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Lexstone Insight:

The Parties are entitled for full refund of their Court fee irrespective of the fact whether they have settled the matter using Court's machinery or any other mode/ infrastructure.

LEGAL UPDATES

- Parties entitled for refund of Court fee if the matter gets settled.

High Court of Judicature at Madras v/s M. C. Subramaniam & Ors.
(2021) 3 SCC 560

The Hon'ble Supreme court while deciding the issue of Return of Court fee extended its view to Section 69-A of the Tamil Nadu Court Fee and Suit Valuation Act, 1955 along with Section 89 of the Code of Civil Procedure Code.

The Hon'ble Supreme Court through the present Judgement categorically stated that the Courts must be liberal while interpreting the said provisions in a manner that it should serve their objective and purpose. The Hon'ble Apex Court further held that construing the provisions narrowly would lead to a situation wherein parties who settle their dispute through in accordance with Section 89, CPC would be entitled to claim refund of their court fee, whilst parties who settle the disputes privately will be left without any mean, such differential treatment between two similar situated persons, would constitute a violation of Article 14 of the Constitution.

The Hon'ble Court while arriving at the conclusion also stated that the provision of Section 89 of C.P.C. must be understood in the backdrop of longstanding proliferation of litigation in the Civil Courts and that the provision was enacted to reward parties who have chosen to withdraw their litigations in favour of more conciliatory dispute settlement mechanisms, thus saving the time and resources of the Court, by enabling them to claim refund of the court fees and the parties who have agreed to settle their disputes without requiring judicial intervention under Section 89, CPC are even more deserving of this benefit.

: Rishi Vohra, Principal Associate

Alternative remedy prior to Habeas Corpus

A Bench of Hon'ble Apex Court comprising of Hon'ble Justice Dinesh Maheshwari and Justice Annurudha Bose on 20.05.2021 directed a petitioner, who had filed a Habeas Corpus plea under Article 32, against illegal detention of his wife by her father to pursue remedy u/s 97 CrPC (search for a person who is wrongfully confined). The husband had filed the writ (Habeas Corpus) contending that his wife had been wrongfully detained by her family because they had not consented to their marriage. In course of argument, the Judge reminded the Petitioner about Section 97 of Cr.P.C and subsequently the Petitioner had to withdraw his writ petition on the ground of availability of alternative remedy.

Section 97 in The Code of Criminal Procedure, 1973

"Search for persons wrongfully confined. If any District Magistrate, Sub- divisional Magistrate or Magistrate of the first class has reason to believe that any person is confined under such circumstances that the confinement amounts to an offence, he may issue a search- warrant, and the person to whom such warrant is directed may search for the person so confined; and such search shall be made in accordance therewith, and the person, if found, shall be immediately taken before a Magistrate, who shall make such order as in the circumstances of the case seems proper".

Section 97 of the Cr.P.C states that when a person is confined under certain circumstances, defined therein, the confinement is illegal. If the District Magistrate (Executive), SDM or Judicial Magistrate of First class "has reason to believe that such person is [illegally] confined", they can issue a search warrant to find that person.

The Hon'ble Court observed that the Police, the District Magistrates and the SDMs must take such requests filed by the complainants seriously so that they would not be denied justice and felt the need to unnecessarily approach the Hon'ble Apex Court. This will save the precious time of the Courts and will lead to a better and just society where rights are effectively enforced - even outside the Courts. In conclusion, Section 97 of the Code of Criminal Procedure has enormous potential for use in habeas corpus pleas and must not become a 'dead-letter' law due to the shortcuts taken by the litigants.

: Sahil, Principal Associate

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People should refrain themselves from directly approaching the Hon'ble Supreme Court by way of filing writ of 'Habeas Corpus' without exhausting alternative remedy under Section 97 of Cr.P.C. as application filed under Section 97 Cr.P.C. can be said to be an alternative remedy prior to 'Habeas Corpus' and so that it does not become a "Dead Letter" due to these shortcuts.

- RBI clears the buzz in relation to Cryptocurrency.

RBI vide its circular being RBI/2021-22/45 | DOR. AML.REC 18 /14.01.001/ 2021-22 dated 31.05.2021 issued a clarification stating banks or entities cannot cite RBI's 2018 order [RBI circular DBR.No.BP.BC.104/ 08.13.102/2017-18 dated April 06, 2018] that barred them from dealing with virtual cryptocurrencies. The RBI's statement comes in the wake of several media reports claiming some banks are warning customers against dealing in virtual currencies by referring to the RBI's April 6, 2018, order.

The RBI 2018 order is no longer valid now and it further clarified that such references to the above circular by banks/ regulated entities are not in order as 2018 circular was set aside by the Hon'ble Supreme Court on March 04, 2020, in the matter of Writ Petition (Civil) No.528 of 2018 (Internet and Mobile Association of India v. Reserve Bank of India). As such, in view of the order of the Hon'ble Supreme Court, the circular is no longer valid from the date of the Supreme Court judgement, and therefore cannot be cited or quoted from.

