



Analysis of lifting of corporate veil

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Abstract

From juristic point of view, a company is a legal person distinct from its members (*Salomon v salomon*, 1897 A.C 22) the effect of this principle is that there is fictional veil between the company and its members. But in a number of situations, the court will pierce the corporate veil or will ignore the corporate personality to reach the person behind the veil. The rationale behind the veil is probably that law will not allow the corporate form to be misuse or abused Lifting of corporate veil is an mechanism which could penetrates through the Doctrine of separate legal personality to prevent any malpractices in the company under the banner of corporate personality. It further enhances the transparency in the organization. It does ensures that none of the wrong doer could escape the liability in the name of such Doctrines. Broadly there are two types of provisions for lifting of corporate veil –Judicial pronouncements and statutory provisions. This article first introduces the readers the concept of “Veil of Incorporation” then it explains the meaning of the term lifting of corporate veil, it then points out the Judicial as well as the statutory provisions For Lifting of the Corporate Veil with the help of various case laws.

Keywords: lifting, Corporate, fictional, mechanism

Introduction

The concept of company, being a corporate entity and one of the most advantageous forms of business organization, is based on various concepts- existence of a 'separate legal entity' being the most important one. By this term we mean that the company is an artificial person, different from its members, *i.e.*, it has its own individuality and, hence, for the acts done by this person, others cannot be held liable. It is generally said that "members may come and go, but the company remains forever". Now, the concept of 'separate legal entity' is based on the presumption that the company is a totally different person in the eyes of the law, separate from its members and owners. It can sue and be sued in its own name. This also leads to an inference that the company can own a property in its name and can also sell one.

The assets of these natural persons cannot be brought to sale for the wrongful acts of this 'separate legal entity', unlike sole proprietorship or a partnership which are not incorporated entities. An exception to this doctrine was created when the Courts decided that in certain cases the members can be personally held liable for any wrongful activity which affects the company at large, then the concept of 'separate legal entity' can be done away with to make him liable for such a wrong committed. This phenomenon is generally called 'lifting of the corporate veil'. This means that the Courts in certain exceptional circumstances will ignore the principle of 'separate legal entity' and will look into as to who are the real people behind a certain act and will make them liable, instead of the company as a whole.

The Companies Act, 2013 has incorporated various provisions which directly make the directors liable, ignoring the concept of separate identity. Section 2(60) makes the officer-in-default liable for his act; section 7(6) makes suppression of material facts as punishable; section 34 makes them liable for misstatement in prospectus; section 36 makes directors liable for inducing a person to invest money in the company; section 339 makes directors liable

for fraudulent trading and section 447 for other kinds of fraudulent activities.

Distinct Legal Personality of a Company

The company as a separate entity was firmly established in the landmark decision in *Salomon v. Salomon & Co. Ltd* ^[1]. Salomon, a sole trader, sold his manufacturing business to Salomon & Co. Ltd. (a company he incorporated) in consideration for all but six shares in the company, and received debentures worth 10 thousand pounds. The other subscribers to the memorandum were his wife and five children who each took up one share. The business subsequently collapsed, and Salomon made a claim, on the basis of the debentures held, as a secured creditor. The liquidator argued that Salomon could not rank ahead of other creditors because, in fact, the company and Mr. Salomon were one and the same—or alternatively, that the company carried on business on Salomon's behalf.

On appeal, the House of Lords held that Salomon & Co. Ltd. was not a sham; that the debts of the corporation were not the debts of Mr. Salomon because they were two separate legal entities; and that once the artificial person has been created, “it must be treated like any other independent person with its rights and liabilities appropriate to itself.” In *Macaura v. Northern Assurance Co. Ltd* ^[2], the House of Lords decided that insurers were not liable under a contract of insurance on property that was insured by the plaintiff but owned by a company in which the plaintiff held all the fully-paid shares. The House of Lords held that only the company as the separate legal owner of the property, and not the plaintiff, had the required insurable interest. The plaintiff, being a shareholder, did not have any legal or beneficial interest in that property merely because of his

