CHAPTER - VII

CONCLUSION

After making a detailed study of the law on Corporate Criminal Liability in India the conclusions arrived at on the topic are presented in this chapter. First, a summary of the research work, then the findings of research and the recommendations of the researcher are given:

(i) SUMMARY OF THE THESIS

The study has been undertaken in the background of the developments relating to the abstract entity of a company or corporation and the liability of the institution for its illegal transactions and unlawful commitments.

In regard to the conceptual framework of research the study was conducted of the institution of company and its legal liability. The researcher has traced the development of the abstract entities which received recognition as to their independent personality and immunity from legal liability. It has been noted that the ancient Common Law recognized the rights of natural persons only. In a situation like that a thing actually possessed was recognized by the courts and not the thing which was not possessed but that a person had a beneficial interest in the matter. The thing actually possessed was known as legal estate, the rights of the natural person were known as his legal rights and the remedies provided by the Courts of Common Law were known as his legal remedies. The Courts of Equity which was yet another segment of the machinery of justice, a person who was not in actual possession of the thing but had only an interest in the third. In other words, the Courts of Equity recognized the concept of Equitable Estate, Equitable owner and equitable remedies. On the analogy of Equity the governmental authorities issued their Royal Charters to certain institutions and conferred thereby a legal status on their personality. By such an action was conferred on the abstract entity the status of independent personality as also the legal capacity to sue and to be sued. The East India Company was one of the earliest examples which was established under a Royal Charter of Her Majesty the
Queen of England to trade in the East Indies, and which was designated as the East India Company. The Royal Charter ushered in the concept of a corporate body on which certain privileges and immunities were conferred by the Sovereign. Institutions like the trading companies, the stock exchanges, the churches, the universities and the hospitals received recognition under Royal patronage for certain privileges and immunities and in course of time the institutions grew in number and the activities in regard to which the privileges and immunities were granted also grew in vast number. It was in the famous case of Saloman v. Saloman that a revolutionary change was acknowledged in the existing system of legal relations. The House of Lords in this case confirmed the status of a company as being that of an independent entity having a separate personality and a separate existence of its own with a capacity to sue and to be sued in its own name.

The institution of a corporate entity which was thus recognized in the beginning in respect of a commercial institution was recognized in respect of several other institutions also which were engaged in non-commercial transactions. In other words, the privileges and immunities which went to the commercial entities were claimed by non-commercial entities also. This is how the concept of corporate bodies became a popular method in the realm of law, and the abstract entities could avail for themselves the privileges and immunities like those of the corporate bodies.

In the wake of expansion in commercial activities there was a tremendous growth in the form of business organizations and every institution which was established in the realm of trade, commerce and business sought to avail the privileges and immunities that primarily went to the commercial institutions of the original type. By virtue of such privileges the commercial entities could enter into a wide range of transactions. Such a change in the system of commercial transactions brought in a great expansion in the nature and scope of the provisions of Private Law which consisted of various segments like the Law of Contract, the Law of Agency, and Law of Partnership etc.

But the growth of the subject did not stop with just the growth and development of Private Law only, it entered the area of Public Law also in regard to various matters and this was because the governmental institutions in partnership with
the commercial institutions engaged themselves in business transactions and met the needs and requirements of the business community on the one hand and needs and the society on the other. Such an involvement of companies in governmental transactions ushered in the concept of Public Companies which became the subject matter of Private Law as well as the Public Law. Such a fusion of law of the two branches was noticed at several places of the world because of the commonality of the transactions in trade and commerce.

After taking note of the salient features of the Law on the subject of corporate entities the next thing which was examined in this work was the concept of corporate crimes, which meant that the persons managing the business abused their position and misused their powers. The manipulators of legal privileges that way contributed when they indulged in objectionable activity they created a mess in the area of commercial transactions because of which arose the concept of Corporate Crimes. These crimes were indulged in by such of the persons who were associated with the institution of corporate entities as Directors, Managers or employees of the corporation but who for their personal benefits violated the established provisions of law.

What called for examination at this stage was the response of the law to the issues which had surfaced in the business world. In United States, the Anti-Trust Laws were the first to furnish a response to the corrupt practices which had crept into the commercial world. A trust had the additional meaning of a large business, and the anti-trust laws sought to penalize the criminal conduct of the persons managing the institution of trust. A large number of Anti-Trust laws were enacted by the United States to deal with criminality of the business world. The stringent punishment provided by the anti-trust laws may be illustrated by making a reference to the following provision:

“Every contract combination in the form of a trust or otherwise or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and on conviction thereof, shall be punished by the fine not exceeding $ 100,000,000 if a corporation or if any
other person, $1,000,000 or by imprisonment not exceeding 10 years or by both and punishment in the discretion of the court.”

