



**CORPORATE VEIL LIFTING: ISSUES AND SOLUTIONS AND PUBLIC POLICY AS A GROUND; TRACING THE INDIAN, ENGLISH AND AMERICAN JURISPRUDENCE**

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**Abstract**

The practice of corporate veil lifting has been in practice since centuries. This concept rests on the belief that sometimes, the principle of corporate personality of a company can be used to engage in improper or illegal acts, and commit corporate frauds. Since an artificial person is not capable of doing anything illegal or fraudulent, the façade of corporate personality might have to be removed to identify the persons who are really guilty. However, features such as separate personality and limited liability are considered as fundamental for the existence of a company. By lifting the corporate veil, these fundamental principles are disregarded by courts. There have been debates upon the correctness of this doctrine, a few of which this paper will mention. Certain scholars and researchers have also come up with solutions to these veil piercing issues, some of which will be discussed in this paper. After a lot of analysing and applying judicial mind, judges and legal scholars came up with certain legislative and judicial principles/grounds which should be adhered to if the veil is lifted. One of them being, the ground of “public policy” an area which is boundless in nature. This paper is an attempt to discover

the unexplored aspects of corporate veil lifting. It also aims to provide an opinion about public interest as a ground, through empirical research analysis.

**Introduction and reasons for selecting the topic:**

**The Concept of Corporate Veil**

Corporate Veil is a legal concept that distinguishes between the personality of a corporation from the personalities of its shareholders and safeguards them from being personally liable for company’s debts and other obligations. Shareholders of a corporation are not to be held accountable for the liabilities of a company except for the capital that they have contributed in return of their invested share capital.<sup>1</sup>

**Lifting of Corporate Personality**

Sometimes, the principle of corporate personality of a company can be used to engage in improper or illegal acts, and commit corporate frauds. Since an artificial person is not capable of doing anything illegal or fraudulent, the façade of corporate personality might have to be removed to identify the persons who are really guilty.<sup>2</sup> This practice is known as “lifting” or “piercing” of the corporate veil.

The principle of separate legal entity of a company has been provided by law to ensure a concrete and distinguished legal existence of a company, separate from its shareholders, so as to protect the shareholders from the company’s debts and obligations, which will be considered as company’s own, having

<sup>1</sup> Robert B. Thompson, *Piercing the Corporate Veil: An Empirical Study*, 76 Cornell L. Rev. 1036 (1991) 2

<sup>2</sup> S. Chaitanya Shashank (January 7, 2015). ‘Lifting the Corporate Veil’, *Academike Online Journal* by

Lawctopus, ISSN: 2349-9796, available at <https://www.lawctopus.com/academike/corporate-veil/>



only a limited bearing on the shareholders to repay the amount of unpaid shares held by them. Mostly while investing in a company, a shareholder considers the reputation of the company, and places faith in the running of the company rather than focussing upon the reputation of the owner. However, there can be ways in which the owners can run the company which serves them rather than the company itself. In such cases, the creditors of the company can end up getting defrauded. When such a situation is taken up to the courts, the courts cannot make the company liable, since it's just an artificial legal person. The courts will have to "lift the corporate veil" in such cases, and will have to make the owners liable. However, what is again important to note here is that the principle of limited liability offered to shareholders comes under the main characteristic feature of a company. By this doctrine, a shareholder can only lose what he or she has contributed as shares to the corporate entity and nothing more.<sup>3</sup> These two concepts are in serious conflict with each other and cannot co-exist. Hence, through this paper, an attempt has been made to resolve this conflict by striking a situation of balance between the two concepts by referring to certain judicial pronouncements. Certain scholars and researchers have also come up with solutions to these veil piercing issues, some of which will be discussed in this paper.

Moreover, this paper specifically addresses topic of lifting of the corporate veil on grounds of public policy, i.e., if the company has indulged in some activity which goes against public interest. The term "public policy" and "public interest" is very broad and also a bit vague as per my opinion. Sometimes such a situation can arise because

of a company's deliberate attempt to engage against common public interest and benefit, while other times, the company could not have anticipated the same. Hence, it can get a little difficult for courts to adjudicate upon such matters which are believed to go against the public policy. However, it is also of great importance, since a company basically works to serve the people, and not defraud them. Through this paper, an effort has been made to resolve this conflict as to whether public policy should even be considered as a ground for lifting the corporate veil because of its vague and unforeseeable nature, the reason why it's not considered in United Kingdom. The paper will hence trace the Indian and English Jurisprudence on the same issue and provide with relevant cases.