¹[1896] UKHL 1

²[1925] AC 619

shareholding. In *Lee v. Lee's Air Farming* ^[3], the Privy Council held that Lee, as a separate and distinct entity from the company which he controlled, could be an employee of that company so that Lee's wife could claim workers' compensation following her husband's death. In *Hobart Bridge Co. Ltd. v. FCT* ^[4] relying on the judgment by Lord Sumner in *Gas Lighting Improvement Co. Ltd. v. IRC* ^[5], Kitto, J summarizes the position in the following manner:

"Between the investor, who participates as a shareholder, and the undertaking carried on, the law imposes another person, real though artificial, the company itself, and the business carried on is the business of that company, and the capital employed is its capital and not in either case the business or the capital of the shareholders. Assuming, of course, that the company is duly formed and is not a sham ...". More recently, the High Court in *Industrial Equity v. Blackburn* ^[6] has held that the principle operates to prevent a holding company from treating a wholly-owned subsidiary's profits as its own. Therefore, it can be seen that there has been, and still is, the highest authority for the separate entity concept.

However, consideration has to be given to the limitations of the separate entity principle which completely denies the efficacy of the corporate entity as a legal person separate from its founders, shareholders or management. Judgements as early as the Salomon case have indicated the recognition of exceptions to the principle of separate entity by the courts. Recognition of the separate entity is possible provided there is "no fraud and no agency and if the company was a real one and not a fiction or myth." According to Lord Denning in *Littlewoods Mail Order Stores Ltd. v. IRC* ^[7], incorporation does not fully "cast a veil over the personality of a limited company through which the courts cannot see. The courts can, and often do, pull off the mask. They look to see what really lies behind." "A corporation will be looked upon as a legal entity as a general rule but when the notion of legal entity is used to defeat public convenience, justify wrong, protect fraud or defend crime the law will regard the corporation as an association of persons."

The two significant reasons as to why exceptions to the separate entity principle exist is that firstly, although a corporation is a legal person, it cannot always "be treated like any other independent person." For example, a corporation is not capable of committing a tort or a crime requiring proof of mens rea unless courts disregard the separate entity and determine the intention held by the directors and/or shareholders of the corporation. Secondly, strict recognition of the principle may lead to an unjust or misleading outcome if interested parties can "hide" behind the shield of limited liability. Judicial discretion and also legislative action allows the separate entity principle to be disregarded where some injustice is intended, or would result, to a third party (either internal or external to the company) with whom the company is dealing.

Lifting of Corporate Veil: Meaning and Scope

Lifting of the corporate veil is one of the disadvantages of having incorporation. An incorporated company is clothed

with a distinct personality by fiction of law. But in reality it is an association of persons who, in a way, are the beneficial owners of the property of the body corporate ^[8]. A company being an artificial person, cannot act on its own, it can only act through the natural persons.

The theory of corporate entity of a company is still the basic principle on which the whole law of corporations is based. But the separate personality of the company, being a statutory privilege, it must always be used for legitimate business purposes only. Where the legal entity of a corporate body is misused for fraudulent and dishonest purposes, the individuals concerned will not be allowed to take shelter behind the corporate personality. In such cases, the court will break through the corporate shell and apply the principle of "lifting or piercing the corporate veil", i.e., the court will look behind the corporate entity ^[9].

In the case of *Salomon v. Salomon*, it was decided that "in questions of property and capacity, of acts done and rights acquired or, liabilities assumed thereby... the personalities of the natural persons who are the company's corporators is to be ignored." ^[10]

The Supreme Court has adopted a similar approach and in some cases it has seen through the corporate veil. Thus, in *Central Inland Water Transport Corporation Ltd. v. BrojoNathGanguly* ^[11], the Apex Court while considering the question whether the appellant company was an agency or instrumentality of the State for the purpose of Article 12 of the Constitution of India, *inter-alia* observed: "For the purpose of Article 12, one must necessarily see through the corporate veil to ascertain whether behind that veil is the face of an instrumentality or agency of the State."

