CHAPTER VIII

DERIVATIVE AND OTHERS ACTIONS

The Rule\textsuperscript{597} of supremacy of the majority in Foss v. Harbottle\textsuperscript{598} laid down that in respect of corporate institute legal proceedings where the duty is owed to the company. The proper plaintiff, in such a situation is the company itself. But exceptions to the Rule in Foss v. Harbottle were recognized in Foss v. Harbottle itself. It is now generally admitted by the courts\textsuperscript{599} that the exceptional cases in which is shareholder can himself bring an action are, where:

(1) the act is ultra vires the company or illegal;
(2) the resolution requiring special majority has been passed by a simple majority;
(3) the act constitutes an infringement of the personal rights of members;
(4) the act constitutes a fraud on the minority;
(5) the act is such as justice demands that the court should intervene to assist an otherwise helpless minority shareholder.

The kinds of actions: A shareholder can bring the following kinds of actions to enforce his rights:

1. **The Personal Action:**

A shareholder can bring an action as a matter of right in respect of his individual membership rights\textsuperscript{600} because the rule in Foss v. Harbottle does not apply to such personal rights\textsuperscript{601}. This is called a personal action. It applies where a wrong is done or threatened by the company. A personal action may be brought by the shareholder in his own name as plaintiff against the company as defendant, e.g., where the act is ultra vires

\textsuperscript{597} See Chapter I (1), page 1, ante.
\textsuperscript{598} (1843) 2 Hare 461.
\textsuperscript{599} Per Jenkins L.J. in Edwards v. Halliwell (1950) 2 All E.R. 1064, at p. 1067. For a full discussion, see pages 7 to 10 and p. 11, n. 57, ante.
\textsuperscript{600} See pages 6 to 7, ante, for distinction between individual and corporate membership rights.
\textsuperscript{601} Minority shareholders and corporate irregularities, (1978) 41 Mod. L.R. 147, P. 160.
the company, or the directors, the company is interfering with class rights, depriving a member of his votes or the some other right conferred upon him by the articles, etc. There is no need to join the directors as co-defendants unless some relief is required against them.

2. **Personal representative action:**

Where the aforesaid individual rights of a shareholder are identical with those enjoyed by all the other members, or by all members of the same class of shareholders, he can sue in a representative capacity on behalf of himself and all the others, all including himself acting as actual plaintiffs against the company as a defendant. It thus avoids multiplicity of actions and also ensures that the judgement is binding on all whom he represents. There is again no need to join the directors as co-defendants unless some personal relief is asked against them. But the mere fact that a member is entitled to a personal representative action does not bar him to institute his own personal action against the company.

3. **Derivative action:**

Where a shareholder is permitted to bring an action in respect of his corporate membership rights, i.e., where the wrong is done to the company and the act falls within any of the aforesaid exceptions to the rule in Foss v. Harbottle, such action will be brought in a representative derivative capacity on behalf of all the shareholders (including himself) except those members, if any, who are being sued. A representative derivative action or simply called "derivative action" is different from the aforesaid personal representative action. In a derivative action, the shareholder sues in respect of the wrong done to the company (i.e., he derives his right from the company) by the controlling majority who will not allow the company to act as plaintiff, and in this case the wrongdoers are the defendants, the company being joined a minimal co-defendant. The rationale of "derivative actions" or "derivative suits" is explained as:

604 Pender v. Lushington (1877) 6 Ch. D. 70.
"The minority shareholders' suit is a procedural device designed to facilitate holding wrongdoing directors and majority shareholders to account, and also to enforce corporate claims against third persons. It is obvious that wrongful acts by directors or other manager may result in direct injuries to individual shareholders entitling the latter to sue in their own right and for their own benefit. Of such a character are the wrongful failure to permit a shareholder to vote, and to permit a transfer of shares on the corporation's books. On the other hand, many wrongful acts or omissions of directors or other managers injure the shareholders only indirectly through depleting the corporate assets of using them in manner contrary to the provisions of the articles of incorporation. Shareholders derivative suits are concerned with this latter type of wrong."

