



The Companies Act, 2013

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NEW CORPORATE LAWS TREATISE

ADJUDICATION AUTHORITIES AND PENAL PROVISIONS




PAST PITFALLS AND LESSONS LEARNT



• 2G spectrum – companies used multi layer structures to hide identity of real promoters




• Inadequate protection to Investors – No entrenchment provisions




• Global developments, best practices and precedents (like CSR, rotation of independent directors/ auditors, scrutiny of transactions by various authorities, etc)



• Usage of funds for purposes other than those specified in the IPO document



• Inadequate reliefs for small shareholders and depositors



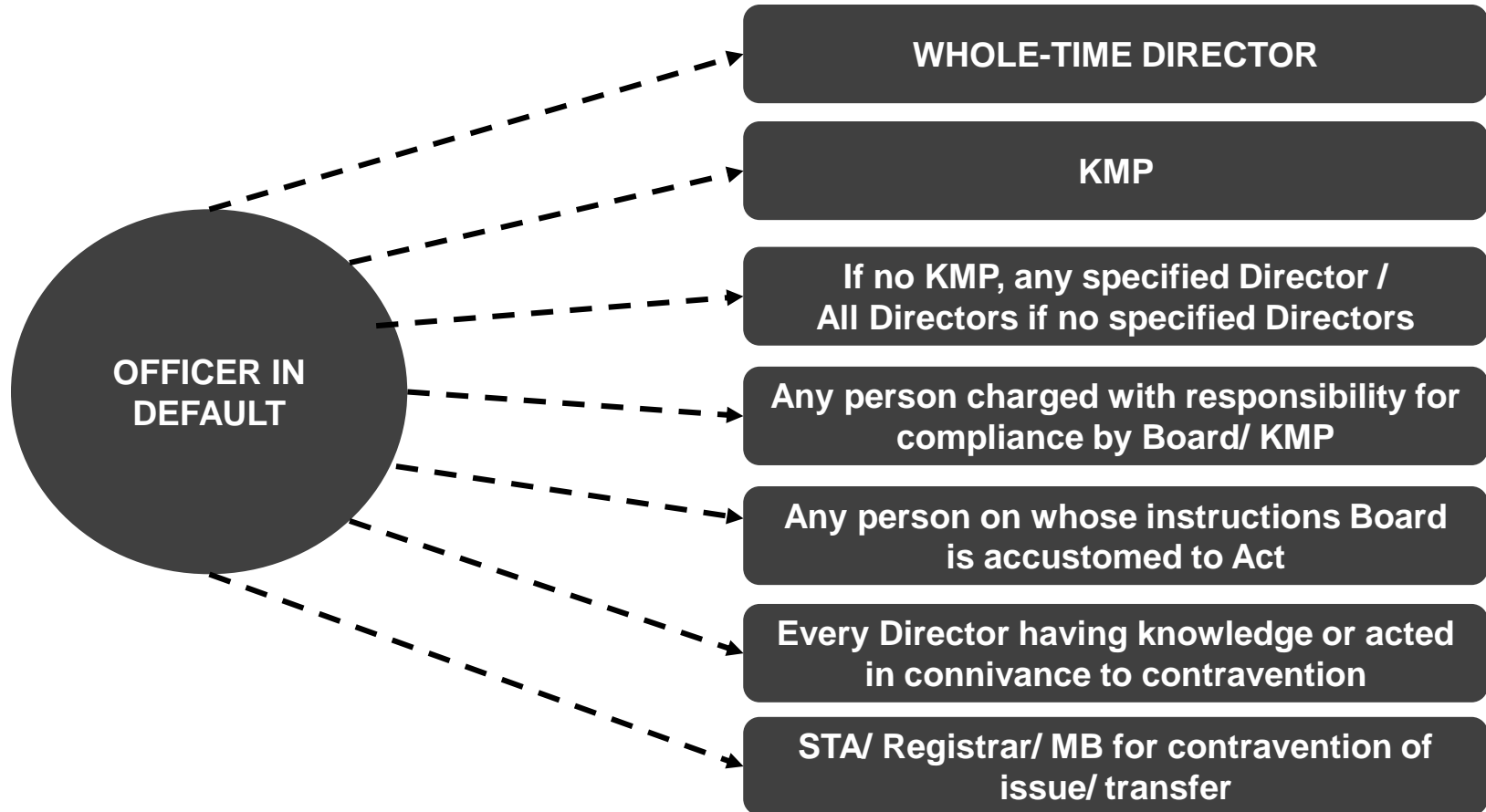
• Satyam/ Sahara episode – examples of misrepresentation, financial fraud and bypass of regulatory norms