In the new situation which had raised its ugly head like this the specific problem to be addressed was to whom should the responsibility be assigned, whether it is the personal liability of the officer, the manager, the director or the manager only or it is the vicarious liability of the corporation to which they belonged.

The provisions of law enacted in various countries equated the responsibility of the individuals to that of the institution and made no difference in the responsibility of the corporate entities in any matter. The personal liability of the individual officers and the vicarious liability of the companies went hand in hand. But the difficulty was that the ancient principles of criminal jurisprudence usually required the presence of a mental element to constitute a crime and since a corporate entity could not be said to possess a mental element like ‘intention, knowledge or recklessness’ it was not very difficult for the courts to assign legal liability to the companies and corporations.

The nature of response of the criminal law of our own country was that it had equated the meaning of a corporation to that of an individual by laying down a provision in the General Clauses Act and the provisions of the Indian Penal Code saying that the term ‘person’ includes ‘a company, a corporation, an association whether incorporated or not’. The Penal Code and the General Clauses Act were the general laws of the country. Apart from these general laws a number of Statutes were enacted on various subjects, places or things which constituted the special laws in the realm of the criminal law of our country. The provisions of the general law and the special laws set the tone in our country with regard to its response to the problem of corporate criminality. But the problem was with regard to the enforcement of such a noble brand of laws; the courts stuck to the ancient principle of insisting upon the elements of crime and the motive for such crimes because of which the criminality could not be arrested. This particular aspect of the social conditions was taken note of in the previous chapters. The system of laws in foreign jurisdiction and the problem of

1 Sherman Act, 1890, Section 1.
corporate crimes were dealt with extensively in the previous chapters of the Thesis. The system of enforcement of laws and the actual work done by the courts through the process of interpreting the laws were presented in these chapters. A gist of the findings of research is given below.

II. FINDINGS OF RESEARCH:

1. The concept of Corporate Criminal Liability is fairly important in the context of business transactions.
2. The idea of a corporation being treated as a separate entity is a very good idea; such an idea was adopted in respect of the institutions donated or established by Churches, Universities, Colleges, Hospitals etc. established for the welfare of the people.
3. But in the business world what is noticed is that the idea of corporate entity has been exploited for unlawful gains.
4. Such an exploitation of the idea of a corporation has caused harm to the interests of the state on account of which the authorities of the state invoked the penal powers.
5. The actual problem in addressing the question of criminality arose about fastening liability to such entities on account of the legal theories which were operating since ancient days, such as the theory of actus reus and the theory of mens rea.
6. These theories lent support to the view that the natural persons alone could be subject to the punishment of imprisonment and that an abstract entity could not be brought under the purview of criminal law.
7. The cases studied in regard to the foreign legal systems as well as India show that the problem of corporate criminality is very grave. Such a criminality exists not only in developing countries but also in developed countries like the United States.
8. Although the statute defined a person as including a company or a corporation yet the interpretative process made the task difficult because of the ancient theories of penal liability. In other words, the ancient theories of criminal jurisprudence created hurdles in the way of punishing the corporate entities and they confined themselves to the responsibility of assigning personal liability to
the individuals and stopped short of punishing the abstract entities.

9. The movement for law reform addressed the issue, but the efforts made by the Law Commission and other authorities in clarifying the situation have not rendered the task easy; the problem is still bothering the authorities about liability of the companies and corporations.

10. The Companies Act, 1956 contains certain provisions, which empower the courts to lift the veil to reach the persons who are in fact responsible for the culpable or wrongful act. The corporate veil can be lifted in the following cases:

(1) Where the doctrine conflicts with the Public policy,
(2) Where corporate veil has been used for fraud or improper conduct,
(3) Where the corporate facade is only an agency instrumentality,
(4) For determining the real character of the company,
(5) Where the veil has been used for evasion of taxes,
(6) In quasi-criminal cases,
(7) For investigating the ownership of the company,
(8) For investigating the affairs of the company,
(9) Where the company is used as a medium to avoid various welfare and labour legislations,
(10) In case of economic offences,
(11) Where the company is used for some illegal and improper purpose, etc.