While the plaintiff really represents the company. A derivative action, in contrast to a personal action can be brought in respect of anything which took place prior to the time when the plaintiff became a member, and it may often lead to a monetary judgement in favour of the company. A personal single or representative action, based on shareholder's contract in the memorandum and articles, can rarely lead to a money judgement against the company, and appropriate remedy will be an injunction or a declaration. Therefore, a derivative action is always preferred wherever it is admissible.

DERIVATIVE ACTIONS IN THE U.S.A.

The term "derivative action" is actually an American one although it is said to have originated in England in Foss v. Harbottle itself. In America, the Supreme Court first recognized it in Dodge v. Woolsey The stockholder is "derivative suit" is the principal weapon of minority shareholders to curb abuses within the corporation. It has been a recognized from of litigation in American courts since Dodge v. Woolsey and is long considered the chief regulator of corporate management. But there were obvious dangers of allowing a minority of shareholders whose interests may be relatively small to

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608 (1843) 2 Hare 461.
609 (1856) 59 U.S. (18 How.) 331.
bring an action on behalf of the corporation. The alleged cause of action may be without merit, or the cost of litigation coupled with the adverse effect on the business relationship between the corporation and the party to be sued may outweigh any recovery that could be gained. In these situations a suit will be against the best interests of the corporation. The derivative suit may also be abused by the filing of “strike” suit of “blackmail” suits—i.e., actions commenced for their settlement value with no hope of securing any recovery for the corporation. A “strike suit” is brought for its nuisance value, with the sole purpose of obtaining a settlement for the complainant’s sole benefit—the amount of the proposed settlement being far greater than any possible injury suffered by the complainant.\textsuperscript{611}

Requirements of a derivative suit in the U.S.A.: 

Therefore, the following limitations were put on stockholder’s derivative actions by the courts and the legislature in America to minimize the said dangers and to preserve the principle of corporate law that normally the directors should govern a corporation:

1. Exhaustion of Intracorporate Remedies:

This limitation is presently codified in Rule 23.1 of the Federal Rules of civil Procedure, 1966 and consists of the following two requirements:

(i) The Demand on the Directors:

The shareholder, before he can institute a derivative action, must show to the satisfaction of the court the court that he made a demand on the directors to pursue the claim or demonstrate why making such a demand would be futile.\textsuperscript{612} Once such a demand is made and rejected, this requirement of Rule 23.1 is met. This requirement may be excused on ground of futility where: (A) the directors are controlled by the alleged wrongdoers\textsuperscript{613}, (b) the directors will not prosecute claim due to a conflict of interest\textsuperscript{614}, (c) the directors participated or acquiesced in the impugned transaction\textsuperscript{615}, (d) the directors have made it clear that they are opposed to the bringing of the suit\textsuperscript{616}, or (e)

\textsuperscript{611} Ballantine on Corporations, Rev. ed. 1946, p. 356.
\textsuperscript{612} This requirement in Rule 23.1 of the Federal Rules of procedure is base don the Supreme Court decision in Hawes v. Oakland 104 U.S> 450 (1882), following Foss v. Harbottle (1843) 2 Hare 461.
\textsuperscript{614} Landy v. Federal Deposit Ins. Corp. 486 F. 2d. 139 (3rd cir. 1973).
\textsuperscript{615} In Re Kauffman Mutual Fund Actions, 479 F.2d.257 (1st Cir.).
\textsuperscript{616} Nussbacher v. continental I.N.B. & Trust Co., 518 F.2d 873 (7th cir.)
where more than half of the directors are themselves defendants in the suit. Where more than half of the directors are themselves defendants in the suit. In several recent cases, the Federal courts have reversed this last futility exception as follows. Where the majority of directors were defendants, they formed a "Special litigation Committee" composed of those directors who were not defendants. This Committee decided not to pursue the derivative action and asked the trial court to dismiss the action. The courts applied the business judgment Rule to the Committee's decisions and thereupon dismissed the actions. Such a judicial approach has been criticized on one of the grounds that meritorious cases would thus be aborted and the committee should not be given such judicial deference.

