

Analytical aspects of Corporate Frauds in India



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There are two ways to get something from someone illegally: (1) Forcing someone by using a weapon, or a brute force, and (2) Tricking someone out of his assets or belongings. While the first can be termed robbery, the latter can be termed fraud. Robbery is often more violent and traumatic than fraud, and attracts larger public attention. However, the loss from fraud far exceeds the loss from robbery. Fraud is an intentional deception or a wilful misrepresentation of a material fact and includes lying, cheating, and stealing.

Fraud as per Oxford Dictionary, a fraud is the use of a false representation to gain an unjust advantage and criminal deception. In the broadest sense of the term, a fraud can encompass any crime for personal gain that uses deception as its principal modus operandi. Of the three ways to illegally relieve a victim of money-force,

INGREDIENTS OF FRAUD

Donalt Cressey, the famous criminologist, developed the concept of 'fraud triangle', citing the three elements of the triangle as: (1) motivation (pressure), (2) opportunity, and (3) rationalisation. He described motivation as a non-shared financial problem, opportunity due to lack of internal control, and rationalisation as the ability of a person to rationalise his behaviour.



Corporate frauds can have a devastating effect on the business firms in which a fraud has occurred. The loss in the organisation can also have an impact on the local, state and national economic conditions based on the size of the business affected by the fraud. Fraud cannot be committed without some sort of rationalisation, even when there is enough motivation and opportunity.

trickery or larceny, all the offences that employ trickery amount to a fraud. Thus, deception is the linchpin of any fraud.

Under the common law, the general elements that must be present in a fraud are:

- (1) It is a misrepresentation of a material fact,
- (2) It is made knowingly and deliberately,
- (3) It is made with the intent to deceive,
- (4) It relies on the misrepresentation by the victim,
- (5) It results in injury or damage to the victim.

Motivation: The motivation component of fraud is the pressure or 'need' that a person feels. The motivation could also be a perceived financial need, whereby a person strongly desires some material goods, but does not have enough money or means to acquire them. Motivation is a combination of an individual's personality and the environment surrounding him. Opportunity provides the method or circumstances of committing a crime or fraud. Management in an organisation must understand the opportunity that could lead any person to commit a fraud and then to minimise the risk of fraud by reducing the opportunity that exists for such fraud and Rationalisation, which

encourages the committing of a fraud, is the ability of the person to rationalise his or her own behaviour. Without such rationalisation, a person will not commit fraud, even if he has the motivation and opportunity. The sense of ethics, morality and the idea of right and wrong is what prevents some individuals from rationalising their behaviour. Thus, a fraud cannot be committed without some sort of rationalisation, even when there is enough motivation and opportunity.

There are various factors which lead to pressure, opportunity, and rationalisation. The major ingredients of these fraud elements are listed in Table 1:

Table 1

INGREDIENTS OF A FRAUD

Motivation	Opportunity	Rationalisation
<ul style="list-style-type: none"> Financial greed High personal debt Addiction that requires money like gambling Poor credit rating Power Dominance Maintenance of lifestyle standard or living beyond means Revenge Possessiveness about custody of records/ office space Inadequate income Frustration with the job 	<ul style="list-style-type: none"> Weak or inadequate internal control Excessive trust in certain employees Unprofessional environment Lack of appropriate separation of duties or independent checks Inadequate management approval Inadequate system control Nexus with supplier Inadequate record keeping with respect to misappropriation of assets Poor physical safeguards over cash inventory or fixed assets Lack of mandatory vacations for employees holding key positions 	<ul style="list-style-type: none"> Low moral character View of fraud as action less crime 'Rules do not apply to me' A strong desire to beat the system Sense of entitlement Lack of strong code of ethics

WHY IS A FRAUD COMMITTED?

