WHO ANSWERS FOR A MISLEADING PROSPECTUS? DUE DILIGENCE AND CIVIL LIABILITY UNDER SECTION 35 OF THE COMPANIES ACT, 2013

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ABSTRACT

Section 35 of the Companies Act, 2013 makes the company, its directors, promoters, authorisers and experts liable to compensate investors for a misleading prospectus. This paper asks whether the section fairly balances investor compensation against the protection of those who prepare or authorise the document. It reads the text alongside the 1956 Act, the legislative record, Derry v. Peek, the SEBI (ICDR) framework and US and UK comparators. There is almost no reported Indian case law applying the section, so the analysis is textual and structural.

The paper argues that Section 35 is mis calibrated, not simply too strict or too lenient. Liability follows neither care nor the capacity to verify. First, the 2018 amendment lets directors rely on experts but gives no defence for their own reasonable inquiry, so care matters only indirectly, through Section 149(12) for outside directors. Second, the lead manager, who verifies the whole document under Regulation 24(3), falls outside Section 35(1) and faces only regulatory sanction, while experts are exposed for the entire prospectus without a defence of their own. Third, Section 35(1) compensates only those who "subscribed", and the 2013 Act dropped the 1956 words treating offer-for-sale buyers as subscribers. On a literal reading this leaves out investors in the offers for sale that make up roughly three of every five rupees raised in recent Indian IPOs. The paper argues the purposive reading is better, but investors should not have to litigate to get it.

It proposes three reforms: a tiered due diligence defence with the company staying strictly liable, naming lead managers with a capped liability and restoring contribution, and making claims workable through a presumption of reliance, a wider Section 245 class action standing and a route for SEBI recoveries to reach investors.

1. Introduction

Investors in a public offer cannot negotiate terms or inspect the company's records. They rely on the prospectus. When it contains a misleading statement or omits a material fact, the question is who should bear the loss. The answer is hard because many people stand behind one document: the company, its directors, its promoters, the experts whose reports appear in it, and the intermediaries who manage the issue.

Section 35 of the Companies Act, 2013[1] is the main civil remedy. It makes the company and five categories of persons liable to compensate anyone who subscribed on the faith of a misleading prospectus. Whether that remedy works depends on two things: who can claim and who can be sued, and what defences those defendants have. There is almost no reported Indian case law applying the section, so this paper reads its text and structure against the 1956 Act, the legislative record, *Derry v. Peek*[2], the SEBI (ICDR) Regulations, enforcement material, and the US and UK regimes.

The paper argues that Section 35[3] is mis calibrated: its liability follows neither care nor the capacity to verify. Directors may rely on experts but not on their own reasonable inquiry. The lead manager, who verifies the entire document, falls outside the section, while experts face liability for the whole prospectus with no defence of their own. And because the section compensates only those who "subscribed", it may leave out buyers in offers for sale, which make up most of the money raised in recent Indian IPOs. Part 2 sets out the prospectus regime and Parts 3 to 5 examine the section and its common law roots. Parts 6 to 8 develop the three gaps above, Part 9 compares other jurisdictions, and Part 10 proposes reforms.

2. The Prospectus Regime

2.1 What counts as a prospectus

Section 2(70) of the Companies Act, 2013 defines a prospectus as any document described or issued as a prospectus[4], expressly including red herring and shelf prospectuses under Sections

[1] Companies Act 2013, s 35 (India).
[2] *Derry v Peek (*1889) 14 App Cas 337 (HL).
[3] CA 2013, s 35.
[4] Companies Act 2013, s 2(70) (India).

32[5] and 31[6], respectively, and other documents inviting public offers to subscribe for or purchase securities. The definition is functional not just formal: a document's substance and purpose matter more than label it carries. Thus, calling an offer document "promotional" or "marketing" document does not automatically take it outside the ambit of Section 35 of the Act.[7]

Section 26 prescribes the information and financial reports required in a prospectus, alongside requirements concerning its dating, signatures and filing with the Registrar of Companies.[8] Section 33 requires application forms for securities to be accompanied by an abridged prospectus, subject to statutory exceptions.[9] Where a prospectus includes an expert's statement, Section 26(5) governs the relevant requirements, including written consent.[10] Section 2(38) defines an expert to include engineers, valuers, chartered accountants, company secretaries, cost accountants and other persons authorised by law to issue certificates.[11] These provisions establish the disclosure framework against which potential liability under Section 35 may be assessed, including where expert statements form part of the prospectus.[12]

For listed companies and companies proposing to list their securities, the framework is supplemented by SEBI's powers under Section 24[13] and the SEBI (Issue of Capital and Disclosure Requirements) Regulations. These prescribe detailed disclosure requirements for offer documents and impose due-diligence obligations on lead managers. The Companies Act establishes the principal statutory liability framework, while SEBI's regulations specify further requirements concerning disclosure and verification. Non-compliance may therefore have consequences beyond regulatory action, particularly where a failure to meet disclosure requirements results in a misleading prospectus.

