Vedanta Law Chambers

Monthly Newsletter

MONTHLY NEWSLETTER

February 2021 Edition

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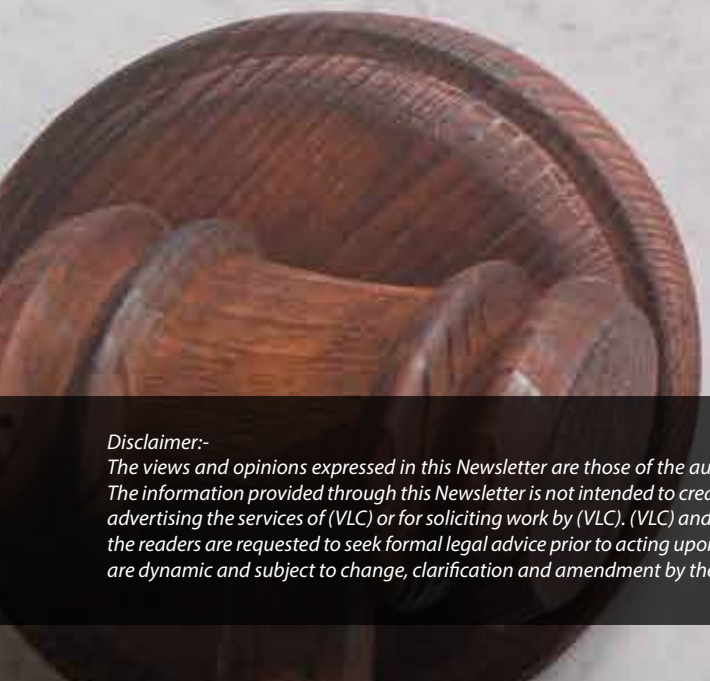

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From the Partner's Desk

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Adv Nivedita Sarda,
Partner

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Article

Hammering the legal nail - future of digital currency including cryptocurrency in India

Adv Aditya Bohra,
Senior Associate

After the announcement by Elon Musk owned Tesla for investment of $1.5 billion in Bitcoin with plans to accept cryptocurrency from customers who wish to purchase its electric vehicles, the Central Government announced to introduce ***The Cryptocurrency and Regulation of Official Digital Currency Bill, 2021*** on the next day in the ongoing session of the Parliament which drove the digital money to an all-time high.

The word '*cryptocurrency*' is not new as far as the digital payment in India is concerned, however, recently it has gained importance as it is apprehended that the Government is all set to regulate the cryptocurrency which till today is still a grey area. The Hon'ble Supreme Court in its judgment titled '*Internet and Mobile Association of India v. Reserve Bank of India*', 2020 SCC Online SC 275 has noted that "*[t]he FATF report defined 'Virtual currency' as a digital representation of value that can be traded digitally and functioning as (1) a medium of exchange; and/or (2) a unit of account; and/or (3) a store of value, but not having a legal tender status. The FATF report also defined 'Cryptocurrency' to mean a math-based, decentralised convertible virtual currency protected by cryptography by relying on public and private keys to transfer value from one person to another and signed cryptographically each time it is transferred.*

Time and again, there have been attempts made to regulate the cryptocurrency market in India by statutory body. In 2018, the Reserve Bank of India vide circular dated 06th April, 2018 directed that all Financial Institutions governed by it to not to deal in virtual currencies or to provide any services facilitating any person or entity who tends to deal in the same citing the concerns over economic stability of the country. The said circular was challenged before the Hon'ble Supreme Court of India by The Internet and Mobile Association of India who contended that Reserve Bank of India does not have any right to restrict the right to trade in cryptocurrency in absence of any legal framework by the Government and therefore the circular deserves to be set aside. At the other hand, the Reserve Bank of India contented that though there were no legal framework in India regarding cryptocurrency, that doesn't mean that there is no risk involved in such transactions and therefore it is the responsibility of Reserve Bank of India to regulate the same. The Hon'ble Supreme Court in the said matter [*Internet and Mobile Association of India vs Reserve Bank of India (2020 SCC Online SC 275)*] quashed the Circular dated 06th April, 2018.

