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The iron man behind my accompanied thesis has been my father Adv. Arvind C. Shah who still encourages all his children for achieving laurels in life so that we can be useful to the society. "I shall not stop your education till you stop it" have been my father's words lingering in my mind ever since my school days. But for his active support, I would not have been able to complete my thesis. My mother Mrs. Shakuntala's blessings have contributed to my father's encouragement. I must confess that my wife Mrs. Leena has/had to sacrifice her happiness with ever smiling face in making available to me the time for being devoted to the thesis. The encouragement given to me by other members of my family deserve equal mention.

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KOLHAPUR. 

(ADV. SANTOSH A. SHAH)

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Introduction to the thesis:

(A) Need and Preliminary Questions:

A few years back the Chief Justice of the Supreme Court of India Justice P.N. Bhagwati remarked that the Indian Legal System is on the verge of collapse. It is obvious that repercussions of such a remark coming from no one else but the Chief Justice of the Supreme Court which declares the law of the land, are bound to be felt in the society. It was not that the judges, the lawyers, the scholars and even the general public was not aware of the situation, but remarks like these bring the problem in the limelight and draw attention of everyone.


"to introduce measures by which the poor and the disadvantaged are taught to combat exploitation and injustice and to fight for their rights and entitlements by using law creatively and imaginatively is the constitutional obligation"

Efforts of studying and solving the problems in the Indian legal system are being made after independence. Sometimes they have come from the legislature, sometimes from the judiciary and
sometimes from the executive. Research made by the academicians and their writings has also been responsible for the changes.

Legal systems of the world provide for certain checks aimed at restricting the access to the legal system as litigation is not the cure of every illness in the society. Furthermore, too much litigation can result in breakdown of the society, relations between people and even collapse of the judicial system. There is also always a risk of growth of False, Frivolous and Vexatious litigation. On the other hand, care must always be taken to see that these checks do not result in restricting access to justice of true and deserving cases. This requires keeping of proper balance between the equally important objectives. To name a few of such checks as examples, there are concepts of limitation, res-judicata, locus standi which are embodied in the legal systems of the world. The concept of limitation is based on the reasoning that at some point of time the acts and omissions between the parties must get finality i.e. they should not be allowed to be disputed after a lapse of certain time. At the same time however efforts are made to construe the provisions in relation to Limitation in favour
of right to sue. Provisions are made for extension of time, condonation of delay, acknowledgments of the barred claims so as to protect the true and deserving causes. The concept of res judicata is aimed at avoiding multiplicity of proceedings i.e. once a dispute is finally decided between the parties they should not be allowed to reagitate the same. This principle of res judicata too is applied only to matters finally decided and only between the parties to the dispute and only when the issues in dispute are exactly alike of the once on which decision has been given.

Similarly, whenever cases come before the court the first obvious question that the courts inquire into is whether the party suing has right to sue which is known as locus standi. The plaintiff must have a right to relief meaning thereby the plaintiff must be legally injured or his legal rights must be at stake. To this general rule of locus standi there are exceptions meant for increasing access to justice of true and deserving causes which aim at collectivisation of plaintiffs defendants and even causes of action and their representation by any one person amongst the group or by their organisation or sometimes even by a third party. My focus in the thesis is on the
same. Such collectivization and representation is made in different forms e.g. labour laws allow Trade Unions to put forth the cause of their labour members, criminal laws allow taking of actions against public nuisance by any affected person or group of persons, civil laws allow a member of public to make sure that public charities are not misutilised.

Over the last two decades, the Supreme Court of India has evolved a new form of legal action keeping in mind the mandate of social, economic and political justice of our Constitution. It has come to be known as Public Interest Litigation or Social Action Litigation. The Court has by widening the concept of locus standi allowed access to public spirited people to enforce the rights of those who due to their poverty, illiteracy or other disabilities can not have access to justice in our legal system. The Court has even allowed such petitions for enforcement of certain public duties against the government. Public interest litigation often aims at benefiting a class of people e.g. undertrials pavement dwellers etc.

There is yet another such device which is that of representative suits similar to the concept
of public interest litigation, enshrined in Order 1, Rule 8 of our Code of Civil Procedure, 1908. Similar to our Code, the United States Federal Rules of Civil Procedure also has a provision in Rule 23 for what is called as class action there. This is a traditional legal device found in most of the common law countries of the world which allows representation of a group cause by any one person from the group. As against this those countries of the world where civil law as against common law is prevalent no such provision is found.

I have also confirmed from my research that class action is a great force in the U.S. However, in India representative suits have not been so popular. This is in spite of the fact that both the legal systems are common law dominated legal systems. Representative Suits is the main subject matter of my thesis.

