

# A Jurisdictional Analysis of Class Action Suits under Section 245 of the Companies Act, 2013

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## ABSTRACT

*In 2011, the perpetrators of the Satyam Scam agreed to pay of 125 million dollars to settle the class action suit instituted against them in the United States. Though this would have gone largely unnoticed in the United States because of the frequency of the class action lawsuits initiated there due to the ease of doing so along with the collective support a suit can garner, this culture of class protectionism has been largely absent in India. Though many class action provisions exist in today's landmark legislations such as in the Industrial Disputes Act, 1947 or the Consumer Protection Act, 1986 they have hardly been utilized. Due to the non usage of these, the discourse surrounding class action in India is often limited to learning about them being applied in western countries such as the Enron Securities Settlement in 2006 for 206 Billion Dollars in the United States and the potential MasterCard Ruling in the United Kingdom which would benefit a potential 46 million people. In 2013, the Central Government took note of this disadvantage Indian investors have vis-a-vis investors in foreign jurisdictions and enacted S.245 in the Companies Act, 2013. This provision was implemented with the objective of ensuring that Indian shareholders have some sort of recourse when their interests are compromised. The provision detailed its definition of a class, the powers of the court and on what basis a tribunal should consider its decision. Despite this s.245 under the Companies Act, 2013 has remained largely unsuccessful, as only a handful number of cases have been filed under it. This paper will seek to compare class action suits under the companies act to those existing in the United States and the United Kingdom and will seek to analyze certain shortcomings and strengths of Indian Investors wishing to proceed under the Act.*

## I. INTRODUCTION

Consumer, The Black's Law Dictionary defines class action as situation wherein "a person or a small group of people represent the interests of a larger group when it is more convenient for the larger group to litigate through a smaller group with similar interests."<sup>2</sup> The concept of class action lawsuits has existed for a long time and has recently emerged into the limelight in India to due to the incorporation of Section 245 under the Companies Act, 2013 [hereinafter "the Act"].

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<sup>2</sup> Henry Campbell Black, Black's Law Dictionary (8<sup>th</sup> ed., 2004).

In a world which is being globalized at an exponential rate with mass marketing, production, wide-reaching communication and economic interdependence, there has been a rise in the violation of the same legal right of numerous individuals by big corporations or practices, and in majority of instances these damages individually are not of a significant value.<sup>3</sup> Even though the individual claims may not be sufficient to provide enough incentive to initiate litigation, cumulatively these small harms may yield a larger compensation.<sup>4</sup>

Thus class action suits provides an answer to the monetary obstacle in litigation by gathering singular claims together to initiate a single lawsuit, which is economically viable for the aggrieved parties. Through this process, it has been observed that there has been greater judicial efficiency as it takes less of the court's time and involve fewer judges while disposing off cases thus allowing for greater uniformity in the damages received by similarly deprived parties.<sup>5</sup>

Though class action suit allows for more parties to easily avail of damages, it restricts an individual to exercise their own discretion in a suit, thereby limiting their compensation options for remuneration. Through this paper the author will seek to compare class action suits in India, The United States of India and the United Kingdom.

## II. RESEARCH QUESTIONS

The author will be discussing the following research questions in this paper:

1. What was the prevailing circumstance that led to the enactment of Section 245 under the Companies Act, 2013?
2. What are the differences in the legislative provisions and judicial interpretation under the American, British and Indian jurisdictions with respect to:
  - I. Definition of Class
  - II. Discretion of the Court
  - III. Funding and Costs of the Suit
  - IV. Right to opt-out of a class action suit

## III. HYPOTHESIS

With the rising awareness of the shareholder's rights and the feeling of holding big companies accountable for their actions, class action suits are becoming more important to protect the common man. The author will explain the context in which a class action provision was enacted in the Companies Act, 2013 and compare it

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<sup>3</sup>Janet Cooper Alexander, *An Introduction to Class Action Procedure in the United States*, Presented Conference: Debates over Group Litigation in Comparative Perspective, Geneva, Switzerland, July 21-22, 2000.

