CLASS ACTION SUITS AND INVESTORS' PROTECTION IN INDIA: A LEGAL PERSPECTIVE

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Abstract

Class action suits were introduced in India in 2016. Suprisingly, not even a single case of class action has been filed in the country so far, although there have been many instances where the aggreieved shareholders could have filed such suits. This paper examines the provisions of the class action law and analyses the reasons for such suits being non-starter in India. This is primarily because such suits are less appealing in India on account of concentrated ownership in the family-dominated corporate sector, marked often by family feuds leading to anti-oppression suits. Also, the investors in India have the other speedier and less costly legal recourse laid down by a comprehensive regulatory mechanism for investors' protection. The paper also identifies the gaps in the legal framework that should be filled to make these suits a reality.

Keywords *- Corporate Laws, Investors' Protection, Shareholders Rights, Class Action Suits, Prevention of Oppression and Mismanagement.*

I. Introduction

PROVISION OF class-action suits permit a group of persons to sue a company or institution on their behalf as well as others with a common cause. This kind of suit avoids conflicting decisions which are the resultant of 'multiplicity of cases' and are not exclusive of the later.

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Class action suits originated in the US in 1842 with the promulgation of rule 48[1] on class practice which stated:[2]

> Where the parties on either side are very numerous, and cannot, without manifest inconvenience and oppressive delays in the suit, be all brought before it, the court in its discretion may dispense with making all of them parties, and may proceed in the suit, having sufficient parties before it to represent all the adverse interests of the plaintiffs and the defendants in the suit properly before it. But in such cases the decree shall be without prejudice to the rights and claims of all the absent parties.

At present, the principal law of class suits in the US is the Federal Rules of Civil Procedure (Rule 23) under which class litigation can be filed broadly by security holders, consumers, and employees. Many securities class action suits have been filed by the investors in the US against violations of the Securities Act, 1933 and the Securities Exchange Commission Act, 1935[3]. There are a few noticeable examples where compensations of large amount were given to the security holders. In *Re Enron Corporation Securities Litigation*[4] settled in 2006 wherein $7.2 billion was paid to the investors who lost money when the company was decalred bankrupt owing to falsification of financial accounts and hiding of losses. In *Re. World Com, Inc. Securities Litigation*[5] which was settled in 2005 with $3.56 billion paid to the investors who purchased publicly traded shares and bonds of WorldCom between April 29, 1999, to June 25, 2002. Similarly in the case of *Re. Tyco International Ltd. Securities Litigation*[6] compensation of $2.975 billion was paid to the class of investors who were the victims of losses from false and misleading statements and aggressive accounting.

In the UK, a class action suit is titled 'group litigation' which is a part of English civil procedure permissible under two categories: 'opt-in', and 'opt-out'. The 'opt-in' action is called 'group litigation order' (GLO) which can be preferred under Section III of Part 19 of

[1] Hutchinson, Diane Wood, "Class Actions: Joinder or Representational Device?" 1983(1) *The Supreme Court Review*, 461 (1983).
[2] *Id.,* at 462.
[3] Parimala Veluvali, *Regulatory framework relating to investor protection with specific reference to retail investors in initial public offerings a critical study* 136 (2014) (Unpublished Ph.D. Thesis Symbiosis International University, Pune, *available at*: http://hdl.handle.net/10603/38115 (last visited on Oct. 23, 2020).
[4] Litigation No. H-01 -3624 (S.D. Tex.) filed in TXSD on Aug. 29, 2008.
[5] Case no. 02-cv-3288, US D. C., Southern District of New York, filed on June 27, 2002.
[6] Case no. 02-cv-00878, US D. C., Southern District of New York, filed April 2, 2002.

the Civil Procedure Rules (CPRs) and Practice Directions (PDs). Under GLOs which were introduced in May 2000, individual claimants are not included in the action suits unless they expressly join it (Rule 19.3)[7] The 'opt-out' suit known as 'representative action suit' is available under section VI of part 19 of the Civil Procedures Rules (CPRs) wherein a claim may be brought on behalf of the represented class without the need of claimants to join on an individual basis[8]. Unlike the US, class action suits could not take off in the UK due to the absence of an opt-out procedure until 2015 when an opt-out procedure was introduced in the Consumer Rights Act 2015[9]. In 2018, the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018 introduced the 'opt-in' and 'opt-out' provisions for all types of claims in the Scottish Courts[10].

In India, although the Companies Act, 2013 (Act 18 of 2013) introduced 'class action suit' in the statute book for the first time, representative suits have been allowed under various other laws. Rule 8 order 1 of the Civil Procedure Code 1908 permits representative suits with the sanction of the court; articles 32 and 226 of the Constitution of India also empower the persons to file Public Interest Litigation (PIL) on behalf of a large number of persons to enforce their constitutional and legal rights; and section 35(1) of the Consumer Protection Act, 2019 (Act 35 of 2019) permits the filing of a complaint (in relation to any goods sold or services rendered) by one or more consumers on behalf of all the interested consumers with the approval of the District Commission.

Protection of investors' interest, especially non-promoter shareholders, depositors, and creditors is the rivet of the Indian company law, which has placed the Indian regulations at fourth place of the global ranking on minority investors' protection[11]. Provisions relating to class-action suit, although introduced in the Indian Companies Act, 2013 (Act 18 of 2013) became operative from June 1, 2016[12]. Provision regarding the 'requisite number of members/depositors' to file a class-action suit was brought in by 2019 amendment, whereas

[7] Ministry of Justice, "Civil Procedure Rules, Part 19" *Parties and Group Litigation*, Jan. 30, 2017, *available at*: https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part19 (last visited on July 31, 2021).
[8] *Id.,* at 19.6.
[9] Editorial, "Opt-out Class Action in the UK: Are we entering a new era in Litigation?" *Interenational Disputes Digest*, Aug., 2019, *available at*: https://cms.law/en/mkd/publication/opt-out-class-actions-in-the-uk-are-we-entering-a-new-era-in-litigation (last visited on July 31, 2021).
[10] *Id.,* 'Developments in Scotland – the 2018 Act'.
[11] Joe C Mathew, "Ease of Doing Business 2018 rankings: India jumps 30 points to reach top-100 club" *Business Today*, November 1, 2017.
[12] Section 245 on class action suit was brought in force from June 1, 2016 vide notification of the Ministry of Corporate Affairs, Government of India, number S.O. 1934 (E) dated June 1, 2016.

the filing procedures were notified on May 18, 2019, by the National Company Law Tribunal (Second Amendment) Rules, 2019[13].

This paper based on the existing case laws, legal provisions on investors' protection, and recent cases of corporate feuds and frauds, analyses the reasons of class suits being non-starter in India despite many cases where relief could have been sought under the provisions of these suits. The paper also highlights the unresolved legal issues which need to be settled to make these suits a reality beyond the statute book. As the class action law is at the evolving stage in India, it is for the legislature and the judiciary to play a proactive role in bridging the gaps.

II. Investor Protection in India

The Companies Act 2013 (Act 18 of 2013) contains many provisions which seek to protect the investors by providing recourse to proceed against the directors, promoters, and others in case of wrongdoings. To secure the interest of investors, heavy financial penalty and also imprisonment are provisioned in cases of violation of various requirements under the Act or tempering with the documents or accounts of the company[14]. Some of the specific provisions to safeguard the interest of the investors are: section 34 of the Companies Act prescribes criminal liability against the directors, promoters, etc. in case of misrepresentation in the prospectus; section 35 requires these persons to pay compensation to the investors who have suffered losses or damages on account of such misleading prospectus; section 36 prescribes punishment of the persons who intentionally or recklessly induce the investors to invest in the company through any agreement or to secure a profit; and section 73(1) states that no company shall invite, accept or renew deposits from the public except in a manner provided under Chapter V of the Act. In addition, section 73(4) of the Act empowers the depositors to apply to the National Company Law Tribunal (NCLT) for an order directing the company to pay the sum due or compensate for any loss or damage as a result of non-payment of deposits.

