

**PROTECTION OF HARMED INVESTORS:
THE MISSING LINK IN THE DISGORGEMENT ORDERS OF THE SEBI**

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Disgorgement is a monetary equitable remedy that is designed to prevent wrongdoers from unjustly enriching themselves as a result of their illegal conduct. Prompted by the practice in the United States of America, the Securities and Exchange Board of India has been issuing disgorgement orders since 2003. Accordingly, the ill-gotten monies collected by the SEBI under disgorgement orders are credited to the SEBI Investor Protection and Education Fund.

This Article expounds the twin objectives of the monies retained in the SEBI Investor Protection and Education Fund – the protection of the interests of investors and the promotion of investor education in accordance with the specified regulations. The author argues that by such retention, the SEBI is violating the cardinal principles of undue enrichment under the Indian Contract Act, 1872. Though the Indian Contract Act provides for ‘gain-based’ remedies like disgorgement and restitution, the amended SEBI Act, 1992 falls short of restitution. However, in 2019, the Securities Appellate Tribunal in its decision in the matter of Ram Kishori Gupta & Anr. v. SEBI held that “disgorgement without restitution does not serve any purpose.”

Thus, this Article argues that to better serve the mandate of the SEBI, a specific provision should be inserted in the SEBI (Investor Protection and Education Fund) Regulations, 2009, to the effect that the disgorged monies credited to the fund should be utilised for compensating harmed investors upon identification.

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CONTENTS

INTRODUCTION.....	56
I. THE ENFORCEMENT REGIME IN THE SEBI ACT.....	60
II. THE SCOPE AND OBJECTIVES OF DISGORGEMENT POWERS OF THE SEBI	62
III. THE MISSING LINK OF INVESTOR PROTECTION BY THE SEBI IN ITS DISGORGEMENT ORDERS	66
<i>A. Disgorgement and the Investor Protection Regime: Analysing the United States Regulatory Model vis-à-vis the Indian Regulatory Model.....</i>	<i>67</i>
<i>B. Reconciling the Inconsistency in the Indian Regulatory Model of Disgorgement and Investor Protection Regime.....</i>	<i>70</i>
CONCLUSION	74

INTRODUCTION

Disgorgement is a deterrence measure. It amounts to the removal of any financial benefit directly derived from violating the law. The objective is to strip off the actual profits earned by the wrongdoer. In the famous case of *Huntington v. Attrill*, the Supreme Court of the United States of America (hereinafter “USA”) stated that “*disgorgement is a pecuniary penalty imposed and enforced by the State, for a crime or offences against its laws.*”¹ It is imposed as a consequence for violating public laws, i.e. a violation committed against the State rather than an aggrieved individual. The deterrent effect of enforcement action by the securities regulatory bodies would be greatly undermined if the violators of securities law were not required to disgorge illicit profits.² At the same time, courts in the USA have also held that disgorgement is often not compensatory.

The Securities Exchange Act of 1934 (hereinafter “SEC Act”) did not specifically provide for disgorgement powers to the Securities Exchange Commission (hereinafter “SEC”). Before the Securities Enforcement Remedies and Penny Stock Reform Act of 1990, the SEC had no express authority to collect and distribute funds to defrauded investors in either judicial or administrative

¹ *Huntington v. Attrill*, 146 U. S. 657, 667(1892).

² *Kokesh v. SEC*, 581 U. S. 3-8 (2017).

proceedings. The ruling in *SEC v. Texas Gulf Sulphur Co.*³ marked the first case in which an appellate court recognised disgorgement as a remedy. The genesis of the disgorgement provision can be traced to the enactment of the Sarbanes-Oxley Act of 2002 (hereinafter “SOX Act”).⁴ The enactment of the statute came in the aftermath of the Enron scam and explicitly authorised the SEC to collect funds to compensate the harmed investors for their losses under Section 308. It bestowed broad authority for “*any equitable relief that may be appropriate or necessary for investors.*”⁵

The Securities and Exchange Board of India Act of 1992 (hereinafter “SEBI Act”), analogous to the SEC Act, also did not contain any specific provision in relation to the disgorgement powers of the regulator. However, the power to take preventive or punitive measures was implicit in the SEBI Act.⁶ Backed by the enactment of the SOX Act providing for disgorgement as an equitable remedy, the Securities and Exchange Board of India (hereinafter “SEBI”) similarly began issuing disgorgement orders from 2003 as an equitable remedy. However, this soon became a contentious issue in Indian courts. The directions of the SEBI were reversed by the Securities Appellate Tribunal (hereinafter “SAT”) on 3 November 2003, in the case of *Rakesh Agarwal v. SEBI*.⁷ The SAT in its order held that:⁸

*“...equitable powers can only be exercised by courts and not any quasi-judicial tribunals/bodies. SEBI does not have the power to direct disgorgement of any alleged profits. The disgorgement of alleged profits is always directed as a measure of deterrence and not compensation. Any pecuniary burden sought to be imposed by the legislature upon citizens, must be expressly provided for in the concerned Act/Regulation. Directions of disgorgement are therefore penal in nature, and accordingly cannot be passed pursuant to Section 11 B of the said Act, under which only remedial directions may be passed.”*⁹

³ *SEC v. Texas Gulf Sulphur Co.*, 401 F.2d 833 (1968).

⁴ Sarbanes–Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002).

⁵ Barbara Black, *Should the SEC Be a Collection Agency for Defrauded Investors?*, 63 THE BUSINESS LAWYER, 317-346 (Feb., 2008).

⁶ The Securities and Exchange Board of India Act, 1992, No. 15, Acts of Parliament, 1992.

⁷ *Rakesh Agarwal v. SEBI*, (2004) 49 SCL 351 (SAT).

⁸ *Id.* at ¶77 (Quoting *SEC v. Maurice Rind*, 991 F.2d 1486); *see Videocon Intl. v. SEBI*, (2015) 4 SCC 33.

⁹ SAT followed the earlier cases of *SEC v. Maurice Rind*, 991 F.2d 1486; *SEC v. Manor Nursing Centers*, 458 F.2d 1082 (1972); *Sterlite Industries v. SEBI*, SCC OnLine SAT 28; *BPL v. SEBI*, 2001 SCC OnLine SAT 40; *Videocon Intl. v. SEBI*, *Id.*

In *Ritesh Agarwal v. SEBI*, the Supreme Court observed that:¹⁰

“Section 11B is more action oriented, in a sense, it is a functional tool in the hands of the Board. In effect, Section 11B is one of the executive measures available to the respondent (SEBI) to enforce its prime duty of investor protection...the section identifies the persons to whom and the purposes for which, directions can be issued.”

