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# Corporate Criminal Liability: An Emerging Issue

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## ABSTRACT

*A perception that only humans can commit a crime is an invalid concept. A company being a separate legal entity, an artificial person can also commit a crime. Initially in 16th and 17th Century it was believed that a corporation cannot commit any crime. There were some contradictions on the theory of a company being a separate legal, but it does not have soul and body of its own. Thus, they cannot commit any crime or any offensive act for which it can be held liable. But slowly and gradually the concept of corporate criminal Liability has been developed, through various judgments like Standard Charter Bank V. Directorate of enforcement. It was understood that even a company through its representatives can commit a crime and it can be held liable. The concept of corporate criminal liability evolves from a Latin maxim i.e. Actus non facit reum, nisi mens sit rea which means to make one liable it must be shown that act or omission has been done which was forbidden by law and has been done with guilty mind. The doctrine of the corporate criminal liability has gained a worldwide importance after the landmark judgment of Standard Charter Bank.*

**Keywords:** Liability, Crime, Company, Corporate, Legal.

## I. INTRODUCTION

Large scale enterprises are all over. These corporations are help to be the characterizing power over the globe in pretty much every part of our lives. Corporations have turned out to be dangerous criminals. As a principle, people only submit the offense. The exemption to this standard is that the corporate bodies can be held accountable for the corporate violations. The subject of research is that whether a corporate body is fit for perpetrating a wrongdoing and on the off chance that truly, at that point how a company can be held criminally at liable by the law. The prior view was that an organization ought not to be accountable for a crime. The criminal blame required a goal and an enterprise not having a psyche could shape no goal. Additionally, a company had no body of its own which could be detained. The courts are probably going to impose the risk on the officer-in-control or chiefs or different people acting

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within the extent of business.

From the years together, the doubt has emerged for the need of convention of corporate criminal liability. There is no broad answer to this doubt. It is to be inspected and decided for each case and after that a decision must be taken with respect to the risk of enterprises. Commentators to this idea contend that the doctrine of corporate criminal obligation is totally superfluous on the accompanying two grounds: Firstly, they contend that it isn't the corporations that carry out crimes, the people do. Furthermore, that the retributive impact is borne by the investors and buyers. It implies that the cost of corporate criminal fines and endorses is borne by the investors and the buyers for the demonstrations of companies. In criminal law, corporate risk decides the degree to which a corporate as a lawful person which can be subjects for the demonstrations and exclusions of the common individual it utilizes. It is viewed as a part of criminal vicarious liability.

## II. CONCEPT OF CORPORATE CRIMINAL LIABILITY

*A company can only at through human beings and a human being who commits an offence on account of or for the benefit of a company will be responsible for that offence himself. The importance of incorporation is that it makes the company itself liable in certain circumstances, as well as the human beings – Glanville Williams*

Corporations are becoming an integral part of our society, and with development of corporations they have become significant factor in our economy, our society runs in the risk of getting victimized by these corporation and they should be deterred too. The concept of corporate criminal liability is based on the doctrine of “respondent superior”. Respondent superior means that a corporation can be held liable for the acts of its employees and agents working for the corporations. Apart from this section 11 of the Indian Penal Code defines a person and it reads as “the word person includes any company or Association or a body of persons, whether incorporated or not”. This means that corporations have their own identity and they have a separate legal personality and also they are different from their members, and this is sufficient to make them held liable.

If there is any connection between the criminal acts of the agent and his corresponding corporate duties, the corporation can be held liable for the conduct of the agent.

For imposing the criminal liability on the corporation it becomes necessary and essential that the act of the employee is committed with the intention of incurring benefit to the corporation directly or indirectly and in addition to this the corporation can be criminally liable if it was found that the act was committed with the intention of obtaining some personal benefit but it

also ended up benefitting the corporation as well.

Besides this the doctrine of corporate criminal liability has faced many major issues throughout ages. Firstly, the failure to prove or identify the criminal intention of the agent or the employee, as it is very important to find the mens rea for the commission of the criminal act to be proved as corporation are a separate legal identity. Secondly, the courts required the accused to be physically present in the court when the proceedings are taking place, but this was not possible in case of corporation. Thirdly, the most important issue in case of corporate criminal liability is of Sanction that is a corporation cannot be imprisoned or put to death. Thus, the treat of imprisonment which plays a major role in criminal law cannot be enforced here in this case.

