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Jurisperitus: The Law Journal *is a non-annual journal incepted with an aim to provide a platform to the masses of our country and re-iterate the importance and multi-disciplinary approach of law.*

This journal is an initiative by Legal Education and Awareness Foundation, a registered Non-Governmental Organization, which aims at providing legal education and awareness to all parts of the country beyond any social and economic barriers.

We, at Jurisperitus believe in the principles of justice, morality and equity for all.

We hope to re-ignite those smoldering embers of passion that lie buried inside us, waiting for that elusive spark.

With this thought, we hereby present to you

Jurisperitus: The Law Journal.

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AN ANALYTICAL STUDY OF ABUSIVE MARRIAGES IN INDIA AND UNDERSTANDING STAY/LEAVE DECISIONS

- DR. SANSKRITI SRIVASTAVA

In India women do not come out and tell if they are living in an abusive marriage. They tolerate every sort of emotional abuse just because our so-called Dharma says that one should not leave their partner howsoever bad, they are. Sometimes this constant tolerance converts into mental health issues like depression, hallucinations etc.

But our society, even law does not support a person if he or she wants to come out of an abusive relationship specially in the case of Marriage.

From decades women have been tolerating violence, disrespectful behaviour, cruelty, force even some men face it but they do not talk about it. Emotional abuse is the most tragic kind of abuse as wounds are not visible but they do exist.

Cheating is also a form of abuse as it hurts the partner internally, make them question their competence and capability. Abuse might include following:

- Aggressive looks, holding the other person so tight that they feel restrained.
- They say that they will kill themselves if you leave them.
- Forcing you into any sexual behavior that you don't approve of.
- They don't trust you, keep asking questions, track your phone or follow you.
- Annoy or insult you in front of your friends.

One must talk to their parents, best friends, Therapist. Someone must know what you are going through. If you are afraid of moving out in Covid times, go for online or telephonic counselling.

In our country, more than 30% of women tolerate domestic ferocity at some point of time in their lives, according to the National Family Health Survey (NFHS) data.

Hitherto, closely 75% of those who stated being exposed to domestic ferocity did not seek assistance from anybody. For those persons who do, they confide in close friends, family members etc.

And that crime often gets cleaned off as a secluded or domestic matter and no complaint is filed against the wrongdoers.

This retort tricks women in abusive circumstances. Various studies have emphasized the effects of being in an abusive relationship, females who live with close partners who commit violence against them are not only 10% to 25% are not monetarily autonomous, but she suffers huge depression from domestic ferocity for a long time, and those bad painful memories create permanent barriers to forming new relationships, as she is afraid if she forms a new connection same thing will happen again and again.

So, let's look into the laws and rights of victims of domestic violence:

Law is a game of words, firstly let's understand What is domestic violence?

Any act is domestic violence when it troubles or imperils the well-being, care, lifetime, limb, or comfort (mental or physical) of the target, or tends to do so, and comprises producing-physical abuse, sexual abuse, verbal abuse, emotional abuse, and economic abuse.

domestic violence can be committed by any individual who is or was in a domestic connection with the target; it is a domestic relationship when two persons who living, or have at any point of time lived, together in a shared household, or when they are related by blood or through a relationship in the nature of marriage or adoption.

Is domestic violence an offense only when a woman is actually injured?

The law says that Only a woman who is/was in a internal association with the attacker can take action under the Protection of Women from Domestic Violence Act, 2005.

Though the act exactly defines the attacker as "any adult male person," many Supreme Court rulings have detained that even a lady can be an attacker in contradiction of another woman for obligating and/or helping and assisting acts of domestic ferocity.

We must and we can help someone in need:

A lady who has not been injured can act on behalf of her minor offspring, if the family is being ill-treated.

Affirmatively all of us can help a victim of domestic abuse it is our duty our right.

As the natural guardian and legal guardian of the children or the children under her care, she can and she must take action, even if the intention is not to leave but at least enough fear must be created.

A first, lawful phase or the right method is to call police or go to the police for assistance or to pursue the help of a Defence Officer, selected by the administration to support sufferers of domestic violence. A complaint can also be filed before the Magistrate's Court, a Family Court or the District Court within the authority of whom the of domestic violence was done or where victim resides. In winning any of these ladders, there will be a requirement that you tell everything to police clearly all the facts, tell all the incidents of domestic violence committed against anyone in order to seek corrective act from these establishments.

The right Method:

In order to pursue help from the society or expert that is most easily accessible or nearby available must be contacted. It may be valuable to refer a attorney and/or have the help from an NGO or a lady's rights group in such matters.

There can be a scenario if the police fail to file an FIR, saying that the case doesn't fall under their authority? The police are constrained to list an F.I.R. even if it is not covered within their regional authority. After recording an F.I.R., the police establishments may handover it to the police station who has the proper authority.

Though, if they be unsuccessful in doing so, the court having authority over the specific police station where the F.I.R. has been recorded can be reached directly.

The Typical process followed after filing legal complaint:

Once a grievance is wedged, notices are delivered to the assailants and after they presented by their lawyers needed orders and instructions will be passed by the Court of law.

In cases of dangerous earnestness and forthcoming danger to the victim, special orders may be passed by the court at the first hearing itself.

The authority and the court will take steps to stop any further acts of domestic violence and to ensure the security and happiness of the prey concerned.

The victim need not move out of the house and, in fact, can even get a protection order from the court barring the aggressor from throwing her out of his home. In some cases, the court of law has even directed the attacker to move out of the family regardless of who owns it.

The attacker can be fixed to reimburse for medicinal expenses. if the offender and their family deny charges completely, Acts of domestic violence are seldom committed in public view or in broad daylight. Though, if a victim's evidence and the evidence before the authorities pass

the test of cross-examination, it is preferably adequate proof of an act of domestic violence. This is, of course, a particular typical sort of method and may differ from case to case.

This is different in every case of abuse and varies from matter to matter. Children suffer the most in such cases they are scared for life. Sometimes they try to commit suicide because of witnessing such scenarios. As far as possible, children should not be kept in such a home. They can stay with their grandparents for some time. Presence of mother is necessary though as the nourishment children need comes from mother.

The court of law can eliminate the attacker from a residence or location so that he can no longer commit acts of domestic viciousness against the survivor. The attacker may also be given a prison term in accordance with the law, or the court of law may pledge an offence of contempt of court for defying its commands.

Many theories have been advanced to explain the various issues persuading victims' choices to continue in or dispensation of an offensive connection. Thus far, however, these concepts have failed to sufficiently capture the difficulty of break/dispense decision-making and have had limited scientific and investigative usefulness. The resolve of the present study is to provide a behaviourally based approach to understanding stay/leave decisions by expanding on Myers' (1995) behavioural conceptualization of spouse ferocity.

Notwithstanding the fact that so many victims return to their partners and continue to be physically assaulted, because of their financial conditions.

Some women are unaware of their potential for complaining against the insulting relationship because of the unawareness of rights.

Many studies suggests that after a certain time women leave an abusive relationship within two to three years after the initiation of violence in the theory suggested by Gortner, Berns, Jacobson, & Gottman, 1997.

Some of the studies suggest that the wife or women may frequently leave and return to the violent partners before finally finishing off the relationship with them, as per the theory suggested by Schutte, Malouff, & Doyle, 1988.

Investigators have recognized a variety of aspects manipulating a prey's choice to remain in an offensive relationship. Amongst the many issues recognized, promise to the relationship seems to be crucial for predicting a victim's choice to stay in the association.

Results from preceding educationists indicate that victims who have been in insulting relations for lengthier periods are more likely to stay in those relationships for a longer time.

Some women want to save the relationship at any cost or acknowledge having sensitive attachment to the partner may be more likely to endure even violent relationships, as according to the theory suggested by Pfouts, 1978, Strube & Barbour, 1983.

Other issues that may upsurge the hazard that a prey will stay in the relationship include:

lack of monetary resources, their own house, in India a house either belongs to a father or a husband. Sometimes the problem is lack of child maintenance, few association substitutes, lack of service or teaching, partner's promises to change and their consistent failure to do so, fear of revenge, and social pressure which is huge in our country, From a house maid to entire colony and all the relatives will be concerned if a women leaves a bad marriage and goes on to stay with her parents.

In some researches it is found out that there are some common reasons because of which women will leave an abusive relation eventually:

1. When incidence and the harshness of the exploitation surges.

In one study, level of ferocity was the utmost interpreter of parting and separation.

Fascinatingly, upsurge in expressive misuse seems to influence a victim's choice to leave more so than an upsurge in corporeal misuse.

Victims are also likely to pursue assistance or finish an offensive connection when their kid is in danger for becoming expressively or bodily harmed by the domestic ferocity upsurges.

Augmented admission to numerous incomes (e.g. monetary, instructive, work-related) and extra social care seem to further upsurge the probability that a victim will leave a fierce relation1.

Hypothetical conceptualizations

Founded on the issues labelled overhead, numerous philosophies have been obtainable to recapitulate these answers and clarify the procedures fundamental victims' stay/ending the relation decisions.

There are some theories discussed here based on degree of experimental support as well as their popularity among domestic violence researchers and practitioners. Altogether three of these representations are based on the supposition that the choice to leave an offensive association.

However, many academicians have found approximately equal rates of spouse ferocity commission and persecution among males and females[1]2.

Some studies have revealed that females are more likely than men to grieve wounds as a result of close partner violence3[2].

Also, most present hypothetical replicas of close partner ferocity and stay/leave choices focus mainly on the association between lady victims and male culprits.

Researcher in this paper, has deliberated on heterosexual relationships only involving female victims and male perpetrators.

Although other systems of close companion ferocity occur, which may include man victims, female culprits, shared ferocity, and same-sex companion ferocity, and researcher hopes that a behavioural analysis of these relations may be useful likewise for the upcoming studies.

Learned Helplessness Model

Originally industrialized by Seligman to describe clinical depression, this philosophy of educated powerlessness proposes that recurrent performances of conditional provocations lastly produce the effect that consequences do not depend on the behaviour of an individual.

In the case of close partner viciousness, Walker gave the theory that exploited females often trust that they are helpless to break the pattern of violence and, thus, often finish making any efforts to approve or modify the rude circumstances.

Walker was also of the opinion that society's old-style gender roles may more add to a victim's confidence that she cannot come out of an abusive relationship.

[1] (Arias & Johnson, 1989; Gortner, Berns, Jacobson, & Gottman, 1997; Harned, 2001),

[2] (Cascardi & Vivian, 1995; Sorenson, Upchurch, & Shen, 1996)

For example, Walker proposes that in the United States of America, females are made to believe that a flawless marital relation is possible if they put enough amount of effort to make the marital relation fruitful. But in reality, this duty is on both men and women to be honest, truthful towards each other.

Researcher is of the opinion that exploited women who hold these beliefs may continue to remain in an abusive relationship despite the fact that attempts to change their relationships have remained futile time and again. The author notes that maltreated females may even start to trust that they are accountable for the exploitation and tolerate the abuse without raising their voice.

