

INDIA

SURVEY QUESTIONS & RESPONSES¹

Survey conducted as part of *Commerce, Crime, and Conflict: A Comparative Survey of Legal Remedies for Private Sector Liability for Grave Breaches of International Law And Related Illicit Economic Activities*.

I. Disclosure requirements for business entities

1. What sort of material information are business entities required to provide to their shareholders and/or public under your jurisdiction's company law or securities laws that may be relevant to potential litigants? For example, are such entities required to provide information about:

- **material civil litigation?**
- **risk factors that would impact a shareholder's investment in the company?**
- **any reported violations of law or pending proceedings arising from such violations?**
- **revenues received from, or amounts paid to or on account of, a government or its officials or agents?**

Response-1: The relevant provisions in this regard are contained in the Companies Act, 1956 ("Companies Act"). Different aspects/details of a business entity are required under the Companies Act to be furnished to the shareholders/members as well as the public.

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- (i) Section 33 of the Companies Act provides that the memorandum of association and articles of association of a company shall be presented for registration to the Registrar of Companies (“ROC”) of the state where the registered office of such Company is located. In terms of sections 13 and 14, the memorandum is required to, *inter-alia*, specify the extent of liability of its members and amount of its share capital.
- (ii). The provisions contained in Part III of the Companies Act relate to issuance of Prospectus and allotment, and other matters relating to issue of shares or debentures. Section 56 requires the Company to, *inter-alia*, disclose in such prospectus details relating to:
- (a) General information about the Company.
 - (b) Capital structure of the Company.
 - (c) Company, management and project (including history and business of the Company, its subsidiaries, promoters and their background, plant and machinery and technology, process etc., collaborations, infrastructure facilities, schedule of implementation of the project and progress made so far including details of land acquisition, nature of the product, approach to marketing and proposed marketing set up, export possibilities and export obligations, future prospects).
 - (d) Stock market data for shares/debentures of the Company details of previous capital issues of the Company and rate of dividend paid thereon.
 - (e) Outstanding litigation including disputed tax liabilities and criminal prosecution launched against the Company and directors for violations under:
 - ➔ Indian Stamp Act, 1899
 - ➔ Central Excises Act, 1944
 - ➔ Industries (Development and Regulation) Act, 1951
 - ➔ Prevention of Food Adulteration Act, 1954
 - ➔ Essential Commodities Act, 1955
 - ➔ Companies Act, 1956
 - ➔ Securities Contracts (Regulation) Act, 1956
 - ➔ Wealth Tax Act, 1957
 - ➔ Income Tax Act, 1961
 - ➔ Customs Act, 1962
 - ➔ Monopolies and Restrictive Trade Practices Act, 1969
 - ➔ Foreign Exchange Regulation Act, 1973
 - ➔ Sick Industrial Companies (Special Provisions) Act, 1985
 - ➔ Securities and Exchange Board of India Act, 1992
 - ➔ Foreign Trade (Development and Regulation) Act, 1992
 - ➔ Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974
 - (f) Particulars of default in meeting statutory dues, institutional dues and towards instrument holders.
 - (g) Material development after the date of the last balance sheet and its impact on performance and prospects of the Company.
 - (h) Management perception of risk factors.

- (i) Financial information including a report by the auditors of the Company covering profits, losses, assets and liabilities of the Company.
- (j) Assets of the Company charged as security.
- (k) Statutory information including property purchased by the Company, material contracts.

The Company is also required to make available for inspection, copies of balance sheets, profit and loss accounts, material contracts and other documents. Under section 60 a prospectus shall not be issued by or on behalf of a Company unless a copy thereof, signed by a director or his agent, is delivered to the ROC for registration before the publication of such prospectus.

- (iii) Section 58A and 58B of the Companies Act provides that a Company shall not invite any deposit without first issuing an advertisement, *inter-alia*, showing the financial position of the Company. The provisions applicable to a prospectus have also been made applicable to such an advertisement.
- (iv) Section 125 provides that a charge created on the assets of a Company shall be registered with the ROC by submitting the particulars of such charge and a copy of the instrument by which such charge has been created.
- (v) Sections 159 and 160, *inter-alia*, provide that companies with and without share capital, respectively, shall file returns with the ROC within Sixty days after the Annual General Meeting of the Company. The return shall, *inter-alia*, contain details regarding the total indebtedness of the Company.
- (vi) Section 163, *inter-alia*, provides that the registers and returns of the Company shall be kept at the registered office of the Company and made available for inspection subject to such reasonable restrictions that the Company may impose.
- (vii) Section 293A prohibits a government company (company in which the government holds more than fifty – one percent of the paid up share capital) and any company which has been in existence for less than three years from contributing any amount, directly or indirectly, to any political party or to any person for any political purposes. Other companies may make such contributions provided the aggregate of such amounts in any financial year shall not exceed five per cent of its average net profits in the three immediately preceding financial years. Violation of this provision entails punishment of the company with fine which may extend to three times the amount contributed and imprisonment of every officer of the company with a term which may extend to three years.

The information that can be accessed through the advertisements mandated under Section 58A and 58B, or which is available with the Registrar in the form of returns filed by the company (which can be inspected under Section 163) can indicate such activities of the company that may be violation of the law generally and of international law in particular.

In addition, a company desiring to have its shares listed and traded in any recognised stock exchange is expected, under Section 21 of the Securities Contracts (Regulation) Act, 1956, to comply with the conditions of the listing agreement of that stock exchange. A violation of this provision entails a punishment, in terms of Section 23(2) of imprisonment for a term which may extend to ten years or with fine, which may extend to 250 Million Indian Rupees or with both.

The area of issue of prospectus, offering documents or advertisements soliciting money for the issue of securities is sought to be further regulated by the Securities and Exchange Board of India (“SEBI”), under Section 11A of the Securities and Exchange Board of India Act, 1992. The SEBI can issue directions to a company prohibiting it from issuing any prospectus or securities or specify the conditions subject to which this could be done. Failure to comply with these directions entails a penalty of 100,000 Indian Rupees for each day such failure continues.

Further, if a business entity is a public authority amenable to the Right to Information Act, 2005 then subject to the terms of the said statute, such an entity is required to furnish information to a citizen, in any form including records, documents, memos, e-mails, opinions, advices, press releases, circulars, orders, logbooks, contracts, reports, papers, samples, models, data material held in any electronic form and information relating to any private body which can be accessed by a public authority under any other law for the time being in force.

Section 2 (h) of the Right to Information Act, 2005 defines “public authority” as “any authority or body or institution of self government established or constituted:

- (a) by or under the Constitution;
- (b) by any other law made by Parliament;
- (c) by any other law made by State Legislature;
- (d) by notification issued or order made by the appropriate Government, and includes any –
 - (i) body owned, controlled or substantially financed;
 - (ii) non-Government Organisation substantially financed,

directly or indirectly by funds provided by the appropriate Government.”

It is possible therefore that companies that answer the above description would be considered to be public authorities for the purposes of this statute.

Section 3 provides that subject to the provisions of the Act, all citizens shall have the right to information.

Section 4 casts an obligation on every public authority to:

- maintain all its records and ensure that all records that are appropriate to be computerized are computerized and connected through a network all over the country on different systems so that access to such records is facilitated;

- publish information, *inter-alia*, about its organisation, functions and duties, its officers, employees procedure followed in the decision making process, budget allocated to each of its agencies etc.;
- publish all relevant facts while formulating important policies or announcing decisions which affect public; and
- provide reasons for its administrative or quasi judicial decisions to affected persons.