The RBI statement said banks and other entities can, however, "continue to carry out customer due to diligence processes in line with regulations governing standards for Know Your Customer (KYC), Anti-Money Laundering (AML), Combating of Financing of Terrorism (CFT) and obligations of regulated entities under Prevention of Money Laundering Act, (PMLA), 2002, in addition to ensuring compliance with relevant provisions under Foreign Exchange Management Act (FEMA) for overseas remittances.

: Karan Valecha, Senior Associate

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This is a very positive development for the whole industry and as such it clears the confusion among banks and other entities about whether they can service their clients in the crypto industry.

Dying Declaration cannot be the sole basis for conviction under Section 302 IPC, re iterates SC.

The Hon'ble Supreme Court has set aside the order of the Karnataka High Court which had convicted two persons under section 302 Indian Penal Code and sentenced them to life imprisonment while stating that we find it difficult to uphold the conviction based on Dying Declaration. In this case, the Karnataka High Court reversed the acquittal recorded by the Trial Court and convicted the accused in a murder case. To convict them, the High Court relied on the dying declaration made by the deceased.

The Apex Court said that dying declaration statement of deceased cannot become the sole factor and cannot be relied upon in convicting the appellants namely Jayamma and Lachma, even though testimonies of PW -11 (Inspector) who recorded the statement of deceased and PW -16(Doctor) who endorsed that deceased was in fit state of mind to give her voluntary statement, are conclusive and unimpeachable.

The Dying declaration becomes more unreliable since half of the prosecution witnesses during the proceedings turned hostile and due to which, such corroboration lacked, and prosecution case were damaged already in the trial, but the High court reversed the findings of the Ld. Trial court and held that evidence of dying declaration was clinching and it was sufficient enough to book the appellants under offence of section 302 r/w 34, 504, 114 of IPC.

The Apex Court rendered detailed reasons, why it is not relying upon the dying declaration of the deceased victim, such as:

a) *casts doubt upon so much of accuracy of narration of events in Dying Declaration;*

b) *Injured victim was an illiterate old person – narrated whole story exactly – creates a doubt;*

c) *Victim was given highly sedative painkillers- it is likely to create hallucination;*

d) *Contradictory statements of Inspector and Doctor;*

e) *Purported document containing oral endorsement of doctor showed before courts;*

f) *alleged motive for Homicidal death is highly doubtful;*

g) *the court said reason for it to dissuade from harping upon dying declaration is the conduct of the parties i.e. natural recourse expected to happen. None of the family member report such a ghastly crime.*

h) *As a rule of prudence, Presence of Judicial/Executive magistrate to record a dying declaration – to strengthen case of Prosecution, the Court further said that the prosecution had enough time to call a Judicial/Executive Magistrate to record the dying declaration. It is common knowledge that such Officers are judicially trained to record dying declarations after complying with all the mandatory pre-requisites, including certification or endorsement from the Medical Officer that the victim was in a fit state of mind to make a statement.*

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The Court must be satisfied that the dying declaration is true and voluntary, and only then could it be the sole basis for conviction without corroboration. The dying declaration is therefore admissible in evidence on the principle of necessity as there is very little hope of survival of the maker, and if found reliable, it can certainly form the basis for conviction held by the Hon'ble Supreme Court.

The apex court further referred to the various judgments, which had already dealt in the past pertaining to evidentiary value of Dying Declaration, and its sustenance of conviction solely based there upon. Referring to a few precedents on the subject [P.V. Radhakrishna. v. State of Karnataka (2003) 6 SCC 443, Sham Shankar Kankaria v. State of Maharashtra (2006) 13 SCC 165, Chacko v. State of Kerala 2003) 1 SCC 112, Surinder Kumar v. State of Haryana (2011) 10 SCC 173].

: Kartikey Yadav, Senior Associate

- SEBI notifies significant amendments in the SEBI Takeover Code

Securities Exchange Board of India, vide notification no. SEBI/LAD-NRO/GN/2021/19 dated 05.05.2021 notified certain amendments in the SEBI (Substantial Acquisition of Shares and Takeover) Regulations, 2011 by making SEBI (Substantial Acquisition of Shares and Takeover) (Amendment) Regulations, 2021 (hereinafter the "Amendment Regulations"). Amendments have been made in the following regulations:

A. *Regulation 1- Short title, commencement, and applicability*

"Institutional Trading Platform" in the proviso to sub-regulation (3) be substituted with the word "Innovators Growth Platform".