This state of mind of the person who has gone through a lot is unimaginable and self-blame promotes to the growth of miserable symptoms leading to depression in the longer run, which may additionally aggravate the preys' emotional state of powerlessness. The women who suffered the loss, must be told, trained and counselled that their transformation is possible, be it their personal affairs or professional. If this philosophy is valid, then it may help explain why it takes women to think a lot even before leaving an abusive relationship. Researcher while examining the beliefs of the learned helplessness model have found uncertain results for the philosophy. It is deep-rooted in the society's mind set specifically in Indian society that women should be in a relationship howsoever bad, brutal, unfaithful the marriage is.[3]

Since most of the women are not financially independent so because of greater dependency on the family they never even think about leaving the person. Further research concludes that a woman feels compelled and suffocated in such marriages but does not dare to speak about it. Such prolong tolerance results in depression and a number of mental as well as physical health issues. Like memory issues, stress, anxiety, stress eating etc.

The Rigid Mind-Set

Another approach is the more one invests in a relationship becomes better and stronger. The more one invests more is returned to them. For instance, a married lady spends a lot of effort to make her marriage flourish, bloom and grow.

[3] (Campbell, Sullivan, & Davidson, 1995; Cascardi & O'Leary, 1992; Stein & Kennedy, 2001; Watson et al., 1997).

As she gives more and more into the relation and the same is not reciprocated, she ends up feeling worthless and her confidence in herself and the relation slowly declines.

While she consistently feels annoyed and disrespected, she still continues to be in that relationship. The dissatisfaction sometimes converts into depression.

Basically, women feel after investing so mush in relationship, the shared house, or any other obligations, she must continue in the same marriage or relationship[4].

The Time invested and spent together becomes the biggest constrain here. Though probably impossible, she keeps on hoping her entire life that one day he will change[5].

There are many factors responsible for procuring such mind set in women[6]. First, individuals must perform various purposeful, goal-directed behaviours that are expected to be rewarded eventually. For example, a person may remain in an abusive relationship and frequently comply with her partner's requests in the hopes that those behaviours will eventually change.

She keeps thinking that what can be done to reduce violence and improve relationship satisfaction. In our society this mind set is very common that men will do certain things women will do certain things and the role of women is to serve men.

She makes a lot of attempts to make him happy, she feels obliged to keep him happy. Hence she invests more in the relationship. Though the individual's submission may be unsuccessful in stopping upcoming fierce affairs, in most of the cases women starts believing that it is her fault that husband is abusive, or that she is doing something wrong.

2 out of 10 women says that they have faced domestic abuse at home.

As a consequence, she stays in a marriage even if its abusive or bad for her mental or physical health. It is not just the women's duty to nurture the relation like obedience with spouse's unreasonable requests, like unnatural sexual behaviour without her consent or against her will. This describes why maltreated women make numerous efforts before leaving an abusive relationship before ending the relationship finally. A maltreated lady may distinguish that her efforts at refining the connection are failed, but she is unable to leave her home because of lack of resources maybe she is dependent on the abuser himself.

[4] (Teger, 1980).
[5] (Rubin, Brockner, Small-Weil, & Nathanson, 1980)
[6] Brockner & Rubin, 1985; Strube 1988

Emotional attachment is also one of the top most reason why she does not leave him.

In the case of sexual ferocity, women are hesitant to even go and talk about it.

Communal prestige- society treats women really bad, who leave their husband and live at their parents home[7].

Sometimes the abuse is financial relationship sometimes even emotional.

Women who are not getting enough care from her partner, they think that she would be unable to find another suitable partner for herself.

Women blame themselves for not being enough which is a baseless idea, as a cheater cheats anyway. Because of his weaknesses not because she is not good enough.

Hence, individuals who are concerned about how leaving the relationship would be viewed by others and those who blame themselves for the violence may be more prone to psychological entrapment. Furthermore, entrapment is more likely to continue when the individual only has to make a passive decision to commit, but must make an active decision to quit (Rubin et al., 1980). For example, a person must take specific actions to end a marriage (e.g. filing divorce paperwork, moving out of the home). However, a person's decision to continue to stay committed to the marriage simply requires the person to remain in the marriage. Finally, the less a person is aware of risks associated

Stay/leave decisions

with continued commitment, the more likely that person will become entrapped (Rubin et al., 1980). Thus, a person who is less aware of the dangers involved in remaining in abusive relationship will be more likely to become psychologically entrapped.

Investment Model

The investment model, based on exchange theory (Thibaut & Kelley, 1959), describes a cost/benefit analysis in making commitment decisions. These commitment decisions are based on comparing rewards and costs for the current relationship against the estimated benefits and costs for alternative relationships including being single.

Pfouts in his study in the year 1978 described a two-stage process that occurs in violent families, which determines how victims will respond to these abusive relationships. During the first stage, a victim estimates her current level of relationship satisfaction by figuring out the

[7] Brockner, Rubin, & Lang, 1981; Staw, 1976

current number of rewards within the relationship for example security, housing, finance etc and weighing it against the total number of costs associated with the relationship for example frequency/severity of abuse, instability, effects on children. Using this same cost/benefit approach, an estimate of satisfaction for alternative relationships is determined and compared with the satisfaction level for the current relationship.

Pfouts (1978) proposed four basic coping strategies that may result from this cost/benefit analysis. The first of these coping responses, known as the self-punishing response, occurs when there are low payoffs in the marriage, but even lower payoffs for alternative relationships. As a result, the victim may believe that she is responsible for being trapped in the current relationship and not having any additional relationship options. For instance, a person in an aggression against her partner and children. The third response is referred to as the early disengagement response and describes cases in which payoffs for the current marriage are low, but the alternative relationship payoffs are high. Thus, victims in this category may be less tolerant of abuse and may leave the abusive relationships sooner. The final response is labelled as the mid-life crisis.

The question is who decides whether to stay in an abusive relationship or marriage? It should be the call of the person suffering the pain of cheating or violence in whatever form.

In these cases, victims may gradually move towards ending their current relationships as they become more certain that the risks involved in staying are too high. Although only indirectly tested, this model may aid in targeting specific entries for intervention that will assist victims in ending abusive relationships. In addition, the model may be useful in explaining cases where victims leave the abusive relationships despite high investments[8].

Expanding on this model, Rusbult and Martz (1995) have argued that both satisfaction levels and commitment levels are essential to understanding stay/leave decisions. Satisfaction continues to be defined as an estimate of the pay-offs for the current relationship minus the estimated payoffs for alternative relationships. Commitment is then determined by a comprehensive assessment of relationship satisfaction, degree of investments, and quality/availability of alternatives (Rusbult & Martz, 1995). It is level of commitment that essentially determines whether an individual will leave a relationship. Based on this theory of

[8] (Strube, 1988).

commitment, a victim of intimate partner violence would be most likely to leave the relationship when there was low relationship satisfaction, little investment into the relationship, and numerous, rewarding alternatives available. Preliminary studies examining this model have found substantial evidence supporting this theory[9] In one study, Rusbult and Martz (1995) found that the investment model accounted for approximately 21 – 33% of the total variance associated with stay/leave decisions.

The question is why a victim would remain in an abusive relationship even when other person is not that much involved or abusive.

The first reason behind staying in such a bad relationship is the notion of unconditional love, according to this co called unconditional love, a person stays in an unhealthy relationship on the ground of unconditional love.

One example is staying with an alcoholic or drug addict for years just because you love them. Or they are really loving towards you because, may be you are providing them with enough money to fulfil their needs or indirectly supporting their addiction.

Another reason is Family, in India sometimes family puts a lot of pressure to stay even in a bad marriage involving physical, sexual, mental abuse, financial abuse.

Third yet most important reason is children, if there are children involved then the parties feel obliged to stay within the boundaries of marriage.

In recent years, greater attention has been given in the literature towards understanding factors that potentially influence a victim's decision to permanently leave an abusive relationship.

Numerous studies indicate that victims who contact the police during a domestic dispute or briefly leave an abusive relationship are often at high risk for eventually returning to that relationship and experiencing continued abuse.[10]

[9] (Bui, Peplau, & Hill, 1996; Davis & Strube, 1993).

[10] *(Strube, 1988).*

THREE STRIKES LAW

- JITIN

History

Three strikes law was enacted to control the increase in crimes across the country. the law was passed in California in 1994. The state got a very assertive response when they held a proposal vote. In three strikes law, if a person has two previous convictions, which fall within the extent of serious crimes, he will face imprisonment for life on his third serious or violent crime.

In United States of America, three strikes law were first brought up on 7th march 1994 and it became a part of us justice department and anti- violence strategy. Some forms of three strikes law have been implemented by 28 countries.

CASE LAWS --

1. Michael Elton Johnson was one of the first people sentenced under three strikes. Strike one was a 1976 second-degree rape in Montana, in which Johnson dragged a 14-year-old girl into the woods and raped her. Within a few weeks of his release in 1980, Johnson committed strike two for an attempted second-degree rape of a 15-year-old girl in the Wenatchee area during a burglary. His strike three for second-degree assault was perpetrated just a month after his release from prison in 1991. During this attack, Johnson cut his wife's face and neck, rammed a 9-inch-bladed knife into her mouth, pointed a pellet gun at her head and told her that he "would kill her anytime" he wished. At this time, three strikes was only a concept, so instead of receiving a life-without-parole sentence for the brutal assault, he received only a two-year sentence. Immediately after his release, Michael Johnson returned to preying on women and children. He was arrested for domestic violence and malicious mischief in Snohomish county for again beating his wife, who finally divorced him. Shortly after that, the department of corrections was informed that Johnson had been caught following a 17-year-old girl into a ferry-boat restroom in Snohomish county. Johnson subsequently moved to Oregon briefly, where he raped his own sister and threatened her life before moving back to eastern Washington. He was also charged with fourth-degree assault

for putting a woman in a headlock after going into a tavern with her. She escaped unharmed, but was terrified by the experience. Johnson then befriended a Springdale woman who lived with her 16-year-old daughter. On Christmas day, 1993, he committeed strike four by raping the daughter and kidnapping both her and her mother and taking them to a neighbouring county. The next day he raped the daughter again before releasing them both. He pleaded guilty to two counts of rape and one count of kidnapping. The other kidnapping charge, the rape of his sister, and the non-strike assaults were all dropped in exchange for his guilty plea. In 1994 Michael Elton Johnson was sentenced to life without parole under three strikes. Michael Johnson's last three rapes, two kidnappings and four other assaults would have been prevented if three strikes had been enacted just three years earlier.

2. Martin t. Shandel is actually a five-striker specializing in rape. Strike one was for sexually assaulting a 14-year-old girl in 1967. He was paroled in 1969.Shandel's strike two was for raping a 13-year-old girl who was walking home along a country road in 1971. He stopped his car, forced her into a wooded area and raped her. Just an hour before the attack, he had grabbed two younger girls and attempted, but failed, to force them into his car. His strike three was for second-degree assault with a knife. He forced a woman off the road, brandished a knife and broke out her car window. He then grabbed her arm but was scared off by a witness. His predatory behaviour would have been stopped at this point by three strikes, had it been in effect. It wasn't, and Shandel was paroled yet again just six years later. His strike four was for raping a 37-year-old woman whose home he was visiting in 1985. He attacked her after she asked him to leave. This last rape occurred just three months after his most recent release. This victim sued the Washington state department of corrections for failing to adequately supervise Shandel. She was awarded $204,000 by a king county superior court jury in 1992. The state appealed the decision and the state court of appeals overturned the award on a technicality. The state supreme court then reinstated the monetary award and the victim finally has received it. Martin Shandel was released yet again in 1994. Less than a year later, he committed strike five for the second-degree rape of his sister-in-law at the

Woodinville home he shared with his wife in 1995. His reign of terror ended when he was convicted under the new three strikes law and sentenced to life without parole.

