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# Piercing the Veil of Environmental Liability in India Comparative Analysis Between India and USA

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## ABSTRACT

*The concept of piercing the corporate veil is the weakest brick in the edifice of company law, which has the power to both uphold and break the very structure of a company. In order to maintain the balance and ensure the building of the company and everything doesn't fall apart the said brick of the corporate veil needs to be placed right without moving it around too much. Over the years, there seems to be an increasing struggle of managing environmental concerns while maintaining the corporate veil, and due to the unprecedented environmental damage, this struggle has become a concern. This article attempts to deal with the determination of such placement with an ecological lens, by comparing the existing structures within India and USA. For this purpose, it has been imperative to understand the difference between piercing the veil and lifting the veil as only then could we draw the blueprint of the future action plan. We have then delved into both statutes and precedent-based doctrines in both the said nations. The said analysis has helped reach the conclusion that if used right, then the concept of piercing the corporate veil can be used as an effective tool to address environmental concerns.*

## I. INTRODUCTION

Globally countries are pacing towards a more sustainable path. The world, for a while, has been struggling to maintain a balance between environmental development and economic development. The economy is based on corporations and companies thus new rules are being set up in order to regulate these to minimize environmental harm. Although, the companies have a separate juristic personality that shields individuals involved and prevents them from liability. Devoid of personal liability, individuals tend to deter from practicing the best environmental policies in lieu of generating more profits. Thus, individual liability becomes important for the purposes of accountability.

Imposing individual liability on company officials is done by piercing the corporate veil but only under limited instances. Considering the complete disregard of the environment by several

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companies it becomes important to evaluate if this careful piercing of the veil to prevent the company is in accordance with environmental prevention. How fragile is the corporate veil, and what is the extent of liability that can be imposed against an environmental wrong after the piercing? In this paper we shall be addressing this question with respect to environmental situations.

## II. PIERCING THE CORPORATE VEIL

The Company is a separate Legal Entity with a legal personality distinct from its shareholders, directors, promoters, members or employees. In other words, a company is a juristic person with a separate legal identity than any other person involved. This creation of law has been termed as Corporate Personality which is regarded as the “most pervading of the fundamental principles of company law”<sup>2</sup>. In fact, the purpose of a company’s establishment is attributed to a having a separate Legal Personality.<sup>3</sup>

Although, this most fundamental principle, forming the very edifice of a company and the related jurisprudence, is not absolute. This legal personality separates the individuals from the company like a veil. This veil can be pierced in certain specific circumstances and the same is termed as piercing the corporate veil. Once the veil is pierced the officials lose limited liability. Piercing the corporate veil has been defined as the judicial act by which corporate officers, directors and shareholders are held responsible for the acts of the corporation by imposing liability to which they otherwise had immunity.<sup>4</sup>The same has no effect on individual liability. The limited liability that survives after the piercing of the corporate veil only protects non-participating shareholders. It becomes an effective tool to hold undercapitalized organizations accountable if there are no funds available to fund a company’s environmental liability due to systematically drained dividends as the court may then infer fraud.

In India the essence of this doctrine of piercing the corporate veil has been codified in various sections of Company Act<sup>5</sup> such as: 45, 147, 212, 247 and 542. This is one of the most contested and debated topics in company law which gives the right to several questions. It becomes imperative to allow the piercing without destroying the edifice of company and the adjoin jurisprudence.

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<sup>2</sup> R. Dinesh Kumar, *Study of Doctrine of Corporate Veil and Effects of Piercing in to Corporate Veil*, 4 (2) Indian Journal of Law and Human Behavior 163-168 (2018).

<sup>3</sup>Salomon v. Salomon and Co. Ltd. [1897] AC 22.

<sup>4</sup> BLACK’S LAW DICTIONARY 1168 (7TH ED. 1999).

<sup>5</sup> The *Companies Act, 2013*. Act No. 18, Acts of Parliament, 2013 (IND) [Hereinafter, *Companies Act*].