The Act substantially redresses past pitfalls and lays checks and balances through disclosures and enhanced corporate governance mechanisms

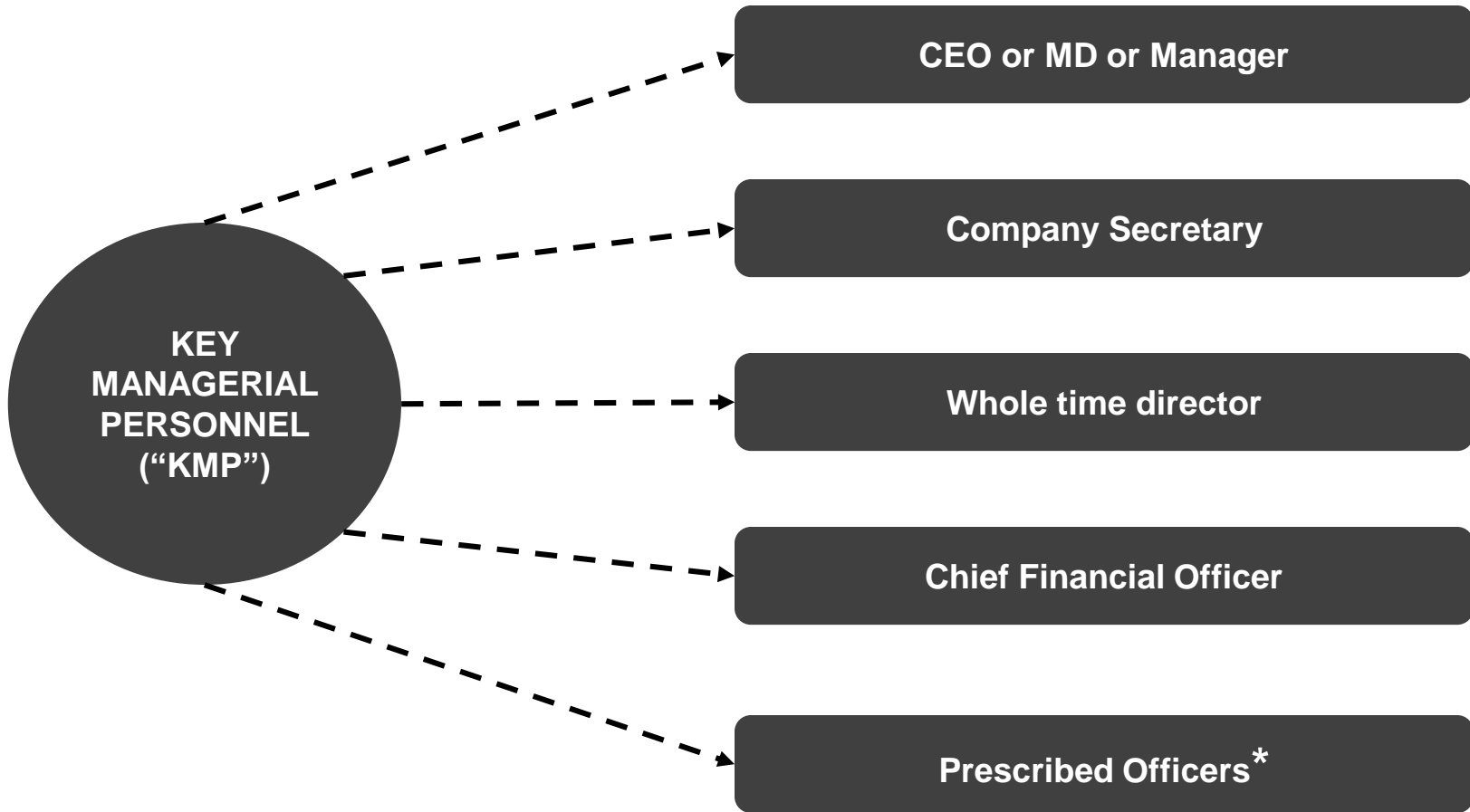
Stringent penal provisions introduced and fine increased