Again, in *State of U.P. v. Renuagar Power Company* ^[12], the Supreme Court observed:

"The veil of corporate personality even though not lifted sometimes, is becoming more and more transparent in modern company jurisprudence."

This theory of corporate entity is indeed the basic principle on which the whole law of corporations is based. Instances are not few in which the courts have successfully resisted the temptation to break through the corporate veil ^[13].

In the case of *Lee v. Lee's Air Farming Ltd* ^[14], Lee incorporated a company of which he was the managing director. In that capacity he appointed himself as a pilot of the company. While on the business of the company he was lost in a flying accident. His widow recovered compensation under the Workmen's Compensation Act. "In effect the magic of corporate personality enabled him of directors and shareholders consent to the misuse of the company's money, they can be prosecuted for the theft because the consent of the whole number may not be the consent of the company" ^[15].

Although, in general, the courts do not interfere and essentially go by the principles of separate entity as laid down in the Solomon's case and endorsed in many others, it

⁸*Gallagher v. Germania Brewing Co.*, (1893) 53 Minn. 214

⁹Dr. N.V. Paranjape, *Company Law*, (3rdedn., Central Law Agency, 2005)

¹⁰Lord Parker in *Daimler Co. Ltd v. Continental Tyre & Rubber Co. Ltd.*, [1916] 2 AC 307

¹¹(1986) 3 SCC 156

¹²AIR 1988 SC 1732

¹³Avtar Singh, *Company Law*, (15thedn., Eastern Book Company, 2007)

¹⁴1961 AC 12

¹⁵Attorney-General's Reference of 1984 (No 2 of 1983), (1984) 2 QB 456

³[1960] UKPC 33

⁴[1951] HCA 33

⁵[1923] AC 723

⁶(1977) 137 CLR 567

⁷[1969] 1 WLR 1241

may be in the interest of the members in general or in public identify and punish the persons who misuse the medium of corporate personality.

The chief advantage of incorporation from which all others follow is, of course, the separate legal entity of the company. However, it may happen that the corporate personality of the company is used to commit frauds or improper or illegal acts. Since an artificial person is not capable of doing anything illegal or fraudulent, the façade of corporate personality might have to be removed to identify the persons who are really guilty. This is known as *Lifting of the Corporate Veil*.

In a case, the Karnataka High Court has ruled that the lifting of the corporate veil of a company as a rule is not permissible in law unless otherwise provided by clear words of the Statute or by very compelling reasons such as where fraud is needed to be prevented or trading with enemy company is sought to be defeated^[16].

As to when the corporate veil shall be lifted, the observations of the supreme court in *Life Insurance Corporation of India v. Escorts Ltd*^[17], is worth noting. While it is firmly established ever since *Saloman v. A. Saloman & Co. Limited*^[18], was decided that a company has an independent and legal personality distinct from the individuals who are its members, it has since been held that the corporate veil may be lifted, the corporate personality may be ignored and the individual members recognized for who they are in certain exceptional circumstances.

Generally, and broadly speaking the corporate veil may be lifted where the statute itself contemplates lifting the veil or a beneficent statute is sought to be evaded or where associated companies are inextricably connected as to be, in reality, part of one concern.

In the case of *State of U.P. v. Renuagar Power Co*^[19], the Supreme Court has referred "Corporate veil" as a changing concept: "*The concept of lifting the corporate veil is a changing concept. The veil of corporate personality even though not lifted sometimes is becoming more and more transparent in modern company jurisprudence. It is high time to reiterate that in the expanding of horizon of modern jurisprudence, lifting of corporate veil is permissible, its frontiers are unlimited. But it must depend primarily on the realities of the situation.*"

Legal standards for Piercing the Corporate Veil

Under statutory provisions

- **Non-compliance of requirements of incorporation (S. 464):** The purpose of the provision is to withdraw the advantages of incorporation when the conditions of incorporation are not maintained.
- **Misrepresentation in the Prospectus (Ss. 34, 35):** In case of any kind of misrepresentation in the prospectus, every director, promoter and every other person who authorizes such issue of prospectus incurs liability towards those who subscribed for shares on the faith of untrue statement. (Section 34).
- **Failure to Return Application Money:** If the company fails to receive minimum subscription within 120 days after the date of issue of the prospectus, it

must refund the entire application money within next 10 days (Section 39). In case of any default, the company and its officer who is in default shall be liable to a penalty, for each default, of one thousand rupees for each day during which such default continues or one lakh rupees, whichever is less.