The quashing of circular issued by RBI further brought uncertainty in crypto market in India as the circular was the only guiding factor at that moment which was also set aside and any subsequent guide lines to that effect were also not in existence. This brought a grey area in the cryptocurrency market and strongly paved a way for bringing a strong legal framework in cryptocurrency market which would not only aim at regulating cryptocurrency market and it's participants, but also to develop the cryptocurrency market vis-à-vis economic growth of the country.

Subsequently, the *Banning of Cryptocurrency and Regulation of Official Digital Currency Bill, 2019* which aimed to prohibit mining, holding, selling, trade, issuance, disposal or use of cryptocurrency in the country was

introduced. The cryptocurrency was defined for the first time in the Bill as:

"Crytocurrency, by whatever name called, means any information or code or number or token not being part of any Official Digital Currency, generated through cryptographic means or otherwise, providing a digital representation of value which is exchanged with or without consideration, with the promise or representation of having inherent value in any business activity which may involve risk of loss of an expectation of profits or income, or functions as a store of value or a unit of account and includes its use in any financial transaction or investment, but not limited to, investment schemes."

Further, the Bill also provided a punishment of upto 10 years of imprisonment or fine or both upon mining, holding, selling, trade, issuance, transferring or use of cryptocurrency. The said Bill was not presented before the Parliament and therefore the same became relevant only for academic discussions and the legal framework that was anticipated was again deferred.

A bill titled ***The Cryptocurrency and Regulation of Official Digital Currency Bill, 2021*** is slated to be introduced in the Parliament in the on-going Lok Sabha Session, [copy of the same is not made public]. The purport of the Bill is "*[t]o 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 crytpto currency and its uses.*"

The news of the introduction of this legislation has already created a panic situation in the present dealers of the same as they are not certain as to whether the Bill would facilitate them in further dealing in cryptocurrency or would prove to be a draconian law for them. Internationally, certain countries like Japan, Canada and Switzerland have already permitted regulated use of cryptocurrency whereas country like China has put a blanket ban over the use of same. Under such circumstances, it is assumed that bringing such legislation would not only legalise the use of cryptocurrency but would also enable India to compete with other nations who have already permitted using the same by facilitating financial transactions.

The news of legislating cryptocurrency in India has also compelled Indian dealers to ponder upon various questions including what will be the status of "*private cryptocurrency*" which is to be defined in the Bill; which currency, like *Bitcoin, Ethereum* etc. will be legalised and be permitted for usage in the market. It would be further worth noticing that whether the government will itself enter into trade in cryptocurrency at the first instance or the same will be available for private users under the regulation of Government.

It will be important to see how the market responds to the same as a holistic approach has to be seen as cryptocurrency will not be just circumscribed to one aspect but will have far reaching effects including increase in cyber-crimes, money laundering activities, frauds etc. Since the cryptocurrency market has already established in India now, completely banning of private cryptocurrency would lead to a situation of hue and cry as traders have equipped themselves for working upon the same. Only a pragmatic approach of the Government in the present situation by taking adequate measures for regulating and developing the technology for use of cryptocurrency will benefit the voluminous traders which will not only be beneficial for them but will also be beneficial for international trade in times to come.

Legal Updates

Securities Laws

Securities and Exchange Board of India (Mutual Funds) (Amendment) Regulations, 2021

The SEBI through notification dated 4th February, 2021 has issued the Securities and Exchange Board of India (Mutual Funds) (Amendment) Regulations, 2021. The amendment provides that an applicant in a scheme whose application has been

- accepted shall have the option either to receive the statement of accounts or to hold the units in dematerialized form and the asset management company shall issue to such applicant, a statement of accounts specifying
- the number of units allotted to the applicant or issue units in the dematerialized form as soon as possible but not later than five working days from the date of closure of the initial subscription list or from the date of receipt of the application.

The amendment also clarifies trustees and

- asset management companies shall ensure that the assets and liabilities of each scheme are segregated and ring-fenced from other schemes of the mutual fund; and bank accounts and securities accounts of each scheme are segregated and ring-fenced.

SEBI amended provisions to strengthen position of Debenture Trustee.

