

## PIERCING THE CORPORATE VEIL – AN INSTANCE OF ABUSING HUMAN RIGHTS?

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### Abstract

In the field of corporate law, the doctrine of corporate veil is recognized for its uniqueness and so is the lifting of that veil. However, while delving down in the recent developments in legal regime, the burning dispute that haunts the Corporate bodies, pertains to the violation of human rights as alleged due to the interference of the doctrine named ‘piercing the corporate privilege veil’. The question therefore arises whether lifting the corporate veil and mixing the corporate personality with the natural personality of its members violates the human rights of the members in realm or whether imposing the criminal liability on the corporations by way of piercing the veil disregards the nature of corporate personality at its first instance. This article hence endeavors to encounter the issues pressing the ground of corporate law followed by a critical analysis of the same.

**Keywords:** *Corporate Veil, Criminal Liability, Human Rights, Separate Personality, Public Policy.*

## **INTRODUCTION**

A human by birth has absolute ownership and control on certain tangible or intangible things and conducts which are popularly known as human rights, a guarantee every person inherits and cannot be subjected to abuse. Now, stepping down to analyze the word 'Person', the legal framework classifies the wording into two categories – Natural & Artificial Person. Where the former is born by a natural biological process, the latter is a creation of the Law only having the capacity to be guaranteed some rights on it. A Company being an exact instance of such Artificial Legal Person therefore deserves to possess an Artificial Personality, or labeled as Corporate Personality – the bedrock trait for incorporation of a Company thereafter. The paramount tagline representing such Corporate Personality is that the Company being a separate legal entity is discrete from the personality of its members and shareholders resulting to safeguard them from being personally liable for the losses and debts incurring by the Company itself. In other sense, such legal concept is also termed as the Concept of Corporate Veil, which therefore is bound to be protected and maintained always. But one should never forget that it is the Law who never confers the absolute power to any person whether it is Natural or Artificial. And thus, the Concept named "Lifting of Corporate Veil" comes to the limelight. What is this lifting of Corporate Veil in real? A literal interpretation of the uttered terminologies exhibits the scenario where the Court is given an opportunity to pierce the mask of the distinct personality of the Company and catch the real offender behind the veil in red-handed. This is only the exception of Corporate Personality where the personalities of Company and its members get overlapped on each other. Therefore, the aforementioned doctrine may make the directors or the other members (as the case may be) personally liable depending upon the amount of intention they showcased to commit an offence falling under the ruling of the doctrine. Hence, the above was the whereabouts of the Doctrine of the Lifting or of the Corporate Veil in brief.

Apparently, it seems to face no issue at all. But if we delve deeper into the real scenario, it will hardly take any time to point out the clash between human rights and the Lifting of Corporate Veil. While analyzing the reason briefly, the Corporate Veil is actually mixed up with two sorts of Personality – The Artificial one i.e., the Company and the Natural one i.e., its members. In this context, the members of the Company are protected from the liability incurred by the Company. This denotes the absolute protection of the Natural Personality or the Rights of those individuals. But when all of a sudden, the Court lifts the corporate veil; it considers only Natural

Personality and ignores the artificial one. Subsequently, the artificial one, hence, gets vanished and as a result, the natural person, i.e., the members are held personally liable. Under such circumstances, a question may certainly pertain - whether such activity of the Court violates or abuses the human rights or not? Whether the lifting of Corporate Veil by the Courts should be illegal and invalid being a sufficient ground of the violation of human rights or not? Hence, an attempt has been made in this paper to encounter such pressing issue lying in the corporate domain which is to be followed by necessary recommendations.

### **CORPORATE VEIL – THE CONCEPT**

The heading subsequently carries its synonym and that is Corporate Personality. The Corporate Veil or Personality therefore recognizes the Company as an artificial person having the artificial personality also. Like a natural person takes birth out of a natural biological process; a Company being an artificial person takes birth due to the creation by law artificially. So, additionally a Company is also a juridical body. Delving deeper its human character reveals a flock of significant features the Companies possess which are similar to the features of a natural juridical person. We, the humans have been guaranteed with many rights, powers and arrayed with many duties whereas in case of a company, no differences can be discovered while comparing with the natural humans with this regard. For a human, powers conferred by the Constitution is the prescribed limit to be exercised by him; for a Company powers conferred by the Memorandum of Association of that Company prescribed the limit to be exercised by it. The main theme of Corporate Personality lies in the distinct character of the Company from its members. It is that veil where the activities and decisions taken by a Company shall not make its members liable – a safeguard gifted to the members of a company under the veil of artificial Corporate Personality.