- **Misdescription of Name:** Where the name of the company is not mentioned properly while transacting any kind of business in the name of the company, the signatory directors are to be held liable. (Section 12).
- **Fraudulent Conduct (Section 339):** While winding up of the company, it appears that any business of the company has been carried on with the intent to defraud the creditors of the company or any other person, liability shall be incurred if it is proved that the business of the company has been carried on with the view to defraud the creditors.
- **For Investigating the Actual Owner of the Company:** Under section 216, the Central Government may appoint one or more inspectors to investigate and report on the membership of any company for the purpose of determining the true persons doing the acts on behalf of the company.
- **Sections 73 and 76:** provide for prohibition on acceptance of deposits from public and acceptance of deposits from public by certain companies. Every officer of the company who is in default is to be made punishable with imprisonment which may extend to seven years or with fine which shall not be less than twenty-five lakh rupees but which may extend to two crore rupees, or with both. Company is liable to fine of not less than one crore rupees which may extend to ten crore rupees.
- **Liability for ultra vires act:** The Object clause in the memorandum defines the perimeters within which the company functions. Any act not authorized by the object clause is ultra vires for which the members/directors are liable. *Weeks v. Propert*^[20] is an authority on point, where the loan in question being ultra vires was held to be void and the warranty of the directors being broken, they were held personally liable.

By judicial interpretation

Protection of Revenue

In the case of *Sir Dinshaw Maneckjee Petit, Re*^[21], the assessee was a millionaire earning huge income by way of dividend and interest. He informed four private companies and transferred his investments to each of these companies in exchange of their shares. The dividends and interest income received by the company was handed back to Sir Dinshaw as a pretended loan. It was held that the company was informed by the assessee purely and simply as a means of avoiding tax and company was nothing more than assessee himself.

Fraud

in the case of *Gilford motor company ltd v. Horne*^[22] Mr. Horne was an ex-employee of The Gilford motor company and his employment contract provided that he could not solicit the customers of the company. In order to defeat this

¹⁶*Cotton Corporations of India Ltd. v. G.C. Odusumathd* [1999] 22 SCL 228 (Kar)

¹⁷[1986] 59 Comp. Cas 548 (SC)

¹⁸1897 A.C. 22

¹⁹[1991] 70 Comp. Cas. 127.

²⁰(1873) LR 8 CP 427.

²¹AIR 1927 Bom. 371

²²[1933] 1 CH 935

he incorporated a limited company in his wife's name and solicited the customers of the company. The company brought an action against him. The Court of appeal was of the view that "the company was formed as a device, a stratagem, in order to mask the effective carrying on of business of Mr. Horne in this case it was clear that the main purpose of incorporating the new company was to perpetrate fraud. Thus the court of appeal regarded it as a mere sham to cloak his wrongdoings.

In another case, *Jones v. Lipman* ^[23], a man contracted to sell his land and thereafter changed his mind in order to avoid an order of specific performance he transferred his property to a company. Russell Judge specifically referred to the judgments in *Gilford v. Horne* and held that the company here was "a mask which (Mr. Lipman) holds before his face in an attempt to avoid recognition by the eye of equity" he awarded specific performance both against Mr. Lipman and the company.