[13] Ministry of Corporate Affairs, "National Company Law Tribunal (Second Amendment) Rules, 2019" *Gazette of India*, *available at*: https://www.mca.gov.in/Ministry/pdf/AmendmentRules1_08052019.pdf (last visited on July 31, 2021).

[14] For instance, section 447 of the Companies Act, 2013 provides that any person who is found to be guilty of fraud involving an amount of at least ten lakh rupees or one per cent of the turnover of the company, whichever is lower shall be punishable with imprisonment for a term which shall not be less than six months but which may extend to ten years and shall also be liable to fine which shall not be less than the amount involved in the fraud, but which may extend to three times the amount involved in the fraud.

The interest of shareholders is also safeguarded by the Companies Act, 2013, by way of conferring certain statutory rights on them. Some of important rights are: right of access to the statutory books and documents[15], right to make fundamental corporate decisions[16], right to appoint directors and auditors including their removal, and right of participation in the general meeting including voting, appointing proxies, requisitioning extra-ordinary general meeting.

The regulatory framework to protect investors' interests in India is quite comprehensive. Besides the remedial actions laid down in the Indian Companies Act, 2013, shareholders of the listed companies may file complaints with the Securities and Exchange Board of India (SEBI)[17] to protect the interest of investors in securities[18]. SEBI has framed extensive regulations to prohibit manipulation of securities prices, fraudulent trade practices, insider trading, and financial reporting frauds[19]. SEBI has been mandated with the power to investigate, prosecute and penalize the violaters of rules and regulations framed by it.

The regulations enforced by SEBI have been quite effective in the protection of investors' interest particularly the public issues of securities, referred to as 'Initial Public Offerings' (IPOs). It was for the first time in the history of the stock market in India that the investors were compensated for the notional losses in not getting any allotment of shares on account of a few security dealers and brokers who cornered shares meant for retail investors in 21 IPOs, including Tata Consultancy Services, YES Bank and Suzlon Energy, during 2003-05 by opening multiple fictitious 'Demat accounts'[20]. A whopping amount of Rs 95.69 crore was

[15] Memorandum of Association; Articles of Association; Annual Report including Director' Report; Balance Sheet and Profit and Loss Account. To inspect Register of Members; Register of Debenture-holders; Register of Charges; Register of Investments; Minute Books of general meetings; Proxies lodged for the general meeting; and all returns filed by the company.

[16] Changing registered office; authorising capital increases; buying back shares; amending articles of association; delisting; acquisitions, disposals, mergers and takeovers; changes to company's objectives; making loans and investments beyond prescribed limits; authorizing the board to: sell or lease major assets; borrow money in excess of paid-up capital and free reserves, and appoint sole selling agents; and apply to the Tribunal (NCLT) for the winding up of the company.

[17] SEBI is the stock market regulator in India constituted under the SEBI Act 1992 (No.15 of 1992).

[18] SEBI Act 1992, s.11(1).

[19] Some of the relevant regulations are: SEBI (Appointment and Procedure for Refunding to the Investors) Regulations 2018, SEBI (Issue of Capital and Disclosure Requirements) Regulations 2018, SEBI (Listing Obligations and Disclosure Requirements) Regulations 2015, SEBI (Prohibition of Insider Trading) Regulations 2015, SEBI (Prohibition of Fraudulent and Unfair Trade Practices relating to Securities Market)

[20] PTI, "Stock scam: investors to receive compensation" *Mint, E- Paper*, April 9, 2010, *available at*: https://www.livemint.com/Money/jeJDim5sNovLHcaP53yAUP/Stock-scam-investors-to-receive-compensation.html (last visited on Nov. 12, 2020).

made by the fraudsters which were recovered from them through 'disgorgement' and paid to the retail investors[21].

In another similar case, SEBI dredged up a large-scale fraud in IPOs of Jet Airways and Infrastructure Development Finance (IDFC) wherein hundreds of fictitious 'Demat accounts' were used to corner shares meant for retail investors which were later transferred to Opee Stock (an Ahmedabad based-operator) and other such entities. Those shares were then offloaded at higher prices after listing. In December 2008, the SEBI passed orders for disgorgement of the illegal gains. It was, however, set aside by the Securities Appellate Tribunal (SAT). An appeal[22] was filed to the Supreme Court of India which quashed the orders of the SAT and restored the 'disgorgement' orders of the SEBI. An unlawful gain of Rs 41.34 crore from the IPO scam was also reallocated to about 1.27 million investors[23].

III. Anti-Oppression Law

The long-settled 'majority rule' principle in *Foss*.v. *Harbottle*[24] stands for prevailing of the majority decisions in corporate matters. The facts of the case were - Richards Foss and Edward Turton, the two minority shareholders in a company 'Victoria Park Company' filed a legal suit against Thomas Harbottle and other four promoters and directors of the company. The claimants alleged that assets of the company had been misapplied fraudulently causing losses to the company. They contended that the guilty parties be held accountable and prayed that the defendant be decreed to compensate the company for the loss.

The court held that 'when a company is wronged by its directors it is only the company which is competent to settle it'. The court, thus established two rules. Firstly, the 'proper plaintiff rule' that a wrong done to the company may be vindicated by the company alone. Secondly, the 'majority rule principle' that if the alleged wrong can be confirmed or ratified by a simple majority of members in a general meeting, then the court will not interfere.

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[21] PTI, "IPO scam: Retail investors may be compensated" *The Economics Times*, December 29, 2009, *available at*: https://economictimes.indiatimes.com/markets/ipos/fpos/ipo-scam-retail-investors-may-be-compensated/articleshow/5392225.cms?from=mdr (last visited on Nov. 14, 2020).
[22] *Securities and Exchange Board of India* v. *Opee Stock-Link Ltd*., 2016 SC 2252.
[23] N. Sundaresha Subramanian, "The scam that changed India's primary market" *Business Standard,* New Delhi, July 14, 2016.
[24] 67 E.R. 189; 1843 2 Hare 461.

These rules were laid down in 1843 and *Foss* v. *Harbottle* is one of the most cited case on majority rule. The Supreme Court of India also reiterated the majority rule in the case of *Rajahmundry Electric Supply Co.* v. *Nageswara Rao*[25]. Chapter XVI (sections 241 to 245) of the Companies Act, 2013, however lays down exception to the 'majority rule'. Sections 241 to 244 of the Act confer rights to shareholders in matters of oppression by the majority shareholders or mismanagement of the company. The lesser of one hundred shareholders or those holding at least ten percent of voting rights can approach the National Company Law Tribunal (NCLT) for relief against oppression and mismanagement. NCLT has wide powers for regulating a company's affairs to repress oppression and mismanagement. It can terminate or modify agreements entered into by the company or remove/appoint directors to the board; and set aside any agreement or transaction which the company has entered into.