There are few requisites which are necessary to be established before criminal liability which can be imposed on a corporation of any other kind of legal entity.

### **III. REQUIREMENTS FOR ESTABLISHING CORPORATE CRIMINAL LIABILITY**

#### **1. Act within the scope of employment**

There are certain requirements which need to be fulfilled for a corporate criminal liability to arise. Firstly the main requirement is that the employee committing the offence must be acting within the scope of employment. This means that there must be a master and servant relationship between them which creates a vicarious liability between them, i.e. Master and servant and he must be performing the duties which are authorized to them by their parent company.

*This ticket was sold, not by either Mr. Shah or Mrs. Shah, but by their employee Mr. Hob day. Unfortunately, but inevitably, his offence was, at once, their offence, given the principles of vicarious liability as explained in Mousell Bros Ltd v London and North-Western Railway Co<sup>3</sup>.*

#### **2. Benefit to the corporation**

The second requirement which is needed fulfilled for a corporate criminal liability to arise is that the corporation should have received any benefit out of the act of the employee or the agent. It is not necessary that the company must have received any benefit or not, it's only necessary that the act is done by the employee or the agent for benefitting the corporation.

There are various methods through which the corporations can be held liable are collective and wilful blindness doctrine. In Collective blindness doctrine it is not necessary that an individual

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<sup>3</sup>[1917] 2 K.B 836

can be made liable for the act benefitting the corporation, there can be group people made liable for this, proving that each person of the group has knowledge in totality. Whereas in wilful blindness doctrine, the corporation is in knowledge of the illegal practices but they turned blind eye towards it, in such case the employee as well as agents will be liable for the illegal practices. Apart from this the employees as well as the agents can be held liable for conspiracy together in corporate criminal liability.

#### IV. THE JURISDICTIONAL EVOLUTION

The controversy on corporate criminal liability in India began with the Supreme Court's decision in *Standard Chartered Bank v. Directorate of Enforcement*<sup>4</sup>. In this case the Court held that Indian law recognised that corporations could be prosecuted and convicted for an offence which set out a mandatory sentence of imprisonment and a fine. This judgment further clarified that in cases where the offence imposed both imprisonment and fine, the court would be entitled to apply only the fine in situations where the impugned party was a corporation. This marked a convergence from the established line of precedents where courts refused to convict corporations for crimes as the court could not, by discretion, decide to impose only the fine and not the mandatory imprisonment.

Six years later, in *Iridium India Telecom Ltd. v. Motorola Inc. (Iridium)*<sup>5</sup>, the Supreme Court for the first time attributed *mens rea* to Indian corporations. In *Iridium*<sup>6</sup> a company was charged with the offences of cheating and criminal conspiracy, on the basis of alleged false representations made by the company in its prospectus in connection with the offering of securities to the public. The Supreme Court held that a corporation is virtually in the same position as any individual and may be convicted under common law, as well as for statutory offences, including those requiring *mens rea*. *Iridium*<sup>7</sup> judgment held that a corporation would be held criminally liable when an offence is committed in relation to the business of the corporation by a person or body of persons in control of its affairs, who would therefore be treated as the “alter ego” of the company whose *mens rea* would stand attributed to the company. However, the Supreme Court noted that

In such circumstances, it important to ascertain to discover that *the degree and control of the person or assemblage of persons is so intense to the point that a corporation might be said to think and act through the person or the body of persons.*

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<sup>4</sup>2005 SCC (Cri) 961

<sup>5</sup> (2010) 3 SCC (Cri) 1201

<sup>6</sup>*Iridium India Telecom Ltd. v. Motorola Inc.*, (2011) 1 SCC 74

<sup>7</sup>*Ibid*

## TESTS TO DETERMINE THE CORPORATE CRIMINAL LIABILITY

### Identification Test

In *Tesco Supermarkets Ltd v. Nattrass* Lord Reid<sup>8</sup> said: “*The person who acts is not speaking or acting for the company. He is acting as the company and his mind which directs his acts is the mind of the company. If it is a guilty mind then that guilt is the guilt of the company.*” This test is otherwise called as alter ego test and furthermore as directing mind and will hypothesis. This test is applied in the English courts for identification or controlling and coordinating mind of the organisation so as to determine the criminal liability of corporations.