Motivation, Opportunity and Rationalisation are three important factors which are connected with committing a fraud. Motive comes from financial pressure; opportunity occurs through weakness in internal control and rationalisation is the fraudsters' internal justification for his or her act. Competitive and economic

survival can be a motive to commit a fraud. The circumstances for committing a fraud can be categorised as (1) The lifestyle issues, and (2) Other issues.

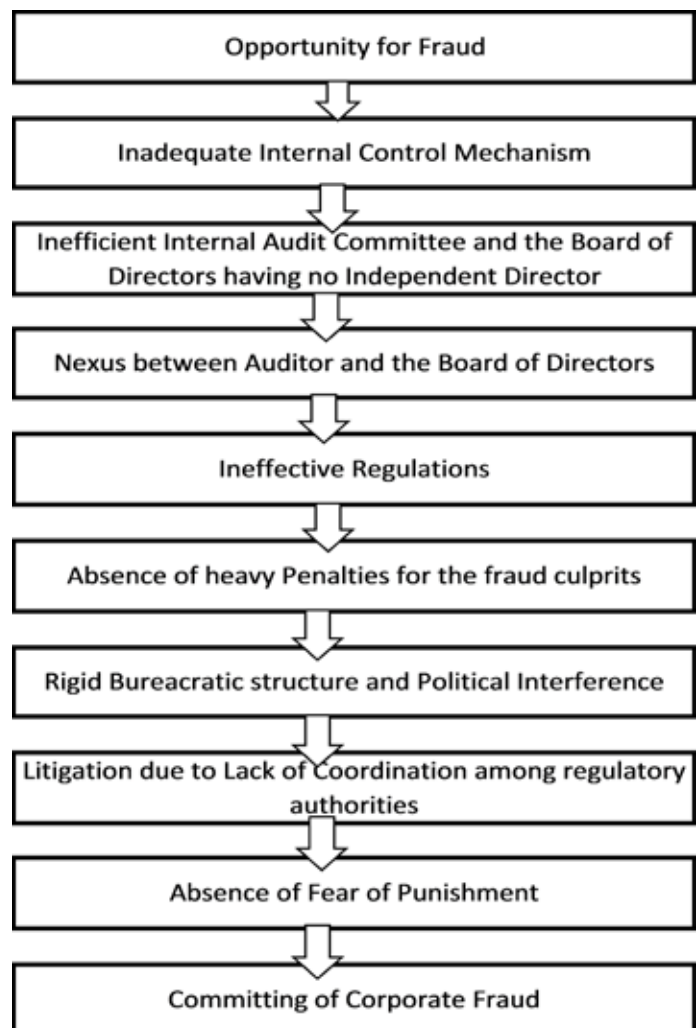
WHO COMMITS A FRAUD?

Anyone can commit fraud and fraudsters cannot be distinguished from other people by their characteristics. From the ingredients, one may conclude that fraud is caused mainly by factors external to the individual: economic, competitive, social and political issues, and poor control mechanism.

HOW A FRAUD IS CULMINATED?

Although the Indian regulatory and legal system is well designed and quite comprehensive, it is inefficient in implementation and handling of the corporate frauds both from definitional and strategic handling perspective. A flow chart developed by the author showing the activities involved in the culmination of a corporate fraud in India is given in following Figure