Section 8 provides for exemption from disclosure of particular kinds of information including state secrets, information that could harm the sovereignty and integrity of India or which is expressly forbidden by any court of law or cause a breach of privilege of the legislature. Pertinent to the present survey, Section 8 (1) (d) exempts from disclosure “information including commercial confidence, trade secrets or intellectual property, the disclosure of which would harm the competitive position of a third party, unless the competent authority is satisfied that larger public interest warrants the disclosure of such information.”

The Right to Information Act creates a mechanism comprising a Central Information Commission and State Information Commissions to enforce the provisions of the Act. The Act also provides for penalties for violations to be adjudicated by these Commissions.

2. Is there a right to know statute enabling one to obtain information from your government?

Response-2: The relevant statute in India is The Right to Information Act, 2005. The relevant provisions have been set out in the response to the earlier question.

II. Status of business entities under criminal law

3. Does your penal code (or judicial interpretations thereof) provide that business entities may be prosecuted criminally for violations of such code?

Response-3: Section 2 of the Indian Penal Code, 1860 (“IPC”) provides that “Every person shall be liable to punishment under this Code, and not otherwise for every act or omission contrary to the provisions thereof, of which he shall be guilty within India.”

Section 11, IPC defines “Person” to include “any Company or Association or body of persons, whether incorporated or not.” This also includes ‘firms’.

Section 305 of the Code of Criminal Procedure, 1973 (“CrPC”) lays down the procedure to be followed when a corporation or registered society is an accused. It provides that:

“Right of person against whom proceedings are instituted to be defended.

- (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) *Where a representative of a corporation appears, any requirement of this Code that anything shall be done in the presence of the accused or shall be read or stated or explained to the accused, shall be construed as a requirement that that thing shall be done in the presence of the representative or read or stated or explained to the representative, and any requirement that the accused shall be examined shall be construed as a requirement that the representative shall be examined.*
- (4) *Where a representative of a corporation does not appear, any such requirement as is referred to in sub-section (3) shall not apply.*
- (5) *Where a statement in writing purporting to be signed by the managing director of the corporation or by any person (by whatever name called) having, or being one of the persons having the management of the affairs 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."*

However, according to judicial interpretations, apart from the exceptions of offences like treason, murder, perjury etc. which can be committed by a human individual alone and offences which are compulsorily punishable with imprisonment or corporal punishment, a corporate body (business entity) is indictable for the criminal acts or omissions of its directors, authorized servants or agents, whether they involve *mens rea* or not, provided they have acted or purported to act under the authority of the business entity or in pursuance of its aims or objects.²

In *Standard Chartered Bank v. Directorate of Enforcement*³ the issue related to economic offences committed by business/corporate entities under the Foreign Exchange Regulation Act, 1973. The Supreme Court of India held by a majority decision of 3:2 that a Company cannot escape punishment merely on the ground that the punishment provided under the statute is '*imprisonment and fine*' and that a Business entity cannot be imprisoned. The Court held that in such cases, the provision

² *State of Maharashtra v. Syndicate Transport Co. (P) Ltd.* AIR 1964 Bom 195; *M.C.D. v. J.B. Bottling Co.Pvt. Ltd.* 1975 Cri LJ 1148 (Del) (FB).

³ (2005) 4 SCC 530 = AIR 2005 SC 2622.

shall be construed to mean ‘*imprisonment or fine*’ and the offending business entity would be punished with fine. The Supreme Court however, has left open the question of conviction of a Business entity, for offences, which are punishable only with imprisonment.

In India there are several statutes that make various kinds of economic offences punishable. Under these statutes, a Business entity can also be prosecuted and penalized. A few Illustrative examples are:

- (i) The Securities Contracts (Regulation) Act, 1956 – This statute regulates contracts relating to securities. Sections 23 to 26 prescribe a range of offences and penalties (including fine and/or imprisonment) that can be awarded to companies that contravene the provisions of the Act.
- (ii) The Foreign Exchange Management Act, 1999 – This statute (which replaced its predecessor Foreign Exchange Regulation Act 1973) relates to un-authorized dealings in foreign exchange. Under section 42, a Company can be held liable for contravening the provisions of the act. The penalty being in the nature of a fine.
- (iii) The Negotiable Instruments Act, 1881 – Under section 138 of this act, the dishonour of cheques is an offence punishable with fine and imprisonment. Section 142, *inter-alia*, provides that if the offender is a Company then alongwith the Company, every person who was in charge of and responsible to the Company for the conduct of the business of the Company, at the time of commission of the offence, shall be liable to be punished.

A few examples of crimes for which a Company may be prosecuted which involve other types of criminal activity are as follows:

- (i) Criminal Breach of Trust – Section 405 of Indian Penal Code, 1860 (“IPC”) deals with the offence of criminal breach of trust. Explanation 1 and 2 thereof provide that an employer who defaults in crediting the deductions made from the wages of his employees into the Provident Fund or Family Pension Fund and Employees’ State Insurance Fund, shall be deemed to have dishonestly used such amount.
- (ii) Cheating – Section 415 of IPC deals with the offence of cheating.

Even though the presence of *mens rea* (Dishonest intent/fraudulent intent/intentional inducement, as the case may be) is necessary in the aforesaid offences, a Company may be prosecuted for these offences if the Directors/Managing Directors /principal officers of such Company have acted with such *mens rea* as a corporation through its managerial agents can entertain an intention to commit an offence.⁴

⁴ *Emperor v. Dhanraj Mills Ltd.* AIR 1943 Bom 182.

4. What type of sanctions are applied to business entities, as opposed to natural persons?

Response-4: There are several special statutes in India where under the sanctions that may be imposed by the courts/authorities are not limited to monetary penalties. The sanctions include asset forfeiture and injunctions. A few illustrations are as follows:

- (i) The Prevention of Money Laundering Act, 2002 – Section 3 provides that *“Whosoever directly or indirectly attempts to indulge or knowingly is a party or is actually involved in any process or activity connected with the proceeds of crime and projecting it as untainted property shall be guilty of offence of money laundering.”*

Section 70 provides that if the offence is committed by a Company then both the Company and every person who was in charge of and responsible to the Company for the conduct of its business shall be deemed to be liable for such offence and be punished accordingly.

Section 5 provides for provisional attachment of the property involved in the offence for a period not exceeding ninety days. Under section 8 such provisional attachment shall be confirmed and become final if the offender is adjudged to be guilty by the adjudicating authority. The property shall thereafter vest in, and shall be managed by, the Central Government.

- (ii) The Narcotic Drugs and Psychotropic Substances Act, 1985 – Section 8A of the act prohibits the conversion or transfer of a property with the knowledge that such property has been derived from an offence committed under the act or any corresponding law of any other country. The said provision also prohibits concealing or disguising the true nature, source, location, disposition of any property with the knowledge that such property is derived from an offence committed under the act or any corresponding law of any other country.

Section 38 deals with offences by companies. The extent and purport being identical to that of section 70 of the Prevention of Money Laundering Act, 2002.

Section 68B defines “illegally acquired property” to be property derived from the commission of contravention of the provisions of the act. Section 68C prohibits the holding of such illegally acquired property by a person (offender) by himself or through another person in his behalf (including relatives and associates) and makes such illegally acquired property liable to be forfeited to the Central Government. Section 68F provides for seizure/freezing of such property. Section 68G provides for management of such properties. Under section 68M, the transfer of such property subsequent to the initiation of proceedings in respect thereof shall be void.