The following provisions of the Companies Act, 1956 provide that the Members or the Directors/officer(s) of a company will be personally liable if:

(i) A company carries on business for more than six months after the number of its members has been reduced below seven in the case of a public company and two in the case of a private company. Every person who was a member of the company during the time when it
carried on business after those six months and who was aware of this fact, shall be severally liable for all debts contracted after six months,

(ii) The application money of those applicants to whom no shares has been allotted is not repaid within 130 days of the date of issue of the prospectus, then the Directors shall be jointly and severally liable to repay that money with the prescribed interest,

(iii) An officer of the company or any other person acts on its behalf and enters into a contract or signs a negotiable instrument without fully writing the name of the company, then such officer or person shall be personally liable,

(iv) The court refuses to treat the subsidiary company as a separate entity and instead treat it as only a branch of the holding company,

(v) In the course of winding up of the company, it appears that the business of the company has been carried on with intent to defraud the creditors of the company or any other person or for any fraudulent purpose, all those who were aware of such fraud shall be personally liable without any limitation of liability.

(vi) What needs to be pointed out is that the protection of separate legal entity cannot be claimed in all cases and the limited liability of the shareholder becomes unlimited if he is engaged in these activities.

(vii) The concept of “limited liability” restricts the liability of a shareholder to the nominal value of the shares held by him. If he has paid the entire amount which is payable towards his shares, he cannot be held liable for the debts of the company, even if he holds almost the entire share capital of the company. This rule, however,
does not apply if the court lifts the corporate veil and finds the shareholder responsible for the wrongful act.

(viii) While the legislature has done its best in covering the criminality of corporate bodies and brought it under the purview of the criminal law, the ancient theories have dogged the law-making process and made the task of enforcement difficult. It is not that the legislature is completely silent on the issue. On the other hand, the legislature has done its best in grappling with the situation but the difficulty has been with the principles that have come in its way.

(ix) After noting the response of the legislature to the problems of corporate criminality the attitude of the courts has to be noted. While in certain cases the courts have stuck to the ancient principles of criminal justice like Mens Rea and Actus Reus in certain cases the courts have adhered to the principle of literal interpretation and imposed liability on the companies.

(x) The biggest contribution of the courts has been to the view that the existence of a corporation is the result of a fiction by virtue of which it is allowed to have the rights and remedies of a natural person, then why there cannot be a fiction when it comes to examining the conduct and the corporation subjected to the liabilities like a natural person, if it is found that it has violated the law in its own way.

(xi) It will not be out of place to note the judicial activity in expanding the scope of the law. The separate personality of the company is, however, a statutory privilege; it must be used for legal and legitimate business purposes only. Where a fraudulent, dishonest or improper use is made of the legal entity, the concerned individual will not be allowed to take shelter behind the corporate personality.
The court will break through the corporate shell and apply the principle of “Lifting of the corporate veil”. The court will look behind the corporate entity and take action as though no entity separate from the members existed. In other words, the benefit of separate legal entity will not be available and the court will presume the absence of such separate existence.

(xii) In the landmark judgment of Kapila Hingorani v State of Bihar\(^2\) the Apex Court analysed the rights and liabilities of a company vis-à-vis the Fundamental rights and Human Rights of the individuals. The Court observed:

“A company incorporated under the Companies Act is a juristic person and has a distinct and separate entity vis-à-vis its shareholders. The corporate veil, however, can in certain situations be pierced or lifted. Whenever a corporate entity is abused for an unjust and inequitable purpose, the court would not hesitate to lift the veil and look into the realities so as to identify the persons who are guilty and liable thereof. The veil can indisputably be lifted when the corporate personality is found to be opposed to justice, convenience and interest of the revenue or workman or against public interest”.

- It has also been observed that a corporation deemed to be “State” within the meaning of Article 12 of the Constitution and acting as agency of the government, would be subject to the same limitations in the field of Constitutional or administrative law as the government itself, though in the eyes of law they would be distinct and independent legal entities.
- A study of the developments relating to legal instruments and the judicial opinion on the subject confirms the hypothesis that the law on corporate liability is in a state of its own weaknesses because of which it has not been able to deal with the problems arising in our society. There is therefore need

\(^2\) 2003 (6) SCC 1.
to modify the provisions of law and make its response more relevant and more effective.

III. RECOMMENDATIONS OF THE RESEARCHER:

(α) The problem of corporate criminality has been growing in its severity. The series of scandals have shaken the confidence of the people in the system of state administration.
(β) Several government officials entering into transactions with the local, regional and foreign companies have involved themselves in corrupt practices causing damage to public interest. Scandals like the Bofors scandal, the Bhopal gas disaster, the Coal allocation scandal, have seriously damaged the credibility of the persons in power.
(χ) One of the scams called the ‘Fodder scam’ was so serious that it was enough by itself to bring down a shaky Indian government. This is how the New York Times had commented in its columns:

'Fodder Scam' Could Bring Down a Shaky Indian Government, The New York Times, 1997-07-02. Accessed 2008-10-29. "... The scandal, said to involve $285 million, occurred in one of the country's poorest regions, the eastern state of Bihar. The money, which is reported to have been stolen over nearly 20 years, came from agricultural support programs aimed mainly at helping the 350 million Indians who live in extreme poverty ..."

