THE CLASS ACTIONS LAW REVIEW

SEVENTH EDITION

Editors
Camilla Sanger and Peter Wickham

THE LAWREVIEWS

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PREFACE

Class actions and major group litigation can be seismic events, not only for the parties involved but also for whole industries and parts of society. That potential impact means they are one of the few types of claim that have become truly global in both importance and scope, and this is reflected in this seventh edition of *The Class Actions Law Review*.

There are also a whole host of factors currently coalescing to increase the likelihood and magnitude of such actions. These factors include continuing geopolitical developments, particularly in Europe and North America, with moves towards protectionism and greater regulatory oversight. At the same time, further advances in (as well as greater recognition and experience of the limitations of) technology is giving rise to ever more stringent standards, with the potential for significant liability for those who fail to adhere to these protections. Finally, ever-growing consumer markets of increasing sophistication in Asia and Africa add to the expanding pool of potential claimants.

It should, therefore, come as no surprise that claimant law firms and third-party funders around the world are becoming ever more creative and active in promoting and pursuing class actions, and local laws are being updated to facilitate such actions before the courts.

As with previous editions of this *Law Review*, this updated publication aims to provide practitioners and clients with a single handbook to which they can turn for an overview of the key procedures, developments and factors in play in this area of law in a number of the world's most important jurisdictions.

Camilla Sanger and Peter Wickham
Slaughter and May
London
March 2023

Chapter 7

INDIA

Sumeet Kachwaha and Ankit Khushu[1]

I INTRODUCTION TO THE CLASS ACTIONS FRAMEWORK

Class action provisions have existed under the Indian Code of Civil Procedure (CPC) since 1908. However, a framework relating to class actions came about through a 1976 amendment.[2] Broadly, the key provisions are as follows.

There must be numerous persons having the 'same interest'. The Explanation for the relevant section clarifies that it is not necessary that they have the same cause of action. A Supreme Court judgment elaborates: 'either the interest must be common or they must have a common grievance which they seek to get redressed'.[3]

A declaration of a suit as a representative suit requires court permission and this permission can be sought by either the plaintiff or a person defending the suit.

In addition to the general provisions, special provisions exist in the CPC for collective actions in relation to public nuisance or other wrongful acts affecting or likely to affect the public, regardless of whether any special damage has been caused to the person bringing the action.[4] In relation to suits in respect of charitable or religious trusts, however, 'only a person who has an interest in the trust' may bring a representative action.[5] In either case, court permission is required.

In addition to the CPC route, a class action can be brought under a variety of special statutory and constitutional provisions briefly described below.

i Consumer Protection Act

In July 2020, a new statute, the Consumer Protection Act 2019 (CPA) came into force replacing the Consumer Protection Act 1986. Class action-enabling provisions continue to be available under the CPA. It requires that persons sought to be represented have the same interest.[6] Additionally, the new Act envisages the establishment of a Central Authority called the Central Consumer Protection Authority (CCPA) to, inter alia, protect, promote and enforce the rights of consumers as a class, and prevent violation of consumer rights.[7] The CCPA has the power to conduct inquiries as to whether there exists a prima facie case of violation of consumer rights or any unfair trade practice or false or misleading advertisement

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2 Order I, Rule 8, The Code of Civil Procedure 1908 (CPC).

3 *Chairman, Tamil Nadu Housing Board v. T.N. Ganapathy*, (1990) 1 SCC 608.