### (i) *Piercing or Lifting*

Before we delve deeper into the concept of piercing the veil with respect to environmental claims it becomes essential to address the slight distinction drawn between lifting the veil and piercing the veil. ‘Pierc[ing] . . . is reserve[d] for treating the rights or liabilities or activities of a company as the rights or liabilities or activities of its shareholders’, whereas ‘lift[ing] . . . [is] to have regard to the shareholding in a company for some legal purpose’.<sup>6</sup>Essentially the veil can only be pierced once it has been lifted.

Although, most courts especially in India, have used these terms interchangeably. While it is important to understand this distinction it bears no relevance to this paper. For this paper, we shall focus on piercing the corporate veil while discussing general environmental claims which account for situations where actions have been taken.

### (ii) *Permitting Piercing*

Piercing the corporate veil disregards the corporate personality and the same is done in specific situations which include two broad scenarios i.e Statutory Provisions and Judicial Pronouncements. The former is inclusive of Membership Reduction<sup>7</sup>, Prospectus Misstatement<sup>8</sup>, Money Return Application Failure<sup>9</sup>, Company Name Misdescription<sup>10</sup>, Application Refund Failure,<sup>11</sup> Ownership Investigation<sup>12</sup>, Fraudulent Conduct<sup>13</sup>, Inducing Investments<sup>14</sup>, False Statements<sup>15</sup>, Prospectus Misrepresentation,<sup>16</sup> Subsidiary Holding<sup>17</sup>, Failure to Facilitate Investigation<sup>18</sup>, Defaults Repeat<sup>19</sup> and Holding Officer is in Default Liable<sup>20</sup>. While the latter includes Tax evasion<sup>21</sup>, fraud prevention & improper conduct<sup>22</sup>, enemy

<sup>6</sup> ATLAS MARITIME CO SA V AVALON MARITIME LTD [1991] 4 ALL ER 769.

<sup>7</sup> Companies Act, *supra* note 4, S.45.

<sup>8</sup> Companies Act, *supra* note 4, S. 26 (9), 34 & 35.

<sup>9</sup> Companies Act, *supra* note 4, S. 39 (3).

<sup>10</sup> Companies Act, *supra* note 4, S. 12; Hendon v. Adelman 1973 New LJ 637.

<sup>11</sup> Companies Act, *supra* note 4, S.69(5).

<sup>12</sup> Companies Act, *supra* note 4, S. 216.

<sup>13</sup> Companies Act, *supra* note 4, S.339; Delhi Development Authority vs. Skipper Construction Company (P) Ltd., 1996(4) SCC 622.

<sup>14</sup> Companies Act, *supra* note 4, S. 36.

<sup>15</sup> Companies Act, *supra* note 4, S.448.

<sup>16</sup> Companies Act, *supra* note 4, S.62& 63.

<sup>17</sup> Companies Act, *supra* note 4, S.212.

<sup>18</sup> Companies Act, *supra* note 4, S.239.

<sup>19</sup> Companies Act, *supra* note 4, S.449.

<sup>20</sup> Companies Act, *supra* note 4, S.2(60).

<sup>21</sup> **Tata Engineering And Locomotive Co. Ltd. vs. State of Bihar & Ors, 1988 PLJR 1024; CIT v. Sri Meenakshi Mills Ltd AIR 1967 SC 819.**

<sup>22</sup> Gilford Motor Company Ltd v. Horne (1933) Ch. 935 (CA); and Jones v. Lipman; Daimler Co. Ltd. v. Continental Tyre and Rubber Co. [1916] 2 A.C.307.

character<sup>23</sup>, ultra-virusacts<sup>24</sup>, agency company,<sup>25</sup> group enterprise,<sup>26</sup> negligent activities<sup>27</sup>, sham company<sup>28</sup>, agent for shareholders<sup>29</sup>, economic offences<sup>30</sup> and public policy<sup>31</sup>. Environmental claims usually deal with the latter. The most common of all involves the intention of fraud which has been discussed further in this paper.