A CONCEPTUAL MODEL FOR CULMINATION OF CORPORATE FRAUD



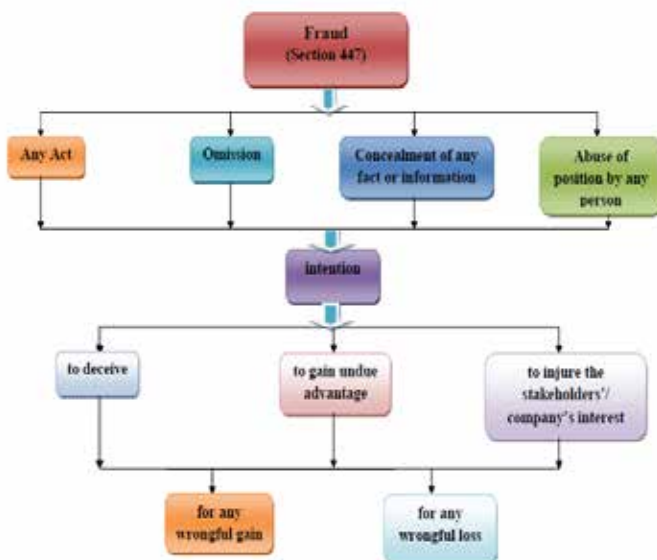
FRAUD UNDER THE COMPANIES ACT, 2013

The corporate sector is mainly regulated by the Companies Act, since different provisions have been provided in the Act for regulating the affairs of a company and the first time the concept of fraud has been inserted in the Companies Act, 2013.

Explanation to Section 447 reads: -“ for the purposes of this section—

- (i) “fraud”, in relation to affairs of a company or any body corporate, includes any act, omission, concealment of any fact or abuse of position committed by any person or any other person with the connivance in any manner, with intent to deceive, to gain undue advantage from, or to injure the interests of, the company or its shareholders or its creditors or any other person, whether or not there is any wrongful gain or wrongful loss;
- (ii) “wrongful gain” means the gain by unlawful means of property to which the person gaining is not legally entitled;
- (ii) “wrongful loss” means the loss by unlawful means of property to which the person losing is legally entitled”.

Fraud: A graphic description



The building blocks of a corporate fraud are briefly described below:

Any act/Omission to act: An act means to take action or to do something. Mere coming of an idea into mind to do a fraud is not fraud, until the idea is converted into an act. An act of omission is the failure to perform an act expected to be done by a person whereas the act of commission is doing an act that causes harm.

In Barendra Kumar Ghose 's case AIR 1924 Cal 257, 312: 25 Cri LJ 817 (FB) it was held that the legal consequences of an 'act' and of an 'omission' being the same, if an act is committed partly by an act and partly by an omission, the consequences will be the same as if the offence was committed by an 'act' or by an 'omission' alone. This does not create a substantive offence. This shows that when an offence is the effect partly of an act or partly

of an omission, it is one offence only.

Fraudulent Concealment: The word “Fraudulently” in Section 206 of Indian Penal Code, 1860 cannot be interpreted as nothing more than “dishonestly.” A dishonest act is not a fraudulent act unless and until an intention to deceive is present in that dishonest act. Where there is neither an intention to deceive, nor secrecy, the act though dishonest, is not fraudulent.[1937 MWN 462: 46LW139: AIR 1937 Mad 713: (1937) 2 MLJ 802]. Fraudulent misrepresentation is also a part of fraudulent concealment. A misrepresentation is made with the express intention of defrauding someone, which subsequently causes injury to that person.

Abuse of position: In many cases the most serious frauds and corruption frauds are committed by people at the top who have the power to conduct fraudulent transactions and cover them up. There are several things which suggest someone is abusing his position and could actually be committing fraud.

By any Person: The Companies Act has not defined the concept of a person, while the meaning of person is defined under Section 11 of Indian Penal Code, 1860. Every person who has been charged for committing a crime in India is liable for punishment without distinction of caste, religion, creed, sex, or colour. Companies and corporations are excluded since these entities are artificial juridical persons and the acts of these are performed by an individual or a group of individuals. Therefore, the criminal courts are exempted to award any punishment of imprisonment to a company but a fine can be imposed on a company.

Intent: An act of fraud, omission or concealment should be done with an intent: (a) to deceive; (b) to gain undue advantage from someone; and (c) to injure the interest of (i) the company, (ii) a shareholder, (iii) creditor, or (iv) any other person. It is the ‘intent’ of a person which will determine whether his action, omission, concealment of facts or abuse of position amounts to fraud or not. The intent of a person must be to deceive, to gain undue advantage, or to injure the interest of the other party.