Introduction

Three strikes law are referred to the strike out in a baseball game, wherein a batter against whom three strikes are recorded strikes out. Three strikes law came out from a slogan which was chanted loudly [three strikes and you are out]. Three strikes law was firstly implemented in state of Washington in 1993. Three strikes law campaign was launched by a father of 18 years old young women who was murdered by a man who had an extensive criminal record. This law came into force when a 12 years old girl was abducted and murdered. First stage of this law was passed in 1993 when it was approved by the voters of Washington and it became a law in 1994. After this a petition was signed by 800000 people to not only to deter offenders but to enforce a strict 25 year life sentence on those who were convicted more than once. This statute has faced many controversies and one of the controversy was that the third crime should not be a serious crime as it would include a 25 years sentence for a less serious offence. In 2012, the law was adjusted to declare third strike only if it was a very violent offence

The category of crimes referred as 'violent' includes murder, kidnapping, sexual abuse, aggravated robbery. The statute also mentions that felonies like unarmed robbery or arsons are not a threat to human life.

Three strikes law require both a felony and two other previous convictions to serve a compulsory life imprisonment and it limits the ability of these offenders to receive a punishment other than a life imprisonment.

Essential elements

Three strikes law has three of the essential elements, which are to be fulfilled for the application of the law in a particular case -

1. **It requires both and extreme furious felonies**
2. **To previous convictions to carry out**
3. **Compulsory life imprisonment in prison**

Criticisms faced by three strikes law

The third strike should not be a conviction for furious and serious crimes, any conviction involving even a non-violent act to be punished with 25 years of imprisonment.

It somehow obstructs the framework of the court and blocks the Defendants who must be detained. Being in prison for such a long duration would decrease the chances for the trial and that of a fair trial. It also opposed the faith in rehabilitation and it can be proved as these laws encouraged punishments in place of healing and striking down the law reunites them with their families and would increase the opportunities to change themselves.

Three strikes law in America

The three strikes legalisation is two-pronged in its application. A convict shall be imprisoned for life if he committed a serious crime and he has two previous convictions, where one qualifies as a serious felony and other one too is of substantial gravity such as a drug offence. Main purpose of such legalisation is to decrease the number of repeat offenders by discouraging them from committing any other violations. Previous convictions of an offender are made a factor to provide evidence to a present judgement. The three strikes law speaks only of serious crimes, however, because of its inconsistent drafting many times crimes which are not serious in nature are going to get a very low penalty. The real aim of three strikes law was to decrease the number of violent offences while making a judicial element which adequately punishes criminals for their anti-social or violent acts. Three strikes law helped many states in bringing down the number of serious or violent crimes but it also faced many controversies because of its inconsistency. In California, criminal records shows that many of the offenders have been found guilty under three strikes law for crimes or acts like steaking a sandwich or breaking into a soup kitchen. The data also show that most of the offenders are of African- American origin. The central government decided to review convictions of 4000 offenders who had been imprisoned under three strikes law, making basic provisions like parole breaks available to them. The government accepted that many offenders who have been founded guilty under three strikes law do not deserve such extreme sentences. It was the biggest penal experiment of its modern American history due to its differentiated provisions and most importantly the doubling of nominal sentences for many second-strike offenders.

Three strikes law in India

INDIA has seen an extreme rise in criminal activities ever since independence. The statistical changes in country's criminal records are published every year by the national crime bureau. Under crime over time, murder rate has increased by 7% as compared to 1953 scenario and kidnapping has increased by 47% and cognizable crimes have increased by 1.5% . Rape one of the most heinous crimes, is amongst India's highest recorded criminal acts, outnumbering countless felonies. The case of Nirbhaya shook the countries to its roots and which still questions that guarantees freedom to safety to its citizens, irrespective of their gender, but fail miserably in implementation. These issues are recognised in Indian jurisprudence and many legislative reforms have been under taken to facilitate the judicial and enforcement precepts. Three strikes law in Indian states of affairs can bring about revolutionary changes. Indian judiciary is practicing 'enhanced sentencing'. a rule which takes offenders criminal history in account can drastically restrict repeat Crimes and discourage the offender who committed the crime for the first time from committing any illicit acts. The existing laws in India are not identical are somewhat believed sue generics to the three strikes law in cases of sexual offences and another abhorrent and loathsome crimes on paper. The government of India has realized the need for the hour and has taken some steps but as clearly seen they are not enough. In a country where the crimes are increasing at this rate, the need to implement the 'Three Strikes Law' is at the peak as it could be the hope for the country . According to the surveys, most of the time the criminal is known for the victim and also has a list of crimes committed before. By passing this law, they will be forced to think 100 times before committing such act as after second-strike there will be knockout and no way out would be there after such sentence is declared.

A STUDY ON THE INEFFICACY OF INTERNAL COMPLAINT MECHANISMS IN RESOLVING SEXUAL HARASSMENT CLAIMS

- S. HASTHISHA DESIKAN

INTRODUCTION

In today's complex society, women with increased access to quality education and opportunity for employment are entering the labour market, redefining the conventional parameters of "division of labour" and allowing women to work in the same sectors as men. Women who are new to this setting encounter a variety of responses at the workplace, one being sexual harassment of women. Incidents of sexual misconduct are perceived as a danger to the idea of gender justice in a society where it is believed to be fundamental in its values and principles and has a legal expression in the form of various laws. As a result, various steps have been undertaken periodically at both the international and national levels to prevent and protect women from workplace harassment and to make sure that both men and women are treated equally. In India, the enactment of the Sexual Harassment of Women at Workplace (Prevention, Prohibition, and Redressal) Act, 2013 (POSH) is one such measure.

From a legal point of view, sexual harassment is a type of discriminatory practices that consists of two kinds of actions: quid pro quo harassment and hostile environment harassment. Sexual favours or bribes would be made a requirement of employment or adopted as the system based for hiring considerations is known as quid pro quo harassment. Sexual quips, remarks, and contact that hinder with a person's capacity to execute her or his task or establish a "threatening, hostile, or offensive working environment" fall under the category of hostile environment or harassment. Sexual harassment is often about making women know they aren't encouraged or welcome in particular workplaces and aren't recognized as part of the group. The notable 'Vishaka principles'[11] for the protection of women against sexual misconducts at work were established by the Supreme Court over two decades ago, and also the POSH Act has been in existence for a long time. However, the current scenario in India demonstrates that the legal

[11] Vishaka v. State of Rajasthan, (1997) 6 SCC 241.

systems in existence have failed to effectively address the problem of workplace sexual harassment. One of the major flaws in the inefficiency of the redressal system in place could be attributed to the Internal Complaints Committees (ICC) constituted under the POSH Act, the function of this committee is to investigating and assess the allegations of sexual harassment.

This paper will start off with analysing the current mechanism and the nature of function the ICC undertakes in the current legal system followed by highlighting the shortcomings and adverse effects of the shortcomings of the current regime. Finally, certain suggestions are made out to possibly improve upon the current system and develop a mechanism that is more efficient in redressing the matters before it.

WORKING OF THE ICC UNDER THE CURRENT REGIME

The ICC is established under Chapter II, Section 4 of the POSH Act. Section 4(1) mandates that each and every employer in a workplace establish an internal complaints body by written order. The ICC shall be formed at all administrative units or office spaces and if the workplace's offices or administrative units are situated in multiple locations then at all the divisional or sub-divisional level. The ICC will be composed of the following individuals, who will be appointed by the employer:

- A presiding officer who must be a woman working at a senior position in the workplace, If a high level female employee is not present, the Presiding Officer will be chosen from the other workplaces or administrative units within the organisation referred to in sub-section (1). The Presiding Officer can be appointed from any of the other workplaces of the same employer or other department or organisation if the other offices or administrative units of the workplace do not have a senior level women employee.[12]
- Two members among the workforce who are ideally devoted towards the cause of welfare of women and have some involvement in social work, or have legal knowledge.

[12] Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013, §4(2), No. 14, Acts of Parliament, 2013.

- One person from a non-governmental organisation or a group dedicated to the welfare of women, or someone competent about issues of sexual harassment and women should account for at least half of the total number of Members appointed.

The Presiding Officer and each member of the ICC must serve for a term of not more than three years from their appointment, as specified by the employer. The member nominated from among the non-governmental organisations or group are obligated to be reimbursed by the employer fees or allowances as may be stipulated for convening the sessions of the ICC. When the Presiding Officer or any person of the ICC shall be liable to be removed from the Committee, and the member shall be replaced by fresh appointment in accordance with the requirements of Section 4(1) and so shall any casual vacancies be filled. The grounds or removal are as follows:

- Violates Section 16 of the Act,
- Has already been found to be guilty in any improper conduct or disciplinary proceedings, has a disciplinary action open against him,
- Has indeed misused his position as to render his continuation in office adverse to the interest of the public.[13]

According to Section 9(1) of the Act, the aggrieved women must file a written complaint with the ICC or the local committee within three months of the purported act, and if the complaint cannot be filed in writing, the Presiding Officer or any person of the ICC must offer all necessary support to the woman in filing the complaint in written form.[14]

There are various stages involved in addressing a complaint when received by the ICC and it starts off with an aggrieved woman presenting a written complaint before the ICC. However, before any inquiry under Section 11 is carried, the ICC can may, at the behest of the aggrieved woman, take necessary steps to settle the matter and reach a conciliatory agreement between the parties, provided that any settlement will not be monetary in nature.[15] If no such action is pursued, the inquiry is launched starting off with collection of relevant documents. Any official documentation or record connected to the aggrieved woman might be summoned by the

[13] *Id,* §4(5).
[14] *Id,* §9(1).

[15] *Id,* §10.

ICC. In the event that the alleged offender fails to attend the proceedings before the ICC for any reason, the ICC has the authority to render a judgement ex parte. The committee members' judgement determines whether a rationale is valid. The assumption here is that the responder will not appear in front of the committee and will have nothing to say in his defence. Once the proceedings are initiated all the actions and documents presented are recorded by the ICC and are made available to the parties.[16] All witnesses are subject to cross examination by the aggrieved woman and the alleged offender. Cross examination will take the manner of written questions and replies overseen by the committee. The alleged offender has cannot cross-examine the woman who has lodged the complaint or the witnesses.