OFFICER WHO IS IN DEFAULT

Persons liable as “officer in default” to any penalty by way of imprisonment, fine or otherwise, means any of the following officers of a company:



KEY MANAGERIAL PERSONNEL



KMPs can now be made responsible for compliance with the Act and they shall be capable of being proceeded against as 'officers in default' for offences under various provisions of the Act

SPECIAL COURT

SPECIAL COURT

- Central Government to set up special courts for speedy trial of offences under the Act [435]
- All offences under the Act shall be triable by the Special Court having jurisdiction over area of registered office of the company [435]
- The Special Court would have the liberty to try summary proceedings for offences punishable with imprisonment for a term not exceeding three years. In case of summary trial it can award a maximum imprisonment for **1 year** [436]
- Appeal against order of Special Court to lie with High Court
- Except as specified under the Act, provisions of Cr P C shall apply before the Special Court and they shall be deemed to be Court of Session

Offences under the Act shall be **non-cognizable** except related to investigation by SFIO/ fraud matters which will be **cognizable offence** [439]

SPECIAL COURT

SPECIAL COURT

- The person conducting a prosecution before a Special Court shall be deemed to be a Public Prosecutor
- No Court shall take cognizance of an offence alleged to have been committed by a Company or any officer except on a Complaint of:
 - The Registrar
 - Shareholder; or
 - Any person authorised by Central Govt.
- Cases related to issue or transfer of securities, non-payment of dividend, cognizance of such offences can be taken by Court on a complaint by SEBI

Until Special Court is established, offence under the Act to be tried by Court of Session exercising jurisdiction over the area [440]

ADJUDICATION OF PENALTIES

- The CG may, appoint Adjudicating Officers (“**AO**”), not below the rank of Registrar, for adjudging penalties under the provisions of the Act in the prescribed manner and also set their jurisdiction [s. 454]
- The AO by an order impose the penalty on the Company and the officer who is in default stating any non-compliance or default under the relevant provision of the Act
- Appeal against the order of AO to be made before the Regional Director (“**RD**”) within 60 days of receipt of order of AO in the prescribed form
- The Regional Director after hearing the party pass such order **confirming, modifying or setting aside** the order appealed against
- Non payment of penalty upon order of **AO** or **RD** by the Company / Officer liable to penalty as follows:

Company	Officer in Default
Fine ranging Rs 25k to Rs 5 lacs	Imprisonment upto 6 months <u>or</u> Fine ranging Rs 25k to Rs 1 lac

COMPOUNDING OF OFFENCE

Compounding by Company or Officer can be done on payment of such sums as may be specified by NCLT, RD or any Officer specified by MCA

NCLT

- Any offence punishable under the Act with **fine only**

Regional Director/
Prescribed Officer

- Where the maximum amount of **fine does not exceed Rs 5 lacs**

Special Court

- Any offence liable for **imprisonment or fine or both** can be compounded with the permission of Special Court