B. *Regulation 3- Substantial acquisition of shares or voting rights*

This regulation states that no acquirer shall acquire shares or voting rights in the target company which taken together, along with person acting in concert, entitle them to exercise 25% or more of the voting rights without making a public announcement of an open offer for acquiring shares of the target company.

Amendment: Sub-regulation (5) has been inserted which states that in case the shares are listed on Innovators Growth Platform, then the percentage shall be 49% not 25%.

C. *Regulation 6- Voluntary offer*

Regulation 6 pertains to the voluntary open offer which an acquirer and persons acting in concert holding shares or voting rights in the target company to the extent of 25% or more can make which shall not breach the maximum permissible non-public shareholding.

Amendment: Sub-regulation (4) has been inserted which states that in case the shares are listed on Innovators Growth Platform, then the percentage shall be 49% not 25%.

D. *Regulation 26- Obligations of the target company*

This regulation talks about the obligations of the target company. According to sub-regulation (6), upon receipt of the detailed public statement, the board of directors of the target company are under an obligation to constitute a committee of independent directors to provide reasoned recommendations on such open offer and the target company shall publish such recommendations.

Amendment: A proviso has been inserted by Amendment Regulations that while providing reasoned recommendations on the open offer proposal, the committee shall disclose the voting pattern of the meeting in which it was discussed.

E. *Regulation 29- Disclosure of acquisition and disposal*

i. Sub-regulation (1) states that the acquirer shall disclose the shareholding and voting rights in the target company aggregating to 5% or more of the shares of the target company.

Amendment: For securities listed on Innovators Growth Platform, the limit is 10% not 5%.

ii. Sub-regulation (2) specifies that any person along with person acting in concert holds equivalent or more than 5% shares or voting rights in the target company shall make a disclosure in case there is change in shareholding or voting rights exceeding 2% in the target company.

Amendment: For securities listed on Innovators Growth Platform, the above-mentioned limits shall be considered as 10% and 5% respectively.

: Akanksha Jain, Associate

Lexstone Insight:

In the year 2015, SEBI introduced the Institutional Trading Platform to facilitate listing of new-age start ups. Further, it has been renamed as Innovative Growth Platform. With Amendment Regulations, SEBI has reviewed the takeover norms for shares listed on Innovative Growth Platform.

ARTICLES FOR PEER REVIEW

- Will – Necessity for Succession Planning and Harmony in Family

If life insurance is necessary for safety and well-being of family members after death of a person, in same manner, his Will is equally important to avoid any property disputes between the family members over distribution of his assets after his death.

In such difficult times of insecurities and chaos, if a person has been advised by any legal counsel or a financial advisor to make a Will- then trust him, it is in his best interest. Recently, we are seeing increasing family and property disputes amongst the close family members of a deceased person over distribution of his assets who died suddenly during COVID-19 pandemic but without leaving a Will or Valid Will.

Writing a will is an analytical component of estate planning. Pandemic is just a reminder of the relevance of a Will. Life is uncertain and we never know when it will come to an end, particularly during any pandemic. Covid-19 Pandemic has caused over 3 lakhs deaths just in India.

A person while preparing a will, can not only choose to leave his estate to the beneficiaries of his choice, but he can also leave legacies (fixed sums of money) or specific gifts or possessions (anything from jewelry to a sentimental book) to a variety of named beneficiaries. A person can also name persons who he wishes to deal with the administration of the estate, the executors, to act in accordance with the terms of his will.

What is a Will

"Will" is a *legal declaration of the intention of a testator with respect to his property which he desires to be carried into effect after his death*. It is defined under section 2(h) of the Indian Succession Act, 1925. A testator is the person making the Will. Will is a legally enforceable declaration of how a person wants it property and assets to be distributed after death.

Some of the advantages of making a Will

Will is an effective tool to curtail family disputes. A Will makes it much easier for the testator's family or friends to sort everything out when he dies, and on the contrary, without a Will, the process can be more time consuming and stressful. If a person does not write a will, everything he owns will be shared out in a standard way defined by the law – which is not always the way he might want.

Who can write a Will

Section 59 of the Indian Succession Act, 1925 talks about persons capable of making Wills. The said Section provides - *"Every person of sound mind not being a minor may dispose of his property by Will"*.

Even though any person of a sound mind can make a Will but there are certain conditions for making a Valid Will:

1. *The testator shall sign or shall affix his mark to the Will.*
2. *The signature or mark of the testator shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a Will.*
3. *The Will shall be attested by two or more witnesses.* No beneficiary or legatee should be the witness to a will as it creates doubt with respect to the authenticity of the Will.

Essential elements of a Will

Declaration: A Will should clearly declare the intention of a Testator. It should be clear and unambiguous.

Listing of Assets: The person making/drafting the Will should clearly list all his movable and immovable assets.

