



Deeming Fiction: The Statutory Intendment of Affixing Corporate Criminal Liability in India

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Abstract

This article discusses the statutory intendment pursued by the Indian judiciary in order to avoid the standstill issue of corporate criminal liability, by proper mechanism of fastening legal responsibility through the creation of a legal fiction. Far from giving corporations a shield to commit fraud, this concept narrows down the scope of escape by rejecting the plea that no one is to be held criminally liable for an act of another. This article studies the issue of how the judiciary has disallowed the notion that a body corporate cannot commit a criminal offence by reasoning out the scope of deeming fiction. This article also discusses the issue of one principle being compromised for another, arraigning the corporation along with the functionaries of the corporation. The authors argue that the principle of deeming fiction can capture the desirable features of other principles such as identification, attribution and lifting of the corporate veil. Further the authors demonstrate as to how this principle renders all other theories meaningless in the light of a plain statutory intendment, when put to use in its complete sense to have full effect. The application and use of various UK, USA, Canada, and Indian case laws has been adopted in order to understand and compare the

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above mentioned machinery of fastening culpability to the money making corporations, for the offences committed by them. Lastly, the authors feel that the courts, upon proper application of mind, have considered the issues of participation, responsibility and enforceability in each case, without which it would have been a futile exercise. The article concludes on the note that a blanket application of either principle would prove to be detrimental and statutory intendment would fasten the liability of deemed culpability, and proceeds against the corporation or the director or both, accordingly.

Keywords: Alter Ego, Attribution, Corporate Criminal Liability, Deeming Fiction, Identification.

Introduction

Individuals and corporations have always been in the news wherein maximizing profits is the sole criterion of their business. The white-collar crimes that they commit can be best defined as the illegal acts committed to enhance resources and profits by corporate employees on behalf of the corporation and with its support.¹ These crimes are a resultant of the deliberate acts and decisions of the corporate personnel to profit at the expense of its competitors, shareholders and general public.

Corporations, though juristic persons, could not be jailed since it did not possess the body of a natural being and it only existed in the contemplation of the law.² Under original common law, companies could not be convicted for any criminal offence,³ since

¹ ANNA LEON-GUERRERO, *SOCIAL PROBLEMS: COMMUNITY, POLICY, AND SOCIAL ACTION* 351 (Sage Publications 2013).

² Yedidia Z. Stern, *Corporate Criminal Personal Liability: Who is The Corporation*, 13 J. CORP. L. 125, 126 (1987).

³ PAUL ROBERTS, *STRICT LIABILITY AND THE PRESUMPTION OF INNOCENCE: AN EXPOSÉ OF FUNCTIONALIST ASSUMPTIONS* 37-41 (Oxford Scholarship Online, 2010).

they were held to be devoid of any natural existence, lacking the necessary *mens rea* and *actus reus* requirement.⁴

However this notion changed with the modernization and economic development across the world when criminal liability was touched upon in the earliest case of *Queen v. Great North of England Railways Co.*⁵ It was ruled by Lord Denman, that corporations could be held criminally liable for misfeasance. Where the law required a guilty mind as a condition of a criminal offence, the guilty mind of the directors or the managers rendered the company itself guilty.⁶ The American courts soon began to follow this trend and in the course of time the court started pressing on extending corporate criminal liability to all crimes not requiring intent.⁷ Thus, when a responsible agent of a body corporate put forward a document with the knowledge of its falsehood and intending that it should cause deception, this knowledge and intention was imputed to the body corporate.⁸

The convergence of aggravated yet justified public outrage at the unfettered greed, malice, misfeasance by corporate offenders, sweeping legal tools, evasion tactics, and aggressive prosecutions

⁴ JOHN C. COFFEE, JR., CORPORATE CRIMINAL RESPONSIBILITY, ENCYCLOPAEDIA OF CRIME AND JUSTICE, 253 (Sanford H. Kadish et al. eds., 1983).

⁵ *In re. Queen*, (1846) 115 Eng. Rep. 1294 (Q.B.).