Interestingly, in the case of *IPO irregularities - dealings by Ms. Roopalben N. Panchal*, the SEBI while citing the decisions of the SAT in a catena of cases, held that *“disgorgement is not a penalty, but a monetary equitable remedy”*.¹¹ Following the decision of the SAT in *Dushyant Dalal v. SEBI*,¹² it was observed that *“there need be no specific provision in the [SEBI] Act in this regard and this power to order disgorgement is inherent in the Board.”*¹³

Due to confusion prevailing over the equitable powers of the SEBI, an ‘explanation’ to Section 11B in the SEBI Act was inserted by the Securities Laws (Amendment) Act of 2014 in line with global precedents of legislative empowerment to the regulator for issuing disgorgement orders.¹⁴ It was clarified that the power to issue directions under Section 11B shall:¹⁵

“Include and always be deemed to have been included the power to direct any person, who made profit or averted loss by indulging in any transaction or activity in contravention of the provisions of this Act or regulations made thereunder, to disgorge an amount equivalent to the wrongful gain made or loss averted by such contravention.”

It was made effective from 18 July 2013. Thus, the amendment would not fall foul of the cardinal principles crystallised against *ex facto law* and the violation of fundamental rights. Disgorgement of ill-gotten benefits is not a penalty; it is an equitable remedy. The jurisprudence on disgorgement has been reiterated by the SAT in a recent decision in the matter of *Mrs. Ram Kishori*

¹⁰ *Ritesh Agarwal v. SEBI*, (2008) 8 SCC 205, at ¶27.

¹¹ *In re Roopalben N. Panchal alias Rupalben N. Panchal*, 2011 SCC OnLine SEBI 33, at ¶9d.

¹² *Dushyant N. Dalal v. SEBI*, (2017) 9 SCC 660.

¹³ *In re Roopalben N. Panchal alias Rupalben N. Panchal*, *supra* note 11.

¹⁴ The Securities and Exchange Board of India (Amendment) Act, 2014, No. 27, Acts of Parliament, 2014.

¹⁵ *Id.*

Gupta v. SEBI (commonly known as the *Vital Communications case*),¹⁶ wherein it has been held that “*disgorgement without restitution does not serve any purpose.*”¹⁷

This Article reviews the background engendering the evolution of the disgorgement of ill-gotten gains in the Indian securities market. The author, through examining various decisions, seeks to test the efficacy of the disgorgement orders issued by the SEBI. The aim is to explore whether the SEBI, by restricting its powers only up to passing disgorgement orders, is fulfilling its legislative mandate of investor protection. This is of utmost importance since large amounts have been collected by the regulator in the recent past. Now that the SAT has held that “*disgorgement without restitution*” does not serve the purpose of investor protection in the securities market, the author attempts to highlight the provisions of the SOX Act and the corresponding practices followed by the SEC in the USA to protect the interests of the harmed investors.

Arguably, the amount spent on investor education in India is minuscule and the interest on the unspent monies in the Investor Protection and Education Fund is also becoming an additional source of revenue generation for the SEBI. This being the case, the author argues that the extant process followed by the SEBI of collecting and retaining the disgorged monies of ill-gotten gain amounts to ‘undue enrichment’ of the SEBI. Hence, it is violative of the cardinal principles enshrined in the Indian Contract Act, 1872.

It is argued in this Article that equity demands that the disgorged monies should be returned or used to compensate the investors who lost their monies due to the nefarious designs of a few market participants. The SEBI cannot hold this money with itself, particularly when the monies remain unutilised. Taking a cue from the Rules of Practice and Rules on Fair Fund and Disgorgement Plans followed by the SEC, this Article endeavours to propose a mechanism to compensate, upon identification, the harmed investors in the domestic securities market. To meet this investor protection objective, the author proposes an amendment to the SEBI Act.

Part I of this Article narrates the journey of the enforcement regime in the SEBI Act. Part II deliberates on the jurisprudence developed, encompassing various perspectives of the disgorgement powers of the SEBI. Part III highlights the missing link in the investor protection process followed by the SEBI upon passing disgorgement orders. To assert this central issue, evidence will also be

¹⁶ Ram Kishori Gupta & Anr. v. SEBI, 2019 SCC OnLine SAT 149.

¹⁷ *Id.* at ¶6.

brought out. Taking a leaf out of the provision of Section 308 of the SOX Act (Fair Funds for investors), this Article endeavours to propose the insertion of an appropriate provision in the SEBI Act. The Indian Companies Act, 2013 also contains a similar mechanism with the intervention of the Court.

I. THE ENFORCEMENT REGIME IN THE SEBI ACT

The enforcement ecosystem in a jurisdiction is greatly influenced by its legal and extant regulatory landscape, eco-political framework, merits of the case, nature of the conduct to be deterred and, to cap it all, the social, cultural, and economic environment.¹⁸ In India, the significance of a deterrent action against the perpetrators of economic offences by the SEBI has been underlined by the Supreme Court in *N. Narayanan v. Adjudicating Officer, SEBI*.¹⁹ In the aforementioned case, the Court observed:²⁰

“Economic offence, people of this country should know, is a serious crime which, if not properly dealt with, as it should be, will affect not only country’s economic growth, but also slow the inflow of foreign investment by genuine investors and also casts a slur on India’s securities market. Message should go that our country will not tolerate ‘market abuse’ and that we are governed by the ‘Rule of Law’. Fraud, deceit, artificiality, SEBI should ensure, have no place in the securities market of this country and ‘market security’ is our motto.”

The evolution of the enforcement metrics and the penalty-setting regime in India has been gradual and has also been influenced by many externalities. The Indian securities laws have gone through a learning curve. The SEBI Act was crafted by law-makers having little market experience and without a forward-looking approach. The Act could not fully comprehend the designs and colours of market violations and hence, the imposition of penalties was not provided in the Act. In the article titled *“Historical Perspective of Securities Law,”* Sahoo states that *“in the light of experience gained with the working of the SEBI Act, 1992, it was considered desirable to expand the jurisdiction of SEBI, enhance its*

¹⁸ THE BOARD OF THE INTERNATIONAL ORGANIZATION OF SECURITIES COMMISSIONS, PRINCIPLES FOR FINANCIAL BENCHMARKS (2013).

¹⁹ *N. Narayanan v. Adjudicating Officer, SEBI*, (2013) 12 SCC 152.

²⁰ *Id.* at ¶170.