COMPOUNDING OF OFFENCE

Offences by Company or any Officer shall not be compounded



Any investigation against the Company is initiated or is pending

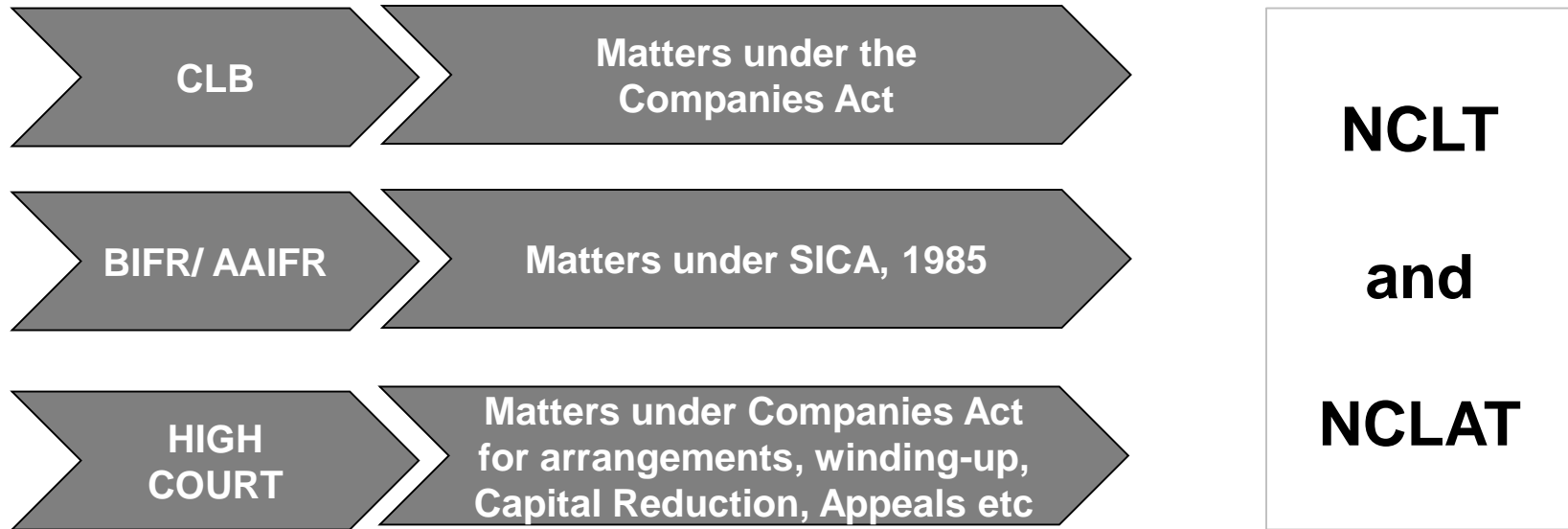


Where similar offence has been compounded within preceding 3 years from the date of offence

Offences which are liable for penalty by way of Imprisonment or Offences which are liable for penalty by way of Imprisonment and Fine are Non-Compoundable Offences under the Act

NATIONAL COMPANY LAW TRIBUNAL

NCLT consolidates the power and jurisdiction of:



Transitional Issues

- Transition process for existing Schemes under section 391 of the Old Act which involve two motions may need to be transitioned carefully
- Reserved judgements of CLB are likely to be re-heard by NCLT.
- NCLAT is not empowered to entertain an appeal against the order of CLB. Whether HC jurisdiction remains open for past CLB orders?

NATIONAL COMPANY LAW TRIBUNAL

- NCLT to consist of mix of judicial and technical members
- No Civil Court shall entertain appeals from matters dealt with NCLT/ NCLAT
- NCLT/ NCLAT has power to punish for its contempt as those available to High Court under the Contempt of Court Act, 1971

PROCEDURE BEFORE NCLT

Section 424

- Shall not be bound by code of civil procedure
- Shall be guided by principles of natural justice
- Other provisions of this act or rules made thereunder
- Shall have power regulate their own procedure

APPLICATION OF LIMITATION ACT

Section 433

- Provisions of Limitation Act apply to proceedings before tribunal or appellate tribunal

Impact

- If period is given in the Act, then application/appeal has to be filed within time contemplated
- if not filed within the time contemplated application for condonation of delay under sec.5 has to be filed
- If no period is given in the Act, then Art.137 of Limitation would apply. Art.137 prescribes a maximum of period of three years
- If not filed within 3 years then application for condonation of delay has to be filed

Bank of Rajasthan Ltd vs Rajasthan Breweries Ltd (2007) 140 Com.cas 622 CLB

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APPEAL FROM NCLT ORDERS

Section 421 APPEAL TO NCLAT

- Consent orders cannot be appealed
- Appeal has to be filed within a period of **45** days
- On sufficient cause being shown can be filed within a further period not exceeding 45 days

Section 421 APPEAL TO SUPREME COURT

- Appeal within a period of **60** days
- On sufficient cause within a further period not exceeding sixty days.