I am inspired by an extract from the report of Justice Bhagwati Committee on National Judicare: Equal Justice, titled "Need to undo pervasive pessimism." It is observed:

"we have injustice, inherited and acquired, colonial, feudal, industrial, political bureaucratic and economic. The victims are large numbers of the community who console themselves in their privations muttering fatalistically "it is no use mumbling, it is no use grumbling. Life isn't just fair."
Even so the patience mileage of the Indian poor is running out and the political fuel of the leadership in government can no longer keep impatience under control. There is already a feeling, widespread among the organised and unorganised sectors of the Indian people, that "only wealth can buy you justice." To undo this pervasive pessimism, we require Public Interest Litigation and class actions and representative proceedings for redressal of wrongs and assertion of rights" (emphasis provided)

I propose to research this topic. I have decided to adopt inductive approach i.e. where the investigator first acquires a close and reasonably full familiarity with the area of life under study and will then progressively sharpen his focus as the inquiry proceeds. Here, the researcher shifts from one to another line of inquiry, adopts new points of observation as his study progresses, moves in new directions previously unthought of and changes his recognition of what are relevant data as he acquires more information and better understanding. Even the title I have selected is analytical in nature. My thesis aims at inculcation of all the following elements of research needed for law reform viz. analytical, historical, comparative, statistical and critical.

Keeping the above discussion in mind, I am framing the following questions as the questions
of my research starting from the general and basic questions and then sharpening the focus on the area of inquiry i.e. representative suits as an input for access to justice. The questions are:

(1) What is the nature of Indian Legal System?

(2) What is the nature of American Legal System?

(3) Why is Indian Code of Civil Procedure made?

(4) Why is United States Federal Rules of Civil Procedure made?

(5) What are representative suits or class action suits?

(6) Are representative suits used in India? In what areas of law? How often?

(7) What is the position of the class actions in the U.S.?

(8) Are representative suits useful input for access to justice?

(9) What is Public Interest Litigation?
(10) How can we compare Public Interest Litigation with Representative Suits? Is Representative Suit a good substitute for PIL?

(11) Can we point out how a representative suit would proceed in Indian legal system with reference to a real life case study?

(12) What are the problems for making this device an effective input for access to justice? What solutions can we offer?

I hope to draw attention of academicians, lawyers, judges and all those interested in improvements in the Indian legal system to recognise the importance of representative suits as another effective legal device.

(B) Sources of Research

As far as the Indian side of this subject is concerned, there is no work either in the form of article or a book which is devoted directly and entirely to this subject. I will therefore have to go to the use of this legal device made
by lawyers. The same can be found out from the reported cases of various High Courts and the Supreme Court of India which will be my primary source of research. The All India Reports and the All India Reports Manual will be best for this purpose.

Then work done on topics close to representative suits like Public Interest Litigation/Social Action Litigation, Collective Actions, Social Justice, etc. and cases decided on these topics will give me a proper direction to pursue my topic. It will allow comparative analysis and enable me to judge the place of this legal device in the Indian Legal System. Particularly in last two decades many books, articles, reports and cases have been decided on Public Interest Litigation which will be useful.

As far as the American side of this topic is concerned, in sharp contrast which India, much work has been done in the form of published articles, books and decided cases particularly by Federal Courts on this topic of class action. I have compiled good amount of material during my stay at Temple Law School, Philadelphia for LL.M. degree on this topic. Moreover 'American Jurisprudence', a publication of Lawyers Co-operative

(C) Guide to the thesis:

My thesis will be divided into two parts. First part will be informative and analytical. Second part will aim at application of the information and analysis.

As has been pointed out, the purpose of this thesis is to study the legal device of Representative Suits in the context of Indian legal system comparing it with the American legal system. It is therefore obvious that we should have first, good introduction to the Indian and American legal systems, the code of civil procedure in India and the federal rules of civil procedure in the U.S. as these two enactments lay down the provision for representative suit/class action suit in the respective countries. Unless we understand the legal systems in the two countries and the nature of the procedural civil codes we will not get a grip of the subject and we may not understand the
differences for the purpose of the main subject. My thesis therefore starts with these basic introductions.

I will then get into explaining and analysing the provision of representative suit in the Indian Code of Civil Procedure and the concept of representative suit.

After understanding the concept, we must go into its use in different substantive areas of law in India. From the examples/cases it will be clear to us as to how far this device is being used in different substantive areas of the law here.

Then, a reference to the American class action suits will fit well. A brief survey of the use of class action suits in different substantive areas of law in the U.S. will make the comparison possible.