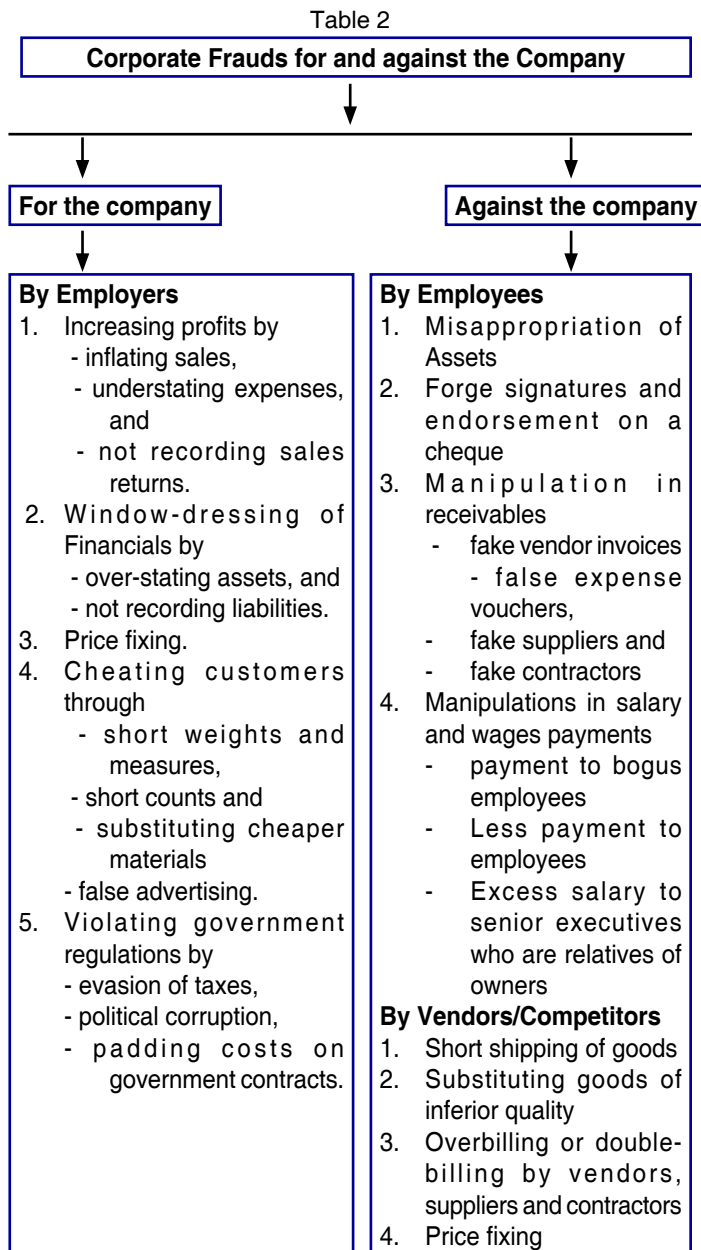
Injury: The word “injury” denotes any harm whatever illegally caused to any person in body, mind, reputation or property. In Swami Nayudu v Subramania Mudali (1864) 2 MHC 158, 160. (Per Halloway, J); Appalasami B (1892) 1 Weir 441; Priyanath Gupta v Lal Jhi Chowkidar AIR 1932 Cal 590: 24 Cri LJ 396; Baij Nath Bhagat AIR 1940 Pat 486: (1940) 41 Cri LJ 427 (Pat) and Appalasami B, supra it was held that ‘Injury’ is an act contrary to law. The word ‘injury’ has been given a wide meaning. It will include every tortious act.

Wrongful Gain and Wrongful Loss: It is immaterial whether or not there is any ‘wrongful gain’ or ‘wrongful loss’. ‘Wrongful gain’ mean the gain by unlawful means of any property to which the person gaining is not legally entitled, ‘Wrongful loss’ means the loss by unlawful means of any property to which the person having is legally entitled.