*autonomy and empower it to take a variety of punitive actions in case of violations of the Act.*²¹ India was admitted as a member of the International Organization of Securities Commissions (hereinafter “IOSCO”). Principle 9 of the then 30 Principles of Securities Regulations prescribed a strong enforcement process in its membership and consequently, the effective implementation of the Principles was critical for the SEBI.²² Accordingly, Chapter VI-A – Penalties and Adjudication – was inserted in the SEBI Act by the Securities Laws (Amendment) Act, 1995.²³ The Amendment Act provided the much-desired teeth of monetary penalties to the enforcement empowerment of the SEBI as an alternative mechanism to deal with capital market misuse as well as abuse.²⁴

Regulatory haste coupled with the lack of experience again created a regulatory gap. Section 14(1)(aa) of the SEBI Act provided “*all sums realized by way of Penalties under this Act shall be credited to Securities and Exchange Board of India General Fund*”²⁵, whereas the penalty amounts were credited to the government treasury in other major jurisdictions. The SEBI (Amendment) Act, 2002 rectified this anomaly.²⁶ Consequent to the amendment, the penalties are deposited in the Consolidated Fund of India. Despite the amendment, it appeared that due compliance was not made by regulators in India including the SEBI (per the scope of this Article). The Comptroller and Auditor General of India for the fiscal year (hereinafter “FY”) ended March 2010 pulled up the SEBI and other regulators for “*contravention of constitutional provision*” by keeping their surplus funds worth over INR 2,142 crores collected through fee and penalty outside the government accounts.²⁷ Incidentally, the Annual Accounts of the SEBI for the year ended March 2016 as well as March 2017 stated that the penalties were being deposited in the Consolidated Fund on India.²⁸

²¹ M.S. Sahoo, *Historical Perspective of Securities Laws*. CHARTERED SEC’Y (2000).

²² INTERNATIONAL ORGANIZATION OF SECURITIES COMMISSIONS, OBJECTIVES AND PRINCIPLES OF SECURITIES REGULATION (2003).

²³ The Securities and Exchange Board of India (Amendment) Act, 1995, No. 5, Acts of Parliament, 1995.

²⁴ Misuse will include delayed or non-disclosure of Price Sensitive Information; directly or indirectly using any manipulative or deceptive device; non-filing of event-based corporate information. Abuse will include non-adherence of the Code of Conduct; indulging in Insider Trading, using the funds of clients for trading in the proprietary account of the broker.

²⁵ §14(1)(aa), SEBI Act, 1992.

²⁶ The Securities and Exchange Board of India (Amendment) Act, 2002, No. 59, Acts of Parliament, 2002.

²⁷ ET Bureau, *CAG pulls up 5 watchdogs for keeping fee out of govt accounts*, THE ECONOMIC TIMES (Mar. 19, 2011, 12:49 AM), <https://economictimes.indiatimes.com/news/economy/finance/cag-pulls-up-5-watchdogs-for-keeping-fee-out-of-govt-accounts/articleshow/7740032.cms> (last visited May 18, 2020).

²⁸ The annual accounts are available in the public domain for these two financial years only. Hence, the observations of the Comptroller & General of Accounts could not be verified.

Though the Indian Contract Act, 1872 provides for ‘gain-based’ remedies,²⁹ their wider application is comparatively a new class of remedy in the regulatory enforcement ecosystem (applied only in the IPO scam) of the Indian securities market. The objective of this remedy is to compensate for the loss suffered by the plaintiff, i.e. award of compensation to the extent possible, equivalent to the loss of monies by the investor(s). Gain-based remedies are generally classified as: (a) restitution; and (b) disgorgement. The law of restitution, which is an equitable remedy, is the law of gains-based recovery. It provides for restoring anything unjustly taken from another. It is not compensation. However, the money or property wrongfully in the possession of the defendant must be traceable, i.e. it can be tied to particular funds or properties. In such a case, restitution comes in the form of a constructive trust or an equitable lien.³⁰

II. THE SCOPE AND OBJECTIVES OF THE DISGORGEMENT POWERS OF THE SEBI

The meaning and objectives of empowering the SEBI to issue disgorgement orders,³¹ have been elaborated by the SAT in *Karvy Stock Broking Ltd. v. SEBI*.³²

“Disgorgement is a monetary equitable remedy that is designed to prevent a wrongdoer from unjustly enriching himself as a result of his illegal conduct. It is not a punishment nor is it concerned with the damages sustained by the victims of the unlawful conduct. Disgorgement of ill-gotten gains may be ordered against one who has violated the securities laws/regulations but it is not every violator who could be asked to disgorge. Only such wrongdoers who have made gains as a result of their illegal act(s) could be asked to do so. Since the chief purpose of ordering disgorgement is to make sure that the wrongdoers do not profit from their wrongdoing, it would follow that the disgorgement amount should not exceed the total profits realized as the result of the unlawful activity. In a disgorgement action, the burden of showing that the amount sought to be disgorged reasonably approximates the amount of unjust enrichment is on the Board.”

²⁹ Indian Contract Act, 1872, No. 9, Acts of Parliament, 1872.

³⁰ ANNA PAYNE & MONIQUE LEAHY, RESTITUTION AND IMPLIED CONTRACTS, 66 AM. JUR. 2D §6 (Thomson Reuters, 2001).

³¹ §15J, inserted by the 1995 amendment *inter alia* provides that while adjudging the quantum of the penalty, the adjudicating officer shall have due regard to the amount of disproportionate gain or unfair advantage, wherever quantifiable, made as a result of the default.

³² *Karvy Stock Broking Ltd. v. SEBI*, (2008) SCC OnLine SAT 74, at ¶5.

Upholding that the principles of natural justice shall prevail even while the SEBI passes disgorgement orders, the SAT quashed the orders of the SEBI in the above matter and observed:³³

“...the impugned order was passed without affording an opportunity of hearing to the appellant and other entities which have been ordered to disgorge a sum of Rs. 115.82 crores. The least that was required of the Board was to have called upon the appellant to show cause as to why it should not be ordered to disgorge the amount determined in the impugned order. Not having done so, the principles of natural justice have been flagrantly violated. The impugned order, therefore, deserves to be set aside on this ground alone.”

The powers and objectives of enforcement of the SEBI were elaborated by the SAT in *Karvy Stock Broking Ltd. v. SEBI*:³⁴

“Section 11 is the very heart and soul of the Act. This provision has been periodically amended and today it is substantially different from what it was at its inception in the year 1992. The scope of the power has been considerably widened. The introduction of Sub section (4) in Section 11 and various other provisions like Section 11B is indicative of the legislative intent. These provisions are meant to arm the Board with authority so as to be able to effectively exercise power and achieve the declared objectives of the Act. It is clear that a common thread runs through the various provisions of the Act and that is to empower the Board to take preventive as well as punitive measures so as to protect the investor and to promote the securities market.”

The SEBI has been directing the disgorgement of funds in various matters on the premise that *“the interest of the market and of the investors requires that such entities are not allowed to participate in the market and unjustly enrich themselves at the cost of investors. Such acts of serious irregularities threaten the market integrity and orderly development of the market and calls for regulatory intervention to protect the interest of investors.”*³⁵ In *Sumeet Industries v. SEBI*, it was held that the computation of unlawful gains should be per precise norms. In case, it is not so, it will be set aside and the SEBI may be directed to

³³ *Karvy Stock Broking Ltd. v. SEBI*, *supra* note 32, at ¶7.

³⁴ *Karvy Stock Broking Ltd. v. SEBI*, 2007 SCC OnLine SAT 2, at ¶18.