4 Section 91, CPC.

5 Section 92, CPC.

6 Section 2(5)(v), Consumer Protection Act 2019.

7 Section 18(1)(a), Consumer Protection Act 2019.

prejudicial to public interest or the interest of consumers. The investigation may be conducted upon either information or a complaint or directions from the central government, or on its own motion.[8]

Since its inception, the CCPA has been taking active measures to protect consumer interests.

a In June 2022, the CCPA published the Guidelines for Prevention of Misleading Advertisements and Endorsements for Misleading Advertisements 2022,[9] to prevent false or misleading advertisements and endorsements relating thereto. These Guidelines apply to all advertisements and includes conditions for non-misleading and valid advertisements, due diligence required for endorsement and advertisements targeted at children.

b Many companies, such as GlaxoSmithKline Asia, were fined by the CCPA and their advertisements discontinued for false and deceptive claims.[10] In another order, Amazon was fined for allowing the sale of non-compliant domestic pressure cookers on its e-commerce platform. The CCPA directed Amazon to notify all consumers of the 2,265 pressure cookers sold on its platform, recall the product, reimburse the consumers and submit a compliance report.[11]

c In the wake of recent acid attacks in India, the CCPA issued notices to two e-commerce companies, Flipkart Internet Private Limited and Fashnear Technologies Private Limited, for violations concerning the sale of acid reported on their platforms.[12]

The CPA establishes three forums to hear consumer complaints, namely the National Commission (for matters where the compensation sought exceeds 100 million rupees), the State Commission (for matters where the compensation ranges from 10 million rupees to 100 million rupees) and the District Commission (for matters where the compensation sought is less than 10 million rupees).

ii Companies Act

There is a bit of a context to the introduction of class action provisions under the Companies Act in 2013. Some years ago, India witnessed a huge corporate scandal when the founding chairman of a leading information technology company, Satyam Computers, confessed that the company's accounts were fabricated and approximately US$1 billion showing on the company books were in fact missing. A consumer protection organisation sought to bring a collective action before the consumer court.[13] The complainants chose to approach the consumer court rather than the normal civil court, as a complex matter like this would have entailed inordinate delays given the backlog of civil suits in India. However, the consumer court rejected the complaint *in limine* as it follows a summary procedure and does not entertain matters that are likely to involve complex factual issues. An appeal to the Supreme Court was also unsuccessful.[14] The complainant then chose to abandon its claim.

8 Section 19(1), Consumer Protection Act 2019.

9 https://consumeraffairs.nic.in/sites/default/files/file-uploads/latestnews/CCPA%20Notification.pdf.

10 https://www.tribuneindia.com/news/business/misleading-ads-glaxo-naaptol-fined-10l-460446.

11 https://pib.gov.in/PressReleasePage.aspx?PRID=1848370.

12 https://pib.gov.in/PressReleaseIframePage.aspx?PRID=1884119.

13 *Midas Touch Investors Association v. M/s Satyam Computers Services Ltd*, CC 71/2009.

14 *Midas Touch Investors Association v. M/s Satyam Computers Services Ltd*, Civil Appeal No. 4786/2009.

In essence, in the absence of a collective action mechanism under the Companies Act (and as the alternative avenues were found to be wanting and unsuitable), the Indian investors were largely left remediless. In contrast, the American investors in the same company were able to recover damages in the US courts through a class action.[15]

This vacuum was filled via a 2013 amendment to the Companies Act, which now empowers the National Company Law Tribunal (the Tribunal) to declare an action a class action. In class action litigation provisions under the Companies Act, there are certain departures from the CPC provisions, the most significant being a minimum number of members need to join an action for it to be declared a class action.[16] Further, the Companies Act avoids the expression 'same interest' and instead the Tribunal is required to consider (among several other factors) whether there are questions of law or fact common to the class and whether the claims or defences of the representing party are typical of the class it seeks to represent. Class action provisions, however, do not apply to a banking company.

iii Competition Act

Class actions have also been provided for under India's Competition Act 2002. The basic structure is the same as that under the CPC (i.e., that the loss or damage has been caused to numerous persons with the same interest and the Tribunal has granted permission to one or more of those persons to litigate on behalf of the class). The Competition Act provides that the class action CPC provisions shall apply. However, to date, the class action provisions under the Competition Act have not been tested.

iv Public interest litigation (by writ petition under the Constitution of India)

There is an altogether different dimension of representative suits in India in the form of public interest litigation (PIL). This is a unique and expansive jurisdiction carved out by Indian courts in which any person (without the need to disclose any *locus standi* or special grievance) can espouse a public cause. These petitions lie before the high courts or the Supreme Court, in the exercise of their writ jurisdiction. Indian courts have been extremely liberal in entertaining PIL actions (to the extent of being accused of crossing their legitimate constitutional bounds and transgressing into the realm of the legislative and the executive). However, PIL actions are very popular, resorted to regularly and here to stay. They cover virtually every conceivable facet of public life, including the right to a clean environment, food, water, education and medical care.