Oppression and mismanagement, as per section 241(1) of the Companies Act, 2013 include the conduct of a company's affairs prejudicial to the public interest[26]; or in a manner prejudicial or oppressive to the member(s) making such application or to any other member(s) of the company; or in a manner prejudicial to the interest of the company. To prove oppression, one has to prove that the decisions taken by the majority shareholders are against the interest of minority shareholders alone or benefit majority shareholders at the expense of minority shareholders. In *Shanti Prashad Jain* v. *Kalinga Tubes Ltd*.[27], the Supreme Court of India opined:

> It must be shown that the conduct of the majority shareholders was oppressive to the minority as members. There must be continuous acts on the part of the majority shareholders showing that affairs of the company were being conducted in a manner oppressive to some parts of the members. The conduct must be burdensome, harsh, and wrongful, and mere lack of confidence between the majority shareholders and the minority shareholders would not be enough.

The Court further pointed out that oppression must involve at least an element of lack of probity or fair dealing with a member so far the rights of members are concerned. It has also been held by the Supreme Court that an unwise or inefficient conduct of the directors would

[25] AIR1956 SC 213.
[26] 'Public interest' means functioning of a company for the public good or general welfare of the community and not in a manner detrimental to public good (*N.R. Murty* v. *Industrial Development Corporation of Orissa Ltd.,* 47 Com. Cas., 1977 HC Orissa 389).
[27] AIR 1965 SC 1535.

not be a ground for relief against oppression[28]. The words "the affairs of the company have been or being conducted…."[29] pertain to both continuing and past instances of oppression and mismanagement. It is not sufficient to allege that the affairs of the company have been or being conducted in a manner which is oppressive to the minority members. There should be a course of oppressive conduct and the applicant must give specific instances and facts of oppressive actions, not merely statements or opinions of third parties[30].

What is more important in cases of oppression and mismanagement is to establish that the decisions taken by the majority shareholders have impacted only the minority shareholders or benefitted only the majority shareholders. In case of a dispute between the majority or minority on the issues of governance or management, the majority will prevail provided it is acting within the domain of law as laid down by the Companies Act, memorandum of association, and articles of association of the company. It is pertinent to cite the case of *Tata Sons Ltd.* The petition alleging oppression of minority shareholders was made to the Mumbai Bench of NCLT by the two investment firms of the Mistry family. The allegations focussed on the oppression of minority shareholders (i.e. the two family firms of Cyrus Mistry) owing to the removal of Cyrus Mistry from the chairmanship of Tata Sons on October 24, 2016. The Mumbai Bench of NCLT in its July 9, 2018 order rejected the petition[31] and justified Mistry's removal as the chairman of Tata Sons on October 24, 2016. The Bench was of the opinion that "in corporate democracy, decision making always remains with board of directors as long as they enjoy the pleasure of the shareholders"[32].

There are many instances wherein reliefs have been granted by the court/Company Law Board (CLB)[33]/NCLT[34] against oppression and mismanagement. The effectiveness of section 241 of the Companies Act, 2013 to check oppression and mismanagement is evidenced by cases wherein fraud/malpractices had been detected and the Central Government moved the NCTL/CLB to supersede the boards of such companies and appointed the government

[28] *Needle Industries (India) Ltd.* v. *Needle Industries Newey (India) Holding Ltd.,* 1981 AIR 1298, para 15(ii).
[29] The Companies Act, 2013, s. 241(1).
[30] *Maharastra Power Development.* v. *Dabhol Power Company,* AIR 2004 Bom 38, para 19.
[31] *Cyrus Investments Pvt. Ltd.* v. *Tata Sons Ltd*. (2017) 2 CompLJ 332.
[32] The two investment firms of Cyrus Mistry filed an appeal at the National Company Law Appellate Tribunal (NCLAT) against the July 9, 2018 order of NCLT alleging that the verdict has "errors of law and errors in reasoning", relying on "external information".
[33] The Companies Act, 1956, had given the power of relief in case of oppression and mismanagement to the court which was substituted by the Act 31 of 1988, (w.e.f. 31- 5- 1991) to the Company Law Board (CLB).
[34] The Companies Act, 2013, has vested this power to the NCLT under section 241. NCLT commenced functioning w.e.f. June 1, 2016.

nominees on the boards to take the remedials steps including investigations by the investigating wing of the Central Government[35].

However, there are many cases[36] where relief was sought by a few disgruntled shareholders on frivolous grounds to settle their score with the promoters and management. The family feuds in the companies controlled by families have often culminated in the oppression suits. The recent one was that of Kirloskar Brothers Ltd., wherein the feud in the Kirloskar family which controlled the 130-year-old Kirloskar Group widened further with filing of anti-oppression suit at the NCLT (Mumbai Bench) by one faction of the family to oust the other faction of the family alleging oppression and mismanagement[37].

IV. Class Action Suits in India

In India, although the Companies Act, 2013 introduced the 'class action suit' in the statute book, Code of Civil Procedure (CPC) 1908 has an enabling provision since 1977. Rule 8 order 1 of the CPC lays down that a person may file a suit representing a group of persons with a 'common concern' on the directive of the court. The court in such case has to notify the persons who are proposed to be interested. A decree passed on such a suit shall be operative on the persons joining the suit.

A case in point is that of *TCI Cyprus* v. *Coal India Ltd. (CIL)*[38]. Children's Investment Fund Management (UK) LLP (TCI in abbreviation) is a UK-based hedge fund held nearly 1.35% shareholding in the government-owned Coal India Ltd (CIL). It filed petitions in the Calcutta and Delhi high courts in 2012 against Coal India and its' directors for mismanagement and under-pricing of coal. The directors of Coal India were charged by TCI for negligence to perform their duties "with adequate care and skill". The Fund also named the government for allegedly misusing the majority shareholder powers and for breach of investors' interest

[35] In September 2018, the government moved the NCLT to suspend the Board of IL&FS plagued by debt defaults. The NCLT (Mumbai Bench) approved it noting that mismanagement in IL&FS made the case a fit one as "affairs of IL&FS were being conducted prejudicial to public interest" and invoked section 241(2) to suspend the existing board. Similarly, in January 2009 when the fraud of Satyam Computer Services Ltd. came to light following a confession of manipulating the books of the company by its chairman, the government moved Company Law Board for supersession of the Satyam board of directors and appointed its own nominees on the board.

[36] Some of the such cases are: *Aruna Oswal* v. *Pankaj Oswal*, AIR 2020 SC 3088; *Chatterjee Petrochem (I) Pvt Ltd.* v. *Haldia Petrochemicals Ltd.*, AIR 2012 SC 2753; *Shri V.S. Krishnan* v. *M/S Westfort Hi-Tech Hospital,* (2008) 3 SCC 363.

[37] *Kirloskar Industries Ltd.* v. *Kirloskar Brothers Ltd.,* CP/93/241,242/2017.

[38] *TCI Cyprus* v. *Coal India Ltd* (CIL), GA No 2969/2012 (Calcutta High Court).

protection treaties that India had with the UK and Cyprus.

TCI claimed that by the close of 2012-13, CIL would have lost more than $1.75 billion in pre-tax profits on account of price increase reversing of December 2011. Further, the plaintiff in the first-ever representative suit in India, contended that directors of CIL were liable to pay $43 billion for failing to raise coal prices to the market level since the initial public offering of the company.

TCI asked for compensation on the ground that notional profit would have been paid as dividend to the shareholders[39]. The Calcutta High Court permitted the suit by TCI as a representative suit under Code of Civil Procedure, 1908 (Order 1, Rule 8) and directed it to place advertisements in the national dailies for informing the other affected investors about the representative suit. The High Court of Delhi also issued notices to Coal India and the Central government. However, in December 2013, TCI withdrew both cases for undisclosed reasons[40].

