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SCOPE, DISTINCTION AND APPLICABILITY OF SECTION 34 & SECTION 149 IPC

Introduction

The criminal liability of a person depends upon one fundamental principle which states that there must be wrongful act i.e. actus reus, combined with a wrongful intention i.e. mens rea. This fundamental principle is based upon the legal maxim ‘actus non facit reum nisi mens sit rea’ which means that ‘an act does not makes one guilty unless the mind also legally blameworthy’. A mere criminal intention not accompanied by the prohibited act cannot constitute a crime; similarly, mere a prohibited act ceases to be a crime unless it is accompanied by a guilty mind.¹ Thus, it can be that the criminal intent or the mens rea is one of the central elements to constitute crime. The word ‘intention’ is not specifically defined in IPC but Section 34 of IPC deals with common intention.

Sometimes scholars studying criminal law in India confuse Section 34 IPC with Section 149 IPC which deals with common object but both the sections are in no manner synonymous and have their own distinguishable characteristics. Although both these sections represent the rule of constructive liability which means that an individual is responsible for repercussions arising from the acts of another but are distinct because intention is different from object. Object behind an act can be seen or known but the intention cannot be. Further it is to be noted that Section 34 falls within the Chapter II of IPC which deals with General Explanations. Section 34 talks about common intention and tells that when can the intention be called common intention. On the other hand, Section 149 falls within Chapter VIII of IPC which deals with the offences of public tranquillity and prescribes the punishments thereof.

¹ KL Vibhute, PSA Pillai’s Criminal law 27 (14th ed. 2019)

Indic Legal Law Journal

Section 149 talks about the common object of the people of an unlawful assembly. Here unlawful assembly is in itself punishable u/s 143 IPC and Section 141 IPC defines as to when an assembly of people is said to be unlawful. Further, Explanation to Section 141 makes it clear that an assembly which was not unlawful when it assembled may subsequently become an unlawful assembly.²³

Thus, the main focus of this article is on the scope, applicability and distinction of Section 34 and 149 IPC.

Scope of Section 34 IPC

Section 34 of IPC deals with the acts done by several persons in furtherance of common intention. It states that “*when a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone*”.⁴ Here the term ‘act’ refers to a series of acts as a single act.⁵ However, Supreme Court defined the term ‘act’ used in the later part of Section 34 as the ultimate criminal act with which the accused is charged of sharing the common intention.⁶ And ‘common intention’ implies acting in concert. There is a pre-arranged plan which is proved either from conduct or from circumstances or from incriminating facts.⁷ Therefore, there must be prior meeting of minds. The prior concert or meeting of mind may be determined from the conduct of the offenders unfolding itself during the course of action and the declaration made by them just before mounting the attack. It can also be developed at the spur of the moment but there must be pre-arrangement or premeditated concert.⁸

In order to invoke liability under Section 34 IPC following ingredients must be fulfilled:

1. The criminal act consisting of series of acts should have been done, not by one person, but by more than one person.

² District and Session’s Court Aurangabad, Workshop on Civil and Criminal Held on March 28th 2015, [http://mja.gov.in/Site/Upload/GR/Title%20NO.104\(As%20Per%20Workshop%20List%20title%20no104%20pdf\).pdf](http://mja.gov.in/Site/Upload/GR/Title%20NO.104(As%20Per%20Workshop%20List%20title%20no104%20pdf).pdf)

³ Indian Penal Code 1860, §141

⁴ Indian Penal Code 1860, §34

⁵ Indian Penal Code 1860, §33

⁶ Suresh Kumar v. State of UP, AIR 2001 SC 1344

⁷ Gopi Nath v. State of UP, AIR 2001 SC 2493

⁸ Ramashish Yadav v. State of Bihar, (1999) 8 SCC 555

Indic Legal Law Journal

2. Doing of every such individual act cumulatively resulting in the commission of criminal offence should have been in furtherance of common intention. Here, the common intention must be distinguished from similar intention.⁹

However, it is to be noted that to attract Section 34 IPC, it is not necessary that each one of the accused must assault the deceased. It is enough if it is shown that they shared a common intention to commit the offence and in furtherance thereof each one played his assigned role by doing separate acts, similar or diverse.¹⁰ Here the common intention of all the accused must be to commit the particular crime though the actual crime be committed by anyone having the common intention. Then only others can be held to be guilty.¹¹

Under this Section 'Common intention' is a state of mind of accused which can be inferred objectively from the conduct of the accused displayed in the course commission of the crime as also prior and subsequent attendant circumstances, Mere participation in the crime with others is not sufficient to attribute common intention one of others involved in the crime. The subjective element in common intention therefore, should be proved by objective test. It is only then that one accused can be made vicariously liable for the acts and deeds of the other co-accused.¹²