- In furtherance of the decision to strengthen the role of Debenture Trustee taken by SEBI at its meeting held on September 29, 2020, SEBI has enacted the (i) Securities and Exchange Board of India (Debenture Trustees) (Amendment) Regulations, 2020, (ii) Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) (Third Amendment) Regulations, 2020 and (iii) Securities and Exchange Board of India (Issue and Listing of Debt Securities) (Amendment) Regulations, 2020.

Adv Sakshi Jain,
Associate

The Debenture Trustee is now required to exercise due diligence to ensure that security on which charge is being created is free from any encumbrance or necessary consent from existing chargeholders has been obtained if the security has an existing charge and monitor asset cover on a quarterly basis.

The amendments mandate Debenture Trustee to obtain a certificate on half yearly basis from issuer's statutory auditor regarding value of receivables/ book debts. Debenture trust deed is required to be structured in a manner that statutory/standard information pertaining to the debt issue is mentioned in Part A and details specific to the particular debt issue in Part B. SEBI has also introduced new requirement of creation of recovery expense fund' which is to be created by the issuers for utilisation by the debenture trustee in the event of default or to take legal action to enforce the security.

It is relevant to mention that the said fund is in addition to the existing requirement of creation of debenture redemption reserve and other funds as per Companies Act, 2013. For the protection of interest of investors, several mandatory disclosures have been added in the format of information memorandum. All listed entities are, now, required to disclose initiation and submit report of forensic audit along with comments of management. This disclosure is to be made without applying any test of materiality.

SEBI Circular on contribution by Issuers of listed or proposed to be listed debt securities towards creation of "Recovery Expense Fund" effective from 1st January 2021

SEBI vide Circular No. SEBI/HO/MIRSD/CRA-DT/CIR/P/2020/207 dated 22nd October 2020 has introduced provisions related to creation of "Recovery Expense Fund"(REF)) in order to enable Debenture Trustee(s) to take prompt action for enforcement of security in case of 'default' in listed debt securities. The issuer proposing to list debt securities shall be required to deposit an amount equal to 0.01% of the issue size subject to maximum of Rs.25 lakhs per issuer towards REF with the 'Designated Stock Exchange', as identified and disclosed in its Offer Document/ Information Memorandum. The Issuer shall be required to deposit cash or cash equivalent(s) including Bank Guarantees towards contribution to REF at the time of making the application for listing of debt securities. The amount collected in the REF shall be used in the manner as decided in the meeting of the holders of debt securities. The existing Issuers whose debt securities are already listed on Stock Exchange(s) are being given an additional time period of 90 days to comply with this circular for creation of REF.

Corporate Laws

Companies (Specification of Definitions Details) Amendment Rules, 2021

The Ministry of Corporate Affairs vide notification dated 1st February 2021 has amended the definition of small companies to increase paid up capital of the small company from rupees fifty lakhs to not exceeding rupees two crores and turnover from rupees two crores to rupees twenty crores.

Companies (Compromises, Arrangements and Amalgamations) Amendment Rules, 2021

Ministry of Corporate Affairs vide Notification G.S.R. 93(E) [F. NO. 2/31/CAA/2013-CL.V], dated 1-2-2021 notified provision for merger or amalgamation of start-up companies. Now, a scheme of merger or amalgamation under Section 233 of the Companies Act, 2013 can be entered into between two or more start-up companies; or one or more start-up company with one or more small company. A "start-up company" means a private company incorporated under the Companies Act, 2013 and recognised as Start up by the Department for Promotion of Industry and Internal Trade.

Companies (Incorporation) Second Amendment Rules, 2021

The Ministry of Corporate Affairs vide its notification dated 1st February 2021 has published the Companies (Incorporation) Second Amendment Rules, 2021 which shall come into force from 1st April 2021 has bought amendment in the provisions of the One Person Company.

The amendment has reduced the limit of residency for an Indian citizen to set up an OPC from 182 days to 120 days. The amendment Act has removed the restrictions on paid up capital and turnover on OPCs.

A One Person company may be converted into a Private or Public Company, other than a company registered under Section 8 of the Act, after increasing the minimum number of members and directors to two or seven members and two or three directors, as the case may be, and maintaining the minimum paid-up capital as per the requirements of the Act for such class of company.