Dividing of Assets: Will should clearly state who is to receive which assets. Going item-wise may remove any ambiguity. If the testator wishes to give his assets to a minor, do not forget to appoint a custodian of the assets. It is important to select someone a testator trusts as a custodian.

Will can be revocable by the testator during his lifetime. Although Wills are usually made for disposing property, they can also be made for appointing executors, for creating trusts and for appointing testamentary guardians of minor children.

How to draft a Will

There is no particular format for a Will. It can be typed or handwritten. The most important requirement for a Will is that the intentions of the testator should be clear and unambiguous. A person while drafting the contents of a Will should keep in mind the above-stated essential elements to avoid any sort of confusion after his death. Section 74 of Indian Succession Act states the same in clear terms. Relevant section reads as follows:

"*A Will should be written in a manner that is easy to read and understand. As far as possible, the Will should avoid legalese and be worded in simple language. It should be specific and clear with respect to the intentions of the testator*."

Stamp paper is not necessary when writing the Will but writing the Will on a stamp paper will prove the authenticity about the date by which one can identify when the Will was made.

Registration of Will is not necessary but preferred to avoid controversy

The law governing the registration of a Will is Section 18 Indian Registration Act, 1908 which provides that the registration of Will is optional. A will need not be registered compulsorily but if so, desired it may be registered by the testator during his lifetime.

Registration of a Will reduces the chances that the Will may be challenged as being a forgery. Mere non-registration cannot be a reason to doubt the validity or genuineness of a will. However, the doubt as to the validity of a Will would be less significant if it is registered and the sub-registrar certifies that it was read over to the executor who, on doing so, has admitted the contents as well.

The other advantage of registration is that the Will is in safekeeping at the office of the Registrar. Registered Will cannot ordinarily be tampered with, destroyed, mutilated, lost, or stolen.

Though the registration of a Will is not compulsory, it can be registered with the sub-registrar. If, at any time, the testator wishes to withdraw the Will, he can do so. A Will also can be sealed and kept in safe custody.

Landmark Supreme Court Judgment on Will

In ***Jagdish Chand Sharma v. Narain Singh Saini (Dead) Through LRs*. and Others**, the Hon'ble Supreme Court referring to Section 63 of the Indian Succession Act had illustrated that to validly execute the Will, the testator would have to sign or affix his mark to it or the same must be signed by some other person in his presence and on his direction. Further, the signature or mark of the testator or signature of the person signing for him must be so placed that it was intended to give effect to the writing as a Will. Section 63 mandates that the Will should be attested by two or more witnesses each of whom has seen the testator sign or affix his mark to it or has seen some other person sign it in the presence and on the direction of the testator, or has received from the testator a personal acknowledgement of his signature or mark, or the signature of such other person and each of the witnesses has signed the Will in the presence of the testator, though it is not necessary that more than one witness be present at the same time and that no particular form of attestation is necessary. The execution and attestation of the Will are mandatory in nature and any failure and deficiency in adhering to the essential requirements would result in invalidation of the instrument of disposition of the property.

Whether a person can make changes to his last Will

Well, the answer is yes through a Codicil. A codicil is a legal document that dictates any modifications or amendments to a person's last Will and Testament. If, for any reason, a person feels the need to change some part of his Will which can include adding new arrangements or removing old ones, he can easily do so with a codicil.

In case of a registered Will, all subsequent alterations, or modifications (Codicils) should also be registered. Any non-registered alterations or modifications or explanations or deletions are not accepted by courts.

However, the testator may make a fresh Will revoking the registered Will and declaring the provisions of the fresh Will as his final desires. Even if the fresh Will is unregistered (if it is of a date later than the registered Will), the fresh Will shall prevail over the registered Will.

Living Will

The concept of a Living Will is still new to a country like ours and therefore, considering the current crisis going on in our country, a person should be made aware of the same.

A Living Will is a legal written document that spells out medical treatment a person would and would not want to be used to keep him alive. A person can avoid unnecessary suffering and relieve his care takers of decision-making burden during times of crisis. A person can make a living will and direct his beneficiaries/executor as to what must be done in an event of an accident, medical negligence, disease or any other reason/because he enters into a coma/permanent vegetative state. Living Will can also be construed as directions to the healthcare persons if in any event the above-stated situation arises.

It basically determines healthcare measures that will be taken or avoided when the person is alive but, in a position, where they are unable to take healthcare decisions for themselves or to communicate those decisions; for example, if they are in a coma.

A patient through his living will can choose for Passive Euthanasia if he enters an irreversible coma state and does not want to be on an artificial life support. This is in accordance with the rules and guidelines passed by the Hon'ble Supreme Court of India in a landmark judgment having citation "*(2018) 5 Supreme Court Cases 1*".