2.2 What makes a statement misleading

The Companies Act, 2013 does not define "misleading" for the purposes of Section 35.[14]

[5] Companies Act 2013, s 32 (India).
[6] Companies Act 2013, s 31 (India).
[7] CA 2013, s 35.
[8] Companies Act 2013, s 26 (India).
[9] Companies Act 2013, s 33 (India).
[10] Companies Act 2013, s 26(5) (India).
[11] Companies Act 2013, s 2(38) (India).
[12] CA 2013, s 35.
[13] Companies Act 2013, s 24 (India).
[14] CA 2013, s 35.

Section 34 provides guidance by covering statements that are "untrue or misleading in form or context" and inclusions or omissions "likely to mislead."[15] Section 35[16] adopts a similar approach, indicating that liability extends beyond expressly false statements to the overall impression created by a prospectus.

There are three main types of misleading statements to consider. First are expressly false statements, which involve outright inaccuracies such as inflating order books or misrepresenting how issue proceeds will be used. Second are material omissions and concealment, which occur when vital context or legally required information is excluded such as presenting favourable financial figures without material qualifications. This includes "half-truths," which may be technically accurate but mislead based on what they hide. Third are ambiguous statements, which use vague language or double meanings capable of creating a false impression in the mind of an ordinary investor.[17]

Materiality separates real defects from trivial errors. Section 34 expressly allows an immateriality defence,[18] while Section 35 doesn't.[19] Even so, materiality still matters under Section 35[20] when deciding if a prospectus is misleading and whether the claimant's loss resulted from it. Indian law prescribes no single materiality test under Section 35[21]. A useful comparison comes from US securities law. There, a fact is material if there's a substantial likelihood a reasonable investor would see it as important in the "total mix" of information available. That's a helpful yardstick, but it's an analytical aid, not binding Indian law.[22]

Opinions and future promises further make things difficult. A projection isn't misleading just because it doesn't come true. But presenting an uncertain forecast as a sure thing, with no reasonable basis and no mention of the key assumptions or limits, can make it misleading. What matters is the difference between a prediction that turned out wrong and a statement that was already misleading when it was made.

[15] Companies Act 2013, s 34 (India).
[16] CA 2013, s 35.
[17] LegalRaasta, 'Misstatement in Prospectus' (LegalRaasta) accessed 25 October 2026 https://www.legalraasta.com/blog/misstatements-in-prospectus/
[18] CA 2013, s 34.
[19] CA 2013, s 35.
[20] CA 2013, s 35.
[21] CA 2013, s 35.
[22] *TSC Industries, Inc v Northway, Inc,* 426 US 438 (1976); *Basic Inc v Levinson*, 485 US 224 (1988).

3. Section 35 in Detail

3.1 Structure of the section

Section 35 sets out civil liability for misleading prospectuses.[23] Sub-section (1) lists who must compensate investors for their losses[24], and sub-section (2) provides the defences.[25] Sub-section (3) deals with fraud[26]: if a prospectus is issued with intent to defraud applicants or for any fraudulent purpose, every person covered by sub-section (1) becomes personally liable, without limitation.[27]

So the section separates ordinary statutory liability for a misleading prospectus from the harsher consequences of fraud. Both protect investors, but sub-section (3)[28] stands out because it expressly lifts the limit on personal liability where the conduct is fraudulent.

3.2 Who may claim

Section 35(1)[29] gives compensation to anyone who subscribes for securities on the faith of a misleading prospectus and suffers loss because of it. So three things control access to the remedy: subscription, reliance and causation.

Subscription: Subscribers are clearly covered, but secondary-market buyers are a grey area. Section 2(70)[30] defines a prospectus to include documents inviting the public to subscribe for or purchase securities. Section 35(1), though, speaks only of subscribers, so it's unclear whether stock-market purchasers can claim.[31]

Reliance: Claimants have to show they subscribed on the faith of the misleading prospectus. That can be hard if they actually relied on an abridged prospectus, a broker or some other source. Section 35[32] has no general presumption of reliance. The US fraud-on-the-market

[23] CA 2013, s 35.
[24] Companies Act 2013, s 35(1) (India).
[25] Companies Act 2013, s 35(2) (India).
[26] Companies Act 2013, s 35(3) (India).
[27] CA 2013, s 35(1).
[28] CA 2013, s 35(3).
[29] CA 2013, s 35(1).
[30] CA 2013, s 2(70).
[31] CA 2013, s 35(1).
[32] CA 2013, s 35.

doctrine, by contrast, presumes reliance in certain circumstances.

Loss and causation: Investors must prove the misstatement or omission caused their loss. Section 35[33] gives no damages formula, so assessing compensation may need evidence of what the securities would have been worth without the misstatement, and of how market movements or later events affected the price. That kind of evidence makes individual claims expensive.

So proving a prospectus was misleading isn't enough to get compensation. Claimants also have to link the disclosure to their subscription and their loss.

3.3 Who may be sued

Section 35(1)[34] identifies the company and five categories of persons potentially liable for loss caused by a misleading prospectus: directors at the time of issue; persons who have authorised and agreed to be named as directors or to become directors; promoters; persons who authorised the prospectus's issue; and experts referred to in Section 26(5).[35] These categories extend potential liability beyond the company to those involved in its management, promotion and disclosure.