The defining features of a PIL action are that the court disregards *locus standi* and procedural compliance. It is even willing to entertain a simple letter from a public-spirited

15 *Re: Satyam Computer Services Ltd Securities Litigation*, US District Court, Southern District of New York, No. 09-MD-2027 (BSJ).

16 Section 245(3), Companies Act 2013 sets out the number of members or depositors required to file a class action suit:

a Required number of members: for companies having share capital, no fewer than 100 members or a prescribed percentage of total members whichever is less, or a member or members holding a prescribed percentage of the shareholding in the company. For a company without share capital, not less than one fifth of the total number of its members.

b Required number of depositors: minimum 100 depositors or a prescribed percentage of the total depositors, whichever is less, or a depositor or depositors to which the company owes the percentage of the total deposits as prescribed.

person and *suo moto* convert it into a writ petition. However, the petitioner must be seen to be acting bona fide and not for personal gain or profit. A PIL judgment is binding on everyone, whether they have notice of the proceedings or not and whether they were afforded an opportunity of being heard or not. The nature of the parties is amorphous and the petitioner is not *dominus litus*.[17] PIL is viewed as non-adversarial, with the judge taking on a proactive role and not being confined to the pleadings or evidence produced. Public policy doctrines such as res judicata and estoppel are inapplicable.

Illustrative PIL cases

The body of case law concerning PIL is immense and diverse. A few illustrative cases are set out below to give a flavour of the scope and ambit of this jurisdiction.

Manohar Lal Sharma v. Union of India and Ors

In 2021, a writ petition was filed to examine the validity of the alleged state use of spyware called 'Pegasus' on unknown private individuals without their consent.[18] The petitioners contended that this constituted a violation of the fundamental right to privacy and speech. The government declined to join issue on the contentions, pleading national interest. The Supreme Court appointed a three-member expert committee to probe the allegations and make appropriate recommendations on related issues, and it has since submitted its report. The matter is currently under consideration.

M C Mehta v. Union of India

Mr M C Mehta is an acknowledged environmental PIL activist. In 1985, he filed a writ petition in the Supreme Court seeking court directions on environment-related matters, including relocation of polluting and hazardous industries outside Delhi.[19] The Court has since kept the petition on record and, from time to time, entertained environmental issues brought before it. Various orders (on a diverse range of environmental issues) have been passed in this petition. These include orders concerning lead-free gasoline; cleaning up of major rivers; controlling crop burning (which leads to smoke pollution across North India); restricting construction activities when pollution levels spike; disposal of waste and rubbish; traffic congestion; and phasing out overaged vehicles from the city of Delhi.

Vishaka v. State of Rajasthan

The Supreme Court here was approached by a group of social activists and non-governmental organisations seeking the Court's intervention to prevent and address sexual harassment in the workplace.[20] The Supreme Court held that there was a legal vacuum as neither the civil nor the penal laws adequately address sexual harassment in the workplace, and that legislative intervention may take time. The Court virtually legislated by prescribing rules for both the private and the public sector to follow. Briefly, the Court imposed a duty on the employer to put in place systems to prevent and deter sexual harassment at the workplace and for resolution

17 Aman Hingorani on 'Public Interest Litigation'; *Annual Survey of Indian Law 2017*, Vol. LIII, Chapter 24, p. 634.

18 *Manohar Lal Sharma v. Union of India (UOI) and Ors.*, AIR 2021 SC 5396.