#### Research Questions

1. Whether the concept of lifting of corporate veil on a number of legislative and judicial grounds (which sometimes can also be dubious and ambiguous) goes in blatant violation of the fundamental principle of limited liability and separate personality of a company?
2. Whether any middle solutions can be introduced to cope up with this problem?
3. Whether public interest should be considered as a ground for lifting the corporate veil considering it's vague and infinitely wide scope?

#### Objectives

- ✓ To make an attempt of resolving the confliction position between the 2 concepts of lifting the corporate veil and the doctrine of limited liability and separate personality by referring to established principles and judicial pronouncements;

<sup>3</sup> *Supra Note 2*



- ✓ To research upon mechanisms and solutions for both concepts to co-exist;
- ✓ To determine whether public interest as a ground for lifting the corporate veil is too vague to consider.

### **Research Methodology**

With respect to research questions number 1 and 2, the methodology used is doctrinal study and analysis derived from secondary sources such as e- books, journals, published papers and research articles. However, for the purpose of the 3<sup>rd</sup> research question, empirical research methodology has been used. A survey of 30 people, who belong to diverse professional backgrounds has been carried out through google forms, and their opinions have been recorded. The statistics about the same will be elaborated upon in this paper.

### **Results and Discussions**

#### **Origin of the Doctrine**

A company incorporated has a separate legal entity from its members starting from its day of incorporation. In England, this principle was given recognition in 1867, but came into effect in the case of *Salomon v. Salomon & Co. Ltd.*<sup>4</sup>

Salomon, a boot manufacturer, had his business in a sound condition, who incorporated a company, Salomon & Co to further carry on his business, after complying with all the formalities required for incorporation, which provides for separate legal existence of the company. The subscribers to the Memorandum and the only members of company were Salomon, his

wife, his daughter and four sons, 2 of them being a part of the board of directors of the company. The business was transferred to the company for £ 40000. In payment Salomon took 20000 shares of £ 1 each and debentures worth £ 10,000.<sup>5</sup> It was certified by these debentures that the company owed Salomon £ 10000, and a charge for created on the company's assets. Each remaining member of the family was provided with one share. However, when the company went into liquidation in less than an year, it had assets amounting to £ 6,000 which proved insufficient for paying the debentures in full and the other creditors got nothing.

The liquidator sought to have the debentures cancelled on the ground that the company was only an agent of Salomon.<sup>6</sup> It was contented by the unsecured creditors that the existence of the company was not independent, Salomon was the sole person behind the actual control of the company, and hence was contrary to the spirit and meaning of the prevailing company law.

The House of Lords refused these arguments on the ground that after incorporation the Salomon and Co. Ltd. acquired separate legal existence, having its own rights and obligations, and it should be regarded as any other individual independent person.

#### **The History of English doctrine can be divided into three stages:**

- A. **1897-1966-** This period, as it was called, was the 'classic veil lifting' the experimentation period, was when the English courts

<sup>4</sup> UKHL 1, AC 22

<sup>5</sup> Ashu Bala, *Lifting of Corporate Veil: Indian Scenario* (Last visited, September 24,2020), available at

<http://www.legalservicesindia.com/article/1876/Lifting-of-Corporate-Veil:-Indian-Scenario.html>

<sup>6</sup> *Supra Note 5*



experimented with different ways of applying the doctrine. The decision in the case of *Salomon v Salomon* by the House of Lords dominated in this period.

**B. 1966-1989-** This period also known as the ‘interventionalist period’ began after the second world war, which observed more cases of veil lifting resulting in a change of rules set by the House of Lords in *Salomon’s* case.

In *Littlewoods Mail Order Stores Ltd. v. IRC*<sup>7</sup>, Lord Denning stated, "the doctrine laid down in *Salomon’s* case has to be watched very carefully. It has often been supposed to cast a veil over the personality of a limited company through which the courts cannot see. But that is not true. The courts can, and often do, pull off the mask." With of wanting of any hypothesis, the spirit of the doctrine in this period can be attributed to the most influential jurist of the twentieth century.<sup>8</sup>

**C. 1989- The Present-** The courts started to disfavour the lifting of the corporate veil during this period. In *Wolfsan v. Southclyde Regional Council*<sup>9</sup>, court stated that the “one situation where a corporate veil could be lifted was whether there are special circumstances indicating that the company is a mere facade concealing the true facts”.