- (iii) The Unlawful Activities (Prevention) Act, 1967 – This Act, which initially was intended to punish unlawful activities of individuals and associations, has since September 21, 2004, been extensively amended to empower the state to punish terrorist activities and to ban terrorist organisations. It incorporates in s. 2 (1) (k), (l) and (m) the definitions of ‘terrorist act’, ‘terrorist gang’ and ‘terrorist organisation’ respectively. Section 21 makes a punishable offence the act of holding proceeds derived from terrorist activities. Section 24 provides that the proceeds of terrorism shall be liable to be forfeited to the Central or State government. Section 33 provides that all or any of the properties of a person accused of violating the provisions of the act, shall be attached during the period of trial of such person. Further, upon conviction of such person, all his property or any of his properties shall stand forfeited to the Central or State government, free from all encumbrances. Where these involve shares of a company then those shares, shall under Section 34 be compulsorily transferred by the company in the name of the government.

5. What are the standards applied in your jurisdiction for attributing liability to a business entity for the actions of individual servants? For example:

- a. What must one demonstrate in order to convince the court that the actions of the servants of the business entity may be attributed to the business entity to establish the guilt of the business?**
- b. If, in order to find a business entity guilty of a crime, the court must find that the business entity intended to carry out an activity that is a crime, how must the prosecution demonstrate that such intent (mens rea) was present? ; and**
- c. What are the standards applicable in your jurisdiction for attributing the criminal liability of a business entity to the servants of the business entity?**

Response-5: As parts a– c of Query 5 are inter-linked, they are addressed herein through a common response. As stated in response to Query No.3, in order to hold a Company liable for the actions of its servants, it must be established that the servants (i.e. directors, authorized servants or agents) acted or purported to act under the authority of the Company or in pursuance of its aims or objects. Similarly, if an offence is committed by the Company, then every such person who was in charge of and responsible to the Company for the conduct of its business, at the time of the commission of the offence, is also deemed to be guilty along with the Company. Various statutes in India contain specific provisions to this effect that are *pari materia*. (For illustrations please refer to Response 3 and 4 hereof).

Although vicarious liability is normally alien to criminal law, cases of statutory liability, strict liability and absolute liability are exceptions to this general rule. In *Dhanraj Mills Ltd.* case⁵ it was held by the Bombay High Court that a corporation can be prosecuted and convicted because a corporation through its managerial agents can entertain an intention to commit an offence. Therefore, the *mens rea* of a Company can be demonstrated by establishing the presence of such *mens rea* in the managerial agents of the Company.

Section 138 of the Negotiable Instruments Act, 1881 is an instance of a 'no fault' offence which is made explicit by the wording that where a cheque is returned by the bank unpaid due to insufficiency of funds, the person who drew the cheque "shall be deemed to have committed an offence."⁶ Thus, the defence in a criminal action for dishonour of cheques has had to be in a very narrow compass as illustrated by the following decision.

A three judges bench of the Supreme Court of India in *S.M.S. Pharmaceuticals Ltd. v. Neeta Bhalla*⁷ while interpreting sections 138 and 141 of the Negotiable Instruments Act, 1881, *inter-alia*, held that:

"The normal rule in the cases involving criminal liability is against vicarious liability, that is, no one is to be held criminally liable for an act of another. This normal rule is, however, subject to exception on account of specific provision being made in the statutes extending liability to others. Section 141 of the Act is an instance of specific provision, which in case an offence under Section 138 is committed by a Company, extends criminal liability for dishonour of cheque to officers of the Company. Section 141 contains conditions which have to be satisfied before the liability can be extended to officers of a company. Since the provision creates criminal liability, the conditions have to be strictly complied with. The conditions are intended to ensure that a person who is sought to be made vicariously liable for an offence of which the principal accused is the Company, had a role to play in relation to the incriminating act and further that such a person should know what is attributed to him to make him liable. In other words, persons who had nothing to do with the matter need not be roped in. A company being a juristic person, all its deeds and functions are result of acts of others. Therefore, officers of a Company who are responsible for acts done in the name of the Company are sought to be made personally liable for acts which result in criminal action being taken against the Company. It makes every person who, at the time the offence was committed, was in charge of, and was responsible to the Company for the conduct of business of the Company, as well as the Company, liable for the offence. The proviso to the sub-section contains an escape route for persons who are able to prove that the offence was committed without their

⁵ *Id.*

⁶ This necessarily shifts the burden of proof to the person who drew such cheque, a position that is made clear by Section 139 which draws a presumption in favour of the holder of such cheque and Section 140 which prevents the drawer of a cheque from mounting a defence that he "had no reason to believe that when he issued the cheque that the cheque may be dishonoured on presentment."

⁷ (2005) 8 SCC 89= AIR 2005 SC 3512.

knowledge or that they had exercised all due diligence to prevent commission of the offence.”⁸

The court proceeded to explain that there was no automatic presumption that every director of a company is deemed to be in charge of and responsible to the company for the conduct of its business. This had to be determined as a question of fact preceded by a specific averment to that effect in the complaint. The position in case of a managing director would be different since they would admittedly be in charge of the affairs of the company and in that capacity would become liable under Section 141 of the Act.

This shifting of the burden of proof onto the accused by virtue of a deemed provision is indeed helpful in prosecuting companies and their directors for specific offences. However, it is not clear if the civil law principles of strict and absolute liability, arising in the area of torts would *ipso facto* also apply to cases involving criminal liability of corporations.

The leading case of the Indian Supreme Court in which the principle of enterprise liability was first sought to be applied was *M.C. Mehta v. Union of India*⁹ (Oleum Gas Leak Case) where while dealing with a case involving leakage of oleum gas from an industrial plant, the Supreme Court of India was called upon to fasten liability on the officers of the company which operated the plant. Extending the enterprise liability doctrine to bring in the Chairman and Managing Director of the company, even though they may not be involved in the day to day functioning of the units, the court observed:¹⁰

" We do not see any reason why the Chairman and/or Managing Director should not be personally liable for payment of compensation in case of death or injury resulting on account of escape of chlorine gas, particularly when we find that according to the reports of various expert committees which examined the working of caustic chlorine plant, there was considerable negligence in looking after its safety requirements and in fact, considerable repair and renovation with and installation of safety devices had to be carried out at a fairly heavy cost in order to reduce the element of risk of hazard to the community. We may however make it clear that the undertaking to be given by the Chairman and/or Managing Director may provide that no liability shall attach to the Chairman and/or Managing Director if he can show that the escape of chlorine gas was due to an Act of God or vis major or sabotage. But in all other cases the Chairman or Managing Director must hold himself liable to pay compensation. That alone in our opinion would ensure proper and adequate maintenance of safety devices and instruments and operation of the caustic chlorine plant in a manner which would considerably reduce, if not eliminate, risk or hazard to the workmen and to the people living in the vicinity".

⁸ *Id.* at para 4, 95-96 (SCC).

⁹ 1986 (2) SCC 325 = AIR 1987 982.

¹⁰ *Id.* at 330.

In its concluding judgment in the Oleum Gas Leak case the court formulated the principle of enterprise liability in the following words: “An enterprise which is engaged in a hazardous or inherently dangerous industry which poses a potential threat to the health and safety of the persons working in the factory and residing in the surrounding areas owes an absolute and non-delegable duty to the community to ensure that no harm results to anyone on account of hazardous or inherently dangerous nature of the activity undertaken... if any harm results on account of such activity, the enterprise must be absolutely liable to compensate for such harm and it should be no answer to the enterprise to say that it had taken all reasonable care and that the harm occurred without any negligence on its part.”¹¹

While the enterprise liability principle has thereafter been applied in a number of cases concerning environment pollution by companies,¹² there has been no occasion since where this doctrine was applied in the context of criminal liability of corporations.

