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# **PIERCING THE CORPORATE VEIL OF FOREIGN ENTITIES**

*Author –*

**Sofiya Mhaisale**

Student

Symbiosis Law School

## **ABSTRACT**

The paper is based on the principle of Lifting of Corporate Veil, and has been written to draw a comparative analysis between the laws of the US and UK regarding piercing the veil of a foreign parent company. Over the years, we have seen various instances of how the directors, employees, managers, etc. of companies have erred in various ways, which have forced the court to lift the veil of incorporation to find the person responsible for a particular act of a company.

But in the same situation, is it possible for the courts in one country to pierce the corporate veil of a company in another country? Do the courts of a particular country have the power or the authority to hold the directors, employees, etc. of a foreign entity beyond its territorial jurisdiction responsible for their acts affecting the prior country?

The writer has chosen this topic to briefly throw light on the principle of Lifting of Corporate Veil, and to focus on the extraterritorial jurisdiction of this aspect, as to whether the courts of one country can pierce the corporate veil of a company in some other country. The paper has been written to draw a comparative analysis between the laws of the US and the UK regarding piercing the veil of a foreign parent company.

The paper deals with the tests and doctrines that the US and UK have developed over time for determining as to whether the veil of incorporation of a foreign entity can be lifted or not, and the extent of liability of the foreign company for the acts of its subsidiaries.

## **INTRODUCTION**

Let's assume there is a class full of students, and there are many such classes. Each class has a teacher responsible for the acts of the class. Whenever the principal of the college is around, the classes are expected to maintain pin-drop silence. But when there is a class which is making a lot of noise, it's the class teacher who is held responsible, even if it was the work of a few students. This teacher in some way represents a company.

Now let's take another example. When the principal is around, she hears a window of a class break, because a child threw a stone at it. In this case, the teacher would not be held responsible,

rather there would be an inspection as to who committed the act, and for what reason and that individual child would be held responsible.

In the above example, the teacher represents the company, the children represent the employees, directors, managers, etc, and the Principal represents the court.

The hypothesis of Corporate is the essential guideline on which the law of incorporation is based. In *Salomon v A Salomon & Co Ltd*.<sup>1</sup> in 1897, a great development took place, where it was established that the Company, being a legal person has a corporate personality which is distinct from its members, known as the veil of incorporation. This veil of incorporation limits the personal liability of the corporate officers, employees and directors for actions taken in the course of business. This concept also tends to protect the shareholders of the company from being personally liable for the company's wrong and its obligations. Therefore, a corporation is seen as a separate entity, which has an independent corporate existence<sup>2</sup> and is a distinct legal persona. It has its own separate property<sup>3</sup>, it can sue and be sued<sup>4</sup>, it can transfer shares according to its will,<sup>5</sup> and has various other rights. The courts have laid down, that there exists a veil between the company, as an artificial person, and its employees, directors, managers, etc. This veil separating both of the above is of fundamental importance for upholding the principle of Limited Liability.

The business of a company is often carried on for the benefit of some individuals, and they are the real beneficiaries of Corporate advantages.<sup>6</sup> It needs to be realized at some point, that after all a company is an artificial person, and the acts of the company are the acts of the “controlling minds behind it”. Therefore, on some occasions, the court may lift this veil, and see the actual person responsible for the wrong done by the Company and expose its true character.

The business of a company is carried on by Individuals, and on some occasions. The doctrine of Lifting of Corporate Veil can be applied by the court and is entitled to lift the mask of the corporate veil when it is used for perpetrating fraud or evasion of tax.<sup>7</sup> Corporate veil can also

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<sup>1</sup> *Salomon v A Salomon & Co Ltd* [1896] UKHL 1

<sup>2</sup> *Tata Engineering Locomotive Co. Ltd. v. State of Bihar and others*

<sup>3</sup> *Bacha F Guzdar v. CIT*, AIR 1955 SC 74

<sup>4</sup> *Union Bank of India v. Khaders International Construction Ltd*, 1993 (2) Comp. LJ 89 (ker)

<sup>5</sup> Section 44, Companies Act, 2013

<sup>6</sup> Avtar Singh, *Company Law*, 16<sup>th</sup> Ed. Pg. 13

<sup>7</sup> *Juggilal Kamlatpat v. CIT*, AIR 1969 SC 932.

be lifted when promoters act in furtherance of their dishonest and fraudulent design,<sup>8</sup> and has been held to be permissible in various cases.<sup>9</sup>

The courts around the world may lift veil of the corporate for various reasons, some of the most often ones being during the occurrence of fraud with the company's funds and piercing the veil could point to one or a few individuals. The court may also pierce the veil to determine to the character of the Company, as to whether it is "enemy", or to verify whether a company has been formed for tax evasion purpose or to determine whether the company is governmental, or to identify the individuals behind the tort committed by the company.