### (iii) Criminal Liability

Environmental Claims often give rise to criminal liability. However, for a criminal claim to succeed it is imperative to show mens rea, and a corporate body, despite its stature of a juristic person, is incapable of having a mens rea due to the absence of mind and it also cannot be subjected to imprisonment.<sup>32</sup> A direct implication of this would be that corporate should become immune to all criminal claims against them. Since this would result in absurdity, the courts have tried to address this in several cases. The imprisonment aspect was addressed by the Indian Apex Court, where the court dictated that imprisonment is to be imposed whenever possible otherwise only fine shall be the punishment.<sup>33</sup>

The court has, in fact, quashed proceedings against companies under the pretext of absence of mens rea.<sup>34</sup> The Apex Court overruled previous decisions and held that corporations can be held criminally liable and pointed out that CPC doesn't draw a distinction between corporations and individuals; although, the court did not address the corporations' capability to have mens rea.<sup>35</sup> The idea is to infer prima facie intent. The doctrine of attribution and imputation has rejected the view that the corporates cannot be held criminally liable.<sup>36</sup> The SC has reiterated this by emphasizing on fine as the punishment.<sup>37</sup> Once the corporate can be held liable for it's the veil can also be pierced.

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<sup>23</sup> Dailmer Co Ltd vs. Continental Tyres & Rubber Co Ltd, [1916] 2 AC 307.; Sivfracht vs. Van UdensScheepvart (1942) 74 Ll.L.Rep. 59.

<sup>24</sup> Ashbury Railway Carriage & Iron Company Ltd v. Hector Riche (1875) LR 7 HL 653.

<sup>25</sup> New Tiruper Area Development Corporation Ltd vs. State of Tamil Nadu W.P No. 923 of 2009.

<sup>26</sup> D.H.N. Food products Ltd. v. Tower Hamlets London Borough Council [1976] 1 WLR 852.

<sup>27</sup> Chandler vs Cape Plc [2012] EWCA Civ 525.

<sup>28</sup> Gilford Motor Co Ltd vs.Horne [1933] Ch 935; P.N.B. Finance v. Shital Prasad [1983]54 Comp. Cas. 66; Snook v London and West Riding Investments Ltd. (1967) 2 QB 786.

<sup>29</sup> R.G. Films Ltd. (1953) 1 All ER 615.

<sup>30</sup> Santanu Ray v. Union of India (1989) 65 Comp. Cas. 196.

<sup>31</sup> Jyoti Limited vs. Kanwaljit Kaur Bhasin & Anr 1987 62 CompCas 626 Delhi.

<sup>32</sup> A. K. Khosla v. S. Venkatesan, (1992) Cr.L.J. 1448.

<sup>33</sup> MV Javali v. Mahajan Borewell & Co and Ors., AIR 1997 SC 3964.

<sup>34</sup> Motorola Inc. v. Union of India, (2004) Cri.L.J. 1576; Zee Telefilms Ltd. v. Sahara India Co. Corp. Ltd., (2001) 3 Recent Criminal Reports 292.

<sup>35</sup> Standard Chartered Bank and Ors. v. Directorate of Enforcement, (2005) 4 SCC 530.

<sup>36</sup> Angira Singhvi, Corporate *Crime and Sentencing in India: Required Amendments in Law*, International Journal of Criminal Justice Sciences, Vol. 1 (2) (2006).

<sup>37</sup> CBI v. M/s Blue-Sky Tie-up Ltd and Ors., (2011) 15 SCC 144.

### III. COMPARATIVE ANALYSIS: UNITED STATES AND INDIA

Piercing the corporate veil is a common law principle that shares jurisprudence from around the world. In order to understand the application of this principle in India we must also look in legal situation in other common law nations. In fact, several legislation in the UK and US impart both strong civil and criminal liability on corporate and their officials.<sup>38</sup>

#### (i) Statutes

Moreover, Corporate law allows a corporation to be held criminally liable and the same can extend to environmental crimes.<sup>39</sup> Most statutes relating to the environment in the US include companies and corporations in their definition of the term “persons” with reference to prosecution.<sup>40</sup> Environmental corporate liability is imposed using principles of vicarious liability and piercing the corporate veil.<sup>41</sup> In order to implement the true intention of the law the courts have imposed criminal penalties on officers as the same serves as a better form of regulation.<sup>42</sup> A prime example of the same is the CERCLA, that imposes strict liability on the corporation along with the directors and shareholders; sec 107(a) even includes lenders for the purpose of liability.