19 *M C Mehta v. Union of India*, (2020) SCC OnLine SC 29.

20 *Vishaka v. State of Rajasthan*, (1997) 6 SCC 241.

(or prosecution) of complaints relating to sexual harassment. Inter alia, the Court required an employer to set up complaint committees (to be headed by a woman). The complaint mechanism must ensure time-bound complaint redressal and maintain confidentiality. If the conduct complained about amounts to a criminal offence, the employer would be required to take action in accordance with the law by making a complaint to the appropriate authority. If it amounts to a civil wrong or misconduct, appropriate action is to be initiated in accordance with the applicable service rules.

The Orissa Mining Corporation case

Here, two multinationals had sought requisite permissions from the Ministry of Environment, Forest and Climate Change to undertake mining and industrial activities in a forest area.[21] The Ministry granted the preliminary permissions but rejected the final permits. The rejection was pursuant to certain recommendations by a government committee appointed by the Ministry, which expressed concern regarding adverse effects on the region's indigenous people and their lifestyle. The Supreme Court concluded that the mining activities already undertaken were illegal as they exceeded the government permits. Further, it concluded that the mining activities threatened the stakeholders' traditional lifestyle, which was entitled to protection. Going forward, the Court required greater involvement of the village-level bodies in the decision-making processes concerning forest-related industrial or mining activities.

Endosulfan (pesticide) case

The Supreme Court took cognisance of certain press reports that a pesticide, endosulfan, posed serious health risks. This pesticide was used widely on crops and fruit trees. Controversially (because the measures taken were merely on the basis of press reports), the Supreme Court put an immediate ban on the production, distribution, use and sale of endosulfan and directed the seizure of stocks.[22] It then appointed a committee headed by the Director General of the Indian Council of Medical Research and the Agriculture Commissioner to conduct a study on the adverse effects of endosulfan. Months later, the Court modified its interim order and permitted export of endosulfan to countries that permitted its use and in relation to which Indian exporters had existing purchase orders.

II THE YEAR IN REVIEW

As stated, the CPA came into force in July 2020, replacing the Consumer Protection Act 1986. The new legislation establishes a central authority called the CCPA to protect and enforce the rights of consumers as a class. The CCPA is empowered, inter alia, to conduct investigations into violation of consumer rights and institute complaints and prosecutions, order recall of unsafe goods and services, order discontinuation of unfair trade practices and misleading advertisements and impose penalties on manufacturers, endorsers and publishers of misleading advertisements.

A review of some recent judgments is set out below.

21 *Orissa Mining Corporation v. Ministry of Environment and Forest*, (2013) 6 SCC 476.

22 *Democratic Youth Federation of India v. Union of India and Ors.,* (2011) 15 SCC 530.

i Brigade Enterprises Ltd v. Anil Kumar Virmani

Buyers of approximately 50 residential apartments, out of 1,134 in a complex, joined together to file a consumer complaint on behalf of purchasers of apartments.[23] The National Commission treated the complaint as a representative action. The Supreme Court observed that since there were only 'a few consumers' and not 'numerous consumers' with the same interest, the complaint qualified as a joint complaint and not a representative action. These consumers, it held, need not file independent and separate complaints and could join and file a single complaint.

ii Puri Construction Pvt Ltd v. Shailesh Gupta & Ors

A consumer complaint was initiated by 48 allottees against the builder for price discrimination on behalf of themselves and 'all the similarly situated aggrieved buyers/allottees/consumers'.[24] A class action was allowed, but a subsequent attempt to abandon part of the claim without notice to the class was struck down by the Delhi High Court as contrary to the CPC.

iii TDI Infrastructure Ltd v. Union of India & Anr

The complainant's grievance[25] was that the allotted plots were underdeveloped, uninhabitable and lacked basic amenities. The National Commission treated the complaint as a class action, holding that all consumers who seek a common relief can be represented by a select group of the consumers concerned. The Delhi High Court set aside the order, however, holding that the Commission's reasoning was flawed and what was required was not 'sameness of relief' but 'sameness of interest'. Sameness of interest would, in turn, require identity, or at least similarity, of the grievances of the consumers and, in the absence of any specific pleading to that effect, this cannot be established.