Section 34 lays down a principle of joint liability in the doing of a criminal act. The section does not say 'the common intention of all' nor does it say 'an intention common to all'. Under the section, the essence of that liability is to be found in the existence of a common intention of the accused leading to the doing of a criminal act in furtherance of such intention. In order to bring home the charge u/s 34 successfully, it must be proved by the prosecution with the help of evidences whether direct or circumstantial that pre-arranged plan or the spur of moment but before the commission of crime.¹³ Therefore, the true concept of this Section is that if two or more persons intentionally do an act jointly, the position in law is that as if each one of them has done it individually by himself.¹⁴ Thus, it can be said that Section 34 IPC also recognises the principle of vicarious liability in the criminal jurisprudence. It makes a person liable for action of an offence not committed by him but by another person with whom

⁹ Suresh Kumar v. State of UP, AIR 2001 SC 1344

¹⁰ Nandji Rastogi v. State of Bihar, 2003 SCC (Cri)177

¹¹ Hardev Singh v. State of Punjab, AIR 1975 SC 179

¹² Harjit Singh v. State of Punjab, 2002 SCC (Cri) 1518

¹³ Mahboob Shah v. Emperor, AIR 1945 PC 118

¹⁴ Sachin Jana v. State of West Bengal, (2008) 3 SCC 390

Indic Legal Law Journal

he shared the common intention. It is a rule of evidence and does not create a substantive offence.¹⁵

Scope of Section 149 IPC

Section 149 IPC deals with the offences committed in prosecution of common object by the members of an unlawful assembly. It states that *“if an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence”*.¹⁶ For the purpose of this section the term ‘unlawful assembly’ is been defined under Section 141. According to which to constitute unlawful assembly there must be:

1. an assembly of five or more persons.
2. a common object for them.
3. Common object must be one of the five ingredients, specified in the above section.¹⁷

The Supreme Court of India in this regard has held that ‘it is competent to a court to come to the conclusion that there was an unlawful assembly of five or more persons, even if less than that number have been convicted by it if:

- (i) the charge states that apart from the persons named, several other unidentified persons were also members of the unlawful assembly whose common object was to commit an unlawful act.
- (ii) or that the first information report and evidence shows such to be the case even though the charge does not state so.
- (iii) or that though the charge and prosecution witnesses named only the acquitted and the convicted accused persons there is other evidence which discloses the existence of named or other persons.’¹⁸

Another important element under Section 149 is ‘Common Objective’. The word 'object' means the purpose or design and, in order to make it 'common', it must be shared by all. In

¹⁵ Suresh Kumar v. State of UP, AIR 2001 SC 1344

¹⁶ Indian Penal Code 1860, §149

¹⁷ Raghavendra Pratap Singh, Common Intention & Common Object, (February 4, 2015), <https://www.lawctopus.com/academike/common-intention-common-object/>

¹⁸ Ram Bilas Singh v. State of Bihar, (1964) 1 CriLJ 573

Indic Legal Law Journal

other words, the object should be common to the persons, who compose the assembly, i.e., they should all be aware of it and concur in it. A common object may be formed by express agreement after mutual consultation, but that is by no means necessary. It may be formed at any stage by all or a few members of the assembly and the other members may just join and adopt it. Once formed, it need not continue to be the same. It may be modified or altered or abandoned at any stage and the phrase 'in prosecution of common object' as appearing in Section 149 has to be strictly construed as equivalent to 'in order to attain the common object'.¹⁹ However, a common objective cannot be proved directly, it has to be inferred from the facts and circumstances of each case and also from the membership of the assembly, weapons used and the nature of injuries and the surrounding circumstances.²⁰ When the accused persons forming unlawful assembly inflicted their injuries on the head which did not cause any internal injury and there was no injury on the vital part of the body of the victim, the common object can be said to be only assaulting the victim.²¹

Section 149 is based upon the idea of constructive liability which is the sine qua non for its operation. Its main emphasis is on the common object and not on common intention. Mere presence in an unlawful assembly cannot render a person liable unless there was a common object.²² Therefore, it can be said that Section 149 IPC makes every member of an unlawful assembly at the time of committing of the offence guilty of the offence. The section creates a vicarious liability for the unlawful acts committed pursuant to the common object by any other member of the assembly. The basis of such constructive liability is mere membership of such assembly with the requisite common object or knowledge. Therefore, once the Court holds that certain accused persons formed an unlawful assembly and an offence is committed by any member of that assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every member of that unlawful assembly is to be held guilty of that offence. After such a finding it would not be open to the Court to see as to who actually did the offensive act or require the prosecution to prove which of the members did the offensive acts.²³ Further, it cannot be laid down as a general proposition of law that unless an overt act is proved against a person, who is alleged to be a member of unlawful assembly, it cannot be said that he is a

¹⁹ Gangadhar Behera v State of Orissa, 2003 SCC (Cri) 32

²⁰ Haramant v. State of Karnataka, 1994 CriLJ 1422 (SC)