³⁵ In re IPO Irregularities- Dealings by Mr. Deepak Kumar Shantilal Jain in the Initial Public Offering of Infrastructure Development Finance Company Limited, 2008 SCC OnLine SEBI 176, at ¶13.

recompute the quantum of unlawful gains liable to be disgorged by the appellants.³⁶ Further, in the matter of *Palred Technologies*, the SEBI order held that where the impounded funds liable to be disgorged, “are found to be insufficient to meet the figure of unlawful gains, then the securities lying in the demat account of these persons shall be frozen to the extent of the remaining value.”³⁷

In the *NSE Co-location* matter, the regulatory body noted that “the stock exchange, as a first level regulator, has a fiduciary duty to the entire ecosystem. Market participants’ confidence in the trading system is based on the presumption that the rules of trading are completely uniform and transparent.”³⁸ It further stated that “an order for disgorgement of a portion of the profits derived from the TBT [Tick by Tick]³⁹ data dissemination activity during the relevant period, for being transferred to the Investor Protection and Education Fund, created by SEBI under section 11 of the SEBI Act, would be an appropriate direction, commensurate with the violations.”⁴⁰

As an interim measure, the SEBI may also impound the unlawful gains in case there is a possibility of diversion of such monies. In the *Bank of Rajasthan Ltd.* matter, the SEBI directed:⁴¹

“With the initiation of investigation and quasi-judicial proceedings, it is possible that the notices may divert the unlawful gains (subject to the adjudication of the allegation on the merits in the final order), which may result in defeating the effective implementation of the direction of disgorgement, if any to be passed after adjudication on merits. Non-interference by the Regulator at this stage would therefore result in irreparable injury to interests of the securities market and the investors.”

Further, interest on the disgorged monies may be awarded from the date on which the cause of action arose till the date of the commencement of the proceedings for the recovery of such

³⁶ *Sumeet Industries v. SEBI*, (2016) SCC OnLine SAT 289.

³⁷ In the matter of *Trading in the shares of Palred Technologies Limited*, 2016 SCC OnLine SEBI 42, at ¶12.

³⁸ In the matter of *National Stock Exchange (NSE) Ltd. and Ors.*, 2019 SCC OnLine SEBI 120, at ¶8.3.3.9.

³⁹ Tick-by-Tick data disseminated by Stock Exchanges is a near-real-time trade transaction information “where each ‘tick’ constitutes an information packet of any market event (new order, cancel order, modify order or trade) with a uniquely identified ‘tick sequence number’. Every ‘tick’ of a scrip/instrument, i.e. any new order/modification/cancellation/trade will affect the order book of that scrip/instrument as multiple ‘ticks’ processed together form the state of the market book”. See In the matter of *OPG Securities Pvt. Ltd.*, 2019 SCC OnLine SEBI 116.

⁴⁰ In the matter of *National Stock Exchange (NSE) Ltd. and Ors.*, *supra* note 38, at ¶10.2.

⁴¹ In the matter of *insider trading by suspected entities in the scrip of Bank of Rajasthan Ltd.*, 2016 SCC OnLine SEBI 19, at ¶24.

interest in equity.⁴² The interest may also be awarded to be paid till the date of actual payment. However, such directions must be specific. Notwithstanding this, in the absence of the words “*along with further interest till actual payment is made*”⁴³ in the order of SEBI, no future interest is payable.

In the case of *Ram Kishori Gupta and Anr. v. SEBI*, SAT, on 30 April 2013, held that restitution by the SEBI of the losses suffered by the complainants is outside the scope of the SEBI.⁴⁴ It further noted that:⁴⁵

“This aspect needs to be looked into by a civil court of competent jurisdiction in a trial and not by SEBI under the SEBI Act for the simple reason that SEBI has neither the expertise nor infrastructure for this purpose. There is no mandate in law requiring SEBI to do so in case any investor suffers loss on account of trading in shares and so on. It must be emphasised that such jurisdiction is not envisaged anywhere in the entire scheme of the SEBI Act. In fact, the law of damages/compensation is a complex area and SEBI is not supposed to undertake the same for reasons stated hereinabove.”

Interestingly, before parting with its decision, the SAT directed “*SEBI to look into the part of the complaint of the Appellants which relates to the alleged misleading and fraudulent advertisements issued by Vital Communications Limited, along with the investigation, understandably, being carried on in respect of VCL or separately, as it may be advised and considered fit and proper in the circumstances of this case as per law.*”⁴⁶

Occasionally, due to the complex nature of transactions and the fact that the investigation report does not dwell on the extent of the specific gains made by the clients or the brokers, it is difficult to exactly quantify the disproportionate gains of the unfair advantage enjoyed by an entity and the consequent losses suffered by the investors.⁴⁷ In case, the wrongful gains along with interest as directed are not paid within the specified time, then the SEBI has a right to initiate the recovery process under Section 28A of the SEBI Act.⁴⁸

⁴² *Trojan and Co. v. Nagappa Chettiar*, (1953) SCR 789.

⁴³ *Dushyant N. Dalal v. SEBI*, *supra* note 12.

⁴⁴ *Ram Kishori Gupta and Anr. v. SEBI*, (2013) SAT 52.

⁴⁵ *Id.* at ¶9.

⁴⁶ *Id.* at ¶12.

⁴⁷ *In re Jay Bharat Fabrics Mills Ltd.*, SEBI Order No. AS/AO-03/2014 (2014).

⁴⁸ *In re Sumeet Industries Ltd.*, 2014 SCC OnLine SEBI 278.

III. THE MISSING LINK OF INVESTOR PROTECTION BY THE SEBI IN ITS DISGORGEMENT ORDERS

Investor protection is crucial in the securities market. Wrongdoers, by their conduct, expropriate monies including ill-gotten gains. Such conduct undermines the functioning of the financial markets. Therefore, there must be a deterrent enforcement ecosystem in the securities market that “holds individuals and entities accountable and deters misconduct, promote public confidence in financial services, create an environment in which fair and efficient markets can thrive (sic).”⁴⁹

Disgorgement of monies is in the larger public interest and has been upheld by the Supreme Court of the USA.⁵⁰ The SEBI has been enjoined with ‘public interest’ jurisdiction in the securities market. The Supreme Court of India explained the term in *Bihar Public Service Commission v. Saiyed Hussain Abbas Rizwi*:⁵¹

“The expression ‘public interest’ has to be understood in its true connotation so as to give complete meaning to the relevant provisions of the Act. It does not have a rigid meaning, is elastic and takes its colour from the statute in which it occurs, the concept varying with time and state of society and its needs.”

The object of the SEBI Act is to protect the interests of the investors in securities and to promote the orderly, healthy development of the securities market through regulation and further investor confidence.⁵² It is a well-accepted canon of statutory construction that the Court is duty bound to further the aim of the Parliament of providing a remedy for the mischief against which the enactment is directed. Accordingly, the Court should prefer a construction which advances this object rather than one that attempts to find some way of circumventing it.⁵³

Extending the rationale of the judicial decisions mentioned above, it can be said that the crediting of the penalties by the SEBI to the Consolidated Fund of India is an expression of the legislative mandate of the SEBI Act that such monies are public monies which can be utilised as

⁴⁹ IOSCO, *supra* note 22.