Importance of Executors

The role of Executors in a Will is very significant. Executors are the trusted persons of the Testator who are given the responsibility of distribution of his assets to the beneficiaries named in the Will. The Executor should be of 18 years of age and of sound mind. It is advisable to name atleast two Executors or appoint a committee or panel of persons who will act as the Executor of a Will. Testator can also name substitute executors in case the original executor denies to fulfil his duties.

The Executor can be given the responsibility of (i) meeting the medical and funeral expenses from the estate left by the testator; (ii) payment of money that is due from the testator or collecting money due to the testator; (iii) taking control and custody of the assets and management thereof till distribution to the named beneficiaries; (iv) obtaining probate of Will, if required, from the court; (v) representing the testator in any legal action (excluding criminal and defamatory matters); and (vi) implementation of the Will by distributing the assets to the named beneficiaries.

The professionals may also be named as executors of Will who will be neutral and fair in discharging their duties as executors of the Will.

Conclusion

COVID OR NO-COVID- **There are no good and bad times to prepare a Will. Any person especially when he is the sole earning member of a family, should consider writing a Will.** Writing a will is especially important if a person have surviving parents and a spouse who are dependent on him financially, or if he wants to leave something to people outside his immediate family. As per the famous saying - 'Better late than never', perhaps it is time for people to write a Valid and Effective Will for the security, safety and protection of their loved ones.

: Harneet Kaur, Senior Associate

- CRYPTOCURRENCY IN INDIA

ABOUT CRYPTOCURRENCY

A cryptocurrency or crypto, is a virtual currency which is aptly secured by cryptography. It is designed to work as a medium of exchange, where individual ownership records are stored in a computerized database. The word "cryptocurrency" is procured from the encryption techniques which are used to secure the network. Cryptocurrencies work based on blockchain. Blockchain connotes decentralized technology spread across many computers that manages and records transactions.

In India, at present, cryptocurrency is at the blooming juncture, but it is neither declared illegal nor legal and it is not specifically regulated by any Indian law. In India, the apex financial authority i.e., the Reserve Bank of India, has understood cryptocurrency as a form of digital/ virtual currency generated through a series of written computer codes that rely on cryptography which is encryption and is thus independent of any central issuing authority per se.

FLIP-FLOP AND UNCERTAINTY AROUND CRYPTOCURRENCY IN INDIA

In 2018, the Finance Ministry released a statement saying - *"The Government does not consider Cryptocurrencies as Legal Tender or Coin and will take all measures to eliminate the use of these Crypto Assets in Financing Illegitimate Activities or a Part of the Payment System. The Government will explore the use of Blockchain technology proactively for assuring in Digital Economy."*

Thereafter, on 6th April 2018, the Reserve Bank of India vide its Circular No. RBI/2017-18/154 DBR.No.BP.BC.104 /08.13.102/2017-18 prohibited all entities governed by it to stop offering any kind of service to the entities associated with virtual currencies. In 2018, Crypto Token and Crypto Asset (Banning, Control and Regulation) Bill, 2018 was introduced to control cryptocurrency market. The main highlights of the bill included prohibition of dealers of crypto tokens to be sold as securities or investment schemes as there is gap in regulatory framework and a register was required to be maintained of all the transactions on the recognized exchanges.

In July 2019, a high-level Inter-Ministerial Committee, constituted by the Government of India in 2017 to report on various issues pertaining to use of virtual currency, submitted its report recommending a blanket ban on private cryptocurrencies in India. Thereafter, in 2019, ***Banning of Cryptocurrency and Regulation of Official Digital Currency Bill, 2019*** was introduced. The bill envisaged banning of crypto currencies to be used as a medium of exchange, as a payment system, for providing cryptocurrency related services, for trading with Indian or foreign currency, for raising funds, for investments.

However, the circumstances prevailing around cryptocurrencies and their usage completely changed on 4th March 2020, when the Hon'ble Supreme Court of India in the case of ***Internet and Mobile Association of India v Reserve Bank of India***[1], struck down the Reserve Bank of India's Circular that had effectively imposed a ban on virtual currency trading in India.

In 2021, it was divulged by the Government of India that it will introduce a new bill on cryptocurrencies, i.e. ***The Cryptocurrency and Regulation of Official Digital Currency Bill, 2021***. The Bill aims to create a facilitative framework for creation of the official digital currency to be issued by the Reserve Bank of India. The Bill also seeks to prohibit all private cryptocurrencies in India; however, it allows for certain exceptions to promote the underlying technology of cryptocurrency and its uses. Further, there are speculations that Government of India is likely to set up a panel of experts to study the possibility of regulating crypto.