MEDIATION AND CONCILIATION PANEL

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- A Panel of experts to be set up to facilitating mediation and conciliation between parties during any proceeding under the Act before the Central Government or NCLT or NCLAT
- Reference to Panel can be made suo-moto by relevant authority or by the concerned parties
- Panel to dispose of the matter referred within **3 months**
- Panel to forward its recommendation to relevant authority
- Aggrieved parties can file its objections before relevant authorities

Speedier dispute resolution mechanism introduced under the Act for amicable settlement of disputes/ proceedings among parties

Need for robust anti-fraud measures for corporates

CASE REFERENCE*	KEY ISSUE
Satyam	Accounting fraud/ material mis-statements
Financial Technologies India Limited/ NSEL	Restraining company sale of assets
Shradha Scam	Ponzi Scheme
Speak Asia	Online survey scheme, MLM
Reebok	Accounting fraud

US jurisprudence:

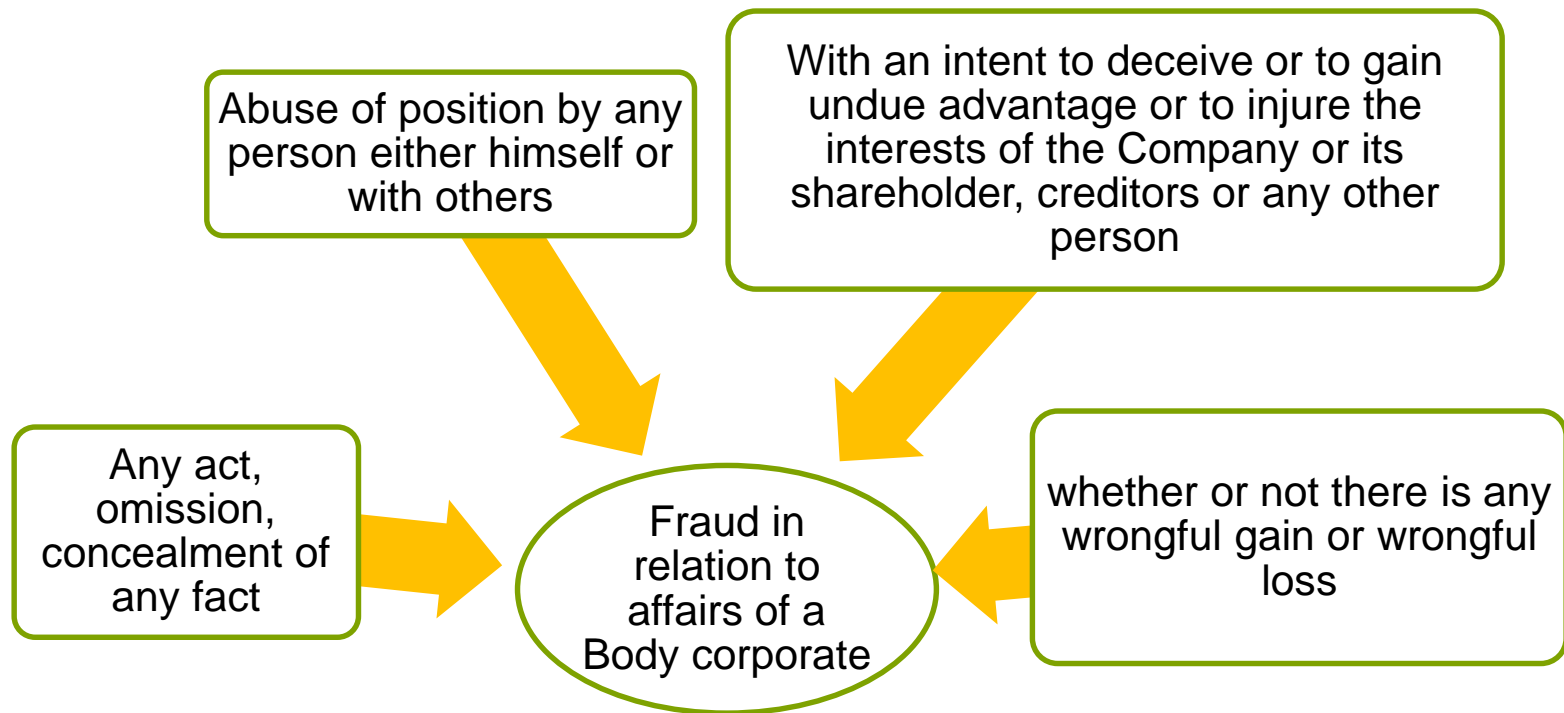
- US FCPA
- UK Bribery Act
- Other Acts and regulations