The standard of determining liability in Indian statutes is higher than that of strict liability; it requires specific knowledge of the act. Several Environmental legislations in India have incorporated clauses that either instigate criminal action against corporate personnel who have been involved with environmental pollution<sup>43</sup> or hold the personnel in-charge of the company accountable for the acts of the company if they cannot prove that they took all possible precautions, and the act was without their knowledge<sup>44</sup>. The latter also extends to all persons involved by means of having a part in connivance or neglect.<sup>45</sup> The term ‘directly in-charge’ has been explained to exclude individuals who do not directly control the usual business of the company.<sup>46</sup> Furthermore, directors have the burden of proving their lack of involvement and also of providing names of those who can be held vicariously responsible.<sup>47</sup>

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<sup>38</sup>Stone, *Te palace of enterprise liability in the control of corporate conduct*; 90 Yale law journal 76-77 ,1-77 (1980).

<sup>39</sup> PATRICK BIRNIE, *INTERNATIONAL LAW AND THE ENVIRONMENT* AT 325 (OXFORD UNIVERSITY PRESS, NEW YORK: 2008).

<sup>40</sup> Elizabeth M. Jalley, et.al., *Environmental Crimes*, 39 Am. Crim. L. Rev. 403, 408 (2002).

<sup>41</sup> *Id.*

<sup>42</sup> *United States v. Dotterweich*, 320 U.S. 277 (1943); *United States v. Park*, 421 U.S. 658 (1975).

<sup>43</sup> *The Water (Prevention and Control of Pollution) Act, 1974, S.47, Act no. 06, Acts of Parliament, 1974(IND.)*.

<sup>44</sup> *The Air (Prevention and Control of Pollution) Act, 1981. S. 40, Act No. 14, Acts of Parliament, 1981 (IND.); Environment Protection Act, 1986, S.16, Act No. 29, Acts of Parliament, 1986 (IND.)*.

<sup>45</sup> Shyam Divan, *Environmental Law and Policy In India* at 190 (Oxford University Press, New Delhi: 2005).

<sup>46</sup> *NA Palkhiwala v MP Pradushan Nivaran Mandal I.L.R. (1990) M.P. 466*.

<sup>47</sup> *Dwarka Cement Works LTD. V Satate of Gujrat (1992) 1 Guj Law Herald 9*.

(ii) ***As against other doctrines of Individual liability***

There are three elements which are required for the purposes of imposing liability by piercing the veil. The first element is that of control and domination, which must have control over policies to the extent that in the absence of this exercised control the company fails to exist.<sup>48</sup> The second element is that of improper use, it is imperative to have a violation of a positive legal duty<sup>49</sup>. Lastly, the third element is that of having resulted in damage or harm which must be in proximity.<sup>50</sup>

The first two elements seem necessary. The requirement of damage is a tangible one and begs the question that the office of a corporation will only be held liable after r damage has been caused irrespective of their disregard for the environment reflected in their practices? The duty here is that of not causing environmental damage, and not to take measures to prevent the environment. The current standard as it stands does not provide motivation for preventive measures. Essentially, the officials will hide behind the veil even if they are not following guidelines. The only difference in the piercing is made by an unfortunate circumstance, which becomes a prerequisite for imposing individual liability.