### Aggregation Test

There might be situations where a corporate wrong might be the consequence of a combination of guilty mind of numerous people. By amassing the acts of two or more persons, the actus reus and mens rea can be taken out of the conduct and knowledge of several individuals. In *United States v. Bank of New England*<sup>9</sup>, the court of appeals confirmed that a collective knowledge is appropriate because corporations would divide duties and avoid liabilities. This test has been applied in Australia but is rejected in England.

### Respondeat Superior Test

The courts have provided various reasons to justify corporation’s liability for the acts of agents. A corporation can be held liable for the acts of its agents a) commit a crime b) within the scope of employment c) with the intent to benefit the corporation. This was clearly held in *United States v. A. P Trucking Co.*<sup>10</sup>

## JURISPRUDENTIAL POSITION IN INDIA

Prosecution for the crimes committed out is embraced according to the provisions of Indian Penal Code, 1860 under the Indian Criminal Justice System. Section 11 defines the expression “person”. It incorporates any company or affiliation or body of persons. It could be either incorporated or not. Thusly, the corporations can be prosecuted for the commission of crimes. Be that as it may, the position of criminal obligations of corporations needs to be determined when the corporations carry out offences where the penal code demands for a mandatory imprisonment and fine. Some landmark decisions settled this issue and aided in the advancement and development of corporate criminal liability.

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<sup>8</sup>[1972] A.C 153

<sup>9</sup>821 F.2d at 854

<sup>10</sup>1958 SCC OnLine US SC 195

In the case of Assistant Commissioner v. Velliappa Textiles Ltd<sup>11</sup>, it was held by a majority decision that a company can not be prosecuted for offences which require imposition of a mandatory term of imprisonment coupled with fine. Where the punishment provided is both imprisonment and fine, the court can not only impose fine. This difficulty was noticed by the Law Commission of India and in its 41st report the Law Commission of India suggested an amendment to section 62 of Indian Penal Code by adding the following lines: “*In every case in which the offence is only punishable with imprisonment or with imprisonment and fine and the offender is a company or other body corporate or an association of individuals, it shall be competent to the court to sentence such offender to fine only*”<sup>12</sup>.”

The Apex Court in Standard Chartered Bank and Ors. v. Directorate of Enforcement and Ors<sup>13</sup>. made the scenario crystal clear. It had overruled the past perspectives with respect to the principle of corporate criminal obligation. The court held that there is no sweeping insusceptibility for any company from the indictment of offenses in light of the fact that the arraignment requests a required detainment. The peak court chose that in instances of offenses which command both detainment and fine, the companies ought to be rebuffed with a fine.

In case of Iridium India Telecom Ltd v. Motorola Incorporated Co. , the apex court emphasized: “... a corporation is virtually in the same position as any individual and may be convicted of common law as well as statutory offences including those requiring mens rea. The criminal liability of corporation would arise once associate offence is committed in reference to the business of the corporation by someone or body of persons on top of things of its affairs. In such circumstances, it would be necessary to ascertain that the degree and control of the person or body of persons is so tense that a corporation may be said to suppose and act through the person or the body of persons.”<sup>14</sup>”

## V. INTERPRETATIONS WITH IPC

Section 11 defines that the ‘person’ would come with “*any Company of Association or body of persons, whether incorporated or not*”<sup>15</sup>.

Henceforth, corporations can be prosecuted under IPC for the crimes committed. It is an undisputed fact that The companies can't be prosecuted for crimes done by people like assault, where the only punishment as contemplated in IPC, is imprisonment. At that point, the

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<sup>11</sup> (2003) 11 SCC 405

<sup>12</sup> Section 62 of Indian Penal Code, 1860

<sup>13</sup> 2009 SCC OnLine Del 4145

<sup>14</sup> (2011) 1 SCC 74

<sup>15</sup> Section 11 of Indian Penal Code, 1860

grey area was to decide the situations of the cases when the corporations commit offences where the IPC demands a mandatory punishment of both imprisonment and fine. Some milestone decisions settled the issue and aided in the development of corporate criminal liability.