Determination of the Enemy Character of a company

In the case of *Diamler Company Ltd v. Continental Tyre & Rubber Co* ^[24], a company was incorporated in London by a German company for the purpose of selling tyres manufactured in Germany. Its majority shareholders were Germans. A war was declared between Germany and England and since the majority shareholders were controlled by Germans, enemy company, the trade debt was dismissed on the ground that such payment would amount to trading with the enemy company.

Where the Company is a Mere Sham or a Cloak

In the case of the *Delhi Development Authority v. Skipper Construction Company (P) Ltd* ^[25], the Supreme court held that the fact that the directors and members of his family had created several corporate bodies did not prevent the court from treating all of them as one entity belonging to and controlled by the director and his family if it was found that these corporate bodies were mere cloaks and that the device of incorporation was really a ploy adopted for committing illegalities and/or to defraud people.

In case of economic offences where certain degree of mens rea is required

In *Santanu Ray v. UOI* ^[26] Delhi High Court held that only after the veil of the corporate entity is lifted, the adjudicating authorities will determine as to which of the directors is concerned with the evasion of the excise duty by reason of fraud, collusion or wilful mis-statement or suppression of facts, or contravention of the provisions of the Act and the Rules made there under.

When purpose is to avoid welfare legislations

When the purpose of formation or existence of an entity is to avoid welfare legislations, then the courts can lift the corporate veil, as was held in the case of *Workmen Employed in Associated Rubber Industry Ltd. v. Associated Rubber Industry Ltd* ^[27]. In this case the holding company had been receiving dividends on the share investments in the subsidiary company. When the said income was added in

company's income while calculating the workers' bonus under the Payment of Bonus Act, 1965, the holding company formed a new, wholly-owned subsidiary of its own and transferred the whole of this dividend income to the said newly formed subsidiary company. This latter company had no other source of income of its own, except what it got by way of dividend from the holding company. Thus, the profits available to workers for calculation of bonus got reduced, thereby decreasing the amount of individual bonuses. J. Reddy, while lifting the corporate veil said: "A new company is created, wholly owned by the principal company with no assets of its own except those transferred to it by the principal company, with no business or income of its own except receiving dividends from shares transferred to it by the principal company and serving no purpose whatsoever except to reduce the gross profits of the principal company. These facts speak for themselves."

Contempt of Court

In the case of *Jyoti Ltd. v. Kanwaljit Kaur Bhasin* ^[28] (sale of flats-disputed-court restrained alienation) the Court has held that the corporate veil can be lifted to punish for contempt of Court. Although such cases of contempt proceedings are very few and those that do not squarely fall in the ambit, cannot be made an exception to the general rule of 'separate legal entity'. In the case of *U.K. Mehra v. Union of India* ^[29], the Court had specifically directed through an interim order to a certain company not to enter into any Joint Venture in India and the company entered in India through its wholly-owned subsidiary, the Court held that it could not be called as a contempt of court's order and the subsidiary would not be called as a Joint Venture.

Mere Agency of the holding company

The landmark judgment about when can a subsidiary be treated as an agent of the parent and, thus, held liable was delivered in the case of *Smith Stone & Knight Ltd. v Birmingham Corporation*, a local company had a decree of compulsorily acquiring a land owned by the appellants, SSK. The said appellants sold this land to the BWC, its subsidiary company, and, thus, when the local company (the respondents) wanted to acquire the said land, the appellants said they did not have the ownership of the same. The Court realized that the said transaction was undertaken by the agent of appellant for the benefits of its principal. The Court lifted the corporate veil and held the parent company liable. The Court in this case laid 5 tests:

- That the profits of the subsidiary should be treated as that of holding company;
- The persons taking care of subsidiary's business should be appointed by holding company;
- The holding-company should take care of the business of the subsidiary and decide as to what should be done, how and when;
- The profits of the subsidiary should be as a result of skill and direction of holding company;
- The holding company must have an effective and constant control.

In the case of *Adams v. Cape Industries Plc* ^[30] it was held

²³[1962] 1 All ER 442

²⁴[1916] 2 AC 307.

²⁵[1996] 5 SCALE 202 (SC).

²⁶1989 65 CompCas 196 Delhi.