The need for a class action suit was, in particular, felt after the Satyam scam involving fraudulent accounts and diversion of funds which left thousands of investors high and dry with the market price of the share of the company nosedived from a high of Rs. 178.95 on January 6, 2009 to Rs. 11.50 on the BSE Stock Exchange and Rs 6.50 on the National Stock Exchange (NSE) on January 9, 2008, wiping out Rs. 9,376 crores of investors' wealth in just three days[41]. Midas Touch Investors Association filed a suit in National Consumer Dispute Redressal Commission, New Delhi to claim damages of Rs 4,987.5 crores for nearly 300,000 shareholders[42] of Satyam Computer Services Ltd who were defrauded by the promoters and the auditors of the company. The suit was dismissed by the court as being outside the scope of the Consumer Protection Act. Midas Touch also filed a suit in the Supreme Court on behalf of these shareholders to seek compensation of nearly Rs 5,000 crores from the promoters, directors, and statutory auditors for the losses due to the accounting fraud.

[39] TNN, "The Children's Investment Fund sues government, Coal India directors over loss" *The Times of India*, New Delhi, Oct. 13, 2012, *available at*: https://timesofindia.indiatimes.com/business/india-business/The-Childrens-Investment-Fund-sues-government-Coal-India-directors-over-loss/articleshow/16790705.cms(last visited on Nov. 11, 2020).

[40] Sumit Moitra, "TCI withdraws case against Coal India, quits battle to change government ways" *DNA*, Dec. 25, 2014. *available at*: https://www.dnaindia.com/business/report-tci-withdraws-case-against-coal-india-quits-battle-to-change-government-ways-2046806 (last visited Nov. 11, 2020).

[41] Anil Kumar, *Corporate Governance: Theory and Practice* 119 (International Book House, New Delhi, 2012).

[42] Treating shareholders of Satyam Computer Ltd. as consumers of financial products and services.

However, the court did not admit the lawsuit and advised its withdrawal giving no reason for this response[43].

In contrast, several class-action suits for claims were filed by the US investors in the District Court of Southern District of New York against the company, its promoters, auditors, and others for violation of the US securities laws[44]. The investors hit severally by the fraud got compensation of nearly $125 million in out of the court settlement[45].

Legal Provisions

The Companies Act, 2013 introduced the statutory provisions on class action suits which are laid down in section 245 of the Act. These provisions were, however, notified on June 1, 2016. With the constitution of the National Company Law Tribunal (NCLT)[46] in June 2016 followed by the notification of NCLT Rules 2016, the legal framework for representative suits was put in place in India. On May 8, 2019, the Ministry of Corporate Affairs, Government of India notified[47] the NCLT (Second Amendment) Rules, 2019 which prescribe the procedure for filing the class lawsuit.

As per section 245(1) of the Companies Act, 2013, requisite member(s)[48] /depositor(s)[49] can file a petition to the NCLT on behalf of the members or depositors when they view the conduct of the company against their interest or of the company. The requisite number of members as per section 245(3) of the Act[50] are:

(a) for companies having a share capital, at least one hundred members or 5% of the total number of members, whichever is less or member(s) holding at least 5% of the total

[43] *Midas Touch Investors Association* v. *Satyam Computer Services Ltd.,* Civil Appeal No 4786/2009.
[44] *Re. Satyam Computer Services Ltd.*, Securities Litigation, US District Court, Southern District of NY, No 09-MD-2027 (BSJ).
[45] Vivek Sinha, "Satyam seals $125-mn class action deal" *Hindustan Times*, New Delhi, Feb. 17, 2011.
[46] Following the recommendations of the Eradi Committee, National Company Law Tribunal was introduced by the Companies (Amendment) Act, 2002. NCLT was intended to be introduced in the Indian legal system in 2002 to take away the powers of the courts in dealing with corporate civil disputes or matters arising out of it. However, the constitutional validity of NCLT was challenged in the court of law, therefore, NCLT could not be constituted until in May 2015 the Supreme Court of India upheld the constitutionality of the NCLT . In June 2016, the Central Government constituted National Company Law Tribunal (NCLT).
[47] Minitry of Corporate Affairs, Notification *Gazette of India*, May 8, 2019, *available at*: http://www.mca.gov.in/Ministry/pdf/AmendmentRules1_08052019.pdf (last visited on Dec. 5, 2020).
[48] Member as per s. 2(55) of the Companies Act, 2013, means a person who is a subscriber to the memorandum of the company, has agreed in writing to become a member, holds shares and his/her name is entered as a member in the register of members. The terms 'member' and 'shareholder' are generally used interchangeably.
[49] Depositor means any member of the company who has made a deposit with the company as per s. 73(2) of the Companies Act 2013.
[50] Inserted by the NCLT (Second Amendment) Rules 2019.

issued share capital in case of an unlisted company and 2% in case of a listed company'. It is subject to the condition that the member(s) have paid all calls and other dues.

(b) For a company without share capital, at least one fifth of the total number of members.

(c) The requisite number of depositors are at least one hundred or 5% of the total depositors, whichever is less or the depositor(s) to whom the company owes 5% or more of the total deposits.

While section 245 is wide in scope as the interpretation of the words "prejudicial to the company interest or its members or depositors" is subject to judicial prudence, clauses (i) to (h) of section 245(1) lay down the instances/situations wherein order from the NCLT may be sought for claiming relief and/or damages by the members/depositors for seeking an injunction against the company for doing ultra vires acts; declaring a resolutions void when it is passed by suppression or misrepresentation of material facts; claiming damages or compensation or other appropriate action against the company or its directors or auditors or an advisor or expert or any other associated person of the company for any wrongful, fraudulent or unlawful act or misleading statement or report or omission. It is important to emphasize that it is a major departure from rule 8, order 1 of the CPC which requires a common 'question of fact' or 'law' of the representing members for such type of suit. Class lawsuit can be filed against a company which is registered under the Indian company law. However, banking companies are exempted from these provisions. To avoid duplicity or overlap of suits, a class suit is not permissible for matters which may be pursued by the member(s)/depositor(s) under other sections of the Companies Act, 2013, for example, in case of misrepresentation in the prospectus issued by the company, civil and criminal suits against the directors, promoters, auditors and others responsible for the issue of such prospectus can be filed under sections 34 to 36 of the Companies Act[51]. Similarly, individual suits can be filed in case of withholding property of the company (section 452); failure to return application money [section 39(3)]; default in holding of annual general meeting (section 99); and failure to pay dividend which is declared (section 127).

Class Action Suits *vis-a-vis* Anti-Oppression Suits

[51] Refer to part II of the paper for details.

While the provisions on class action suits and anti-oppression suits are included in the same chapter XVI in the Companies Act, 2013 and under both the suits the applicants have to establish conduct of company affairs prejudicial to the public interest, the relief sought under these suits are different. Under a class lawsuit, applicants may get compensation/damages for any unlawful or fraudulent conduct from directors as well as third party experts such as auditors or valuers; or may obtain an injunction restraining the company and directors from doing those acts which are *ultra vires*. In suits for oppression prevention, the power of the Tribunal is broadly to regulate the company affairs or/and remove director(s) and appoint new directors or to set aside a contract or transaction(s). The difference between the two was demonstrated in Satyam Computer scam involving fraudulent financial manipulation. Under the provisions of oppression and mismanagement, the directors were removed by the orders of the CLB[52] and government nominees were appointed to protect the stakeholders' interest. However, the shareholders of the company could not be indemnified for the losses from a deep fall in the market price of their shares. Had there been a class action suit in the Indian statute book at that time, Indian shareholders would have got damages from the company, directors, auditors and others.

