

# Corporate Liability: A Conceptual Study and Procedural Aspects under Indian Scenario

Meenu Sharma<sup>1</sup>, Dr.Sachin Rastogi<sup>2</sup>

## ABSTRACT

With the expansion of trade and methodology of carrying it posed various challenges including for proceeding against wrong committed by corporation through its directors and/or functionaries once corporation has been given legal status as a 'juristic person', separate and distinct from its members, the ascertainment of corporate liability crossed its field of operation overlapping the liability under core criminal law and the liability under special laws, besides the civil liability. In addition, the liability for Mis-feasance, Non-feasance and Mal-feasance emerging in common law entered the arena of statutory laws under Indian scenario. In almost all the jurisdictions of developed countries 'person' includes the incorporated entities especially corporations/companies, despite the position that the company does not have a brain or soul of its own, it can be held liable for both civil and criminal liabilities. The Liability is not so simple to trace but is divergent as reflected from different statutes including the vicarious nature of liability. There are core statutes like Civil and Criminal Procedure Code on one side but on the other there do exist the Tribunals to address some spheres of Corporate Liability for which the special laws have created substantive obligation for breach of which a liability both Civil and Criminal. The Statue also in limited areas addressed the liability for Mis-feasance, Non-feasance and Mal-feasance. The concern of the Research Article is to ascertain the areas of Corporate Liability from divergent statutes, procedure for proceeding and procedures applicable. For this purpose topic titled as 'Corporate Liability : A Conceptual Study and Procedural Aspects under Indian Scenario' is deliberated on doctrinal methodology on the strength of primary and secondary source of data where by one sores of date is corroborated with other for arriving at conclusions and suggestions

## Keywords

Corporation, Incorporation, Civil Liability, Criminal Liability, Mis-feasance, Non-feasance and Mal-feasance, Vicarious Liability

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## Introduction

The topic under title 'Corporate Civil Liability: A Conceptual Study and Procedural Aspects under Indian Scenario' is a topic of essence keeping in view the expansion of trade and commerce with application of different statutes to provide regulatory mechanism. The conceptual approach to corporation and their civil liability has been of debate since the emergence of companies as incorporated persons capable to sue and being sued in its own name. Solomon's case laid the foundation of company as a body corporate which is separate and distinct from the person who constitute it. The Company as incorporated personality is considered as an artificial person which comes into life and dies only as per the provisions of the law. The analysis of decided cases leads one to believe the distinct nature of company notwithstanding the language used in different pronouncements. It is also observed that a company as a separate individual has its own name and common seal, it holds its own assets and liabilities and can sue and be sued in its own name. It is an association of individuals who have come together in order to achieve a common purpose. The company is a fictitious person created by the law and is completely distinct from the members or shareholders who constitute it to the extent that even the properties of the companies are not termed as the properties of the shareholders. However, despite the reality that the company does not have a brain or soul of its own, it can be held liable for both civil and criminal liabilities.

## Corporate Liability in Different Aspects:

The Corporate Liability in different aspects by now has concretized into civil and criminal liability. But in addition

to this the liability for Mis-feasance, Non-feasance and Mal-feasance against its directors/functionaries and vice-versa under exceptional circumstances against the company itself is not ruled out. In addition by incorporation of social obligations on corporate entity in the form of Corporate Social Responsibility (CSR), the company becomes subject to civil liability if it fails to fulfill its obligations towards CSR. In subsection 5 of Section-134 it is clearly revealed that board of company ought to spend 2 percent of average net profit towards corporate social responsibility. The Average net profit is to be computed on the bases of three financial year profit position. However the Companies Act, 2013 provides solace by mentioning that if the company fails to spend such amount, the Board shall, in its report made under clause (o) of sub section (3) of section 134, specify the reason for not spending the amount. These aspects will be further dealt in later part of this Article.

## Corporate Penal Liabilities:

Coming out from aforesaid deliberations, one finds the applicability of Penal Laws as is clear from the provisions of Indian Penal Code which in its section 11 defines "person". Thus Company can be proceeded for criminal liability, the procedure for proceeding is provided under 305 of the Criminal Procedure Code, 1860, the relevant portion of which says that in case of corporation as an accused, it may appoint any person as a representative for the Inquiry or Trial. The relevant portion also says that the appointment of representative may not be under the seal of the corporation. The representation so made on behalf of company shall be construed as compliance to the presence of accused before Court or Authority for any such trial or inquiry. The Companies Act, 2013 itself carries Criminal

Liability for Misrepresentation but Courts insist for establishing the Men's-rea as far as criminal action is concerned.