²⁷ AIR 1986 SC 1.

²⁸ 1987 Del HC.

²⁹ AIR 1994 Del 25.

³⁰[1990] Ch 433

that the subsidiary was furthering economic cause of holding company, the Court could not lift the veil. In the case of *Royal Industries Ltd. v. Kraft Foods, Inc.*, the Court said,

"Suing a parent corporation on an agency theory is quite different from attempting to pierce the corporate veil. In the first instance, the claim against the parent is premised on the view that the subsidiary had authority to act, and was, in fact, acting, on the parent's behalf - that is, in the name of the parent."

Thus, while using this agency exception, the Courts have also been very cautious, as to whether the said entity meets all the requirements to be called as an agency and, thus, if satisfied, the corporate veil is lifted by the Court.

Acting against public policy

In the case of *PNB Finance Ltd. v. Shital Prasad Jain* ^[31] the Court extended the doctrine of 'lifting the corporate veil' to meet the ends of justice. However, this criterion for lifting the corporate veil has always been in question due to its vagueness. Moreover, the ambit of 'public policy' is so wide that it can cover too many things. An exception to the general principle of 'separate legal entity' cannot go to an extent to disregard the principle in its totality. Also, the ambit of an exception should be kept as small as possible, so that a clear line can be drawn between the principle and the exception. In the case of *Re Polly Peck International Plc. (in administration)* ^[32] the Court said that when the two claims are so closely connected, in respect of the same debt, then the Courts would look into the legal substance of the said transaction rather than looking into the economic value of the same. J. Robert Walker said that merely on the presence of the fact of perceived injustice, the Courts cannot disregard the principle of 'separate legal entity' and cannot lift the corporate veil in the said transaction.

Negligent activities

In certain cases when the Court is satisfied that there was a presence of duty of care on the part of holding company while the acts of its subsidiary are in question, the former can be made liable for the acts of the latter, by lifting of the corporate veil, for breach of duty of care, *i.e.*, for the negligent act of the holding company *e.g.*, in the case of *Chandler v. Cape Plc* ^[33], the English Court had held the parent company liable for negligent act of its subsidiary with respect to the health and safety of the employees of the said subsidiary. In this case the plaintiff was an employee of the subsidiary of the defendant. While working with the said subsidiary company, the plaintiff, since he was exposed to asbestos, acquired certain disease, about which he came to know later, when the symptoms became visible. By that time, the subsidiary had already been shut down, so he brought a claim of negligence against the said parent company. The Court of appeal, through L.J. Arden said that there could be 4 situations where duty of care can be said to be present:

- When the business of both the parent and subsidiary are same, or almost similar;

- When the parent company is supposed to have a superior knowledge of the aspects related to health and safety related to the particular industry;
- When the parent company was supposed to know of the subsidiary's system of work and that the said work was unsafe in nature;
- When the parent company could have reasonably foreseen that the subsidiary company or its employees would rely on it, as the parent company is supposed to have a superior knowledge of the nature of activities conducted by the parent.

Legal Issues Surrounding Imposition of Criminal Liability on Corporates

Relevant cases when the veil was pierced to impose criminal liability on corporate

Applying the principles mentioned above, courts in the past have pierced the corporate veil to tax underlying assets of a company in cases of fraud, sham, tax avoidance, etc. The *Vodafone International Holdings v. Union of India* ^[34], presented a case of misuse of the corporate structure to evade taxes. The apex court in this case observed that – "Once the transaction is shown to be fraudulent, sham, circuitous or a device designed to defeat the interests of the shareholders, investors, parties to the contract and also for tax evasion, the Court can always lift the corporate veil and examine the substance of the transaction." ^[35]. The Court, in this case, accordingly held that the Income Tax Office was entitled to pierce the corporate veil in India to see whether or not a company was a resident of Mauritius and if it was paying income tax in Mauritius or not ^[36]. *Commissioner of Income Tax v. Sri Meenakshi Mills Ltd., Madurai* ^[37], is another case in which the Court observed that the veil can be lifted to look into the economic realities behind the legal facade. Similarly, in *Life Insurance Corporation of India v. Escorts Limited and Others* ^[38], the Court pointed out four key instances when the veil can be pierced– (a) where a statute itself contemplates lifting of the veil; (b) where there is a fraud or improper conduct intended to be prevented; (c) where a taxing statute or a beneficial statute is sought to be evaded, or (d) where associated companies are inextricably as to be, in reality part of one concern.