Based on the evidence and the account of the witnesses the ICC prepares a report narrating the chronological sequence of events and the evidences presented before it. The most crucial part of the report is the recommendations it provides to the employers. If the committee determines that the charges against the respondent are true, it will make a recommendation about the organisation's course of action which has to be necessarily complied with by the organisation. The employer must provide a compliance report in under 30 days of receiving the committee's recommendation, which ranges from demanding a written apology from the offender to terminating his employment. If the employer does not comply, he or she might face a penalty of up to fifty thousand rupees.[17] The victim of sexual harassment at workplace is also entitled to receive compensation for the mental and physical trauma she had to undergo in addition to any career opportunity she lost on account of the harassment.[18]

The function, as laid down by the POSH Act, of the ICC is to provide a mechanism for women at a workplace to report any sexual misconduct they have been subjected to and it is essential that their complaints are addressed in a swift and decisive fashion by the ICC so as to prevent further such actions from the offender towards the woman. The ICC is also responsible for creating a safe and conducive environment for women at workplace by sensitising the employees through various seminars and workshops.[19]

[16] Reshma MG v. All India Radio, File No.: CIC/AIRCL/A/2017/101742/SD.
[17] *Supra* note 2, §26.
[18] *Supra* note 2, §15
[19] Anju Thomas, *Incidents of Sexual Harassment at Educational Institutions in India: Preventive Measures and Grievance Handling*, 2 INTERNATIONAL JOURNAL OF RECENT ADVANCES IN MULTIDISCIPLINARY RESEARCH, 317, 321 (2015).

CRITICISMS OF THE CURRENT REGIME

Just before the enactment of the POSH Act, the Supreme Court had pronounced in one of the cases on account of the fact that so many States and Union Territories still had not begun to take any action to enforce the Vishaka guidelines in state agencies and government bodies, and that no appropriate system in place to resolve sexual harassment cases in private entities.[20] Also, in a report by the Human Rights Watch in 2020 highlights the plight of the women workers in India. Although women in India have been gradually coming out against the sexual harassment in the workplace, in part a consequence of the worldwide #MeToo movement, taboo, fear of retaliation, and structural impediments to justice continue to limit many, notably in the informal sector, according to the survey.[21] With the rising number of incidences and the lack of initiative shown by the governments shows that not much improvement has happened in the years since the Vishaka guidelines were set out. This issue ought not to be viewed as arising solely as a result of inconsistencies in the application of the provisions. Rather, the legislation is intrinsically inadequate to satisfy the demands of women who have been harassed by men.

The failure of the law to recognise the systemic roots of sexual harassment does have the following effects: first, it creates a complaint mechanism made up of people who were part of the same environment that made possible the misbehaviour, which itself is doubtful to be completely unbiased or reflective of any and all best interest. Second, by transferring role for establishing internal complaint processes to employers, the legislation gives employers the ability to develop protocols that are tailored to their needs. Furthermore, there are possible procedural hurdles for women in taking the matters further in case of unsatisfactory dealing of the complaint presented by them. Also, employer accountability for facilitating effective conduct and completion of the investigation and execution of any ICC measures is inadequate.

Issues with Constitution of ICCs

Section 4 of POSH grants the employer sole authority to form the ICC, allowing for the biased selection of personnel from the existing candidates. Considering that sexual harassment is

[20] Medha Kotwala Lele v. Union of India, (2013) 1 SCC 297.
[21] Jayshree Bajoria, "No #MeToo for Women Like Us": Poor Enforcement of India's Sexual Harassment Law, HUMAN RIGHTS WATCH, 37-38, 2020.

more likely to take place in male-dominated workplaces in the absence of effective harassment measures, those entities may be hesitant to take the process of forming a fair and unbiased ICC sincerely.[22] This will be exacerbated if the organisation wishes to prevent the adverse reputation that a guilty decision would bring.

In addition, the introduction of POSH has resulted in the election system being replaced by the Act's nomination-based mechanism, raising issues that these changes are likely to worsen current hierarchies of power and enable organizations to repress accusations against individuals in higher positions of authority.[23] The POSH Act also aims to address power disparities by enabling the Presiding Officer of the ICC to be a leading female staff, as well as the other individuals must be committed to the welfare of women. Furthermore, as previously stated, half of the committee members must be made up of women. However, in a workplace whose senior management members are largely male and hence in a capacity to strike against women ICC members, this will be of little help.[24] Furthermore, simply requiring women's involvement in the ICC overlooks the influence of social stratifications like caste and religions in sexual harassment accusations, as well as the ensuing prejudices.

Procedural Issues in the Working of ICCs

The fact that ICCs are made up of managerial staff has a detrimental impact as to whether the ICC really be impartial in its investigation, especially in organisations that do not regard sexual harassment to be a serious problem. Except for the need that an investigation be undertaken "in accordance with the service rules applicable to the respondent,[25]" POSH provides no direction as to how an investigation must be performed. As a result, the employer has a lot of leeway in choosing a process that best suits their needs.

[22] James E. Gruber, The Impact of Male Work Environments and Organizational Policies on Women's Experiences of Sexual Harassment, 12 GENDER & SOCIETY, 301 (1998).
[23] Sarah Zia, Can Institutional Safeguards Prevent Campus Sexual Harassment?, LIVEMINT ,October 15, 2017, available at https://www.livemint.com/Education/ZkM6SeJwUa15oO8LBmwRWJ/Can-institutional-safeguards-prevent-campus-sexual-harassmen.html (Last visited on March 10, 2022).
[24] Paramita Chaudhuri, Sexual Harassment at the Workplace: Experiences with Complaints Committees, 43 EPW 101 (2008).
[25] *Supra* note 2, §11(1).

Prior to initiating an investigation, POSH Act does not precisely specify the level of training that ICC members must meet. Section 4 merely states that minimum two members must preferably have some legal knowledge. This is despite the fact that the ICC has powers similar to that of civil courts in terms of calling witnesses and mandating document discovery. Employers must provide "capacity building and skill building" programmes for ICC members according to the POSH Rules, however the definition of these phrases, as well as the regularity with which such training should be held, are not defined in the POSH Rules.[26] Due to a lack of clearly established procedural criteria, ICCs frequently rely on informal connections to understand the factual scenario in a case and are vulnerable to being inaccurate or may not represent the entirety of the matter.

A further substantial flaw with POSH is that it does seem to be founded on the presumption that the ICC would operate in a traditional government or private-sector organisation, despite the fact that ninety percent of Indian employees are engaged in the informal sector, where the ICC process does not extend to them.

The appeal procedure as envisaged under the POSH Act could be vexatious to an aggrieved woman. An aggrieved respondent has the option to challenge the decision of the ICC by appealing to a court or tribunal under POSH, also "in accordance with the terms of the service regulations" that apply to the organisation.[27] This is applicable regardless of the severity of the misconduct or the ICC punishment. Furthermore, many organisations include internal appeal systems that allow the employer to overturn or amend the ICC's decision. POSH does not impose any limitations on the purview of an appeal to challenge the decision of ICC, as is the case in other civil cases, such as limiting introduction of additional of evidence, and interfering with the ICC's decisions on the merits, and so on. As a result, if an influential respondent can eventually bring the complainant to court, the aim of establishing ICC as an alternative to judicial processes is defeated. Furthermore, the potential of the decision being reversed on appeal raises the ICC's emphasis on procedural rigour.

As a result of the emphasis on the ICC system as a mechanism of demonstrating the 'truth' of a complainant's allegation, employer responsibility under POSH has received less attention.

[26] Sexual Harassment of Women at the Workplace (Prevention, Prohibition and Redressal) Rules 2013, Rule 13(d).

[27] *Supra* note 2, §18.

Under POSH, an employer who neglects to form an ICC or violates the Act's terms is only subject to a criminal punishment of a fine of up to 50,000 rupees, which may be insignificant for companies which are worth millions. Furthermore, rendering non-compliance of POSH laws a criminal offence merely makes it a crime against the state. Although Sections 357 and 357A of the Criminal Procedure Code of 1973 provides the victim certain amount of compensation, the award is contingent on the criminal trial's outcome. Furthermore, the Court or the competent government authority has absolute discretion over the amount of compensation to be given. Except for in cases where the culprit is unidentifiable or no trial is held, the victim cannot file a suo motu plea for compensation on their own basis.[28] There is an absence of a statutory provision that allows a victim to file a civil or tortious claim against an employer for failing to comply with the provisions of POSH, requesting damages or any form of relief.

Additionally, there is no positive requirement for the employer to substantially incentivise ICC members for fulfilling their duties effectively. Only members of non-profit organisations are eligible for any kind of reimbursement under Section 4. Organisational staff, who must manage their usual job obligations with resolving complaints, receive no special remuneration for their efforts. As a result, even unbiased ICC members may be discouraged from devoting much time or effort to addressing complaints, particularly if the organisational culture favours the responders and is doubtful to compensate them for their efforts.

Although some of these flaws seem trivial in the overall compliance and procedural execution of the POSH Act, they, nonetheless, increase the difficulty for an aggrieved woman to obtain justice and makes the entire process seem like an ordeal, especially in light of the fact that she had to go through a sexual harassment, which on any level is bound to affect the mental health of a person.

SUGGESTION FOR IMPROVING THE REDRESSAL OF COMPLAINTS

Although eliminating instances of sexual harassment at workplace needs a social change in viewing gender discrimination and safety of women, certain legislative changes could help in

[28] Criminal Procedure Code 1973, §357A (4).

preventing as well as ensuring that such instances are addressed in a swift and just manner so as to render justice to the aggrieved individual.

Role of External Bodies Replacing ICCs

POSH establishes 'Local Committees' ('LC') in each urban ward and village to undertake investigations at workplaces with less than ten employees, or those that employ people in the unorganised sector, or in incidents where the respondent is the employer. The district official, who is a civil servant, will form the LC. From Section 7 of the POSH it becomes clear that the LC has a more impartial composition than that of ICC with at least one of the woman member belonging to SC/ST or OBC community.[29] A more sensitive committee is ensured by the presence of individuals who are not only women, but are also dedicated to the cause of women's issues and sexual harassment. Furthermore, the inclusion of a woman representation from the SC/ST minority community recognises the importance of taking diversity into account when deciding on sexual harassment accusations.

As a result, LCs could be thought of as a replacement to the present ICC system of an organisation. As an alternative for ICCs, the authority of LCs under POSH may also be broadened to all workplace environments in a specific local region. The LC might also be made more diverse by including representatives from the queer community, labour unions, domestic workers' groups, and other disadvantaged groups. The makeup of LCs could also be changed to reflect the prominence of a specific trade or industry in a given location. In circumstances in which the respondent is a prominent government official, or a high-ranking official from a business organisation, the PSC Report already has suggested that members from both the National and State Commissions for Women be included in LCs.

However, the formation and operation of LCs as under POSH has been inadequately implemented in the current situation. Only 29% of the 655 districts in India declared that they had formed LCs.[30] Only 16% of the districts that reported the formation of LCs have said they have a female Chairperson, and only 8% said they had an NGO representation. 97% of the districts with LCs failed to submit details on participation in the SC/ST/OBC/minority

[29] *Supra* note 2, §7.

[30] Martha Farrell Foundation, Who Safeguards a Woman's Right to a Safe Workplace?: A Study of Local Committees Across India Using RTI Data, October 2018, available at https://www.marthafarrellfoundation.org/uploads/pdf_files/1555302838_RTI%20Study%20PDF.pdf (Last visited on March 12, 2022).

communities. In addition, the bulk of the LCs had not had any sort of orientation training for its members. As a result, while LCs have the promise to be even more objective and sensitive bodies than ICCs in principle, governments have failed to capitalise on this opportunity. These issues must be solved if LCs are to be considered a viable replacement of ICCs.