However, in the context of the applicability of the penal provision of a law relating to factories, the court applied the strict liability rule to find liability of a company for ‘absolute offence’. In the case of *J.K. Industries v. Chief Inspector of Factories and Boilers*¹³ while interpreting section 2(n)(ii) of the Factories Act, 1948, the Supreme Court of India held that since a company is a legal abstraction, it can act only through its agents who in fact control and determine the management and are the centre of its personality. Such agents are generally called the directors being the “directing mind and will” of the company. Such persons are held vicariously liable for commission of statutory offences. The directors of the company are, therefore, rightly called upon to answer the charge, being the directing mind of the company. ‘Absolute offences’ are not criminal offences in any real sense but acts, which are prohibited in the interest of welfare of the public, and the prohibition is backed by sanction of penalty. Such offences are generally known as public welfare offences. What is made punishable under the Act is the ‘blameworthy’ conduct of the occupier which resulted in the commission of the statutory offence and not his criminal intent to commit that offence. The rule of strict liability is attracted to the offences committed under the Act and the occupier is held vicariously liable along with the Manager and the actual offender, as the case may be. Penalty follows actus reus, mens rea being irrelevant. The fact that the notified/identified director is ignorant about the ‘management’ of the factory, which has been entrusted to a manager or some other employee and is himself not responsible for the contravention cannot absolve him of his liability. The notified/identified director is held vicariously liable for the contravention of the provisions of the Act, the rules made thereunder or of any order made in writing under it for the offender company, which is the occupier of the factory.

6. Under your criminal law (penal code) what is the legal standard for convicting someone of being an accomplice to or aiding and abetting

¹¹ *M.C.Mehta v. Union of India* (1987) 1 SCC 395 = AIR 1987 SC 1086. . The court emphasised (at 420-21 SCC) that “such liability is not subject to any of the exceptions which operate vis-avis the tortious principle of strict liability under the rule in *Rylands v. Fletcher* (1868) LR 3 HL 330.”

¹² *Indian Council for Enviro-Legal Action v. Union of India* (1996) 3 SCC 212 = AIR 1996 SC 1446; *In Re: Bhavani River-Shakti Sugars Ltd.* (1998) 6 SCC 335 = AIR 1998 SC 2578.

¹³ (1996) 6 SCC 665.

the commission of a crime by another (complicity)? What is the legal standard for convicting someone of plotting with another to commit a crime (criminal conspiracy)?

Response-6: The IPC treats **“Abetment”** as a separate and distinct offence provided the thing abetted is an offence. It is not necessary for the commission of abetment that the offence so abetted must also have been committed.¹⁴

Broadly, Section 107, IPC provides that abetment is constituted: (1) by instigating a person to commit an offence; or (2) by engaging in a conspiracy to commit it; or (3) by intentionally aiding a person to commit it.

Therefore, in order to prove the charge of abetment, the prosecution is required to prove that the abettor had instigated for the doing of a particular thing or engaged with one or more other person or persons in any conspiracy for the doing of that thing or intentionally aided by an act of illegal omission, doing of that thing.

The three aspects of ‘abetment’ delineated hereinabove are mutually exclusive.

“Instigation” is illustrated in Section 107 in the following manner: “A, a public officer, is authorized by a warrant from a Court of Justice to apprehend Z. B, knowing that fact and also that C is not Z, willfully represents to A that C is Z, and thereby intentionally causes A to apprehend C. Here B abets by instigation the apprehension of C.” Further, Section 113 provides that when an act is abetted with an intention to cause a particular effect and the act abetted causes a different effect than the one intended by the Abettor, such Abettor would be liable for the effect so caused, provided he knew that the act abetted was likely to cause that effect. Therefore, for purposes of “instigation”, it would suffice if there is encouragement with reason to know about the likely consequences of such encouragement.

As regards “abetment” in the context of civil liability, the standard text on the law of torts in India¹⁵ mentions with reference to three decisions handed down over a hundred years ago¹⁶ that the abettor of a tortuous act is equally liable with the tortfeasor. It would appear that in India the threshold for establishing abetment as a matter of civil liability is lower than that for criminal liability. The law in this area has not developed beyond the English common law that was prevalent in the pre-independence era.

“Criminal Conspiracy” is dealt with in Section 120A, IPC. The essence of criminal conspiracy is an agreement to do an illegal act or a legal act by illegal means. As regards the legal standard for conviction, such an agreement can be proved either by direct evidence or by circumstantial evidence or by both. However, where the prosecution relies only on circumstantial evidence to establish a criminal agreement it is necessary for the prosecution to prove and establish such circumstances, which

¹⁴ *Gurbachan Singh v. Satpal Singh* (1990) 1 SCC 445 = AIR 1990 SC 209.

¹⁵ G.P. Singh (revised) Ratanlal & Dhirajlal’s Law of Torts, 23rd Ed. (1997), Wadhwa & Co., Nagpur, p. 159.

¹⁶ *Kashee Nath v. Deb Kristo* (1871) 16 WR 240; *Golab Chand v. Jeebun* (1875) 24 WR 437 and *Wharton v. Moona Lall* (1866) 1 Agra HC 96.

would only lead to the conclusion of a criminal conspiracy. The facts established must rule out any likelihood of innocence of the accused. If there are circumstances compatible with the innocence of the accused persons the prosecution shall be unsuccessful.¹⁷

7. Are there any other practical considerations or factors that must be present when the defendant in a criminal proceeding is a business entity rather than a natural person?

Response-7: As mentioned in Response-5 hereinabove, *mens rea* can be imputed to a business entity through its agents. However, apart from showing the requisite *mens rea* of the agent of the business entity, it is also incumbent to establish that such an agent acted within the scope of his activity so as to bind the business entity. For instance, in cases of statutory offences, as mentioned in Response-3 and 4 hereinabove, such a person must be in charge of and responsible to the company for the conduct of its business, at the time of commission of the offence in question. While, such a standard is not prescribed in a criminal proceeding involving a natural person.

III. Status of International Law/International Humanitarian Law in your Country's Legal Framework

8 Which international crimes have been incorporated into your domestic criminal law? Please include any crimes enumerated in the Rome Statute of the International Criminal Court such as genocide, war crimes, crimes against humanity, and other relevant instruments.

Response-8: India is not a party to the Rome Statute of the International Criminal Court. In fact, India was among the few countries that voted against it.¹⁸ The resultant position is that there are no special provisions defining the offences of genocide, torture, and crimes against humanity and resort will have to be had only to the IPC provisions for punishing those crimes. However, the provisions of international covenants touching upon different types of crime have been incorporated into the Indian municipal law through enactment of special statutes. A few illustrations are as follows:

- (i) The Geneva Conventions Act, 1960.
- (ii) The Protection of Human Rights Act, 1993 ("human rights" has been defined herein to mean the rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in the International Covenants and enforceable by courts in India; and

¹⁷ *Ram Narain v. State of Rajasthan* (1973) 3 SCC 805 = AIR 1973 SC 1188; *Bhagwan Swarup Lal Bishan Lal v. State of Maharashtra* AIR 1965 SC 682 = (1964) 2 SCR 378; *Shivnarayan Laxminarayan Joshi v. State of Maharashtra* (1980) 2 SCC 465 = AIR 1980 SC 439; *A. Jayaram v. State of Andhra Pradesh* 1995 Supp (3) SCC 333 = AIR 1995 SC 2128; and *Param Hans Yadav v. State of Bihar* (1987) 2 SCC 197 = AIR 1987 SC 955.

