FRAUDS BY FOREIGN COMPANIES IN U.S AND INDIA: COMPARATIVE ANALYSIS

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ABSTRACT

Corporate fraud has become a huge global concern and has emerged as one of the most critical hazards to which organizations are vulnerable. Rules that ensure oversight, alertness, and transparency procedures—including whistleblower complaints—are constantly reinforced. Everyone agrees that fraudsters always find a way around the law and stay one step ahead of the authorities.

The concept of "alter ego," which sees the director/shareholder and the company as one and the same, has been studied by the researcher in this article to explain the criminal liability of the corporations. Concerns about human health, consumer complaints, and corporate liability of multinational corporations have been raised in the wake of recent allegations that Johnson & Johnson's baby powder, talcum powder, and other talc-based products contained asbestos, a known carcinogen; and its defective Acetabular Surface Replacement (ASR) hip implants; and the Gambian incident where nearly 66 children allegedly died after consuming cough syrup exported by Maiden Pharmaceuticals, based in the Sonipat district of Haryana. The occurrence in Gambia called into doubt the reliability of medical supplies made in India. The incident was highlighted in the international media.

It becomes relevant to research the following in order to comprehend the need for stronger regulations to deter fraud by foreign companies, particularly for India: the development of the concept of corporate liability regarding fraud in both the US and India; pertinent laws regarding the subject matter in both the jurisdictions; and cases concerning fraud by foreign companies in both the jurisdictions.

1. CORPORATE CRIMINAL LIABILITY IN UNITED STATES

1.1 ORIGIN OF THE CONCEPT OF CORPORATE CRIMINAL LIABILITY IN THE UNITED STATES:

In common law, it was stated that "a corporation cannot commit treason, felony, or other crime in its corporate capacity: but its members may, in their distinct individual capacities." With time, this viewpoint changed. Initially, it was determined that a business might face criminal charges for neglecting to fulfill legal obligations (also known as nonfeasance) and for inadequately carrying out those tasks (also known as malfeasance).

1.2 THE PRINCIPLE BEHIND CORPORATE CRIMINAL LIABILITY IN UNITED STATES

The Court adopted a more expansive position at the start of the 20th century and the idea originated in response to the widespread industrial revolution that occurred in the late 18th century. Federal and state laws in the United States provide for the criminal prosecution of corporations and their personnel for engaging in unlawful actions. The widely recognized common tort law doctrine of respondent superior (let the master answer), which holds that an individual is held vicariously liable for the deeds of his agents, provides the basis for the concept of corporate criminal liability.

CASE LAWS

i. In **Commonwealth v. The Philadelphia Button Manufactory**, in 1812, the Pennsylvania Supreme Court decided that if an agent's actions were within the bounds of their authority, the corporation might be held criminally liable for those actions. After this decision, judges made similar rulings in several other cases, holding businesses criminally liable for a variety of offenses like fraud, negligence, and pollution. Because of this, courts all around the country have applied this concept and have utilized it to convict businesses for a variety of crimes.

ii. In **New York Central & Hudson River Railroad v. United States**[1], held that since a

[1] New York Central & Hudson River Railroad v. United States, 212 U.S. 481 (1909).

New York Central agent committed a crime while doing his responsibilities, the company was criminally accountable. The US court, on the other hand, failed to differentiate between civil and criminal culpability in this case. It is noteworthy that three main factors are necessary in all criminal cases: intent, deterrent, and stigma. The Supreme Court, which decided that corporations might be held criminally accountable for the activities of their agents if such acts were performed within the limits of the agent's power. The Court reasoned that companies are "legal persons" and therefore be held accountable for their conduct in the same way as natural persons are. The Court also emphasized that corporations handled the great bulk of interstate business, and that holding merely individual agents accountable for criminal crimes committed in the course of their employment would be unworkable.

iii. However, the Court indicated that the issue may be resolved by observing that the question is about the character of the crime, not the nature of the business ("some crimes, in their nature, cannot be committed by corporations"). Because there is no crime in the federal arena unless by act of Congress, the issue is one of legislative proscription and congressional intent. Through the above stated precedent, corporations were held accountable for misfeasance even when no intent was necessary.

