

## ARTICLE ON CLASS ACTION SUIT



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**Mumbai Off :**

1005, Hubtown Solaris  
Off Western Express Highway  
East End of Andheri Flyover  
Andheri(East) Mumbai-400069

Landline: + 91-22-2684-5920/21

Fax: + 91-22-6678-7499

Mobile : + 91-982-017-7691

**Hyderabad Off :**

My Home Hub, 4th Floor, C Block, Madhupur,  
Hi-Tech City, Hyderabad, AP 500 081

# CLASS ACTION SUIT



## **CLASS ACTION SUIT- A POWERFUL WEAPON**

### **HISTORY:**

The concept of Class Action Suit was emerged during 13<sup>th</sup> century. In a Class Action Suit, a large number of people having same or similar injuries caused by the same person or organization bring to the judicial body which is represented by the leading applicant or group of applicant for the relief.

The antecedent of the Class Action was what modern observers call "group litigation", which appears to have been quite common in medieval England from about 1200 AD onward, These lawsuits involved groups of people either suing or being sued in actions at common law.

The oldest predecessor to the class action rule in the United States (US) was Equity Rule 48, promulgated in the year 1833, which allowed for representative suits in situations where there were too many individual parties are victimized, then this rule was replaced within ten years by the Supreme Court of America with Equity Rule 38 as part of a major restructuring of the Equity Rules in the year 1938, then Equity Rule 38 became Rule 23 of the Federal Rules of Civil Procedure. Now class actions in US are governed by Rule 23 and 28 of Federal Rules of Civil Procedure Rule.

In India, Supreme Court in the 1980<sup>s</sup> relaxed strict locus standi requirements to permit the filing of suits on behalf of rights deprived sections of society by public minded individuals or bodies. Although not strictly "class action litigation" as it is understood in American law, Public Interest Litigation arose out of the wide powers of judicial review granted to the Supreme Court of India and the various High Courts under Article 32 and Article 226 of the Constitution of India, respectively. The sort of remedies sought from courts in Public Interest Litigation go beyond mere award of damages to all affected groups.

## **IMPACT ON DIFFERENT COUNTRIES**

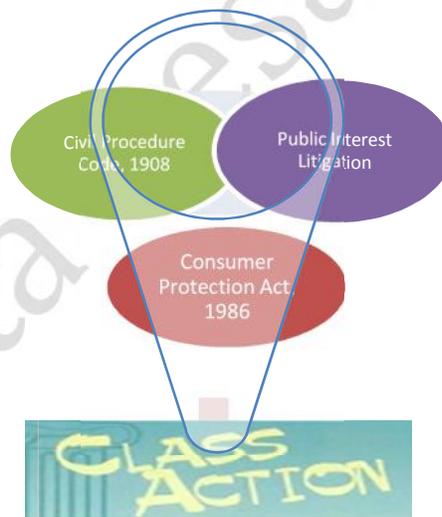
### **The impact of class action suits in different countries:**

- In United state of America, it is much evolved system.
- In Switzerland, laws does not allow any form of class action.
- In Germany, it has been enacted law on Model Case Proceedings in Disputes under Capital Markets Law which allows Proceeding arising for mass Capital Markets transaction.
- In India PIL is like class action suits however in a strict sense it is not class action suit as it is not codified.

## **DIFFERENT ACTS IN INDIA FOR CLASS ACTION SUITS**

- Consumer Protection Act, 1986
- Human Rights Act, 1993
- Public interest Litigation under civil procedure code, 1908
- Disaster Management Act, 2005
- The Environment (Protection) Act, 1986

In India before the emergence of the class action suits representative action were taken via Three Modes - Civil Court, Consumer Court and Public Interest Litigation Petition (PIL)**Bhopal Gas Tragedy**



## **CLASS ACTION SUIT GLOBALLY:**

### **UNITED STATES OF AMERICA**

#### **MEANING:**

A lawsuit that allows a large number of people with a common interest in a matter to sue or be sued as a group. In the United States federal courts, class actions are governed by **Federal Rules of Civil Procedure Rule 23**.

#### **EVOLUTION OF CLASS ACTION SUIT IN UNITED STATES OF AMERICA:**

In the year 1853, the United States Supreme Court reiterated that, for the sake of both justice and convenience, courts should allow a representative to sue or be sued on behalf of all those who were similarly situated, with the resulting judgment binding all members of the group.