Of lately, Reserve Bank of India vide its Circular No. *RBI/2021-22/45 DOR. AML.REC 18 /14.01.001/2021-22* dated 31st May, 2021[1] has clarified that circular issued by Reserve Bank of India in 2018 is no longer valid from the date of the Supreme Court judgement, and therefore cannot be relied upon. Further, it was stated by Reserve Bank of India that banks/other entities dealing in virtual currencies may continue to carry out customer due diligence processes in consonance with regulations governing standards for Know Your Customer (KYC), Anti-Money Laundering (AML), Combating of Financing of Terrorism (CFT) and obligations of regulated entities under Prevention of Money Laundering Act, (PMLA), 2002 in addition to ensuring compliance with relevant provisions under Foreign Exchange Management Act (FEMA) for overseas remittances.

PROS AND CONS OF CRYPTOCURRENCY

Just like any other technology, cryptocurrency has its pros and cons. Pros of using cryptocurrencies includes relaxations pertaining to the fund transfer, no dependency on a third party while making payments, cryptocurrency systems come with a user "wallet" or account address which is accessible only by a public key and private key. The private key is only known to the owner of the wallet. Cons includes almost hidden nature of cryptocurrency transactions makes them easy to be the focus of illegal activities such as money laundering, tax-evasion and possibly even terror-financing[1].

FUNCTIONING OF CRYPTOCURRENCY

The following entities are involved in trading of cryptocurrency:

(1) **Crypto Miner** who creates cryptocurrency, such as Bitcon, Ethereum, Ripple, Litecoin, Dogicoin, etc.
(2) **Crypto Exchange** is a market intermediary and broker which provides trading platform for sale-purchase of cryptocurrency, such as WazirX, Coinx, etc. Crypto exchange is similar to trading platform of NSE, BSE, MCX, etc. providing trading platform for shares, mutual funds, currency and commodity.
(3) **Digital Wallet** which provides digital storage for cryptocurrency similar to depositories in India such as NSDL and CDSL.
(4) **Smart Token Fund (STF) Traders** similar to stockbrokers.
(5) **Payment Processor** for settlement of payments. While payments of trades executed within same country and same currency are settled through normal banking channel, on the contrary, payments of trades executed in multiple jurisdictions and/or in multiple currency are settled through Peer-to-Peer (P2P) exchange of cryptocurrency without involving any bank or financial institution.

For example, transaction in INR by an Indian resident with another Indian resident is settled by way of exchange of real money/ fiat currency between buyer and seller (non-P2P transaction). However, transaction involving more than one currency where buyer and seller are in different countries involves settlement through P2P transaction. In WazirX, non-P2P transaction is carried out by WazirX (Zanmai Labs Pvt. Ltd.) but P2P transaction is carried out by its holding company, Binance Holdings Ltd. (a company headquartered in Malta and based out of China).

CRYPTOCURRENCY OUTSIDE INDIA

Legality of cryptocurrencies varies from country to country. For instance, cryptocurrency exchanges are legal in the United States and fall under the regulatory scope of the Bank Secrecy Act (BSA). In UK, cryptocurrencies are considered as a property instead of a legal tender since UK has no specific cryptocurrency laws. Further, from 10th January 2021, all UK crypto asset firms (including recognized cryptocurrency exchanges, advisers, investment managers, and professionals) that have a presence or market product in UK, or that provide services to UK resident clients, are mandated to register with the Financial Conduct Authority (FCA). Apart from this, entities engaging in activities involving crypto assets must also comply with the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 (MLRs).

CRYPTOCURRENCY IN INDIA – LEGAL ISSUES

The following legal issues need attention of the regulators, entities and investors involved in trading of cryptocurrencies in India:

1. Foreign Exchange Management Act

Cryptocurrency is not a legal tender in India and is therefore not an Indian currency. However, in many countries (e.g., USA, Canada, Australia, European Union, etc.), many companies (e.g. Dish Network, Microsoft stores, Subway, etc.) have started accepting payment in the form of cryptocurrency for sale of their products in exchange. Due to its acceptability in many countries for payment of goods and services, cryptocurrency may be termed as virtual foreign currency for an Indian resident. On the contrary, in some countries, cryptocurrency is considered as asset or commodity. In our view, trading in cryptocurrency is akin to binary trade which is not permissible in India. Even otherwise, any transaction of cryptocurrency between the person resident in India and the person resident outside India will have implications under the Foreign Exchange Management Act 1999 and rules thereunder.

In general, cryptocurrency is not backed by any business or valuable asset and its prices are determined purely on the basis of demand-supply principle and that is why, we see huge fluctuation in the prices of cryptocurrency. Therefore, transactions in cryptocurrency can be considered as speculative in nature which is prohibited as per Schedule I of the FEMA (Current Account Transactions) Rules 2000.

In case cryptocurrency is considered as virtual foreign currency in view of its acceptability in many countries for payment of goods & services, transactions in cryptocurrency will be regulated by FEMA (Permissible Capital Account Transactions) Regulations 2002. There is a limit of USD 2000 for retention of foreign currency notes by an Indian resident as per the Foreign Exchange Management (Possession and Retention of Foreign Currency) Regulations, 2015.