In the case of Assistant Commissioner v. Velliappa Textiles Ltd. the Supreme Court by a majority of 2:1 held that since corporations couldn't imprisoned they could not be prosecuted for an offence where IPC commands an imprisonment. The contradicting judge saw that on the grounds that corporation cannot be imprisoned can never be an explanation behind for an observation that the corporation can not at all be prosecuted all things considered.

The judge additionally included that the court had two capacities to perform. The first one is to decide whether the accused is guilty of having committed the crime and this conclusion has to be made on the basis of the evidence produced before the court. Furthermore, the function is to award a sentence for the offence for which the accused is discovered guilty. He clarified

*“Courts would be shirking their responsibility of imparting justice by holding that prosecution of a company is unsustainable merely on the ground that being a juristic person it cannot be sent to jail to undergo the sentence. Companies are growing in size and have huge resources and finances at their command. In the course of their business activity they may sometimes commit breach of the law of the land or endanger others' lives. More than 4,000 people lost life and thousands others suffered permanent impairment in Bhopal on account of gross criminal act of a multinational corporation. It will be wholly wrong to allow a company to go scot-free without even being prosecuted in the event of commission of a crime only on the ground that it cannot be made to suffer part of the mandatory punishment<sup>16</sup>.”*

Examining these functions alongside concerns, the judge observed that the corporations could be punished with a sentence of fine if the court finds them liable.

### **Stricter Interpretations**

The same issue was detected with in the case of Standard Chartered Bank v. Directorate of Enforcement<sup>17</sup> where the Supreme Court overruled the Velliappa case and held that there is no blanket immunity for any corporation from the prosecution of offences just because the prosecution demands a mandatory imprisonment. And the court decided that in cases of offences which mandate both imprisonment and fine, the corporations should be punished with

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<sup>16</sup> (2003) 11 SCC 405

<sup>17</sup> 2009 SCC OnLine Del 4145

a fine.

The component of mens rea has assumed a vital job in the development of corporate criminal liability in India. It likewise included that the corporations might be said to act and think thoroughly considered the body of persons controlling it thus the mens rea of the body of persons in control ought to be discovered, which is for all intents and purposes viewed as in indistinguishable position as the corporations.

### **Fixing the Liability**

An Indian Courts have endeavored to distinguish the controlling and the coordinating mind of the companies and this rule is utilized in different statutes. The issue around there will be whether the coordinating person approved to follow up in the interest of the firm could be prosecuted when the corporations are not charged.

In the case of U.P Pollution Control Board v. Modi Distillery<sup>18</sup>, the respondent- industrial unit has been releasing its very harmful and contaminated exchange effluents into the stream through a local drain channel. This discharge, done by the industrial unit, made a breach of the Water (Prevention and Control of Pollution) Act of 1974. The Court held that the the directors and the people in charge of the organization's that the company's act could be prosecuted even if the company was not prosecuted.

The court also added that there was a “*technical fault on the part of the company to furnish the requisite information called for by the Board directed for making a formal amendment by the applicant and substitute the name of the owning industrial unit*”<sup>19</sup>.

The objection was inadequate yet was curable and the persons responsible for the conduct of the corporation should be prosecuted.

This ratio was reaffirmed in Anil Hada v. Indian Acrylic Ltd<sup>20</sup>. But in the case of AneetaHada vs M/S Godfather Travels & Tours<sup>21</sup>, the Supreme Court overruled the decision held in Anil Hada case and stated that the decision which was given in the Modi Distillery case is “treated to be restricted to its own facts” since it is decided on its own factual matrix. After stating so, the court held that if the company is arraigned as an accused then the proceedings against the director or the company cannot be maintained. In other words, there can be no vicarious liability unless there is any prosecution against the company.