There is indeed a need for an unbiased organisation that can recognise gender discrimination in the workplace and take appropriate action to address it. To avoid allegations being suppressed by ICCs, the Justice JS Verma Committee Report on legal reform against sexual assault advocated creating a separate Employment Tribunal to investigate incidents of sexual harassment. As a potential substitute both to ICCs and LCs, such a Tribunal could be established.[31]

Pursuing Restorative Mechanism for Redressal

Shifting from the existing punitive system to restorative justice might alleviate some of the procedural issues faced by complainants in sexual harassment cases. This is an approach that usually entails mediated meetings in which victims, offenders, and community members all engage with full educated assent. The meeting offers a space for the complainant to illustrate the effect of the action with the perpetrator and other members of the community. This also allows the offender to embrace some kind of minimal accountability, such as therapy and community work, among other things. The meeting or session could be led by trained facilitators. Such discussions can take place at any point, as a "warning" before a legal claim is filed, as an alternative to a formal investigation, or as a way for parties to reach an agreement after the inquiry is completed.[32]

One important distinction between restorative justice and the settlement mechanism is that the former is typically employed when the offender acknowledges to engaging in harmful behaviour and is willing to be accountable for it. This differs from mediation, in which a perpetrator may officially plead culpability to escape punishment but does not undertake any actual measures toward accountability or behavioural change. Restorative justice goes beyond traditional disciplinary/punitive methods of 'passive offender responsibility' in this regard as

[31] JUSTICE J.S. VERMA COMMITTEE, Report of the Committee on Amendments to Criminal Law, 130, 2013.
[32] Mary Koss & Mary Achilles, Restorative Justice Responses to Sexual Assault, NATIONAL ONLINE RESOURCE CENTER ON VIOLENCE AGAINST WOMEN 5-8, 2008, available at https://vawnet.org/sites/default/files/materials/files/2016-09/AR_RestorativeJustice.pdf (Last visited on June 13, 2022).

well. Instead, it promotes 'active' offender responsibility, in which the perpetrator is required to rectify the harm they have caused and to indicate some kind of change.[33]

CONCLUSION

This paper seeks to shed light on the issue of ICC established under Indian laws against sexual misconduct are contradictory in the sense that they include inquiry by a group of peers/supervisors regarding behaviour that may have already become accepted and reinforced at work. However, neither Vishaka guidelines nor the POSH establish appropriate measures to guarantee that an impartial inquiry is conducted by an ICC that is reflective of all workplace interests and groups. Internal complaint processes are more likely to be driven by an instinct to protect offending personnel and preserve the organization's reputation than by a willingness to give an appropriate remedy to the aggrieved woman.

The formation of external entities as a replacement for the fact-finding and adjudication responsibilities now performed by ICCs is also recommended in this paper. Such entities can take the shape of regional Employment Tribunals or strengthening of the LC bodies with local divisions that provide complainants a comprehensive variety of remedies, including counselling, traditional rights-based inquiries, and restorative justice meeting.

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LIFTING OF CORPORATE VEIL

- PRATIKA KANWAR CHOUHAN

ABSTRACT

The concept of lifting of corporate veil reveals the reality and the truth which is behind the scenes . The lifting of corporate veil was the concept introduced by the lawmaker so that the real culprit behind the acts done by the company or corporation should be punished. Since the company is an artificial person it need human force to work and also all the activities are performed by the humans in the name of the company . The law also given the company a special characteristic that is separate legal entity in which company has the separate identity it can sue , it can purchase assets and also other things . So some of the humans try to take advantage of this concept of separate legal identity and try to manipulate things in favour of them in the name of company and perform certain fraudulent activities . To make sure that the humans are not able to take the advantage the concept of piercing of veil was introduced.

INTRODUCTION

Incorporation of an organization by registration was presented in l844 and the precept of limited liability of an organization followed in l855. In this manner in l897 in Salomon v. Salomon and Company, the court influenced these establishments and solidified into English law the twin ideas of limited liability and corporate entity. This guideline is touch on to as the 'veil of incorporation'.

The main preferred view point of incorporation from which all others follow is the separate entity of the organization. As a general rule, be that as it may, the matter of the legal person is constantly carried on by, and for the edge of, a few people. In a definitive investigation, some individuals are the real receiver of the corporate preferences, "for while, by the fiction of law, an enterprise is an well defined distinct entity, yet in all actuality, it is a relationship of people who are in certainty the beneficial proprietors of all the corporate property.

ARTICLES

Article l

BY: S.Chaitanya Shashank

Basically, here the author wants to tell that the lifting of corporate veil is conceptual phenomena through which one can differ the company and its agents.

Since, the company need agents to operate and the company cannot itself do fraud or other irregularities, these can only done by the agents who are running the company. Since the company embraces the nature of separate legal entity and because of that the agents tries to do some fraud or irregularities in the name of the company .

So, that is why the concept of lifting of corporate veil was introduced sothat these types of fraud and irregularities can be taken care of.

Article 2

BY : Ashu Bala

In this author has explained the Indian scenarioand the consequences of the lifting of corporate veil. The doctrine of the lifting the corporate veil means ignoring the corporate nature of the individual incorporated as a company . A company is a juristic person but in reality it is a group of person whoare beneficial owners of the property of the corporate body. Being an artificial person, it cannot act own it's own, it can only act by natural persons. The doctrine of lifiting of corporate veil can be understood as identification of the company with its members

Article 3

BY: Parshant madhav

In this article the author's main purpose is toinvestigate the bounds of the principle of limited liability. It is suggested in this article the common law exception ie agency, fraud , avoidance of obligations, preventions of injustice, and imputation of members characteristics tothe company, are symptomatic of the court's attempt toensure that parties , both shareholders, creditors, and other third parties whomay be considered by the court tohave a legitimate interest in the affairs of the corporation.

Lifting of corporate veil

This concept was introduced to reveal the real culprit behind the company that is the human force working behind the company. Since human is the one who control all the activities of the company and they are the one who are responsible for all the do's and dont's of the company. To clear the concept of this the lawmaker introduce the concept of corporate veil. In this concept law maker make sure that the real culprit behind the certain fraudulent activity will be punished.

Since the shareholders , members , directors of the company have separate liability and asset and the company has its separate assets and liability. So if the company perform certain activity which is performed by the human force so if anything goes wrong or in fraudulent manner then the consequences will be paid by the company . So at sometimes the humans take advantage of it and perform certain activities to make their own profit in the name of the company and also held company liable if there are some losses or fraudulent matters.

Since company is a separate legal entity and has its own assets and liability so to protect it from these types of fraudulent activities this concept was introduced and it also make sure that the real culprit should be punished.

The Legal Personality Of a Company

1) Judicial interpretations

Revealing character

Since the company and the corporation has been formed and also channelized by the members of the company who were running the company. Sometimes in cases of alien enemy the reality of the company should be taken into the lights as in past there are some cases which are related to the alien enemy. For example if the company is a German company and selling its products to the English company and the English company has taken loan from other company which is England originated but has been controlled by the German then the English company will not

liable to pay the money to the England originated company since there is a war going on between Germany and England.

Tax Advantages

Since the company were made to take tax advantages . Since there are some principle companies who makes some companies for the purpose of tax evasion. For example the company A is the principle company and for the purpose of tax evasion it makes company b ,c and d so that their a proper distribution of the assets. So the veil has to be lifted in this and the real culprits should be punished.

FRAUD

The main motive of this concept is to prevent fraud . Since some of the companies were made for the fraudulent activities . For eg A and B enters into the contract and A agrees to sell his property to B. Afterwards A changes his mind and formed the company and sell the property to the company so that he can save himself from the specific performance of the contract which he made with B. So to reveal the reality behind all this the court has lifted the corporate veil and held A liable.

Agents

In some of the cases the company has the job of the agent for its shareholders and its acts like a agent for them . So whatever the act done by the company the shareholders will be liable for it and it depends upon the type of agreement. For example the Indian company finance the cost of the film in Germany in the name of Australian company. The director of the Indian company held maximum no of stakes in the Australian company . The German board refuses to register the film as an Australian film . the decision came out that the Indian company acted as nominee of Australian company.

Statutory Provisions

Members

The members of the company are the one who forms the company and if it got to the minimum number then the company can carry its business for atleast six months and after that the company and the members are held liable for the debts which has to be given by them or by the company to the creditors .

Retort

If there is retort or misrepresentation then the promoter, director and all other person whom which the authorities were given will be held liable for the retort.

Application money

When the company calls for the application money from its subscribers and failed to get least amount of application money then they have to return or refund the same with interest that is 6 percent.

Misapprehension of the name

When the person in authority sign in reference to the company any contract , PN, is liable to the person in authority if the Name of the company is not purposesly mentioned.

FINDINGS

The lifting of corporate veil has been playing a major role in the past and also it plays a major role in the presnt and will be playing in the futre . this concept of lifting of corporate veil has a revealing nature . Since the humans are majorly greedy and for the protection of a company this plays a major role . it is like a puppet show in which the wooden show piece puppet performs the acts and entertain the people , but the main person behind the puppet who is controlling them and making it do what he wants to . If he performs well then the show will be attractive and also if he didn't perform well then the show will not be perfect. This concept make sure that every person behind the wall performing certain activities for the company has be ware of the law as there are certain rules and regulation where he has to work in such a way

that he should not cross the limits beyond the law if he does then he has to face the circumstances . since the liability of the company and the members , shareholders , directors are different from each other they take advantage of the company in the favour and make company liable for all the fraud and other mis happenings . So to reveal the truth and lift the veil the image of real culprit is shown.

OBJECTIVES

The objectives of lifting of corporate veil are ;

- Prevention of fraud – the corporate veil is the process in which the reality of the people working behind the veil is revealed. Since the company has the characteristic of separate legal identity. To take the advantage of this character so of the people working behind the company make frauds or improper conducts and to cover that loophole the concept of lifting of corporate veil has been made.

- Cover loopholes – The concept of corporate veil covers the loopholes as some of the people working behind the company take the advantage of the loophole and start doing the fraud and improper conduct so to prevent these activities the concept of lifting of corporate veil has been introduced.

- Tax matters- To avoid the payment of tax or to minimise the payment of the tax some of the company start making the small companies to transfer their assets so they have to make the payment of taxes ie minimum or not .

- Reveal the real culprit- The concept of corporate veil reveals the real culprit behind the veil who performs all the fraudulent activities in the favour of himself in the name of the company . This concept of corporate veil was made to reveal the real culprit.

CONCLUSION

The human in genunity ,however started using this veil of corporate personality deliberately as a cover for fraud or improper conduct. Thus it became necessary for the courts to breakthrough the veil or crack the shell of corporate personality or disregard the corporate personality of the company .

Ignoring the separate legal amity of the company disregarding the corporate personality of the company and looking behind the company to identify the real person who conrol the company Only honest use of veil is allowed the advantage of incorporation are allowed to be enjoyed only by those who honestly use the veil of the company for the collective benefit of the company. Veil shall be pierced in case of dishonest and fraudulent use of incorporation, law can pierce and lift the corporate veil.