Another major difference is that while class lawsuit is allowed on behalf of non-participating shareholders or depositors belonging to a class, in anti-oppression suits all the applicants to the suit are required to join as a party to the suit. Moreover, actions for oppression and mismanagement can be initiated only by the members (shareholders) of the company who individually or together own at least 10% of shares in the company. The Central Government has also been given power by section 241(2) of the Companies Act to file a suit with the NCLT when "it is of the opinion that the affairs of the company are being conducted in a manner prejudicial to public interest". On the contrary, class action suits may be filed by the requisite members as well by the requisite number of depositors which is specified under section 245(3) of the Act.

Finally, the anti-oppression suit cannot be instituted for isolated instances of abuse as there is a requirement of continuous acts or misconduct by the majority shareholders on the minority shareholders[53]. Class action suit, on the other hand may be filed to claim damages or compensation for "any fraudulent, unlawful or wrongful act or omission or conduct or any

[52] Before the constitution of National Company Law Tribunal, Company Law Board was the authority for such matters.
[53] *Shanti Prashad Jain* v. *Kalinga Tubes Ltd*., AIR 1965 SC 1535, para 20.

likely act or omission or conduct" by the company or any of its director[54]. The compensation or damages can also be claimed against the auditor "for any improper or misleading statement of particulars made in the audit report"[55]. Such instances can be one-off unlike the anti-oppression suits where it has to be continuous and 'burdensome' on the minority shareholders who have approached the NCLT for relief.

V. Why Class-action suit is non-starter in India?

Class action suits provide protection to the investors by enabling them to claim damages from the unscrupulous promoters and directors of the company by pooling their resources to share the cost of litigation. It an effective mechanism to put dishonest directors or auditors on the hook and to bring to fore that giving misleading information or engaging in fraudulent activities can end up in paying huge compensation to the affected investors.

The important question to examine is why the class lawsuits could not take off in India. It's more than three years now that the legal framework of this kind of suit was put in place in the Companies Act, 2013, but till date not even a single suit is filed in India[56]. It is astounding that a number of frauds and misdeeds have surfaced in the Indian corporate sector in the recent past where class suits could have been initiated by the affected parties to seek compensation for the losses. It is in complete contrast with the US where a class suit is a well-established mechanism evident from the fact that between January 1, 1996, and June 30, 2018, a total of 4,989 federal securities class action suits were filed[57]. The settlement rate of such suits was 49% of the total core filings which is quite encouraging[58].

The reasons for the non-initiation of class action suits in India are grounded in the peculiarities of Indian corporate sector and the related corporate governance issues. The

[54] The Companies Act, 2013, s. 245 (1) (g) cl. (i).
[55] *Id.,* at cl. (ii).
[56] Manjeet Kripalani and Kartik Ashta, 'Experts Explain: Hurdles in Class action' *Indian Express*, June 24, 2021, *available at:* https://indianexpress.com/article/explained/cyclone-tauktae-ongc-barge-disaster-hurdles-in-class-action-7372907/ (last visited on Aug. 5, 2021).
[57] Cornerstone Research, "Securities Class Action Filings" *Midyear Assessment* 32, 2018, *available at*: https://www.cornerstone.com/Publications/Reports/Securities-Securities-Class-Action-Filings%E2%80%942018-Midyear-Assessment (last visited on Nov. 29, 2020).
[58] *Id.,* at 17.

corporate sector in India is dominated by the family-owned companies[59]. A few established business families have a dominating control over the companies promoted and developed by them over many years. Their shareholding in more than two-third of the listed companies (as on March 31, 2018) was more than 50 percent[60]. In such corporate structures, "dominance of controlling shareholders operates to dampen the effects of shareholders activism"[61]. The retail shareholders in most cases are the passive participants in the corporate affairs of the companies and prefer to exit the market whenever a slight indication of misgovernance is noticed. The head of the 'business family' who is generally the chairman of the group companies has significant influence in the bureaucratic and political set up of the country[62]. The cultural and social milieu of the country is also such that individual shareholders generally take the business houses in high esteem on account of their role in industrial development of the country[63]. It requires considerable courage to challenge the functioning of such companies. Most companies in India have also learnt the 'smart ways' to maneuver and dampen the effects of shareholder activism. Class suits are thus "more suitable for a country like USA wherein shareholding is dispersed"[64].

Many prominent family companies in India have been facing family feuds leading to either division of group companies or in most cases these battles are fought in court rooms[65]. Some recent cases are that of Tata Sons, Religare and Fortis, Hinduja, Singhania, Wadia, Kirloskar, Bajaj Industries, Mafatlal to name a few. The litigation in many of these cases pertains to the removal or appointment of directors or managing director for which application under section 241 of the Companies Act had been filed. The retail or minority shareholders in such battles choose to be 'moot spectators' finding it extremely difficult to take legal recourse against the losses on account of the fall in share prices emanating from the family discords of the controlling shareholders. The related factor is that on account of concentrated shareholding

[59] Credit Suisse Research Institute (CSRI), 'Credit Suisse Family 1000 in 2018' *available at:* file:///Users/anilkumar/Downloads/the-cs-family-1000-in-2018.pdf (last visited on Aug. 4, 2021).
[60] OECD, *Ownership structure of listed companies in India* (2020) *available at:* https://www.oecd.org/corporate/ownership-structure-listed-companies-india.pdf (last visited on Oct. 29, 2020).
[61] Varottil Umakanth, "The Advent of Shareholder activism in India" 1(6) *Journal of Governance* 586 (2012).
[62] *Supra* note 41 at 173.
[63] *Id*., at 174.
[64] Vikramaditya Khanna and Umakanth Varottil, "The Rarity of Derivative Actions in India: Reasons and Consequences", In Dan W. Puchniak, Harald Baum, *et al.* (eds.) *The Derivative Action in Asia: A Comparative and Functional Approach* 386 (Cambridge University Press, 2012).
[65] Panache, "Hinduja v/s Hinduja, Ambani Brothers in Arms, and other family feuds of India" *The Economic Times*, June 29 2020, *available* at: https://economictimes.indiatimes.com/magazines/panache/singh-vs-singh-and-other-family-feuds-that-shook-up-india-inc/ets-dualpane-12/slideshow/65682537.cms (last visied on Aug. 3, 2021).

with the business families, the bulk of the compensation amount in the event of the success of class action suit would go to the majority shareholders[66] who themselves are responsible for such losses. This acts as disincentive to initiate such suits. The retail shareholders would rather be contended with compensation in direct individual suits.

Institutional investors[67] have gained importance in the Indian corporate sector in the last three decades and have become "major driver of India's capital market" holding more than one-third of equity shares (by market capitalization) in the largest 500 Indian listed companies[68]. However, the role of institutional investors to monitor the companies or to take direct legal action is minuscule in India. They have been 'passive' on the issues of governance of the invested company and prefer 'voting by feet' rather than 'by voice' or file suits against the companies they have invested their money. Probably for the first time, the institutional investors of Satyam Computers Ltd. raised their voice against the diversion of company funds for the family concerns of the promoter. One more instance was particularly noticed when 12 mutual funds who had invested in Infosys wrote a letter[69] to the directors of the company expressing their concern about the developments in the company and persuaded to bring back the co-founder of the company, Mr Nandan Nilekani. Similarly, in November 2018, the shares of Sun Pharmaceutical Industries with majority shareholding (54.78%) of Shanghvi family[70] and associates, dove to a six-month low with some concerns on corporate governance practices raised by an Australian brokerage firm Macquarie[71]. Immediately thereafter the National Stock Exchange (NSE) and BSE Stock Exchange sought clarification from the company. Later, Sun Pharma clarified that the company complied with corporate governance requirements as laid down by the SEBI (Listing Obligation and Disclosure Requirements) Regulations 2015.