¹⁸ For an insight into India's position on the ICC Statute see Usha Ramanathan, "India and the ICC", *Journal of International Criminal Justice* 3 (2005), 627-634.

"International Covenants" has been defined to mean the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights adopted by the General Assembly of the United Nations on the 16th December, 1966")¹⁹

- (iii) The Anti – Apartheid (United Nations Convention) Act, 1981.
- (iv) The Anti – Hijacking Act, 1982. (To give effect to the Convention for the Suppression of Unlawful Seizure of Aircraft)
- (v) The Narcotic Drugs and Psychotropic Substances Act, 1985. (To give effect to the International Convention on Narcotic Drugs and Psychotropic Substances.
- (vi) The Prevention of Money – laundering Act, 2002. (To give effect to the Political Declaration and Global Programme of Action annexed to the resolution S – 17/2 adopted by the General Assembly of the United Nations at its Seventeenth special session on 23/02/1990.

9. Do your country’s laws modify the provisions of the ICC Statute, such as concepts of aiding and abetting and conspiracy or liability of business entities rather than only natural persons?

Response-9: The principal criminal law statute i.e. the IPC is anterior to the ICC statute and therefore the question of that law modifying the ICC does not arise. As regards other laws touching upon different aspects of crime, the provisions regarding aiding and abetting and conspiracy as applicable to business entities are similar to that contained in the IPC and are consistent with the corresponding provisions of the ICC.

10. Do your criminal courts have jurisdiction over those international crimes that have not been incorporated into your domestic law?

Response-10: The criminal courts in India do not have jurisdiction over those international crimes that have not been incorporated into the domestic law of India. (Please refer to Response – 11 herein below)

11. May a business entity be prosecuted for international crimes in the courts of your country, whether under domestic law or with reference to international law? If yes, under what circumstances?

¹⁹ The National Human Rights Commission is empowered under Section 12 (a) of that Act to enquire into ‘violation of human rights or abetment thereof’ on a complaint by a victim or any person on behalf of the victim. Under Section 14 the Commission can associate (and invariably does) the investigation agency (usually the Police) in its investigation of the human rights violation. If it finds that the complaint is true, among the recommendations it can make is the registration of a criminal case and fastening of liability for human rights violations and recommending the award of compensation.

Response-11: A business entity may be prosecuted in India for violations of international law only upon incorporation of such law into the municipal law of India, if such law restrict the rights of citizens or others or modifies the law of the State. In *Union of India v. Azadi Bachao Andolan*²⁰, the Supreme Court of India reiterated its earlier decision rendered in *Maganbhai Ishwarbhai Patel v. Union of India*²¹ and held that:

“The obligations arising under the agreement or treaties are not by their own force binding upon Indian nationals. The power to legislate in respect of treaties lies with the Parliament under entries 10 and 14 of List I of the Seventh Schedule. But making of law under that authority is necessary when the treaty or agreement operates to restrict the rights of citizens or others or modifies the law of the State. If the rights of the citizens or others which are justiciable are not affected, no legislative measure is needed to give effect to the agreement or treaty.”²²

Therefore, a business entity can be punished in the Indian courts for violating an international law provided:

- ➔ The Indian State has incurred binding obligations in respect of such international law; and
- ➔ There is a legislation/statute in support of the international law if such law operates to restrict the rights of citizens or others or modifies the law of the State.

Accordingly, invocation of international law including customary international norm, by private litigants and the permission of Indian Courts to prosecute claims arising there from, may also be subject to incorporation of such law into the municipal law of India so as to vest the courts in India with jurisdiction to entertain and try disputes relating to international law. Section 83 of the CPC, *inter-alia*, provides that an “alien friends” may sue in any court otherwise competent to try the suit, as if they were citizens of India. Therefore, it is not mandatory that Indian nationals should be among the victims of the international law violations in order to bring about the prosecution of a claim involving violation of international law as long as such international law has been incorporated into the municipal law and amounts to an offence under the municipal law.

No instance of any such prosecution of either an individual or a business entity in India or outside India appears to have been noticed thus far.

IV. Alternative Mechanisms

- 12. Can you think of any bases in your country’s tort law (civil law) for suing individuals and /or business entities for violations of international criminal law, IHL, (whether or not incorporated into domestic law)?**

²⁰ (2004) 10 SCC 1= AIR 2004 SC 1107.

²¹ (1970) 3 SCC 400 = AIR 1969 SC 783.

²² *Supra* note 18 at 23-24 (SCC).

Response-12: The civil procedural law in India is embodied in the Code of Civil Procedure, 1908 (“CPC”). While, there is no specific provision in CPC for suing individuals/business entities for violations of international law, Sections 16 and 19 of CPC recognize tortious liability in respect of wrongs to immoveable property; and person and movables, respectively. The Courts in India recognize the common-law principles relating to torts. Therefore, such violations of international law as may fall within the scope and ambit of wrongs to immoveable property, person and moveables may be tried under the Civil law in India.

It is theoretically possible that arising out of an incident of crime, the victim would be able to maintain a civil action for damages. A number of reasons make this not practically feasible for many a victim. First, a claim for damages involves payment of court fees ad valorem which is usually prohibitive for a poor victim. Secondly, the system of legal aid is not satisfactory enough and engaging competent lawyers is also unaffordable. Then the question of delays and uncertainties. Fourth is the lack of legal awareness and reluctance of the victims to engage with the formal legal system with all its attendant difficulties. Finally, the legal system as presently ordered does not offer a level playing field to a victim wanting to take on a corporation in her pursuit of justice.²³

However, as regards human rights abuses by state actors, the courts have responded creatively to need to evolve a system of reparations. Where there are proven instances of human rights violations by government servants (for instance, the police officials in the event of a custodial crime) the Indian Supreme Court and the High Courts have awarded compensation to the victims in their constitutional jurisdiction.²⁴ The extension of this principle to companies/corporations is, however, awaited. While the possibility of making companies liable for violation of human rights and therefore subject to the constitutional (public law) jurisdiction of the High Courts and the Supreme Court was explored in the Oleum Gas leak case,²⁵ it was left unanswered and has not been re-visited since.

V. Jurisdiction and related issues

13. On what bases do the courts of your country assert personal jurisdiction over criminal and civil defendants?

Response-13: The basis on which jurisdiction of Indian Criminal Courts is determined for trying the accused/defendants is provided in the Code of Criminal Procedure Code, 1973 (“CrPC”). Generally, the Criminal Courts in India assert jurisdiction over the accused/defendants on the following basis:

- (i) Ordinarily by a Court within whose local jurisdiction the offence was committed. (Section 177, CrPC).

²³ See generally, S.Muralidhar, **Law Poverty and Legal Aid: Access to Criminal Justice**, Lexis Nexis Butterworths, New Delhi (2004).

²⁴ *Nilabati Behera v State of Orissa* (1993) 2 SCC 746; *D.K.Basu v. Union of India* (1997) 1 SCC 416.

²⁵ *M.C.Mehta v. Union of India supra* note 10.