Further, the company shall file an application in e-Form No.INC-6 for its conversion into Private or Public Company, other than under

section 8 of the Act, along with fees as provided in the Companies (Registration Offices and Fees) Rules, 2014.

Companies (Corporate Social Responsibility Policy) Amendment Rules, 2020

The Ministry of Corporate Affairs by its notification dated August 24, 2020 has notified the Companies (Corporate Social Responsibility Policy) Amendment Rules, 2020.

Earlier, the definition of 'Corporate Social Responsibility (CSR) Policy' under the CSR Rules included activities which are undertaken by a company in areas or subjects specified under Schedule VII of the Companies Act, 2013 ("**Act**"), excluding such activities undertaken in pursuance of normal course of business of a company.

Pursuant to the Amendment Rules, a proviso has been added to the definition of 'CSR Policy' which states that any company engaged in research and development activity of new vaccine, drugs and medical devices in their normal course of business may undertake research and development activity of new vaccine, drugs and medical devices related to COVID-19 for financial years 2020-21, 2021-22 and 2022-23 subject to the following conditions:

1. Such research and development activities shall be carried out in collaboration with any of the institutes or organisations mentioned in item (ix) of Schedule VII of the Act.

2. Details of such activity shall be disclosed separately in the annual report on CSR included in the Board's report to be prepared as per the CSR Rules.

Further, Rule 4(1) of the CSR Rules has been amended to state that CSR activities shall be undertaken by the company, as per its CSR policy, as programs or activities (either new or ongoing). Prior to the amendment, activities undertaken in pursuance of the normal course of the business of the company were excluded from the scope of CSR activities.

The *proviso* to Rule 6(1) of the CSR Rules pertaining to the CSR Policy, which stated that CSR activities do not include activities undertaken in pursuance of the ordinary course of business of a company, has been deleted.

Companies (Amendment) Act, 2020

The Ministry of Law and Justice in its gazette notification has published on 28.09.2020, the Companies (Amendment) Act, 2020 ("**Amendment Act**") which introduced certain modifications to the Companies Act, 2013. The Amendment Act has been passed for decriminalizing the most of the offences and decreasing the penal provisions prescribed as stipulated under the Companies Act, 2013 ('Act') and paving simpler ways for a direct overseas listing of Indian companies. Some of the major highlights of the Amended Act are:

- **Amendment in the definition of a listed company under Section 2(52)**

  Under the Section 2(52), in the definition of listed companies, a proviso has been added to exclude a certain class of companies which would not be considered as listed companies although they have securities which are listed or are intended to be listed. Thus, companies which list only debt securities (NCDs) may be excluded from the definition of listed company for the purposes of the Companies Act.

- **Rectification of Name under Section 16**

  As per Section 16(1) of the Act, if the Central Government is of the opinion, that the name of the company is identical with or too nearly resembles the name by which a company in existence had been previously registered, whether, under this Act or any previous company law, it may direct the company to

change its name and the company shall change its name or new name, as the case may be. The time period to change such name has been reduced from six months to three months.

Further, the Central Government has been empowered to allow a new name to the company, in case of default in complying with its direction instead of imposing punishment for non-compliance for such default. The company is however not prevented from subsequently changing its name.

- **Public Offer and Private Placement under Section 23**

  Under the provisions of Section 23 of the Act, a sub-section 3 has been added which provides that certain classes of public companies as may be prescribed may issue such class of securities for the purposes of listing on permitted stock exchanges in permissible foreign jurisdictions or such other jurisdictions.

  Further, sub-section 4 has also been added which states that the Central Government may by notification exempt any class or classes of public companies from complying with the provisions of Chapter III (Prospectus and Allotment of Securities), Chapter IV (Share Capital and Debentures), Section 89 (Declaration in respect of a beneficial interest in any share), Section 90 (Register of significant beneficial owners in a company) or Section 127 (Punishment for failure to distribute dividends) of the Act.

- **Further issue of Share Capital under Section 62**

  Under Section 62, earlier the time period for providing an offer of right issue to the existing shareholders was 15 days to 30 days and for any offer for less than 15 days requires the approval of 90% of Shareholders of the company, however now the same has been done away and there is no requirement of seeking shareholders' approval for decreasing the time period form a period less than 15 days.