In the year 1938, in an effort to provide more uniformity in the conduct of these cases, the Supreme Court adopted Rule 23 of the Federal Rule of Civil Procedure to govern class action litigation and later matured into the powerful tool available today as a result of amendments to that rule adopted in the year 1966.

In the year 1966 amendments greatly expanded the scope of U.S. Class Actions Suit by allowing judges to certify certain types of classes in which participation would now be presumed for every potential member unless the individual or entity formally excused themselves out of the class.

#### **RELEVANT CASES:ENRON VS ENRON CORPORATION ITSELF**

##### **FACTS OF THE CASE**

Investors in energy trading company Enron filed suits in the year 2001 under both US Federal and State securities laws against Enron Corporation, as well as some of its Directors, the Company's accounting firm Arthur Andersen and some of Andersen's partners and employees. They also pursued Enron's former law firm Vinson & Elkins.

The suit claimed that Enron Directors had deliberately disguised losses within specially created entities (SPE) called Raptors, which it failed to disclose in its Annual Reports and filings to the country's stock market regulator, the United States' Securities and Exchange Commission (SEC). The Raptors were created to shield the Company from mark-to-market losses in its growing equity investment arm. They were partly designed to minimise risk, but also to bypass accounting treatments that would decrease the company's earnings.

##### **OUTCOME OF THE CASE**

The case was settled in the year 2006 with USD 7.2 BN awarded to investors who lost everything when the company collapsed in the year 2001. This remains the largest settlement to date in a shareholder securities class action. The accountancy firm Arthur Andersen went into liquidation due to its losses. Several of Enron's executives also received prison sentences for fraud.

## UNITED KINGDOM:

### MEANING:

A legal action that is organized by a group of people who all have the same legal problem called Collective Actions, where multiple claimants with claims sharing common characteristics seek a remedy against the same defendant or multiple defendants.

### EVOLUTION OF CLASS ACTION SUIT IN UNITED KINGDOM:

The **Civil Procedure Rules** of the Courts of England and Wales came into effect since year 1999 and provided for representation of actions in limited circumstances. There has been much used, with only two reported cases at the court of first instance in the first ten years after the Civil Procedure Rules took effect. However, sectoral mechanism was adopted by the Consumer Rights Act 2015, which came into effect on October 01, 2015. Under the provisions therein, opt-in or opt-out collective procedures may be certified for breaches of competition law. This is currently the closest mechanism to a class action in England and Wales.

### RELEVANT CASE: LAWRENCE E. JAFFE PENSION PLAN V. HOUSEHOLD INTERNATIONAL, INC.

#### FACTS OF THE CASE:

The lawsuit was originally filed in the year 2002, alleging that the consumer finance company Household International, as well as some of its senior executives, made false statements that inflated the value of Household International's share price. It was also claimed that the company had carried out unethical lending practices and concealed aspects of its loan portfolio. When rumours of these practices began to emerge in the year 2001, its share price plummeted and Household International was bought by UK Bank HSBC a year later.

#### OUTCOME:

It was HSBC that then had to take responsibility for the US 2.46 billion (AU3.1 billion) settlement that was awarded when the litigants' claims were proven to have foundation.

## AUSTRALIA

### MEANING:

- A class action is a term used for a court proceeding where the claims of a large group or "class" of persons are brought by one or a small number of named class representatives against the same respondent(s) for the benefit of all persons so interest in the cause.
- They are also known as **Representative Proceedings**.
- In Australia, there are regimes for representative proceedings in both the Federal Court and in the State Supreme Courts.

### EVOLUTION OF CLASS ACTION SUIT IN AUSTRALIA:

The first Australian class action regime was enacted in the year 1992, though representative procedures were not new concept. Such procedures have been in existence in English rules of court since year 1883, and were given broader application in the year 1901.

Class Action Proceedings in Australia are termed as "**Representative Proceedings.**"

In the year 1988, a report by the Law Reform Commission [now the Australian Law Reform Commission ('ALRC')] entitled Grouped Proceedings in the Federal Court was tabled in federal Parliament.

Then Class Action regime was incorporated in Part IVA of the Federal Court Act which was enacted and took effect on March 05, 1992.

Class actions were introduced on the recommendation of the ALRC. The ALRC considered that it was desirable to introduce class actions for the following objectives:

- to provide a more efficient way of dealing with group claims; and
- to ensure that persons with causes of action from "multiple wrongdoing" could have "access to justice" and were not prevented from doing so because of lack of resources or cost.

These are commonly referred to as the "**judicial economy**" and "**access to justice**" objectives.