The company: The issuing company is expressly liable under Section 35(1)[36]. However, compensation reduces its assets and may indirectly affect innocent shareholders, reinforcing the importance of holding other responsible persons accountable.

Directors: The provision does not expressly distinguish between executive, non-executive, independent and nominee directors. Their potential liability must therefore be assessed under Section 35(1)[37], subject to the defences in sub-section (2)[38]. Liability may also extend to persons who have agreed to become directors or authorised themselves to be named as such, even if their appointment has not taken effect.

Promoters: Section 2(69)[39] includes persons named as promoters in the prospectus or annual return, those exercising direct or indirect control, and those whose directions the board is

[33] CA 2013, s 35.
[34] CA 2013, s 35(1).
[35] CA 2013, s 26(5).
[36] CA 2013, s 35(1).
[37] CA 2013, s 35(1).
[38] CA 2013, s 35(2).
[39] Companies Act 2013, s 2(69) (India).

accustomed to follow. Persons acting merely in a professional capacity are excluded from the latter category. The definition therefore extends beyond formal titles to persons exercising substantive control over the company.

Persons who authorised the issue: This category may cover persons who approved the prospectus but fall outside the other listed classes. Senior officers may be included depending on their role and evidence of authorisation; their position alone does not establish liability. Merchant bankers are not separately listed, and whether a lead manager falls within this category depends on the facts and applicable law. Their obligations under SEBI regulations remain independently relevant.

Experts: Section 35(1)[40] covers experts referred to in Section 26(5)[41], subject to the applicable statutory requirements concerning their statements, independence and consent. An auditor whose report appears in the prospectus is one example. Whether liability is confined to the expert's own statement requires further statutory and judicial analysis; Section 35 does not expressly establish such a limitation.[42]

Two questions arise which are left unanswered by the wording of the section: firstly, is there joint and several liability in every case; and secondly, how does one determine contribution between defendants? Both need to take into account the general law.

3.4 A wide net and a narrow gate

Subsection (1) of Section 35[43] has wide scope in that it subjects not only the company but also the directors, those who are about to be appointed as such in certain situations, promoters, authorising persons and expert professionals to potential liability.

The situation facing the plaintiff is even more difficult. The investors have to prove subscription, reliance, causality and damage. Neither the section nor any other statutory provision makes any express general presumption of reliance and neither a formula for calculation of damages nor procedure for individual claims.

Therefore, the scope of potential liability may not result in compensation, as it is still necessary

[40] CA 2013, s 35(1).
[41] CA 2013, s 26(5).
[42] CA 2013, s 35.
[43] CA 2013, s 35(1).

to prove the case and prosecute at a reasonable cost.

4. Section 35 and the Surrounding Provisions

4.1 Section 34: Criminal liability

Section 34[44] makes every person who authorises the issue of a prospectus liable under Section 447[45] if it contains a statement that is untrue or misleading, or includes or omits a matter in a way likely to mislead. The provision does not apply to a person who proves that the statement or omission was immaterial, or that he had reasonable grounds to believe, and did believe until the time of issue, that the statement was true or the inclusion or omission was necessary.

The key difference from Section 35[46] is that Section 34[47] provides explicitly for reasonable belief as a defence, while Section 35(2)[48] specifies certain defences against civil liability, but no similar general defence for statements made without expert knowledge. Thus, someone could escape liability criminally but still remain open to a claim for compensation. Whether diligence can be used as a defence under Section 35[49] is determined by the terms of the statute and analysed in Part 6.

4.2 Section 36: Fraudulent inducement

Section 36[50] penalises knowingly or recklessly making false, deceptive or misleading statements, promises or forecasts, or deliberately concealing material facts, to induce another person to enter into an agreement concerning securities or obtain credit facilities. The penalty is imposed under Section 447[51]. Since Section 35[52] operates without prejudice to Section 36, civil compensation and penal consequences may arise from the same conduct.

4.3 Section 37: Suits by affected persons

Section 37[53], lets persons affected by a misleading prospectus pursue remedies under Section

[44] CA 2013, s 34.
[45] Companies Act 2013, s 447 (India).
[46] CA 2013, s 35.
[47] CA 2013, s 34.
[48] CA 2013, s 35(2).
[49] CA 2013, s 35.
[50] Companies Act 2013, s 36 (India).
[51] CA 2013, s 447.
[52] CA 2013, s 35.
[53] Companies Act 2013, s 37 (India).

34, 35 or 36[54]. Its mention of groups and associations points to the possibility of collective action, although it does not outline any procedure in this regard. It differs from Section 245[55] in that it outlines how members and depositors can initiate collective action in accordance with the law.

However, this section allows for collective action without any procedural details regarding the same. Moreover, the mention of any other provision where criminal liability is involved makes it difficult to understand this provision.

4.4 Section 447: Fraud

Section 447 prescribes penalties for fraud under the Companies Act.[56] Its definition covers acts, omissions, concealment and abuse of position undertaken with intent to deceive, secure undue advantage or injure the interests of a company, its shareholders, creditors or another person, whether or not wrongful gain or loss results. It provides for imprisonment and fines, with enhanced penalties in specified circumstances involving public interest.