⁵⁰ *Kokesh v. SEC*, *supra* note 2.

⁵¹ *Bihar Public Service Commission v. Saiyed Hussain Abbas Rizwi*, (2012) 13 SCC 61, at ¶22.

⁵² *N. Narayanan v. Adjudicating Officer*, *supra* note 19.

⁵³ *R.K. Agarwal v. SEBI*, (2001) SAT 15.

such by the government.⁵⁴ Extending this chain of reasoning to the disgorged monies, it is argued that as the monies are to be credited to the Investor Protection and Education Fund, the underlying intent of the legislation is loud and clear that this specific fund is exclusively for two purposes: investor protection and investor education in the securities market. However, as will be demonstrated, the SEBI is using the fund for investor education but not for investor protection. The IPO scams were the only exception to this. Hence, the current functioning creates a regulatory as well as an administrative gap.

A. Disgorgement and the Investor Protection Regime: Analysing the United States Regulatory Model vis-à-vis the Indian Regulatory Model

The phrase ‘investor protection’ is dynamic, fascinating, and yet complex in the financial market space. The SEC, in its mission statement, has given wide amplitude to the term ‘investor protection’. It describes its mission in threefold terms: “*to protect investors; maintain fair, orderly, and efficient markets; and facilitate capital formation.*”⁵⁵ The SEC performs this function of protecting investors from fraud through the enforcement of the securities laws and the punishment of the violators.

The SOX Act has given a more progressive dimension to the investor protection regime.⁵⁶ The collection of damages for the injured investors was never considered an important function of the SEC. Section 308 (popularly called ‘Fair Fund provision’) of the SOX Act envisages a prominent role for the SEC in compensating the harmed investors. The SOX Act now empowers the SEC in certain circumstances to levy “*civil penalties (which) shall be added to and become part of the disgorgement fund for the benefit of the victims of such violation.*”⁵⁷ In other words, it means that the disgorgement monies of ill-gotten gains collected from the wrongdoers shall be utilised for the benefit of the victims of the violations.

Comparatively, two critical deviations are noted in the SOX Act from the provisions of the SEBI Act. *Firstly*, the civil penalties are to be collected by the SEC instead of depositing it with the

⁵⁴ SEBI Act, *supra* note 26.

⁵⁵ U.S. SECURITIES AND EXCHANGE COMMISSION, THE ROLE OF THE SEC, <https://www.investor.gov/introduction-investing/investing-basics/role-sec> (last visited May 18, 2020).

⁵⁶ SOX Act, *supra* note 4.

⁵⁷ *Id.* at § 308.

government treasury. These monies become a constituent of the Fair Funds. *Secondly*, this aggregated fund is distributed to harmed investors. As Black notes:⁵⁸

“Because of SOX’s absence of legislative history, we do not know why.... Congress, chose to condition the distribution of a penalty to investors on obtaining disgorgement from the violator. Perhaps that decision stemmed from congressional focus on the specific facts of Enron one of the classic situations for disgorgement in which the employee-investors purchased securities while the corporate insiders personally profited from their fraud by selling their shares and receiving inflated performance-based compensation.”

The SEC has been earnestly using this process during recent years and compensating the harmed investors. It ordered various entities to pay a total of \$2,506 million in FY 2018 (\$2,957 million in FY 2017) in the disgorgement of ill-gotten gains.⁵⁹ The SEC also distributed \$794 million in FY 2018 (\$1,073 million in FY 2017) to the harmed investors from the Fair Funds created under Section 308 of the SOX Act.⁶⁰ Total monetary relief ordered in FY 2018 increased by approximately 4% from FY 2017.⁶¹

Turning to the Indian context, the Union Finance Minister, while presenting the Budget for FY 2006-07, proposed the establishment of the Investor Protection and Education Fund. The Minister stated that the fund shall be utilised for the protection of the investors, and promotion of investor education and awareness under the SEBI (Investor Protection and Education Fund) Regulations, 2009.⁶² The fund may also be utilised, as the Advisory Board, constituted under the above regulation, may specify.⁶³ Section 125 of the Companies Act, 2013 also provides for the establishment of a similar fund but titled ‘Investor Education and Protection Fund’.⁶⁴ This fund is regulated by the Ministry of Corporate Affairs. Interestingly, amongst other purposes, this fund shall

⁵⁸ Black, *supra* note 5.

⁵⁹ U.S. SECURITIES AND EXCHANGE COMMISSION, SEC ANNUAL REPORT 2018 (Nov. 1, 2018), <https://www.sec.gov/files/enforcement-annual-report-2018.pdf> (last visited May 18, 2020).

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² P. Chidambaram, *Budget 2006-07: Speech of P. Chidambaram, Minister of Finance*, UNION BUDGET AND ECONOMIC SURVEY (Feb 28, 2006), indiabudget.gov.in/budget_archive/ub2006-07/bs/speecha.htm (last visited May 18, 2020).

⁶³ SEBI (Investor Protection and Education Fund) Regulations, 2009, Regulation 5(2)(h), https://www.sebi.gov.in/legal/regulations/apr-2017/sebi-investor-protection-and-education-fund-regulations-2009-last-amended-on-march-6-2017-_34705.html (last visited May 18, 2020).

⁶⁴ The Companies Act, 2013, No. 13, Acts of Parliament, 2014.

also be utilised for “*distribution of any disgorged amount among eligible and identifiable applicants for shares or debentures, shareholders, debenture-holders or depositors who have suffered losses due to wrong actions by any person, in accordance with the orders made by the Court which had ordered disgorgement.*”⁶⁵

It may be noted that the provisions for which the disgorgement orders may be passed under the Companies Act, 2013, are all market-related and fall within the jurisdiction of the SEBI. Section 38(3) of the Companies Act, 2013 provides that “*the Court may also order disgorgement of gain, if any, made by, and seizure and disposal of the securities in possession of, such person.*”⁶⁶ In other words, it is an additional remedy. An exception appears to have been carved out for the Serious Fraud Investigation Office, where, based on its investigation report, the Court may order disgorgement. Otherwise, forum shopping seems difficult given the architecture of securities market enforcement in the country.