However, the court of appeal in the judgement of *Adams Vs. Cape Industry*

*Plcleaves* held that the corporate veil can be lifted in only three circumstances namely:

- i) If the statute being interpreted in the case is in itself ambiguous;
- ii) If circumstances indicate that it is a ‘mere façade concealing the true facts’
- iii) The third exception is an application of the agency principle, when day to day control of a parent company on a subsidiary company is required to establish.

#### **Established Practices in Modern Times- USA, India and UK**

Therefore, it should be obvious that if these specific judicial principles and legislative carve out are in existence, and the concept of limited liability is unqualified in nature, any limits and restrains to the application of the principle of corporate personality and limited liability should be confined to such limited parameters. However, this has not been the case.<sup>10</sup> The courts have exceeded beyond legislative exemptions sometimes to neglect corporate personality and have held shareholders or directors of companies liable. In 1926, Benjamin Cardozo described this concept in law as “enveloped in the mists of metaphor,”<sup>11</sup> and courts and commentators, especially in the USA had not been so considerate in those years. Legal scholars have regarded judicial decisions in favour of piercing the corporate veil as “irreconcilable and not entirely comprehensible,” “defy[ing] any attempt at rational explanation,”<sup>12</sup> and occurring “freakishly.”<sup>13</sup>

<sup>7</sup> 1 WLR 1241

<sup>8</sup> *Supra* Note 5

<sup>9</sup> 1978 SLT 159

<sup>10</sup> Cheng- Han Tan, *Jiangyu Wang and Christian Hofmann, Piercing the Corporate Veil: Historical, Theoretical and Comparative Perspectives*, 16 BERKELEY BUS. L.J. 140 (2019).

<sup>11</sup> *Berkey v. Third Ave. Ry.*, 244 N.Y. 84, 155 N.E. 58 (1926)

<sup>12</sup> Jonathan M. Landers, *A Unified Approach to Parent, Subsidiary & Affiliate Questions in Bankruptcy*, 42 U. CHI. L. REV. 589, 620 (1975).

<sup>13</sup> Frank H. Easterbrook & Daniel R. Fischel, *Limited Liability & the Corporation*, 52 U. CH. L. REV. 89, 89 (1985).



This criticism to a large extent, alike Cardozo's comment, is more concerned about the form and language of these decisions rather than the results.<sup>14</sup> A common refrain in the literature is an attack on the use of conclusory terms, such as "alter ego" and "instrumentality"<sup>15</sup> that provide no insight into the nature of the factors considered.<sup>16</sup> Commentators allege that similar factual circumstances have been observed in cases, some provided with relief and others denied,<sup>17</sup> "in an unpatterned mingling of relevant with neutral facts that has stymied constructive analysis"<sup>18</sup> The law is presented as "offering completely antithetical doctrines"<sup>19</sup> which courts can choose to apply or neglect, according to whatever outcomes are intended.

However, despite the critical reviews, many legal scholars believe that though the language used is confusing and dubious, courts are still doing the right thing. An early scholar in this area, Elvin Latty, observed that, "in spite of conflicting and misleading dicta the judicial hunch usually carries through to a correct decision." According to Adolf Berle, "[t]he various reasons, fictions, arguments and important considerations are many, diverse, and frequently inconsistent;

but the scheme of these various exceptions is none the less consistent and logical enough."<sup>20</sup> Also, recent scholars have agreed to these observations, and have claimed that the current legal system is insufficient to deal with the concerns of corporate groups<sup>21</sup> or tort victims.<sup>22</sup>

However, attempts have been made by legal scholars to more accurately understand the logic and legal principles applied in these cases of corporate veil lifting, and to understand the meaning of the unclear and dubious language used by the courts in such decisions, leading to introductions of several checklists and theories that should lead to different outcomes. For instance, suggestions have been made to deal with contract and tort cases differently, or corporations having individuals as shareholders be treated differently and more liberally as compared to corporations having other corporations as shareholders.<sup>23</sup>

The principle of separate corporate personality however also ensures the shareholder's claim to certain benefits which if this boundary or veil between the corporation and its shareholders is ignored, would not be available. For instance,

<sup>14</sup> Robert B. Thompson, *Piercing the Corporate Veil: An Empirical Study*, 76 Cornell L. Rev. 1036 (1991)

<sup>15</sup> Robert W. Hamilton, *The Corporate Entity*, 49 TEX. L. REV. 979, 979 (1971); see Elvin R. Latty, *The Corporate Entity as a Solvent of Legal Problems*, 34 MICH. L. REV. 597, 621-30 (1936); Note, *Judicial Supervision of the One-Man Corporation*, 45 HARV. L. REV. 1084, 1089 (1932).