The intent requirement distinguishes criminal fraud from civil liability under Section 35. Careless or inadequately verified disclosures may attract compensation even where fraudulent intent cannot be established. Section 35 therefore provides a distinct remedy for investor losses that may not meet the threshold for criminal liability.[57]

4.5 SEBI's regime

Under the SEBI Act, 1992[58] and the SEBI regulations, SEBI has an alternative enforcement regime. Under Section 12A, there are certain manipulative and fraudulent practices that are prohibited[59], and under Section 15HA, there is provision for punishment by way of financial sanctions for fraudulent and unfair trade practices.[60] The SEBI (Prohibition of Fraudulent and Unfair Trade Practices relating to Securities Market) Regulations, 2003 also prohibit fraudulent

[54] CA 2013, s 34; CA 2013, s 35; CA 2013, s 36.
[55] Companies Act 2013, s 245 (India).
[56] CA 2013, s 447.
[57] CA 2013, s 35.
[58] Securities and Exchange Board of India Act 1992
[59] Securities and Exchange Board of India Act 1992, s 12A.
[60] Securities and Exchange Board of India Act 1992, s 15HA.

practices.[61]

In *SEBI v. Kishore R. Ajmera*[62], the Supreme Court held that regulatory violations may be established on a preponderance of probabilities rather than beyond reasonable doubt. SEBI may also issue directions under Sections 11 and 11B[63], including restitutionary measures where legally justified. However, regulatory action does not automatically establish an investor's entitlement to compensation under Section 35.[64]

4.6 Four routes, one document

The four principal routes serve different purposes. Sections 34 and 36 address criminal liability[65]; Section 447 prescribes the penalty for fraud; SEBI proceedings enable regulatory sanctions and directions; and Section 35 provides a statutory basis for compensating investors who satisfy its requirements.[66] Section 37 recognises proceedings by affected persons but does not itself resolve every procedural difficulty.[67]

The framework therefore offers several forms of accountability, but regulatory or penal action is not equivalent to an individual remedy. The central challenge remains whether investors can translate a misleading disclosure into an enforceable claim for compensation.

5. Common Law Roots

5.1 *Derry v. Peek* and the gap in deceit

The common-law starting point is *Derry v. Peek*[68]. A tramway company's prospectus stated that steam power could be used subject to the Board of Trade's consent. The directors believed approval would be granted, but permission was refused and the company failed. The House of Lords held that deceit required a false representation made knowingly. Without belief in its truth, or recklessly, without caring whether it was true or false. An honest belief could therefore

[61] Securities and Exchange Board of India (Prohibition of Fraudulent and Unfair Trade Practices relating to Securities Market) Regulations 2003.
[62] *SEBI v Kishore R Ajmera* (2016) 6 SCC 368 (SC).
[63] Securities and Exchange Board of India Act 1992, s 11; Securities and Exchange Board of India Act 1992, s 11B.
[64] CA 2013, s 35.
[65] CA 2013, s 34; CA 2013, s 36.
[66] CA 2013, s 35.
[67] CA 2013, s 37.
[68] *Derry v Peek* (n 2).

defeat a claim in deceit.

This has exposed a gap that exists in investor protection. Directors whose misleading statements resulted from carelessness or a genuine belief in the statement rather than dishonestly could escape liability. The Directors Liability Act 1890[69] of the United Kingdom addressed this gap by imposing compensation liability on directors, promoters and persons authorising a prospectus, subject to a defence requiring reasonable grounds for belief in the statement's truth and actual belief in it. This shifted prospectus liability beyond fraud to encompass certain forms of negligent disclosure.

Concerns relating to disclosures have predated ***Derry v. Peek***[70]. In ***New Brunswick and Canada Railway v. Muggeridge***[71], the court stressed accuracy in prospectuses issued to the public. In ***Central Railway of Venezuela v. Kisch***[72], the House of Lords recognised a subscriber's right to avoid shares where a material contract had been concealed. These decisions reflect the common law's emphasis on full and fair disclosure, while the 1890 Act strengthened investor remedies by providing a route to compensation that did not depend solely on proving fraud.

5.2 The Indian route

Indian law adopted a comparable statutory approach. Section 62 of the Companies Act, 1956 imposed civil liability for prospectus misstatements[73], a framework continued by Section 35 of the 2013 Act.[74]

The Indian Contract Act, 1872 offers related remedies. Section 17 of the Indian Contract Act, 1872[75] deals with fraud. Misrepresentation is discussed under Section 18 of this Act.[76] Section 18[77] includes a positive affirmation which lacks proper grounds but is considered true in the mind of the party. Agreement will be voidable under Section 19[78] when it is induced by fraud and misrepresentation, provided that statutory exceptions are excluded. Whereas under