It is highly unexpected from the institutional institutions to initiate or support or fund any class action suit against the 'invested companies'. It would not only be dysfunctional but detrimental to their shareholding interest. Moreover, many institutional investors in India particularly the government financial institutions such as the public sector banks and public

[66] *Supra* note 64 at 394.
[67] Institutional investors are the financial institutions such as mutual funds, insurance companies, venture capital funds, pension funds etc. including foreign institutions and banks.
[68] *Supra* note 60 at 12.
[69] Ashish Rukhaiyar, "Class action suits ripe for review?" *The Hindu*, Mumbai, Aug. 27, 2017.
[70] Sun Pharma Annual Report 67 (2018-19).
[71] Furquan Moharkan, "Sun Pharma Crisis puts MFs, investors in spot", *Deccan Herald,* Dec. 14, 2018, *available at*: https://www.deccanherald.com/business/sun-pharma-crisis-puts-mfs-706448.html (last visted on Aug. 4, 2021).

financial institutions such as Life Insurance Corporation etc. are not permitted to do that because it is alien to their authorization.

As discussed in section II of this paper, the Indian Companies Act, 2013 provides adequate remedies to the aggrieved investors and also penal action against the company, its directors and others associated with the company in the event of non-compliance with different provisions of the Act. In addition, shareholders of the listed companies may initiate legal action by petitioning to the SEBI for matters connected with the securities regulation including IPOs and fraudulent financial reports. Besides imposing penalties on the erring directors and promoters, compensation and damages in most cases have been awarded to the affected investors. Given the three-tier corporate regulatory framework in India comprising of Ministry of Corporate Affairs (MCA), SEBI and Stock Exchanges, the small shareholders may be more inclined to approach the MCA or the SEBI for remedies against frauds or other corporate wrong-doings[72]. These actions, although on an individual basis are less costly, speedier, and involve the least inconveniences. Both the MCA and SEBI have an online grievance redress system enabling investors to lodge and track the complaints and grievances electronically. As compared to these remedies, class action suits involve stringent procedural requirements besides activism to proceed with the case. The law also provides for imposing the cost for frivolous application[73]. Further, it is for the applicants to establish *bonafide* of the petition and produce evidence that the action of the accused inflicted the same damage on as many people as claimed in the suit. Moreover, bringing together of a requisite number of shareholders or claimants due to absence of 'plaintiff bar' or company-specific shareholders associations is problematic in India[74].

The court cases in India are dragged for years together as litigation battle is a long drawn. To relieve the civil courts from a large number of company cases, eleven benches of NCLT were constituted in 2016. Even these seem inadequate as total number of active companies registered in the country[75] as on March 31, 2020 were 11,99,643. The Tribunals, therefore have a gigantic task of disposing off a large number of petitions which ahave been increasing day by day and the civil courts do not have jurisdiction for matters which are vested with

[72] *Supra* note 64 at 403.
[73] The Companies Act, 2013, s. 245(6).
[74] *Supra* note 64 at 391.
[75] Ministry of Corporate Affairs, *2019-20 Annual Report* 102 (New Delhi, 2020).

Tribunal or Appellate Tribunal[76]. A huge backlog of 21,532 cases were pending[77] under the benches of NCLT as on March 31, 2020. The cases are further prolonged as the Tribunal orders are, in most cases contested in the Appellate, and a person aggrieved by the order of Appellate Tribunal may prefer an appeal to the Supreme Court. The whole process may take years together. A long delay in adjudication of these kinds of suits may wipe out the potential gains on account of the diminished present value of the probable amount of future compensation, and non-holding of the shares by most individual shareholders till the judgment is pronounced[78]. It is highly improbable, therefore that shareholders would choose to file class suits although the situation may be ripe for such suits, particularly those who contemplate selling their shares in the near future.

The high profile *Tata Sons* case on the ouster of Mr. Cyrus Mistry was filed in December 2016 at Mumbai Bench of NCLT. The order of the bench was pronounced on July 9, 2018 which rejected the petition of Mistry against oppression and mismanagement[79]. An appeal to the Appellate Tribunal was filed which reversed the order of the NCLT which took nearly two and a half years. This was further challenged in the Supreme Court in February 2020. The delay in the final outcome and a layer of appeals inbuilt in our legal system adds to the cost of litigation to the aggrieved party besides a long time consumed in consulting the counsels, collecting requisite documents, filing affidavits and counter affidavits. This acts as a dampener to take legal recourse, especially for the individual/retail shareholders in the event of wrongdoings or frauds by the management, directors, promoters, auditors or other persons responsible for such acts.

The filing and contesting a shareholders' suits involve a huge cost. To cite an example from the US, the California-based law firm that managed the class action suit for Enron shareholders got $688 million in fees[80]. Besides corporate lawyer's fees and other legal expenses, one has to match the corporate might in engaging the senior attorney to contest the case. The suit may linger on for years together traveling across the three levels: Tribunal, Appellate and Supreme Court, multiplying the cost of litigation many times. This deters,

[76] The Companies Act, 2013, s 430.
[77] Ministry of Corporate Affairs, 6th *Annual Report* 79 (New Delhi, 2020).
[78] *Supra* note 64 at 392.
[79] *Supra* note 31.
[80] Debra Cassens Weiss, "Judge approves record $688 M Attorney Fees in Enron Securities Case" *ABA Journal,* Chicago, USA, *available at:* https: //www. Abajoural.com/news/article/judge approves record $ 688 M attorney fees in Enron securities case. (last visited on Oct., 30, 2020).

particularly the small shareholders and depositors from initiating class action suit and they may contend with the cost-free online redress mechanism of the SEBI or other regulators[81].

To meet the litigation expenses on class action suits, Investor Education and Protection Fund established under the Companies Act, 2013 provides for reimbursement of the class suit expenses as may be sanctioned by the Tribunal [82]. However, the moot question is, 'can the class action suits against companies be fought with the government-controlled funds'? Besides raising suspicion of targeting rival companies, it may enable only persons with political clouts to get the government funding with chances of it being mis-utilised. SEBI introduced the SEBI (Aid for Legal Proceedings) Guidelines 2009 after the Satyam scam to provide financial assistance from the SEBI controlled Investor Protection and Education Fund to investors' association registered with the SEBI to take up legal proceedings in the interest of investors of securities. Later in 2014, SEBI decided to exclude the class action suits from the legal aid funds[83]. The investors associations are now left with the only option of applying to the MCA for financial support for class action suits.

What is lacking in India is a push mechanism unlike most counties in world where the law firms act as synergists for class action suits incentivized by a proportion in the compensation money awarded by the courts, the litigants get legal assistance without paying upfront. Contingency fee[84] or conditional fee is an established legal practice in many countries of the world including the US, Australia, Canada, France, Brazil and France[85]. Contingency fees arrangements exist in the most developed form in the US. The lawyers of the petitioners are allowed to enter into contingency fees agreements with their clients. The courts in the US approve the award of fees to the lawyers based on a percentage of the settlement fund whether the monetary damages are through settlement or court judgments. Third party funding of class actions is also allowed in the US. The losing party generally does not pay the

[81] *Supra note* 64 at 392.
[82] The Companies Act 2013, s. 125(3)(d).
[83] BS Reporter, " Sebi to exclude class action suits from legal aid funds" *Business Standard,* Mumbai, March 3, 2014, *available at*: https://www.business-standard.com/article/markets/sebi-to-exclude-class-action-suits-from-legal-aid-fund-114030100602_1.html (last visited on Oct. 31, 2020).
[84] Contingency fee (usually calculated as a percentage of the client's net recovery) is charged for a lawyer's services only if the lawsuit is successful or is favourably settled out of court (Black's Law Dictionary, 8th ed. 2004).
[85] Herbert M. Kritzer, *Risks, Reputation, and Rewards: Contingence Fees Legal Practice in the United States* 258-259, (Stanford University Press, 2004).

attorneys' fees[86]. It encourages the aggrieved investors to initiate class suits through law firms without bothering about the potential result of the case, the counsels also have the incentive to contest the case. In the UK, traditionally the 'loser pays' system where the winning party recovers its costs including attorneys' fees had been in vogue. Following the recommendations of Lord Justice Jackson[87], contingency fees, or damages-based agreements (DBAs), have been permitted in England and Wales from April 1, 2013. There has been a surge in group action suits in the UK since 2013 which to a great extent are attributable to third party funding including DBAs.