1.3 RELEVANT LAWS REGARDING CORPORATE CRIMINAL LIABILITY IN UNITED STATES:

a. The Sherman Antitrust Act of 1890

The Sherman Antitrust Act of 1890 expedited the growth of corporate criminal liability. The Sherman Act outlawed a wide range of anti-competitive behaviors, including price fixing and market allocation. The Sherman Act controls corporate criminal liability by prohibiting anti-competitive practices like price-fixing and market allocation, allowing prosecution for antitrust violations, and imposing fines and penalties. It deters and punishes such violations, promoting competition and innovation in the American economy.

In a series of rulings, the Supreme Court agreed with the government that companies might be held criminally responsible for breaking the Sherman Act. In 1890, the United States

Congress approved the Sherman Antitrust Act, which prohibited trusts, monopolies, and cartels. Concerns over the rising concentration of economic power in the hands of a few major businesses prompted the passage of the legislation. One of the most important antitrust statutes in the United States is the Sherman Antitrust Act. It has aided in the dismantling of monopolies, the prevention of anti-competitive activities, and the protection of consumers and companies from unfair competition. The Sherman Antitrust Act is still in existence, and it is considered one of the most important antitrust statutes in the United States.

i. **United States v. American Tobacco Co. (1911)**[2] was the first case to find a company criminally responsible under the Sherman Act. The Supreme Court ruled in that case that a corporation might be held criminally responsible for Sherman Act violations committed by an agent of the company acting within the limits of the agent's power. Since then, the Supreme Court has ruled that companies can be held criminally accountable for antitrust breaches committed by themselves, even if those acts were not sanctioned by the corporation's board of directors or management. The Sherman Act does not specify the penalties that businesses might face for antitrust offenses. Courts, however, have ruled that companies can be penalized.

b. The Federal Sentencing Guidelines for Organizations (FSGO)

The Federal Sentencing Guidelines for Organizations (FSGO) is the primary federal law governing corporate criminal liability. It outlines factors to consider when sentencing a corporation for a crime, including the nature and seriousness of the offense, the corporation's history of criminal conduct, and its efforts to prevent and detect crime. Alternative sentencing options include probation, community service, and restitution. Other federal laws include the Sherman Antitrust Act, the Securities Act of 1933, and the Foreign Corrupt Practices Act. State laws also govern corporate criminal liability. Penalties can be severe, including fines, asset seizure, or shutting down operations.

[2] United States v. American Tobacco Co., 221 U.S. 106 (1911).

Corporations cannot be imprisoned. Otherwise, both businesses and people face much of the same penalties after a conviction. In many cases, the federal sentence Guidelines have an impact on the sentence implications of a conviction. Corporations are subject to fines. They may be put on probation. They may be required to make amends. Their property may be seized. They may be prevented from engaging in a variety of business activities. All of these are addressed in the Guidelines. The corporate fine Guidelines, for example, begin with the concept that a completely corrupt organization should be punished out of existence if the statutory maximum allows. A corporation that operates for criminal objectives or by criminal means should be penalized enough to forfeit all of its assets. In other circumstances, the Guidelines prescribe penalties and other sentencing aspects that reflect the nature and gravity of the crime of conviction, as well as the amount of corporate involvement.

c. Some U.S. laws regarding securities market

The FCPA, or the Foreign Corrupt Practices Act: This law forbids American businesses and people from paying foreign officials in order to gain or keep business. Additionally, it forbids businesses from including fictitious or deceptive information in their accounting records. No matter where a company is formed or where it conducts business, the FCPA applies to all entities that fall under American law.

The Securities Act of 1933: This law mandates that securities offered to the public must be registered with the SEC and that investors be given full disclosure of the seller and the stock offering.

d. Deferred Prosecution deferred prosecution agreement (DPA)

It is a type of agreement between a prosecutor and a company or individual that is facing criminal charges. Under a DPA, the prosecutor agrees to defer prosecution of the charges for a specified period of time, provided that the company or individual agrees to certain conditions. These conditions may include paying a fine, making restitution, or implementing corporate compliance measures. If the company or individual complies with the conditions of the DPA, the charges are dismissed.

DPAs are used in a variety of cases, including fraud, bribery, and money laundering. They are often used as an alternative to criminal prosecution, as they allow companies and individuals to avoid the stigma and negative publicity of a criminal conviction. DPAs can also be used to resolve cases quickly and efficiently, without the need for a lengthy trial.