SCOPE AND LIMITATIONS

The concept of piercing of corporate veil reveals the person behind the company working as a authorized person and the work done by him / her or others for the company . Some of the people tries to take advantage of the loop hole of the law as in the law the company is a separate legal identity. As the characteristic of a company ie separate legal entity open some doors for the persons to take advantage of the loophole and try to do the activities in favor of the them . to stop them the concept of lifting of veil is introduced and to fulfill the loophole in the books of law .

GERMAN CO. CASE LAW

In this case the German company is a tier making company and there are two English company one who sell the tier and other is finance company . so there was a war going on between the Germany and the England. So the company that is English Company 2 has to pay the money the German company .

The court make its decision that the English company which has to pay the German company , the members working in the English company are all Germans who are the alien enemy . So the court lift the corporate veil and held that the german company as a alien enemy

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[i] Gower and Davies, *Principles of Modern Company law*, 8th ed. Sweet and Maxwell, london, 2oo8.

[ii] http://www.legalindia.in/lifting-the-corporate-veil-the-english-and-indian-laws/

[iii] Black's law Dictionary ll68 (7th ed. l999)

[iv] *Solomon v. Solomon & Co.* [l897] A.C. 22, Hl

[v] *Macaura v. Northern Assurance Co. ltd* [l925] A.C. 6l9

[vi] *lee v. lee's Air Farming [l96l] A.C. l2*

[vii] *Tata Engineering locomotive Co. ltd v. State of Bihar & ors. AIR l965 SC 4o*

THIRD PARTY FUNDING IN ARBITRATION – THE INDIAN PERSPECTIVE

- VASUNDHARA SAXENA

Third-party funding (hereafter "TPF") has become one of the "hottest topics" in international arbitration, and the hitherto nascent and nearly unheard-of sector with only a few years of history is transforming into a thriving profession with each passing day.[34] It is progressively gaining traction and legitimacy in the worldwide legal community's collective consciousness. An "emerging" industry (i.e., the TPF business) has evolved into a "maturing" industry.[35]

Regardless of the fact that TPF has originated in litigation in diverse types and in multiple jurisdictions for quite some time and has been encountered with some opposition, TPF is now becoming a component of global arbitration[36] due to the rapid expansion of international investment as well as commercial disputes over the past 50 years and the rising cost of going to arbitration. This expansion reflects the globalisation of international commerce, whereby international arbitration has emerged as the predominant method of resolving disputes.[37] A significant number of parties (referred to in the industry as "funded party") in arbitration proceedings, whether in financial trouble and otherwise, are discovering the use of third-party funders (hereinafter "funder") to fund their meritorious claims in exchange for a percentage of the compensation awarded to the capital provider if successful, whether by settlement or arbitrator's award. The funding of these fees by a third party, who solely invests in the proceedings to make a profit and who has no stake in the underlying grounds of the dispute, is increasingly crucial and necessary for impoverished claimants and defendants to resolve their disagreements through arbitration.[38] On the one hand, international arbitration continues its remarkable expansion, while on the other, the ability to pursue arbitration claims is

[34] M. RODAK, "It's about Time: A System Thinking Analysis of the Litigation Finance Industry and Its Effect on Settlement", U. Pa. L. Rev. 2006, 504; E. DE BRABANDERE and J. LEPELTAK, "Third Party Funding in International Investment Arbitration"

[35] *Ibid.*

[36] Trusz, J.A., 2012. Full Disclosure: Conflicts of Interest Arising from Third-Party Funding in International Commercial Arbitration. *Geo. LJ*, *101*, p.1649.

[37] Dos Santos, C., 2017. Third-party funding in international commercial arbitration: a wolf in sheep's clothing. *ASA Bull.*, *35*, p.918.

[38] Sharma, R., 2018. Third Party Funding in International Commercial Arbitration. *NUALS LJ*, *12*, p.61.

diminishing. In addition to the undeniable benefits of TPF, there is no doubt that TPF has its share of flaws[39], and many difficulties remain unresolved and are even developing. On the one hand, the rise of TPF is commended for enhancing the access to justice for impoverished claimants, and an increasing number of jurisdictions are beginning to embrace the claim-financing industry; on the other hand, TPF is despised and criticised for a number of reasons.[40] Regardless of the fact that this is among the "hottest themes" in international arbitration, our understanding of TPF remains murky. SCHERER rightly stated, "The precise concept of third-party funding remains tricky, and its legal and ethical consequences in international arbitration are largely unexplored."[41] There is currently no unanimity over the proper interpretation of this new economic activity. Some regard TPF to be a form of commercial loan arrangements, but others classify it as an insurance contract. In light of the recent growth of this budding business and in the absence of a definitive solution, definitions are continually being produced, changed, and solidified throughout time.[42]

The bulk of specialised litigation finance institutions are located in nations with a well-developed third-party funding business, such as Australia, Germany, the United Kingdom, the United States, the Netherlands, Canada, and South Africa.[43] Typically, the funder gives the funded side a choice between a conventional loan or non- recourse funding, in which the client's payment is dependent on winning the lawsuit. If the funded party has an insurance plan that addresses the circumstance at hand, then the insurance policy would function as third-party funding, particularly if the terms specify that the insurance provider will reimburse the arbitration costs.[44]

[39] *Supra* note 4.
[40] Khouri, S., Hurford, K. and Bowman, C., 2011. Third party funding in international commercial and treaty arbitration-a panacea or a plague? A discussion of the risks and benefits of third party funding. *Transnational Dispute Management (TDM)*, *8*(4).
[41] M. SCHERER, "Third-party funding in international arbitration: Towards mandatory disclosure of funding agreements?" in B. CREMADES and A. DIMOLITSA (eds.), Dossier X: Third-party Funding in International Arbitration, Paris, ICC Publishing S.A., 2013, 95.
[42] M. DESTEFANO, "Non-lawyers Influencing Lawyers: Too Many Cooks in the Kitchen or Stone Soup?", 80 Fordham L. Rev. 2012, 2794.
[43] Victoria A. Shannon, Harmonizing Third-Party Litigation Funding Regulation, 36 Cardozo L. Rev. 861 (2015)
[44] Colombo, G.F. and YOKOMIZO, D., 2018. A Short Theoretical Assessment on Third Party Funding in International Commercial Arbitration. *名古屋大学法政論集*, (280), pp.109-124.

Third-party funding clients may include corporations, law firms, persons, and even sovereign entities. As per Victoria A. Shannon, there really are four primary factors that contribute to the global growth of the third-party finance sector. Firstly, funders assist individuals with insufficient financial resources to pursue claims they otherwise could not; secondly, many small and insolvent businesses pursue third party funding as a means to pursue valid claims they otherwise could not; and lastly, many big businesses that are commonly sued due to the fact that of their business would prefer a way to even out the litigation line item on their balance sheets, and funders can offer them a fixed payment.[45]

PROCESS OF THIRD PARTY FUNDING

Potential funders execute TPF agreements when the claims raised have a high likelihood of being acknowledged and, more critically, when the claimant has financial constraints that would make the litigation process too expensive for them to endure. To avoid providing an excessively high return on investment to the funder, the claimant corporation must, however, retain case management.[46]

Once a TPF claim is submitted, the funder will do extensive due diligence prior to approval. They will assess the merits of the case and the amount of damages requested before granting money. For an investment opportunity to qualify for TPF, there must be a strong claim and a recoverable profit margin between the damages sought and the legal fees expended. [47]According to available data[48], about 90 percent of TPF applications are denied by funders. In addition, a 2021 Survey on Third-Party Funding in India performed by MNLU Mumbai revealed that the success percentage for different TPF funders ranged from 20% to 85%. It was observed that the success rate tended to be greater for parties who funded more cases.[49]

A TPF agreement between two parties is required to maintain some level of confidentiality, but the nature of arbitration often requires that the third party be disclosed prior to the

[45] Ebrahimi, S.S. and Bolori, P., 2022. Third Party Funding in International Commercial Arbitration. *The Quarterly Journal of Public Law Research*, *73*(23), pp.71-105.
[46] Kamnani, P.V. and Kaushal, A., 2019. Regulation of third party funding of arbitration in India: The road not taken. Indian J. Arb. L., 8, p.151.
[47] Mansinghka, V., 2017. Third-party funding in international commercial arbitration and its impact on independence of arbitrators: an Indian perspective. *Asian International Arbitration Journal*, *13*(1).
[48] Brekoulakis, S., Park, W. and Rogers, C.A., 2018. Report of the ICCA-Queen Mary Task Force on Third-party Funding in International Arbitration.
[49] Ibid.

proceedings in the event that a conflict of interest exists between the third party and any party involved in the arbitration proceedings. To ease access to justice, the supported parties may also seek to disclose specific information regarding the arbitration to the third-party funder. To do so, however, would breach the confidentiality principles of the TPF agreement and the arbitration, which poses the question of how to strike a balance between disclosure and confidentiality duties.[50] It has been proposed that disclosure regulations should account for confidentiality concerns and establish exceptions for them. Many arbitral statutes permit disclosure to a third-party funder without infringing any confidentiality duties to preserve the parties' interests.

In certain instances, parties seek temporary measures in the form of "security of costs" to protect themselves in the event that they are awarded costs but the opposing party lacks the financial means to pay the same. In order to avoid such circumstances, the tribunal may, after allowing the application, require the party to set aside a particular amount of money as security prior to the conclusion of the proceedings. Nonetheless, the mere presence of TPF does not prove that the party is bankrupt or impoverished.[51] In order to protect the enforceability of a future award and the interests of the opposing party, it becomes necessary to reveal the TPF agreement.[52]

THIRD PARTY FUNDING IN INDIA

Retired Supreme Court judge B N Srikrishna once argued that Parliament should legislate third-party funding. Justice Srikrishna added, "It will be difficult if it is implemented solely through the courts' interpretation of the present legal position.

The prevalence and viability of third-party funding as a source of dispute funding has been on the rise at an exponential rate. The world's largest third-party financier has a $ 2.4 billion investment portfolio and a market valuation of approximately $3.2 billion. Although the concept of third-party financing is not new to the Indian legal industry, since numerous cases have been purchased and sold on the unorganised market, it is still in its infancy. Despite

[50] Baumann, A. and Singh, M.M., 2018. New forms of third-party funding in international arbitration: Investing in case portfolios and financing law firms. *Indian J. Arb. L.*, *7*, p.29.

[51] Garg, M., 2020. Introducing Third-Party Funding in Indian Arbitration: A Tussle Between Conflicting Public Policies.