### **RELEVANT CASE: AUSTRALIAN BANKS V/S CUSTOMERS**

#### **FACTS OF THE CASE:**

In the year 2010, leading litigation funder IMP Australia helped initiate more than ten Class Action Lawsuits against leading banks, including Commonwealth Bank, Australia and New Zealand Banking Group (ANZ), Westpac, and NAB, alleging that some AU400 million had been syphoned from customers.

Australian Banks used to routinely charge up to AUD 45 to its customers for the reasons like account was overdrawn without prior agreement, the overdraft limit was exceeded, or late payments were made on credit card transactions.

In the early year 2014, the Country's Federal Court found that the late fees charged by the ANZ were extravagant, exorbitant, and unconscionable. At the same time, the Court ruled that some of the lender's other charges were reasonable.

#### **OUTCOME :**

In April 2015, ANZ won leave to appeal this decision, and it is to be taken to the High Court. The ruling will set a significant precedent in the determination of cases against the other three banks cited in the class action.

## CLASS ACTION SUIT IN INDIA- "IN INDIAN AVATAR"

### EVOLUTION OF CLASS ACTION SUIT IN COMPANIES ACT, 2013:

Protection of the interest of various stakeholders, especially non-promoter shareholders and depositors, has always been the concern of the Companies Act. There were several frauds and improprieties that were noticed where the key losers were the shareholders and depositors. The shareholders who invested in listed companies saw their investments and savings drying up when the companies that they invested in cheated the investors.

For the protection of the minority stakeholders and depositors, the concept of Class Action Suits has been emerged which is one of the major enactment introduced in the Companies Act, 2013 ("The Act") vide **Section 37** and **section 245** of the Act. The concept of Class Action is not new but in Indian context it has found recognition and enforceability now only by means of Companies Act, 2013 for the adjudication of the cases of fraud on minority where wrongdoers who are in control of the Company. The Class Action Suit first time came to the highlight in the context of securities market was when the Satyam scam broke out in year of 2009.

The Company Law Committee ("CLC") anticipated the requirement of such measures in 2005 in Company Law Committee headed by Dr. J.J. Irani and specifically advocated the need of such measure in Companies Act, in parallel to counterparts (i.e. USA, Singapore and UK).

Thereafter in the Companies Bill 2009, Class Action Suits were included as a measure to be available to the members and depositors of the Company to approach National Company Law Tribunal ("NCLT") or National Company Law Appellate Tribunal ("NCLAT"), if the affairs of the Company were conducted in a manner prejudicial to the interest of the Company, or its members and depositors, now this power to adjudicate the matter of Class Action Suit is given to NCLT and NCLAT.

Currently, the Presidency in NCLT is held by Justice M.M. Kumar Retired Judge and the Chairmanship of NCLAT is held by Justice J.J. Mukhopadhaya Retired Judge of Supreme Court.

Before the Companies Act, 2013, filing a case of Oppression and Mismanagement was the only recourse available to the aggrieved shareholders, but with the implementation of Section 245 of the Companies Act, 2013, certain members or depositors can opt for class action suit which bestows in them additional rights and grounds to fight for their rights and any abuse of powers by the company, its management or to that matter even the auditor and consultant.

At the same time, said provision entitles the stakeholders with more rights and powers to seek action against the wrongdoers and it also ensures that the companies become more careful and diligent while performing their duties. With the inclusion of auditors, consultants and experts in this provision, they will also be advising the Companies Act, 2013 more diligently.

### "INDIA'S ENRON"- SATYAM FIASCO CASE: A CATALYST FOR CLASS ACTION SUIT

**Facts of the case:** In the year 2009, where lacs of shareholders of Satyam Computer Services who had invested their money in the Company suffered huge losses due to sudden downfall of the share price of the Company, then they came together and sued the Satyam. The first time class action suit came to the spotlight in the context of securities market after **Satyam scam broke out in 2009**. The shareholders claimed damages worth Rs.5000 Crore but In India there was no law enabling class action lawsuits. The shareholders went from the National Consumer Disputes Redressal Commission to the Supreme Court. However their claims were rejected.

However, US Investors who owned **American Depositary Receipts (ADRs)** could demand a settlement to the tune of USD 125 MN (about 700 Crores) by mounting a class action suit because of proper judicial system in United States of America for Class Action Suit.

Unfortunately, the Indian shareholders of Satyam couldn't take any legal recourse against the company. Credit to the Satyam scam, India has introduced the provision of Class Action Suit in the new Companies Act, 2013 by means of Section 245 which has been notified on 1<sup>st</sup> June, 2016.

