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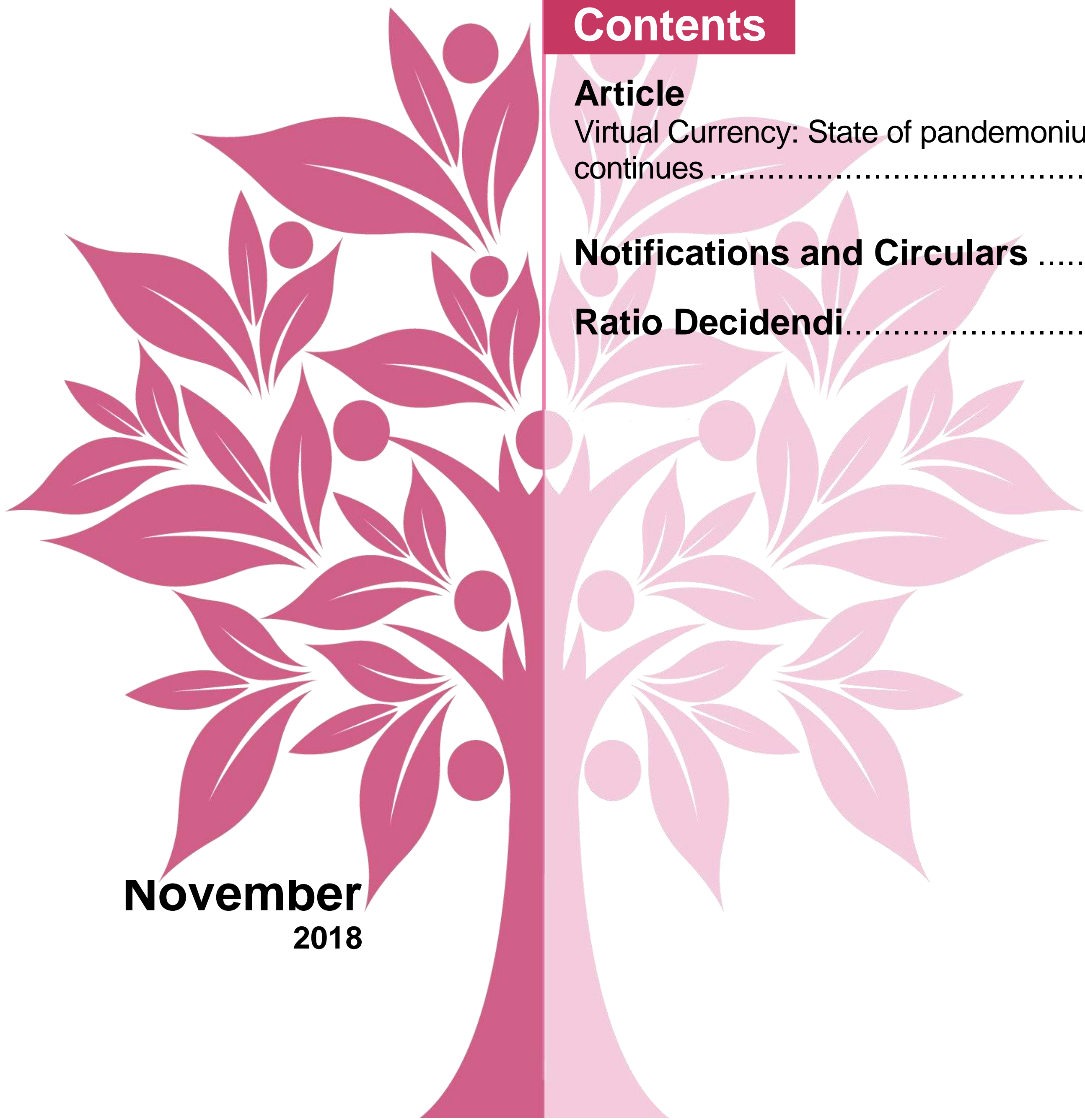

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Article

Virtual Currency: State of pandemonium continues

By **Neeraj Dubey**

In 2017, the Reserve Bank of India ("RBI"), India's central bank, published a "Working Group Report on FinTech and Digital Banking" that discussed the need to have a monitoring framework for new technologies, including blockchain technology. The Institute for Development and Research in Banking Technology ("IDRBT") also published a White Paper on the applications of blockchain technology. Such initiations evidenced the recognition and validation of the use of blockchain technology. However, they did not touch upon the specific subject-matter of virtual currency ("VC").