<sup>4</sup>Subrin & Stephen N., *CIVIL PROCEDURE: DOCTRINES, PRACTICE & CONTEXT* (2000).

<sup>5</sup>A. Ramaiya, *GUIDE TO THE COMPANIES ACT*, Vol. 3 4334 (18<sup>th</sup> ed., 2015).

with parallel provisions in US and UK jurisdiction in order to come to a conclusion where certain shortcomings and benefits of the newly added provision are highlighted.

#### IV. SCOPE

The scope of this paper is limited to certain aspects related to class action lawsuits and will seek to compare the provisions of India, United States and The United Kingdom in terms of the definition of class, the court's discretion, the funding and costs of the suit and the right to opt out of a class action suit.

#### V.METHODOLOGY

The author has used doctrinal method of research to address the comparisons posed in this paper. This methodology aims to analyze the legal structures and current positions of law, which includes case laws, but due to the absence of Indian case law in the subject, the author has interpreted the provision in his own capacity to arrive at a conclusion.

#### VI. CONTEXT OF ENACTMENT OF S. 245

The concept of Class Action Lawsuits in India has been used very extensively and in many different contexts. It has been included in multiple statutes such as the Competition Act, 2002<sup>6</sup>, the Industrial Disputes Act, 1947<sup>7</sup> or the Consumer Protection Act, 1986.<sup>8</sup> However the foundation of class action lawsuits has been provided in the Civil Procedure Code through "Representative Suits."<sup>9</sup>

Even though class action suits have existed for a long time, its inclusion in a corporate set up in India is still in its infant stage. The need for such a provision was felt majorly during the Satyam Scam in 2009 where despite the fact that there was a triumphant multi-million-dollar class action lawsuit in the American jurisdiction, the counterpart investors in India were left without a remedy.<sup>10</sup>

This revealed the vulnerability of Indian shareholders and highlighted the lack of alternatives available to a class of individuals who are similarly deprived as compared to the foreign legal systems. The JJ Irani Committee also in 2005 expressed the need for a provision, which would protect the interests of a company in the eyes of a large class of shareholders from the people in control of the company and recommended the enactment of a provision for class action suits.<sup>11</sup>

The enactment of S.245 came as a result of pressure from external investors who wanted more accountability in

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<sup>6</sup> The Competition Act, 2002, Act no.12 of 2003.

<sup>7</sup> The Industrial Disputes Act, 1947, Act no.14 of 1947.

<sup>8</sup> The Consumer Protection Act, 1986, Act no. 68 of 1986.

<sup>9</sup> Rule 8 Order 11, The Code of Civil Procedure, 1908, Act no 5 of 1908.

<sup>10</sup> Jonathem Stempel, *Satyam to pay \$125 million, settle U.S. suit over fraud*, REUTERS, February 17<sup>th</sup>, 2011.

<sup>11</sup> Dr. Jamshed J. Irani, Report on Company Law (May 31, 2005).

the corporate functioning of a company and the governments need to avoid scams such as Satyam.<sup>12</sup> Through the provision, a class action can now be initiated when the activities of the company are being conducted in a manner, which is harmful to the interests of a company's investors and claim damages or compensation.<sup>13</sup>

With the help of this provision the minority stakeholders will be at benefit as the costs of litigation will reduce and the stakeholders will not be disincentivized to institute suits to protect their rights against not only the company but also auditors and experts.<sup>14</sup> Thus the ambit of liability provided under this section is now not limited to the management but can be associated with "any other person". This will entail third parties to tread more carefully while dealing with companies.<sup>15</sup>

## VII. CLASS ACTION IN INDIA VIS-À-VIS THE US & THE UK

In the United States, class action suits fall under the purview of the Federal Rules under rule 23.<sup>16</sup> This applies for a variety of issues and does not limit itself to a particular subject matter. Class actions under the federal rules have been of a diverse nature such as *Brown v. Board of Education*,<sup>17</sup> which declared racially segregated schools as unconstitutional or *Anderson v. Pacific Gas*,<sup>18</sup> where the court awarded \$333 million dollars due to illegal and hazardous dumping of waste into a local water body.