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<sup>18</sup>AIR 1988 SC 1128

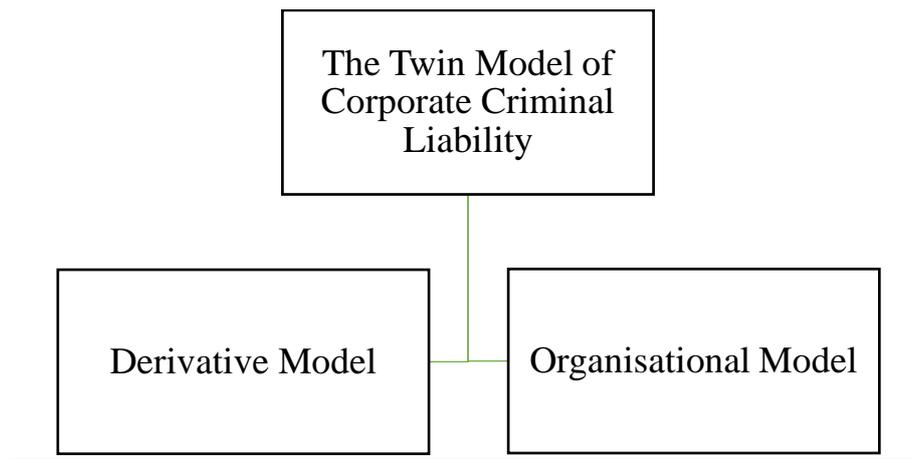
<sup>19</sup>AIR 1988 SC 1128

<sup>20</sup> (1999) BC 138 (SC)

<sup>21</sup> (2008) 13 SCC 703

There are different provisions in IPC which can be utilized to charge corporations for joint risk, criminal conspiracy, supporting and abetting unlawful activities and so on. The corporate criminal liability in India has developed quickly with the proclamation of the milestone decision from the legal executive and it is to be noticed that corporate criminal liability is only one among numerous parts of law which is utilized to make corporations accountable for their unlawful exercises.

## VI. THE TWIN MODEL OF CORPORATE CRIMINAL LIABILITY



Derivation model is usually an individual centred model as it derives to attach the liability to the corporation, this is because only an individual connected to the corporation can incur some liability for which an individual can be punished. Derivation model can further be sub-divided into Vicarious liability and Identification model.

The concept of Vicarious liability is based on two maxims, firstly, *qui facit per alium facit per se* which means he who acts through another shall be deemed to have acted on his own, and secondly *Respondent superior* which means that corporation can be held liable for act of employee's and its agents, which clearly states that let the master answer.

There are some standards set up by the New York central for creating the vicarious liability:

1. That the employees must act, at least in part, for purpose of benefitting the corporation or with the belief that the corporation will get benefit with the act. The corporation is benefitted or not, it completely secondary but their act is primary concern.
2. Secondly, the employee must have an apparent authority to act on behalf of the corporation.
3. Lastly, underscoring that the employee's actions and mental states will be attributed to the corporation despite being in violation of corporate policy and explicit instructions to the contrary.

In *Bartonshill Coal Co. V. McGuire*<sup>22</sup>, Lord Chelmsford had said that every act done by the employee and the agent, in the course of employment and his duty is regarded as done by his employer's orders, and consequently it is considered as employer's act done by the employer himself.

Whereas in *Commonwealth V. Beneficial Finance Company*<sup>23</sup>, held three corporations criminally liable for a conspiracy to bribe, the first company, for the acts of its employee, the second company, for the act of its Director, and the third company, for the acts of the Vice-President of a wholly owned subsidiary. The Court seemed to believe that corporate criminal liability was very necessary since, a corporation is a separate legal entity which consists of different individuals.

Whereas in Identification doctrine it is an English law doctrine which supports in finding and identifying the certain key person of the corporation who has acted on behalf of the corporation, and whose conduct and state of mind has been attributed to that of the corporation.

The principle of identification doctrine has been originated by the civil case *Lennard's Carrying Co. Ltd V. Asiatic Petroleum Co. Ltd.*<sup>24</sup>, where it was held that, in order to prove that a corporation had actual fault or privity, the privity of the company's manager was the privity of the company itself and added that the person 'who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation'.