### Corporate Civil Liability:

This apart for Civil Liability company is considered to be a legal person with separate legal entity and has the right to sue and be sued. Therefore, a company owes both the civil and the criminal liability for its actions. The Law provides procedure for proceeding towards Civil Liability in Order XXIX of the Civil Procedure Code 1908 which provides :

“Suits by or against Corporations

1. Subscription and verification of pleading.—In suits by or against a corporation, any pleading may be signed and verified on behalf of the corporation by the secretary or by any director or other principal officer of the corporation who is able to depose to the facts of the case.

2. Service on corporation.—

Subject to any statutory provision regulating service of process, where the suit is against a corporation, the summons may be served—

(a) on the secretary, or on any director, or other principal officer of the corporation, or

(b) by leaving it or sending it by post addressed to the corporation at the registered office, or if there is no registered office then at the place where the corporation carries on business.

3. Power to require personal attendance of officer of corporation.—The Court may, at any stage of the suit, require the personal appearance of the secretary or of any director, or other principal officer of the corporation who may be able to answer material questions relating to the suit. Although the company is a creation of the law having no brain or body of its own and operating through the minds of the board of directors, it can still be held liable for civil damages. Civil liability of a company can be described as an obligation of the company to compensate the third party in case of any physical injury or damages caused to the property by the representatives of the company during their course of employment. The company can be held liable for the civil

wrongseither vicariously or under the provisions of the Companies Act, 2013. The liabilities under the above-mentioned heads are elucidated as under:

### Vicarious Liability of a company:

The company can be made vicariously liable for the wrongs committed by its employees or servants that are committed by them in the course of employment of the company. This concept of vicarious liability is based on the legal maxim *qui facit alium facit per se* which means that any authorized act which is done through another person is deemed to be done by that person himself. Therefore, any act which is done by the employees or directors of the company for the fulfilment of the objectives of the company shall be deemed to be done by the company itself. Consequently, any harm which is caused to any third person is so doing that act shall be attributed to the company as well. Reference among others may be made to section 237 Of the Contract Act , 1872 which

deals with the liability of principal inducing belief the agent's unauthorized acts were authorized .

The section is clear in itself which requires apparent Authority of agent like directors /officials of company and exercise of such authority during the course of employment. However, the moot question involved here is the meaning of the term 'course of employment'. The term course of employment means anything which is done by the director/agent of the company on the behalf of the company which the company was legally authorized to do. Therefore, anything which is done by the agent of the company for doing which the company had no powers under the statute or the articles of association cannot be termed as done in the course of employment of the company.

A controversy which however revolves around the concept of vicarious liability is that since the company does not have a mind of its own, therefore can it be held vicariously liable for offences

involving malices such as the offence of defamation? This question was answered in affirmative by

Lord Lindley in the case of *Citizen's Life Assurance Company vs.*

*Brown* in which the company

was held liable for defamatory statements made by the Superintendent of the company against the company's ex-employee.

Therefore the company can be made liable for the tort committed by the servant or agent of the company against the third person irrespective of the fact whether malice is an important element of the tort or not provided that the tort must be committed in the course of employment with the company.

### Civil Liability under the Companies Law:

Apart from the vicarious liability of the Company for the acts of its directors and employees, the company can also be held liable for civil damages under the Companies Act, 2013. Section 35 of the Companies Act, 2013 stipulates that the company shall be liable for all the losses suffered by any person who has subscribed to the shares of the company by relying on any misleading statement mentioned in the prospectus. The company shall become liable to pay compensation to every person who has sustained a loss because of such misstatements.

The statement mentioned in the prospectus is deemed to be untrue if it pertains to the material terms of the prospectus based on which the investor took the decision of investing in the company. One of the major advantages of proceeding for civil liability under Section 35 of the Companies Act, 2013 is no requirement to prove malice or fraudulent intention on part of the company or its directors. If the statement is false or fraudulent, the company and its directors can be made liable under Section 35 of the Companies Act, 2013.

According to section 35 of the Companies Act, 2013, the company and the officers of the company shall be held liable for the misstatement in the prospectus and to pay the compensation to all the persons who suffered losses due to that misfeasance. Instances for this are many and reference can be made to an old English case of *Derry V. Peek* wherein the directors escaped the liability because they honestly believed the statement made to be true . Likewise

one may also refer to earlier Judgement of Peek V. Gurney observing that purchaser of shares in open market has no remedy against the company or the promoters though he might have bought on the faith of the representations contained in the prospectus .