(ii) The demand on the Shareholder

Similarly, the shareholder has to make a demand on the shareholders under the said Rule 23.1 "if necessary", unless he can show that it would be futile to do so. He can be excused on the ground of futility where: (a) the majority of shareholders are the alleged wrongdoers, (b) the alleged wrong is non-ratifiable by the shareholders, or (c) it involves undue expense or delay.

2. "Standing to Sue"

In addition to exhausting the aforesaid intra corporate remedies, the complaining shareholders must also demonstrate that they have a standing to sue. This requirement is based on the Common Law Doctrine that a shareholder cannot bring such an action against the will of the directors or majority of shareholders unless the Corporation's refusal to sue was wrongful. A shareholder can have "standing to sue" where: (a) the directors are either controlled by the alleged wrongdoers or are interested in the

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618 Ibid.
621 Hawes v. Oakland (1882) 104 U.S. 450.
transaction\(^{625}\) (b) the directors have participated in an injurious or illegal transaction\(^{626}\), or (c) the refusal to sue is itself an illegal act.\(^{627}\)

3. **Vote of the majority shareholders:**

Where the directors either fail or are unable to exercise sound business judgment, question may be decided by the majority shareholders. It has been held that in that case the minority shareholders can be deprived of a "Standing to sue" by the negative vote of the majority shareholders.\(^{628}\)

4. **Security for "Expenses" Requirement:**

This is laid down in Security for "Expenses" Statutes, first of which was enacted in 1944 by New York, requiring that the Corporation on whose behalf the derivative action is brought can require the plaintiff to give security for the reasonable expenses if those bringing suit held "less than 5% of the outstanding shares of any class of such Corp's stock" or unless the securities so held had a "market value in excess of fifty thousand dollars". Many Commentators foresaw the derivative suit's demise in such "security-for-expenses Statutes" enacted to curb the abuse of "strike suit" litigation, but these reports proved exaggerated as plaintiffs discovered various tactics by which to outflank these Statutes; and by late 1960's, the crisis was past and a revival in the derivative action's popularity was duly noted by leading academics.\(^{629}\)

If the foregoing requirements are met, the shareholder can bring a derivative suit. Despite the foregoing hurdles or barriers, derivative suit in the U.S.A. still remains a chief regulator of corporate management although it seems unlikely to survive as more than a nuisance to defendants and an occasional modest source of income for plaintiff's attorneys\(^ {630}\). The derivative suits are still considered in the U.S.A. as the minority shareholder's only effective remedy for attacking abuses of managerial power, the usefulness of these derivative actions is thus described by a Federal District Court Judge:

\(^{625}\) Hawes v. Oakland, 104 U.S. 450, at p. 460 (1882).
\(^{626}\) Litwin v. Allen 25 N.Y. s. 2nd 667 (s. ct. 1940).
\(^{630}\) Ibid., p. 237.
“Despite the numerous abuses which have developed in connection with such suits, they have accomplished much in policing the corporate system, especially in protecting corporate ownership as against corporate management. They have educated corporate directors in the principles of fiduciary responsibility and undivided loyalty. They have encouraged the wisdom of full disclosure to stockholders. The minatory effect of such actions has undoubtedly prevented the diversion of large amounts from stockholders to managements and outsiders.”