[69] Directors Liability Act 1890, 53 & 54 Vict, c 64.
[70] *Derry v Peek* (n 2).
[71] *New Brunswick and Canada Railway and Land Co v Muggeridge* (1860) 1 Dr & Sm 363, 381; 62 ER 418.
[72] *Central Railway Co of Venezuela v Kisch* (1867) LR 2 HL 99.
[73] Companies Act 1956, s 62 (India).
[74] CA 2013, s 35.
[75] Indian Contract Act 1872, s 17.
[76] Indian Contract Act 1872, s 18.
[77] ICA 1872, s 18.
[78] Indian Contract Act 1872, s 19.

common law deceit, there is no possibility of relief on the ground of certain misrepresentations in good faith, there is scope of remedy under Section 19 of the Indian Contract Act, 1872.[79] Silence per se will not amount to fraud under Section 17[80] but a prospectus is different because the statute requires disclosure. Rescission of contract and statutory compensation are distinct remedies for breach of prospectus. Rescission addresses the agreement between the investor and the company, whereas Section 35[81] extends potential liability to specified persons responsible for the prospectus. It therefore provides a distinct route to compensation.

Section 35[82] reflects this by extending potential liability beyond the company while preserving statutory defences in specified circumstances. The central question is whether these defences adequately balance investor protection against the interest of those who exercised reasonable care in preparing or authorising a prospectus.

6. The Diligence Defence That Isn't

Part 5 ended by asking whether Section 35 balances investor protection against the interests of those who exercised reasonable care.

6.1 What Section 35(2) now allows

Section 35(2)[83] gives three defences (i) a director may escape the liability if before the prospectus was released he had withdrawn consent for the same meaning that it was issued before his authority, (ii) If the prospectus was issued without the knowledge and consent of the director in question and such was made with reasonable public notice and (iii) if a person had reproduced the statement of the experts accurately and had reasonably believed that the statement given by the expert was given and not withdrawn the required consent. This shows us that the first 2 defences are designed to protect people who had not willingly taken part in the issue and the last defence protects individuals who had relied on someone else's work. Neither of these defences provide any protection to a person who took part and had verified the contents of the prospectus. The majority of the content of the prospectus is not part of expert verification and things like the objective of the business, the risk factors that are involved with

[79] ICA 1872, s 19.
[80] ICA 1872, s 17.
[81] CA 2013, s 35.
[82] CA 2013, s 35.
[83] CA 2013, s 35(2).

business and the objective of the issue are all answered by the company itself so the directors are directly liable for misleading statements regarding the same.

6.2 A choice, not an oversight

In 2011 when the companies bill was put before the standing committee of finance, the involved stakeholders had asked that the exception that were available in the 1956 companies act be retained in the new act, including where directors "had reasonable ground to believe that such statement was true". The Ministry replied that "the relevant exceptions have already been provided in clause 35(2)[84]", and nothing changed.[85] In 2016 the Companies Law Committee noted that directors had lost the expert-reliance defence of Section 62(2)(d)(ii)[86], and referred to what it described as the UK position, under which a director is liable only if he knew, or was reckless as to whether, a statement was untrue or misleading. It recommended only that experts be held liable for statements prepared by them on which directors relied.[87] That became clause (c).

6.3 Sections 34 and 35 as mirror images

As Part 4.1 noted, Section 34[88] reaches only a person who "authorises the issue" but gives him express defences of immateriality and reasonable belief. Section 35 [89]reaches five categories of person and contains neither defence. The criminal provision has the narrower net and wider defences; the civil provision has the wider net and narrower defences. A careful director can therefore be acquitted under Section 34[90] yet ordered to pay full compensation under Section 35 for the same statement. The 1956 Act excused reasonable belief in both.

The best justification is that compensation allocates loss rather than punishing fault, so a participating director should bear the loss in preference to an innocent investor. But the 2018 amendment undercuts this. Parliament accepted that a director who reasonably relied on an auditor should not bear the loss; there is no principled reason why reliance on an expert should excuse him while his own reasonable investigation should not. In both cases the investor keeps

[84] CA 2013, s 35(2).
[85] Standing Committee on Finance, Fifty Seventh Report on the Companies Bill, 2011 (Lok Sabha Secretariat, June 2012).
[86] Companies Act 1956, s 62(2)(d)(ii).
[87] Ministry of Corporate Affairs, *Report of the Companies Law Committee* (February 2016).
[88] CA 2013, s 34.
[89] CA 2013, s 35.
[90] CA 2013, s 34.

a defendant: the expert in one, the strictly liable company in the other. And a genuine loss-allocation rule would look first to those best placed to prevent the loss, which, as Part 7 shows, Section 35[91] does not.

6.4 Section 149(12) as a back door

Care does matter in one place, though not by design. Section 149(12)[92] provides, "notwithstanding anything contained in this Act", that independent directors and non-executive directors who are not promoters or key managerial personnel are liable only for acts of the company that occurred with their knowledge, attributable through board processes, "and with his consent or connivance or where he had not acted diligently". Issuing a prospectus is an act of the company, so an outside director sued under Section 35[93] can invoke this filter. Since prospectuses are always board approved, the real question is diligence, and the Supreme Court has said that a director "cannot shut his eyes to what must be obvious".[94] Because Section 149(12)[95] limits liability rather than creating a defence, the claimant may even bear the burden of proving a lack of diligence.

