MENS REA IN OFFENCES BY COMPANIES

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Mens rea, being the essential ingredient of an offence for which a person may be punished under the law, the question which had exercised the minds of the jurists in the 19th century was whether a company could be made punishable for an offence. A company, though a person in the eye of law, is only a legal concept. It has neither a body to be kicked nor a soul to be damned. In the circumstances, the jurists were at a loss to understand how a company could be punished for an offence because it could not have any *mens rea*.

A company can function only through its directors and other officers, and it is the act or omission on the part of any director or officer of the company which can render the company punishable for an offence. Such a liability being only a vicarious one, and the principle of vicarious liability not being applicable to criminal law, the 19th century jurists expressed a doubt as to whether a company could, at all, be made punishable for the acts or omissions of its directors and other officers.

The doubt indicated above was not resolved by the Joint Stock Companies Act 1850, which was the first legislation in India with regard to the regulation of joint stock companies. By sub-section (3) of section 8 of that Act, a registered company was prohibited from purchasing its own shares or from making any loan of money or securities for money to any person on the security of a share or shares of the company or the business of the company and every breach of the said provision was to be treated as a breach of trust by agents or trustees misappropriating money or property. By sub-section (4) of section 8 of that Act, a registered company was prohibited from making any loan of money or securities for money to any director or officer of such company or to any member of a local committee by any branch or agency and every contravention of the said provision was to be treated as a breach of trust by agents or trustees misappropriating money or property.

It will thus be seen that by the said Act, the company itself was not made punishable but the persons who were guilty of such breach of trust

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were to be proceeded against under the ordinary law relating to breach of trust.

Subsequently, the theory which was developed by the jurists was that a company could be made criminally liable for the breach of certain statutory duties, the breach of which could be proved in a court of law without any obligation to prove the existence of *mens rea*. This theory found its expression, for the first time, in the Joint Stock Companies Act 1857, which is the first self-contained statute in India with regard to the incorporation, registration, regulation and winding up of companies (other than banking and insurance companies). That Act, which is the foundation on which subsequent legislation in India relating to companies is based, for the first time established that the company itself could be made criminally liable for certain offences. The offences for which the company alone was made criminally liable by that Act were :

(*a*) default in keeping a register of shareholders or in sending to the Registrar of Companies a copy of its list of shareholders and a summary of its share capital[1]. The said default continues to be an offence under the subsequent legislation relating to companies[2].

(*b*) omission to paint or affix its name on the outside of every office or place in which the business of the company is carried on. It continues to be an offence[3].

(*c*) omission to give notice to the Registrar of Companies regarding the increase of the share capital of the company[4]. The said default continues to be an offence[5].

Although the principle that the company could be made liable for a breach of its statutory obligations was accepted by the Act of 1857, the principle that both the company as well as the officers of the company could be made liable for the offence was not adopted in that Act. The pattern which was followed in that Act was that every company was punishable for the offences indicated above. The officers of the company were, on the contrary, made punishable for the following offences, namely :

(*i*) use of the seal of the company without its name being engraved thereon or for the issue of any notice, advertisement etc., without mentioning the name of the company on such notice, advertise-

1. Joint Stock Companies Act 1857, section 6.
2. Companies Act 1956 (hereinafter referred to as CA) sections 150(2) and 162 (1).
3. *Ibid* section 147(2).
4. Supra note 1 section 42.
5. CA section 97(3).

ment etc.[6] The said default continues to be an offence[7].

(*ii*) omission to produce any document or books of account before an Inspector appointed either by the local Government or the company to examine into the affairs of the company and to answer questions put by such Inspector relating to the affairs of the company[8]. The said default continues to be an offence[9].

(*iii*) mutilating, altering or falsifying any books, papers, writings or securities or for making any false or fraudulent entry in the register, books of account or other documents belonging to the company with intent to defraud the creditors or contributories of the company[10]. The said default continues to be an offence."