⁶ *Lennard's Carrying Company Ltd. v. Asiatic Petroleum Company Ltd.* (1915) A.C. 705, 713-714 (in certain cases, where the law requires personal fault as a condition of liability in tort, the fault of the manager will be the personal fault of the company).

⁷ Kathleen F. Brickey, *Corporate Criminal Accountability: A Brief History and an Observation*, 60 WASH. U. L.Q. 393, 396 (1981); Vikramaditya S. Khanna, *Corporate Criminal Liability: What Purpose Does it Serve?* 109 (7) HARVARD L. R. 1477 (1996).

⁸ *Director of Public Prosecutions v. Kent and Sussex Contractors Ltd.*, (1994) 1 All.E.R. 119 (DC).

had many societal advantages. There was also a dire need for an effective and patent enforcement of law against corporations.⁹

Attribution and Identification Principle

In the wake of the series of corporate scandals, position of English Law changed tremendously. The hurdle of imputing a corporation for having criminal intent was overcome by the opinion of Viscount Haldane¹⁰ inventing a theory of primary corporate criminal liability for offences requiring fault which came to be known as the 'identification theory' or the 'alter ego' theory of responsibility. The company could not dissociate itself from the registered managing owner in an attempt to say that there was no actual fault or privity on part of the company.¹¹ This principle acknowledges the existence of corporate officers, who are the embodiment of the company when acting in its business. Landmark cases like *Bolton Engineering Co. v. Graham*¹² and *R v. Andrews Weatherfoil*,¹³ have held that where 'the acts and state of mind of those who represent the directing mind may be imputed to the company, is where the corporate will be held liable. A company may also be liable for the act of its servant even though that act was done in fraud of the company itself.¹⁴

⁹ Sanford H. Kadish, *Some Observations On The Use Of Criminal Sanctions In Enforcing Economic Regulations*, 30 U. CHI. L. R. 423, 430-35 (1963); *Developments In The Law – Corporate Crime: Regulating Corporate Behaviour Through Criminal Sanctions*, HARVARD. L. R. 92, 1227, 1231-42 (1979); Brent Fisse & John Braithwaite, *The Allocation of Responsibility for Corporate Crime: Individualism, Collectivism and Accountability*, 11 SYDNEY L. R. 468, 504-07 (1988).

¹⁰ *Lennard's Carrying Co. Ltd. v. Asiatic Petroleum Co. Ltd.* (1915) A.C. 705.

¹¹ *Id.* at 713-714.

¹² *H.L. Bolton Engineering*, (1957) 1 All.Eng. Rep. 159 (Q.B.).

¹³ *Weatherfoil*, (1972) 1 W.L. R 118.

¹⁴ *Moore v. Bressler Ltd.*, (1944) 2 All.Eng. Rep. 515 (Q.B.).

In *H.L. Bolton (Engineering) Company Ltd. v. T.J. Graham & Sons Ltd.*,¹⁵ Lord Denning, expressed that a company may be likened to a human body that had a brain and nerve centre which controlled what it did. It also had hands which held the tools and acted in accordance with directions from the centre. The personnel either consisted of servants and agents who were nothing more than hands and the others were the directors and managers who represented the directing mind and will of the company. The importance of incorporating this liability comes in certain circumstances when the liability has to be ascertained against the company as well as the human beings¹⁶.

The Supreme Court of Canada in *Dredge and Dock Case*,¹⁷ described the characteristics of the doctrine of identification theory, as:

- a. If according to the court an employee is the directing mind and will of the corporation in relation to the duty and responsibilities assigned to the employee by the corporation, the employee's actions and intentions are the action and intentions of the company itself. It was further provided that the employee should act within the scope of his authority.
- b. The essence of this test is that the identity of the directing mind and the company coincide when the directing mind is acting within his/ her assigned field of corporate operations i.e. field of operations may be geographic, or functional, or it may embrace the corporation's entire operations.
- c. A corporation may have more than one directing mind. Where corporate activities are geographically widespread, there will be several directing minds.
- d. Due to doctrine of identification, it is no defence for a corporation, to claim that:

¹⁵ *H.L. Bolton Engineering*, (1957) 1 All. Eng. Rep. 159, 172 (Q.B.).