The result is a three-tier structure no one designed: outside directors' face fault based liability, executive directors, promoters and authorisers near strict liability, and experts (Part 7) liability without a defence of their own. No court has applied Section 149(12)[96] to a prospectus claim, but the reading follows from the text.

6.5 A defence never tested

The few reported decisions on Section 62 of the 1956 Act[97] concern procedure, not defences. In *Bhupinder Kaur Singh v Registrar of Companies*[98], the Delhi High Court held only that Section 62[99] was civil, not criminal, and that its remedy belonged to "the person who has subscribed for shares or debentures".[100] No reported Indian decision appears to have weighed a reasonable belief defence. The defence was removed before any reported decision applied it,

[91] CA 2013, s 35.
[92] Companies Act 2013, s 149(12).
[93] CA 2013, s 35.
[94] *Official Liquidator, Supreme Bank Ltd v P.A. Tendolkar* AIR 1973 SC 1104.
[95] CA 2013, s 149(12).
[96] CA 2013, s 149(12).
[97] Companies Act 1956, s 62.
[98] *Bhupinder Kaur Singh v Registrar of Companies* Crl MM (Delhi HC, 25 January 2007).
[99] CA 1956, s 62.
[100] *Bhupinder Kaur Singh v Registrar of Companie* Crl MM (Delhi HC, 25 January 2007).

and its absence has produced no body of compensation that its return would endanger.

7. Who Verifies and Who Pays, The Gatekeeper Gap

If Section 35[101] does not track care, it might at least track who can verify a prospectus. It does not.

7.1 The lead manager's duty and India's existing standard

Regulation 24(3) of the SEBI (ICDR) Regulations, 2018 requires the lead manager to "exercise due diligence and satisfy" itself about "all aspects of the issue including the veracity and adequacy of disclosure". It must also certify to SEBI, when filing the draft offer document, that the disclosures are "true and adequate to enable the investors to make a well-informed decision".[102] Directors approve the document and experts certify parts of it; the lead manager must verify all of it.

SAT and SEBI have given this duty content. Applying the equivalent duty under the 2009 Regulations, SAT held in *Keynote Corporate Services v SEBI* that due diligence by a merchant banker "does not mean passively reporting whatever is reported to it".[103] *Almondz Global Securities v SEBI* added that a merchant banker must do everything reasonable, not everything possible, and may treat an auditor's comfort letter as a legitimate step.[104] In 2025, where about 40 per cent of an SME issue's proceeds were earmarked for a lease deposit on a building still under construction, SEBI held that merchant bankers must "actively test material facts", and then imposed only a 21 day bar on new assignments.[105] India therefore already has a reasonable investigation standard, but uses it only to discipline. The participant most clearly judged by that standard is the one Section 35 does not reach, while most of those it does reach are denied it.

7.2 Why Section 35(1) misses the lead manager

Part 3.3 left this open; the better reading is that a lead manager is outside Section 35(1)[106].

[101] CA 2013, s 35.
[102] SEBI (Issue of Capital and Disclosure Requirements) Regulations 2018, regs 24(3) and 25(2)(b).
[103] *Keynote Corporate Services Ltd v SEBI* (SAT, Appeal No 84 of 2012, 19 February 2014).
[104] *Almondz Global Securities Ltd v SEBI* (SAT, 13 May 2016).
[105] SEBI, Enquiry Order in respect of Gretex Corporate Services Ltd (30 October 2025).
[106][106] CA 2013, s 35(1).

Clause (d) covers a person who "has authorised the issue", and that authority lies with the company and its board; a lead manager manages and certifies the issue but does not authorise it. Clause (e) covers only an expert "referred to in sub-section (5) of section 26[107]", that is, one whose statement is included in the prospectus with his written consent. Even if a lead manager's due diligence certificate made it an "expert" under Section 2(38)[108], as a person issuing a certificate under law, that certificate is filed with SEBI and is not included in the prospectus as an expert's statement.[109]

7.3 Experts face the opposite problem

Section 35(1)(e)[110] drops the 1956 proviso limiting an expert to his own statement, and the expert defences of Section 62(3)[111] are gone. Clause (c) protects those who rely on experts, not experts, and an expert who has consented cannot use clauses (a) or (b). Read literally, an auditor is liable for a misleading statement anywhere in the prospectus, with no defence of care. This answers the expert question in Part 3.3: the text sets no own statement limit. Causation does not help, because the loss is caused by the misleading statement whoever made it; any limit must be read in by the courts, most plausibly from the link to Section 26(5)[112], which concerns the expert's own statement. Nothing in the legislative record suggests the point was considered; in 2012 the Ministry said only that "there is no direct reference of auditor in the clause".[113]

7.4 Section 245 and contribution

Section 245(1)(g)(iii)[114] permits class claims against "any expert or advisor or consultant or any other person", but its misstatement limb covers only statements "made to the company". A prospectus speaks to the public, and diligence certificates go to SEBI. The limb for any "fraudulent, unlawful or wrongful act or conduct" might reach a breach of Regulation 24(3)[115],

[107] CA 2013, s 26(5).
[108] CA 2013, s 2(38).
[109] Clauses (d) and (e) of s 35(1) are joined by "and". Read literally, a defendant would have to fall within every clause at once; the provision can only sensibly be read disjunctively.
[110] Companies Act 2013, s 35(1)(e) (India).
[111] Companies Act 1956, s 62(3) (India).
[112] CA 2013, s 26(5).
[113] *Fifty-Seventh Report Standing Committee on Finance* (2011-12), The Companies Bill, 2011 (Lok Sabha Secretariat, June 2012) 31-32.
[114] Companies Act 2013, s 245(1)(g)(iii) (India).
[115] Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations 2018, reg 24(3).

but that is untested, and only current members and depositors may sue.