### **RESEARCH QUESTION**

As we have seen, for the above reasons, a court can easily pierce the corporate veil to determine the particular issue at hand. However, what if an Indian company like Reliance has various branches and subsidiaries throughout the world, and one of these subsidiaries commits fraud in a country like the UK. Do the courts of the UK have the jurisdiction to pierce the veil of an Indian Company.

Therefore, the question the writer would like to frame is **"Whether the courts of a particular country can lift the corporate veil of a company in another country"**

The following question can be further broken down into 2 issues: Whether a person sues a foreign company, will the courts lift the veil of its subsidiary, or of the parent company and How the relationship between the foreign company and the subsidiary can a company be determined.

### **ANALYSIS**

#### **INTRODUCTION OF LIFTING THE VEIL OF FOREIGN COMPANIES:**

Big multinationals all over the world establish their corporate structures in different countries, depending on various reasons, varying from cheap labour availability to larger capital markets.

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<sup>8</sup> Jai Narain Parasrampur v. Pushpa Devi Saraf,

<sup>9</sup> LIC v. Escorts Ltd. 1986 (1) SCC 262.

All these corporate structures in other countries can be defined as subsidiary companies, and the original parent company often gains by expanding trade this way. However, these Multinationals still limit their economic risk by establishing these entities which function independently in some countries, while remaining a part of an integral conglomerate group.<sup>10</sup> However, due to an increase in the Multinationals across the world, there is a need for establishing the responsibility and authority for the actions of multinationals that require lifting the veil.

An issue also arises as to whether this Multinational commits an act in a nation which requires piercing the veil, can the parent of this Multinational be subject to the jurisdiction of the nation where this act was committed.

The prevalent cross border litigation in various countries and the adoption of various laws of extraterritorial jurisdiction had raised an important question as to whether an alien corporate affiliate of a nation can be subject to the jurisdiction. There are often suits filed against the actions of foreign multinationals and the alien parent organization having the subsidiary in a particular nation.<sup>11</sup>

### **SITUATION IN INDIA**

India like all other countries in the world, and abides by the maxim, “*par in parem non habet imperium*” which translates to, “one sovereign state is not subject to the jurisdiction of another state”. However, an exception has been made out under the Indian Constitution under section 86, where any person may sue the foreign state after obtaining the consent of the central government.

The landmark judgment<sup>12</sup> where the question of piercing the veil arose in the Bhopal Gas Tragedy in India. After the leak of the hazardous gas Methyl Isocyanate, which polluted the soil, drinking water, and was dangerous to even inhale. Thousands of people died due to the incident, and many were critically injured. The industry that leaked was owned by Union Carbide in the US. However, the court dismissed to pierce the veil of the foreign company in this case, and Justice Keenan held, “There is no need to pierce the corporate veil to prevent

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<sup>10</sup> William A. Voxman, Comment, Jurisdiction Over a Parent Corporation in its Subsidiary's State of Incorporation, 141 U. PA. L. REV. 327, 368 (1992)

<sup>11</sup> John D. Gleissner, David C. Veeneman, & S. Rodgers Wheaton, Obtaining Personal Jurisdiction Over Alien Corporations-A Survey of U.S. Practice, 9 VAND. J. TRANSNAT'L L. 345, 346-47 (1976)

<sup>12</sup> *Union Carbide Corporation v. Union Of India*, 1990 AIR 273

fraud or injustice because, even if there were evidence that UCC dominated UCIL, there is no allegation or evidence that UCC did so to commit a fraud or wrong that harmed the plaintiffs.”<sup>13</sup> The judgment was highly criticized later, for its insensitivity and lack of correctness.

The paper henceforth analyses the piercing of veils of corporates by other nations.

## 1. **UNITED KINGDOM:**

### **Present Situation:**

On June 13, 2013, the Court in the UK held that under exceptional circumstances, the veil of incorporation of a foreign company having a subsidiary in the UK can be pierced. The UK courts distinguish between judicial and legal piercing of the corporate veil.<sup>14</sup> Legal piercing is statutory in nature and can be applied only as a basis to the statutory exception to limited liability. However, the grounds for judicial piercing is found by precedents, where the judges have certain discretion to decide a matter. Therefore, the courts have often adopted a laissez-faire method before piercing the veil.

Therefore, the circumstances and conditions under which the courts may pierce the veil have not been expressly laid down, hence being unclear and uncertain to a large extent. The court has however laid down in *Adams v Cape Industries*<sup>15</sup> that the veil of incorporation of a foreign subsidiary may be pierced for fraud, agency doctrine, and single economic unit doctrine, and the parent company may be held liable.