DERIVATIVE ACTIONS IN ENGLAND:

Prof. Gower once warned against using the terms “derivative action” for minority shareholders’ action in England, but now Prof. Gower himself and other leading writers freely use this term to denote such actions indicating that individual shareholder sues on behalf of the company to enforce rights derived from it. The minority shareholders’ action, usually, under the Supreme Court Rule, R.S.S., 0.15 r. 12, in England, in which minority shareholders except those who are defendants (the directors are usually defendants), and joining the company as a nominal defendant, is brought under any of the exceptions to the rule in Foss v. Harbottle, and has come to be called as a “derivative action”, In Waller Steiner v. Moir (No.2) It was judicially pronounced that such minority shareholders’ action is now to be called a derivative action, as the “American description of a minority shareholders’ derivative action, is apt.” It is to be so called because the right to sue derives from the company. The shareholders as such have no such right.

The form of derivative action:

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635 Not applicable to Scotland.

636 See pages 7 to 11, ante, for exceptions to the rule in Foss v. Harbottle.

The form of the derivative action under R.S.C. 0.15, r. 12, ibid., was judicially approved in Wallesteiner v. Moir (No.2)\textsuperscript{638} as:

"The form of the action is always 'A.B. (A Minority shareholders) on behalf of himself and all other shareholder of the company' against the wrongdoing directors and the company."

(A) DERIVATIVE ACTION UNDER THE "FRAUD ON THE MINORITY" EXCEPTION TO THE RULE IN FOSS v. HARBOTTLE:\textsuperscript{639}

A "fraud on the minority" means a wrong which could not be validly waived by the company in general meeting and it covers the following types of conduct:\textsuperscript{640}

(i) Expropriation of the property of the company or, in some circumstances, that of the minority, (ii) Breach of the directors' duties of subjective good faith, and (iii) Voting for company resolutions not bona fide in the interests of the company as a whole.

Conditions:

To bring a derivative action under this exception to Foss v. Harbottle, it is essential to show that the alleged wrongdoers are in control of the company in general meeting, i.e., they control the majority of the shares in the company, and so they will not permit an action to be brought in the name of the company. The alleged wrongdoers in this case are usually both directors and controlling shareholders. And the directives may be exercising not only actual (de jure) control when they are in actual majority, but also apparent (De facto) control although they have considerably less than a clear majority of shares. In order to get the action on its feet it is not necessary to prove control but merely to allege facts which, if proved, would establish control. Further, as the right to bring a derivative action is granted to the individual members as a matter of grace, he must come to the court with "clean heads" otherwise his conduct may be regarded by a court of equity as disqualifying him from appearing as plaintiff not on company's behalf. If these

\textsuperscript{638} (1975) 2 Q.B. 373 (C.A.), per Lord Denning M.R. at p. 390.
\textsuperscript{639} (1843) 2 Hare 461.
\textsuperscript{640} Gower’s, Principal of Modern Company Law, 7th ed. (2003), p. 648, note 46.
up of those likely to be cast by the delinquent himself plus those voting with him as a result of influence or apathy".656

Vinelott J. however left fundamental questions unanswered as to how to practically determine de facto control in various situations657, and neither does the Court of Appeal lay down any clear criteria in this regard.658

Procedural requirements:

The statement of claim in a derivative action founded on the "fraud on the minority" is defective unless it contains an allegation that, owing to the wrongdoers being in control of the company, they cannot sue in the name of the company.659 In Heyting v. Du pont660, Plowman J. held that if the statement of claim does not allege facts which bring the case within one of the admitted exceptions to the rule in Foss v. Harbottle, the court has no jurisdiction to hear the action, and must dismiss the action 'proprio motu' if the point is not taken by the defendant. The decision of the Court of Appeal in Prudential Assurance co Ltd., v. Newman Industries Ltd. (No.2)661 is authoritative on the procedural position that when a minority shareholder commences a derivative action, the question whether in fact the company is controlled by the alleged wrongdoers should first be determined before the derivative action itself is allowed to proceed. Moreover, the right to bring a derivative action should not be decided as a preliminary issue on the hypothesis that all allegations in the statement of claim of 'fraud' and 'control' are fats, as in the trial of preliminary point of law. The plaintiff should at least be required to establish a prima facie case that (i) the company is entitled to the relief claimed, and (ii) the action falls within the proper boundaries of the rule restricting members' actions on behalf of the company.