In India, lawyers are not permitted to charge contingency fees. Rule 20 of the Bar Council of India Rules on 'Standards of Professional Conduct and Etiquett' states that: "An advocate shall not stipulate for a fee contingent on the results of litigation or agree to share the proceeds thereof"[88]. The Supreme Court of India also held in *B. Sunitha* v. *The State of Telengana*[89] that fee of an advocate based on proportion of outcome of litigation is illegal. India is one of the few countries in the world which do not allow contingency fees[90]. Probably the main reason is that it may lead to excessive litigation, and the lawyers may resort to unscrupulous practices to win the cases. The judiciary is already over-burdened with a long pendency of cases. The conundrum, however is that the litigants with limited means particularly the retail shareholders in the companies cannot afford the upfront charges of legal counsels for class suits and therefore are not inclined towards such petitions. Class lawsuits cannot be pushed with a meagre government funding provided in the Companies Act, 2013 which is also not assured.

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[86] Stacy Nettleton, Eric Hochstadt, *et. al*., "United States" In Jonathan Polkes and David Lender (eds.) *Class Actions 2020,* 103 (Lexology, London October 2019), *available at:* https://www.weil.com/~/media/files/pdfs/2020/ca2020united-states.pdf (last visited on Nov. 3, 2020).

[87] Sir Rupert Jackson, a senior Court of Appeal judge, was asked to carry out a review into the costs of civil litigation in England. The resulting changes to civil litigation procedure were brought into the Civil Procedure Rules ("CPR") in April 2013 and have become known as "*the Jackson Reforms*". Clyde & Co., *The Jackson Reforms: What you need to know,* March 2, 2015, *available at*: https://www.clydeco.com/en/insights/2015/03/the-jackson-reforms-what-you-need-to-know (last visited on Aug. 27, 2021).

[88] Bar Council of India Rules, Part VI, Chapter II, Section II, Rule 20 In The Advocates Act, No. 25 of 1961, Chapter II 'Bar Council'. *available at*: https://upload.indiacode.nic.in/showfile?actid=AC_CEN_3_46_00001_196125_1517807320172&type=rule&filename=BCI%20Rules,%20Part-V%20to%20IX.pdf (last visited on Nov. 3, 2020).

[89] *B. Sunitha* v. *The State of Telengana*, AIR 2017 SC 5727.

[90] Nitesh Mishra "Contingency Lawyering It Depends on Results" *Law Times Journal*, April 8, 2019, *available at:* http://lawtimesjournal.in/contingency-lawyering-it-depends-on-results/#_ftn22 (last visited on Nov. 3, 2020).

VI. Gaps in the Legal Framework

An important aspect missing in the Indian legal framework on class action lawsuit is about the companies which are under the proceedings of Insolvency and Bankruptcy Code (IBC) 2016 (No. 31 of 2016). Section 14(1) of the IBC provides that on commencement of the insolvency, the 'Adjudicating Authority' *i.e.,* the NCLT shall order moratorium prohibiting continuation or institution of suits against the corporate debtor. This would imply that class lawsuits, in that case, will also be suspended. However, there is no clarity on the issue and the law has to take a shape in this regard.

Another missing aspect is the exclusion of banking companies from these kinds of lawsuits. It limits the applicability of such suits as banking companies are more susceptible to frauds and losses. The management of such banks including directors and auditors must be taken to task to compensate the shareholders on account of their negligence or misdeeds. The recent fraud in Punjab National Bank (PNB) of estimated Rs 13,500 crores which caused a massive loss of Rs 13,417 crores in January-March quarter of 2017-18[91] was the largest by an Indian bank. While the massive fraud eroded the market capitalization of Punjab National Bank's by Rs. 10,939 crores[92], it affected the market capitalization of 34 banks by more than Rs. 36,380 crores between February 12-15, 2018[93]. With the fall in share prices the loss was massive to all the shareholders: the Central Government Rs 6,274.4 crores; Life Insurance Corporation Rs 1,532.3 crores; Foreign portfolio investors (FPIs) Rs 1,381.6 crores; and small investors lost about Rs. 387 crores in the market valuation. The helpless shareholders could not claim damages from the directors or auditors of the bank who were supposedly negligent in performing their duties. The recent case of fraud in Punjab and Maharashtra Cooperative Bank (PMC) also highlighted the inadequacies of the class action legislature. While criminal proceedings have been launched against the promoters, Chairman, CEO and other involved officials of the PMC, the question is who would compensate the losses and agony of the depositors and other stakeholders.

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[91] Saurabh Gupta, "PNB Stocks Tumble After Bank Reports Rs. 13,417 Crore Q4 Loss" *NDTV*, May 16, 2018, *available at* https://www.ndtv.com/business/fraud-hit-pnb-stocks-tumble-after-bank-reports-rs-13-417-crore-q4-loss-1853186 (last visited on November 25, 2020).

[92] PTI, "PNB loses Rs11,000 crore market cap in 5 days, shares recover marginally" *Live Mint*, Feb. 20, 2018, *avalable at:* https://www.livemint.com/Money/5WQ2zJR7VCAiOg64fwy9bO/PNB-loses-Rs11000-crore-market-cap-in-5-days-shares-recove.html (last visted on visited on Nov. 25, 2020).

[93]Sameer Bhardwaj, "Nirav Modi case: PNB fraud affects stocks of Union Bank, Allahabad Bank, SBI, Axis Bank" *Business Today,* (New Delhi, March 22, 2018).

Section 245(4) of the Companies Act, 2013 stipulates consideration of class suit in "good faith" which is for the NCLT to scrutinise based on facts of the specific case and conduct of the applicants. The obligation is on the shareholders to establish that their rights have been adversely affected and such suit would benefit the company. The conundrum is the admission of class lawsuit does have a negative impact on company's share price. In a situation where the company is asked to pay the compensation to the shareholders, the payment of such amount would obviously diminish shareholders' funds. Balancing of the interest of company while safeguarding the shareholders is a 'win-lose' situation where net gain may be negligible for the shareholders. While accepting the class action petition, these issues may crop up.

Section 245(6) of the Companies Act, 2013 provides that the order of the NCLT shall be binding on all the members and depositors of the company. That would mean that members of the concerned class who were absent to the suit will also be bound by the Tribunal order unlike in the US wherein opt-out option is given in class suits. This would promote 'free ride' for many affected investors who will wait for others to take the lead and bear the expenses.

The Act is silent on the inclusion of foreign investors under the class action suits[94]. Section 245(3) only prescribes minimum number of members/depositors to file petition of class action. *Ipso facto*, it includes foreign shareholders as well to such suits. This is unlike the US legal regime where non-US investors inclusion in the suit is contingent on the recognition of judgment of US courts by the home country of the non-US investors. What if the foreign investors pursue class action litigation in the country of their origin after losing out the case in India[95]? Would it not be unfair for the company and Indian shareholders of the company?