B. Reconciling the Inconsistency in the Indian Regulatory Model of Disgorgement and Investor Protection Regime

To resolve the ambiguity created by the statutes and the SEBI Act being a special act, the assistance of legal interpretation is warranted. The Supreme Court of India has previously held that “*the Court has to ascertain the object which the provision of law in question is to sub serve and its design and the context in which it is enacted. If the object of the law will be defeated by non-compliance with it, it has to be regarded as mandatory.*”⁶⁷ Further, “[T]he principle as regards the nature of the statute must be determined having regard to the purpose and object the statute seeks to achieve.”⁶⁸ In the SEBI (Investor Protection and Education Fund) Regulations, 2009, the scope for distribution of the disgorged amounts to eligible investors is ambiguous and is left to the discretion of the Advisory Board of SEBI.⁶⁹ However, the distribution of disgorged money is specifically authorised under the provision of the subsequently enacted Companies Act, 2013.⁷⁰

In addition to the aforementioned, the SEBI Act is predominantly a socio-economic legislation for the welfare and protection of the interests of the retail investors. The argument of the author gains strength in the precedent of compensating the harmed investors out of the disgorged

⁶⁵ *Id.* at §125(3).

⁶⁶ *Id.*

⁶⁷ Sharif-ud-Din v. Abdul Gani Lone, (1980) 1 SCC 403, at ¶9.

⁶⁸ Chandrika Prasad Yadav v. State of Bihar, (2004) 6 SCC 331, at ¶31.

⁶⁹ SEBI (Investor Protection and Education Fund) Regulations, 2009, Regulation 5.

⁷⁰ §125(3)(c), Companies Act, 2013.

monies collected by the SEBI in the IPO scam. There is no denying that this action of the SEBI restored the confidence of the retail investors in the market. Thus, there is a convergence in the objectives of both the provisions under the separate laws. The author holds the view that it is a fit case for preferring a beneficial as well as a purposeful interpretation as to the scope of the utilisation of the disgorged amounts under the SEBI (Investor Protection and Education Fund) Regulations, 2009.

Though no explanation has been provided for the creation of the Investor Protection and Education Fund by the SEBI, the logic is similar to Section 308(a) of the SOX Act (Fair Fund provision) which authorises the “SEC to *inter alia*, utilise the disgorgement funds for the benefit of victims of securities law violations.”⁷¹ The provisions in the Companies Act, 2013 are based on the limited recommendations of the Wadhwa Committee Report which was set up to ascertain “*eligible and identifiable applicants who suffered losses in the IPO scam by the actions of some market participants.*”⁷² As noted above, the Companies Act advocates for the intervention of the Court in compensating the losses instead of empowering its Tribunal. This is noteworthy to buttress the argument to carve out an exception for remedial action. That being said, the objectives of the provisions complement the procedural variations in meeting the objectives.

Further, as per the latest available Annual Accounts for the FY 2017, a meagre 10% of the amount of the Investor Protection and Education Fund has been expended and the balance of 90% of the amount is lying idle.⁷³ To put it differently, the SEBI is unduly getting enriched to the extent of retaining the unutilised disgorged monies and the interests accrued thereon. All the monies have been utilised for investor education exclusively,⁷⁴ except the monies reallocated and expenses related thereto for compensating the harmed investors of the IPO scam.

It is worth noting that the SAT in its recent decision in the matter of *Ram Kishori Gupta v. SEBI*,⁷⁵ which was pronounced on 2 August 2019 (recalling its earlier decision on 30 April 2013),

⁷¹ U.S. SECURITIES AND EXCHANGE COMMISSION, REPORT PURSUANT TO SECTION 308(C) OF THE SARBANES OXLEY ACT OF 2002, <https://www.sec.gov/news/studies/sox308creport.pdf> (last visited May 18, 2020).

⁷² WADHWA, J., ET AL., SEBI, REPORT ON REALLOCATION OF SHARES IN THE MATTER OF IPO IRREGULARITIES (2007), https://www.sebi.gov.in/sebi_data/attachdocs/1289366396898.pdf (last visited May 18, 2020).

⁷³ SECURITIES AND EXCHANGE BOARD OF INDIA, ANNUAL STATEMENT OF ACCOUNTS 2017-18 (2018), https://www.sebi.gov.in/reports/annual-accounts/jul-2019/sebi-annual-accounts-financial-year-2017-18_43728.html (last visited May 18, 2020).

⁷⁴ Not quantified in various Annual Reports of SEBI.

⁷⁵ *Ram Kishori Gupta & Anr. v. SEBI*, *supra* note 16.

observed that since it was conclusively established that Vital Communications Limited violated the securities laws, “*the impugned order should have contained provision for compensating the appellants*”.⁷⁶ The SAT directed the SEBI to pay the said amount to the appellants either from the amount being disgorged from Vital Communications Limited and connected entities as given in the impugned order or from the SEBI Investor Protection and Education Fund.⁷⁷ The Tribunal further held that “*the basic idea behind disgorgement is restitution. As an investor protection measure, the Appellants need to be compensated, since disgorgement without restitution does not serve any purpose.*”⁷⁸

An analysis of various disgorgement cases establishes that the SEBI, of late, is using disgorgement as a hammer in the cases it believes it can quantify ‘ill-gotten’ gain. In certain cases, the amount was not quantified due to the complex design of the trade transaction. Nonetheless, the amounts collected by the SEBI as disgorged amounts have exponentially increased in recent months, more particularly after the recent high-profile case popularly called the *NSE co-location* case.⁷⁹ That being the landscape, the circumstances warrant that a market-centric, purposeful interpretation would be in both public interest and investor interest in particular. In *Sahara Real Estate Corp. Ltd. and Anr. v. SEBI and Anr.*,⁸⁰ the Supreme Court upheld that the protection of investors is the legislative mandate of the SEBI and the mandate would be best served only when the harmed investors are compensated by SEBI.

Following the holding in the order by the SAT dated 2 August 2019, that “*disgorgement without restitution does not serve any purpose*”,⁸¹ the author argues that an enabling specific provision may be inserted in the SEBI (Investor Protection and Education Fund) Regulations, 2009, which would mandate that the disgorged monies lying credited in the SEBI Investor Protection and Education Fund be utilised for compensating the harmed investors.

Moving to the mechanism for identification of the harmed investors and the process for compensating them, the SEC in the USA has issued a comprehensive Rules of Practice and Rules on

⁷⁶ *Id.* at ¶6.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ In the matter of National Stock Exchange (NSE) Ltd. and Ors., *supra* note 38; In the matter of NSE Ltd. and Ors., 2019 SCC OnLine SEBI 123.

⁸⁰ Sahara India Real Estate Corporation Ltd. and Anr. v. SEBI and Anr., (2012) 174 Comp Cas 154 (SC).

⁸¹ Ram Kishori Gupta & Anr. v. SEBI, *supra* note 16, at ¶6.

Fair Fund and Disgorgement Plans for this purpose.⁸² Rule 1100, *inter alia*, provides that the enforcement order shall mandate that “*the amount of disgorgement be used to create a fund for the benefit of investors who were harmed by the violation*”.⁸³ Further, the SEC shall:⁸⁴

“Submit a plan for the administration and distribution of funds in a Fair Fund or disgorgement fund within 60 days. It will also contain detailed plan for administration and distribution of funds to the harmed investors. The plan will include ‘categories of persons potentially eligible to receive proceeds; procedures for providing notice to such persons of the existence of the fund and their potential eligibility to receive proceeds of the fund; procedures for making and approving claims, procedures for handling disputed claims, and a cut-off date for the making of claim; procedures for the administration of the fund, including selection, compensation; proposed date for the termination of the fund, including provision for the disposition of any funds not otherwise distributed and such other provisions as the Commission or the hearing officer may require.’”