Despite the recognition of latest developments in blockchain technology and its use in India, since 2013, the RBI and Ministry of Finance continued to caution users of VCs against its risks stating that they are akin to Ponzi schemes. In RBI's Press Release dated December 24, 2013, RBI cautioned users of VCs against potential financial, operational, legal, customer protection and security related risks. Vide its Press Release dated February 01, 2017, RBI advised on not having given any license or authorization to any entity/company to deal with bitcoins/ VCs. Further, on December 5, 2017, RBI reiterated previous concerns in the wake of increase of Initial Coin Offerings. The Finance Ministry Press Release of December 29, 2017 stated that VCs are not government fiat and are not legal tender. Hence, they are not currencies and RBI has not authorised them as a medium of exchange. Finally, the RBI notification dated April 06, 2018 ("Notification") on "Prohibition on dealing in VCs" clearly instructed the entities regulated by the RBI to not deal in VCs or provide services that facilitate any person/entity in dealing with or settling VCs.

The future of cryptocurrencies still remains a grey area with Indian authorities not taking a firm stand as to its regularization or prohibition. In the wake of such mixed signals from the Indian authorities, the Notification was challenged by a lot of stakeholders and affected parties in various cases. Many Indian companies dealing with or in crypto currencies aggrieved by the restrictions imposed by the Central Bank came before the High Court and Supreme Court. The subsequent paragraphs provide details of those cases.

A company, Kali Digital Eco-Systems Private Limited, which ran the exchange "CoinRecoil", filed a writ before the High Court of Delhi claiming infringement of its right to equality [Article 14 of the Indian Constitution] and right to carry on trade [Article 19 (1) (g) the Indian Constitution]. Just after this, another company named Flinstone Technologies Private Limited, which runs the exchange "moneytradecoin.com", approached the High Court of Delhi challenging the Notification. Considering the similarities of the above two cases of *Kali Digital Eco-Systems Private Limited vs. RBI and Others* & *Flinstone Technologies Private Limited vs. RBI and Others,* the Delhi High Court tagged the matters. Proceedings in these writ petitions were subsequently stayed by the Supreme Court of India ("SC") on May 17, 2018.

Siddharth Dalmia and Dwaipayan Bhowmick were the first ones to bring crypto currency related cases before the Apex Court in 2017. The

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first Writ Petition was filed by Mr. Siddharth Dalmia and Mr. Vijay Pal Dalmia before the SC in which they sought a ban on the sale and purchase of cryptocurrency on the ground that it is used in anti-national, illegal and nefarious activities such as terrorism funding, illegal trade of arms and drugs, bribery, money laundering, tax evasion, payment of ransom, etc. The second Writ Petition, which was filed in public interest by Mr. Dwaipayan Bhowmick in which he sought a direction to regulate the flow of cryptocurrency and to ensure that the cryptocurrency be made accountable to the exchequer and to setup a panel to determine the framework of regulations on bitcoin and other cryptocurrencies in India.

Subsequently, in *Rajdeep Singh vs. RBI*, four exchanges in India – CoinDCX, Coindelta, Koinex and Throughbit along with two individuals Mr. Pramod Emjay and Mr. Aditya Ahluwalia petitioned in the SC for an interim relief, asking the government to allow the cryptocurrency businesses to run without any hindrance. In this case, the interim relief petition was tagged with the writ filed by Dwaipayan Bhowmick. Finally, the SC tagged both (Rajdeep and Dwaipayan) petitions with the main case of *Siddharth Dalmia & Another vs. Union of India & Others*. Interim relief was not granted by the SC. Later, the SC permitted the RBI to move all cases pending in High courts to the SC and directed that no High Court shall entertain any petition relating to the Notification.

The Internet and Mobile Association of India ("IAMAI"), an industry body representing the interests of online and mobile value-added service providers filed a writ petition in the SC demanding a stay on the Notification. In this case, IAMAI had petitioned the SC to declare illegal and ban all illegal VCs, cryptocurrencies or decentralised digital (currencies) such as, bitcoins, litecoins, bbqcoins, dogecoins and investigate, fix accountability and responsibility for the sale and purchase of such VCs, and prosecute the offenders. Additionally, it had also requested to declare illegal and ban all websites, web links and mobile applications, being used to buy, sell or deal in any manner whatsoever, VCs; and require the government to publicize the illegality of the sale, purchase and dealing of VCs by the public in India. Noting the urgency of the matters raised in this Petition, the SC hearings were expedited while granting the petitioners permission to submit a representation to the RBI and also directed the RBI to dispose of any representations filed by the IAMAI within a week from the date of the Order, where the disposal of the representation shall contain reasons.