FRAUDS FOR AND AGAINST THE COMPANY

Any fraud perpetrated by, for, or against a company is known as a corporate fraud. Corporate frauds are often intended to satisfy the economic needs of the officials, or executives or of a Company whose compensation is based largely on one measure of performance. Examples of frauds against the company and for

the company are listed in Table 2. The frauds committed against the company can be further classified as: (1) Fraud perpetrated by employee and (2) Fraud perpetrated by vendors/ competitors



VICTIMS OF CORPORATE FRAUD

The most trusting people are also the most gullible and victims of fraud. Frauds are committed by owners, employees and by even outsiders. People, become the victim of corporate frauds outside or inside the company. The insiders, including the directors, managers, and the employees, may suffer a loss of position, reputation or standing. The outside victims would include the investors, creditors, partners, customers, suppliers, underwriters, attorneys, and the independent auditors. The list of fraud perpetrators, victims and types are summarised in Table 3:

Table 3

VICTIMS OF CORPORATE FRAUD

S. No.	Victims	Type of Fraud	Fraud perpetrator
1	Bankers	False applications for credit, False financial statements for working capital arrangements.	Companies and their Directors
2	Competitors	Predatory/ exploitative Pricing, Selling below cost to eliminate or prevent competition, Information piracy, Infringement of patents/ copyrights, Theft of trade secrets.	Companies and their Directors, Competitors
3	Customers	False advertising, False weights, False representations, Price fixing, Defective products, Short shipment, Overbilling, Double billing, Substitution of inferior goods, Corruption of employees.	Companies and their Directors, Vendors
4	Employers	Expense account Padding, Fake Performance, Overstating revenue and assets, Overstating profits, Understating expenses and liabilities, Theft of assets, Embezzlement, Commercial bribery, Insider Trading, Related Party Transactions, Manipulation/ destruction of records.	Vendors, Suppliers and Contractors, Employees
5	Employees	False employment applications, False benefit claims, False expense claims, Theft and Pilferage, Fake Performance, Embezzlement, Corruption.	Employees and Employers
6	Government Agencies	False reports/returns, False claims, Contract padding, Wilful failure to file reports/returns.	Companies and their Directors
7	Insurance Agencies	Fraudulent loss claims, Arson for profit, False insurance claims.	Companies and their Directors
8	Stakeholders (Shareholders/ Creditors/ Investors)	False financial statements, False financial forecasts, False representations. False applications for credit.	Companies and their Directors

CONSEQUENCES OF CORPORATE FRAUDS

Corporate frauds can have a devastating effect on the business firms in which a fraud has occurred. The loss in the organisation can also have an impact on the local, state and national economic conditions based on the size of the business affected by the fraud. The consequences of frauds on company's stakeholders; for the organisation and for the economy has been shown briefly in the following figure:

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CONSEQUENCES OF FRAUDS

Stakeholders	Organisation	Economy
<ul style="list-style-type: none"> Loss of confidence of investors in the organisation Loss of credibility of the organisation Loss of employees due to switching over Non-payment to creditors Non-payment to bankers against working capital facilities availed leads to NPA which damages bankers Non-receiving of dividend for long period Loss of capital invested by investors (Indian and Foreign investors) Decrease in value of investment Employees losses their savings and pension 	<ul style="list-style-type: none"> Adverse effect on banker's attitude in respect of granting of loans and other credit facilities Loss of Net worth Loss of Reputation/Goodwill of the company Loss of dedicated and experienced employees More government regulations Decrease in value of shares Loss of confidence of investors (Indian and Foreign) Bound to set unrealistic corporate targets Lowering of employee's morale Loss of customers (existing and future) due to negative publicity by media 	<ul style="list-style-type: none"> Loss of confidence of foreign investors Adverse effect on overall growth Higher cost of projects Imposition of more government controls Reduction in employment Negative impact on the investment climate in the country Loss of Revenue due to stripping of large taxes Negative plunge on national wealth Adverse effect on the Foreign Exchange Inadequate or false returns affects policy decisions

INFAMOUS CORPORATE FRAUDS IN INDIA

Corporate frauds have shown an unprecedented increase in India in recent years and have posed serious questions before managers, regulators and professionals, on the effectiveness of corporate governance mechanism, regulatory mechanism, and the role of corporate and individual ethics.