(B) Derivative action under the other two schematic exceptions to the Rule in Foss v. Harbottle:

656 Ibid., at p. 364.
660 (1963) 1 W.L.R. 1192.
bona fide for the benefit of the company there was no fraud on the minority to allow such as action. Megarry V. C. refused to accept that Test of Fraud on the minority as applicable for the purposes of bringing a derivative action, as that test only related to the alteration of the company's articles. The allowed this derivative action as the action of the majority shareholder injured one category of shareholders to the benefit of another, and that fraud in this sense is abuse of power. 

Again, in Re a Company the Court granted an injunction on a derivative action by a shareholder, to prevent the company pleading guilty to a charge of conspiracy to defraud at the instigation of the directors, on the ground that this would damage the company's potential civil claims against others. Improper influence used on the company in this case was held on amount to a "fraud on the minority".

2. Scope as to the requisite element of "Control" by the Majority

Until recently, the view was that for a minority shareholder to bring a derivative action under "fraud on the minority" exception to Foss v. Harbottle, he had to show that the wrongdoers were in actual legal (de jure) control of the company i.e. actual voting control. But in Prudential Assurance co. Ltd. v. Newman Industries Ltd. (No. 2), Vinelott J. held that this exception of "Fraud on the minority" to the Rule in Foss v. Harbottle extends to the situation where the fraud was committed by directors who did not exercise actual voting control but who exercised control in practice by manipulating their position in the company to ensure that the majority will not allow a claim to be brought by the company for the alleged wrong, i.e., where the wrongdoers are in factual (de facto) though not necessarily legal control. On appeal, the Court of Appeal observed that:

"control embraces a broad spectrum extending from an overall absolute majority of votes at one end to a majority of votes at the other end made

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650 Ibid., at p. 445.
652 (1843) 2 Hare 461.
those directors and the company for damages, alleging that he directors had been negligent in selling an asset of the company for less than its market value. Most of the shares in the company were held by another company the directors of which were also the directors of the first company. It was held that, since the sale of the mine was intra vires the company, and there was no allegation of fraud on the minority by the directors or appropriation of assets of the company by the majority shareholders in fraud of the minority, the action was not maintainable.

**Scope of derivative action under the fraud exception widened recently in two ways:**

1. **As to the meaning of “Fraud”:**

   In Daniels v. Daniels, the minority shareholders of a company were allowed to bring derivative action where the directors had authorized the sale of a company land to one of them at a price alleged to be well below its market value. The directors objected that since fraud had not been alleged the action should not be allowed. Temple man J. laid down a wider definition of “fraud” for this purpose, as:

   "If minority shareholders can sue if there is fraud, I see no reason why they cannot sue where the action of the majority and the directors, though without fraud, confers some benefit on those directors and majority shareholders themselves,"

   He distinguished Pavlides v. Jensen on the ground that the directors had not benefited by this “negligence”. The essence of this decision is that since fraud is often impossible to prove it may be presumed from such obvious facts.

   In Estmanco (Kilner House) Ltd., v. Greater London Council, the majority shareholder proposed to alter a contract it had with the company in order to deprive the minority shareholders of certain rights. The majority shareholder then proposed a resolution whereby the company should not sue for breach of contract. When a minority shareholder sought to bring a derivative action, the majority argued that since it has acted

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646 (1978) 2 All E.R. 89.
647 Ibid., at p. 96.
648 See note 646, ante.
and other conditions of bringing a derivative action are satisfied, the courts allow this forms of action on the ground that if the aggrieved minority could not bring a minority shareholders' action in such a case, their grievance would never reach the court.