All petitions ranging from seeking clarification on the status of crypto currencies to seeking a complete ban have been clubbed into a single case by the SC. Petitions before the SC have been tagged with, *Siddharth Dalmia & Anr. v. Union of India & Ors.* This matter is yet to be finally decided by the SC.

The recent arrest of the founders of the start-up that had set-up a kiosk for VC in Bengaluru further stirred the issue and suggests that the authorities are inclined to have the understanding that VCs are illegal in India irrespective of the absence of any specific regulation suggesting the same. If the recent statement by an official in the Ministry of Finance is to be believed, it is said that a draft regulatory framework for crypto currencies is in queue, which would deal with the aspects of such businesses that should be banned and preserved. The current situation leaves the stakeholders in lurch until the Apex Court decides or the regulator comes up with a regulation.

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Notifications and Circulars

Report of Insolvency Law Committee on Cross Border Insolvency: The Ministry of Corporate Affairs constituted the Insolvency Law Committee ("Committee") to suggest amendments to the Insolvency and Bankruptcy Code of India, 2016 ("Code"). On 22nd October, 2018 the Committee submitted its 2nd report to the Government dealing with cross border insolvency. The Committee was of the view that Sections 234 and 235 of the IBC were insufficient to deal with cross border insolvency. In view of this, the Committee recommended adoption of the UNCITRAL Model Law on Cross Border Insolvency, 1997.

Presently, the Code has been dealing with domestic insolvency and does not cover within its ambit default cases with cross-border implications. There is an ardent need for developing such a framework because many Indian companies have global presence and foreign companies have operations across India.

The Report deals with the recommendations of the Committee and the rationale behind its adoption into the Code. The Report also comprises of two annexures: Annexure I comprising of the notification dated 16 November 2017 constituting the Committee, and Annexure II containing the proposed draft cross-border insolvency legislation.

The Model Law covers four major principles of cross-border insolvency in its report, namely:

(i) direct access to foreign creditors and foreign insolvency professionals and participation in or commencement of domestic insolvency proceedings against a defaulting debtor;

(ii) recognition of foreign proceedings & provision of remedies;

(iii) cooperation between domestic and foreign courts & domestic and foreign insolvency practioners;

(iv) and coordination between two or more concurrent insolvency proceedings in different countries. The main proceeding is determined by the concept of centre of main interest ("COMI"). The Model Law does not define COMI but provides a rebuttable presumption for the same. The rebuttable presumption is that a corporate debtor's registered office is its COMI in the absence of proof to the contrary.

According to the Committee the following are some of key advantages of adopting the Model Law:

(i) Increasing foreign investment: Though foreign creditors have a remedy under the Code, adoption of the Model Law will provide additional avenues for recognition of foreign insolvency proceedings, fostering cooperation and communication between domestic and foreign courts and insolvency professionals. It will enable India to align with global best practices in insolvency resolution and liquidation thereby attracting global investors, creditors, governments, international organizations and multinational corporations about the robustness of India's financial sector reforms.

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(ii) Flexibility: The Model Law is designed to be flexible and to respect the differences amongst national insolvency laws.

(iii) Protection of domestic and public interest: The Model Law enables refusal of recognition of foreign proceedings or provision of any other assistance if such action contradicts domestic public policy.

(iv) Priority to domestic proceedings: The Model Law gives precedence to domestic insolvency proceedings in relation to foreign proceedings.

(v) Mechanism for cooperation: The Model Law incorporates a robust mechanism for cooperation and coordination between courts and insolvency professionals, in foreign jurisdictions and domestically facilitating faster and effective conduct of concurrent proceedings.

IBBI (Liquidation Process) (Second Amendment) Regulations, 2018: The Ministry of Corporate Affairs ("MCA") has amended the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 for the second time this year, vide its Notification dated 22nd October, 2018, which are effective forthwith.

There has been inclusion of the term business for realisation of assets and mode of sale. In addition to the first amendment on 27th March, 2018 which enhanced the liquidator's mode of sale during liquidation, the MCA has in amplification to this, given the power to the Liquidator to sell the business or businesses of the corporate debtor as a going concern. Further, it has been mandated that assets vested with security interest shall not be sold unless the same has been relinquished.

For the valuation of assets or businesses to be sold under liquidation process, the liquidator must consider the average of estimates of value arrived at under IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 or IBBI (Fast Track Insolvency Resolution Process for Corporate Persons) Regulations, 2017. The average of two estimates to be taken as the value of the assets or businesses.