¹⁶ GLANVILLE WILLIAMS, TEXT BOOK OF CRIMINAL LAW 970 (2nd ed. 1961).

¹⁷ *R v. Canadian Dredge & Dock Co.*, (1985) 1 S.C.R. 662.

- i. The Board of Directors or other corporate officers issued general or specific instructions prohibiting the criminal conduct. The corporation and its directing mind are one, and thus the prohibition from one controlling arm of the corporation to another controlling arm can have no effect in law;
- ii. The Board of Directors had no awareness of the criminal conduct and did not authorize or approve it.

Therefore, a corporation is construed to be in the same position in relation to criminal liability as a natural person and may be convicted of common law and statutory offences including those requiring *mens rea*.¹⁸ However, while dealing with criminal prosecution with respect to certain crimes punishable with fine, in certain jurisdictions, a corporation cannot be convicted except as specifically provided by the statute.¹⁹

Nevertheless, the courts had moved away from a blanket application of the identification principle towards a more critical examination of the statute creating the offence. In *Meridian Global Funds Management Asia Ltd v. Securities Commission*,²⁰ it was held that having regard to the legislation, the appropriate rule of attribution to be implied was that a company knew it was a substantial holder in a public issuer when that holding was known to the person who acquired it with the company's authority, irrespective of whether that person was properly described as the directing mind and will.

The UK Law even proposed to introduce a separate 'failure to prevent' offence aimed at corporations, coupled with a due

¹⁸ HALSBURY'S LAWS OF ENGLAND, CRIMINAL LAW, EVIDENCE AND PROCEDURE, 603 (Volume 11(1), 4th ed. London, Butterworths 1990); *Assistant Commissioner v. Velliappa Textiles Ltd.*, (2003) 11 S.C.C. 405, 423.

¹⁹ *Aneeta Hada v. Godfather Travels and Tours Pvt. Ltd.*, (2012) 5 SCC 661; *Avnish Bajaj v. State and Anr.*, 116 (2005) DLT 427; *Ebay India Pvt. Ltd. v. State and Anr.*, AIR 2012 SC 2693.

²⁰ *Meridian Global*, (1995) 2 A.C. 500.

diligence defence instead of targeting the directing mind. That said, it is evident that the dearth of significant corporate prosecutions so far can be attributed entirely to the obscurities in the identification of the directing mind.

In *Tesco Supermarkets Ltd v. Nattras*,²¹ Lord Reid clarified the distinction between primary liability through attribution and vicarious liability. Considering the nature of the personality which by a fiction the law attributes to a corporation, where the directors had set up a series of command through regional and district supervisors, they continued to be in control and the managers had to follow orders. Yet, since the board was found not to have delegated any of its functions, the branch manager could not be identified with the company. Therefore, the acts or omissions of shop managers could not be imputed to the company itself due to the delegation of the employees.

Thus, the concept of vicarious liability, which had its origin in the field of tort, has come to be applied, in the field of criminal law, to a corporate body. This was an elaborate version of the principle of attribution²², which has been developed by the courts to ensure that the object of a penal provision is not defeated and a corporate body does not escape by taking the plea that a juristic person²³ is incapable of committing any crime, far less an offence involving *mens rea*.²⁴ The fall out of the development of the principle of attribution was seen in the argument that in order to make a corporation liable for an offence, which requires criminal intent or knowledge, the criminal intent or knowledge of its officer or agent

²¹ *Tesco Supermarkets*, (1972) 1 A.C. 153.

²² Ross Grantham, *Attributing Responsibility to Corporate Entities: A Doctrinal Approach*, 19 COMPANIES & SEC. L.J. 168 (2001).

²³ *State of Maharashtra v. Mayer Hans George*, A.I.R. 1965 S.C. 722; W.O. RUSSELL, RUSSELL ON CRIME, 17 (12th ed. 2001); P.S.A. PILLAI, CRIMINAL LAW 27 (Lexis Nexis, Butterworths Wadhwa, Nagpur 10th ed. 2012).