Costs:

The cost of the derivative action, especially where the money received is payable to the company itself and not the minority shareholder, offers a problem. The Legal Aid Act, 1974 does not provide for legal aid in such an action. And it is unlawful for a solicitor, unlike in the U.S.A.\textsuperscript{641} to accept a retainer for the plaintiff(s) to conduct the action on a contingency fee basis (i.e., he is paid the fee if he wins but not if he loses), as it would be contrary to public policy.\textsuperscript{642} In Wallerstainer v. Moir (No.2)\textsuperscript{643}, it would be held that it was open to the court in a derivative action to order that the company should indemnify the plaintiff against the costs incurred in the action. Generally, the minority shareholder should apply for the court's sanction for costs to proceed with the action at the commencement of the action. The court will judge it is reasonable and prudent in the company's interest for the plaintiff to bring the action and it is brought by him in good faith. If so, the court should order the company to pay the plaintiff's costs down to judgement whether the action succeeds or not.

Old Illustrations

(i) In Cook v. Deeks\textsuperscript{644}, a shareholder brought a minority shareholders' action (derivative action) to compel the directors to account to the company for the profits made out of the construction contract which they took in their own names. The action succeeded. The Privy Council held that the benefit of the contract belonged to the company, and the directors must account to the company for it, and the purported ratification was a fraud on the minority and ineffective.

(ii) Pavlides v. Jensen\textsuperscript{645}, a minority shareholder sought to bring a derivative action, on behalf of himself and all other shareholders, save three who were directors, against

\textsuperscript{642} Wellersteiner v. Moir (No.2), (1975) Q.B. 373 (C.A.), Lord Denning M.R. dissenting.
\textsuperscript{643} (1975) Q.B. 373 (C.A.).
\textsuperscript{644} (1916) 1 A.C. 554 (P.C.)
\textsuperscript{645} (1956) Ch. 565.
Derivative action has also been allowed where the act is one which is illegal or ultra vires the company\textsuperscript{662} and that where it required a special resolution which has not been obtained.\textsuperscript{663}

(C) Derivative action under the "Interest of Justice" exception to the rule in Foss v. Harbottle:

In the Prudential Assurance Co. Ltd. v. Newman Industries Ltd. (No.2), Vinelott, J. based\textsuperscript{664} his decision on the derivative action against the directors on the doctrine that a minority action could be allowed if "the interest of justice requires that a minority action should be permitted". The court of Appeal did not have to decide on the exceptions to the Rule in Foss v. Harbottle because the company had actually adopted the case, but expressed\textsuperscript{665} the opinion that "interest of justice" exception is not a convincing practical test, "particularly if it involves a full dress trail before the test is applied."

In Estmanco (Kilner House) Ltd. v. G.L.C.\textsuperscript{666}, Megarry V.C. also held that the "justice" of the case was not a practical test of an individual's competence to sue, but merely a reason for creating exception to the basic rule in Foss v. Harbottle.

Whether derivative action can be combined with a personal action:

In Prudential Assurance Co. Ltd. v. Newman Industries Ltd. (No.2)\textsuperscript{667} Vinelott J. held that a minority shareholder's derivative action could be joined with direct personal claim by that minority shareholder where the claims arose out of the same transaction. The court of Appeal\textsuperscript{668} held that there was no objective to such a combing where the reality justifies such a course, although in this case the personal action was held to be misconceived.

Derivative Actions in Scotland

\textsuperscript{662} Flitcroft's case (1882) 21 ch. D. 519 (C.A.).
\textsuperscript{663} Bailie v. Oriental Telephone Co. Ltd. (1915) 1 Ch. 503 (C.A.).
\textsuperscript{664} (1980) 2 All E.R. 841, at p. 877.
\textsuperscript{666} (1982) 1 W.L.R. 2, at p. 10,11.
\textsuperscript{667} (1982) 1 All E.R. 354 (C.A.).
\textsuperscript{668} Ibid.
Although Scotland is a part of the U.K., the said Rule\textsuperscript{669} of the Supreme Court allowing a derivative action in England is not applicable to Scotland. There is no special form for a “derivative action” in Scot Law: the minority shareholder would require to proceed in his own name and he does not act on behalf of the shareholders as a whole.\textsuperscript{670}