In case cryptocurrency is considered as asset or commodity, transactions in cryptocurrency will be regulated by FEMA (Export of Goods & Services) Regulations 2015. It means, the buyers and sellers of cryptocurrency are doing export-import of cryptocurrency in digital form but may be without complying with export-import rules including requirement to have importer-exporter code (IEC) and without payment of any custom duty.

Assuming that transaction in cryptocurrency by an Indian resident is covered under the Liberalised Remittance Scheme (upto USD 2,50,000), such persons may not be complying with the provisions of this Scheme which includes filing of Form A-2 with RBI through Authorised Dealer.

2. **Income Tax Act and Black Money Act** – In case of remittance under the Liberalised Remittance Scheme, as per Section 206C of the Income Tax Act 1961, TCS @ 5% needs to be collected by Authorised Dealer at the time of collection of payment. Further, cryptocurrency (whether virtual foreign currency, asset or commodity) should be disclosed in the Income Tax Return, otherwise it may have implications under the Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015.

3. **Money Laundering** – Cryptocurrency can be used for conversion of black money into legal money similar to trading in penny stocks. Cryptocurrency can be transferred from one digital wallet to another digital wallet which are in different jurisdictions and these transactions will not be reported to any regulators. As per media reports, many criminals and hackers have started blackmailing and extortion by demanding payments in the form of cryptocurrency.

CONCLUSION

Considering the legal issues and threat of tax evasion, money laundering, cyber-attack and terrorism, cryptocurrency may be completely banned in India. Considering number of Indian investors dealing in cryptocurrency and amount invested by them, the Government of India should take immediate action to clarify its position on cryptocurrency, and till then, a regulatory framework for registration, reporting and record keeping by the persons/ entities involved in dealing of cryptocurrency should be implemented to balance the fundamental right guaranteed under Article 19 of the Constitution of India vis-à-vis safety, security and sovereignty of India.

: Karishma Hans, Senior Associate

MEDICO LEGAL

- Medical Negligence

Medical negligence is punishable under various laws such as torts, IPC, Indian Contracts Act, Consumer Protection Act, etc. It can be defined as misconduct by a medical practitioner or doctor. Failure of a doctor and hospital to discharge this obligation is essentially a tortious liability. A tort is a civil wrong (*right in rem*) as against a contractual obligation (*right in personam*) - a breach that attracts judicial intervention by way of awarding damages.

Thus, a patient's right to receive medical attention from doctors and hospitals is essentially a civil right. The relationship takes the shape of a contract to some extent because of informed consent, payment of fee, and performance of surgery/providing treatment, etc. while retaining essential elements of tort.

NEGLIGENCE PER SE

While deliberating on the absence of basic qualifications of a homeopathic doctor to practice allopathy in *Poonam Verma vs. Ashwin Patel and Ors.* (1996) 4 SCC 322, the Supreme Court held that a person who does not have knowledge of a particular system of medicine but practices in that system is a quack. Where a person is guilty of negligence per se, no further proof is needed.

DOCTORS AND CONSUMER PROTECTION ACT, 1986

Doctors in India may be held liable for their services individually or vicariously unless they come within the exceptions specified in the case of ***Indian Medical Association vs V P Santha***. Doctors are not liable for their services individually or vicariously if they do not charge fees.

Thus, free treatment at a non-government hospital, government hospital, health centre, dispensary or nursing home would not be considered a "service" as defined in Section 2 (1) (0) of the Consumer Protection Act, 1986.

BURDEN OF PROOF

The burden of proof of negligence, carelessness, or insufficiency generally lies with the complainant. The law requires a higher standard of evidence than otherwise, to support an allegation of negligence against a doctor. In cases of medical negligence, the patient must establish her/ his claim against the doctor.

In ***Calcutta Medical Research Institute vs Bimalesh Chatterjee,*** it was held that the onus of proving negligence and the resultant deficiency in service was clearly on the complainant. In Kanhaiya Kumar Singh vs Park Medicare & Research Centre, it was held that negligence has to be established and cannot be presumed.

A doctor can be held liable for negligence only if it can be proved that he/she is responsible of a failure that no other doctor with ordinary skills would be guilty of it, if acting with reasonable care. A slip in judgment constitutes negligence only if a professional who is reasonably competent with the standard skills and has acted with ordinary care, would not have made the same error.

JUDICIAL PRECEDENTS:

- The broad principles on this subject have been explained in detail by the three Judge Bench of the Supreme Court in **Jacob Mathew** v**. State of Punjab and Anr. [(2005) 6 SCC 1]**. In paragraph 41 of the decision, the Court observed that:

  "The practitioner must bring to his task a reasonable degree of skill and knowledge and must exercise a reasonable degree of care. Neither the very highest nor a very low degree of care and competence is what the law requires."