<sup>16</sup> *Supra* Note 14

<sup>17</sup> David C. Cummings, *Disregarding the Corporate Entity: Contract Claims*, 28 OHIO ST. L.J. 441, 450 (1967)

<sup>18</sup> John F. Dobbyn, *A Practical Approach to Consistency in Veil-Piercing Cases*, 19 U. KAN. L. REV. 185, 188 (1971).

<sup>19</sup> E.R. Latty, *A Conceptualistic Tangle and The One-Or-Two-Man Corporation*, 34 N.C.L. REV. 471, 472 (1956).

<sup>20</sup> Adolf A. Berle, *The Theory of Enterprise Entity*, 47 COLUM. L. REV. 343, 345 (1947).

<sup>21</sup> Phillip I. Blumberg, *The Corporate Entity in an Era of Multinational Corporations*, 15 DEL.J. CORP. L. 283, 328 (1990)

<sup>22</sup> Arden Doss, Jr., *Should Shareholders Be Personally Liable for the Torts of Their Corporations?* 76 YALE L.J. 1190 (1967)

<sup>23</sup> *Supra* Note 14



shareholder-employees of a company might not receive social security and unemployment allowances if the corporate veil is lifted.

Initially this principle of lifting the corporate veil was to be applied to closed corporations and family held companies.<sup>24</sup> However overtime this has come to include large transnational corporations and public companies. Courts often exercise restraint and caution when it comes to lifting the corporate veil and often there are very restrictive guidelines set in place to do so. These guidelines have evolved through a series of judgements, which do not allow the court often to pierce the veil without any concrete legal justification to do so.

In India lifting the corporate veil is very rare circumstance, despite multiple cases where the plaintiffs (in civil suits) and the prosecution (in criminal cases) have demanded that the “veil” be pierced.

Though the Indian principle of lifting the corporate veil is drawn in parallel to that of the English overtime the Indian judiciary has itself come up with its own distinctive principles with regards to lifting the veil. This principle has often resulted in companies indulging in unlawful activities and often being only punished with a fine and nothing more, in a way it can be said that the management of companies are often immune to prosecution. This has resulted in courts coming up with various theories and principles to prevent management from using the veil as a shield to cover up criminal activities in the name of business.

One conclusion that can be drawn is that the veil though is used to protect innocent shareholders from the liabilities of the company, however it is actively used by the management to shield themselves from the said liability.

In the end it can be said the veil is a necessary evil. Necessary because it protects innocent shareholders from liabilities of the company, but evil for the fact it shields those responsible from the same liability. Because after all even Salomon escaped his obligations from his creditors.

#### Statistics United States of America

United States of America stands as the only country with some empirical data available about corporate veil lifting. As per the research conducted by Thompson involving the decisions in 1,583 cases prior to 1985 with regard to veil piercing, it was shown the veil was pierced in an estimate of 40% of the reported cases.<sup>25</sup> Most of these involved contract claims (779) and tort claims were observed in around 226 cases. Contract cases saw more piercing (42%) than tort claims (31%).<sup>26</sup> This observation which indicated that piercing was less frequent in tort cases went against the claims of commentators who stated that a tort claim makes for a much stronger case of veil piercing since the opportunity to bargain for the lack of liability was not provided to the plaintiff. Later, when Prof. Thompson updated his study to include cases prior to 1996, the results were more or less the same as the previous study.

<sup>24</sup> David H. Barber, *Piercing the Corporate Veil*, 17 Willamette L. Rev. 371, 404 (1981)

<sup>25</sup> Karen Vandekerckhove, *Piercing the Corporate Veil*, (2007).

<sup>26</sup> R.B. Thompson, *'Piercing the veil within corporate groups: corporate shareholders as mere investors'*, (1999) 13 Conn. J. Int'l L., 379 et seq.



Therefore, as established by the above-mentioned practices and empirical data, courts often end up in a conflicting position when the question of corporate veil arises. There is not much clarity on the issue, and this paper, with the help of referring to a number of cases, attempts to bring more clarity on the conflicting situation. Once the conflict is well established through through research and analysis, the paper will also propose certain solutions to corporate veil piercing issues.