[52] Issac, G. and Menon, T., 2020. Walking the Tightrope of Third-Party Funding in Arbitration in India: Challenges, Opportunities and Prospects. *International Arbitration Law Review (Sweet & Maxwell)*, *23*(2).

litigation finance's outperforming private equity, real estate, credit, and hedge funds, third-party financing is a "yet-to-be-discovered asset class in India."[53] Even with such exceptional development, litigation finance, also known as third-party financing, remains a "yet-to-be-discovered asset class in India." Seventy percent (70%) of legal practitioners in India at a recent gathering believed that third-party fundraising is prohibited by Indian law.[54]

2017 marked the submission of the Report of the High-level committee[55] to study the institutionalisation of arbitration systems in India. Comparable to Hong Kong and Paris, the judicial committee proposed the inclusion of third-party funding to promote India as an arbitration hub. The Committee highlighted India's aspiration to become a famous centre for international arbitration, as well as the necessity to include and elaborate on TPF concepts within the statute. Therefore, India's approach towards TPF has been one of acknowledgment and progressive incorporation into a legal framework.[56] The authors believe that legalisation and the subsequent recognition of TPF as legal and valid may bring benefits to the country in terms of attracting foreign investment, and could make the country an even more attractive venue for arbitration by providing a mechanism for any company/individual with meritorious claim/s but limited financial resources to also bring claims in the arbitration to protect their rights.

In regards to third-party funding in arbitration, Indian law is completely silent. No law expressly prohibits or enables third-party fundraising. In addition, the Arbitration and Conciliation Act of 1996 does not expressly address the legality or illegality of third-party funding. In states such as Maharashtra, Gujarat, Madhya Pradesh, and Uttar Pradesh, however, the use of third-party funding in civil cases is openly acknowledged. By amending Rule 1 of Order XXV of the Code of Civil Procedure of 1908, these states have made it possible for

[53] Sharma, R., 2018. Third Party Funding in International Commercial Arbitration. *NUALS LJ*, *12*, p.61.
[54] Cyril Shroff and Amita Gupta Katragadda, *Third party Funding of Litigation in India: An Asset Class* in *Waiting.* https://www.bloombergquint.com/opinion/third-party-funding-of-litigation-in-indi a-an-asset-class-in-waiting#gs.0rpd8e (Accessed on February 21st, 2022, 1.00 pm)
[55] Ordinance, A., India: reform of arbitral institutions and arbitration law.
[56] Meduri, R.B. and Baweja, R.K., 2019. Third Party Funding in International Arbitration-An Indian Context. *Supremo Amicus*, *9*, p.251.

courts to collect litigation costs from a financier by making them a party to the proceedings. However, it is not appropriate to conclude that money from outside parties is permissible.[57]

CONCLUSION

As stated in the Report of the High-Level Committee, it is essential that the principles of third-party funding be adopted through legislation and associations in order for India to develop into an arbitration hub that encourages parties to choose arbitration as the preferred method of dispute resolution over litigation. Important to the success of TPF would be for the funders to facilitate the process by collaborating with the party seeking money. As we begin to emerge from the epidemic, there is a need to recognise the financial limits that claimants may encounter, but there is also an unavoidable requirement for procedures openness with regard to TPF agreements. Achieving a balance between the two is unquestionably the objective of our current system.

[57] Anish Wadia and Shivani Rawat, Third Party Funding in Arbitration – India's Readiness in Global Context, TDM Special Issue on "International Commercial Arbitration and Investment Dispute in and with India", Vol. 15, Issue 2, Feb 2018.

GROUP OF COMPANIES DOCTRINE – DOES THE INDIAN ARBITRATION LANDSCAPE NEED A RELOOK?

- VASUNDHARA SAXENA

Agreement of the parties to a dispute to use arbitration as a means of conflict settlement is one of the most significant aspects of arbitration. In reality, Section 7 of the Arbitration & Conciliation Act of 1996 specifically outlines the prerequisites for a valid arbitration agreement ("the Act"). In other words, for an arbitration agreement to be legal, there must be consensus ad idem, which basically states that the contracting parties must have the purpose to seek relief from an arbitral tribunal. Nevertheless, in creating this theory of common agreement in arbitration law, one must take into account a number of other judicial precedents that may play a part in the fair determination of the dispute. Regarding its validity and soundness, the 'group of firms' doctrine is but one doctrine which has raised some eyebrows across jurisdictions.

Consent is the fundamental principle of international arbitration. Due to the fact that arbitration implies a loss of the right to seek court intervention, the notion is basically based on consent and functions under the premise of party autonomy. The parties' intent to arbitrate is expressed by way of an arbitration agreement. On occasion, however, the range of an arbitration agreement is expanded to non-signatories when it would be difficult or ineffective to resolve a dispute without the participation of a particular party. In this context, the Group of Companies Doctrine ("the Doctrine"), which sets a three-part test to establish whether a non-signatory is bound by an arbitration agreement, is frequently utilised. Tribunals examine the existence of a close group structure, the participation of the third party in the conclusion of the contract, and the intention of all parties to bind the third party to the arbitration clause. The article defends the idea by answering arguments against its validity. It seeks to demonstrate that consent can be manifested both in writing and through the conduct of the parties. This is the behaviour that the theory investigates, so sustaining the fundamental principle of consent in arbitration.[58]

As its name implies, the 'group of companies' doctrine, in broad and simple terms, permits a non-signatory to an arbitration agreement to be added as a party to the arbitration, as this non-

[58] Adyasha Samal, Extending Arbitration Agreements to Non-Signatories: A Defence of the Group of Companies Doctrine, 11 King's Student L. Rev. 73 (2020)

signatory may belong to the same group of companies as one of the signatories to the arbitration agreement. In addition, the question of whether this non-signatory meant to be bound by the arbitration agreement will be considered when this concept is applied.

Nonetheless, at first look, the "group of firms" theory appears to contradict the fundamental notions of independent legal identity, which are so firmly ingrained in both common law and civil law nations. As observed in the Indian arbitration law landscape over the past few years, any deviation from this traditional attitude is certain to generate debate and controversy. A second area of contention regarding the widespread acceptance of the "group of companies" doctrine is the fundamental principle of international law to impose arbitration only on parties who have expressly consented to it.[59]

ORIGIN OF THE DOCTRINE –

The doctrine's starting point is the *Dow Chemical France, the Dow Chemical Company v. Isover Saint Gobain[60] case.* In this instance, Dow Chemicals subsidiary launched Arbitration proceedings against Isover. This was the opposed by Isover on the basis that certain Dow Chemicals subsidiaries had not signed the Arbitration Agreement.

The International Court of Arbitration (ICC) rejected Isover's objection on two grounds: a) that the subsidiaries played a significant role in the performance of the agreement between the parent company and Isover, and b) that the subsidiaries were controlled and directed by the parent company, and therefore had the right to pursue their claims in arbitration.

In this particular instance, the non-signatories did not object to being bound by the arbitration clause.

THE INDIAN POSITION –

In *Chloro Control India Private Limited v. Severn Trent Water Purification Incs.[61]*, the court acknowledged that the 'group of companies' doctrine has been widely adopted in recent years in jurisdictions such as England, the United States, and France, but cautioned that "definite reference to the language of the contract and intention of the parties" must be determined with great care. In addition, the Court emphasised that "the purpose of the parties is a crucial element

[59] Hiroo Advani et al., India: The Validity Of The 'Group Of Companies' Doctrine, Mondaq (27 April 2021) https://www.mondaq.com/india/trials-appeals-compensation/1061558/the-validity-of-the-group-of-companies39-doctrine

[60] *(ICC Case No. 4131)*

[61] *(2013)1 SCC 641*

that must be proven before it can be declared that the scope of arbitration includes both signatory and non-signatory parties." In determining the scope of the doctrine, the Court identified four factors that must be considered: I the 'direct relationship' of the non-signatory to the signatory to the arbitration agreement; (ii) the 'direct commonality of the subject matter and agreement' between the parties; (iii) the transaction must be of a 'composite nature where performance of [the principal] agreement may not be possible without the aid, execution, and performance of the sui generis agreement'; and (iv) whether referring disputes under all agreements would 'serve the ends of justice'.

As a conclusion, the Court observed, "An arbitration agreement entered into by a firm within a group of companies can bind its non-signatory affiliates if the circumstances suggest that both the signatory and non-signatory parties intended to be bound." Prior to the *Chloro Controls* judgments, the Supreme Court in *Sukanya Holdings v. Jayesh H. Pandya*[62] had refused to refer a dispute to arbitration on the grounds that the claims fell outside the scope of the arbitration agreement, primarily because some of the parties were not signatories to the agreement. *Chloro Controls* can be separated from Sukanya Holdings because at the time Section 8 of the Act did not contain the language "claiming through or under."

The Chloro Controls decision has paved the way for a number of cases in which the courts in India have taken a progressive stance, such as in *Cheran Properties Limited v. Kasturi and Sons Limited*[63], the Supreme Court determined that an arbitral award can be enforced against a non-signatory, depending on the particular facts and circumstances of each case. The Supreme Court observed that the "group of firms" theory facilitated the parties' aim to bind both signatories and non-signatories to the arbitration agreement. In rendering this ruling, the Supreme Court also emphasised the uncommon nature of this theory and stated that its application is primarily dependent on the language of the arbitration agreement and the setting of the dispute. The court also relied on Section 35 of the Act, which states that arbitral awards "must be final and binding on the parties and their respective claimants." In establishing this doctrine, the *Cheran Properties* decision emphasised the significance of the parties' intention to bind both signatories and non-signatories to the arbitration agreement.

[62] *(2003) 5 SCC 531*
[63] *(2018) 16 SCC 413*

LEGISLATIONS THAT ACKNOWLEGDE THE DOCTRINE-

After the loophole was brought to light by the *Chloro Control* judgment, the Law Commission made a recommendation to possibly fill the gaps on the same in its 246th report and stated the following-

"64. This interpretation given by the Hon'ble Supreme Court follows from the wording of Section 45 of the Act which recognizes the right of a "person claiming through or under [a party]" to apply to a judicial authority to refer the parties to arbitration. The same language is also to be found in Section 54 of the Act. This language is however, absent in the corresponding provision of Section 8 of the Act. It is similarly absent in the other relevant provisions, where the context would demand that a party includes also a "person claiming through or under such party". To cure this anomaly, the Commission proposes an amendment to the definition of "party" under Section 2 (h) of the Act."

What also followed was an amendment in 2015 in the very definition of Section 8 of the Act was amended through the Arbitration and Conciliation (Amendment) Act, 2015, which read as follows -

"(1). A judicial authority, before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party to the arbitration agreement or any person claiming through or under him, so applies not later than the date of submitting his first statement on the substance of the dispute, then, notwithstanding any judgment, decree or order of the Supreme Court or any court, refer the parties to arbitration unless it finds that prima facie no valid arbitration agreement exists."

CONCLUSION-

To conclude, applicability of the "group of companies" concept is worthy of consideration, it should not diminish the significance of the doctrine's growing acceptance by courts in India. In numerous decisions, the Supreme Court of India has set the correct tone by emphasising the essential principles of shared purpose and implied agreement. It is also essential to differentiate between the 'group of businesses' theory and the 'piercing of the corporate veil', a topic that arises frequently in arbitral procedures.

The possibility that a judgement can be implemented against a non-signatory raises grave problems with regard to due process. If a non-signatory is added as a party to the arbitration,

the correct due process would be to provide the non-signatory with an equal opportunity to be heard and to defend its claims adequately. In addition, the *Cheran Properties* decision broadens the scope of the concept beyond its initial intent, which was to bind non-signatories to an arbitration agreement. Taking into account the precedent established in *Chloro Controls* and *Cheran Properties* offers a dangerously expansive scope for the employment of the concept to enforce judgements against non-parties to the arbitration procedures. In the case *Mahanagar Telephone Nigam Ltd. v. Canara Bank*[64], the Supreme Court, elaborating on *Chloro Controls*, held that "there is a tight group structure with strong organisational and financial ties so as to create a single economic unit, or a single economic reality."