The Court in one of the oldest cases, *Shri Ambica Mills Ltd., Re* ^[39], pointed out that in cases of criminal acts of fraud by officers of a company, the court can pierce the veil to reach the substance of the matter. Another important case which came up recently is *VTB Capital v. Nutritek* ^[40] in which dispute arose out of a fraudulently obtained loan. The Court of Appeal, in this case made two important observations. First, it said - "lifting the corporate veil" does not ignore the existence of the company, but allows the court to provide a remedy that would otherwise be available only against the company (as opposed to the controller or vice versa) ^[41]. Secondly, it said that there is no requirement that the

³⁴*Vodafone International Holdings B.V. v. Union of India & Anr.* [S.L.P. (C) No. 26529 of 2010, dated 20 January 2012].

³⁵*Id.* at para 75.

³⁶*Id.* at para 94.

³⁷ AIR 1967 SC 819.

³⁸ (1986) 1 SCC 264.

³⁹ 1897 AC 22.

⁴⁰ [2012] EWCA Civ 808.

⁴¹ Niranjan V., "VTB Capital: The Consequences of Lifting the Corporate Veil", available at <<http://indiacorplaw.blogspot.in/2012/09/vtb-capital-consequences-of-lifting.html>> last accessed: 18/10/2015.

³¹ 1983 Del HC

³² [1998] All ER (D) 194

³³ [2012] EWCA Civ 525

corporate veil can be lifted only when there is no other remedy available^[42]. These two key points, when applied to a criminal case of default by companies, means that imposing criminal liability can very well be a remedy even when there are other remedies available. This is significant development because, it allows piercing of corporate veil to impose criminal liability even when the matter can be disposed by mere imposition of civil or administrative liability.

Criminal acts by subsidiary of a company

Another most important legal issue related to fixing of criminal liability on corporations is whether a parent company or its subsidiary should eventually be held liable for the wrongful acts of the subsidiary. If it is said that the parent corporation cannot be held liable for criminal acts of the subsidiary, this can further encourage corporate irresponsibility. Companies can maintain strategic control from afar but strategically leave operations and safety mandates in the hands of local managers and the host government. This way, control can be maintained, while liability is evaded^[43]. As a general principle, a parent corporation is not liable for the acts of its subsidiary. The report of the Committee^[44] on International Investment and Multinational Enterprises (CIME) had pointed out that a liability on a parent company for criminal acts done by a subsidiary was not recognized even in the member states of the OECD^[45]. Also, "Corporate Veil" as a principle has so far, not been applied in situations of extraordinary environmental hazard caused by subsidiary of a parent company^[46]. Furthermore, the Indian Courts have also construed statute as "cracking open the corporate shell" only when constrained to do so by the clear mandates of the statute. In fact, they have taken extra precaution to avoid such construction wherever possible^[47].

However, U.S. Supreme Court in *United States v. Bestfoods*^[48] has pointed out that the Court can pierce the corporate veil to hold the parent company liable for the conduct of its subsidiary, if the corporate form is abused to achieve wrongful purposes, most notably, fraud on the shareholder's behalf and the parent company is directly a participant in the wrong complained of.