### **Doctrines of Lifting the Veil**

The fraud doctrine<sup>16</sup>, determined by the “façade test”, sees whether the company has been incorporated for a fraudulent purpose.

According to the Agency doctrine,<sup>17</sup> The parent has a dominant influence over the policy of the subsidiary. This doctrine is helpful in piercing the veil of foreign corporations since if it is proved that the Parent body had control over the subsidiary, it can be held liable for the acts of the subsidiary. The single economic unit doctrine was developed in *DHN Food Distribution v Tower Hamlets London Borough*

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<sup>13</sup> States, O. (2018). *Union Carbide, Anderson cleared of liability for Bhopal tragedy*. [online] The Hindu. Available at: <https://www.thehindu.com/news/national/other-states/union-carbide-anderson-cleared-of-liability-for-bhopal-tragedy/article3581313.ece> [Accessed 23 Jul. 2018].

<sup>14</sup> K. Vandekerckhove, 'Piercing the Corporate Veil', (2007) Kluwer Law International, European Company Law Series, Vol. 2., p. 6

<sup>15</sup> *Adams v Cape Industries plc* [1990].

<sup>16</sup> Established under *Gilford Motor Company Ltd. v. Horne*, [1933] Ch 935

<sup>17</sup> *Smith, Stone, & Knight v Birmingham*

*Council* [1976] 1 WLR 852<sup>18</sup>, and it stipulates two criteria which need to be fulfilled in order to treat the parent company and subsidiary as a single economic unit for the purpose of piercing the veil. These criteria are:

- (1) the parent holds the majority of all of the shares of the subsidiary company
- (2) has a decisive influence in the business operations of the subsidiary.

### **Recent Developments:**

However, in *Antonio Gramsci Shipping Corp v Stepanovs*<sup>19</sup>, the above theories were challenged as to the piercing the veil of a subsidiary. A more prominent development was when the very doctrine of lifting the corporate veil was challenged in *Prest v Petrodel Resources Ltd*<sup>20</sup>. However, the court in the above cases upheld the doctrine of piercing the veil but limited it to only the above mentioned three doctrines.

To conclude, it can be held that the UK courts have given the nation the power to pierce the veil of a foreign nation's company, as long as the subsidiary in the UK and the parent company in the other nation bear a direct relationship in the form of an Agency. The Insolvency Act of the UK also provides for piercing the corporate veil now. There has however been inconsistency in the precedents of the UK, leading to ambiguity in the intention of the court.<sup>21</sup>

## **2. THE UNITED STATES:**

### **Present Situation and Due Process Doctrine**

The principle of Limited Liability was established in the US very late, probably in the Mid 19<sup>th</sup> Century.<sup>22</sup> However, due to a number of state jurisdictions prevalent in the US, it leads to various conflicting decisions and therefore lacks clarity as to a fixed principle for determining the grounds for piercing the veil.<sup>23</sup>

In the US, the presence of the due process clause constrains the courts from exercising jurisdiction over foreign subjects and prevents the person from being subjected to the

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<sup>18</sup> DHN Food Distribution v Tower Hamlets London Borough Council [1976] 1 WLR 852

<sup>19</sup> Antonio Gramsci Shipping Corp v Stepanovs, [2011] EWHC 333 (Comm)

<sup>20</sup> Prest v Petrodel Resources Ltd, [2013] UKSC 34, at para 27.

<sup>21</sup> F.A. Gevurtz, Corporation Law, (St Paul, MN, West Group, 2000) 70.

<sup>22</sup> Philip I. Blumberg, Limited Liability and Corporate Groups, 11 J. Corp. L. 573, 587=91 91986

<sup>23</sup> K. Vandekerckhove, 'Piercing the Corporate Veil', (2007) Kluwer Law International, European Company Law Series, Vol. 2. p. 78

binding decision of the court who has no contact or ties with it. However, over the years, the courts have made development and have established that the structure of the relationship between the parent company and the subsidiary will be determined in order to establish liability. Ascertaining jurisdiction over foreign subjects requires an examination of two basic instincts. First being that the foreign defendant has a fair warning that it may be subject to a suit in any particular forum.<sup>24</sup> Second, jurisdiction over foreign subjects should be reasonable, and should not interfere with fair trial and justice.<sup>25</sup>