- (ii) In case of uncertainty regarding the place of commission of the offence or if the offence comprises of a series of transactions then by the Court having jurisdiction over any of the local areas. (Section 178, CrPC)
- (iii) In cases where an act is an offence by reason of anything, which has been done, and of a consequence, which has ensued then such an offence, can be tried by a Court within whose local jurisdiction either of such events occurred. (Section 179, CrPC)

Apart from the foregoing general basis, the CrPC also provides specific basis for determining local jurisdiction of a court in respect of specific offences like:

- (i) Being a thug, Commission of murder by a thug, dacoity, dacoity with murder, belonging to a gang of dacoits, escape from custody. (Section 181(1), CrPC)
- (ii) Kidnapping or abduction. (Section 181(2), CrPC)
- (iii) Theft, extortion and robbery. (Section 181(3), CrPC)
- (iv) Criminal misappropriation and criminal breach of trust. (Section 181(4), CrPC)
- (v) Possession of stolen property. (Section 181(5), CrPC)
- (vi) Offences committed by letters. (Section 182 (1), CrPC)
- (vii) Marrying again during the lifetime of husband or wife and concealment of such marriage. (Section 181(2), CrPC)
- (viii) Offences committed on journey or voyage. (Section 183, CrPC)

The provisions of CPC, *inter-alia*, deal with the aspect of jurisdiction of Indian Civil Courts. The jurisdiction of Indian Civil Courts can be classified under two co-extensive heads:

- ➔ Pecuniary jurisdiction; and
- ➔ Territorial jurisdiction

Pecuniary jurisdiction refers to the pecuniary limit up to which a Civil Court in the hierarchy of Indian Civil Courts may entertain a civil action. Pecuniary jurisdiction is determined on the basis of the monetary value involved in the concerned civil action. The pecuniary limit is not uniform throughout India.

Territorial jurisdiction refers to the extent of territorial limits within which a Civil Court may exercise its jurisdiction to entertain a civil action. The amenability of the Territorial jurisdiction of a Civil Court to entertain a civil action is determined on the following basis:

- (i) The place where the subject matter of dispute is situated, partly or wholly. This includes civil action relating to property, both moveable and immoveable. (Section 16, CPC)
- (ii) In civil actions for compensation for wrongs to person or movables, the action can be instituted at the place where the wrong was done or at the place where the defendant resides or carries on business or personally works for gain. (Section 19, CPC)

(iii) In respect of civil action/suits other than those mentioned at (i) and (ii) hereinabove, the territorial jurisdiction of a Civil Court to entertain a suit is determined on the following basis:

- ➔ The place where the defendant(s) actually or voluntarily reside, or carry on business or personally work for gain, at the time of commencement of the civil action; or
- ➔ The place where the cause of action, wholly or in part, arises.

If the defendant(s) is a corporate entity then a civil action can be instituted against such entity not only at its sole or principal place of business but also at the place where such entity has its subordinate office, provided that the cause of action for such an action arises wholly or in part thereat. (Section 20, CPC)

14. When parent and subsidiary entities are involved in a multinational setting, how does a court assert personal jurisdiction over parents or subsidiaries located out of country? What are the standards for overcoming limitations on jurisdictions over business entities within a multinational corporation?

Response-14: In situations involving parent and subsidiary entities in a multinational setting, the courts in India may assert personal jurisdiction over such entities outside the country if the cause of action arises wholly or in part, within the territorial limits of their local jurisdiction. The aspect relating to jurisdictional basis has been dealt with in Response – 13 hereinabove.

However, if the multinational parent company located outside the jurisdiction of the court refuses to submit to the court's jurisdiction and it has no tangible assets within the local limits of the court's jurisdiction, which can be seized or attached to enforce the presence of the MNC, then there may be practical difficulties in proceeding against the MNC in such a case. In the Union Carbide case, despite the order of the magistrate of the Bhopal criminal court attaching the shares of UCC in UCIL in order to enforce the presence of the accused UCC and its chairman Warren Anderson, they continue to abscond and avoid submitting to the criminal jurisdiction of the Bhopal court till date.²⁶

Indian courts are yet to evolve principles on which they can extend their jurisdiction to parent or subsidiary entities located outside the country, particularly where such entities do not volunteer to submit to the jurisdiction of such court.

²⁶ For the factual background see the judgment in *Keshub Mahindra v. State* (1996) 6 SCC 129. UCC's submission to the jurisdiction of the civil court in Bhopal was also based on an undertaking given by it in the court of Judge Keenan, Southern District Court of New York: For the factual narration see the judgment of the Supreme Court of India in *Union Carbide Corporation v. Union of India* (1991) 4 SCC 584 = AIR 1992 SC 248. For a comprehensive reporting of the legal aspects of the Bhopal Gas Disaster see S.Muralidhar, "Unsettling Truths, Untold Tales: The Bhopal Gas Disaster Victims' Twenty Years' of Courtroom Struggles for Justice", available at <http://www.bhopalffm.org/Legal %20Aspects.htm> visited on April 30, 2006.

15. How may a court attribute the actions of a subsidiary to a parent business entity, i.e. “pierce the corporate veil”?

Response-15: Section 4 of the Companies Act defines “holding company” and “subsidiary”. A company shall be, *inter-alia*, deemed to be a subsidiary of another company if:

- (i) The latter company controls the composition of the Board of directors of the former; or
- (ii) The latter company exercises more than half of the total voting power of the former company or holds more than half in nominal value of its equity share capital; or
- (iii) The former company is a subsidiary of any company, which is the subsidiary of the latter company.

The doctrine of lifting the corporate veil laid down in *Salomon V. Salomon & Co*²⁷. has been recognized and applied by the courts in India.²⁸ In *State of UP v. Renusagar Power Co.*,²⁹ the Supreme Court of India while applying the doctrine of lifting the corporate veil held that the doctrine is expanding in the context of modern jurisprudence. The doctrine is of general application and is not confined to the Companies Act. It can be resorted to in all cases depending upon:

- (a) The relevant statutory or other provision.
- (b) The object sought to be achieved.
- (c) The impugned conduct.
- (d) The involvement of public interest.
- (e) The interest of the affected parties.³⁰

The doctrine has been applied in India by the courts to prevent evasion of statutes and also to make the holding company liable for the commitments of its subsidiary unless it has guaranteed the subsidiary’s debts.³¹

16. What types of actions (civil and criminal) might be asserted against a business entity with respect to activities taking place outside of your jurisdiction by a business entity over which your courts have jurisdiction?

²⁷ 1897 AC 22.

²⁸ *Tata Engineering and Locomotive Co. Ltd. v. State of Bihar* AIR 1965 SC 40 = (1964) 6 SCR 885.

²⁹ (1988) 4 SCC 59 = AIR 1988 SC 1737

³⁰ *Bijay Kumar Agarwal v. Ratan Lal Bagaria* AIR 1999 Cal 106.

³¹ *Workmen Employed in Associated Rubber Industry Ltd. v. Associated Rubber Industry Ltd.* (1985) 4 SCC 114 = AIR 1986 SC 1; *Delhi Development Authority v. Skipper Construction Co. Pvt. Ltd.* (1996) 4 SCC 622 = AIR 1996 SC 2005.

Response-16: The following types of actions may be asserted against a business entity over which the Indian courts may have jurisdiction, for activities taking place outside India:

- ➔ Actions based on Criminal Liability – Section 3 of IPC provides that any person liable under Indian law to be tried for an offence committed beyond India shall be dealt with according to the provisions of IPC for any act committed beyond India in the same manner as if such act had been committed within India.