After introduction of Class Action Suit in the Act as it is evident that the legislature intended to boost the confidence of investors in the capital markets and aimed to initiate healthy investments and healthy growth of the economy.

### **MEANING OF CLASS ACTION**

A class action suit refers to a lawsuit that allows a **large number of people with a common interest** in a matter to sue or be sued as a group. It is a procedural device enabling one or more plaintiffs to file and prosecute a litigation on behalf of a larger group or class with a leading applicant, wherein such class has common rights and grievances.

### **CLASS ACTION SUIT UNDER NCLT:**

Provisions for constitution of NCLT and NCLAT were notified wide notification no. S.O. 1932(E) and S.O. 1933(E) both dated June 1, 2016. In the first phase powers of CLB are transferred to NCLT and it is one of the start-up activities of the NCLT and NCLAT is to admit "Class Action Suit", a representative action on the part of the member or depositors against a Company in default and to protect the interest of investors.

### **AGAINST WHOM CLASS ACTION SUIT CAN BE FILED**

The Companies Act, 2013, the Class Action Suit can be filed against any Company, private or public which is incorporated under the Companies Act, 2013 or any previous Companies Act except Banking Companies. This action can be against the following persons:

#### **Class action suit can be filed against whom?**

- Company
- Any of its directors
- Auditor, including audit firm
- Expert or advisor or consultant or any other person

## **CRITERIA FOR MEMBERS OR DEPOSITORS TO THE CLASS ACTION SUIT:**

### **As per Section 245(3) of the Act, a Class Action Suit may be filed by:**

**1) Member or members or any class of them, as described below**

**a) In the case of a company having a share capital:**

100 or more members of the company,

**Or**

members equal to or exceeding 10% of the total number of its members, whichever is less,

**Or**

Any member or members singly or jointly holding atleast 10% of the issued share capital of the company,

*subject to the condition that the applicant or applicants has or have paid all calls and other sums due on his or their shares*

**b) In the case of a company not having a share capital:**

Members equal to or exceeding 1/5th of the total number of its members.

**2) Depositor or depositors or any class of them, as described below –**

Any 100 or more depositors of the company,

**Or**

Depositors equal to or exceeding 10% of the total number of its depositors, whichever is less,

**Or**

any depositor or depositors singly or jointly holding atleast 10% of the total value of outstanding deposits of the company.

**3) The Central Government, if it is of the opinion that the affairs of the Company are being conducted in a manner prejudicial to public interest.**

## **SUIT CAN BE FILED FOR:**

Class Action Suit can be filed for various issues and hold the Company accountable for their actions. The issues can be any of the following:

- (a) If the Company has committed an act which is ultra vires the Articles or Memorandum of the Company;
- (b) If the Company has committed breach of any provision of the Company's Memorandum or Articles;
- (c) If the Company has declared a resolution altering the Memorandum or Articles of the Company as void, if the resolution was passed by suppression of material facts or obtained by mis-statement to the members or depositors and to restrain its directors from acting on such resolution;
- (d) If the Company intends to take any act to which is contrary to the provisions of this Act or any other law for the time being in force;
- (e) If the Company intends to take any action contrary to any resolution passed by the members;

(f) to claim damages or compensation or demand any other suitable action from or against-

(i) the company or its directors for any fraudulent, unlawful or wrongful act or omission or conduct or any likely act or omission or conduct on its or their part;

(ii) the auditor including audit firm of the company for any improper or misleading statement of particulars made in his audit report or for any fraudulent, unlawful or wrongful act or conduct; or

(iii) any expert or advisor or consultant or any other person for any incorrect or misleading statement made to the company or for any fraudulent, unlawful or wrongful act or conduct or any likely act or conduct on his part;

(g) to seek any other remedy from the Tribunal.

### **PROCEDURE BEFORE NCLT AND NCLAT**

The procedure for application for Class Action Suit is contemplated under Section 245 of the Act read with chapter XVI (Prevention of Oppression and Mismanagement) and NCLT Rules, 2016.

#### **CAUSE:**

If affairs of the company are being conducted in a manner prejudicial to the interests of the company or its members or depositors, then Members or Depositors with lead applicant may file an application to NCLT in Form NCLT- 1

#### **QUALIFICATION OF APPLICANT :**

The members or depositors oppressed by the Management applying to NCLT should be qualified to be minimum requisite member as required under Section 245(3) of the Act.

