



TAXLAWSCOPE

— beyond the scope —

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“FUTURE OF CRYPTO CURRENCIES IN INDIA”

It is said that necessity is the mother of all inventions. After dealing with the archaic financial institutions that operate with lengthy procedures and also take a cut in every transaction that happens through them, perhaps, it was felt necessary to bypass the system and trade with an alternative instrument. It was then, only a matter of time for the technology to evolve to create an instrument for transactions, sale, barter etc without any administrative interference. That was the idea that led to the birth of virtual currencies (‘VC’). Before attempting to know the future of VCs, from an Indian perspective, it is imperative to understand the position and sentiment towards VCs in India. The Supreme

Court recently, in the case of **Internet and Mobile Association of India v. Reserve Bank of India**¹, had exquisitely analysed the position of VCs and crypto currencies. In India, the RBI had always issued advisories against crypto currencies and VCs since 2013. The trouble brewed when the RBI issued its Circular² no. RBI/2017-18/154, dated 06.04.2018, to all commercial banks, payment banks, non-banking financial institutions, payment system providers to immediately isolate and not provide any more financial services to any person or entity dealing in or settling with VCs.

The main issues before the Hon'ble Court were the scope of RBI to regulate VCs and whether the Circular issued by the RBI was in violation of Article 19(1)(g) of the Constitution. The Court rejected the primary contention of the petitioners that the RBI had no scope to regulate VCs and held that RBI has wide regulatory powers vested with them and therefore can, in fact, regulate VCs as well. In Para 6.90, it was held as follows:

“Therefore, anything that may pose a threat to or have an impact on the financial system of the country, can be regulated or prohibited by RBI, despite the said activity not forming part of the credit system or payment system.”

In response to the second contention of petitioners that the Circular was in violation of Article 19 (1)(g), RBI contended chiefly on the grounds that the petitioners were corporate entities/bodies and not 'citizens' thus, cannot claim the protection of fundamental rights. Further it was also pleaded by them that there was no fundamental right to sell/buy/transact/invest in VCs. For the first objection, the Court held that even though the petitioner was a not for profit organisation, the shareholders and promoters have come up with the second writ petition and therefore, the challenge of the Petitioners is valid. The second objection of RBI was also rejected by the Court on two main reasons namely,

- that at least some of the petitioners are not claiming any right to purchase, sell or transact in VCs, but claiming a right to provide a platform for facilitating an activity (of trading in VCs between individuals/entities who want to buy and sell VCs) which is not yet prohibited by law; and
- that in any case the impugned Circular does not per se prohibit the purchase or sale of VCs.

The Court had demarcated three main categories who trade in cryptocurrencies. The first category are those who engage in such trading as a hobby and they cannot claim the protection under Article 19 (1)(g) as it only covers trade, occupation, profession or business. The second category of users who also cannot claim that the circular had completely shut down their business are those who trade in peer to peer transactions as those transactions and accept payments for purchase of goods and services. The Court, therefore, concluded that only the third category i.e., the cryptocurrency exchanges that completely rely on the banking systems that are deprived of their fundamental right under Article 19(1)(g). The straw that broke the camel's back however was the disproportionality of the damage caused by the circular. The Court held that a heavy burden is cast upon the RBI to show that there existed a larger public interest warranting such a measure of denying banking facilities. Further, the Court held that the RBI did not find any evidence to show that the activities of these VC exchanges have actually impacted adversely to the economy or any other entity regulated by RBI or caused any semblance of damaged suffered by its regulated entities. In view of the above and in absence of any legislation that

bans VCs or exchanges dealing in VCs, denying access to formal banking channels was held to be a disproportionate measure.

Aftermath: What Does The Future Hold For VC?

While the Hon'ble Supreme Court has delivered a rather poetic and a magnificent judgement on VCs and had gone into explaining all the intricacies of the VCs, it may be pointed out that future still looks rather bleak for the general populace dealing in crypto currencies. The main issue with a decentralised currency is the fact that, as noted by the Hon'ble Supreme Court as well, is the very fact that it can be used for anti-social activities, money laundering, economic instability and also terrorism. Thus, the effect of the judgement on allowing VCs to operate in India is rather ephemeral inasmuch as VCs can be terminated at anytime if its deemed to be in the interests and security of the nation by the Parliament or the RBI as well.

In India, the general official outlook towards VC has always been rather hostile. This hostility is further cemented by the **“Banning of Cryptocurrency & Regulation of Official Digital Currency Bill, 2019”**³. This draft bill

seeks to prohibit mining, holding, selling, trading, issuance or use of cryptocurrency in India. If passed, this Bill requires everyone in possession of cryptocurrency to declare and dispose the same within 90 days of its commencement. Further, anyone in possession or using cryptocurrency can face a fine along with a maximum imprisonment of 10 years. Mere possession of cryptocurrency is also illegal as per this Bill. The only exceptions permitted are for experiment, research or teaching. However, whether or not possible, banning it cannot be solution as it does not work in most cases. Instead, India has tremendous scope and opportunity to regularize VC's and let them run through proper channels and monetize on the same. For example, in the United States, Bitcoin is categorised as a property for the purposes of taxation by the Internal Revenue Services⁴. The fact of the matter is that disruptive technologies are expanding at a pace that legislation cannot possibly keep up with. Prohibition and embargos probably worked in the previous century, but banning VCs and placing harsh sentences on legitimate uses of it not only hurts our image as innovator friendly market but also does not serve any ultimate purposes because in the world of peer to peer

payments and the internet, prohibition is somewhat akin to placing a gate on a river.

Conclusion

Cryptocurrencies and VCs have indeed come a long way, especially, in India where an ever growing young population is looking at different new avenues to invest. The judgement of the Hon'ble Supreme Court also caters only to a niche category of users that use cryptocurrency. But this small niche category keeps growing faster by the day and is finding more popularity especially after demonetization. While it is risky for Governments to deal with such VCs as they may pose a threat to fiat currency, imposing a ban seems to be taking the easy way out. On the contrary, this could actually be an opportunity for the Government to give the backing cryptocurrency it needs, and usher into the new era of innovation and digitisation of the currency.

Views expressed are strictly personal.

References:

¹Writ Petition (Civil) No. 373 of 2018.

²“Prohibition on dealing in Virtual Currencies”- Reserve Bank of India Circular, RBI/2017-18/154 dated 06.04.2018. Accessible at https://www.rbi.org.in/Scripts/BS_CircularIndexDisplay.aspx?Id=11243

³Accessible at <<https://www.prsindia.org/billtrack/draft-banning-cryptocurrency-regulation-official-digital-currency-bill-2019>>

⁴IRS Virtual Currency Guidance, Internal Revenue Bulletin: 2014-16
< https://www.irs.gov/irb/2014-16_IRB>