- ➔ Actions based on Statutory/Absolute liability – There are various special statutes in India that permit the courts in India to exercise their jurisdiction beyond their territorial limits. A few illustrations are as follows:
 - (i) Geneva Conventions Act, 1960 – Section 4 provides that if an offence there under is committed by any person outside India, he may be dealt with in respect of such offence as if it had been committed at any place within India at which he may be found. Section 14 provides that if an offence under the act is committed by a company then the company as well as every person in charge of, and responsible to, the company for the conduct of its business at the time of the commission of the offence shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly.

 - (ii) The Narcotic Drugs and Psychotropic Substances Act, 1985. – Under section 24, the engagement in or controlling of any trade whereby the drugs are obtained outside India and also sold outside without the requisite approvals shall be punishable. Section 38 extends the operation of the provisions of the act to companies and its officers who are in charge and answerable to the company for the conduct of its business at the time of contravention.

Civil action based on torts and contract. These can be maintained in terms of Section 9 CPC, which enables the courts to try all civil suits unless expressly or impliedly barred. Under Section 20 CPC a business entity which is amenable to the jurisdiction of the Indian courts can be sued for an activity taking place outside the country as long as the principal office or any place where it carries on business and a part of the cause of action arises and such place is within the jurisdiction of the Indian court.³² The entity could also be sued in the court of any place in India where a part of the cause of action arises. Further under Section 83 CPC alien friends can sue in Indian courts as if they were Indian citizens. Foreign states too can sue under Section 84 as long as it is for the enforcement of a private right. This would be applicable to actions under torts and contracts. The same principle would apply to actions before the tribunals constituted under the Consumer Protection Act, 1986 which can adjudicate claims for damages against companies for commission of certain kinds of

³² *Patel Raodways Ltd. v. Prasad Trading Co.* (1991) 4 SCC 270 = AIR 1992 SC 1514.

torts, like supply of defective goods or provision of deficient services. Likewise corporations can be made answerable to the jurisdiction of labour courts and tribunals in actions brought forth by aggrieved workmen. Civil suits for breach of contract are also maintainable unless barred by an exclusionary clause in a contract which may provide remedy by way of arbitration or any other alternative redressal mechanism.

17. If plaintiffs wanted to sue a business entity in your jurisdiction, what are some of the jurisdictional and procedural obstacles that they (and their lawyers) might face?

Response-17: The defence against a civil action depends upon and varies with the facts and circumstances of each case. However, some of the standard defences that are usually raised on behalf of a business entity whilst defending against a civil action are as follows:

- (i) Lack of pecuniary jurisdiction.
- (ii) Lack of territorial jurisdiction.
- (iii) Exclusion of jurisdiction by mutual consent.
- (iv) Lack of subject matter jurisdiction, i.e. where the statute excludes the jurisdiction of certain courts and limits their jurisdiction to try certain classes/kinds of offences. For example, section 73 of the Narcotic Drugs and Psychotropic Substances Act, 1985 excludes the jurisdiction of civil courts in respect of offences punishable under the said Act.
- (v) Plea of *Forum non conveniens*.
- (vi) Presence of an arbitration agreement between the parties to the *lis*.
- (vii) Plea as to existence of a prior consent decree passed in an earlier proceeding.
- (viii) Absence of authority or invalid authority of the person instituting the civil action.
- (ix) Improper verification of the plaint filed by the plaintiff.
- (x) Non-issuance of mandatory notice to the State prior to the institution of civil action against the State.
- (xi) Insufficiency of court fees that is required to be filed at the time of institution of civil action.
- (xii) Bar of Limitation.
- (xiii) Non-disclosure of cause of action against the business entity in the plaint.
- (xiv) Plea of *Res judicata* (Broadly, this principle provides that once an action or *lis* attains finality then the same cannot be re-agitated.)
- (xv) Plea of *res judice*. (This principle, *inter-alia*, provides that during the pendency of a civil action between the concerned parties seeking a particular relief, the trial of another action initiated between the same parties for the same relief shall not be permitted.)
- (xvi) Non-joinder of necessary and proper parties.
- (xvii) Misjoinder of parties.
- (xviii) Misjoinder of causes of action.

These obstacles are independent of other procedural difficulties including costs of litigation (court fees, lawyer's fees etc.), delays (a civil suit in India could take as

long as ten years on an average) and uncertainties with there being at least two tiers of appeals at the levels of the High Court and the Supreme Court.

In the context of suits against business entities the presence of an arbitration agreement, the lack of territorial jurisdiction are major hurdles that invariably confound the Plaintiff. The inequality of arms is brought out sharply when an individual Plaintiff takes on a Defendant corporation. The latter is invariably represented by the best of the bar.³³

18. Do the civil courts of your country sometimes decline to exercise jurisdiction over matters where the events occurred in another country and/or the majority of witnesses and the bulk of other evidence is outside of your country, thereby making it more convenient for the parties to litigate in the courts of another jurisdiction (sometimes referred to as the doctrine of forum non conveniens)?

Response-18: The doctrine of *forum non-conveniens* has been recognized and applied by the courts in India in appropriate cases. In *Modi Entertainment Network and Another v. W.S.G. Cricket Pte. Ltd.*³⁴ the Supreme Court of India has laid down the following principles with regard to this doctrine:

- (i) In a case where more forums than one are available, the court in exercise of its discretion to grant anti-suit injunction will examine as to which is the appropriate forum (*forum conveniens*) having regard to the convenience of the parties and may grant anti-suit injunction in regard to proceedings which are oppressively or vexatious or in a *forum non conveniens*.
- (ii) Where parties have agreed, under a non-exclusive jurisdiction clause, to approach a neutral foreign forum and be governed by the law applicable to it for the resolution of their disputes arising under the contract, ordinarily no anti-suit injunction will be granted in regard to proceedings in such a *forum conveniens* and favoured forum as it shall be presumed that the parties have thought over their *conveniens* and all other relevant factors before submitting to the non-exclusive jurisdiction of the court of their choice which cannot be treated just as an alternative forum.
- (iii) A party to the contract containing jurisdiction clause cannot normally be prevented from approaching the court of choice of the parties as it would amount to aiding breach of the contract; yet when one of the parties to the jurisdiction clause approaches the court of choice in which exclusive or non-exclusive jurisdiction is created, the proceedings in that court cannot *per se* be treated as vexatious or oppressive nor can the court be said to be *forum non-conveniens*.
- (iv) The burden of establishing that the forum of choice is a *forum non-conveniens* or the proceedings therein are oppressive or vexatious would be on the party so contending to aver and prove the same.

³³ For an interesting analysis of trt litigation involving corporations see Galanter, Marc, 'Why the "haves" come out ahead: Speculations on the limits of legal change', 1974 *Law and Society* (Fall) 95.

³⁴ (2003) 4 SCC 341 = AIR 2003 SC 1177.

19. Are there any checks and balances on prosecutorial discretion or decision making (e.g. when a prosecutor declines to prosecute a case, are there any measures in place to review his or her decision or an appeals mechanism?)

Response-19: Section 321 of CrPC deals with such situations. Section 321 contains the necessary checks and balances on prosecutorial discretion. Section 321 provides as follows:

“321. Withdrawal from prosecution. The Public Prosecutor or Assistant Public Prosecutor in charge of a case may, with the consent of the Court, at any time before the judgment is pronounced, withdraw from the prosecution of any person either generally or in respect of any one or more of the offences for which he is tried; and, upon such withdrawal, -

- (a) if it is made before a charge has been framed, the accused shall be discharged in respect of such offence or offences;
- (b) if it is made after a charge has been framed, or when under this Code no charge is required, he shall be acquitted in respect of such offence or offences:

Provided that where such offence-

- (i) was against any law relating to a matter to which the executive power of the Union extends, or
- (ii) was investigated by the Delhi Special Police Establishment under the Delhi Special Police Establishment Act, 1946 (25 of 1946), or
- (iii) involved the misappropriation or destruction of, or damage to, any property belonging to the Central Government, or
- (iv) was committed by a person in the service of the Central Government while acting or purporting to act in the discharge of his official duty, and the Prosecutor in charge of the case has not been appointed by the Central Government, he shall not, unless he has been permitted by the Central Government to do so, move the Court for its consent to withdraw from the prosecution and the Court shall, before according consent, direct the Prosecutor to produce before it the permission granted by the Central Government to withdraw from the prosecution.”

