

Corporate Criminal Liability: *Revisiting Iridium*

Introduction

The complexity shrouding the issue of criminality of a corporation was settled by the Supreme Court (“SC”) in *Iridium India Telecom Ltd. v. Motorola Inc.*¹ case. In January 2015, it got an opportunity to decide criminal liability of corporate officers for the acts of a company and to examine the principle of alter ego. This recent ruling in *Sunil Bharti Mittal v. Central Bureau of Investigation (“CBI”) and Others*² once again chartered into the territory of the corporate criminal liability and relied on *Iridium case* to determine the issue at hand.

This newsletter discusses the principle of attribution, which talks about the identification of the person whose acts will be instrumental in imputing criminal liability to the company. It touches upon the evolution in the concept of attributing mens rea to a company by analyzing the case of *Iridium* and *Sunil Bharti Mittal*.

1. Background

Companies are juristic persons and, hence, the prevalent view was that a company could not be charged of offences because of procedural difficulties of arrest, etc. Due to absence of requisite intention to commit a crime no criminal liability could be attributed to them. In *Assistant Commissioner, Assessment-II, Bangalore v. Messers Velliappa Textiles Ltd.*³ the SC had endorsed alter ego theory. However, it had by majority held that a company cannot be prosecuted for offences requiring imposition of imprisonment only or of mandatory term of imprisonment coupled with fine. However, a year later in *Standard Chartered Bank v. Directorate of Enforcement*⁴, a five-judge constitution bench overruled *Velliappa Textiles* dictum. From thereon, the SC has inched forward in determining the issue of corporate criminal liability and has provided jurisprudential value through *Iridium* and *Sunil Bharti Mittal* rulings.

2. Jurisprudential Position

The issue of criminality of corporate acts has always been controversial in nature. Legal position of corporate criminal liability has been evolving over the years and with time courts in India have taken a stricter approach while determining liability of a corporate body for acts committed by its directors and other agents.

2.1 Iridium case & issue of mens rea

The significance of *Iridium* lies in the fact that it clarifies the law on the point as to whether a company can be punished for crimes requiring mens rea. In this case Iridium had filed a criminal complaint against Motorola under sections 120 (Conspiracy) and 420 (Cheating)

¹ (2011) 1 SCC 74

² Criminal Appeal No. 35 of 2015 (arising out of Special Leave Petition (Cri.) No. 3161 of 2013 decided on January 9, 2015

³ AIR 2004 SC 86

⁴ AIR 2005 SC 2622

of the Indian Penal Code based on which the magistrate in Pune started proceedings against Motorola. Motorola then moved to the Bombay High Court seeking to quash the proceedings started by the judicial magistrate. The High Court allowed the petition quashing the proceedings at the magistrate level giving several reasons, one of them being that a company is incapable of having a guilty mind therefore no offence of cheating can be committed by it. Iridium, by way of appeal approached the SC. The SC framed the following two issues for its consideration: firstly, can mens rea be attributed to the companies for the criminal liability and secondly, what is the criminal liability for misstatements in the context of securities offerings made to specific investors on a private basis.

Substantially, the SC was concerned about the corporate criminal liability of the company. This was done by way of principle of attribution. This principle is invoked when the question as to whose mental element shall be attributed to the company for foisting criminal liability, comes up. In this judgment the court ruled that the person who is in direct control and in-charge of the affairs of the company and the degree of the control is so intense and rigorous that the company is said to act through the person, is instrumental in attributing criminal liability to the company. The two main points on which the court gave its ruling were: first that a company is capable of possessing the requisite mens rea and secondly that the rigid test of identification of the directing mind of the company has to be followed in determining the requisite mental element.

The court had relied on the case of *Tesco Ltd.*⁵ wherein it was laid down that the people who are specifically entrusted with the powers and duties towards the company and are mentioned in the Memorandum of Association (“MOA”), Articles of Association (“AOA”), named by the directors or approved of such powers in the general meetings of the company will be held liable and their acts will be instrumental in attributing criminal liability of the company. *Iridium* goes one step ahead by holding any natural person accountable and attributing liability to the company on behalf of their actions. The only requirement is that the person should be in charge of the affairs of the company. The court further held that non-disclosure of proper information would be treated as mis-representation thereby constituting the criminal offence of cheating for which the company can be held liable. The court finally ruled that criminal liability can be attributed to the company since it is capable of possessing the requisite mens rea for commission of the offence.