III PROCEDURE

i Types of action available

As stated in the introduction, there are various avenues available for class action. To summarise, actions can be brought under the following:

a Code of Civil Procedure 1908;
b Consumer Protection Act 2019;
c Companies Act 2013;
d Competition Act 2002; or
e PIL.

ii Commencing proceedings and procedural rules

The discussion below is relevant for class actions (other than PIL actions).

As seen, a class action in India necessarily requires court permission. Before granting the requisite permission, the court shall (at the plaintiff's expense) cause notice to be issued to all persons sought to be represented. Where personal service is not feasible (including for the

23 *Brigade Enterprises Ltd v. Anil Kumar Virmani*, 2021 SCC OnLine SC 1283.

24 *Puri Construction Pvt. Ltd v. Shailesh Gupta & Ors.*, CM(M) 520/2020, as decided by the Delhi High Court on 17 August 2022.

25 *TDI Infrastructure Ltd v. Union of India & Anr*, 2022 SCC OnLine Del 1835.

reason that large numbers of persons are involved), service through public advertisement may be permitted instead. A person who seeks to be represented or defended may apply to the court to be impleaded. A decree passed in the suit is binding on all persons on whose behalf or for whose benefit the suit is instituted or defended.

iii Damages and costs

Historically, Indian courts have been conservative in awarding damages. There are no jury trials. The basic principle for awards of damages is restitution and compensation. However, in environmental degradation cases, damages can be extensive and, in some cases, punitive as well.

In cases of public wrongs, courts tend not to calculate damages precisely or base them on any expert evidence; instead, the court takes a broad-brush approach and orders what it considers just and appropriate given the totality of the facts. In representative suits, damages will be awarded either to identified individuals (sometimes through court-appointed commissioners) or, in environmental cases, simply in favour of the government exchequer towards restoration of the harm done.

One significant feature of Indian law is that actual or realistic costs are not awarded and an exercise of assessment of costs is not undertaken (as in the US or English courts). Section 35 of the CPC deals with the subject of costs. It states that costs shall be at the discretion of the court but subject to limitations as may be prescribed in law. The general rule is that costs shall follow the event. However, where the merits are evenly balanced or there is a fair question of law involved, the parties are left to bear their own costs.

Various high courts have framed rules prescribing a schedule of costs awarded in suits and these are at a very modest scale (rarely exceeding a few hundred dollars). To illustrate this, Section 35A of the CPC (last amended in 1977) states that if a claim or defence is found to be false or vexatious to the knowledge of the party concerned, the court may award 'exemplary costs' against it; however, these costs shall not exceed 3,000 rupees (about US$42).

The courts have taken notice judicially that unscrupulous litigants may take advantage of the fact that costs are either not awarded or awarded only nominally.[26] In addition, it is felt that costs may be an impediment to pursuance of a legal right or defence (and, therefore, contrary to public policy). The Law Commission of India (an advisory body to the government and Parliament), in a report of May 2012,[27] recommended that more reasonable costs should be awarded. Nonetheless, its recommendation for Section 35A of the CPC concerning false or vexatious costs claims is merely to increase the cap on costs from the existing 3,000 rupees to 100,000 rupees. This indicates that realistic costs awards are still some distance away, particularly in non-commercial disputes.

iv Settlement

Once a court certifies an action as a class action, it can be neither withdrawn nor abandoned and no agreement, compromise or satisfaction can be entered into unless the court has given (at the applicant's expense) notice in the prescribed manner to all interested persons.[28] The legislation is silent, however, as to how the court is then to proceed. In particular, there is no

26 *Salem Advocates Bar Association, Tamil Nadu v. Union of India,* (2005) 6 SCC 344.