Indian jurisprudence:

- Provisions in IPC
- Information Technology Act
- Indian Contract Act, 1872
- Special Enactments- PML Act, 2002; Prize Chits and Money Circulation Scheme (Banning) Act, Whistle Blower Bill

*Publicly collated data, for illustrative purposes

CO. ACT 2013 - FRAUD RELATED PROVISIONS



“wrongful gain” means the gain by unlawful means of property to which the person gaining is not legally entitled

“wrongful loss” means the loss by unlawful means of property to which the person losing is legally entitled

CO. ACT 2013 - FRAUD RELATED PROVISIONS

FRAUDS

- **'Fraud'** defined to include any act or omission or abuse of position with an intent to deceive or obtain undue gain or to injure the interests of the company, its shareholders or its creditors or any other person
- Persons convicted of fraud subject to severe penal consequences and imprisonment for up to a maximum of ten years

SFIO

- Government to constitute "Serious Fraud Investigation Office" ("SFIO") by notification, until then SFIO in existence since 2003 as a non-statutory body of the Ministry of Corporate Affairs shall continue
- Statutory recognition given to SFIO to act as a nodal agency for investigation of frauds
- **SFIO vested with the powers of a magistrate and issue directions for arrest of person**

PART 2 – CLASS ACTION SUITS



SATYAM CASE – AN EYE OPENER

- The Satyam scam involved a fraudulent scheme wherein the revenues of Satyam were materially overstated
- Satyam's ADS were listed on the NYSE, therefore several class actions were filed against Satyam and the managing director including other members of management of Satyam on behalf of purchasers of Satyam's ADS, in the U.S
- In addition, the global audit firm PwC along with its international and India unit were charged with class action for having recklessly disregarded a multi-year massive fraud by the Satyam management
- In 2011, Satyam and its auditor PwC agreed to pay USD 125 million and USD 25.5 million to settle claims filed by shareholders by way of a class action in US
- However, due to the absence of any statutory provision for class action under the Companies Act 1956, no similar proceedings could be initiated by the Indian shareholders

CLASS ACTION SUITS – NEW CONCEPT

- New provisions relating to class action suits introduced
- Framework laid down enabling members or depositors to approach the Tribunal directly
- In order to mitigate the risk to frivolous suits, minimum applicant size prescribed
- Banking companies exempted

US jurisprudence:

- **Federal Rules of Civil Procedure (Rule 23) - state specific law**
- **Class Action Fairness Act 2005 -**

Indian jurisprudence:

- **Sec.91 of Code of Civil Procedures**
- **Order I, Rule 8 of Code of Civil Procedures**

CLASS ACTION SUITS – AN OVERVIEW

Section 245

Conditions for Relief

- Pre- Requisite for filing CAS
- Prescribed number of members or depositors;
 - Have a collective opinion that the management or conduct of affairs of a Company are being conducted in a manner prejudicial to the Company or its stakeholders