In the United Kingdom, class action suits are called Group Litigation and are governed under the Civil Procedures Rules and Practice Direction. Group Actions are rising in the U.K. as they allow for similar individual interests to clubbed and avoid the hassle of filing separate claims.<sup>19</sup> In 2017, the English courts entertained numerous group litigations brought about against large companies- a consequence of the introduction of the legislative changes to help better the position of the claimant.<sup>20</sup>

With the government has only recently formally included the right to have a class action suit in the Indian Corporate set up, the author will compare the s. 245 of the Act with similar provisions provided in the United States and United Kingdom on certain specific grounds.

### Definition Of "Class"

The definition of "Class" is of paramount importance as it is what determines who can file a class action suit and sets the eligibility criteria for the initiation of the suit. In India the widely accepted definition of a class is

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<sup>12</sup> Anup Kohli, *Class Action Suits: Why India needs them*, TIMES OF INDIA (May 15, 2015).

<sup>13</sup> S. 245, The Companies Act, 2013.

<sup>14</sup> *Id.*

<sup>15</sup> *Class Action Suits: Notified yet Ambiguous*, PSA LEGAL CHAMBERS available at <http://psalegal.com/wp-content/uploads/2017/01/ENewlineNovember2016.pdf>.

<sup>16</sup> Rule 23, Federal Rules of Civil Procedure, 2016.

<sup>17</sup> *Brown v. Board of Education of Topeka*, 347 U.S. 483.

<sup>18</sup> *Anderson v. Pacific Gas*, Civil Appeal No. 20333 (First District Division Two) decided on July 15<sup>th</sup> 1963.

<sup>19</sup> Clive Coleman, *US style class action suit introduced in UK*, BBC (October 1, 2015).

<sup>20</sup> *Id.*

when a single person or a small group has identical or similar interests with that of a larger group.<sup>21</sup>

S. 245 introduces the class action suits as “specialized class action” by investors and shareholders. Though the act does not define “class” it reveals a rigid criterion to file a suit. Under the Act, a class of members<sup>22</sup> or a depositor<sup>23</sup> can bring about a class action suit by fulfilling the required number of 5 percent<sup>24</sup> of the total number of the shareholders or depositors of the company or at least 100 shareholders or depositors whichever is less.<sup>25</sup>

In the US, the definition is a very liberal one as it allows for a particular person to represent the interests of a large group of people if their interests are similarly situated and such that the “*joinder of all members is impractical.*”<sup>26</sup> Due to this loose definition a class of 35 members has been allowed to file a suit, but a class of 1000 has been denied.<sup>27</sup> A similar liberal definition is followed in the United Kingdom, with a class being defined as one where the claimants have “same interest”.<sup>28</sup>

Even though it has only been 2 years since the enactment of the provision, there has been no decision from the NCLT on the section, compared to the rise in group litigation in the UK after the enactment of new legislation in 2015.<sup>29</sup> Hence, it seems as though the rigid criteria for filing a suit seems to be an obstacle for shareholders. With a liberal definition of a class the US and UK have capitalized on the protection of minority stakeholders while holding companies accountable to their shareholders. According to the author, the rigid definition, which needs to be satisfied before filing of a class action suit is not allowing the Indian investors to file suits.

### Courts Discretion

The court needs to answer certain question before allowing for a class action suit after determining that the parties that filed a suit do necessarily constitute a class. In the Companies Act, under S.245 the court needs to ascertain that the parties are acting in “good faith” while making the application for an order along with determining whether the cause of action is something which can be pursued in an individual capacity rather than a group action.<sup>30</sup>

In the United States, the court are required to look into similar aspects of practicality of filling individual suits

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<sup>21</sup> P Ramanathan Iyer, *ADVANCED LAW LEXICON* 820 (3<sup>rd</sup> ed., 2005).

<sup>22</sup> Sec. 2(55), Companies Act, 2013.

<sup>23</sup> Rule 2 (d), Companies (Acceptance of Deposits) Rules, 2014. The Ministry of Corporate Affairs, G.S.R.256(E) (March 31<sup>st</sup>, 2014).