27 'Costs in Civil Litigation', Law Commission of India, Report No. 240.

28 Order I Rule 8(4), Code of Civil Procedure 1908.

provision for a 'fairness hearing' (as known in, for instance, the United States). The absence of clarity in the legislative framework has led Indian courts to proceed in an ad hoc manner and to falter many times.

The following is illustrative.

The Supreme Court found itself in a peculiar situation over a PIL in the *Olga Tellis* case.[29] The city of Mumbai (then known as Bombay) sees a continuous influx of migrants, who settle in shanties because of the unaffordability of regular housing. These dwellings sometimes spill over onto public pavements. In 1985, the city sought to evict the pavement dwellers, but it did not offer them any alternative shelter. There was public outrage as this was just prior to the outbreak of the monsoons. (Mumbai has heavy torrential rains during the monsoon months). Moved by the plight of the pavement dwellers, a citizens' group approached the High Court of Bombay, through a leading senior advocate who 'candidly conceded' in court that his clients were not claiming any fundamental or legal right to stay on the pavement, rather they were only looking at a humanitarian approach to tide them over during the monsoon period. On the strength of this statement, the eviction was halted. However, when the monsoons had passed, the pavement dwellers stayed put and some other organisation now petitioned the Supreme Court directly (under its writ jurisdiction) contending that the pavement dwellers had a fundamental right to stay on the pavement unless alternative accommodation was made available. The new set of petitioners representing the pavement dwellers claimed that they had nothing to do with the previous set (who had given the undertaking to the High Court). The problem was compounded because, in a PIL writ petition (where the CPC does not apply), no public notice was given nor was the matter declared a representative action. Unfortunately, the Supreme Court did not provide any guidance for future reference and simply dismissed the argument relating to res judicata, stating that there can be no estoppel of fundamental rights and, therefore, any concession in the lower court (under a mistake of law) would not affect the fundamental rights of pavement dwellers to approach the Supreme Court, and the Court ruled on the merits in favour of the pavement dwellers.

The issue was soon to be revisited. Lack of clarity on the procedure to be followed (and the absence of any court-led procedures) led to an alarming situation in the case of the Bhopal gas leak. By way of background, the Bhopal gas leak disaster in December 1984 (in the city of Bhopal) was the worst industrial accident known to mankind. A major American multinational chemical company, Union Carbide Corporation, was involved. The government stated that over 3,000 people had died and another 30,000 had suffered serious injuries. As Union Carbide was a US-based corporation, India immediately saw multitudes of 'ambulance-chasing' lawyers descend on the city and ask people at large to sign contingency fee arrangements. This led the government to step in and enact special legislation, the Bhopal Act,[30] conferring exclusive powers on the central government, inter alia, to represent all victims and deal with the claims to the claimants' best advantage. By virtue of the Bhopal Act, the central government ousted the claimants and took over the right to represent all victims (whether within or outside India) to the same extent. The Bhopal Act specifically allowed the government to enter into a compromise with Union Carbide but failed to provide any procedure or guidelines to be followed in this regard.

29 *Olga Tellis and Ors. v. Bombay Municipal Corporation and Ors.,* (1985) 3 SCC 545.

30 The Bhopal Gas Leak Disaster (Processing of Claims) Act 1985.

Armed with the Bhopal Act, the government filed a civil suit in the Bhopal civil court before a special court constituted for this purpose, and claimed a total of US$3 billion for the victims (making it the largest damages case in the world at the time).