Part 3.3 also asked how liability is shared. Section 35(1)[116] makes "every person" liable to "every person" who suffered loss, which suggests joint and several liability. Section 62(5) of the 1956 Act[117] added a right of contribution; Section 35 does not. A defendant who pays in full has no statutory right to recover a share from the others, a gap any extension to lead managers must address.

Liability therefore runs inversely to capacity to verify: the widest verifier faces only regulatory sanction, experts face liability for the whole document, and directors fall in between.

8. The Offer for Sale Problem

The gaps so far concern defendants. A further gap concerns claimants, and it may cover most of the money raised in Indian IPOs.

8.1 Two fictions, one dropped

Section 28(2)[118] deems an offer for sale document, "for all purposes", to be "a prospectus issued by the company" and applies the law "as to liability in respect of misstatements". But Section 35(1) compensates only a person who "has subscribed for securities", and a buyer in an offer for sale does not subscribe; he buys existing shares from a seller. These buyers are not the secondary-market purchasers discussed in Part 3.2, they buy in the public offer itself, on the faith of the same document as subscribers to any fresh issue. Section 64(1) of the 1956 Act solved this by applying the liability rules "as if persons accepting the offer were subscribers".[119] Although Section 64 concerned a different arrangement, in which shares were allotted to an intermediary for resale, its solution is the one Section 28 needs. The 2013 Act kept the first fiction and dropped the second. Section 35(3) shares the gap.

8.2 The narrow reading

Read literally, buyers lose. The Supreme Court has described allotment as "the acceptance by the company of the offer to take shares" and held that the re-issue of a forfeited share "is not

[116] CA 2013, s 35(1).
[117] Companies Act 1956, s 62(5) (India).
[118] CA 2013, s 28(2).
[119] Companies Act 1956, s 64(1).

an allotment but a sale".[120] By analogy, a buyer of existing shares purchases rather than subscribes. Even *Bhupinder Kaur Singh*, though not concerned with this question, described the remedy as belonging to "the person who has subscribed". The change of wording from 1956 suggests a change of meaning, and the Act's definition of a prospectus, which says "subscription or purchase", shows that Parliament knows the difference.

8.3 The purposive reading

The stronger reading runs the other way. Section 28(2) operates "for all purposes" and names liability expressly. The Explanation to Section 23 adds that, for Chapter III, a "public offer" includes "an offer for sale of securities to the public by an existing shareholder, through issue of a prospectus". The Supreme Court has held that a court must ask "for what purposes and between what persons" a statutory fiction operates and carry it "to its logical conclusion".[121] The stated purpose is to apply prospectus liability, and the persons concerned are those making and accepting the offer, so treating buyers as subscribers completes the fiction.

The literal reading also produces absurd results. In an issue made entirely by offer for sale, no one subscribes, so Section 28(2)'s express reference to liability would give buyers no civil remedy at all. In a mixed issue, an investor receives one block of shares without knowing which came from the company and which from the sellers, yet his claim would turn on that distinction. The counterargument is that a fiction "is created for a definite purpose and cannot be extended beyond its legitimate field",[122] and that the fiction in Section 28(2) still has work to do through criminal liability under Section 34, which does not depend on anyone having subscribed. But Section 28(2) applies the law "as to liability" generally, without confining it to criminal liability, and reading it down to Section 34 would leave investors with punishment for the wrongdoer and nothing for themselves. The purposive reading is better, though investors should not have to litigate to secure it.

8.4 Why it matters

Offers for sale made up 70.2 per cent of mainboard IPO money in 2022, about 60 per cent in

[120] *Sri Gopal Jalan & Co v Calcutta Stock Exchange Association Ltd* AIR 1964 SC 250.
[121] *State of Bombay v Pandurang Vinayak Chaphalkar* AIR 1953 SC 244; followed in *Raja Shatrunji v Mohammad Azmal Azim Khan* (1971) 2 SCC 200.
[122] *Bengal Immunity Co Ltd v State of Bihar* AIR 1955 SC 661.

2024, and 59 per cent in 2025.[123] Hyundai Motor India's Rs 27,870 crore issue in 2024, the largest Indian IPO at the time, was entirely an offer for sale, as was LIC's in 2022. On a literal reading, no investor in either issue "subscribed". About three of every five rupees invested in Indian IPOs may sit outside Section 35.