1.4 CASE ON FRAUD BY FOREIGN COMPANIES IN US

a. The Olympus scandal:

The Olympus scandal[3], exposed in 2011, exposed the Japanese multinational conglomerate's accounting fraud. The scandal involved management inflating asset value and engaging in fraudulent mergers and acquisitions. Michael Christopher Woodford, Olympus's new CEO, discovered the company had been involved in accounting fraud for years. An independent investigation found Olympus had concealed losses of over $1.7 billion. The scandal led to the resignation of the company's chairman, president, and other executives. In 2012, Olympus agreed to pay a $192 million fine to the US Securities and Exchange Commission and appoint an independent monitor to oversee its financial reporting. The scandal damaged Olympus's reputation and took several years to recover.

b. United States v. Huawei Technologies Co., Ltd

The most recent case in the United States involving corporate fraud by a foreign business is United States v. Huawei Technologies Co., Ltd[4]., which was filed in 2021. In the lawsuit, Huawei, a Chinese telecommunications giant, is accused of violating the Foreign Corrupt Practices Act (FCPA) by paying foreign officials in order to acquire business.

The FCPA is a federal legislation that forbids foreign officials from being bribed. The legislation applies to any US individual or firm doing business in another country.

The business is accused of bribing foreign authorities in Africa, Asia, and Latin America in order to acquire contracts for its telecom’s equipment, according to the lawsuit against Huawei. Bribes

[3] SEC v. Olympus Corporation, No. 12-cv-00238 (N.D. Cal.)
[4] United States v. Huawei Techs. Co., 18-CR-457 (S-2) (AMD) (E.D.N.Y. Dec. 3, 2019)

reportedly were paid in cash, travel costs, and other presents.

These above said cases demonstrate that foreign firms are not exempt from prosecution in the United States for fraud. The United States government is dedicated to upholding the rule of law and safeguarding businesses from unfair competition.

2. CORPORATE CRIMINAL LIABILITY IN INDIA:

Unlike in the United States and the United Kingdom, there is no mechanism in India for Deferred Prosecution Agreements (DPA), under which the firm can make any deal with the prosecution to avoid criminal charges.

a. Under Indian Penal Code, 1860

Concept of Attribution- The concept of attribution states that the criminal purpose of the "alter ego" of the firm / body corporate, i.e., the person or group of people who lead the company's activity, is ascribed to the corporation. Mens rea is given to the corporation based on the company's alter persona. Section 11 of the Indian Penal Code of 1860 defines 'person'. Section 11 defines a corporation as any organization, association, or group of people. It also includes all body corporates, whether incorporated or not. As a result, corporate criminal responsibility may be traced back to the Indian Penal Code. Furthermore, corporates are held criminally accountable under the terms of the Companies Act of 2013.

In the case of corporations, the existence of specific laws such as the Companies Act reduces the application of general law, which is the IPC. However, corporate criminal responsibility can be drawn from the IPC. The notion of criminal culpability is founded on “Actus non facitreum, nisi mens sit rea," which states that an act will not become a crime unless there is a guilty mind. As a result, in the instance of corporate criminal culpability, the guilty minds of those in the role of administering the activities of the body corporate are examined.

According to Section 11 of the IPC, corporations can be prosecuted under the provisions of the IPC. However, before inflicting sanctions, the courts had to examine their breadth.

b. Evolution of corporate criminal liability in India

Corporations are fictitious people. As a result, they are recognized by natural people participating in the management of business activities. However, the culpability of these natural people is restricted to the scope of the employee-employer relationship. As a result, the issue of personal culpability for these natural individuals will not emerge unless the corporate veil is raised, which the courts will do in rare circumstances where such natural persons act beyond the limits of their job.

In India, corporate criminal liability has evolved as a result of court interpretations. As a result, the following instances are regarded as watershed moments in the evolution of the notion of corporate criminal culpability.

The Supreme Court ruled in the case of **Assistant Commissioner v. Velliappa Textiles Ltd**[5] that corporations cannot be tried for offenses that require jail as punishment. As a result, only fines can be imposed as punishment, and only offenses that call for fines or alternative punishment can be pursued against corporations. Later, in the case of **Standard Chartered Bank v. Directorate of Enforcement**[6], the Supreme Court reversed this ruling, holding that according to legislative intent corporations cannot be granted blanket immunity from prosecution under rules that demand jail as penalty. Despite the fact that the Supreme Court did not expressly state whether corporations are capable of having mens rea, the precedent that they could be prosecuted for criminal offenses in a manner distinct from individuals was a critical milestone in shaping the courts' approach to corporate criminal liability.