Apart from being an Artificial as well as Juristic Person; a Company also deserves to be in the category of legal person as it has the legal competency to contract, to transfer properties and to sue or be sued etc. Even like a natural person; every Company is identified by its own name and seal being official signature of the Company. What mainly creates the veil is the separation of the Company's assets and liabilities from its members or shareholders as the Company itself bears a different personality than the aggregate of its members' personality.

The flock of significant features that makes a Company unique than its shareholders are summed below:

1. Corporate Personality (as discussed above)
2. Perpetual Succession (Being an artificial legal and juristic person a company possess a perpetual succession within its capacity which only ends during winding up procedure or if limited by the Objective Clause of its MOA).
3. Separate Property (Like a natural person, what a Company carries out is its own property from its incorporation, which should be registered under the provisions of the Companies Act 2013).
4. Transferability power with regard to Shares (Shares being the movable property are subjected to transfer and the power to transfer such movable property has also been vested with the Companies itself).
5. Common Seal in its own name (only the exception lies when the Article of Association itself passes a resolution authorizing a person to sign the official Contracts in replace of the Company's seal).
6. Contractual Right (Like a legal natural person. The Companies have the legal competency to enter into a Contract by its own name and seal).
7. Limitation of Action (The object clause of a MOA acts similar to the Constitution – only the former one limits an artificial person like Company, where the latter one is a limitation for a natural human).
8. Separate Management (It is the Memorandum and Article of Association which governs the Company's management internally and externally).
9. Termination of Existence (Unlike a natural person, Death or dissolution does not affect a Company's existence because of its artificial character, but the strategies like Reconstruction, Mergers and Amalgamation terminate its existence).

## **JUDICIAL INTERPRETATION OF CORPORATE VEIL OR PERSONALITY**

Probing the spirit of Corporate Personality spotlights three landmark cases in this context where the Phenomenon was subjected to judicial interpretation by the Court. The three landmark cases in this behalf are as follows: -

1. Salomon v. Salomon & Co. Ltd.
2. Lee v. Lee's Air Farming Ltd.
3. United Bank of India (UBI) v. Khader International Construction & Ors.

In 'Salomon v. Salomon & Co. Ltd.', before incorporating the respondent Company, the petitioner being the director of the respondent Company was engaged in a business of leather shoe manufacturing. Later the petitioner incorporated a company comprising of the seven shareholders being himself, his wife, 4 sons and his daughter holding £1 share each i.e., the paid-up share capital was £7 and nominal capital was the sum of £40,000 per £1. The concerned business being the prosperous enough was sold by the petitioner himself to his newly incorporated Company for £38,782. To partly pay concerned £38,782, a sum of £10k was issued to Salomon as a debenture on the assets of the Concerned Company. Besides, Salomon the petitioner himself applied for the 20,000 allotments of shares £1 each, which was granted to him. Finally, the amount remained was the sum of £8782 which was paid to him by cash. But after that, the Company started liquidating and it was discovered that the liabilities were more than the assets of the Company. When the investors as well as the unsecured creditors claimed their money to the Company, the Company declared Salomon liable on the ground that he was the sole beneficiary of the Company and the Company was his mere agent. But the House of Lords clearly held that as the Company has a separate entity from its members, shareholders as well as other investors, therefore the Corporate Personality would prevail than the members' personality which would hold the Company liable instead of the Petitioner.

## **EXCEPTION OF CORPORATE VEIL – ‘LIFTING THE VEIL’**

Since ages the Legislatives in consonance with the Judicial bodies have been continuing to protect Company's artificial personality and hence, the members or the shareholders or the investors have been privileged to avoid the liability for the personality possessed and exercised by the Company itself. But the conflict may arise when the personality possessed by the Company is fraudulent in character and that fraudulency too takes place due to the wrongs done by any member of that Company. What should the Court do at that time? Whether the Court needs to maintain the same Corporate Personality and be silent for punishing the concerned culprit? Or whether the Court being a justice-provider lifts the guise of Corporate Personality and breaks the protection privileged to its members in order to catch the real culprit behind such crime?