### Corporate Social and other Obligations:

In continuation to earlier introductory remarks and as already deliberated that the Section 135 of the Companies Act, 2013 envisages the Corporate Social Responsibility of the Company towards the society and the environment out of the profits earned by the Company in a financial year. Nowadays, CSR has become the most important part of the company towards the sustainable development of the corporate regime. CSR reserves the environment and the society from pollution and different toxic substances by using different technologies and methodologies. CSR and the Environmental management will give an insight to the organizations in order to maintain the corporate sustainability. It acts as an aid to the government from the corporations.

The Companies (Amendment) Act, 2019 brought stringent provisions of the CSR policies for the large companies and made CSR a punishable offense. But, the Finance Minister, Nirmala Sitharaman had declared in a Press Conference that the intention of the government is just to enhance the corporate regime and not to punish any person. She stated that CSR will be treated as a civil wrong and not a criminal offense. Hence, the company has a civil liability towards the environment and the society.

#### Director's liability –

The directors of the company can be held liable if they commit

- Negligence
- Breach of trust
- There has been misfeasance or misstatement in prospectus
- Has acted ultra vires to MOA or AOA of the company

According to section 35 of the Companies Act, 2013, the company and the officers of the company shall be held liable for the misstatement in the prospectus and to pay the compensation to all the persons who suffered losses due to that misfeasance.

#### Auditor's liability –

Section 477 of the Companies Act, 2013 the court can summon the auditor to produce his books of accounts in the court due to breach of his duty or negligent acts on his parts. If auditor is found to be liable, then the compensation can be claimed from him for the losses suffered by the third parties due to their negligent acts. And if no loss is suffered by the party due to such act, then no liability arises.

#### Other Civil Liabilities of Company –

The civil liability occurs if the representatives of the company cause any bodily injury or injury to the property of the third-party or their clients during their course of employment and the liability can be covered through the insurance policies. The insurance policies are offered to the clients for the risk management. It may cover:

- General civil liability- It is the company's obligation for the physical loss and damage to the property of the client.
- Professional civil liability- Any act of negligence done by the company in relation to the intellectual services. It amounts to tortious liability of the company if they do not take due care of their acts and causes breach of their duty.
- Product liability- It arises if a consumer wants to claim against a defective product. To safeguard the interest of the consumer of the goods, the companies have to compensate them for the damages caused. The Consumer Protection is the utmost priority of every organization, and if the product is defective or not up to the standards, then consumer can claim the damages against those products.
- Environmental damage- It is based upon the "polluter pays" principle and any harm done to the environment. According to Polluter pays principle, the liability lies upon the polluter to remove the toxic substances and bring back the originality of the environment. Therefore, CSR ensures that the environment is not harmed by the technologies used by them.
- Personal liability- It is to prevent the cyber risk and to prevent the leakage of the personal information of the parties. Right to Privacy is the fundamental right to every individual and if a company is taking personal information of the consumers, then it is their responsibility to safeguard that information and prevent it from being shared. Prevention of the cyber risks is the most important liability of the company in today's era. The Corporate Civil Liability therefore includes all these liabilities towards their clients. The company can be held liable for all the stated liabilities and will have to compensate their clients for all the damages caused to the property, or the products and the physical injury.

### Liability for Mis-feasance , Non Feasance and Mal-feasance :

Misfeasance, nonfeasance, and malfeasance are types of failure to perform public obligations that existed at common law, custom or statute. But with the growth on Companies in India all these liabilities are also applicable under corporate governance. The liability usually is enforceable against directors and other persons who are in position of responsibility. But for injury to third parties, the directors including the company can be proceeded with for the wrong of Misfeasance, Non-feasance, and Malfeasance . The legal term of misfeasance is employed in civil cases because there's not a violation of a law or a statute. These sorts of cases are covered under law of tort as far as common law is

concerned. The said wrong is neither a breach of contract and/or breach of trust but at the same is a civil wrong. As the background of tort in common law emanated from the Latin term “tortum” which denotes “damage” or “a twist” which term is similar to the French word in its meaning as “civil wrong”. With the passage of time and codifications of law in India, the word tort emerged in the limitation laws. Under Section 2(m) of The Limitation Act, 1963 it is defined as “Tort means a civil wrong which is not exclusively a breach of contract or breach of trust.” The triple concepts of Misfeasance, Non-feasance, and Mal-feasance relate to common law within the realm of law of torts it is prudent to understand as to how the various jurists interpreted the referred concepts. Towards this reference and reliance can be made on Sir J. Salmond who says:

“Tort is a civil wrong for which the remedy is a common law action for unliquidated damages, and which isn’t exclusively the breach of a contract or breach of trust, or other simply fair obligation”

The referred definition when analyzed, it is understood that acts of Misfeasance, Non-feasance, and Mal-feasance being a civil wrong warrants damages that too unliquidated meaning without any pre-determined formula. The definition may withstand the test of its times and geography but in corporate governance, the corporation has a right to proceed against its directors and other functionaries in pursuance to Rules and Regulations including the conduct guidelines, besides the Companies Articles and other subordinate guidelines derived therefrom. The other authority for the purpose among many is identified as an English Jurist namely Sir Winfield, who says:

“Tortious liability arises from the breach of a duty primarily fixed by law. This obligation is towards persons in general and its breach is recoverable by an action for unliquidated damages”.