There are three other broad theories as applied in the United States which deals individual liability for the acts done under the company's name. These must be analyzed to determine the viability of the piercing the corporate veil theory and the extent of liability thus imposed.

a. ***The Personal Participation Doctrine***

This is a principle applied usually in torts cases and has been used extensively in CERCLA response cause related cases. According to the doctrine, mere knowledge of wrongdoing is insufficient although the requirement does not extend to but is inclusive of active participation.<sup>51</sup> In the Northeastern Pharma Case, the Vice President/managing shareholder was held individually liable for the disposal of waste via burring on a third-party site.<sup>52</sup> In cases like these the courts have used this doctrine without having to rely upon either statutory or general corporate principles, while there were references to Tort's principles such as "joint tortfeasors." This Pennsylvania theory is inclusive of nonfeasance and is not limited to misfeasance.<sup>53</sup>

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<sup>48</sup> Radaszewski v. Telecom Corp. - 981 F.2d 305 (8th Cir. 1992).

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> Yavar Rzayev LLC v. Roffman, Del. Super. C.A. S14L-12-035 MJB.

<sup>52</sup> UNITED STATES V. NORTHEASTERN PHARM. & CHEM. CO., 579 F. SUPP. 823 (W.D. MO. 1984).

<sup>53</sup> See Carter v. Koehring Co., 283 So. 716,721 (La. 1973); Accord Athas v. Hill, 476 A.2d 710; Schaefer v. D & J Produce, Inc., 403 N.E.2d 1015; Kerrigan v. Errett, 256 N.W.2d 394.

Personal participation is different than piercing the veil as the latter induces liability on the owner while the former looks for the actor by finding an individual's participation.<sup>54</sup> The issue with this doctrine is active participation, individuals under direct orders to perform certain acts can also be held liable if this theory is applied.

b. **The Control Doctrine**

This Doctrine dictates that the liability must be imposed based on the control exercised by the company official. This control, however, is with regard to the specific practice that caused environmental harm and not upon the general practices and is thus consistent with limited liability. The Court in Northeastern Pharma Case pointed out the intent behind this line of reasoning is to hold company officers responsible for their decisions, as it is in line with the reasoning of the law makers.

It imitates the personal participation theory in its essence, but only punishes the individual based on their position. It does solve concern with the personal participation doctrine but gives rise to another. The person in a higher position might be unaware of happenings in certain segments simply because of the vastness of segments under the individual. The issue might be that of implementation and not of the policies themselves. The control doctrine would then in such a situation remove liability from the individual at fault.

c. **The Prevention Test Doctrine**

The absence of a definitive standard that ensured interest in environmental prevention was addressed by the introduction of the prevention test in the case of Kelly v. ARCO Industries Corp.<sup>55</sup> The test is two-pronged in nature, the first step determines the individual's control, and the second test determines the said individuals' actions and efforts with respect to the control exercised.

This imposes a duty to prevent, thus if preventive measures were taken there would be no liability to the company irrespective of the harm caused. The duty to prevent is important, however, it has to be implemented in tandem with the duty to not cause environmental damage. This test when used in isolation defies the logic of absolute liability, a concept further discussed.

#### **IV. JUDICIAL PRECEDENTS AND IMPLEMENTATION IN INDIA**

The commonly used rule is that of strict liability<sup>56</sup> which imposes liability when a dangerous

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<sup>54</sup> Nordi v. Keystone Health Plan West Inc., 2010 PA Super 11 (2010); see also Donsco, Inc. v. Casper Corp., 587 F.2d 602.

<sup>55</sup> Kelley v. ARCO Indus. Corp., 723 F. Supp. 1214 (W.D. Mich. 1989).

<sup>56</sup> Fletcher v Rylands, (1866) L.R. 1 Ex 265 ; Rylands v Fletcher, (1868) L.R. 3 H.L. 330.



thing amounting to the extraordinary use of land escapes into another property causing damage. It cannot be avoided by pleading negligence.<sup>57</sup> Although, in recent judgments, the absolute liability principle is applied which holds enterprises involved in hazardous or inherently dangerous activities liable if harm is caused. There is no requirement of proving escape<sup>58</sup> or unnatural use of land as there exists an absolute and non-delegable duty.<sup>59</sup> Presence of reasonable care and absence of negligence cannot be used to wave of this liability<sup>60</sup> and unlike strict liability absolute liability has no exceptions. It is in accordance with the polluter pays principle, and allows for relief to the affected persons.