Nature of Relief

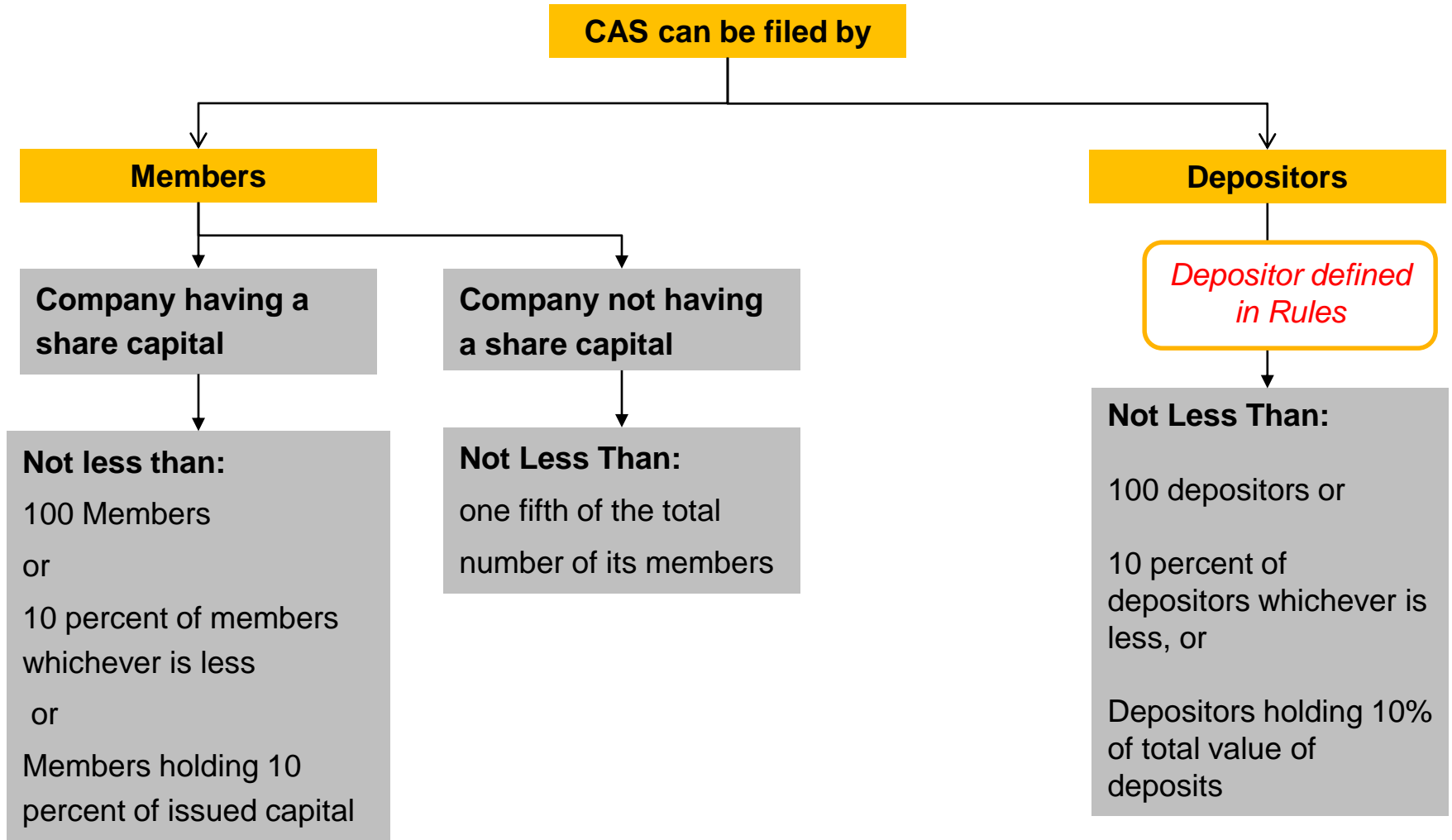
- **Restrain** the Company from doing any act
 - Ultra-vires the MOA/ AOA
 - Contrary to any shareholders resolution
 - Contrary to Co. Act or any other law
- Declare a resolution altering MOA / AOA as not valid if passed by suppression of material facts
- Claim compensation or other suitable action from specified Persons
- Any other remedy

Relief against Whom

- The Company itself;
- Its directors;
- Auditor/ Firm; or
- Any Expert, **Advisor** or Consultant or any other Person

Specific provision for class action in case of mis-statement in prospectus [s.37]

WHO CAN FILE A CLASS ACTION SUIT



Other stakeholders ie creditors, bankers, government etc not covered

Q & A



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