In cases where the same is not done, the liquidator is mandated to appoint two registered valuers within seven days of commencement of liquidation proceedings to determine the realisable value of assets and businesses to be sold. MCA has listed out four categories of persons not to be appointed as registered valuers including a related party of the corporate debtor amongst others. The Valuer is to submit independently to the liquidator the estimates of realisable value of assets or businesses after physical verification of the assets of the corporate debtor, computed in accordance with the Companies (Registered Valuers and Valuation) Rules, 2017.

Further, FORM B for public announcement under Regulation 12 of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 has been revised by the MCA.

The MCA, by this amendment has widened the ambit for liquidators to realise monetary value from not only assets but also from the business of the corporate debtor which was omitted in the original liquidation process regulations and the subsequent amendment, earlier this year. Additionally, a fixed period has been set to appoint the registered valuers to minimise delay due to ambiguity of the provisions.

Prepaid Payment Instruments (PPIS) – Operational guidelines for interoperability: The Reserve Bank of India ("RBI") has issued guidelines for interoperability of prepaid payment instruments ("PPI") via a notification dated 16th October, 2018.

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Interoperability refers to technical compatibility enabling a payment system to be operated in synchronicity with other payment systems, thereby allowing persons in different systems to undertake, clear and settle payment transactions across systems without participating in multiple systems.

Adherence to these requirements are mandated to all PPI issuers intending to implement interoperability through Unified Payments Interface **("UPI")** and/or card networks. These guidelines are in addition to the Master Direction on PPI's. The RBI requires the PPI issuers to have a policy approved by the board, for achieving PPI interoperability.

In cases where PPI's are issued in the form of wallets, interoperability is to be enabled through UPI. Further, where PPI's are issued in the form of cards, cards are to be affiliated to the authorised card networks. PPI issuers like Meal, Gift and MTS operating exclusively in specific segments may also implement interoperability. Interoperability shall be facilitated to PPI accounts in compliance with Know Your Customer **("KYC")** norms and entire acceptance infrastructure. The RBI has instructed PPI issuers to adhere to all technical requirements, certifications and audit requirements etc of card networks or UPI including membership type and criteria, merchant on-boarding etc including regulations applicable to specific payment system. With respect to reconciliation, customer protection and grievance redressal, the RBI has mandated PPI issuers to adhere with the guidelines of card networks and UPI on a daily, weekly or monthly basis as the case warrants for reconciliation of positions and adherence to all prescribed dispute resolution and customer grievance redressal mechanisms.

Ratio Decidendi

NCLT has exclusive jurisdiction over disputes regarding allotment of shares in a company

Brief Facts:

SAS Hospitality (Plaintiff) held 99.96% share capital in the Surya Constructions Pvt. Ltd. (Defendant Company). The Defendants Nos. 5 to 9 were allotted shares of the Defendant Company in an illegal and clandestine manner by transferring the monies belonging to the Defendant Company and showing an artificial deposit of INR 1.6 crores. Effectively, the shareholding of the Plaintiff was diluted to 21.44% from 99.96%. One of the directors had also approached the Company Law Board (CLB) seeking redressal and vide order dated 24th October, 2013, a status quo order was passed by the CLB.

Points for Consideration:

Whether a civil court or the National Company Law Tribunal (NCLT) has jurisdiction over disputes regarding allotment of shares in a company?

Observed:

The Court analyzed the scheme of the Companies Act, 2013, along with the constitution of the NCLT and observed that the NCLT has been vested with powers that are far reaching in respect of management and administration of companies. The said powers of the NCLT include powers as broad as "regulation of conduct of affairs of the company" under Section 242(2)(a), as also various other specific powers.

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The Court held that the bar under Section 430 of the 2013 Act being absolute in nature, the jurisdiction to adjudicate the disputes raised in the present case vests with the NCLT. If the tests are applied i.e., as to whether the Tribunal's order is attributed finality and as to whether the Tribunal would be able to do what a Civil Court could do, an order under Section 59 of the 2013 Act has specific consequences for non-compliance.

It was held that the order is appealable to the appellate tribunal. It noted that under Section 242(2)(d) of the 2013 Act, the Tribunal can impose restrictions on the transfer or allotment of the shares of the company. It can also pass an interim order under Section 242(4) of the 2013 Act. Consequences for non-compliance have also been provided under Section 242(4) of the 2013 Act. The Court held that by applying the tests laid down therein, in issues relating to allotment of share capital, alteration and rectification of the register of members, the NCLT is 'empowered to decide'. Further, the Court also held that it would have no jurisdiction as the matter is also pending before the CLB (now transferred to the NCLT under Section 434 of the Companies Act, 2013). [*Sas Hospitality Pvt. Ltd. and Ors.* v. *Surya Constructions Pvt. Ltd. and Ors.* - Delhi High Court, MANU/DE/3791/2018]

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