2.2 Analysis of Iridium

Iridium went for the strict applicability of the directing mind and will of the company test. This approach is more suitable to the Indian scenario because of the fact that the relaxation in the requirement of mens rea in India is done by way of legislative interventions and not judicial pronouncements. This decision is still in line with the criminal jurisprudence because the requirement of having inherent certainty in the attribution of the criminal liability is being fulfilled by following the rigid approach. No liability is attributed to the people who might be responsible for handling the affairs of the company as against those who are actually named in the MOA/AOA or other relevant documents to do the same. The question of, under what circumstances would a company not be liable for the acts of the directors, etc. was left

⁵ *Tesco Supermarkets Ltd. v. Natrass* (1971) 2 All E.R. 127

unanswered by the court.

The reliance on the case of *Tesco Ltd.* provides the scope of applying the rigid rule of attribution of criminal liability in synchronization with the principle that vicarious liability cannot be attributed in the criminal cases. This leads to non-application of the doctrine of attribution in a flexible manner. This would hence lead to the non-attainment of the true objective and purpose of the concept of the corporate criminal liability. It might filter out those situations where the actual people who are in charge of the affairs of the company might not have a corresponding designation and hence their acts might not get reflected upon the company and hence the company might run scot free in such cases.

2.3 Sunil Bharti Mittal case

A converse scenario as to the ruling laid down in the *Iridium* case is discussed in the *Sunil Bharti case*. This case discusses the proposition as to whether the directors (or any one representing the alter ego of the company) can be prosecuted on the account of criminal acts of the company. This case pertains to the alleged irregularities in relation to the grant of license and allocation of the spectrum in the 2G band wherein CBI had issued summons to the directors of the companies involved once the offences were laid down in the chargesheet.

The SC in the said case comprehensively scrutinizes whether and under what circumstances the principle of attribution (alter ego) be used to make the people in charge of the company liable for the acts (offences committed) of the company.

2.4 Analysis of Sunil Bharti Mittal

The court relied its decision on the previously discussed *Iridium case*. The judgment delivered by Justice AK Sikri (on behalf of the three judge bench) said that the *Iridium case* lays down the proposition that the corporations can no longer claim immunity from punishments under those offences, which require mens rea. The case however does not discuss the converse application of the alter ego principle as laid down in the *Iridium* judgement.

Next the court observed that the directors could be prosecuted for an offence committed by the company only in the following two circumstances. There should either be active involvement and sufficient evidence to adduce the criminal intent of that person, or the legislation should itself impose the liability on the director or person in charge of the affairs of the company. The court noted that there is no such evidence so as to draw an inference that the directors had a criminal intent. Also there is no statutory provision to the effect where the vicarious liability of the director is discussed in context of the offences committed by the company. Thus, it said that mens rea is attributed to the company on the principle of alter ego and it does not apply in reverse where vicarious liability is imputed on the persons dealing with the business of the company.

The principle borrowed from *Iridium* is limited only to the extent that mens rea can be imputed to the companies and they cannot claim immunity on that ground. This case hence by way of analogy relies on *Tesco Ltd.* The SC has referred the decision of *Tesco Ltd.* in many cases and has very clearly laid down that the vicarious liability under strict liability statutes can be

attributed to the person who is actually in charge of the company. Hence, clarifying the *principle of attribution* in cases of vicarious liability where they form part of specific offences in the statutes governing strict liability offences. But this case in general fails to talk about the vicarious liability aspect when it is not clubbed with strict liability offences.

Conclusion

Since the concept of corporate criminal liability has been evolving with time initially there were many difficulties as to how will the evidence be adduced and what will be the standard of proof required for culpability of the offender i.e., the corporate. Gradually, with time, the courts started filling up the voids by answering some of the pertinent questions. In the two cases analyzed above, the courts have further clarified the concept of corporate criminal liability and have widened its ambit. As of today, *Iridium* is the law as to the fact that mens rea can be attributed to the corporate entities and they cannot claim immunity on the ground of absence of legal personality. In the same case the court has refrained itself from laying down clear cut pointers as to the vicarious liability of the companies in case there are no specific offences vis-à-vis strict liability offences. Hence, further judicial interventions are required to add another feather in the chapter of evolution of the concept of corporate criminal liability.

Author

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