Winfield’s definition is more appropriate as the liability for the referred concepts is based on breach of duty. The obligation / duty is towards persons in general including towards the corporate entity itself on the strength the person both under concepts of law including jurisprudence means incorporated entities also who are supposed to have and hold the property. The Jurist agrees with the remedial measures as suggested by others like Salmond, when he says that ‘breach is recoverable by an action for unliquidated damages’ Psychology and Education

. There are many jurists like Faeser who at one or other times have dealt with the topic of tort from which springs up the Misfeasance, Non-feasance, and Mal-feasance.

The first reported case where the court used the word “tort” is an early English case *Boulton v. Hardy*. Today, the maxim as it stands is “ubi jus ubi remedium”, that is, where there’s law, there’s remedy. In recent times, some parts of tort law are codified, for instance, the Fatal Accidents Act, the Workmen’s Compensation Act, the Employers Liability Act, etc. However, this branch of law is mostly based on a judicial precedent. Misfeasance, Non-feasance, and Mal-feasance relate to realm of tort in common law and /or countries thereto especially those who provided statutory recognition as like under section 3(m) of The Limitation Act, 1963. For its easy understanding it is either act or omission which causes injury to public in general and/or company itself.

### Criss Cross Areas of Study:

Corporate Liability under Indian Scenario is multifarious. Corporation have to face Civil Courts, Criminal Courts, Tribunals, Commissions, Registrars, besides other Authorities adjudicatory as well as non-adjudicatory. The Company law itself has created innumerable obligations for companies and for any or every breach there is remedy provided in a way reflected in the fundamental/Core law governing the companies. The Company being ‘person’ under section 11 of the Indian Penal Code can not escape criminal liability as can be fasten on the person though with some exceptions and substitution of accused by the representative as provided in section 305 of the Code of Criminal Procedure. For Civil Liability before the Civil Court same is governed by order XXIX of the said Code. The Suit in the name of Company/Corporation is to be filed through the Secretary, Director or Principal officer, likewise against the Company in the same form. In this way it is clear that for the traditional corporate liability Civil Procedure and/or Criminal Procedure code is attracted as far as procedure is concerned. However, in case the breach of duty or obligation falling under special Statute, then in that case the statute itself governs the procedure to be followed for proceeding against Corporate entity. The Research analysis reveals that even the procedure under different special statutes applicable to companies have carved out divergent obligations and procedures for proceeding against the corporate entity and/or its directors /functionaries which in convenient way equates to Criss Cross scenario in Corporate Jurisprudence that too under Indian Scenario which warrants a resolution towards clarity and for avoidance of confusion and multiplicity of approach. The Criss Cross nature of obligation and/or remedy for breach under some situations may lead to multifariousness actions. For avoidance of multifariousness, all the dimensions of Corporate Liability emancipating from different statutes warrant consolidation for which even a single window redressal mechanism can be thought of.

### Conclusion And Suggestions:

In view of the deliberations hereinbefore based on primary and secondary source of data, it is deduced that for Corporations/Companies divergent laws under Indian Scenario emerged from time to time. The Companies Act as a core and basic statute while other procedural laws for dispute resolution stand attracted. In its evolving jurisprudence the special laws framed since independence especially in relation to Money Laundering, Consumer grievances, Competition aspects, Negotiable Instruments so on and so forth have brought new dimensions in Corporate liability and procedure for proceeding against the corporation and/or the directors or real corporate functionaries. The Criss Cross the subject of liability and adjudications, besides the applicability of proper law is a challenge even to corporate lawyering. The special laws in some areas are parametria with other statutes but there too exists divergence in drafting and fixing the liability and procedure thereof. Accordingly, to overcome all such vagaries of law and procedure it is suggested for a single



window concept of referring the corporate dispute/grievance to a single adjudicatory entity in the form of tribunal or otherwise. The Substantive and procedure laws warrant amendments for carving out common and appropriate phraseology to cover corporate liability and uniformity of approach. For corporal punishments there is need for bringing clarity in Criminal Procedure with respect to fact that the person representing the corporation is not the accused but a mere representative in compliance to law to that extent for which court ought to have power to identify the actual person for enforcement punishment in absence of Corporation as incapable to undergo corporal punishment. In alternative the corporal punishment may be evaluated in terms of monetary compensation /fine as the case may be. In brief the legislatures ought to address the issue of Corporate Liability and redressal of grievance in an appropriate manner including as suggested. In this way the Research topic deliberated on doctrinal methodology is concluded with the suggestions so as to have legislative initiative for compliance to maxim that 'well begin is half done'.