### ISSUE 1

Courts in particular have taken in varying stance with regards to lifting the corporate veil in India. Judiciary especially has played a very important role in the development of corporate laws in India, especially given the fact that Indian Legislation in particular haven't been able to catch up to the pace of development in India. Though in 2013 the government of Indian passed the new companies act 2013 and in 2016 the insolvency and bankruptcy code were introduced, the role of judiciary is still pivotal in corporate jurisprudence in India, especially since the power to lift the corporate veil is vested in courts.

Courts adopt a very cautious approach when it comes to lifting the veil and indicting members of the company, for courts to pierce through the veil, it must feel it's absolutely necessary to pierce the veil and identify the company with its members.

Courts often exercise discretion with respect to lifting the corporate veil, though statutorily it is provided for the veil to be pierced in certain cases such as fraud, it is the duty of

the court to look into matter and then judge as to whether it is necessary to pierce it.

In *Tata engineering Locomotive Co vs state of Bihar*<sup>27</sup> the supreme court held that "the matter largely in discretion of the courts and will depend upon the underlying social, economic and moral factors as they operate in and through the corporation".

Of course, in cases where the court feels the actions of the companies are opposed to public and moral policies such as improper conduct or committing fraud, the court shall take due cognizance and hold the members and the company jointly liable. Based on past judicial decisions courts have come up with the following under the corporate veil may be lifted.

**Determination of Character:** In certain cases, especially during times of war, a company's character can be put under the purview to see whether it is the enemy. For Instance, an Indian company having business in Pakistan, during war may be deemed as an enemy company.

Similar was the case in *Daimler Co vs Continental tire and rubber co ltd*<sup>28</sup> A company was incorporated in England for the purpose of selling tires manufactured in Germany by a German Company. The holders of the shares and the directors of the company were all German and were residents of Germany. During the first world war when England was at war with Germany, the company was assessed as to determine where exactly its loyalties lie. The house of Lords laid down that, though a company is an artificial person and cannot possess a mind or conscious of its own, but it may assume an enemy character if the persons in De facto control of the company were residents of an

<sup>27</sup> 1965 AIR 40, 1964 SCR (6) 885

<sup>28</sup> [1916] 2 AC 30: [1916-1917] All ER rep 191



enemy country, and the possibility of it raising revenue and giving the said revenue to the enemy is a monstrous aspect.

**For the Benefit of Revenue:** Corporations often use shell corporations, for the purpose of Tax evasion, a common practice throughout the corporate world. Courts will disregard the supposed “corporate entity” if it feels its purpose is to evade taxes. In *Dins haw Maneckjee Pettit Re*<sup>29</sup> the assessee was a businessman who formed four companies. His agreement was that he would hold part of the share of the company as an agent and the profits earned by the company would transfer to him on the pretext of a loan. The court in this case held that the Intention of forming the company was to avoid paying tax and hence the company was no more than the assessee himself and his intention to create the company was to defraud the tax authorities. Similar charge was levied against Vodafone India, when the Income tax department charged Vodafone, tax dues to a tune of 12000 crore rupees, the supreme court in this case however refused to pierce the corporate veil as tax authorities had failed to prove that there was any fraudulent intent to defraud the authorities.<sup>30</sup>

**Fraud or Improper Conduct:** In the Daimler case, as the house of lords laid down that a corporate cannot have a mind of its own. A similar view has been adopted with regards to a company formed for the purpose of committing an illegal activity. This view was taken in the of *Case Gilford Motor Co vs Horne*<sup>31</sup> The defendant in this case was appointed as the managing director of a company under the agreement that he would

in no way entice or solicit the customers of this company during the period he is holding office, the defendant however opened his own company and started soliciting customers of the plaintiff company. It was held in this case that; the very purpose of this company was a sham and the real motive all along had been to contravene the defendant’s agreement with the plaintiff company and the defendant intended to use his office in the plaintiff company for the “benefit” of his own company. The defendant was held liable in this case.