Furthermore, the Supreme Court addressed the position of corporate criminal culpability under the provisions of the IPC in the case of **Iridium India Telecom Ltd. v. Motorola Incorporated and Others**[7]. The Court stated that a business, like an individual, can be tried for crimes including mens rea. In prosecuting such offenses, the mens rea of the people overseeing the operations of

[5] Assistant Commissioner, Assessment – II, Bangalore & Ors & Vs. M/s. Velliappa Textiles Ltd. & Anr., AIR 2004 SC 86
[6] Standard Chartered Bank v. Directorate of Enforcement, (2005) 4 SCC 530
[7] Iridium India Telecom Ltd. v. Motorola Incorporated & Ors (AIR 2011 SC 20)

the body corporate is taken into account.

Much of the significance of the Iridium decision lay in the questions raised about corporate liability for the actions of individuals in control (and vice versa): whether the liabilities of the officers and the company were mutually exclusive, what recourses the shareholders would have in such situations, and how culpability would be apportioned in cases of combined guilt, etc.

Later, in **Sunil Bharti Mittal v. Central Bureau of Investigation**[8], the Supreme Court revisited the idea of alter ego and added additional nuance to the prevailing position, closing some of the gaps that remained. The Supreme Court bench established two critical criteria to determine when directors could be held vicariously liable for the company's actions: when there was sufficient incriminating evidence to indicate their role and requisite mens rea for the commission of the crime in question, or when there are statutory specifications of liability to be meted out vicariously to directors for criminal acts committed by the company.

c. Relevant laws to prevent fraud by foreign companies

i. The Securities and Exchange Board of India (SEBI)

It regulates foreign companies investing in India. The regulations include Foreign Institutional Investors (FII) Regulations, 1995, Foreign Portfolio Investors (FPI) Regulations, 2014, Foreign Venture Capital Investors (FVCI) Regulations, 2000, These regulations govern the registration and operation of foreign investors, who invest in Indian securities, real estate, and infrastructure.

ii. The Competition Act, 2002

India has Competition Act, 2002 similar to Sherman Anti-Trust Act of US. It is a law that applies to all Indian enterprises, including foreign ones, and prohibits anti-competitive practices like price-fixing, bid-rigging, and market allocation. It also prohibits abuse of dominant position by enterprises, ensuring they cannot use their market power to harm consumers or competitors. The Act is enforced by the Competition Commission of India

[8] Sunil Bharti Mittal v. CBI, (2015) 4 SCC 609

(CCI), which can investigate suspected anti-competitive practices and impose penalties. Key provisions for foreign companies include anti-competitive agreements, abuse of dominant position, and mergers with adverse effects on competition. The Act also applies to foreign companies selling products or services online.

iii. Tax Acts

India has several laws to prevent tax evasion by foreign companies. The Income Tax Act, 1961 sets the taxation framework, including penalties for non-compliance. The Foreign Exchange Management Act, 1999 regulates foreign exchange inflow and outflow, preventing companies from using India for tax evasion. The Prevention of Money Laundering Act, 2002 prohibits money laundering and prevents foreign companies from using India for money laundering.

D. Liability of foreign companies under Companies Act, 2013

A foreign company is an entity incorporated outside India that operates in India, either directly or through an agent, and conducts business activities in India.

CHAPTER XIV "INSPECTION, INQUIRY AND INVESTIGATION"[9] applies mutatis mutandis to inspection, inquiry, or investigation in relation to foreign companies. Therefore, it outlines the powers of a company inspector, including the ability to call for information, inspect books, and conduct inquiries. It also covers the establishment of a Serious Fraud Investigation Office, investigation into company affairs, and the security for payment of investigation costs. The text also discusses the procedure and powers of inspectors, the protection of employees during investigations, and the power of the inspector to investigate related companies. It also covers the seizure of documents, freezing of company assets, and restrictions on securities. The text also covers the expenses of investigation, voluntary winding up of companies, and the investigation of foreign companies.