(4) In view of the gravity of the problem it is suggested that efforts should be made at all levels and steps should be taken in all forms to curb the tendency of crimes and bring in a new era of crime free society.

(5) Apart from the legislative and judicial activity with regard to the problems of corporate liability there have been studies conducted by several committees and institutions with regard to the question of improving the system of management. As a result of these studies a new concept has emerged which is known as the concept of Corporate Management. The authorities have concluded that apart from the legal provisions there are certain moral and ethical principles relevant to the subject of corporate crimes.
(6) The problem of corporations has been examined by several committees and organizations at the national and international levels. The relevance of these reports to the topic under study is that the committees have suggested how an improvement can be brought about in the organization and functioning of the corporate bodies. The reports submitted by these committees suggest the measures that need to be taken by the corporations to run their business smoothly. They also deal with the basic issues as to what is meant by the term ‘corporations’ and what are meant by ‘corporate governance’. A gist of the reports and the recommendations of the committees that examined the issue of corporate governance abroad and in our own country may be summarised as follows:-

A report on Corporate Governance submitted to the Government of India in February 2003 defines a corporation and corporate governance as under: A corporation is a congregation of various stakeholders, namely, customers, employees, investors, vendor partners, government and society. A corporation should be fair and transparent to its stakeholders in all its transactions. This has become imperative in today’s globalized business world where corporations need to access global pools of capital, need to attract and retain the best human capital from various parts of the world, need to partner with vendors on mega collaborations and need to live in harmony with the community. Unless a corporation embraces and demonstrates ethical conduct, it will not be able to succeed.

(7) Corporate governance is about ethical conduct in business. Ethics is concerned with the code of values and principles that enables a person to choose between right and wrong, and therefore, select from alternative courses of action. Further, ethical dilemmas arise from conflicting interests of the parties involved. In this regard, managers make decisions based on a set of principles influenced by the values, context and culture of the organization. Ethical leadership is good for business as the organization is seen to conduct its business in line with the expectations of all stakeholders.

(8) Corporate governance is beyond the realm of law. It stems from the culture and mindset of management, and cannot be regulated by legislation
alone. Corporate governance deals with conducting the affairs of a company such that there is fairness to all stakeholders and that its actions benefit the greatest number of stakeholders. It is about openness, integrity and accountability. What legislation can and should do is to lay down a common framework – the “form” to ensure standards. The “substance” will ultimately determine the credibility and integrity of the process. Substance is inexorably linked to the mindset and ethical standards of management.

(9) Corporations need to recognize that their growth requires the cooperation of all the stakeholders; and such cooperation is enhanced by the corporation adhering to the best corporate governance practices. In this regard, the management needs to act as trustees of the shareholders at large and prevent asymmetry of benefits between various sections of shareholders, especially between the owner-managers and the rest of the shareholders.

(10) Often, increased attention on corporate governance is the result of financial crisis. For instance, the Asian financial crisis brought the subject of corporate governance to the surface in Asia. Further, recent scandals disturbed the otherwise placid and complacent corporate landscape in the US. These scandals, in a sense, proved to be very dangerous to social interest.

(11) Corporate governance is a key element in improving the economic efficiency of a firm. Good corporate governance also helps ensure that corporations take into account the interests of a wide range of constituencies, as well as of the communities within which they operate. Further, it ensures that their Boards are accountable to the shareholders. This, in turn, helps assure that corporations operate for the benefit of society as a whole. While large profits can be made taking advantage of the asymmetry between stakeholders in the short run, balancing the interests of all stakeholders alone will ensure survival and growth in the long run. This includes, for instance, taking into account societal concerns about labor and the environment. Report of the Committee on Corporate Governance

(12) The failure to implement good governance can have a heavy cost beyond regulatory problems. Evidence suggests that companies that do not employ meaningful governance procedures can pay a significant risk premium
when competing for scarce capital in the public markets. In fact, recently, stock market analysts have acquired an increased appreciation for the correlation between governance and returns. In this regard, an increasing number of reports not only discuss governance in general terms, but also have explicitly altered investment recommendations based on the strength or weakness of a company's corporate governance infrastructure.

(13) The credibility offered by good corporate governance procedures also helps maintain the confidence of investors – both foreign and domestic – to attract more “patient”, long-term capital, and will reduce the cost of capital. This will ultimately induce more stable sources of financing.