The matter reached the Supreme Court on an interlocutory application and the Court played a proactive role by nudging both parties to agree an overall out-of-court settlement of US$470 million. The settlement was worked out in an in-chamber hearing (and not in open court). No victims group was notified or heard. The Court later disclosed that it had arrived at this figure basically by bridging the gap between the US$500 million the central government sought from Union Carbide and the US$420 million that Union Carbide was willing to pay. (The Court basically drew a line in the middle – slightly favouring the victims). While the Indian government found the court-suggested figure acceptable, it was apprehensive about public reaction, the political backlash and the possibility that the victims would feel let down. So the government essentially left it to the Supreme Court to mandate the settlement. The Supreme Court agreed to do so but faltered at rendering a non-speaking 'order' requiring the government to settle the claim for this figure in full and final settlement. This led to a huge public outcry about not only the perceived inadequacy of the sum but also the failure to hold a fairness hearing and the lack of transparency. The Supreme Court realised that it had overstepped itself and *suo moto* issued a supplementary order extensively setting out the reasoning behind the process it had adopted in arriving at the figure of US$470 million and why it considered this to be just and equitable given the facts of the case. The Court said that it was setting out its reasons to be of assistance in relation to the review proceedings, which had by then been initiated to challenge the settlement order.

The Union Carbide settlement was questioned for decades and remains under a cloud to this day. The Supreme Court faced severe criticism, with the entire episode pointing to the fundamental lack of clarity or guidance on the settlement of mass torts in India.

Soon thereafter, the Supreme Court was once again faced with a mass tort situation (the *MC Mehta v. Union of India* oleum gas leak case). This concerned an ageing chemical factory located in north Delhi. In December 1985, a sulphur dioxide tank mounted on a steel structure collapsed under its weight, which led to a massive leakage of oleum gas, causing panic, harm and inconvenience to a large section of the people. Fortunately (given the nature of the gas), not many suffered serious injury. The Supreme Court was already seized of the matter, as a writ petition seeking closure and relocation of the industry outside Delhi was pending consideration and, when the gas leak took place, the Court took up all issues, including compensatory damages resulting from the leak. The Supreme Court entrusted the matter to the Delhi Legal Aid and Advice Board and, under directions from the Court, claims were invited. Five thousand claims came to be filed in the civil courts of Delhi and pursued by the Delhi Legal Aid and Advice Board at no cost to the victims. When the matter came up before the Supreme Court on an interlocutory issue, the Court felt that the matter was one that should be settled. Having recently suffered damage to its reputation (in the Union Carbide–Bhopal settlement), the Court chose to tread far more carefully this time. It did not monitor or drive the settlement process (much less suggest a settlement figure). The Supreme Court did, however, add that a plaintiff refusing to settle the matter in accordance with the advice of the legal aid committee would cease to enjoy the benefit of legal aid and would have to pursue the case independently. The legal aid committee invited the plaintiffs for settlement talks in small batches. The insurance company was also invited to be available.

With a promise of ready cash and a painless procedure, all 5,000 claims were settled within a month, without any outcry or expression of grievance on the part of any of the victims. In this case at least there was a happier ending.

The settlement of representative suits is very much a work in progress. No lessons have been learnt from the past. Neither legislation nor court judgments have furnished the requisite guidance, and the courts continue with an ad hoc approach.

IV CROSS-BORDER ISSUES

i Overview

India's judicial systems and traditions are moored to their English past. The commercial laws are all based on English common law, and English case law is routinely referred to and relied upon.

Politically, India has a quasi-federal structure. Each state has a high court, and the Supreme Court is the final court on all issues of law or fact. (The Supreme Court also enjoys original writ jurisdiction in relation to protection or enforcement of fundamental rights.)

The Indian judiciary is known to be fair and independent. There is no xenophobia in relation to foreign litigants, and the rule of law prevails. There is hardly any instance of a foreign arbitral award not being enforced by the Supreme Court. The main issue with the Indian judicial system concerns delays. A normal civil action can take well over a decade in the court of first instance itself. Writ petitions offer a quicker remedy but are not appropriate for claiming damages. Accordingly, India is not an attractive forum for bringing civil suits or actions in damages. Arbitration proceedings, however, do get seated in India, and are dealt with under the efficient Arbitration and Conciliation Act 1996 (based on the UNCITRAL Model Law[31]).

ii Discovery

The general approach to discovery is conservative. The plaintiff is expected to have the evidence to establish its case, without the need for any elaborate discovery. A request for discovery must be shown to be relevant and proportionate. American-style discovery, or roving or fishing expedition-style discovery, is not permitted.

iii Enforcement of foreign judgments

The CPC has two regimes for enforcement of foreign judgments depending upon their origin being:

a a 'reciprocating territory'; and

b any other territory.

