VII. Liability of Corporations

The violation of the provisions of the Act, apart from the individual persons, may also be committed by companies, bodies corporate, firms and other associations of individuals. Section 47 of the Water (Prevention and Control of Pollution) Act, and section 16 of the Environment Protection Act, 1986 provide for offences by companies. These sections incorporate the strict vicarious criminal liability of persons who are responsible to the company for the conduct of its business; or of its responsible office bearers like director, manager, secretary etc. for all offences committed by a company. This is in derogation of general criminal law principle which says that mens rea is an essential ingredient of an offence and both the intent and act must concur to constitute a crime.

Section 47 of the Water Act and section 16 of the Environment Act deal with cases where an offence has been committed by a company and with the liability of the person who at the time when the offence was committed, was in charge of and was responsible to the company for the conduct of the business of the company.[104] Sub-section (1) of these sections is similar and provides that where an offence under this

Act is committed by a company, every person who at the time the offence was committed was incharge of, and was responsible to the company for the conduct of the business of the company as well as the company, shall be guilty of the offence and shall be liable to be prosecuted against and punished accordingly. However the proviso attached to sub-section (1) exonerates any such person from liability if he proves that the offence was committed without his knowledge or that he exercised all due deligence to prevent the commission of such offence. It is clear from this sub-section that once the prosecution establishes that an offence under these Acts has been committed by a company, there shall be a presumption of guilt against the company as well as against every person, who at the time the offence was committed, was in charge of and was responsible to the company for the conduct of the business of the company and both the company and that person shall be liable to be prosecuted against and punished accordingly. In other words by virtue of sub-section (1), every person who is incharge of and is responsible to the company for the conduct of its business becomes automatically guilty of an offence once it is proved that the offence has been committed by a company. However the basic liability falls on the company

as such and it is only then that such person is deemed guilty of the offence as the offending company.[105] So far as the procedural aspect is concerned, sub-section (1) does not necessarily mandate the incorporation of the words "was in charge of and was responsible to the company for the conduct of the business of the company" in all complaints against the Chairman, the Managing Director or the General Manager of the company for offences in contravention of the Act.[106]

Any person covered under sub-section (1) can escape the guilty presumption only when he brings his case within the ambit of proviso to sub-section (1), i.e., if he proves that the offence was committed without his knowledge or that he exercised all due deligence to prevent the commission of such offence. Here a note may be taken of the words "if he proves" in the proviso, which in fact is a rule of evidence. By using words "if he proves "it means that the burden of proof has been shifted from prosecution to the person claiming the benefit of the proviso. But the initial burden that the company has committed an offence and that the person at that time was incharge of or responsible to the company for the conduct of the business of the company still lies

on the prosecution. In this context in Municipal Committee Amritsar v. Buta Singh[107] the Punjab High Court held that it is the duty of the prosecution to prove that the person sought to be made liable was, at the time of commission of the offence, incharge of and was responsible to the company for the conduct of its business. It is only when the initial onus is discharged in respect of that person that the onus of proving the fact referred to in the proviso that the offence was committed without his knowledge or that he exercised all due deligence for the prevention of such offence would shift on to him.[108] The section does not requires that the person in charge of the company should be found guilty before the company is held liable.[109] This is because the section does not separately provide for liability of companies only. Where an offence has been committed by a company, the provisions of sub-section (1) extend the liability to every person who at the time the offence was committed was in charge of and was responsible to the company for the conduct of its business.

From sub-section (1) it is clear that the legislature has taken care to provide that the natural person be made vicariously liable for the offence committed by a company, or anyone of its

employees are to be punished only when it is established that they had some nexus with the crime either because of their knowledge or due to their negligence which had resulted in its commission.

Sub-section (2) of these sections enlarges the scope of vicarious criminal liability to include director, manager, secretary or other officer of the company if it is proved that the offence has been committed with the consent, connivance or neglect of such director, manager, secretary or other officer. Here a distination can be made between sub-section (1) and sub-section (2). While sub-section (1) makes vicariously liable only persons incharge of and responsible to the company for the conduct of its business, sub-section (2) imposes vicarious liability on directors, managers, secretaries and other officers. However,sub-section (2) comes into play only if it is proved that the offence has been committed with the consent, connivance or neglect of such officers of the company. Thus sub-section (2) may come into play during the course of the trial or even at its conclusion when it is proved that the offence has been committed with the consent, connivance or neglect of such officers.[100] Furthermore unlike in sub-section (1), an officer falling under sub-

section (2) cannot take the defence that the offence was committed without his knowledge, or that he exercised all due deligence to prevent the commission of such offence. Therefore sub-section (2) does not mandate the incorporation of the allegation that the offence was committed with the consent, connivance or was attributable to the neglect on the part of the Chairman, Director, General Manager or Secretary of the company in the complaint itself.[111]

The reason for the inclusion of Director, manager etc. in sub-section (2) is their position in the company. The managing director of a company from its very designation implies both control and command of the affairs of the company. It signifies both control of and responsibility to the company both in ordinary parlance and by virtue of the provisions of the Companies Act. The factum of being a managing director of the company is by itself sufficient to attract the provisions of section 47(1) of the Water Act and the vicarious liability specified therein.[112] In Municipal Corporation of Delhi v. Ram Kishan Rohatgi[113] the Supreme Court observed that "so far as the manager is concerned, we are satisfied that from the very nature of his duties it can be safely inferred that he would be undoubtedly be

vicariously liable for the offence; vicarious liability being an incident of an offence under the Act."