The second part of the thesis aims at application of the analysis made in the first part. Firstly, therefore I will assess the utility of these types of suits. It will also be appropriate to see if there are any risks involved in the utilisation of this legal device and the solutions for such risks.

Then it will be useful to distinguish the
concepts of representative suit and a similar growing branch of jurisprudence of public interest litigation in India with their comparative merits and demerits. We will also try to see if representative suits can replace public interest litigation to some extent.

The greatest mass industrial disaster that the world has known took place at Bhopal, India. By taking this up as a case study I will try to demonstrate if representative suit could have been filed on behalf of people of Bhopal and how it would have been processed in our legal system.

Then, the problems in the utilisation of representative suits as an input for access to justice in India can be considered. The remedies to the problems with the help of my analysis of the American class action suits can be seen. I intend to close my thesis with final conclusions aimed at making representative suits an effective input for access to justice.
Foot Notes of Introduction to the thesis

(1) Chief Justice P.N. Bhagawati's Interview on his retirement on Indian Television: Doordarshan.


(3) A matter adjudged, a thing judicially acted upon or decided, a thing or matter settled by judgement. Rule that a final judgement rendered by a court of competent jurisdiction on the merits is conclusive as to the rights of the parties and their privies, and as to them, constitutes an absolute bar to a subsequent action involving the same claim, demand or cause of action. Black's Law Dictionary, abridged fifth edition, 1989. West Publishing Company, St. Paul, Minn. U.S.A.

(4) A place of standing, a right of appearance in a Court of Justice: The Law Lexicon, Reprint Edition 1990, Wadhawa and Company, Nagpur. There are rules either formulated by the Legislature or developed by the judiciary for allowing standing before the courts to litigate. This concept is described in more detail while dealing with Public
Interest Litigation in the thesis.

(5) See AIR S.C. . See Indian Limitation Act Sec.5, 14, 18, 19, 22,

(6) Sec.11, Code of Civil Procedure 'Res judicata'.

Sec-11 - No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.

Explanation I - The expression "former suit" shall denote a suit which has been decided prior to the suit in question whether or not it was instituted prior thereto.

Explanation II - For the purposes of this section, the competence of a Court shall be determined irrespective of any provisions as to right of appeal from the decision of such Court.

Explanation III - The matter above referred to must in the former suit have been alleged by one
party and either denied or admitted, expressly or impliedly, by the other.

Explanation IV - Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation V - Any relief claimed in the plaint which is not expressly granted by the decree, shall, for the purpose of this section, be deemed to have been refused.

Explanation VI - Where persons litigate bona fide in respect of a public right or a private right claimed in common or themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under persons so litigating.

Explanation VII - The provisions of this section shall apply to a proceeding for the execution of a decree and references in this section to any suit, issue or former suit shall be construed as references, respectively, to a proceeding for the execution of the decree, question arising in such proceeding and a former proceeding for the execution of that decree.
Explanatio VIII - An issue heard and finally decided by a Court of limited jurisdiction, competent to decide such issue, shall operate as res judicata in a subsequent suit, notwithstanding that such Court of limited jurisdiction was not competent to try such subsequent suit or the suit in which such issue has been subsequently raised).

(7) See Barse AIR 1983 S.C. 378, Olga Tellis (1985) 3 SCC 545. For fuller discussion of this aspect see chapters on PIL in this thesis.

(8) See Appendix for Federal Rule 23 and chapter on American Class Action Suits for its analysis.

(9) Prof Cappalli's Article: "Class Actions for Continental Europe? a preliminary inquiry" manuscript available with the writer.

(10) It will not be out of place here to mention that there is a motion picture produced by 20th Century Fox, an Interscope Communications Production, "Class Action" starring Gene Hackman, Mary Elizabeth and Master Antonio. The film is produced by Ted Field, Scott Kroopf and Robert W. Cort and Directed by Michael Apted. Certain
attorneys like Ralph Nader have earned a nationwide name for their utilization of class actions. The utilization of this procedural device has even led to development of new substantive areas of law. The American class actions are discussed later in this thesis. Also see Supra foot note 7.


(13) P.M.Bakshi "Legal Research and Reform" 24 JILI 1982 page 391. Bakshi points out the following processes as necessary processes for each measure of law reform:

1) Analytical, i.e. finding out the existing law,
2) Historical i.e. finding out the previous law in order to understand the reason behind the existing law and the course of its evolution,
3) Comparative i.e. finding out what the law is in other countries, and considering whether
it can be drawn upon, with or without modification,
(4) Statistical i.e. collection of statistics to show the working of the existing law and
(5) Critical i.e. finding out the defects in the existing law and suggesting reforms.