²⁴ Timothy P. Glynn, *Beyond "Unlimiting" Shareholder Liability: Vicarious Tort Liability for Corporate Officers*, 57 VAND. L. R. 329, 357 (2004).

may, in a given case, be imputed to the corporation so as to render it liable.²⁵

Principle of Deeming Fiction in India

The above theory was missing in India since the Supreme Court had recognised the criminality of corporations with certain reservations, making its approach ill-defined and somewhat hesitant. *Firstly*, certain acts because of their nature cannot be committed by a corporation, such as rape, murder,²⁶ etc. and *secondly*, corporal punishment cannot be enforced against the corporation but the corporation could be punished by imposition of fine.²⁷ In order to induce compliance and establish a valid claim, most Indian statutes explicitly included references to corporations in definitions of personality²⁸. The controversy surrounding the guilt of corporations in offences requiring mandatory imprisonment as a punishment was also argued by the Law Commission of India²⁹ and an amendment to the Code had opined to allow the prosecution of corporations for such offences. In numerous cases it was argued that to permit proceedings against corporations for offences like cheating, which were tried with mandatory imprisonment, was both absurd and unfair³⁰. Moreover,

²⁵ R.S. Sodhi and Anr. and Manoranjan Pani and Ors. v. Partha Pratim Saikia, [2009] 151CompCas 583 (Guwahati).

²⁶ Patricia B. Rodella, *Corporate Criminal Liability for Homicide: Has the Fiction Been Extended Too Far?*, 4 J. L. & COM. 95, 105–09 (1984); John M. Hickey, *Corporate Criminal Liability for Homicide: The Controversy Flames Anew*, 17 CAL. W. L. R. 465, 466–67 (1981).

²⁷ RATANLAL & DHIRAJLAL, *THE INDIAN PENAL CODE 71* (Wadhwa & Co., Nagpur, 31st ed. 2006).

²⁸ CODE CRIM. PROC. § 11; General Clauses Act, 1897 § 3(42); Income Tax Act, 1961 § 2(31) (iii); Foreign Exchange Management Act, 1999 § 2(4); Competition Act, 2002 § 2(1); Prevention of Money Laundering Act, 2003 § 2(s); Indian Electricity Act, 2003 § 2(49).

²⁹ LAW COMMISSION OF INDIA, *The Code of Criminal Procedure, 1898*, Report No. 41 (1972), available at <http://lawcommissionofindia.nic.in/1-50/Report41.pdf>.

³⁰ PEN.CODE. § 420.

the alleged offence being one requiring the specific presence of *mens rea* could not be imputed to a company in any way. The court, after much speculation of the above mentioned authorities,³¹ accepted the universal position that corporations could be liable for offences requiring *mens rea*.³²

The honourable Supreme Court in the case of *Standard Chartered Bank v. Directorate of Enforcement*³³ while dealing with the Foreign Exchange Regulation Act, 1973, observed that Section 68 introduced a deeming provision which states that the person who was in charge of the company and was responsible to the company for the conduct of the business of the company, shall also be deemed to be culpable along with the company for the contravention of the provisions of the Act and liable to be proceeded against and punished accordingly.³⁴ Regarding the issue of proceeding against a corporation in offences necessitating mandatory imprisonment, the court has disallowed these claims and extended the ratio laid down in the *Standard Chartered Case*.³⁵

It was observed in the apex court's decision of *Iridium India Telecom v. Motorola Inc.*³⁶ that 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 a body of persons in control of its affairs. The degree and control of the person or the body of persons

³¹ *New York Central & Hudson River Railroad Co. v. United States*, (53 L. Ed. 613); *D.P.P. v. Kent and Sussex Contractors Ltd.*, (1944) 1 All. Eng. Rep. 119; *H.L. Bolton (Engg.) Co. Ltd. v. T.J. Graham & Sons*, (1956) 3 All. Eng. Rep. 624; *Tesco Supermarkets Ltd. v. Nattrass* (1971) All. Eng. Rep. 127; *The Director, Central Railway Company of Venezuela v. Joseph Kisch* (1867) 15 W.R. 821; *Lennard's Carrying Co. Ltd. v. Asiatic Petroleum Co. Ltd.*, (1915) A.C. 705.

³² *State of Maharashtra v. Syndicate Transport Co. (P) Ltd.*, 1964 Cri. L.J. 276.