Whereas in *H.L Boulton Engineering Company Ltd. v. T.J Graham and sons* a civil case where it was held:

"A company in many ways may be likened to a human body. It has a brain and a nerve centre which controls what it does. It also has hands which hold the tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company and control what it does. The state of mind of these managers is the state of mind of the company and is treated by the law as such."<sup>25</sup>

In totality it was held that A company, being a legal institution, cannot operate without human intervention. It cannot take actions nor have a state of mind. The principle, which is sometimes

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<sup>22</sup>3 Macq. H.L 300.

<sup>23</sup>360 Mass. 188, 275 N.E.2d 33 (1971)

<sup>24</sup>[1915] A.C 705, H.L(E.)

<sup>25</sup>[1957] 1 QB 159

known as the alter ego doctrine, was established from these cases.

We are thus still confused between vicarious liability and identification doctrine, leading to the fact that a comprehensive code needs to be drafted based upon the corporate fault principles so that the intent and the 'alter-ego' of the wrong doer can be punished accordingly.

In Organisational Theory, it focuses and takes into consideration the entire corporation and not just an individual, unlike the identification theory. According to this theory a offence requires mens rea that is a mental state to commit a crime along with actus rea that is physical action. But when it comes to make the corporation criminally liable, the problem arises that a corporation which is juristic person, How could possess requisite mental state to commit a crime.

Before Organisational model, Derivative model was the only attribute to know the mental state of the corporation. But then with this model, there was the other way that could be by proving that there existed an environment in the corporation which directed, tolerated and even encouraged the non-compliance of specific law which made it offence. Moreover, a physical act that too is required to complete the requirement of commission of an offence and can be derived or rather be proved from the act of the employees or the agent or directors or the officers. Thus, culture of the corporation is to be seen while determining its criminal liability.

The corporate culture may be the reason for the commission of an offence, firstly by providing the environment and the encouragement that it was believed by the offender working at that work place. And secondly, when the corporation has created an environment which led to the commission of the offence or the crime. Thus, the corporation culture plays a vital role in commission of the offence or crime at the corporation.

## VII. THE NEW APPROACH

The judgment in *SBM<sup>26</sup> judgment* arose from a special leave petition against the order of a Special Judge who took cognizance of the allegations made in the 2G spectrum allocation scam case and issued summons to Bharti Airtel Ltd., Hutchison Essar and Sterling Cellular for having defrauded the Government of India in the auction and allocation for 2G spectrum. Mr Sunil Bharti Mittal and Mr Ravi Ruia were, at the relevant time, the Chairman-cum-Managing Director of Bharti Airtel and Director of Sterling Cellular, respectively. In light of this, in the perspective of the Special Judge, these people who held top administrative posts with the

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<sup>26</sup>Sunil Bharti Mittal v. CBI, (2015) 4 SCC 609

arraigned organisation were *ipso facto* represented as the "coordinating mind and will" of these organizations which had purportedly committed the offences.

Accordingly, the Special Judge issued summons to these people as well, thereby imputing the criminal act of the company to the people who held top managerial posts. In doing so, the Special Judge applied the principle of attribution developed in *Iridium*<sup>27</sup> in reverse, moving from the criminal act of the company to those deemed to be in control, *without* a specific finding that these people were indeed guilty as such.

### VIII. RECOMMENDATIONS

The governing body should make due steps in the form of new punishments to curb the criminal activities done by the companies in the nation. The accompanying recommendation might be taken:

- The Courts should ready to pass some beneficial order rebuffing the corporate alongside the fine imposes on them.
- Stricter punishments like corporate disintegration. In such cases, courts ought to almost certainly administer whether any sort of reincorporation occurs with the punished corporate.
- While managing with crimes badly harming the people within the society, social sanction sought to be given.
- International arranges between nations should act so that the culprits don't get away from the risk with their associations with different nations.
- The courts ought to be in a situation to appoint technical and proficient specialists to make evaluation gives an account of the corporate, if circumstances demand.

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<sup>27</sup> *Iridium India Telecom Ltd. v. Motorola Inc.*, (2011) 1 SCC 74