Probably the first major corporate scam in Independent India was what is referred to as the Mundhra scam. Hari Das Mundhra, an industrialist and stock speculator, sold fictitious shares to the Life Insurance Corporation of India (LIC) and thereby defrauded the corporation by Rs. 1.25 crore in 1957. He was found guilty and was sentenced to imprisonment for 22 years. The then Union Finance Minister, T.T. Krishnamachary had to resign from his prestigious post in the face of scathing criticism within and outside Parliament.

After the Haridas Mundra case of 1957, another major scam in the mid-sixties and early-seventies was associated with Jayanti Dharma Teja. He availed loans from banks and financial institutions and used this easy money to establish a shipping empire, in the name of Jayanti Shipping Company Limited. While he had set up this company with a paid-up capital of a mere Rs. 200/- and took government loans amounting to Rs. 22 crore.

The infamous cases have been summarized below in a tabular form as Table 4:

Table 4
Infamous Corporate Frauds in India

S. No.	Name of Fraud/ Scam	Year/ Period	Nature of Industry	Fraud Perpetrators	Modus Operandi	Amount Involved (Rs. crore)
1	2	3	4	5	6	7
1.	Harshad Mehta	1992	Capital Market	Managing Director	Trading in shares at premium in stock market.	4000
2.	C.R Bhansali	1992-1996	Capital Market	Managing Director	Collecting money from public and transfer the same to non-existent companies.	1200
3.	Cobbler Scam	1995	Shoe Making	Promoter	Borrowing loans from banks in the name of fictitious/non-existent Co-operative societies of shoe makers.	600
4.	Ketan Parekh	2001	Capital Market	Managing Director	Availing loan with the help of bankers, above the maximum banking limits.	1500
5.	Sanjay Agarwal	2001	Financing	Chairman, Executive Director	Taking money from nearly 20 banks and sold the same securities to other banks. Defaulting on the payments and loss of interest	600
6.	Dinesh Dalmia	2001	Information Technology	Managing Director	Trading in shares which were not listed in Stock Exchange.	595
7.	Satyam	2009	Information Technology	Auditor, Director	Hugely inflated accounting entries	8000
8.	NSEL	2013	Exchange	Promoters, Auditors and Members	Fake certificates about availability of goods meant for sale	5600
9.	Saradha Group	2013	Chit Fund	Promoters	Fake Collective Investment Schemes	4000
10.	Bank of Baroda	2015	Money Laundering	General Manager, Foreign Exchange Officer	Created a fraudulent trade circuit, where exports claim duty drawback on inflated export bills and creation of shell Companies to make payment for non-existent imports.	6172
11.	PAFL	2015	CIS including Ponzi Scheme	Founder and KMP	Lure investors by raising money against bogus land allotment letters.	47000

FEATURES OF CORPORATE FRAUDS IN INDIA

The following features drawn after going through the summary of the major corporate frauds in India:

Fraud Perpetrators: A careful look at the major scams in the corporate world in India reveals that the maximum number of frauds have been perpetrated either by the company management or by its top executives. The management or the executives, in connivance with the unscrupulous professionals and consultants, committed the frauds through various modus operandi in order to make personal gains at the cost of other stakeholders'. This may be partly due to the non-existence of independent directors and members in the

audit committees.