The Act of 1860 made the Act of 1857 applicable to banking companies. Under that Act every banking company, registered under that Act, was required to furnish twice a year a statement about its financial position in the forms specified in the Schedule to that Act and in the event of the omission to furnish such statement, each director was liable to a penalty not exceeding fifty rupees for every day during which the contravention continued.[12]

It will thus be seen that until the enactment of the Act of 1866, offences were divided into two categories, namely :

(*i*) those for which the company alone was punishable; or
(*ii*) those for which the directors etc., alone were punishable.

The principle that both the company and the directors could be punished was introduced for the first time by the Act of 1866. But under that Act only those officers or managers of the company, who had knowingly and wilfully authorised or permitted the default, were punishable. That Act thus made it clear that a director or manager of the company could be made punishable for an offence on proof of the fact that he had knowingly and wilfully authorised or permitted the default. The establishment of *mens rea*, in the case of a director or manager of the company, was thus made obligatory by that Act. The same pattern has been followed in the subsequent legislation relating to companies with slight variations.

6. Supra note 1 section 29.
7. CA section 147(3).
8. Supra note 1 sections 49 and 81.
9. CA section 240(3).
10. Supra note 1 section 76.
11. CA section 539.
12. Joint Stock Companies Act of 1860, section 3.

Although the same pattern was followed in most of the sections of the Act of 1882 by which penalties had been provided, slight variations were made in sections 22 and 55 thereof. Under section 22, wilful concealment of the name of any creditor, who was entitled to object to the reduction of share capital, or wilful misrepresentation of the nature or amount of the debt or claim of any creditor of the company was made punishable. Hence, for the establishment of the offence, it was not necessary to establish that the offender was *knowingly* and *wilfully* guilty of the offence. On the other hand, under section 55, a director and manager, who *knowingly* authorised or permited the refusal to inspect the register of the company was made punishable. Under this section, it was not necessary to establish that the offender was wilfully guilty of the offence if it was proved that he had knowingly permitted the offence.

The same pattern was followed in the Indian Companies Act 1913. But in that Act, a noticeable change was made. In the Act of 1882, wherever the expression "knowingly and wilfully" has been used, the persons who have been made punishable are the directors and managers of the company, but wherever the expression "wilfully" has been used, the director, manager or officer of the company has been made punishable. The expression "officer" was not defined in that Act and as such there was a doubt as to whether a secretary was also included in that category. This lacuna was made good in the Act of 1913. In that Act, the expression "officer" was so defined as to include any director, manager or secretary but, save in sections 235, 236 and 237, not an auditor. Hence, for the purposes of section 236, the expression "officer" would include an auditor and consequently an auditor would also be punishable for the destruction, mutilation, alteration, falsification or fraudulent secretion of any books, papers or securities of the company. Since the expression "officer" was defined in that Act, a drafting refinement was made and, instead of repeating in every section that a director or manager shall be punishable, it was throughout provided that every officer of the company who had knowingly and wilfully authorised or permitted the default would be punishable.

Under the law, as it continued up to the Act of 1913, the position was that although an officer of the company was criminally liable if he had knowingly and wilfully authorised or permitted certain defaults, it was not clearly spelt out whether he would be criminally liable where the default was not committed by himself. This lacuna was made good by the Act of 1956. By that Act, the expression "officer who is in default" was defined as an officer of the company who—

(*a*) is knowingly guilty of the default, non-compliance, failure, refusal or contravention, or
(*b*) knowingly and wilfully authorises or permits any default,

non-compliance, failure, refusal or contravention.[13]

For the purposes of the Act of 1956, the definition of the expression "officer" was expanded as follows :

> "Officer" includes any director, managing agent, secretaries and treasurers, manager or secretary, or any person in accordance with whose directions or instructions the Board of Directors or any one or more of the directors is or are accustomed to act, and also includes—
> (*a*) where the managing agent, the secretaries and treasurers or the secretary is or are a firm, any partner in the firm;
> (*b*) where the managing agent or the secretaries and treasurers is or are a body corporate, any director or manager of the body corporate;
> (*c*) where the secretary is a body corporate, any director, managing agent, secretaries and treasurers or manager of the body corporate;
> but, save in sections 477, 478, 539, 543, 545, 621, 625 and 633 does not include an auditor".