The above scenarios and questionings were the notion behind the evolution of the Doctrine i.e., The Doctrine of 'Lifting the Corporate Veil'. Under this doctrine, the Separate Character of a Company as safeguarded by the statute must be maintained for a lawful business having lawful object only. Law always follows the principles of Equity, justice and good Conscience. So, therefore, for the purpose of fraudulency or unlawful object, the statute cannot provide any such privilege or protection to the offenders which amounts the holding of liability of the real offender being the members or the shareholders or any other concerned person involved in the offence. Doctrine of Lifting the Corporate Veil therefore legally and justifiably restricts the real offender to excuse himself by taking shelter under the veil of Corporate Personality. What the Doctrine will do, is to encourage the Court to break the privileged veil and identify the actual culprit and punish him. Such a Justice-oriented Doctrine is popularly known as 'Lifting or Piercing the Corporate Veil'. The First and Foremost rule of the applicability of this Doctrine is the assumption of the Court regarding the absence of any separate corporate entity in certain unlawful and Fraudulent Circumstances.

However, this lifting of veil should be applicable by the Courts with respect to certain prescribed statutory circumstances. It was declared in the landmark case 'Premlata Bhatia v. Union of India' that no members, investors or the shareholders have and power to request for piercing the guise for the personal purpose.

In this Context, the Companies Act 2013 has shown some ray of hope to the Court to penalize the real offender by applying the doctrine. Section 7(7) of the Act prescribes the penalties for handing false data during incorporation of any concerned company whereas Section 251(1) of the said Act holds the offender liable for structuring a false application with an intention to remove the company's name from ROC. Lastly, S. 339 of the Companies Act, 2013 holds the offender liable for carrying on a fraudulent business during winding up procedure of a Company.

Although it is the sole duty of the Court to check the maintenance of Corporate Personality character of a Company, but on the other hand, to deter the offender from committing the offence, it is also another significant duty of the Court to disrespect the Doctrine of Corporate Veil in certain scenarios as follows: -

1. **ENEMY CHARACTER:** - When a Company is regarding as being enemy character in nature and if the directors or any other persons having control on the Company's affairs belong to the inhabitants of an enemy nation, the transactions or contracts entered into by that company will be a sufficient ground for lifting the corporate veil. In the case of 'Daimler Co. Ltd. v. Continental Tyre & Rubber Co.', the Concerned Company was registered in England where the 99% shares were held by the German Residents and only 1% share was with the British Resident. During the World War I, enmity spread between England and Germany due to which the transactions made by the Company were held to be illegal. The Court lifted the Corporate Veil and punished the real offender as the transactions made were declared to be against the nation's interest.
2. **TO PREVENT TAX EVASION:** - If any Company is incorporated under the statute not for the purpose of carrying business, but for evading the tax liability only, then the Court has the absolute power and authority to forget the separate character concept and apply the doctrine of 'Lifting the Corporate Veil' to make the culprits liable for the payment of taxes. In the comical case of Sir Dinshaw Manakjee Petit the offender was a very rich person. What he did was to form 4 Private Companies and sanctioned the loans to them. The Company used to return the income received to him as an assumed loan. This was the strategy he played only to evade his tax liability. But the Court here lifted the veil as the Companies were for carrying no business rather for evasion of tax liability at all.

3. **WHEN COMPANY IS A SHAM:** - Sham denotes 'false' or 'fake'. So, the Court will lift the veil when the Company's intention and activities are fraudulent or the Company itself is a fake one. In 'Gilford Motor Co. Ltd. v. Horne', Mr. Horne entered into the Contract with the Petitioner Company not to solicit their Customers. Horne resigned from the Company after that and formed a new Company where he started to solicit the previous Company's customers. The Corporate Veil here was lifted by the Court as the Contract entered by Horne was not rescinded even after his resignation which made his activities and the purpose of forming the new Company to be sham.
4. **PROTECTION OF PUBLIC POLICY:** - When on behalf of the Company, the directors or the persons having power of decision making, makes some decisions opposed to public policy, then to secure the public interest, the Court lifts the Corporate Veil to punish the real offender behind the offence.

### **'HUMAN RIGHTS vis-vis LIFTING THE VEIL'- A BORDERLINE DISORDER?**

It takes the shape of a comic when the offender being so victimized by the Doctrine of 'Lifting the Veil' starts seeking statutory and Constitutional protection in the name of human rights. The wordings 'Human Rights' comprise of two terms – Human and Rights. Why our Constitution guarantees a flock of rights to humans? Protecting themselves from their wrongs? Or providing them a glimpse of Justice?

Why India is considered to be a welfare-state? The question itself shows its answers by pointing towards the word 'Justice' in the Preamble. The main purpose of the word 'Justice' indicates to secure our nation from any kind of illegal or unlawful activities and make our nation to be a welfare democratic Republic Country at all. While looking into the above title, it clearly exhibits the pressing issue lying in the Borderline Disorder between the protection of Human Rights and the Doctrine of Piercing the Veil. It is by no stretch of imagination admitted that the Corporate Bodies and its members are somewhat privileged by the weapon of Corporate Personality. But whenever you being the member of a Company, are involved in some crime affecting the public



or national or natural justice, how can you claim to cover yourself under the guise of Corporate Personality?