The general jurisdiction over the defendant extends when the defendant has been engaging in systematic and continuous conduct in the forum state. Specific jurisdiction however relates to the defendant's specific contacts with the state which in turn gives rise to a lawsuit. Through various recurring cases, an informal pattern can be laid down in deciding which whether there are grounds for piercing the corporate veil. Two of the most important grounds are that the Parent exercises sufficient control over the subsidiary, and not piercing the veil could lead to injustice to the Appellant. -

### **Doctrine of Close Relationship and Alter Ego**

US courts use judicial piercing of the corporate veil to assert personal jurisdiction over the parent situated in the other nation, which operates the subsidiary. However, this doctrine is applicable only when the personal jurisdiction over a subsidiary has been established and the parent and subsidiary bear a close relation. This process may also have a broad implication on the foreign affairs and trade of a company.<sup>26</sup>

Under the doctrine of Alter Ego, the presumption that a subsidiary and its parent are separate entities can be overcome by establishing that the Parent controls the actions of the subsidiary, namely by providing funds to it, owning its stocks, owns the property of the subsidiary, pays salary to the employees of the subsidiary, etc.

A court may exercise only specific jurisdiction authorized by the Federal State and limited by due process.<sup>27</sup> The court established the minimum contacts doctrine in the case of *International Shoe Co. v. Washington*, and it was ruled that personal jurisdiction over any foreign defendant when certain minimum contacts with the forum exist. The

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<sup>24</sup> *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475-76 (1985).

<sup>25</sup> *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

<sup>26</sup> Austen L. Parrish, *Sovereignty, Not Due Process: Personal Jurisdiction Over Nonresident Alien Defendants*, 41 WAKE FOREST L. REV. 1, 5 (2006).

<sup>27</sup> *Wells Fargo & Co.*, 556 F.2d at 414

parent company voluntarily avails itself of the privilege of conducting activities in a nation, and therefore, accepts the benefits, as well as protection from the laws.<sup>28</sup>

Reasonableness considerations carry weight when courts have to consider whether to exercise personal jurisdiction over foreign defendants. The Courts have invoked the principles of fairness, judicial administration and international comity before exercising jurisdiction over any object.

A Plaintiff may sue both the parent corporation as well as its subsidiary. In this case, the court examines the working relationship between the parent and the subsidiary, and If this relationship is sufficient, the court can assert personal jurisdiction directly over the parent without using the Minimum Contact doctrine. However, the general norm is that when a US subsidiary carries out a business in a forum, the parent is shielded from personal jurisdiction of the above kind, to attract economic investment in the country.<sup>29</sup> Therefore, the proposed jurisdictional veil-piercing test gives wide-ranging flexibility and discretion to the court to determine it on a case to case basis.

## **CONCLUSION**

The principle of a corporate legal entity has been clearly established and laid down in various countries now. Every nation has developed its law for protecting and piercing the veil of the company. As seen through the above approach, it can be realized that the UK courts have established a rather conservative approach compared to the US courts, because they are inclined more to respecting the Salomen's principle.

After world war II, the use of the doctrine over alien parents has considerably reduced, owing to various conventions, treaties, clauses that protect the parent nation and maintenance of International Comity between nations. Companies have often held that piercing the veil is rare, unprincipled and arbitrary in nature. Due to the inconsistency between the court's opinions in various countries, it is difficult to identify a strict doctrine that should be followed to pierce the veil. Every country has been establishing its own set of guidelines and laws for piercing the veil, and this raises further issues as to whether the parent nation having no such law should be made subject to the laws of the forum nation.

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<sup>28</sup> Hanson v. Denckla, 357 U.S. 235, 253 (1958).

<sup>29</sup> Escude Cruz v. Ortho Pharm. Corp., 619 F.2d 902 (1st Cir. 1980)

A solution to the above problem would be the creation of universal guidelines all over the world by the International Court of Justice. When there is an issue which requires piercing of the corporate veil, it is the ICJ which should be given jurisdiction, since it would be a fair and neutral body. Fairness is hard to expect when the court of a particular country defines as to whether the veil of the foreign company should be pierced. Also, the presence of a neutral body would give the foreign parent some security as to the purpose of justice being served right.

It was also seen that the countries are developing their individual tests and expecting foreign parent companies to abide by these tests. This creates a lot of ambiguity, since in countries like the UK there is no written statutory principle in this regard, making it very ambiguous and tedious for the companies to recognize the actual laws and abide by them.

In conclusion, the writer would put forward that the presence of extraterritorial jurisdiction in the countries conflicts with the idea of involving a body like the International Court of Justice for defining justice. Also, it would be very tough to bind the countries to the decision of an independent body, since there is no check to see the abidance to the principles. Therefore, the current scenario is the best that can be made out of the circumstances, but acceptance of the principles of parent-subsidiary nations needs to be brought about.

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