The position which is now well established is that while a company is criminally liable for breaches of certain provisions of the statute, the officers of the company who are in default are criminally liable only when they are either knowingly guilty of the default or where they had knowingly or wilfully authorised or permitted such default. A person who knows that he is committing or intends to commit a breach of his statutory duties, is said to be knowingly or wilfully guilty of the breach of his statutory duties. Similarly, a person who neglects, without there being any pressure of external circumstances over which he had no control, to perform a statutory duty is also considered to be knowingly and wilfully guilty of the default.

The criminal liability of persons who had been managing agents, members or partners of any company or firm which had functioned as the managing agents or secretaries and treasurers of any company, would continue with regard to any liability incurred by them while the company in question was under their management as managing agents or secretaries and treasurers notwithstanding the fact that the system of management by managing agents or secretaries and treasurers has been abolished with effect from April 3, 1970.

According to section 616 of the Companies Act 1956, the provisions of the Act apply to insurance companies, banking companies and electricity

13. C.A. Sections 2(31) and 5.

supply companies except insofar as the provisions of the Act of 1956 are inconsistent with the provisions of the Insurance Act 1938, the Banking Regulation Act 1949, and the Indian Electricity Act 1910, or the Electricity Supply Act 1948, as the case may be. The provisions of the Act of 1956 also apply to any other company governed by any special Act for the time being in force except insofar as the said provisions are inconsistent with the provisions of such special Act.[14]

The Insurance Act 1938, and the Banking Regulation Act 1949, have created the following offences in addition to the offences specified in the Companies Act 1956, namely :

(1) wilful false statement in any return, balance-sheet or other document or any information required or furnished under the Act or any wilful omission to make a material statement;

(2) omission to produce any book, account or other document or to furnish any statement or information, which under the Act it is his duty to produce or furnish.

In addition, under the Insurance Act 1938, any director or officer of an insurance company who withholds any document or property from the Administrator or who, having wrongfully obtained the possession of any property of the insurance company, wrongfully withholds it or wilfully applies it for any purpose other than the purposes of the Insurance Act 1938, is punishable for the offence.[15]

The Banking Regulation Act 1949, provides for criminal liability for the following additional offences, on the part of directors and other officers of a banking company, namely :

(1) omission to answer any question relating to the business of the banking company when asked to do so by the officer making the inspection;

(2) acceptance of any deposit when the banking company is prohibited from accepting such deposit.

Both the Insurance Act 1938, and the Banking Regulation Act 1949, further provided that where a contravention or default is committed by a company, then the company as well as every person who, at the time when the contravention or default was committed, was in charge of, and

14. CA section 616(d).
15. Insurance Act 1938, sections 55 F and 105.

was responsible to, the company for the conduct of the business of the company shall be liable for the contravention. But an officer of the company shall not be criminally liable if he proves that the contravention or default was committed without his knowledge or that he had exercised all due diligence to prevent the contravention or default. Similar provisions have been made in all other statutes which provide for the criminal liability of a company for any offence created by such statutes.[16]

A company, being an artificial person, cannot obviously be sentenced to imprisonment. In the circumstances, whenever the Companies Act 1956, has provided for any punishment, the company has been made punishable with fine only, but where it is intended that sentences of imprisonment should also be passed, it has been clearly specified that such sentences of imprisonment can be imposed only on the officers of the company who are in default.

16. For a list of offences under the Companies Act 1956, see K. M. Ghosh, *Indian Company Law*, Table XXIV.