In both situations, enforcement can be resisted on six stated grounds, which generally boil down to denial of due process or public policy. Where a reciprocating territory is involved, a foreign judgment is treated as a final decree of the court, which can be executed straight

31 United Nations Commission on International Trade Law Model Law on International Commercial Arbitration 1985.

away, whereas a judgment from a non-reciprocating territory requires the initiation of a fresh suit based on the foreign judgment. The Indian courts will presume the foreign judgment to be conclusive on matters directly adjudicated between the parties.[32]

V OUTLOOK AND CONCLUSIONS

Two diverse paths are available in India in relation to class action litigation: the first is the regular mechanism available under the CPC, which in turn forms the template for allied statutes providing for class action (including the Companies Act 2013, the Competition Act 2002 and the Consumer Protection Act 2019). A good part of the action, however, lies in the robust mechanism available by recourse to the high courts (or directly to the Supreme Court) through the PIL instrument. However, PILs are not appropriate in factually contentious matters or where damages are sought.

Indian courts are liberal in matters of injunctive relief (including mandatory injunctions) and do not insist on security by way of costs as a condition for grant of injunction. Nonetheless, an action for damages (instead of injunctive relief) is not attractive because of the inordinate judicial delays involved.

India needs to focus on settlement mechanisms in class actions and put in place a suitable framework providing for notice and a fairness hearing.

32 Section 13, CPC sets out the grounds upon which a foreign judgment can be challenged, which are the same as the grounds relating to foreign judgments of a reciprocating jurisdiction (Section 44A, CPC). The six grounds on which a foreign judgment can be challenged may be summarised as follows: (1) the foreign judgment has not been pronounced by a court of competent jurisdiction; (2) it has not been given on the merits of the case; (3) it appears on the face of the proceedings to be founded on an incorrect view of international law or a refusal to recognise the law in India (where applicable); (4) the proceedings in which the foreign judgment was obtained are opposed to natural justice; (5) it has been obtained by fraud; or (6) it sustains a claim founded on a breach of any law in force in India. Public policy grounds have been interpreted by the Indian Supreme Court as encompassing circumstances that are contrary to: fundamental policies of Indian law; the interests of India; and justice and morality.

Appendix 1

ABOUT THE AUTHORS

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Kachwaha & Partners

Mr Sumeet Kachwaha has over 44 years' standing in the legal profession. He features in Band 1 in the arbitration section of *Chambers Global* as well as *Chambers Asia-Pacific* (from 2009 onwards in the latter). He also figures in *Who's Who Legal* in five sections: arbitration, construction, procurement, government contracts and asset recovery. He is recognised as a 'leading individual' in the dispute resolution section of *The Legal 500: Asia Pacific* and also ranks in the *India Business Law Journal* A-List of India's top 100 lawyers.

Mr Kachwaha has appeared as an expert witness on Indian law in landmark matters before the courts of England and Singapore. He has also served as amicus curiae to the High Court of Delhi in the US$2 billion Vodafone dispute initiated under the Netherlands–India bilateral treaty.

ANKIT KHUSHU

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Ms Ankit Khushu's practice focuses on dispute resolution, international arbitration, insolvency and bankruptcy laws. Ms Khushu is recognised as a 'next generation partner' in the dispute resolution section of *The Legal 500: Asia Pacific* (since 2019). She features in the BW Legal World '40 under 40' lawyers, legal leaders and legal influencers list for 2021 (all-India list).

She is the firm's chief coordinator for the Arb Excel Essay Writing Competition, an all-India essay writing competition for law students, and also (until recently) for the South Asia regional rounds of the Foreign Direct Investment International Arbitration Moot competition.

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