The gap extends to defendants. Promoter sellers fall within Section 35(1)(c), but other sellers, such as private equity funds, are not named and usually limit their responsibility to statements about themselves. They arguably fall within clause (d), since Section 28(3) requires sellers to "collectively authorise the company" to act on the offer, but no court has decided this. As in Part 7, those who receive the money may bear the least liability.

9. How Other Systems Calibrate Liability

Other systems show that a wide net need not mean an absence of defences. Under Section 11 of the US Securities Act, 1933, "any person acquiring" a security may sue, and defendants include "every underwriter". Every defendant except the issuer has a due diligence defence: for non expert parts, a reasonable investigation and reasonable belief; for expert parts, no reasonable ground to disbelieve. The standard is "a prudent man in the management of his own property". Experts answer only for their own parts, underwriters' liability is capped, and contribution is express.[124]

The UK regime in force from 19 January 2026 compensates anyone who "acquired" the securities and excuses reasonable belief after reasonable enquiries, as well as reliance on experts. It does not make underwriters responsible merely because they gave advice.[125]

The US names underwriters and gives defences; the UK excludes advisers but gives defences to those it includes. India excludes advisers and denies a general defence to most of those it includes, and of the three it alone ties the right to claim to subscription rather than acquisition.

10. Recalibrating Section 35

Parts 6 to 8 call for recalibration, not a retreat from investor protection. Three reforms follow.

[123] Prime Database figures reported in Business Standard (5 January 2023 and 18 November 2025); KPMG, *IPOs in India: FY 2025–26* (May 2026).
[124] Securities Act of 1933, s 11, 15 USC § 77k(a), (b)(3), (c), (e), (f).
[125] Public Offers and Admissions to Trading Regulations 2024 (SI 2024/105), reg 30 and sch 2, paras 2–3; FCA Handbook, PRM 3.1.9R.

10.1 A tiered diligence defence

Section 35(2)[126] should add a defence for non-expert statements that the defendant, after reasonable inquiry, had reasonable ground to believe, and did believe up to the time of issue, that the statement was true, the same formula Section 34 already uses. The company should stay strictly liable, as US issuers are, because it received the proceeds and investors should always have one defendant who cannot plead care. Experts should regain a defence for, and be liable only for, their own statements. The standard need not be invented: *Keynote*, *Almondz* and the 2025 SEBI order describe it for lead managers, and *Tendolkar* for directors. The objection that this weakens protection overlooks Part 6.5: strictness that produces no compensation protects investors little, and the company's strict liability remains.

10.2 Widening the net where verification sits

Section 35(1)[127] should name lead managers, with the same defence and a cap linked to their fee or the securities they underwrote. A cap respects the gradation the section already draws, since Section 35(3)[128] reserves personal liability "without any limitation" for fraud. Contribution on the model of Section 62(5)[129] should be restored. Section 28(2)[130] should restore the words treating buyers as subscribers, or Section 35[131] should, like the US and UK, protect anyone who acquired under the prospectus. The objection of over deterrence, especially for SME issues, is answered by the cap and by the fact that SEBI already imposes the standard; the reform changes only who pays when it is breached.

10.3 Making claims workable

Rights need a route to enforcement. A rebuttable presumption of reliance should apply to subscribers during the issue period, displaced by proof that the claimant knew the truth. Unlike fraud on the market, it needs no efficient market, which an unlisted issue lacks. Collective claims matter because individual suits are uneconomic and the consumer forum is closed the Supreme Court held, under the Consumer Protection Act, 1986, that an applicant for shares is

[126] CA 2013, s 35(2).
[127] CA 2013, s 35(1).
[128] CA 2013, s 35(3).
[129] CA 1956, s 62(5).
[130] CA 2013, 28(2).
[131] CA 2013, s 35.

not a "consumer".[132] Section 245[133] should give standing to subscribers and acquirers whether or not they remain members; the first major class action, admitted in 2026, shows the procedure can work.[134] Finally, amounts SEBI recovers in offer-document cases should go to subscribers through a defined process. In the 2003 to 2005 IPO irregularities, disgorged money reached investors in three tranches paid between 2010 and 2023.[135]

10.4 Conclusion

This paper asked whether Section 35[136] fairly balances compensating investors against protecting those who prepare or authorise a prospectus. It does not. Since 2018 a director may rely on an expert but not on his own careful inquiry. Outside directors are protected by a provision written for another purpose, experts are exposed without a defence of their own, and the lead manager, the widest verifier of all, faces no civil liability under the section. Read literally, the section may not even protect most IPO investors. Section 35[137] is neither too strict nor too lenient; it is miscalibrated, because liability under it follows neither care nor the capacity to verify. The reforms proposed here would hold those who can check a prospectus answerable for checking it, excuse those who checked with care, and give investors a remedy they can use.

[132] *Morgan Stanley Mutual Fund v Kartick Das* (1994) 4 SCC 225.
[133] Companies Act 2013, s 245 (India).
[134] *Ankit Jain v Jindal Poly Films Ltd* (NCLT, Principal Bench, 2026), upheld on appeal by the NCLAT.
[135] SEBI, Press Release No 18/2023 (24 August 2023).
[136] CA 2013, s 35.
[137] CA 2013, s 35.