²¹ Sitaram v. State of UP, AIR 1993 SC 350

²² Gangadhar Behera v State of Orissa, 2003 SCC (Cri) 32

²³ Lalji v. State of UP, AIR 1989 SC 754

Indic Legal Law Journal

member of an assembly. The only thing required is that he should have understood that the assembly was unlawful and was likely to commit any of the acts which fall within the purview of Section 141.²⁴ Even if no overt act is imputed to a particular person, when the charge is under Section 149, the presence of the accused as part of unlawful assembly is sufficient for conviction.²⁵

Section 149 IPC consists of two parts. The first part of the section means that the offence to be committed in prosecution of the common object must be one which is committed with a view to accomplish the common object. In order that the offence may fall within the first part, the offence must be connected immediately with the common object of the unlawful assembly of which the accused was member. Even if the offence committed is not in direct prosecution of the common object of the assembly, it may yet fall under Section 141, if it can be held that the offence was such as the members knew was likely to be committed and this is what is required in the second part of the section. Further, the word "knew" used in the second branch of the section implies something more than a possibility and it cannot be made to bear the sense of "might have been known". Positive knowledge is necessary. When an offence is committed in prosecution of the common object, it would generally be an offence which the members of the unlawful assembly knew was likely to be committed in prosecution of the common object. That, however, does not make the converse proposition true; there may be cases which would come within the second part but not within the first part. The distinction between the two parts of section 149 cannot be ignored or obliterated. In every case it would be an issue to be determined, whether the offence committed falls within the first part or it was an offence such as the members of the assembly knew to be likely to be committed in prosecution of the common object and falls within the second part. However, there may be cases which would be within the first, offences committed in prosecution of the common object would be generally, if not always, within the second, namely, offences which the parties knew were likely to be committed in the prosecution of the common object.²⁶

Distinction between Section 34 and Section 149 IPC

Although both Section 34 and Section 149 are based upon the idea of constructive liability and impose vicarious liability for the acts done by others but are distinct from each other in many ways.

²⁴ Madan Singh v. State of Bihar, (2004) 4 SCC 622

²⁵ Yunis v. State of Madhya Pradesh, 2003 Cr LJ 817 (SC).

²⁶ Gangadhar Behera v State of Orissa, 2003 SCC (Cri) 32

Indic Legal Law Journal

- Section 34 does not create any specific offence but only lays down the principle of joint criminal liability. Whereas Section 149 creates specific offence and being a member of an unlawful assembly is itself a criminal offence punishable u/s 143.
- ‘Common intention’ used in Section 34 is not defined anywhere in IPC, while ‘common object’ in Section 149 must be one of the five ingredients defined in Section 141 IPC
- “Common object” is different from “common intention” because it does not require a prior concert and a common meeting of minds before the attack. It is enough if it has the same object in view and they are five or more and that they act as an assembly to achieve that object.²⁷ However in case of Common intention prior meeting of minds of the persons participating in the criminal act is necessary. It is also to be noted this meeting of minds can be pre arranged or can happen at the spur of moment but it should be before the commission of criminal act. Further, for invoking Section 34 it is sufficient that two or more persons were involved.
- Under section 34 the emphasis is on physical presence and promotion or facilitation of the crime. However, u/s 149 common object along with merely being a member of an unlawful assembly within the meaning of Section 141, IPC may be sufficient.²⁸

Reforms Suggested

The Fifth Law Commission of India in its Forty Second Report proposed suggestions for reforms in Section 34 stating that it is ambiguous. It suggested that for better understanding of Section 34 the phrase ‘several persons’ be substituted by ‘two or more persons’.

Further the Law Commission also suggested that the third clause of Section 141 should be substitute ‘to commit any mischief or criminal trespass, or other offence’ with ‘to commit any

²⁷ State of Punjab v. Sanjiv Kumar, AIR 2007 SC 2430

²⁸ Jaswant Singh v State of Haryana AIR 2000 SC 1833

Indic Legal Law Journal

offence punishable with imprisonment' for the purpose of better understanding of Common objective as an element under Section 149.²⁹

Conclusion

Establishment of the vicarious liability u/s 34 or u/s 149 IPC depends on their method adopted for commission of the crime. However, sometimes there are difficulties in proving that whether the accused shared the common intention or not and also how many people were the members of Unlawful Assembly sharing same common object. But, Supreme Court removed these ambiguities in different cases after determining its facts and situation of each case.

Further, for clear and better understanding of these Sections the Law Commission of India had also given many suggestions to Legislature for amendment in some part of the statute. But even after so many efforts there are still difficulties in determining that which law section will be applicable amongst the two in some crucial cases, and therefore investigators and police officer filing charge sheets make mistakes.³⁰

²⁹ Law Commission of India 42nd Report, Indian Penal Code (June 1971)

³⁰ Raghavendra Pratap Singh, Common Intention & Common Object, (February 4, 2015), <https://www.lawctopus.com/academike/common-intention-common-object/>