**Government Companies:** State corporations or government companies are usually opened by governments in order to further the state’s economic interest, this done as to give these companies some form of autonomy which a government department or corporation may not be entitled. These companies though are incorporated as private companies however their shares are held by the office of the president or the government. If we were to scrutinize constitutional law, under article 12 these companies should come under the definition of state, since they are owned by the government and serve the purpose of the government. The supreme court of India has however clarified in *State trading corporation vs CTO*<sup>32</sup> that these companies are not an extension of the arm of the state, furthermore the supreme court in the case *Praga tools corporation vs Immanuel*<sup>33</sup> stated the employees of such companies are not civil servants or government employees. The supreme court clearly drew the line between a government company and a statutory company, where the court held that “*since there is no statutory*

<sup>29</sup> AIR 1927 BOM 371

<sup>30</sup> *Vodafone International Holding ltd vs Union of India*, SCC SLP 733 (2012)

<sup>31</sup> [1933] CH 935

<sup>32</sup> AIR 1963 SC 1811

<sup>33</sup> (1965) SCC 585



*duty imposed upon such companies, hence such companies cannot consider part of the state”*<sup>34</sup>

Though these principles lay down the circumstances under which the court can lift the corporate veil, however the onus determining whether the said case falls under the any of these categories is upon the court. Just as the Vodafone case, where the Income tax department claimed there was an intent to commit tax fraud, the supreme however did not support that view. This cautious judicial approach to lift the corporate veil has been observed in other jurisdictions as well. In the UK even though such guidelines and principles exist, the courts powers to use them are severely restrained. The court of appeals, UK clarified in *Adam vs Cape Industries*<sup>35</sup> that the veil may only be lifted, if the company is established for fraudulent purpose or if the company is formed for avoiding an existing obligation. However, as John P Lowry wrote in lifting the corporate veil, that “*adherence to the Salmon principle will not be doggedly followed where this would cause an unjust result*”<sup>36</sup>

#### **Statutory Provisions with Regards to Lifting the Corporate Veil.**

Numerous legislations have been introduced in India, enabling the veil to be discarded in case of violations. These provisions are not merely limited to the Indian Companies act 2013, but also in other legislations such as the Indian penal code, 1860, where under section 4 of the code, a company falls under the definition of a person. Even in the water act of 1974, under section 47 where one of the

offences listed in Chapter VII of that act are committed by a company, then “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, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly”<sup>37</sup>

Environmental laws in particular play a significant role in holding the<sup>38</sup> company and its management liable for offenses. Provisions are also made under the Income tax act of 1961, under section 178 (with regards to companies under liquidation) and similar rules also existed under FERA 1973 (now FEMA).

Under the Indian companies act 2013, corporate veil may be discarded under sections 34, 35, 39 and 339.

Under sections 34 and 35 it is a punishable offence if the prospectus issued by the company is false or misleading, in these situations the promoters and the directors of the company can be held liable for such false and misleading information.

Under section 39 if the minimum subscription money is not received in such cases the onus of returning the application money to the applicants falls onto the directors and the promoters of the company. Under section 339 if during the winding up of the company fraudulent intent is discovered, then those who knowingly engaged such fraudulent conduct of business shall be held liable.

<sup>34</sup> *Ram Singh vs Fertilizer corporation of India*, (1980) 50 Comp Cas 553

<sup>35</sup> [1990] Ch 433

<sup>36</sup> 1993 JBL 41

<sup>37</sup> Section 47, Water Act, 1974

<sup>38</sup> Criminal Appeal No 206 of 2008 (Supreme Court of India).

**ISSUE 2**

Certain notable scholars and researchers have come up with suggestive solutions to veil piercing issues, depending upon the category/size of the company or the nature or offense committed, whether tortuous or contractual. Some of these are stated as follows:

**Abolition or Limitation of Limited Liability in Certain Cases****1. Wholly owned subsidiaries**

According to some scholars, a parent company should not be held liable for an offense committed by the subsidiary company unless it can be well established that the particular “wrong” or “immoral” transaction, which went against the interests of the investors, was not authorized by the parent company expressly or impliedly.<sup>39</sup>

**2. Closely Held Corporations**

Scholars have been of the view that personal responsibility and limited liability must be viewed as an extension of agency principles in closely held business where there is no separation of ownership and management. “Vicarious owner liability should, in this view, be several rather than joint and several and should be tied to the owner’s power to participate in control.<sup>40</sup> In this respect, there could be a rebuttable presumption that control is proportional to ownership. In addition, some activities should be deemed to have waived limited liability, such as fraud, transfers of assets in exchange for property contributed or services rendered by the owner for less than reasonably equivalent value, or distributions of entity property to an owner that renders the entity insolvent.”<sup>41</sup>

<sup>39</sup> C.M. Schmitthoff, *Above* (JBL 1 978), 226.

<sup>40</sup> *Supra Note 25*

<sup>41</sup> J.W. Callison, *above* (2003) *Bus. Lawyer*, 1 069 et seq.