<sup>24</sup> Rule 84(3) & 84(4), The National Company Law Tribunal (Second Amendment) Rules, 2019, THE MINISTRY OF CORPORATE AFFAIRS, G.S.R.351(E) (May 8<sup>th</sup>, 2019).

<sup>25</sup> S.245, The Companies Act, 2013.

<sup>26</sup> Rule 23, Federal Rules of Civil Procedure, 2016.

<sup>27</sup> Stephen C Yeazell, *THE CIVIL PROCEDURE* (5<sup>th</sup> ed., 2000).

<sup>28</sup> *Emerald Supplies Ltd v British Airways*, [2010] EWCA Civ. 1284.

<sup>29</sup> *UK Class Action Market Heating up in 2016*, Legal Briefings, HERBERT SMITH FREEHILLS available at <https://www.herbertsmithfreehills.com/latest-thinking/uk-class-action-market-heating-up-in-2016>.

<sup>30</sup> S. 245, The Companies Act, 2013.

or a class suit, along with ensuring that the parties will be represented adequately and fairly.<sup>31</sup> After this is determined, the courts grant a certificate, which allows for the existence of the suit, this is absent in the Act. This certification cannot be on merits but depends on practicality.<sup>32</sup>

Furthermore under the Act, the court has to ensure there is no “personal interest” of the parties at stake and that there is no “pre-empted action” such that the cause of action has not arisen and can be avoided by the actions of the company.<sup>33</sup> Meanwhile in the United Kingdom the representatives need not be directly affected, but the court must consider if it is just and reasonable for the suit to be instituted and in the US, the claimants must show that they are entitled to have the court decide on the merits of the case and that their injury is “concrete”.<sup>34</sup>

Though the United States has a certification process, it is just a formal recognition of the suit and provides no other advantage to the class, nor does it bar individual claims to be filed. Likewise in the United Kingdom, the court needs to satisfy itself that the class action is in benefit of all represented parties.<sup>35</sup> The questions that the court needs to satisfy before allowing the case to be argued on merits is similar in all three countries. The one major difference being the court can allow future suits in the United States and the United Kingdom and not in India. This can be seen as a measure to protect the companies from frivolous and malicious prosecution and allowing them to function more freely inside their prescribed ambit.

### **Funding and cost of the Suit**

Under the Companies Act, any costs or expenses occurred in a suit under S.245 is to be recovered by the oppressor company or the person responsible. In addition to this, under S.125(3)(d) of the Act,<sup>36</sup> through the Investor Education Fund, the legal expenses can be reimbursed in a class action lawsuit and the court is given discretion to award costs incidental to the hearing. While the rules governing the funding of the lawyers fee are identical to any other litigation process in India. Hence a lawyer in a class action cannot ask for a stipulated fee contingent on the result of the suit.<sup>37</sup>

The “*loser pays*” principle, which puts the liability of the costs on the losing party, has also been adopted in the United Kingdom and India wherein the court can decide to award costs at the expense of the guilty party or the costs are divided up equitably between the parties.<sup>38</sup> However in the United Kingdom, the lawyers are allowed to profit from contingency fees, which can be asked as either a “*Conditional Fee Arrangement*” where

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<sup>31</sup>Subrin & Stephen N., CIVIL PROCEDURE: DOCTRINES, PRACTICE & CONTEXT (2000).

<sup>32</sup>Janet Cooper Alexander, *An Introduction to Class Action Procedure in the United States*, Presented Conference: Debates over Group Litigation in Comparative Perspective, Geneva, Switzerland, July 21-22, 2000

<sup>33</sup>S. 245, The Companies Act, 2013.

<sup>34</sup>*Spokey Inc. v. Robins*, 136 S Ct 1540.

<sup>35</sup>Rule 19.7, The Civil Procedure Rules, 1998.

<sup>36</sup>The Companies Act, 2013, Act No.18 of 2013.

<sup>37</sup>Bar Council of India Rules, Advocates Act, 1961.