The theory, which is deeply rooted in the idea of implied consent, is based only on the parties' intentions that a specific entity be bound by the arbitration agreement. However, the relationship between this philosophy and international arbitration law is difficult. While some courts and tribunals have accepted it, the vast majority have been more sceptical. Yet, a cursory examination of the judgements issued by Indian courts regarding the validity of this theory raises the possibility that the courts may have exceeded the doctrine's intended scope. It would be vital for the Supreme Court of India to revisit the theory in order to decide if it continues to have a legal basis in Indian law and, if so, what its boundaries are.

[64] *(2020) 12 SCC 767*

MONEY LAUNDERING IN INDIA AND OVERSEAS

- DR. RAM KISHORE MEENA[65]

INTRODUCTION

Money laundering is a process where the proceeds of crime are transformed into apparently legitimate money or other assets. It is the processing of criminal proceeds to disguise its illegal origin. In simple words, it can be defined as the act of making money that comes from one source to look like it comes from another source. INTERPOL's definition of money laundering is: "any act or attempted act to conceal or disguise the identity of illegally obtained proceeds so that they appear to have originated from legitimate sources".[66] The act of money laundering is done with the intention to conceal money or other assets from the State so as to prevent its loss through taxation, judgment enforcement or blatant confiscation. The criminals herein try to disguise the origin of money obtained through illegal activities to look like it was obtained from legal sources because otherwise they will not be able to use it as it would connect them to the criminal activity and the law enforcement officials would seize it.[67]

Article 1 of EC Directive defines Money Laundering as "The conversion of property, knowing that such property is derived from serious crime, for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in committing such an offence(s) to evade the legal consequences of his action, and the concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to, or ownership of property, knowing that such property is derived from serious crime."

The most common types of criminals who need to launder money are drug traffickers, embezzlers, corrupt politicians and public officials, mobsters, terrorists and con artists. Drug traffickers are in serious need of good laundering systems because they deal almost exclusively in cash, which causes all sorts of logistics problems. Criminal activities such as terrorism, illegal arms sales, financial crimes, smuggling, or illicit drug trafficking generate huge sums

[65] Assistant Professor, Government Law College, Jhalawar - 326001, Rajasthan.

[66] Interpol General Secretariat Assembly in 1995 http://www.interpol.int/Crime-areas/Financial-crime/Money-laundering

[67] David A. Chaikin "Investigating Criminal & Corporate Money Trails". in The Money Laundering and Cash Transaction Reporting edited by Brent Fisse, David Fraser and Graeme Coss. North Ryde, NSW: Law Book Co. Pp 257-293. (1992).

of money and criminal organizations need to find a way to use these funds without awakening suspicions about their illicit origin.[68]

The purpose of these criminal organizations is to generate profits for the group or for one of its individual members. When a criminal activity generates substantial profits, the individual or group involved in such activities route the funds to safe heavens by disguising the sources, changing the form or moving the funds to a place where they are less likely to attract attention. The logic of controlling the drug money trial is that profit motivates drug sales, and because most sales are in cash, the recipient of cash has to find some way of converting these funds into utilizable financial resources that appear to have legitimate origins.[69]

The objective of criminalising money laundering is to take profit out of the crime. The rationale for the creation of the offence is that it is wrong for individuals and organizations to assist criminals to benefit from the proceeds of their criminal activity or to facilitate the commission of such crimes by providing financial services to them.[70]

PROCESS OF MONEY LAUNDERING

Money laundering is a single process however, its cycle can be broken down into three distinct stages namely, placement stage, layering stage and integration stage.[71]

Placement Stage: It is the stage at which criminally derived funds are introduced in the financial system. At this stage, the launderer inserts the "dirty" money into a legitimate financial institution often in the form of cash bank deposits. This is the riskiest stage of the laundering process because large amounts of cash are pretty conspicuous, and banks are required to report high-value transactions. To curb the risks, large amounts of cash is broken up into less conspicuous smaller sums that are then deposited directly into a bank account, or by purchasing

[68] FATF-GAFI, Financial Action Task Force on Money Laundering. *"Basic Facts about Money Laundering",* see <www.oecd.org/fatf>

[69] Michael Levi, Money Laundering and Its Regulation, Annals of the American Academy of Political and Social Science, Vol. 582, Cross-National Drug Policy (Jul., 2002), pp. 181-194.

[70] http://www.int-comp.org/what-is-money-laundering

[71] Syed Azhar Hussain Shah, Syed Akhter Hussain Shah and Sajawal Khan "Governance of Money Laundering: An Application of the Principal-agent Model" The Pakistan Development Review, Vol. 45, No. 4, Papers and Proceedings PARTS I and II Twenty-second Annual General Meeting and Conference of the Pakistan Society of Development Economists Lahore, December 19-22, 2006 (Winter 2006), pp. 1117-1133 available at <http://www.jstor.org/stable/41260672>

a series of monetary instruments (cheques, money orders, etc.) that are then collected and deposited into accounts at another location.

Layering Stage: It is the stage at which complex financial transactions are carried out in order to camouflage the illegal source. At this stage, the launderer engages in a series of conversions or movements of the money in order to distant them from their source. In other words, the money is sent through various financial transactions so as to change its form and make it difficult to follow. Layering may consist of several bank-to-bank transfers, wire transfers between different accounts in different names in different countries, making deposits and withdrawals to continually vary the amount of money in the accounts, changing the money's currency, and purchasing high-value items such as houses, boats, diamonds and cars to change the form of the money. This is the most complex step in any laundering scheme, and it's all about making the origin of the money as hard to trace as possible. In some instances, the launderer might disguise the transfers as payments for goods or services, thus giving them a legitimate appearance.[72]

Integration stage: It is the final stage at which the 'laundered' property is re-introduced into the legitimate economy. At this stage, the launderer might choose to invest the funds into real estate, luxury assets, or business ventures. At this point, the launderer can use the money without getting caught. It's very difficult to catch a launderer during the integration stage if there is no documentation during the previous stages.

At each of the three stages of money laundering various techniques can be utilized. Following are the various measures adopted all over the world for money laundering, even though it is not exhaustive but it encompasses some of the most widely used methods:

1. Structuring Deposits: This is also known as smurfing[73], this is a method of placement whereby cash is broken into smaller deposits of money, used to defeat suspicion of money laundering and avoid anti-money laundering reporting requirements.[74]

[72] http://www.fatf-gafi.org/pages/faq/moneylaundering/

[73] Smurfs - A popular method used to launder cash in the placement stage. This technique involves the use of many individuals (the "smurfs") who exchange illicit funds (in smaller, less conspicuous amounts) for highly liquid items such as traveller cheques, bank drafts, or deposited directly into savings accounts. These instruments are then given to the launderer who then begins the layering stage. For example, ten smurfs could "place" $1 million into financial institutions using this technique in less than two weeks.

[74] National Drug Intelligence Center (August 2011). "National Drug Threat Assessment" (PDF). p. 40.

2. Shell companies: These are fake companies that exist for no other reason than to launder money. They take in dirty money as "payment" for supposed goods or services but actually provide no goods or services; they simply create the appearance of legitimate transactions through fake invoices and balance sheets.[75]
3. Third-Party Cheques: Counter cheques or banker's drafts drawn on different institutions are utilized and cleared via various third-party accounts. Third party cheques and traveller's cheques are often purchased using proceeds of crime. Since these are negotiable in many countries, the nexus with the source money is difficult to establish.[76]
4. Bulk cash smuggling: This involves physically smuggling cash to another jurisdiction and depositing it in a financial institution, such as an offshore bank, with greater bank secrecy or less rigorous money laundering enforcement.[77]

IMPACT OF MONEY LAUNDERING

Launderers are continuously looking for new routes for laundering their funds. Economies with growing or developing financial centres, but inadequate controls are particularly vulnerable as established financial centre countries implement comprehensive anti-money laundering regimes. Differences between national anti-money laundering systems will be exploited by launderers, who tend to move their networks to countries and financial systems with weak or ineffective countermeasures.[78]

The possible social and political costs of money laundering, if left unchecked or dealt with ineffectively, are serious. Organised crime can infiltrate financial institutions, acquire control of large sectors of the economy through investment, or offer bribes to public officials and indeed governments. The economic and political influence of criminal organisations can

[75] Arvind Giriraj and Prashant Kumar Mishra, Money Laundering: An Insight Into The Modus Operandi With Case Studies http://www.skoch.in/images/stories/security_paper_knowledge/Arvind%20Giriraj%20and%20Prashant%20Ku mar%20Mishra%20-%20Money%20Laundering.pdf (accessed on 14 May 2015).

[76] Kumar S. Vijay. (2009) "Controlling Money Laundering in India –Problems and Perspectives" Mumbai, INDIA pg. 11.

[77] "National Money Laundering Threat Assessment" (PDF). December 2005. p. 33 http://www.dea.gov/pubs/pressrel/011106.pdf (accessed on 14 May 2015).

[78] "What influence does money laundering have on economic development?" available at http://www.fatf-gafi.org/pages/faq/moneylaundering/ (accessed on 16th May 2015).

weaken the social fabric, collective ethical standards, and ultimately the democratic institutions of the society. In countries transitioning to democratic systems, this criminal influence can undermine the transition.

If left unchecked, money laundering can erode a nation's economy by changing the demand for cash, making interest and exchange rates more volatile, and by causing high inflation in countries where criminal elements are doing business. The draining of huge amounts of money a year from normal economic growth poses a real danger for the financial health of every country which in turn adversely affects the global market.[79] Most fundamentally, money laundering is inextricably linked to the underlying criminal activity that generated it. Laundering enables criminal activity to continue.

Thus, the impact of money laundering can be summed up into the following points:

→ Potential damage to reputation of financial institutions and market

→ Weakens the "democratic institutions" of the society

→ Destabilises economy of the country causing financial crisis

→ Give impetus to criminal activities

→ Policy distortion occurs because of measurement error and misallocation of resources

→ Discourages foreign investors

→ Causes financial crisis

→ Encourages tax evasion culture

→ Results in exchange and interest rates volatility

→ Provides opportunity to criminals to hijack the process of privatisation Contaminates legal transaction.[80]

[79] Chapter-IV Money Laundering in India: An Offshoot of Drug Trafficking available at http://shodhganga.inflibnet.ac.in:8080/jspui/bitstream/10603/18155/10/10_chapter4.pdf (accessed on 14th May 2015) Pg. 12-13.

[80] Syed Azhar Hussain Shah, Syed Akhter Hussain Shah and Sajawal Khan "Governance of Money Laundering: An Application of the Principal-agent Model" The Pakistan Development Review, Vol. 45, No. 4, 22nd Annual General Meeting and Conference of the Pakistan Society of Development Economists Lahore, December 19-22, 2006, pp. 1117-1133 available at <http://www.jstor.org/stable/41260672>