**Tort Cases**

As per what has been proposed by Professor Hansmann and Kraakman, shareholders that have been benefitted from torts committed by the corporation (For e.g. Intentional dumping of hazardous waste, marketing of dangerous products without sufficient warnings) should not be allowed to take the defence of limited liability, provided that the shareholders were made known about such wrongful acts of the organisation.<sup>42</sup>

**ISSUE 3****Public Interest/Policy as a ground for lifting the corporate veil**

The court may pierce the corporate veil in interest of public benefit and protection, and to ensure that no act of the company goes against public policy. There are no specific grounds for piercing the veil as far as this approach is concerned and the court can lift the veil whenever it seems the most “just” option, in the spirit of justice, equity and good conscience. Thus, substance is ignored and the form is rather concerned in cases relating to what’s in favour of public policy, and to uphold public interest in the best possible way.

In 2013, the Supreme Court of the United Kingdom delivered a landmark judgement in *Prest v. Petrodel*.<sup>43</sup> Lord Sumption engaged in a comprehensive analysis of past cases wherein the doctrine was applied. He observed that the judges had applied this doctrine for the wrong reasons often, and that the corporate veil should only be lifted when there is explicit “evasion” and not mere concealment.

<sup>42</sup> H. Hansmann and R. Kraakman, *above* ( ( 1 991) *Yale L.J.* ), 1 879 et seq.

<sup>43</sup> UKSC 34, 4 All ER 673



The opinion of Lord Munby in *Ben Hashem v. Ali Shayif*<sup>44</sup> that the corporate veil need not be lifted unless it's absolutely necessary to do so, because there are no public policy imperatives underlying the course, was affirmed.<sup>45</sup> It was also held that the courts should avoid lifting the corporate veil even when there is evasion observed, as long as other alternative remedies exist. Ultimately, Lord Sumption came to the conclusion that lifting of the corporate veil should be confined to situations where “a person is under an existing legal obligation or liability or subject to an existing legal restriction which he deliberately evades or whose enforcement he deliberately frustrates by interposing a company under his control.” Henceforth, public interest is not considered as a separate ground for corporate veil lifting in England. Courts haven't adopted a wide approach and have restricted the application of this doctrine to selected grounds only. The philosophical underpinning of this judicial stance is the sacrosance of the independent corporate personality and the treatment of incorporation as a business facilitating activity in England.<sup>46</sup>

The Indian position differs from the English position to a good extent in this case since the English position is more interested in balancing the interests of all the stakeholders including third parties which would be

affected if the corporate veil is lifted to reveal the actual controllers of the company. Therefore, Indian courts have been more inclined towards lifting the corporate veil and have established extensive grounds such as public interest. Each case has evoked different grounds which would suit the peculiar facts which are at issue and cited English authorities without application of mind in order to buttress their findings.<sup>47,48</sup> Public interest as a ground has been used in a casual manner by Indian courts to lift the corporate veil without any specificities involved in the pronouncements. In many cases, the ground has been employed to lift the corporate veil despite the test for establishing a façade or a sham not being satisfied.

However, the results of an empirical study, based on surveyed opinions shows varying opinions among people about the same issue. The results can be demonstrated as under.

<sup>44</sup> [2008] EWHC 2380 (Fam)

<sup>45</sup> Shivang Agarwal, *The Vague Concept of Public Interest as a Ground for Lifting the Corporate Veil*, CBCL Blog by NLIU Bhopal, ( April 2, 2018) available at <https://cbcl.nliu.ac.in/company-law/the-vague-concept-of-public-interest-as-a-ground-for-lifting-the-corporate-veil/>

<sup>46</sup> *Supra Note 45*

<sup>47</sup> Commissioner of Income Tax, Madras v. Sri Meenakshi Mills Ltd, AIR 1967 SC 819; Workmen Employed in Associated Rubber Industry, Bhavnagar

Ltd. v. Associate Rubber Industry, Bhavnagar Ltd., (1985) 4 SCC 114; Life Insurance Corporation v. Escorts Ltd., (1986) 1 SCC 264; New Horizons Ltd. V. Union of India, (1995) 1 SCC 478; BALCO Employees Union v. Union of India, AIR 2002 SC 350; Vodafone International Holdings B.V. v. Union of India, (2012) 6 SCC 613, Balwant Rai Saluja v. Air India, AIR 2015 SC 37; Walnut Packaging Pvt. Ltd. v. Sirpur Paper Mills Ltd., MANU/AP/0802/2008.