In fact, the now passed Liability Insurance Act, 1991 (PLI Act) mandate compulsory public liability insurance to ensure speedy compensation to affected persons. Additionally, CPC provides for actions against wrongful acts against the public including nuisance and also provides various remedies like injunctions<sup>61</sup> and perpetual injunctions<sup>62</sup> along with compensation for damages in tort<sup>63</sup> and for compensation breach of fundamental rights.<sup>64</sup>

All these measures are in furtherance to the polluter pays principle, which only accounts for the direct damage caused to certain individuals and not the damage caused to the environment and by virtue of that all of humanity. This again will only seek accountability after an unfortunate happening, and the wrongdoer will only have to pay for that misfortune and not for the actual consequences.

Addressing these concerns is not the end; the presence of policies is insufficient; the absence of implementation and several times procedure acts as a hindrance. While there is no uniformity the courts have taken it upon themselves to ensure implementation. In the Ganga Pollution Case,<sup>65</sup> the SC had to reverse HC's order that quashed a petition on the grounds that the company was not prosecuted.<sup>66</sup> The apex court also quashed a lower court's order and reinstated prosecution against those responsible as they were let scot-free on the grounds of their unawareness of the consequences of their actions.<sup>67</sup> Calcutta HC has held that the manager is

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<sup>57</sup> M.C. Mehta And Anr vs Union Of India & Ors, 1987 AIR 1086, ¶306.

<sup>58</sup> Union of India V. Prabhakaran Vijay Kumar (2008) 9 SCC 527: (2008) 2 KLT 700.

<sup>59</sup> Ratanlal & Dhirajlal's Law of Tort at 520(26th edition 2010).

<sup>60</sup> M.C. Mehta v. Union of India AIR 1987 SC 1086.

<sup>61</sup> Code of Civil Procedure, 1908, Act No.5, s94 and Order 39, 1908 (IND.).

<sup>62</sup> Specific Relief Act, 1963, S37-42, Act no. 57, Acts of Parliament, 1963 (IND.).

<sup>63</sup> Code of Civil Procedure, 1908, Act No.5, s9, 1908 (IND.).

<sup>64</sup> M.C. Mehta And Anr vs Union Of India & Ors, 1987 AIR 1086.

<sup>65</sup> M.C. Mehta v Union of India AIR 1988 SC 1037.

<sup>66</sup> Uttar Pradesh Control Board v Modi Distillery. AIR 1988 SCC 1128.

<sup>67</sup> Pollution Control Board v Mohan Meakins Ltd. (2000) 2 SCALE 532; SANJAY UPADHYAY, WATER LAWS, AIR LAWS AND THE ENVIRONMENT AT 30(LEXISNEXIS BUTTERWORTHS, NAGPUR: 2005).

prima facie liable.<sup>68</sup> In another case the managing director was held liable even though he was left out of the original complaint.<sup>69</sup> A company was prevented from evading prosecution on grounds of the board's failure to sanction complaint.<sup>70</sup>

These are all examples of the lower courts having followed procedure while the apex court deciding to ensure a just outcome. Although is the outcome truly just without the procedure? This brings forward a larger conversation with regard to the judicial system in India.

## V. CONCLUSION

Piercing the veil is an effective tool to hold companies liable for their environmental wrongdoings. The issue is that of outlook of the determination of imposition of liability and the extent of the same. While absolute liability is good law by the value of precedence it must also be codified and inculcated in statutes. It is imperative to broaden the meaning of environmental damage and understand that the damage caused is towards all and not just the immediate affected individuals. The very threat of environmental harm should be taken more seriously and the duty to prevent and the duty to not cause environmental damage should both be imposed. Thus, both the determination of scope and the extent of liability should be broadened to uphold the sanctity of the environment and the concept of piercing the veil itself.

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<sup>68</sup>KK Nandi v Amitabh Banerjee (2000) 2 SCALE 532.

<sup>69</sup>Mahmud Ali v State of Bihar 1983 Cr LJ 1479.

<sup>70</sup>Z Kotasek v State of Bihar 1984 Cr. LJ 683.