³³ *Standard Chartered Bank*, (2005) 4 S.C.C. 530.

³⁴ *Id.* at 543-545.

³⁵ *Id.* at 546.

³⁶ *Iridium India Telecom*, A.I.R 2011 S.C. 20.

was established to be the requisites for identification of the directing mind. If the same were found to be intense then a corporation may be said to think and act through the person or the body of persons. Again, the apex court excluded the immunity of corporations from criminal prosecution on the grounds that they were incapable of possessing the necessary *mens rea* for the commission of criminal offences. In fact the notion that a corporation cannot be held liable for the commission of a crime had been discarded by adopting the Doctrine of Attribution and Imputation.

This concept had a striking affinity with the statutory fiction applied to *In Re Levy*,³⁷ wherein it was held that “when a statute enacts that something shall be deemed to have been done, which, in fact and truth was not done, the Court is entitled and bound to ascertain for what purposes and between what persons the statutory fiction is to be resorted to.” Likewise *East End Dwellings Company Ltd. v. Finsbury Borough Council*³⁸, observed that if it is to treat an imaginary state of affairs as real, then surely, unless prohibited from doing so,³⁹ also imagine as real the consequences and incidents, which, if the putative state of affairs had in fact existed, must inevitably have flowed from or accompanied it. The statute says that it must imagine a certain state of affairs; it does not say that having done so, it must cause or permit the imagination to overwhelm when it comes to the inevitable corollaries of that state of affairs.

A corporate is assimilated into the pre-existing individualistic structure of law by pursuit of fiction and analogy with a natural person.⁴⁰ In other words the criminal intent of the alter ego of the

³⁷ 1881 (17) Ch. D. 746.

³⁸ *East End Dwellings Company Ltd.*, (1952) A.C. 109.

³⁹ In construing the legal fiction, courts are not permitted to go beyond the language of the statute by which it is created, *C.I.T., Bombay City v. Shakuntala*, A.I.R 1996 S.C. 719, 722.

⁴⁰ *Assistant Commissioner v. Velliappa Textiles Ltd.*, (2003) 11 S.C.C. 405, 420-423. See Jess M. Krannich, *The Corporate "Person": A New Analytical*

company or the body corporate that guided the business of the company would be imposed against the corporation.⁴¹The origin of this theory can be traced back to the Texas Supreme Court's⁴² description of veil piercing which can be achieved by looking at the actual dealings and close nexus between the shareholder and the corporation. Under the alter ego theory, the courts disregard the corporate entity when there is an existence of such unity between the corporation and individual, and the separate existence of the corporate ceases to exist, thus, making it liable.⁴³

A company exists, because there is a statutory rule, which provides that a *persona ficta* shall be deemed to exist, and will have certain powers, rights and duties of a natural person. This proposition about a company has to necessarily involve a reference to a set of rules.⁴⁴ That said there would be little sense in deeming such a *persona ficta* to exist unless there were also rules to exemplify the acts which were to be counted as acts of the company. It is, therefore, a necessary part of corporate personality that there

Approach to a Flawed Method of Constitutional Interpretation, 37 LOY. U. CHI. L. J. 61, 62 (2005).

⁴¹ *Id.* at 426, 437.

⁴² *Mancorp, Inc. v. Culpepper*, 802 S.W.2d 226, 228 (Tex 1990); *Castleberry v. Branscum*, 721 S.W.2d 270, 272 (Tex. 1986).

⁴³ The total dealings between the shareholder and the corporation are relevant in determining whether there is an alter ego relationship.; See also *Gentry v. Credit Plan Corp. of Houston*, 528 S.W.2d 571 (Tex. 1975). The Supreme Court of Texas has stated that the evidence may include "the degree to which corporate formalities have been followed and corporate and individual property have been kept separately, the amount of financial interest, ownership and control the individual maintains over the corporation, and whether the corporation has been used for personal purposes." See *Mancorp, Inc. v. Culpepper*, 802 S.W.2d 226, 228 (Tex 1990); *Castleberry v. Branscum*, 721 S.W.2d 270, 272 (Tex. 1986).