In *Rajendra Kumar Jain v. State*³⁵, the Supreme Court of India has laid down the following guidelines relating to section 321 of CrPC:

- (i) Under the scheme of the CrPC prosecution of an offender for a serious offence is primarily the responsibility of the Executive.
- (ii) The withdrawal from the prosecution is an executive function of the Public Prosecutor.
- (iii) The discretion to withdraw from the prosecution is that of the Public Prosecutor and none else, and so, he cannot surrender that discretion to someone else.

³⁵ (1980) 3 SCC 435 = AIR 1980 SC 1510.

- (iv) The government may suggest to the Public Prosecutor that he may withdraw from the prosecution but none can compel him to do so.
- (v) The Public Prosecutor may withdraw from the prosecution not merely on the ground of paucity of evidence but on other relevant grounds as well in order to further the broad ends of public justice, public order and peace. The broad ends of public justice will certainly include appropriate social, economic and political purposes.
- (vi) The Public Prosecutor is an officer of the court and responsible to the court.
- (vii) The court performs a supervisory function in granting its consent to the withdrawal.
- (viii) The court's duty is not to reappreciate the grounds which led the Public Prosecutor to request withdrawal from the prosecution but to consider whether the Public Prosecutor applied his mind as a free agent, uninfluenced by irrelevant and extraneous considerations. The court has a special duty in this regard as it is the ultimate repository of legislative confidence in granting or withholding its consent to withdrawal from the prosecution.

This decision arose in the context of a challenge in a court to the decision of the public prosecutor to withdraw prosecution against certain accused persons. Other instances of challenges to prosecutorial decisions to withdraw criminal cases include *Sheonanadan Paswan v. State of Bihar*³⁶, *Abdul Karim v. State of Karnataka*³⁷, *N.Natarajan v. B.K. Subba Rao*³⁸ and recently *Rahul Agarwal v. Rakesh Jain*³⁹. It may be noted that in *Abdul Karim* and *Rahul Agarwal* cases, the discretion exercised by the Prosecutor was reviewed and reversed by the Court.

Note: The reference to statutes and case law is as on November 30, 2005.

SCC = Supreme Court Cases

AIR = All India Reporter

Com Cases = Company Cases

Cri LJ = Criminal Law Journal

SCALE = Supreme Court Almanac

WR = Sutherland's Weekly Reporter, 1862-1876, Calcutta

Agra HC = Agra High Court Reports, 1866-1868

³⁶ (1987) 1 SCC 288 = AIR 1987 SC 877.

³⁷ (2000) 8 SCC 710 = AIR 2001 SC 116.

³⁸ (2003) 2 SCC 76 = AIR 2003 SC 541.

³⁹ (2005) 2 SCC 377 = AIR 2005 SC 910.

Appendix A:

BRIEF NOTE ON THE UNION CARBIDE LITIGATION IN INDIA.

The Union Carbide case is a clear instance of a missed opportunity. The survey response does not refer to the judgment of the Indian Supreme Court in that case (or that of Justice Seth of the Madhya Pradesh High Court) for several reasons. First, the case at that stage was in the context of tort and was principally a claim for damages. Secondly, it may be useful to recall that the Indian government, representing all Bhopal victims, first approached the civil court in the U.S. This lawsuit was rejected by the U.S. Court of Appeals for the Second Circuit in an opinion authored by federal Judge Keenan on the ground of *forum non conveniens* subject of course to certain conditions which included Union Carbide Corporation (UCC) undertaking to subject itself to the jurisdiction of the Bhopal court.⁴⁰

Thus, the civil action in India against the UCC was based (and in fact proceeded) on an undertaking given by the UCC before Judge Keenan in New York that it would submit to jurisdiction of Indian courts and be subject to the discovery rules applicable in India. In fact it retained the right to resist future execution proceedings in the US of any possible decree against it by the Indian court on the ground of failure of due process requirements. Resultantly, Indian courts never had an occasion to decide the principles of jurisdiction (particularly in the context of question 14 of the Survey).

Thirdly, Justice Seth's order in the Madhya Pradesh High Court on lifting/piercing the corporate veil was never affirmed in the Indian Supreme Court. In fact the settlement recorded by the Supreme Court on February 14 and 15, 1989 undid it in one line. Thus, again, there was no attempt by the Supreme Court to apply the doctrine of enterprise liability as opposed to entity law. In fact one of the judges who constituted the majority (Justice Ranganath Misra) in the Supreme Court's review judgment [*Union Carbide Corporation v. Union of India* (1991) 4 SCC 584] attempted to dilute the dictum in this regard in the *M.C. Mehta* [*M.C.Mehta v. Union of India* (1987) 1 SCC 395] case by terming Justice Bhagwati's judgment on enterprise liability in that case as obiter⁴¹.

It required another bench in a later case [*Indian Council for Enviro-legal Action v. Union of India* (1996) 3 SCC 212] to explain that Justice Bhagwati's exposition was still good law notwithstanding the comments to the contrary by Justice Misra in the Bhopal case. The net result is that the applicability of the doctrine of enterprise liability in civil actions is itself not very clear; its applicability in criminal actions remains entirely untested.

Fourthly, and this is perhaps the most important point, UCC has throughout refused to submit to the jurisdiction of Indian criminal courts to face criminal action. UCC and Warren Anderson were declared absconders and the Indian government's attempts to

⁴⁰ See *In re Union Carbide Corp. Gas Plant Disaster* 809 F.2d 195 C.A.2 (N.Y.),1987

⁴¹ "Obiter dictum" is a Latin term which refers to a statement made by a [judge](#) that, while included in the body of the court's opinion, does not form a necessary part of the court's decision and is not to be relied upon as precedent..

have the latter extradited have been unsuccessful.⁴² This has virtually brought to a standstill the criminal proceedings against UCC, Warren Anderson and UCC. The criminal trial against the Indian subsidiary (UCIL) and its directors is however in progress, albeit very slowly. Here again, no Indian court has had an occasion to determine the jurisdictional basis for trying UCC in Indian criminal courts. When the Supreme Court ordered the revival of criminal proceedings against UCC, UCIL and its directors it did so on the ground that its earlier order approving the settlement of civil claims could not have also foreclosed criminal proceedings. Thus the Union Carbide case does not provide precedent the points the CCC survey is addressing. The Union Carbide case does not help us understand the present position in Indian law in the area of corporate crime or enterprise liability.

For further details of the union carbide Bhopal litigation see "Unsettling Truths, Untold Tales: The Bhopal Gas Disaster Victims' Twenty Years' of Courtroom Struggles for Justice", available at [http://www.bhopalffm.org/Legal %20Aspects.htm](http://www.bhopalffm.org/Legal%20Aspects.htm)

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⁴² Anderson and Union Carbide Corporation [UCC] have been accused of manslaughter, grievous assault, poisoning and killing of animals and other serious offences.