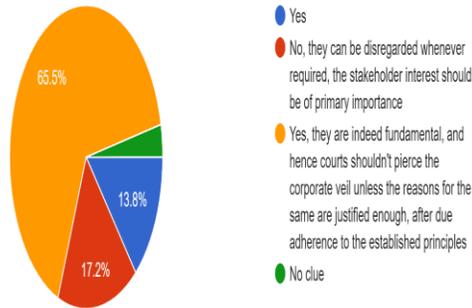
<sup>48</sup> *Supra Note 45*

<sup>49</sup> *Supra Note 45*



Do you believe that "separate personality" and "limited liability" are fundamental features of a company and that they should not be disregarded by courts?

29 responses

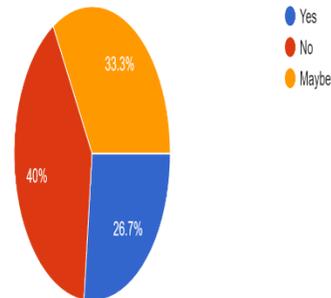


A high percentage of 65.5% people believed that separate personality and limited liability are fundamental features of a company and that they should not be disregarded by courts unless the reasons given for such corporate veil piercing are in consonance with the established judicial principles and concrete legislative carve-outs.

As regards to this question, mixed opinions were seen among people. Still, a majority of 50% people regarded the areas "public interest" and "public policy" as boundless and vague, as seen from a legal point of view. On the other hand, a sizeable amount of population, 33.3%, regarded public interest as having uttermost importance, even if it's boundless. It was interesting to observe how people having varying opinions as far as this question is concerned, making this a very debatable topic.

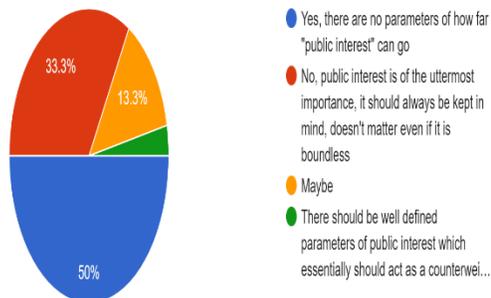
Do you believe that alike English Courts, Indian Courts should also abolish the practice of lifting the corporate veil on grounds of "public interest", considering it's limitations and dubious nature?

30 responses



Do you believe that the areas of "public interest" and "public policy" are limitless and vague when seen from a legal point of view?

30 responses

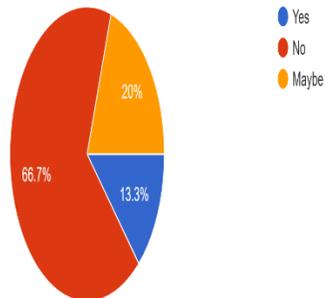


Here again, interesting opinions were observed. Though 40% people believed that Indian courts should not abolish the principle of veil lifting on grounds of public interest alike English courts, 26.7% had a completely opposite opinion. A sizeable population of 33.3% was unsure about the issue considering the boundless nature of public interest, but also the great importance it holds. This again, makes this issue sensitive, debatable and controversial.



Do you believe that the practice of corporate veil lifting is wrong all together, and that the separate identity of a corporation must be respected no matter what?

30 responses



courts must realise that limited liability is indeed a fundamental concept of company law and the basis upon which the identity of a corporation is established, and is incorporated. Hence even in the presence of definitive grounds, corporate veil should only be lifted when there is express evasion observed. Vague and unestablished grounds to lift the corporate veil must never be out to practice by the courts.

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This was a straightforward question which aimed to justify the correctness of the principle of corporate veil lifting all together. A good majority of 66.7% believed that the principle was correct and well justified.

### **Conclusions and Suggestions**

The ambiguity and uncertainty of public interest in the Indian juridical context makes it a ground which is only floating in the air rather than being anchored by a definitive set of factors that determine the same.<sup>50</sup> Henceforth, its application would be threatening to the principle of limited liability which allows citizens to conduct their small business operations without being hesitant due to the risk of unlimited liability. This would hamper investment and lead to entrepreneurs hesitant to commence with their ventures as the ground of public interest is so broad, with its application so wide that the judicial outcomes will never be foreseeable.

Thus, courts should only rely on public interest only when the chances of a fraud being committed are prima facie evident. The

<sup>50</sup> *Supra Note 45*