⁴⁴ *Meridian Global Funds Management Asia Ltd v. Securities Commission*, (1995) 2 A.C. 413.

should be rules by which acts are attributed to the company and these may be called 'the Rules of Attribution'.⁴⁵

The true extent of the rule of attribution is yet to be ascertained in Indian law. The current trend⁴⁶ of simply aggregating the acts and omissions of two or more natural persons acting for the corporation could have absurd results, as seen in *United States v. Bank of New England*.⁴⁷ It has been observed quite often that corporations acquire a momentum and dynamism of their own which temporarily transcends the actions of their officers.⁴⁸ Companies strategically maintain control from afar but leave certain operations and safety mandates in the hands of local managers and the host government.⁴⁹ This way the control can be maintained, while liability is evaded.⁵⁰ In these cases, the simple aggregative Rule of Attribution would not suffice in attaching liability.⁵¹

⁴⁵ STEPHEN M. BAINBRIDGE, *THE NEW CORPORATE GOVERNANCE IN THEORY AND PRACTICE* 25–30 (2008); Jess M. Kannich, *supra* note 41 at 64–90.

⁴⁶ Helen Anderson, *Directors' Liability for Corporate Faults and Defaults - An International Comparison*, 18 PAC. RIM L. & POL'Y J. 1, 34–44 (2009).

⁴⁷ *United States*, 821 F.2d 844 (1987). The knowledge of a corporation is the sum of the knowledge of all of its employees; totality of what all the employees know within the scope of their employment. A corporation could plead immunity by asserting that the information obtained by several employees was not acquired by any one individual who then would have comprehended the full import.

⁴⁸ ANDREW ASHWORTH, *PRINCIPLES OF CRIMINAL LAW* 117 (5th ed. 2006).

⁴⁹ Reinier H. Kraakman, *Corporate Liability Strategies and the Costs of Legal Controls*, 93 YALE L.J. 857 (1984).

⁵⁰ Cassels, Jamie, "The Uncertain Promise of Law: Lessons From Bhopal", 29 OSGOODE HALL L. J. 1, 20 (1991).

⁵¹ The company and the individuals acting for it merge into a single legal entity, and the individual's acts are distributed from the individual and attributed to the company. See Grantham, *supra* note 23 at 171; See Stern, *supra* note 2 at 129; See also Yedidia Z. Stern, *Corporate Liability for Unauthorized Contracts-Unification of the Rules of Corporate Representation*, 9 U. PA. J. INT'L BUS. L. 649 (1987).

However, India too is taking a step forward to incorporate the principle by creating a deeming fiction in law so as to attach liability to the law breakers. The major reason for not having the Identification and Attribution Principle incorporated into the Indian corporate law was because the Principle of Deeming Fiction fit well into the system and provided for improved affixing of liability.

In the landmark judgments of *Aneeta Hada v. Godfather Travels and Tours Pvt. Ltd.*, and *Avnish Bajaj v. State and Ebay India Pvt. Ltd. v. State and Anr.*,⁵² the honourable Supreme Court, while dealing with Section 141 of the Negotiable Instruments Act, 1881, observed that when a statute clearly stipulated that a person which is a company commits an offence, then certain categories of persons in charge as well as the company would be deemed to be liable for the offences under the given section. Thus, the statutory intendment is absolutely plain. When a legal fiction is raised, the ingredients must be satisfied. The provision makes the functionaries and the companies liable by virtue of deeming fiction.⁵³ It has been held to be the bounden duty of the court to ascertain for what purpose the legal fiction has been created. It is also the duty of the court to imagine the fiction with all real consequences and instances unless prohibited from doing so.⁵⁴ However, legal fictions are created only for some definite purpose. The court has to give effect to the language of the section when it is unambiguous and admits of no doubt regarding its interpretation, particularly when a legal fiction is embedded in that section.⁵⁵ That apart, the use of the term 'deemed' has to be read in its context and further, the fullest logical purpose and import are to be understood.⁵⁶

⁵² *Aneeta Hada*, (2012) 5 S.C.C. 661.

