Directorate of Enforcement, AIR 2005 SC 2622, admitted the exception to the criminal liability of corporation that except for such crimes as a corporation is held incapable of committing by reason of the fact that they involve personal malicious intent.