- The Supreme Court in V.N. Shrikhande v. Anita Sena Fernandes [(2011) 1 SCC 53] observed that:

  "*18. In cases of medical negligence, no straitjacket formula can be applied for determining as to when the cause of action has accrued to the consumer. Each case is to be decided on its own facts. If the effect of negligence on the doctor's part or any person associated with him is patent, the cause of action will be deemed to have arisen on the date when the act of negligence was done. If, on the other hand, the effect of negligence is latent, then the cause of action will arise on the date when the patient or his representative- complainant discovers the harm/injury caused due to such act or the date when the patient or his representative-complainant could have, by exercise of reasonable diligence discovered the act constituting negligence.*"

  Thus, the Court held that there is no blanket method to decide as to when the cause of action has ensued the consumer.

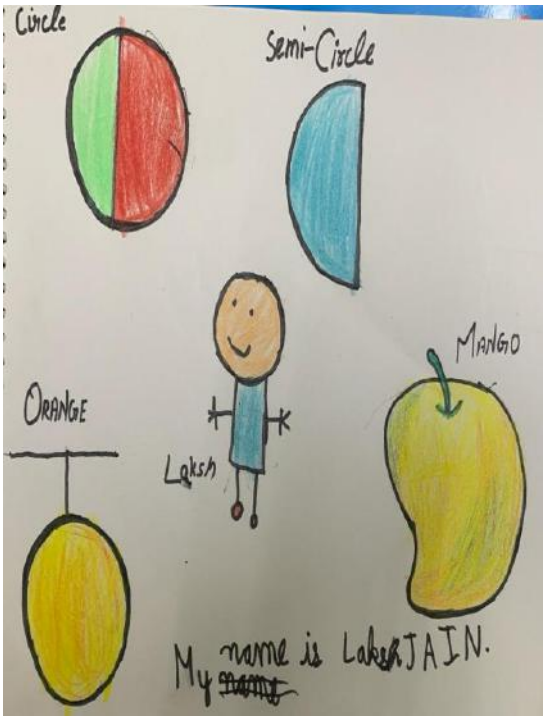
: Harneet Kaur, Senior Associate

KIDS CORNER

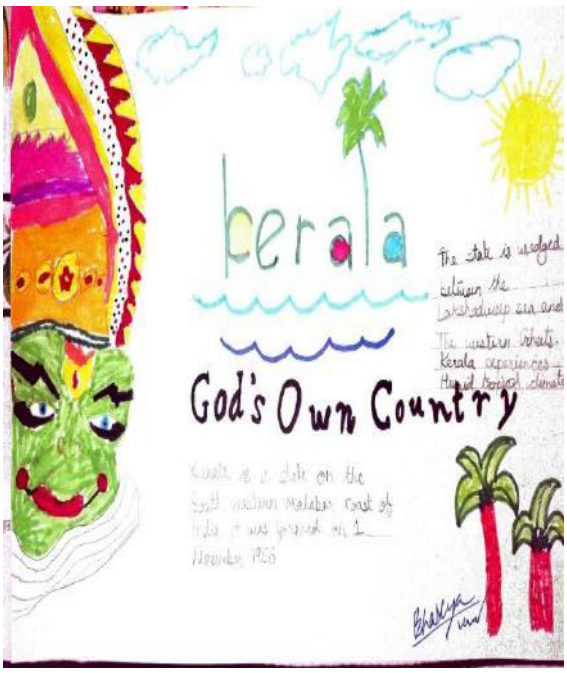
-Tia Sud(16 years)

-Kabeer Malhotra(5 years)

-Vedikaa Virmani (4 years)



-Laksh Jain(7 years)



-Bhavya Virmani (10 years)

-Taarini Yadav(2.5 years)

DO YOU KNOW?

ABOUT TREX

1. The Tyrannosaurus Rex aka T Rex was a carnivorous dinosaur who roamed upon the Earth (in the region which is Canada/USA, now) some 65 million years ago (late cretaceous period).
2. Tyrannosaurus Rex means Tyrant Lizard King.
3. It was enormous with small hands and very sharp teeth. It had a set of 50-60 banana-sized teeth and its bite was more than 10 times stronger than any other dinosaur.
4. T Rex was one of the smartest dinosaurs, it could sense and lure their prey around.
5. It weighed 9000 kg means it weighed around 5000 kg more than an elephant!!
6. Its length was 12.3. mtrs (40 feet), height was 6.1 mtrs and speed was 27 km/hr.
7. More than 20 almost-complete T Rex skeletons have been found, one of which was found in South Dakota, USA, some 20 years ago.

-Ayaan Malhotra(10years)

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