Subsequently, the distribution plan is approved by the regulator. As a safety valve, there is also a provision for a potential challenge by the investors. The SEC has also dedicated an ‘Information for Harmed Investors’ portal.⁸⁵ In addition to the information regarding the Fair Funds Plans, the harmed investors are directed to a link wherein through the ‘Investor Claim Form’, the investor shall submit certain vital financial and other transaction details. The SEC also regularly publishes the ‘Investor Bulletin’ for disseminating such information. As noted above,⁸⁶ the distribution and the administration of the funds are monitored by the SEC. Research by the author has established that though other major jurisdictions provide for restitution, the mechanism provided in the SEC rules is comprehensive and investor friendly.⁸⁷

⁸² U.S. SECURITIES AND EXCHANGE COMMISSION, RULES OF PRACTICE, <https://www.sec.gov/about/rules-of-practice-2018.pdf> (last visited May 18, 2020).

⁸³ *Id.*

⁸⁴ *Id.* at § 1101.

⁸⁵ U.S. SECURITIES AND EXCHANGE COMMISSION, INFORMATION FOR HARMED INVESTORS, <https://www.sec.gov/divisions/enforce/claims.htm> (last visited May 18, 2020).

⁸⁶ U.S. SECURITIES AND EXCHANGE COMMISSION, *supra* note 82.

⁸⁷ The mechanism of compensating the harmed investors as provided under §308 of the SOX Act is rule-based, transparent, and accountable. Every year the SEC publishes an Annual Report ‘Division of Enforcement’ wherein monies returned to harmed investors are mentioned. This is also presented before the Senate each year. *See* U.S. SECURITIES AND EXCHANGE COMMISSION, DIVISION OF ENFORCEMENT: 2019 ANNUAL REPORT (Nov. 6, 2019), <https://www.sec.gov/files/enforcement-annual-report-2019.pdf> (last visited May 18, 2020). It has a dedicated web portal for the purpose also. Other jurisdictions do not seem to have such a robust investor-friendly mechanism.

Having observed the best global practice adopted by the SEC, it is argued that a similar enabling provision, on the lines of the ‘Rules of Practice and Rules on Fair Fund and Disgorgement Plans’ of the SEC may be appropriately incorporated in the SEBI (Investor Protection and Education Fund) Regulations, 2009. With due respect, the author submits that tracing and identifying harmed investor(s) in the present-day regulatory landscape of the Indian securities market may not be as challenging as the period during which the Justice Wadhwa Committee was constituted.⁸⁸

The SEBI has one of the best information and communication technology driven real-time surveillance and monitoring systems in place and this has been acknowledged by the International Monetary Fund and the World Bank in their ‘Financial Sector Assistance Programme (India)’.⁸⁹ Further, all transactions now mandatorily have computer-footprints that leave an audit trail and facilitate the validation of the transactions. The SEBI has a database of tick-by-tick information of all the market transactions which are continually analysed by using sophisticated tools of data analysis.⁹⁰ Artificial intelligence, machine learning, and other tools are also utilised by the SEBI in its market surveillance ecosystem.⁹¹ Only a handful of jurisdictions can assert such infrastructure and

⁸⁸ The IPO scams happened during the year 2005. SEBI did not have in-house Real-Time Information Gathering facilities. Further, Surveillance and Monitoring were generally manual. Due to such drawbacks, mapping of each transaction and generating real-time alerts was not possible. Now SEBI is reported to have “*a real-time surveillance mechanism, harnessing artificial intelligence to build a platform that will capture and analyse data and flag suspicious transactions during trading hours.*” See Pavan Burugula, *SEBI Plans Platform for Real-time Surveillance*, ECONOMIC TIMES (Mar. 5, 2020, 8:13 AM), <https://economictimes.indiatimes.com/markets/stocks/news/sebi-plans-platform-for-real-time-surveillance/articleshow/74485211.cms> (last visited May 18, 2020).

⁸⁹ The Financial Sector Assessment Program (FSAP) is a comprehensive and in-depth analysis of a country’s financial sector. FSAP assessments are the joint responsibility of the IMF and World Bank in developing economies and emerging markets and of the IMF alone in advanced economies. The FSAP includes two major components: a financial stability assessment, which is the responsibility of the IMF, and a financial development assessment, the responsibility of the World Bank. To date, more than three-quarters of the institutions’ member countries have undergone assessments. See INTERNATIONAL MONETARY FUND, FINANCIAL SECTOR ASSESSMENT PROGRAM (2017), <https://www.imf.org/en/About/Factsheets/Sheets/2016/08/01/16/14/Financial-Sector-Assessment-Program> (last visited May 18, 2020); SECURITIES AND EXCHANGE BOARD OF INDIA, FINANCIAL SECTOR ASSESSMENT PROGRAMME 2017, https://www.sebi.gov.in/media/press-releases/dec-2017/india-financial-sector-assessment-program-2017_37076.html (last visited May 18, 2020).

⁹⁰ *SEBI Strengthens Algo Trading Norms, Co-Location Facilities*, Mint (Apr. 9, 2018), <https://www.livemint.com/Money/YYPk4cy7m1VzjpXFKka3EI/Sebi-strengthens-algo-trading-norms-colocation-facilities.html> (last visited May 18, 2020); *SEBI Plans to Deploy Technology To Beef up Surveillance Activities*, The Economic Times (Aug. 26, 2018), <https://economictimes.indiatimes.com/markets/stocks/news/sebi-plans-to-deploy-technology-to-beef-up-surveillance-activities/articleshow/65548984.cms> (last visited May 18, 2020).

⁹¹ *SEBI to Tap Artificial Intelligence, Big Data Analytics to Curb Market Manipulations: Ajay Tyagi*, Bloomberg Quint (Jan. 23, 2020), <https://www.bloomberquint.com/business/sebi-to-tap-artificial-intelligence-big-data-analytics-to-curb-mkt-manipulations-tyagi> (last visited May 18, 2020).

other capabilities as that of the SEBI.⁹² Therefore, with such a market environment in the country, tracing, identifying, and validating the claims of the harmed investors would not be an insurmountable task. It will be a trust-building, transparent, and predictable mechanism for the investing community in the country, more particularly the retail individual investors, whose population is not commensurately growing.