VII. Suggestions

The gaps in the legal framework of class suits highlighted in the previous section should be bridged to make these suits an effective measure to compensate the investors. The legislature must take cognizance of the losses which investors of banking and other financial companies suffer in the cases of frauds by the unscrupulous directors and negligent auditors. The surprise exclusion of these listed entities from the purview of section 245 of the Companies Act, 2013 must be reviwed. It is also suggested that certain matters (put forth in the preceding

[94] Dishi Bhomawat "Class action suits by shareholders in India" 23(2) *Journal of Financial Crimes* 420 (2016).
[95] *Id.,* at 421.

section) on which the present law on class action suits are unclear, should be clarified at the earliest. One such important issue is whether foreign investors who have put their money in Indian companies should come under the purview of 245(3) of the Indian Companies Act. It is pertinent to mention that the judgement of the federal court of appeals in Manhattan (the Second Circuit) in 2017 up held the decision of a district court to exclude the foreign investors from countries that do not recognize the court's judgment or the court-approved settlement as the final resolution for all class members[96]. The Indian legislature should clearly lay down the procedure and conditions for inclusion of foreign investors in the class suits.

As prevalent in many counties of the world, opt-out provision should be introduced in the legal provisions to discourage the 'free-riders' of such suits. Many affected investors joining these suits would enhance the collective bargaining of the retail investors and the litigation expenses would also be spread. The shareholders associations have been very active in developed counties of the world to promote these kinds of suits. Among the leading associations which have been actively advancing the interest of investos are Austrialian Shareholders Association and the UK Shareholders Association[97]. The retail shareholders in India being scattered and unorganized have not been able to organize themselves to take on the legal might of the companies through the derivative suits in case of frauds by the promoters and directors of the companies. As at the end of year 2019-20, there were only 25 Investors' Associations recognised by the SEBI. These associations are primarily engaged in conducting investor awareness programme with a financial support from the SEBI[98] and are not actively involved in advising or initiating the class actions in the cases of wrongdoings by the companies. To make class suits an effective mechanism to protect the interest of investors, shareholders associations should be actively involved in supporting derivative actions. The proxy advisory firms should also encourage and facilitate the derivative actions.

As highlighted in chapter V of the paper, contigency fee is another important issue which is holding back the derivative litigation in India. The attorney in these kinds of suit is the

[96] Olav A. Haazen, "Most Foreign investors are now banned from class actions, must act as Lead Plaintiff or opt-out" *Attorney Articles*, 2017, *available at*: https://www.gelaw.com/news-events/attorney-articles (last visited on Aug. 2, 2021).
[97] *Supra note* 41 at 312.
[98] SEBI, Annual Report, 162 (Mumbai 2019-20).

driving force. This is vindicated by the expriences of many country. For example in Japan which did not allow the contingency fees until the year 1993, shareholders filed a few derivative suits against the directors from 1950-90[99]. It was "not because of cultural mores but because of high attorneys' fees, corporate governance constraints, and comparatively low incentives for Japanese attorneys"[100]. The number of shareholders suits increased manifold with the reduction of filing fees[101]. Similarly, "derivative suits in the US persist not because of a litigious society or an overpopulation of overpaid attorneys, but because of the incentives inherent in the mechanism"[102]. Outside of USA, Australia is a country where securities class litigation is widely prevalent, as courts have held litigation funding by lawyers as permissible. On the recommendation by the Victorian Law Reform Commission, the Justice Legislation Miscellaneous Amendments Bill 2019 (Vic) was enancted on June 18, 2020 which allowed to charge contingency fees in class actions[103].

There has been debate whether lawyers should be allowed to charge contingency fees in derivative suits. The arguments in favour contend the availability of funds for these suits given the meagure resources of the investors, particularliry that of the small shareholders . However, allowing contingency fees may lead to an increase in unmeritorious claims, create conflict of interests between lawyers and clients and lead to excessive profits for plaintiff lawyers[104]. India is amongst a few of the countries which do not allow for contingency fee on ethical and legal grounds[105]. However, the regulators and the judiciary may think of allowing a regulated regime of 'contingent fees' particularly for the representative suits. A ceiling may also be placed over the contingent fees to prevent the lawyers from exploiting their clients. It is unfounded to argue that lawyers may be inclined to indulge in unethical practices for a favourable judgment in a particular case[106] given the fact that the lawyers belong to a valued profession bound by the code of ethics of the Bar Council and despite in interest in the result

[99] Mark D. West, "Why Shareholders Sue: The Evidence from Japan" 30(2), *Journal of Legal Studies*, 351 (2001).
[100] Mark D. West, "The pricing of shareholder Derivative Actions in Japan and United State" 88(4), *Northwestern University Law Review*, 1436 (1994).
[101] *Supra note* 99 at 352.
[102] *Id.,* at 382.
[103] Clayton UTZ, "Contingency fees now available for class actions in the Victorian Supreme Court, so expect more class actions" (June 19, 2020), *available at*: https://www.claytonutz.com/knowledge/2020/june/contingency-fees-now-available-for-class-actions-in-the-victorian-supreme-court-so-expect-more-class-actions (last visited on Aug. 3, 2021).
[104] *Ibid.*
[105] Nitesh Mishra, "Contingency Lawyering "It Depends on Results", *Law Times Journal*, April 8, 2019, *available at:* http://lawtimesjournal.in/contingency-lawyering-it-depends-on-results/#_ftn22 (last visited on Aug. 3, 2021).
[106] *Ibid.*

of the cases, they have a reputation to fend for as well. It must also be recognized that the practice of 'contingent fees' although prohibited in India is known to be followed in several cases particularly in the lower courts[107].

VIII. Conclusion

Class action suits, important from corporate governance perspective specifically shareholder rights[108] are yet to be evolved in India which primarily follows common law system of the UK wherein the high profile class actions have been fairly rare unlike the USA where more than 10,000 new class action suits are filed every year[109]. The family dominated corporate structure and the legal system of India both are not congenial to class suits. Moreover, the corporate regulatory framework of the country laid down primarily by the Companies Act 2013 and regulations enacted by the SEBI are quite effective in protection of investors' interest including resolution of shareholders' complaints and concerns.

Class action suits introduced by the Companies Act, 2013 lack clarity on certain issues. Certain gaps in the class lawsuit laws are also discernible. What is really lacking in India is a 'push' to class lawsuit for which the contingency fee law should be reviewed.

The shape which the law on class action takes in coming years would depend largely on the active role of the Presiding Officers of the Tribunals, Appellate Tribunal and the Hon'ble Judges of the Supreme Court in settlement negotiations and deciding the question of law in individual cases which would surely become precedents in forming case laws. The efficacy of class suits would also be determined by the pace with which compensation or settlements would be granted. With a new law in place, directors, promoters, auditors, advisors, valuers and others associated with companies will have to behave responsibly to perform their fiduciary duties. They must drive it home that providing misleading information and engaging in fraudulent activities could make them liable to pay huge compensation to the investors.

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[107] Mowing the law, "Should Indian Lawyers be Allowed to Work on Contingency Basis- Sample Draft Contingency Fee Arrangement Format" *Blogspot*, Nov. 28, 2018, *available at*: http://mowingthelaw.blogspot.com/2012/12/should-indian-lawyers-be-allowed-to.html (last visited on Nov. 3, 2020).

[108] Amar Gande and Craig M. Lewis, "Shareholder-Initiated Class Action Lawsuits: Shareholder Wealth Effects and Industry Spill overs" 44(4) *The Journal of Financial and Quantitative Analysis* 823 (2009).

[109] *Supra* note 86 at 91.