[9] The Companies Act,2013

"CHAPTER XXII COMPANIES INCORPORATED OUTSIDE INDIA"[10]

The Act applies to foreign companies where at least 50% of the paid-up share capital of a foreign company is held by one or more Indian citizens or companies or bodies corporate incorporated in India, or by one or more Indian citizens and companies or bodies corporate incorporated in India, either individually or in aggregate. The company must comply with the provisions of this Chapter and any other provisions prescribed for its business carried on in India as if it were a company incorporated in India. S.392[11] also provides for punishment for the contravention of provisions under the above said chapter.

CASE ANALYSIS REGARDING FRAUD BY FOREIGN COMPANIES IN INDIA

a. Bofors controversy

The Bofors controversy was a significant political scandal in India that involves charges of bribery and corruption in the Indian government's acquisition of 155 mm howitzers from the Swedish armaments firm Bofors. The scandal cost the Congress party the general election in 1989. The controversy began in 1987, when The Hindu, an Indian newspaper, published an article suggesting that Bofors had paid bribes to Indian politicians and bureaucrats in order to obtain the contract to deliver the howitzers. The report was based on a leaked confidential government document to the media. The committee of inquiry discovered evidence of bribery and corruption in the Bofors agreement, but it was unable to identify those who had been bribed. The commission also determined that the Indian government had failed to conduct a thorough investigation into the claims.

b. Case by SEBI on Toyota Kirloskar Motor Pvt. Ltd. In 2016

The Securities and Exchange Board of India (SEBI) fined Toyota Kirloskar Motor Pvt. Ltd., a subsidiary of Toyota Motor Corporation, Rs. 100 crore (approximately $13 million) for misleading investors about its financial performance. SEBI found that Toyota overstated its profits by Rs.

[10]The companies Act, 2013
[11] S.392, The companies Act, 2013

1,383 crore and understated its liabilities by Rs. 1,100 crores. The fine was the highest ever imposed on a company in India for misleading investors, a major setback for Toyota, which was seen as a model corporate citizen in India.

c. Case on Google by the Competition Commission of India (CCI) in 2020

In India, Google has been accused of anti-competitive activities such as attaching its search engine to other products and services, predatory pricing, discriminatory contracts, and market dominance abuse. The Indian government has taken efforts to address these issues, including a $2 billion punishment against Google by the Competition Commission of India (CCI) in 2020 for abusing its market dominance. Google was judged to have exploited its position by favoring its own products and services in search results, according to the CCI.The case against Google is complicated and will almost certainly continue, but it underscores the Indian government's dedication to enforce the law.

3. CONCLUSION & SUGGESTION:

We can see how the approach to corporate criminal culpability has evolved through time, from when there was no idea of corporate criminal liability to currently having liability determined by the emergence of the doctrine of the company's alter ego. Today, corporate criminal acts are covered in numerous areas such as infrastructure, investment, and so on, demonstrating the need for responsibility and supervision in the business sector. This responsibility holds both individuals and corporations accountable, and when determining individual guilt becomes problematic, it is appropriate to prosecute the company.

The laws of both the countries have evolved overtime in reaction to fraud by foreign as well as domestic companies. These laws have effectively deterred corporate frauds by foreign companies. There are many similarities in law of both the countries (US and India) but there is a gap in regulatory framework regarding “Deferred Prosecution Agreement” in India.

SUGGESTION

1. Both UK and US follow DPAs (Deferred prosecution agreements). Indian laws are mostly

developed on common law practices and there are several reasons to establish DPAs. They can resolve cases quickly and efficiently, deter future wrongdoing, and protect the public. Traditional criminal trials can be costly and damaging to a company's reputation. DPAs also require companies to implement corporate compliance measures, preventing future wrongdoing. Furthermore, they can protect the public from harm caused by wrongdoing, such as bribery, by holding companies accountable. DPAs have some drawbacks, such as allowing companies to avoid full consequences and discourage self-reporting of wrongdoing. However, the benefits of DPAs outweigh these drawbacks, as they help resolve cases quickly, efficiently, deter future wrongdoing, and protect the public. India should consider DPAs as part of its toolkit for combating corporate crime.

2. Furthermore, the government can increase awareness of corporate fraud by educating investors, and the public about fraud risks and reporting methods.