⁵³ *Matrix Cellular Services Pvt. Ltd. Through Capt. Rakesh Walia v. Sanjoy Mukherji & Ors.*, 196 (2013) D.L.T. 649; *Raj Pal Kapil v. State of Himachal Pradesh and Another*, 2013 (3) Shim.L.C. 1248.

⁵⁴ *The Bengal Immunity Company Ltd. v. State of Bihar and Ors.*, A.I.R. 1955 S.C. 661.

⁵⁵ *N. Elangovan v. C. Ganesan*, 2014 (4) M.L.J. (Crl.) 517.

⁵⁶ *Aneeta Hada*, (2012) 5 S.C.C. 661

In *Vodafone International Holdings B.V. v. Union of India (UOI) and Anr.*,⁵⁷ the Court adopted the purposive construction of the enactment and held that a legal fiction has a limited scope and it cannot be expanded by giving purposive interpretation particularly if the result of such interpretation is to transform the concept of chargeability of the provision. Section 9(1)(i) of the Act applied to the assessment of income of non-residents and held that it was brought in by the legislature to avoid any possible argument on the part of the non-resident vendor that profit accrued or arose outside India by reason of the contract to sell having been executed outside India; rather this income was fictionally deemed to accrue or arise in India.⁵⁸

Reading into the intent of the legislature, the Constitution Bench, in the case of *State of Tamil Nadu v. Arooran Sugars Ltd.*,⁵⁹ while dealing with the deeming provision in a statute, ruled that the role of a provision in a statute creating legal fiction is well settled. The Bench made reference to *The Chief Inspector of Mines and Anr. v. Lala Karam Chand Thapar Etc.*⁶⁰ *J.K. Cotton Spinning and Weaving Mills Ltd. and Anr. v. Union of India and Ors.*⁶¹ *M. Venugopal v. Divisional Manager, Life Insurance Corporation of India*⁶² and *Harish Tandon v. Addl. District Magistrate, Allahabad*⁶³ and eventually held that when a statute creates a legal fiction saying that something shall be deemed to have been done which in fact and truth has not been done, the court has to examine and ascertain as to for what purpose and between whom, such a statutory fiction is to be resorted to and thereafter, the courts have to give full effect to such a statutory fiction and it has to be carried to its logical conclusion.

⁵⁷ *Vodafone International Holdings B.V.*, (2012) 6 S.C.C. 613.

⁵⁸ *Id.* at 672-675.

⁵⁹ *State of Tamil Nadu*, A.I.R. 1997 S.C. 1815.

⁶⁰ *The Chief Inspector of Mines*, A.I.R. 1961 S.C. 838.

⁶¹ *J.K. Cotton Spinning*, A.I.R. 1988 S.C. 191.

⁶² *M. Venugopal*, (1994) 2 S.C.C. 323.

⁶³ *Harish Tandon*, (1995) 1 S.C.C. 537.

In *S.M.S. Pharmaceuticals Ltd.v. Neeta Bhalla and Anr.*,⁶⁴ it has been observed that the criminal liability on account of dishonour of cheque primarily falls on the drawee (*sic* drawer) company and is extended to the officers of the company and as there is a specific provision extending the liability to the officers, the conditions incorporated in the section are to be satisfied. Therefore, if a party attempts to use the Alter Ego Doctrine to characterize the assets of a corporation as the assets of its shareholder, such 'reverse piercing' may be sought in order to hold a corporation liable for the controlling shareholder's debt. Since, it is a rule that a corporate officer or agent is personally liable to third parties if he sanctions, directs or actively participates in the commission of an offence⁶⁵; unless it was proved that an accused had participated in issuing any cheque, he could not be held responsible for the dishonour of the same.

Considering the vicarious liability of the directors, managing director and chairman of a corporate entity in penal offences, the Supreme Court reiterated that no vicarious liability can be attributed unless the statute specifically provided so. It is well settled that penal provisions must be construed strictly and in case no vicarious liability is provided in the statute, the same cannot be attributed.⁶⁶ Thus, an individual who has perpetrated the commission of an offence on behalf of a company can be accused, along with the company, provided there is sufficient evidence of his active role coupled with a 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.⁶⁷

⁶⁴ *S.M.S. Pharmaceuticals*, (2005) 8 S.C.C. 89.