<sup>38</sup>Global Legal Group, THE INTERNATIONAL COMPARATIVE LEGAL GUIDE TO: CLASS ACTION LAWSUITS (10<sup>th</sup> ed., 2018).

the lawyer is paid bare costs along with a contingent fee or a “*Damage Based Agreement*” where the fee is only paid if the claimants win the suit.<sup>39</sup>

In the US, the “loser pays” principle does not apply but the “American Rule” applies where each party bears its own costs.<sup>40</sup> The argument given in support of this is that if the plaintiffs are burdened with the possibility of paying the costs of the defendant lawyers if they lose can act as a disincentive to file a suit.<sup>41</sup> Furthermore contingency fee is allowed in the United States but is not followed in class action suits, as the members do not contact the representative lawyer before the filing of the suit.<sup>42</sup> Thus the doctrine of a common fund is used where all members chip into a common fund to cover the costs of the litigation.<sup>43</sup>

We observe three completely different funding and cost regimes in the 3 countries. Though the “loser pays” principle has been followed by the Indian Courts but the approach adopted in the United States could be applied to India as well. If the plaintiffs do not have the problem of possibly paying the costs of the defendants and the introduction of a common fund principle can help easily finance the costs of the litigation.

### **Right to opt out & individual claims**

The right to opt out of class litigation is an essential right as it allows the aggrieved parties to choose to not be bound by the settlement before it is passed if they feel they have not adequately represented.<sup>44</sup> They can then recover the damages through an individual claim. Though in consumer complaints or claims of small value the individual claim cannot stand alone because of the minimal value of the suit, thus the option to opt out is not used often.<sup>45</sup>

In India, the Act allows for an option to opt out of the suit at any time after the suit has been initiated, with the permission of the Tribunal.<sup>46</sup> Furthermore the rules also do not bar the claimant to file a separate individual claim against the company under any other law where a remedy might be available.<sup>47</sup> The United Kingdom in 2015 amended the legislation and brought an opt out mechanism into the group litigation legislation<sup>48</sup> and was

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<sup>39</sup> Morgan & Lewis, *Class Action in US: Overview*, THOMAS REUTERS available at [https://uk.practicallaw.thomsonreuters.com/4-617-9264?transitionType=Default&contextData=\(sc.Default\)#co\\_anchor\\_a384218](https://uk.practicallaw.thomsonreuters.com/4-617-9264?transitionType=Default&contextData=(sc.Default)#co_anchor_a384218).

<sup>40</sup> Janet Cooper Alexander, *An Introduction to Class Action Procedure in the United States*, Presented Conference: Debates over Group Litigation in Comparative Perspective, Geneva, Switzerland, July 21-22, 2000.

<sup>41</sup> Umakanth Varitol, *Shareholder Activism and Class Action Lawsuits*, INDIAN CORP LAW available at <https://indiakorplaw.in/2009/06/shareholder-activism-and-class-action.html>.

<sup>42</sup> Morgan & Lewis, *Class Action in US: Overview*, THOMAS REUTERS available at [https://uk.practicallaw.thomsonreuters.com/4-617-9264?transitionType=Default&contextData=\(sc.Default\)#co\\_anchor\\_a384218](https://uk.practicallaw.thomsonreuters.com/4-617-9264?transitionType=Default&contextData=(sc.Default)#co_anchor_a384218).

<sup>43</sup> Janet Cooper Alexander, *An Introduction to Class Action Procedure in the United States*, Presented Conference: Debates over Group Litigation in Comparative Perspective, Geneva, Switzerland, July 21-22, 2000.

<sup>44</sup> Subrin & Stephen N., *CIVIL PROCEDURE: DOCTRINES, PRACTICE & CONTEXT* (2000).

<sup>45</sup> Global Legal Group, *THE INTERNATIONAL COMPARATIVE LEGAL GUIDE TO: CLASS ACTION LAWSUITS* (10<sup>th</sup> ed., 2018).

<sup>46</sup> National Company Law Tribunal Rules, 2016.