Common types of Frauds: It is noted that the most prevalent type of fraud in India is the manipulation of financial statements in order to evade taxes and other government levies. The second largest type of fraud prevailing in the corporate world is the one resulting from procedural lapses. These procedures include the carrying on of business ultra vires the company objects, merger and amalgamation, and seeking company liquidation on grounds having mala fide intentions.

Lack of Action against Perpetrators: Companies are reluctant to take legal recourse against employees responsible for committing frauds. A few companies take disciplinary action against unscrupulous employees and their associate professionals. This may be due to fear of damages to company goodwill and reputation if news about the fraudulent incidence leaks into public domain. Also companies prefer to avoid reporting of any economic offence to a regulator. Companies are generally interested in recovering the defrauded money rather than getting the culprit punished. The analysis of cases of corporate frauds reveals that the fraud perpetrators got imprisonment for a period ranging from one year to 22 years, besides imposition of penalty.

Accountability: In the first reported major case of corporate fraud, namely, the Hari Das Mundhra case, the then Union Minister of Finance, the legendary T. T. Krishnamachary, and the Finance Secretary both had to resign from their posts. No such action was ever taken in any subsequent case. But, then that was the era of Jawaharlal Nehru and Lal Bahadur Shastri! In fact, no senior functionary in the government either owned up the responsibility or was impugned as a party to the fraud case for administrative lapses.

Insufficient authorities: Lack of an effective regulatory and compliance mechanism, and weak law enforcement are equally responsible for facilitating frauds. Corporate frauds were unearthed because of legislations such as Right to Information Act (RTI) and Public Interest Litigation (PIL).

Insufficient Powers with fraud regulating agencies: It is noted from the above cases that after the introduction of the SEBI Act in 1992, corporate frauds have been rampant in India, which may probably be due to the fact that the SEBI does not enjoy powers of a criminal court. The SEBI also suffers from jurisdictional disadvantages in respect of non-listed companies. It appears that the major regulator of the corporate world has not made its presence felt in the market insofar as the regulation of corporate frauds is concerned.

Approach of the Adjudicating Agencies: The corporate fraud perpetrators have been treated in courts at par with other fraudsters, while the causes and consequences are entirely different and far-reaching. The time lag in judicial decisions is also responsible for inducing corporate fraud as no separate wing has existed to punish the guilty expeditiously.

Time Taken in Disposal of Cases: The disposal of the fraud cases has on an average taken a relatively long period of time. Most of the cases took more than 7 years. The minimum time was taken in the Satyam Case, where the main accused B. Ramalinga Raju, the company chairman, was convicted in two months as he himself confessed the crime. Companies hesitate to record such matters to the police, apprehending the hardship they may face during the investigation and prolonged judicial trials.

Weak Anti-fraud Measures: Companies still rely on old traditional techniques and measures for protection of frauds. Reliance on Internal and External Audit and code of conduct are main measures to detect and prevent frauds. These methods are not sufficient for detecting and preventing frauds. A few companies have pro-active fraud risk management initiatives and whistle-blowing mechanisms. It is surprising as fraudsters are using advance tools and technology to perpetrate frauds.

POLICY IMPLICATIONS

It is not possible to eliminate frauds in corporate sector as no system is completely 'fraud proof'. However, if an organisation or government pays greater attention to the most common indicators, they can provide early warning to discover the fraudster and to prevent the fraudster from committing a fraud. Therefore, the corporate frauds can be minimised by adopting certain policies by the organisation and stakeholders. The Companies Act, 2013 has covered many points to minimise the frauds in corporate sector but still some are missing from it. The following policy implications can be benefitted for reducing corporate frauds in India:

1. **Strengthening of the Internal Audit Department and Audit Committees:** The internal audit department needs to be strengthened by appointing qualified and experienced personnel and the Audit Committees should be given the freedom to act independently from the executives.

