

E-Notes (Compiled)
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Class Action (Section 245)

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Class Action (Section 245)

Brief Introduction

The Companies Act, 2013 has introduced a **new concept of class action suits** under section 245 which **can be exercised by shareholders and depositors against the company.**

- It provides an **alternate remedy** to the **members and depositors** of a company **or any class of them** by way of class action **before the Tribunal.**

- The **main objective behind** the enactment of such provision of class action suits **is to safeguard** the interests of **shareholders/depositors**.
- **So**, these class action suits **are presumed to play an important role to address the unlawful acts** by the Board of Directors, officers & other managerial personnel of the company because it has been **granted statutory recognition** under the Companies Act, 2013.

What does Class Action means?

- Class action **is a law suit** where one or several persons **join together** and **sue on behalf** of a larger **group of person**.
- It is a suit where a group of people **representing a common interest** may **approach the Tribunal to sue**. It is a **procedural instrument** that enables one or more plaintiffs **to file and prosecute litigation** on behalf of a larger group or class **having common rights and grievances**.
- A class action **is suitable** where the **issues in question** are **common to all** affected and the number of person affected is very large **making it impractical for all of them to join hands**.
- As per section 245 (1) such an application **may be filed** if they are **of the opinion** that the **management or conduct** of the affairs of the company are **being conducted** in a manner **prejudicial to the interests** of the **company** or its **members or depositors**.

Who may file an application under section 245?

- According to section 245 (3) (i), the requisite number of members to file an application of class action shall be as under-
- (A) Member or Members**
- 1- In case of company having a share capital**
 - As per section 245 (3) (i)(a), in case of a company having a share capital, an application may be made by **not less than one hundred (100) members**

or **not less than such percentage of total number** of its members as may be prescribed, **whichever is less** or, or any member or members **holding not less than such percentage of the issued share capital** of the company as may be prescribed.

- It is **important to note** that only those members who **have paid all the calls and other sums due** are eligible to join the application.

2- In case of a company not having share capital

- As per section 245 (3)(i)(b), in case of a company not having share capital, application may be made **by not less than one fifth (1/5)** of the **total number** of its members.

(B) Depositors

- As per section 245 (3)(ii), an application on behalf of the depositors may be made by **not less than one hundred (100) depositors** or **not less than such percentage of the total number of depositors** as may be prescribed, **whichever is less**.

- **Apart from this**, any depositor or depositors to whom the company owes prescribed percentage of total deposits of the company may also apply for class action.

Against whom an application of class action may be filed?

- Against the company;
- Against director for any fraudulent, unlawful or wrongful act or omission;
- Against the auditors including audit firm of a company for any improper or misleading statement of particulars made in the audit report or for any unlawful or fraudulent conduct; and
- Against an expert or advisor or consultant for an incorrect or misleading statement made to the company.

Reliefs available under a class action

Or

What type of relief may be claimed through class action suits?

- According to section 245(1), an application of class action may be made by members/depositors/any class of them **before the Tribunal for an order** seeking all or any of the following:
- to restrain the company from committing an act which is *ultra vires* the articles or memorandum of the company under section 245 (1) (a);
- to restrain the company from committing breach of any provision of the company's memorandum or articles under section 245 (1) (b);
- to declare 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 under section 245 (1) (c);
- to restrain the company and its directors from acting on such resolution under section 245 (1) (d);
- to restrain the company from doing an act which is contrary to the provisions of this Act or any other law for the time being in force under section 245 (1) (e);
- to restrain the company from taking action contrary to any resolution passed by the members under section 245 (1) (f);
- to claim damages or compensation or demand any other suitable action from or against under section 245 (1) (g):
 - (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;
- to seek any other remedy as the Tribunal may deem fit under section 245 (1) (h).
- It is **remarkable** that the **relief/remedies/orders** mentioned in **sub-clause (a) to (f)** are **for preventing** or **restraining** the company/directors from acting **against** the provisions of **any law** or **memorandum** or **articles** of association.
 - The relief/remedy/order **in sub-clause (g)** provides **for damages** from any fraudulent, unlawful or wrongful act committed **by the company** or its **directors**.