<sup>47</sup> Rule No. 86, *Id.*

<sup>48</sup> *Securities Class Action Litigation is rising in the UK*, WHITECASE available at <https://www.whitecase.com/publications/insight/securities-class-action-litigation-rising-uk>.

tested on numerous cases.<sup>49</sup>

In the United States, the United States Supreme Court has not allowed a party to continue a suit in an individual capacity after opting out of class litigation,<sup>50</sup> even though almost all of the class litigation allow for a option to opt out.<sup>51</sup> However the court has allowed the party to file an individual complaint when the rights of the party remained unresolved even after the settlement.<sup>52</sup>

The right to opt out is an essential right that needs to be given to the class members as it allows them to have some discretion while accepting or rejecting the settlement when they do not have a say in determining the settlement. With the inclusion of the right to opt-out in the United Kingdom, the group litigation have risen providing more incentive to parties to join a class suit, when they can later choose to withdraw from it.<sup>53</sup> However, it is imperative for the same court to not permit an individual claim as well as a class suit of the cause of action, as it may lead to frivolous prosecution or varied settlements, thereby increasing the judicial burden.

## VIII. CONCLUSION

Class actions in the United States have proven to be an alternative to industry self-regulation and government regulation. Self regulation may not be effective as one cannot ensure all members of industry comply with the self regulation and government interferences requires the use of public finances and cannot often cover all violations.<sup>54</sup> The purpose of incorporating a class action provision in the Act is to give the shareholders more power and hopefully provide effective mechanism to hold companies accountable like the United States and the United Kingdom.

The Ministry of Corporate Affairs has ensured that both the shareholders and the company are protected in class action lawsuits. By narrowing the definition of a class and implementing the “loser pays” rule along with letting the court have discretion over whether the suit can be allowed in every case, the government has attempted to ensure that malicious and trivial suits are not filed and the company is protected.

Furthermore, by allowing the maintenance of individual claims and the right to opt out the government has attempted to protect the aggrieved parties, and having a incentives such as the funding for the suit coming from the Investor Education Fund and allowing the court to grant a variety of compensations, the interests of the shareholders are well protected.

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<sup>49</sup> Dorothy Gibson v. Mobility Products Limited, Case no. 1257/7/7/16 in the Competition Appeals Tribunal.

<sup>50</sup> Matsushita Electricity Industrial Corporation v. Epstein, 516 U.S. 367, 1993.

<sup>51</sup> Stephen C Yeazell, *THE CIVIL PROCEDURE* (5<sup>th</sup> ed., 2000).

<sup>52</sup> American Pipe & Construction Company v. Utah, 414 U.S. 438, 1974.

<sup>53</sup> Clive Coleman, *US style class action suit introduced in UK*, BBC (October 1, 2015).

<sup>54</sup> Janet Cooper Alexander, *An Introduction to Class Action Procedure in the United States*, Presented Conference: Debates over Group Litigation in Comparative Perspective, Geneva, Switzerland, July 21-22, 2000.



Even though the class action under the Companies Act, 2013 remains majorly untried as compared to its western counterpart, the intention of the legislature to help benefit small shareholders is a step in the right direction. This notion has been further strengthened by the new amendment to the National Company Law Tribunal Rules, 2016 that came into force on 8<sup>th</sup> May, 2019.<sup>55</sup> By way of the National Company Law Tribunal (Second Amendment) Rules, 2019 the requisite number of applicants to institute a class action suits under S.245 was reduced to either 100 or 5 percent of the total number of members in both a company with and without share capital.<sup>56</sup> This should provide some ease and lucidity to shareholders wishing to institute a suit under S.245, who would have been barred or deterred by the stringent and harsh requirement prior to the amendment and would have a positive impact on the number of suits being instituted under s.245, which has till not been rather untested.

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<sup>55</sup> Rule 84(3) & 84(4), The National Company Law Tribunal (Second Amendment) Rules, 2019, THE MINISTRY OF CORPORATE AFFAIRS, G.S.R.351(E) (May 8<sup>th</sup>, 2019).

<sup>56</sup> *Id.*

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