2. **Implementation of Corporate Governance in Small and Medium Enterprises (SMEs):**

The Small and Medium Enterprise sector is the second largest employer, after agriculture. The applicability of Corporate Governance in SMEs may have the way for the companies to grow or attract additional investors as alternatives to borrow from Bank at high cost and Corporate Governance in their sector may improve internal control system, better accountability and higher profitability and it will also reduce the conflicts between business owners and management.

3. **Conducting of Due diligence by banks and financial institutions:** Banks and Financial Institutions are the major stakeholders in companies as finances are provided by them. To safeguard their interest, banks and financial institutions to effectively conduct due diligence by independent professionals and agencies before sanctioning the working capital facilities or other financial assistance to the companies.

4. **Adequate disclosures by Professionals:** Regulatory professional bodies should issue guidelines to its members who work as Statutory Auditors, Auditors, Chief Financial Officer and Corporate consultants to ensure giving of proper disclosures in structured deals where money flows from one end to another which goes back to an entity connected with the director of the company.

5. **Setting up of corporate offence wing with Criminal Powers:** Presently there is no specific authority with arrest powers exists to deal with corporate frauds and SEBI being the major regulatory authority for listed companies have only civil powers, the advantage of which is taken by the corporate fraud perpetrators. It is suggested to form a Corporate Offence Wing on the parallel line of Economic Offence Wing.

6. Provisions for Approval of related-party transactions by specific committee: The Companies Act, 2013 removed the approval of central government for related-party transactions in those companies which have paid up capital as Rs. 1 Crore or more. The Act contains the provisions for related-party transactions but only shareholders' approval is required. It is suggested that a separate specific committee consisting of one independent director and one minority shareholder representative has to be formed by each company for approving the related-party transaction, subject to the approval of shareholders.
7. Publication of fraud prevention policy: Non-existence of uniformity of publication standard of fraud prevention policy attracts the suggestion that a publication of uniform fraud prevention policy should be made mandatorily by certain class of companies and it has to be discussed at length in board of director's report of the company. The fraud prevention policy must be publicised among the employees and stakeholders of the company and make mandatorily to report suspected frauds through a well-structured mechanism.
8. Recognition to companies for improved Corporate Governance: Corporate governance has impact on the profitability, growth and sustainability of business. SEBI (LODR) Regulations, 2015 deals with corporate governance. The Institute of Company Secretaries of India for the last several years awarding companies for better corporate governance, it is suggested that government or other authorities should also encourage by giving awards to corporate as well as professionals to adopt better corporate governance which will ultimately affect the growth and sustainability of business.
9. Co-ordination among different regulatory authorities: Regulatory agencies/authorities in India are increasingly identifying

possible corporate frauds risks and becoming proactive in their actions and recently the Government of India constituted the Competition Commission of India to preview antitrust and monopolistic risk prior to large merger and acquisition as well as during operations. The Reserve Bank of India has also stepped up of enforcement of anti-money laundry regulations. Proper coordination among numerous regulatory authorities is recommended.

10. Vesting SEBI with Powers to Punish: SEBI has power of only civil courts and to some extent have transnational jurisdiction issues. SEBI has to be given power of a criminal court for imposing punishments to those who are actively involved in insider trading. All professionals institutions which regulate Chartered Accountants, Company Secretaries and brand Assets valuers should fix responsibility of their members incase if they are found guilty and not performing their duties in the ambit of Professionalism.

CONCLUSION

In the corporate sector in India, there is considerable weakness in governance and regulatory mechanism which need amendment in the existing regulatory framework. There is a time lag between the actual occurrence of a fraud and the information reaching the public domain, and public interest is adversely affected by such delay. The appointment of qualified and independent directors in the audit committees will also help in preventing or minimising frauds. The rotation of statutory auditors and compulsory appointment of qualified internal auditors would also tend to prevent frauds. The auditors also need to be trained in order to make them well-equipped with the changed regulatory measures and technological advancements. CS



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