Pre-requisites for considering an application of Class Action

- Section 245 (4) **casts a duty** upon the **Tribunal** that on receipt of an application, the Tribunal while considering the application **shall take into account** the following **aspects**;
- whether the applicant (member or depositor) is acting in good faith for seeking an order under section 245 (4) (a). (If the application of class action has been made to derive some personal benefits/or to pressurize the company, it will not be considered an application made in good faith);
- any evidence suggesting the involvement of any person other than directors or officers of the company on any of the matters provided in clause (a) to (f) of sub-section (1) under section 245 (4) (b);

- whether the cause of action is one which the member or depositor could pursue in his own right rather than through an order under this section under section 245 (4) (c). (If the former is considered as a better alternative, the class action may not be accepted);
- views of the members or depositors of the company who have no personal interest, direct or indirect, in the matter being proceeded under this section under section 245 (4) (d). (Such requirement may provide fairness and objectivity in the proceeding);
- where the cause of action is an act or omission that is yet to occur, whether the act or omission could be, and in the circumstances would be likely to be authorized by the company before it occurs; or ratified by the company after it occurs under section 245 (4) (e) (i) &(ii). (If any act or omission is within the competency of authorization/regularization of the company, no class action application can be accepted);
- where the cause of action is an act or omission that has already occurred, whether the act or omission could be, and in the circumstances would likely to be, ratified by the company under section 245 (4) (f).(If any alleged act or omission under the application is likely to be ratified by the company, the application would lose its purpose).

Post-acceptance procedure in class action

Or

Procedure to be followed by the Tribunal

- Section 245 (5) **prescribes the procedure to be followed by the Tribunal** once the application has been admitted. It provides that if an **application is admitted**, then the Tribunal **shall have regard** to the following, namely:

- (a) A **public notice shall be served to** all the **members or depositors** of the class in such manner as may be prescribed. (**Rule 87** of the **National**

Company Law Tribunal Rules, 2016 prescribes **the manner** in which the notice shall be served).

(b) If there **is more than one application** prevalent **in any jurisdiction**, they **should be consolidated into a single application**. After such consolidation, the class **members** or **depositors** would **choose the lead applicant**. If the members or depositors are **not able to choose lead applicant**, the **Tribunal** shall **have the power to appoint a lead applicant** to be in charge of the proceedings.

(c) Two class action applications **for the same cause of action shall not be** allowed.

(d) The **cost or expenses** connected with the application for class action shall **be defrayed** by the **company** or **any other person** responsible for any oppressive act.

Effects of non-compliance of the Order of the Tribunal

- As per section 245 (6), any order passed by the Tribunal shall be binding on the –
- company;
- all its members;
- depositors;
- auditors including audit firm; or
- expert; or
- consultant; or
- advisor ; or
- any other person associated with the company.

Non- compliance

- Any failure to comply with the order of the Tribunal **would make the company punishable with fine** which shall not be less than rupees **five**

lakh but which extend to rupees **twenty-five lakh**. Every officer of the company, who is found to be in default, shall be punishable with **imprisonment** for a term which may extend to **three years and with fine** which shall **not be less than rupees twenty- five thousand** but which may extend to **rupees one lakh** .

- If an application of class action **is found to be frivolous or vexatious**, the same **will be rejected** by the **Tribunal**. Under **section 245 (8)**, the Tribunal **shall record the reasons of rejection in writing** and order the applicant to **pay a compensation**.

Concluding remark

- As a gist, the concept of class action is a newly inserted provision in the Companies Act, 2013 and it **can prove to be** an apt **platform** for **members** and **depositors** to raise their **voice against** the **management** of a company including directors, advisors, consultants and auditors *etc.*, for **acts** or **omission** that are **prejudicial**, unlawful or wrongful **to the interests of the company**.

- It may be **welcomed as** redressal **mechanism/ tool** by members/depositors having common interest for creation **of transparent corporate governance**.