Human Rights are guaranteed to the individuals for the purpose of providing justice, equity and good Conscience and also to maintain the larger democracy. But the same can never be guaranteed to excuse you from the burden of criminal liability for which you already made yourself eligible enough to incur. The Legislature implemented the Corporate Personality Doctrine with a sole intention to privilege the immunity to the Companies from the minor civil liabilities for improving our economy through industrialization. But when it comes to the Criminal Liability, the affecting of larger public and national interest dominates and supersedes the purpose of improving economy as the upgradation of economical standard lies in the upgradation of the national interest and the individual's living standard. Being the interpreter of our Constitution, as well as the protector of human rights; it is the paramount duty of the Court to protect the Human Rights at the first instance. Therefore, when the Judiciary itself makes the Lifting of Corporate Veil as a prevalent Modern-day Doctrine which has been alleged to be an abusive instrument of human rights, a question definitely arises – How can the Judiciary become so irresponsible in protecting our human rights? Focusing the intention of judiciary to lift the corporate veil in certain circumstances; it is very much evident to be justified for such lifting as the circumstances where the Court decides to apply the Doctrine are itself the victims of the rampant vice of grave injustice to our nations and its citizens. Therefore, cannot it be a matter of surprise if the Judiciary tries to prevent the vice so as to protect the 'innocent' humans' rights! Hence, not to create any disorder, rather to maintain the borderline itself, the Doctrine of Lifting the Veil is acting in consonance with protecting the Human Rights.

A debate on this point has been arising since the inception and recognition of the instrument 'Lifting or Piercing the Corporate Veil' that the veil is generally meant to be lifted or pierced in a Corporate body so as to punish the offenders due to corporate criminal liability. However, one plausible statement can be taken as an argument that a corporate body has no 'mens rea' unlike humans and therefore criminal liability cannot be imposed on the corporations by any stretch of imagination. To rebut this argument, the nature of separate personality has to be well-understood. Despite having a separate identity distinct from its directors or members, a company ensures to adopt the bedrock of public policy so as to respect such privilege as given by Law and the Judiciary also lays down the principle of public policy not to disregard the personality itself.

Hence, the Courts in various jurisdiction including India have well-interpreted and formulated the doctrine of piercing the veil to prevent the abuse of corporate personality for greater good, instead of protecting the offence committed by the criminals in the name of human rights. The recent landmark judgment of 'Vodafone International Holding' and 'Ram Saroop Gupta v. Major Sp. Marwah' also validates the sustainability of the doctrine 'Piercing the Veil'.

Thus, it is well-evident that Piercing the Corporate Veil does not increase the conflict lying in between the Corporate Law and the Human Rights, rather it emerges as a savior to bridge the gap between them.

## **CONCLUSION**

The allegation the offenders of the Corporal Fraud throw is simply the violation of human rights due to the piercing of Corporate Veil. Does not it seem to create an awesome irony by having a glance at the above allegation? If you presume that there are no such reasons taken place which compels the Court to lift the Veil; what Doctrine would prevail at that time is the Corporate Personality and it is the Court who would ensure the fact itself like what happened in 'Salomon v. Salomon & Co. Ltd.' case. Under the guise of Corporate Personality and with the help of Judiciary, your membership in the Concerned Company would definitely be privileged from the any sort of liability. But when you being the sole member of the Company would involve yourself actively in criminal offence (fraudulency) which would affect your nation and other individuals adversely, where would your values have gone at that time? Where the other citizens are not guaranteed such immunity to excuse themselves from a minor civil liability; for the sake of company's liability, you being the members of the Company are especially excluded from your obvious liability. Doesn't such privilege extend the scope of your human rights compared to others? Then when you are already intentionally engaged in committing severe criminal wrongs affecting the nation and public; how much and to what extent you expect the Judiciary to excuse your liability? Does not it adversely violate the other citizens' human rights in realm? The Constitution undeniably secured the rights of the accused along with the individuals. But where such illegality in the name of human rights defeats the spirit lying in the Innocent Individual's Right, does not the sole purpose of justice and the spirit of Constitutionalism fade at all? Therefore, in the climax, what it needs to equalize the balance between the two disputed factors

namely ‘Abuse of Human Rights’ and ‘Lifting of Corporate Veil’, is to clarify the well-evident fact that the protection of human rights gets proportionate to the Doctrine of Lifting the Corporate Veil itself in realm.