#### **ADMISSION OR REJECTION:**

On receipt of a Class Action Suit application, the Tribunal will look into the matter before admitting it.

### **CONSIDERATION BY THE TRIBUNAL BEFORE ADMITTING THE APPLICATION:**

The Tribunal while considering the admissibility of the Suit in addition to the grounds specified in Section 245 of the Act, take into account the following:

(a) Whether the class has so many members that joining them individually would be impractical, making a class action desirable;

(b) Whether there are questions of law or fact common to the class;

(c) Whether the claims or defences of the representative parties are typical of the claims or defences of the class;

(d) Whether the representative parties will fairly and adequately protect the interest of the class.

#### **SERVICES:**

After making an application to NCLT, the copy of application shall be served to concerned Central Government, Regional Director, Registrar of Companies, the Company and other respondents and such other persons as NCLT may direct.

**PUBLIC NOTICE AFTER APPLICATION IS ADMITTED- AWARENESS TO PUBLIC**

(i) If the application is admitted, the Tribunal will issue a public notice to all the members of the class as per Form NCLT-13 by publishing the same within 7 days of admission of the application once in a vernacular newspaper in the principal vernacular language of the state in which the registered office of the company is situated and circulating in that state and at least once in English in an English newspaper circulating in that State.

(ii) Require the company to place the public notice on the website of such company, if any, in addition to publication of such public notice in newspaper and such notice shall also be placed on the website of the Tribunal, if any, on the website of Ministry of Corporate Affairs, on the website, if any, of the concerned Registrar of Companies and in respect of a listed company on the website of the concerned stock exchange(s) where the company has any of its securities listed, until the application is disposed of by the Tribunal. The date of issue of the newspaper in which such notice appears shall be considered as the date of serving the public notice to all the members of the class.

**CONTENTS OF PUBLICATION:**

The public notice shall inter alia, contain the following:-

- i. Name of the lead applicant;
- ii. Brief particulars of the grounds of application;
- iii. Relief sought by such application;
- iv. Statement to the effect that application has been made by the requisite number of members/ depositors;
- v. Date and time of hearing of the said application;
- vi. Time within which any representation may be filed with the tribunal on the application;
- vii. The details of the admission of the application and the date by which the form of opt out has to be completed and sent as per NCLT- 1; and
- viii. Such other particulars as the tribunal thinks fit.

**COST OF PUBLICATION:**

The cost or expenses connected with the publication of the public notice shall be borne by the applicant at the time of application and shall be defrayed by the Company or any person responsible for any oppressive act in case of order is passed in favour of the applicant.

**RULE OF OPT IN- OPT OUT-**

A member of class action under section 245 of the Act is entitled to Opt out of the proceedings at any time after the institution of the Class Action with the permission of NCLT as per Form No. NCLT- 1.

- (a) For the purpose of opting out of a class member, who receives notice under section 245(1) (a) of the Act, shall be deemed to be the member of the class. He has option to opt out himself from the proceeding as per the requirements of the notice issued by the tribunal in accordance with compliance of rule 38 of NCLT rules.
- (b) Opting out from the proceeding shall not preclude from pursuing a claim against the Company on an individual basis under any other law.

**NO DUPLICATION OF PROCEEDING:**

As per section 245(5) (b) of the Act, All similar applications prevalent in any jurisdiction should be consolidated into a single applications. Two class applications for the same cause of action shall not be allowed.

**LEAD APPLICANT:**

The class members or depositors should be allowed to choose the lead applicant and in case the members or depositors of the class are unable to choose, then Tribunal shall have power to appoint a lead applicant, who shall be in charge of the proceedings from the side of the applicants of that class.

**FEES & ITS REIMBURSEMENT:**

The cost or expenses connected with the application for class action (NCLT Fees- Rs. 5000/- per application) and shall be defrayed by the Company or any person responsible for any oppressive Act.

**BINDING NATURE OF THE SETTLEMENT ORDER:**

Any order passed by the tribunal shall be binding on the Company and all its Members, Depositors and Auditor including audit firm or expert or consultant or advisor or any person associated with the Company unless a any member or depositors had taken option being opt out himself from the proceeding.

**FRIVOLOUS OR VEXATIOUS APPLICATION:**

Where any application before the Tribunal is found to be frivolous or vexatious, it shall, for reasons to be recorded in writing, reject the application and make an order that the applicant shall pay the opposite party such cost which does not exceed INR 1 lac as may be specified in the order.