However, there is a flip side too. The violators are always a step ahead of the regulators. Despite the alacrity of regulatory intervention, it occurs with a time lag. Market designs and manipulations in complex financial products are also gradually getting sophisticated. Hence, a product may require regulatory convergence. This is time-consuming in India, which has a sectoral regulatory landscape. In short, it must be noted that compensation paid (or payable) to the harmed investors may be substantially lower than the claim amount. Alternatively, there may be such transactions wherein due to the complexity of the financial asset or market-design, a correct evaluation of the harmed investor may not be possible and therefore, it may not be practically possible to compensate the claimed loss.⁹³ That being the case, the SEBI portal on 'Information for Harmed Investors' should prominently display a 'disclaimer' to that limited extent. This practice is also followed by the SEC.⁹⁴

CONCLUSION

This Article begins with tracing the evolution of the legislative empowerment provided to the market regulators to order disgorgement of ill-gotten funds from various market participants. As a deterrence measure in the securities market, disgorgement is a contemporary development. Before the Securities Enforcement Remedies and Penny Stock Reforms Act, 1990, the SEC had no express authority to issue disgorgement orders. The SOX Act, enacted after the Enron scam, provides explicit authority to the SEC to order the disgorgement of ill-gotten monies. It is deposited in the Fair Funds for investors. The SEBI Act enacted in 1992 that was analogous to the SEC Act, also did not authorise the SEBI to issue disgorgement orders.

⁹² *SEBI Plans to Spend Rs 500 Crore on IT Projects in 5 Years: Ajay Tyagi*, The Economic Times (Nov. 19, 2019), <https://economictimes.indiatimes.com/markets/stocks/news/sebi-plans-to-spend-rs-500-crore-on-it-projects-in-5-years-ajay-tyagi/articleshow/72129549.cms?from=mdr> (last visited May 18, 2020).

⁹³ Also affirmed by SAT in *Mrs. Ram Kishori Gupta & Anr. v. SEBI*, *supra* note 16.

⁹⁴ U.S. SECURITIES AND EXCHANGE COMMISSION, INVESTOR BULLETIN: HOW VICTIMS OF SECURITIES LAW VIOLATIONS MAY RECOVER MONEY, https://www.sec.gov/oiea/investor-alerts-bulletins/ib_recovermoney.html (last visited May 18, 2020).

However, under its equitable powers, the SEBI started issuing disgorgement orders in 2003. This was reversed by a SAT holding that the power to issue disgorgement orders must be expressly provided for in the Act/Regulation. Eventually, the Securities Laws (Amendment) Act, 2014 gave the much-needed empowerment to SEBI. The monies collected under the said orders are to be credited to the Investor Protection and Education Fund. The jurisprudence developed on the powers of the SEBI to issue the disgorgement of ill-gotten monies by various orders of courts and quasi-judicial authorities in India, discussed in Part II, further strengthen the arguments in this Article.

In Part III, the author has endeavoured to expose the doctrinal and administrative infirmities pursued by the SEBI in the implementation of its disgorgement powers. It is argued that the interests of the harmed investors must be protected in a manner similar to the Fair Funds provision for investors provided in the SOX Act. A similar provision has been provided in the Companies Act, 2013. Reference to Section 38(3) of the Companies Act, 2013 provides an insight into the intent of the disgorgement provision in the said Act – which is to compensate the harmed investors. The violations specified in that Act are market-related offences, which fall under the jurisdiction of the SEBI. That being the case, the intervention of the Court in the Companies Act, 2013 is a carve-out exception for petitions to the Court by the SFIO based on its investigation report. Compensating the harmed investors is the focus in this Article and the provisions of Companies Act, 2013 amplify that. Reallocation of monies to the harmed investors who lost amounts in the IPO scam further strengthens the contention of the author.

This Article, therefore, concludes that the SEBI has gained adequate expertise in exercising its quasi-judicial powers. The International Monetary Fund and the World Bank's 'Financial Sector Assessment Programme', in their latest report, have also commended the enforcement mechanism pursued by the SEBI.⁹⁵ The SEBI Act is pre-eminently a social welfare statute seeking to protect the interests of common men, who are small investors.⁹⁶ The investors would be protected only if there is a legal remedy that provides for the compensation of lost money. Consumer protectionism is also founded on the same principle. The Financial Sector Legislative Reforms Commission in their

⁹⁵ IMF, *supra* note 89.

⁹⁶ Umakanth Varottil, *Dissecting SEBI's Powers Under Section 11B of the SEBI Act, 1992: Part 2*, INDIACORPLAW (June 2, 2015), https://indiacorplaw.in/2015/06/dissecting-sebis-powers-under-section_3.html (last visited May 18, 2020).

report has recommended a regulatory shift towards a consumer protection regime envisaging the burden of consumer protection for unsophisticated consumers upon the financial entities.⁹⁷

Even otherwise, the retention of unspent disgorged monies and the income derived from interest accrued on such monies amounts to undue enrichment of the SEBI. The author argues that regular retention of disgorged monies by the SEBI contravenes the Indian Contract Act which specifically deals with the obligations of a person enjoying the benefit of a non-gratuitous act. In *State of West Bengal v. B.K. Mondal*,⁹⁸ a litmus test was enunciated in the form of three conditions. *First*, a person should lawfully do something for another person or deliver something to him. *Second*, in doing the said thing or delivering the said thing, he must not intend to act gratuitously. *Third*, the other person, for whom something is done or to whom something is delivered, must enjoy the benefit thereof.

That being the case, disgorged amounts non-gratuitously collected and retained as unutilised by the SEBI has the trappings of undue enrichment. The law of restitution commands that “*a person who has obtained a benefit at the expense of another should be liable to restitute the other from whom he has gained.*”⁹⁹ In its recent decision on 2 August 2019 in the matter of *Ram Kishori Gupta*, the SAT has held that “*disgorgement without restitution does not serve any purpose.*”¹⁰⁰

In conclusion, the author argues that since disgorgement has to be followed with restitution, specific provisions in the SEBI (Investor Protection and Education Fund) Regulations, 2009 should be provided wherein the disgorged monies credited to the fund should be utilised for compensating the harmed investors, upon identification. Based on the best global practice adopted by the SEC, the author has also proposed a mechanism to compensate the harmed investors. This will unquestionably boost the morale of the investors, particularly the retail investors who, for multifarious reasons, are shying away from the market. The growth of the Indian financial market hinges more on the regulatory ecosystem than the courts.

⁹⁷ SRIKRISHNA, J., ET AL., MINISTRY OF FINANCE, REPORT OF THE FINANCIAL SECTOR LEGISLATIVE REFORMS COMMISSION (2013), https://dea.gov.in/sites/default/files/fslrc_report_vol1_1.pdf (last visited May 18, 2020).

⁹⁸ *State of West Bengal v. B.K. Mondal*, AIR 1962 SC 779.

⁹⁹ *Renusagar Power Co. Ltd. v. General Electric Co.*, 1994 Supp (1) SCC 644.

¹⁰⁰ *Ram Kishori Gupta & Anr. v. SEBI*, *supra* note 16.