In the recent case of M.C.Mehta v. Union of India[114] the Supreme Court provided exonerating circumstances to the category of officers specified in sub-section (2) of these Acts. These exonerating circumstances are not provided by the Act. In that case it was held that no liability shall attach to the Chairman and/or Managing Director, if he can show that the escape 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. In the same case the court also clarified the words "every person" who at the time the offence was committed was in charge of and was responsible to the company for the conduct of the business of the company, occuring in sub-section (1) of section 47(1) of the Water Act. The court held that such officer is the "occupier" under the Factories Act, 1948 because he is the person who has actual control over the affairs of the factory and/or the officer who is in charge of actual operation of the plant and who is responsible to the management for the operation of the plant as its head.[115]

In M.C.Mehta case the Supreme Court also laid down the extent of liability of any person falling under sub-section (2). The court held that the officer concerned will be personally responsible as the agent of the company and also liable for the payment of compensation for any death or injury caused. But if he can show that such escape of gas etc. took place as a result of act of God or vis-a-major or sabotage or that he exercised all due deligence to prevent such escape, he shall be entitled to be indemnified by the company.[116] It means that a person under subsection (1) can be indemnified by the company under certain circumstances, while a person under sub-section (2) can not be indemnified by the company under any circumstance.

So far as the application of articles 12 and 36 of the Constitution to public and private corporations is concerned, the Supreme Court has held that for the purposes of article 12 and 36, a statutory corporation may be held to be an instrumentality or agency of the government if it fulfills any of the following criteria.[117]

(a) if the entire capital of the corporation is held by the government;

(b) if a department of the government has been transferred to the corporation;

(c) if the functions of the corporation may be regarded as governmental functions;

(d) if the government enjoys a defacto control over the affairs of the corporation;

(e) if the corporation enjoys a monopoly status conferred by the state.

However, the above ingredients are not sufficient for holding government liable for the tortious acts of public corporations or their servants. For that purpose it should further be proved that such corporation is entrusted with doing business as its agent and the wrongful act was done under the authority or control of the Government or the Government had knowledge of the wrongful act or it had ratified such an act.[118]

If the fundamental rights are infringed by any act of the corporation, such an act will be deemed to be an act of state within the meaning of Article 12 and consequently the constitutional remedies under articles 32 and 226 will be available against them.[119] It would be no defence for the corporation that the corporation has a separate legal entity or it was created by a statute.[120] However even where a public

corporation constitutes an agency of the state for the purpose of article 12, such corporation cannot be considered as a department of the government.[121]

Though the scope of article 12 is confined to public corporations, the Supreme Court in a recent judgment[122] has attempted, through judicial activism, to expand its scope to private corporations engaged in an activity which has the potential to affect the life and health of the people. The court was of the view that in the past expansion of article 12 was done to inject respect for human rights and social conscience in our corporate structure. The Supreme Court negated the apprehension that it will create enormous difficulties in the way of smooth functioning of the system and will also affect its structure. The court opined that "such apprehensions are expressed by those who may be affected by any new and innovative expansion of human rights". But this argument, the court said, "should not deter the court from widening the scope of human rights and expanding their reach if otherwise it is possible to do so without doing violence to the language of constitutional provisions."[123] The Supreme Court reasoned its approach on the ground that any hazardous or inherently dangerous activity for private profit can be tolerated only on the condition that

the enterprise engaged in such activity indemnifies all those who suffer on account of the carrying on such activity regardless of whether it is carried on carefully or not.[124] Though the court could not settle the issue - whether a private corporation like Shriram would fall within the scope and ambit of article 12, it directed the Delhi Legal Aid and Advice Board to take up the cases of all those who claim to have suffered from oleum gas and to file actions on their behalf in appropriate court for claiming compensation against Shriram Company.[125]

In Shriram case the Supreme Court also laid down standards for the measure of damages, which, it held, "must be co-related to the magnitude and capacity of the enterprise because such compensation must have a deterrent effect. The large and more prosperous the enterprise the greater must be the amount of compensation payable by it for the harm caused on account of accident in the carrying on of the hazardous or inherently dangerous activity by the enterprise."[126] Though this criteria appears to be appropriate,[127] in fact it has not worked well as it leaves the issue of determining the amount of compensation to judicial interpretation of the prosperity of a corporation in a given set of

circumstances and not on the human values of life, liberty and well being of the innocent victims.

The fallacy of the Supreme Court approach became apparent recently in the Bhopal Case[12e] where the Court awarded meager compensation to the innocent gas victims. The Supreme Court judgment in the Bhopal Case is the biggest assault on the human rights of the people. In that case the court not only exonerated the Union Carbide from any criminal liability but overlooking its previous view that the compensation must have a deterrent effect based on the prosparity of the corporation, awarded only a nominal compensation to the victims.