### References

- [1] Meenu Sharma, Research Scholar Amity Law School, Amity University, Noida (UP) under the Supervision of Dr. Sachin Rastogi, AIALS, Amity University, Noida (UP)
- [2] Prof.(Dr.) Sachin Rastogi (Research Supervisor) AIALS, Amity University, Noida.
- [3] Salomon V. Salomon & Co (1895 – 99) All E R Rep 33 = 1897 AC 22
- [4] Section 134, sub section 5 of the Companies ACT 2013
- [5] Indian Penal Code, 1860. Section 11 "Person" The word "person" includes any Company or Association or body of persons, whether incorporated or not.
- [6] The Criminal Procedure Code, 1973, Section 305 - Procedure when corporation or registered society is an accused
  - (1) In this section, "corporation" means an incorporated company or other body corporate, and includes a society registered under the Societies Registration Act, 1860(21 of 1860).
  - (2) Where a corporation is the accused person or one of the accused persons in an inquiry or trial, it may appoint a representative for the purpose of the inquiry or trial and such appointment need not be under the seal of the corporation.
- (3) . . . . .
- (4) . . . . .
- (5) Where a statement in writing purporting to be signed by the managing director of the corporation . . . . .to the effect that the person named in the statement has been appointed as the representative of the corporation for the purposes of this section, is filed, the Court shall, unless the contrary is proved, presume that such person has been so appointed.
- (6) If a question arises as to whether any person, appearing as the representative of a corporation in an inquiry or trial before a Court is or is not such representative, the question shall be determined by the Court.
- [7] Section 34. Criminal liability for misstatements in prospectus. Where a prospectus, issued, circulated or distributed under this Chapter, includes any statement which is untrue or misleading in form or context in which it is included or where any inclusion or omission of any matter is likely to mislead, every person who authorizes the issue of such prospectus shall be liable under section 447:
- [8] Provided that nothing in this section shall apply to a person if he proves that such statement or omission was immaterial or that he had reasonable grounds to believe, and did up to the time of issue of the prospectus believe, that the statement was true or the inclusion or omission was necessary.
- [9] 35. Civil liability for misstatements in prospectus.
  1. Where a person has subscribed for securities of a company acting on any statement included, or the inclusion or omission of any matter, in the prospectus which is misleading and has sustained any loss or damage as a consequence thereof, the company and every person who—
    - a. is a director of the company at the time of the issue of the prospectus;

- b. has authorised himself to be named and is named in the prospectus as a director of the company, or has agreed to become such director, either immediately or after an interval of time.
- c. is a promoter of the company;
- d. has authorised the issue of the prospectus; and
- e. is an expert referred to in sub-section (5 ) of section 26, shall, without prejudice to any punishment to which any person may be liable under section 36, be liable to pay compensation to every person who has sustained such loss or damage.

[10] Derry V. Peek (1886- 90) All E R 1

[11] Peek V. Gurney (1861 – 1873) ALL ER 116

[12] Press Conference by the Union Finance Minister Nirmala Sitharaman, August 23, 2019,  
[https://www.youtube.com/watch?time\\_continue=1032&v=Dq72jmE4y9M&feature=emb\\_logo](https://www.youtube.com/watch?time_continue=1032&v=Dq72jmE4y9M&feature=emb_logo)

[13] Sir John Salmond was a Legal Scholar , Public Servant and Judge in New Zealand ( Born on December 3, 1862 at North Shields , United Kingdom & died on 19 September ,1924 at Wellington , New Zealand)

[14] Sir Percy Henry Winfield FBA was Rouse Ball Professor of English Law between 1928 and 1943. He was born at Stoke Ferry in Norfolk. He died in Cambridge. He is buried in the Parish of the Ascension Burial Ground in Cambridge with his wife Lady Helena Winfield,

[15] “A tort as an infringement of Right in Rem of a private individual giving of compensation at the suit of injured party”.(1597) 77 E.R. 216.