**EXCEPTION:** The Banking Company is exempt from section 245 of the Act.

**PENALTY ON NON COMPLIANCE OF TRIBUNAL ORDER:**

Any Company who fails to comply with the order passed by the tribunal shall be punishable with fine from INR 5 lacs upto INR 25 lacs and every officer of the Company who is in default shall be punishable with imprisonment for a term maximum of 3 years and fine from INR 2500 to INR 1 lac.

**CONDUCT OF NCLT:**

As per Sec.424, NCLT and NCLAT shall not be bound by code of civil procedure code but shall be guided by Principles of Natural Justice. Rules made thereunder shall have power to regulate their own procedure.

**DISPOSAL OF CASES:**

- 1) As per Sec.422(1) of the Act - Every Application or Petition presented before Tribunal and every Appeal filed before the Appellate Tribunal shall be dealt with and disposed as expeditiously as possible and shall be disposed of within 3 months from the date of its presentation before the Tribunal and Appellate Tribunal as the case may be.
- 2) As per Sec.422(2) of the Act- If the Application or Petition is not disposed of within 3 months, the Tribunal shall record the reason and the president or chairperson by taking into account the reason so recorded extend the period by such period not exceeding 90 days as he may consider necessary.

## **ADVANTAGES AND DISADVANTAGES OF THIS PROVISION OF CLASS ACTION SUIT:**

### **ADVANTAGES:**

- Reduction in number of lawsuits
- Reduces litigation costs
- Aggregation increase the efficiency of legal process
- Avoids repetition of same witnesses, documents and trial time and again
- Overcomes the disincentive - a small recovery that an individual may get by pursuing his single action
- Avoids different court rulings allowing the defendants to follow the rulings easily.
- Faster remedy
- Save court's time by aggregating several litigations.
- Directors, Auditors, Secretary and other officers of the Company are more accountable.
- No first in first out method by the Tribunal.

### **DISADVANTAGES:**

- Ruling by the court operates as Res Judicata for the members of the class.
- High costs – huge amount is spent on attorney fees; sometimes cost benefit ratio is negligible.
- If the claims are eligible for arbitration, whether can be brought before the Tribunal.
- Only Members and Depositors are covered.

### **CONCLUSION:**

The option of Class Action Suit made available in the Companies Act, 2013 will have far reaching effect on accountability of corporate, management and its advisors including audit firms. Unless it is used for harassment of management, it will have revolution in the civil legal remedy. The penalty for vexatious application of Rs.1 Lac should be increased to higher amount to discourage the misuse of these provisions. The professionals are also covered in the net and they will also act more responsibly towards the society at large. Although , currently the Class Action Suit can be filed only by the shareholders and deposit holders but the day is not far when even the employee, vendors, creditors , investors and customers will have the right to make the corporate responsible for any omission or commission of deeds which are not in the interest of public or community at large.

We, Company Secretaries are expert in Company Law matters and we must use this opportunity made available to us by the Government to excel in services towards corporate and various stakeholders. We, as a true professional should take charge of the responsibility given by the Government and Society at large and prove our worth and add value to the corporate world and society. We may be weak in art of advocacy but we are well aware of companies act, principle of natural justice and confident that we have qualities to take the profession ahead .

After Notification dated 10<sup>th</sup> September, 2016 notifying Section 246, 337 to 341 of the Act, the NCLT has been given wider power to order winding up of the Company and also penalizing directors, manager or officers of the Company or any person who were knowingly involved in fraud without any limitation of liability for all or any of the debts or liabilities of the Company. This powers of NCLT and speedy disposal of the Suits will have impact on wrongdoers and good corporate governance environment in managing the affairs of the Company. Initial few judgement of NCLT will be very significant to gain the confidence in legal system and development of such kind of remedy through Class Action Suit.

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### **Amita Desai & Co. Company Secretaries**

#### **Mumbai Off :**

1005, Hubtown Solaris  
Off Western Express Highway  
East End of Andheri Flyover

Landline: + 91-22-2684-5920/21  
Fax: + 91-22-6678-7499  
Mobile : + 91-982-017-7691

#### **Hyderabad Off :**

My Home Hub, 4th Floor, C Block, Madhupur,  
Hi-Tech City, Hyderabad, AP 500 081

**Chief Editor: Mrs. Amita Desai**

**Editor: For Amita Desai and Company**

- Ms. Priyanka Gupta**
- Ms. Seema Yadav**
- Ms. Parul Gupta**