**Derivative actions in India:**

In India, derivative actions by the shareholders to redress a wrong done to the company should be similarly available at Common Law under the exceptions to the Rule in Foss v. Harbottle as is the case in the U.K. The Sachar Committee recognized this fact and saw to it that its recommendations did not affect “rights of action by suit by individual members (either on behalf of themselves alone or as representing the company)”\textsuperscript{671}

However, there is no statutory regulation of derivative actions in India on the lines of the Rule 23.1\textsuperscript{672} and “Security for Expenses” Statute\textsuperscript{673} in the U.S.A. or rule 12\textsuperscript{674} in the U.K. Derivative actions are less resorted to in India because or section 398 of the Companies Act, 1956, which permits a specified body of members to petition in certain circumstances to redress the wrongs done to the company, i.e., where the wrong complained of is “prejudicial to the interests of the company”. Such provisions as in section 398 are not available in the U.S.A. or the U.K. Still section 398 is not so wide enough and easily workable as to do away the need for a derivative action in India. Section 398 does not permit a single shareholder to bring an action on behalf of the company to redress a wrong done to the company. Besides, remedy u/s 398 is not to be lightly accorded and is subject to the various restrictions of the section itself.\textsuperscript{675} So, this remedy is no match to that of a derivative action as available in the U.S.A. and U.K. Therefore, shareholders do resort to derivative actions and the courts do entertain them, although the term “derivative action” or “derivative suit” is not openly used in India. In

\textsuperscript{669} R.S.C., 1965, O. 15, r.12.
\textsuperscript{671} Sachar Committee Report, op.cit., para 7.12, pp. 51 & 52.
\textsuperscript{672} See note 622, ante.
\textsuperscript{673} See note 629, ante.
\textsuperscript{674} See note 645, ante.
\textsuperscript{675} As discussed in Chapter IV and V, ante.
Satya Chran Lal v. Rameshwar Prasad Bajoria\textsuperscript{676}, Fazi Ali J. restated all the cases in which a shareholder can take steps to redress a wrong done to the company. For instance, in L.I.C. of India v. Haridas Mundhra\textsuperscript{677} the company Judge Upadhyaya J. had held that the petition u/s 543 (Sch. XI) of the Companies Act, 1956 must be filed separately and cannot be combined with the one under ss. 397 or 398 of the Act, and also that directors of a company cannot be fastened with liability for losses caused to the Company's subsidiary. On appeal, the Division Bench negative both these holdings and held that u/s 398, fraud, ultra vires actions and misfeasance of directors of the holding company in the management of its subsidiary can make them liable for damages to the subsidiary, Justice Dwivedi even suggested a "Double Derivative" suit to enforce a cause of action in favour of the subsidiary company if the directors of both the companies refused to institute an action in the name of the company, as permitted in the U.S.A.

Again, in L.c. Kapadia v. L.B. Desai\textsuperscript{678} Bhasma J. held that a suit by a minority of shareholder on behalf of the company for permanent injunction restraining the defendants from acting as directors of a company alleging non-compliance with the mandatory provisions of ss. 173 and 258 of the Companies Act, 1956, and an unauthorized alternation in the Board of directors was maintainable since a shareholder as such was interested to see that persons who were apparently directors were validly appointed as though he could not interfere with the internal management of the company.

It is thus seen that in India there is a great need to develop the concept of an easily available "derivative action" and even a "double derivative action"\textsuperscript{679} either by judicial legislation or by suitable amendment of section 398.

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\textsuperscript{676} 1950 S.C.R. 394.
\textsuperscript{677} (1963) I.L.R. 1 All 447 (D.B.)
\textsuperscript{678} A.I.R. 1972 Bomb. 276.
\textsuperscript{679} Ibid, per Dwivedi J.