⁶⁵ *Lemon v. Harlem Globetrotters Intern., Inc.*, 437 F. Supp. 2d 1089, 1110 (D. Ariz. 2006); *Mill Run Assocs. v.*

Locke Prop. Co., 282 F. Supp.2d 278, 287 (E.D. Pa. 2003).

⁶⁶ *Sham Sunder v. State of Haryana*, (1989) 4 S.C.C. 630.

⁶⁷ *Sunil Bharti Mittal v. Central Bureau of Investigation*, A.I.R. 2015 S.C. 923; *Vinod Kashyap and Ors. v. Central Bureau of Investigation*, 2015 (1) J.C.C. 749.

However, even if such a state of mind is imputed to a corporation, in cases where punishment for the offence necessitates mandatory imprisonment,⁶⁸ the stage of sentencing creates a fresh quandary for the courts. This hurdle is overcome by the crystallization of vicarious liability of a person who was in charge of company, since a company by itself cannot be punished, in the sense that a sentence of imprisonment cannot be imposed upon it. On the legal principle that the essence of vicarious liability is inextricably entwined with the liability of the primary or principal offender; the Principle of Vicarious Liability has been enacted by deeming fiction as it were, prescribing that every person at the time of commission of the offence, in charge of and responsible to its affairs, shall be deemed guilty. The emphasis here is that vicarious liability is fastened on every person who was in charge at the time of commission of the offence concerned.⁶⁹

Therefore, applying the deeming fiction in its complete sense itself will have the requisite effect, ostracizing the vague concepts of 'identification', 'attribution' and 'lifting the corporate veil' and, in fact, put the directors and the officers responsible in a deemed concept compartment, based on certain guided parameters.

Conclusion

After rendering due regard to the circumstances of each case, the scheme of the provision gives choice to the complainant to proceed against some or all such directors, 'deemed liable'. Accordingly, it is advisable that the courts should first scrutinize the character of the duty that has purportedly been breached and then conclude as to whom such duty is owed, instead of only examining the participation in an act, negligent conduct of the director or officer, or exercise of control over a business. It is pertinent to note that the directors and officers of the company discharging the internal duties, such as supervisory or management tasks within the framework is protected from liability which should fall directly on

⁶⁸ Standard Chartered Bank v. Directorate of Enforcement, (2005) 4 S.C.C. 530, 563.

⁶⁹ Meenu Bhist v. Vijay Kumar Gupta and Anr., 141 (2007) D.L.T. 923.

the corporation as such. Conversely, culpability should be arraigned for breaches of external duties wherein a negligent conduct forms a major part of the breach. Nonetheless, this relief from personal liability risks the misuse by engaging in intentional infliction of harm and fraudulent conduct. The duty based and participation theories can be put to good use to impute liability. Nevertheless, a blanket application of any principle cannot be constructive.

Even then this form of a statutory fiction has proven to be a much successful mechanism in such cases as it is open to the person concerned, to prove that the offence was committed without his or her knowledge and that he or she had exercised all due diligence to prevent the commission of such offence and break the deeming fiction and ultimately get acquitted. It may be implemented when the judiciary explicitly states that when the company is the offender, vicarious liability of the directors cannot be imputed automatically, in the absence of any statutory provision to this effect. Besides fastening liability upon the company and such persons on the basis of 'deemed culpability', the penal clauses in the above mentioned legislations contain a provision to impose liability upon director, manager, secretary or other officer of the company, if it is proved that the offence has been committed with the consent or connivance of, or is attributable to, any neglect on the part of, any such director, manager, secretary or other officer of the company, and he shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly. In cases where the corporation is insolvent and corporate agents cannot be the subject of any claims, the offended creditor may not have sufficient recourse. The company as well as every individual responsible to the company for the conduct of business of the company, at the time of commission of the offence is deemed to be guilty of that offence. This does not however lead to an assumption that each and every director or each and every person responsible to the conduct of its business has to necessarily be impleaded in the complaint and proceeded with. In the corporate context, courts should embark on examining whether the culpability falls on the corporation, the director or officer, or both, who owed a duty to the third party.