In India, the Bhopal Gas case is one of the most suitable examples where the question arose as to whether parent company or the subsidiary is liable for the environmental

hazard. The two legal issues involved in the Bhopal case^[49] were- whether there is a direct duty of a parent corporation to manage its subsidiaries in a competent manner and, secondly, whether the parent corporation can vicariously be held liable for the acts of its subsidiaries. The answer to the legal issues involved here lies in the fact that 'persons harmed by criminal acts of a multinationals corporation are not in a position to isolate which unit of the enterprise caused the harm, yet it is evident that the multinational enterprise that caused the harm is liable for such harm.' Holding the parent company liable is an effective measure to ensure full compensation to the victims of the criminal wrong and to make such corporations responsible. Justice Seth in the Bhopal case also pointed out that the veil can be pierced even solely on the equitable considerations, when faced with situations of mass disaster and assets of the subsidiary being grossly deficient to satisfy the just claims of the victims. He further observed that the principle that a company has a legal and separate identity of its own is not an absolute principle and has much been watered down with the increasing number of exceptions since *Salomon v. Salomon*^[50].

Conclusion

After going through all the decisions on point, it can be seen that courts have exercised very wide discretion to decide whether or not to pierce the veil in a particular case to impose liability upon the members. Being mindful of the fact that the primary goal of corporate law ought to be certainty and predictability, this has led to uncertainty and lack of predictability regarding legal standards for lifting of the veil. The judges can choose any theory of their choice or sometimes even invent a theory of their own to fasten the liability on equitable grounds.

Though, it is now very clear that incorporation does not cut off personal liability at all times and in all circumstances^[51]. "*Honest enterprise, by means of companies is allowed; but the public are protected against kitting and humbuggery*"^[52]. Therefore, the sanctity of a separate corporate identity is upheld only insofar as the entity is consonant with the underlying policies which give it life. The Courts have at times seized upon certain facts as evidence to justify the imposition of liability upon the shareholders^[53].

Therefore, it is observed that although courts have time and again made references to the different legal principles, they have often used them without much clarity or decisiveness and there exists a wide discretion with the courts whether to lift the corporate veil in a particular case or not.

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⁴⁹ Union of India v. Union Carbide Corp. Ltd (M.P.H.C.).

⁵⁰ [1897] AC 22; Supra Note 3 at para. 14.02.02.

⁵¹ Clive M. Schmitthoff, "Salomon in the Shadow", 1976 JBL 305.

⁵² Cadman, "The Corporation in New Jersey", (1949) 353.

⁵³ Cohen & Simitis, "Lifting the Veil", (1963) 12 IC LQ 189.

⁴² *Id.*

⁴³ Cassels, Jamie, "The Uncertain Promise of Law: Lessons from Bhopal", 29 OSGOODE HALL L. J. 1 1991 at p.20.

⁴⁴ OECD had created this Committee for review and improvement of the OECD Guidelines.

⁴⁵ Therefore, it is the widely accepted practice in the member states of the OECD "not to 'pierce the corporate veil' unless special conditions justify such an extraordinary step; Responsibility of Parent Companies for their Subsidiaries, OECD Publications, 1980; Cohn and Simitis, "Lifting the Veil in the Company Laws of the European Continent", 12 ICLQ 189 (1963) Page 7 of 11 of a parent company.

⁴⁶ 6 Kolvenbach Walter, "European Reflections on Bhopal and the Consequences for Transnational Corporations", 14 INTL BUS. LAW. 357 1986.

⁴⁷ Even looking from the American perspective the judiciary must have compelling reasons to ignore the limited liability rule in order to impose liability on shareholders; Ramaiya, A., GUIDE TO THE CORPORATE ACT (8th edn, 1977), at p. 108.

⁴⁸ 524 US 51 (1998) also available at <<http://www.lawcornell.edu/supct/html/97-454.ZO.html>> last accessed: 17/10/2015.

JBL 305.

6. Cadman. "The Corporation in New Jersey", 1949, 353.
7. Cohen, Simitis. "Lifting the Veil", 1963. 12 IC LQ 189.
8. <http://indiacorplaw.blogspot.in/2014/09/the-indian-supreme-court-on-lifting.htm>
9. <http://artismc.com/index.php/blogs/view/55/221/>
10. <http://www.lawctopus.com/academike/corporate-veil/>
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