- **Filing of Resolutions under Section 117**

  The exemption provided to banking companies which provide loans, guarantees, and security in connection with a loan in its ordinary course of business, from filling the resolution in e- form MGT -14 with the Registrar of the Companies, under Section117 has been extended to RBI registered NBFCs and housing finance company registered under the National Housing Bank Act, 1987.

- **Company to have Board of Directors under Section 149**

  The prevailing provision of the Act provides that the Independent Directors can be paid sitting fees, profit related commission and can be reimbursed the expenses incurred for attending the meetings but are not entitled to any stock option.

  Now, the Amendment Act added a proviso in Section 149, which provides that in case a company has no or inadequate profits, an independent director may receive remuneration, exclusive of any fees payable under sub-section (5) of Section 197, in accordance with the provisions of Schedule V.

- **Corporate Social Responsibility under Section 135**

  Section 135 of the Act provides for constitution of Corporate Social Responsibility (CSR) Committee for the companies which are covered under the specified limits provided in the section. The Amended Act provides that if the amount required to be spent by the company under Section 135 does not exceed Rupees Fifty Lakhs, then the said company is no longer required to constitute a CSR committee and the function of such committee will be discharged by the Board of Directors of the Company.

- **Chapter XXIA for Producer Companies (New Chapter)**

  A new Chapter XXIA has been added in the Act with regard to the Producer Companies from Section 378A to Section 378ZU.

- **Reduction in Monetary Penalties**

  The penalties under Section 56 (Transfer and Transmission of Securities), Section 64 (Notice to be given to Registrar for Alteration of Share Capital), Section 86 (Punishment for Contravention under Chapter VI Registration of Charges), Section 88 (Register of Members), Section 92 (Annual return), Section 117 (Resolutions and Agreements to be Filed), Section 134 (Financial Statement, Board's Report, etc.), Section 137 (Copy of Financial Statement to be filed with Registrar), Section 140 (Copy of financial statement to be filed with Registrar), Section 165 (Number of Directorships), etc. have been significantly reduced by the Companies Amendment Act, 2020.

  The offences which lack an element of fraud or do not have a large public interest has been decriminalized.

- **Removal of Imprisonment in Various sections**

  With an object to decriminalize the offences under various sections of the Act, Imprisonment under Section 8 (Formation of Companies with charitable objects, etc.), Section 26 (Matters to be stated in the prospectus), Section 40 (Securities to be dealt with in stock exchanges), Section 68 (Power of company to purchase its own securities), Section 128 (Books of account, etc. to be kept by company), Section 167-(Vacation of office of director), 184 (Disclosure of Interest by Directors), Section 188 (Related Party Transactions), etc. have been removed by the Companies Amendment Act, 2020.

FEMA Laws

- **Amendment of Master Direction on Compounding of Contraventions under FEMA**

  The Ministry of Corporate Affairs vide notification dated 1st February 2021 has amended the definition of small companies to increase paid up capital of the small company from rupees fifty lakhs to not exceeding rupees two crores and turnover from rupees two crores to rupees twenty crores.

- Reserve Bank of India vide its Circular No. 06 dated 17th November, 2020 amended certain provisions of Master Direction on Compounding of Contraventions, 2016. Salient features of the amendments to the Master Direction on Compounding of Contraventions under FEMA are set out below:

  The Foreign Exchange Management (Non-debt Instruments) Rules, 2019 ("NDI Rules") and Foreign Exchange Management (Mode of Payment and Reporting of Non-Debt Instruments) Regulations, 2019 ("Reporting Regulations"), superseded the erstwhile Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) Regulations, 2017.

- Accordingly, the RBI has listed certain contraventions under the NDI Rules and Reporting Regulations, which can be compounded by the Regional/ Sub Offices of RBI.

  Further, RBI has decided to discontinue the classification of a contravention as 'technical' that was dealt with by way of an administrative/ cautionary advice and regularise such contraventions by imposing minimal compounding amount as per the compounding matrix in the Master Directions on compounding of contraventions under FEMA, dated January 1, 2016.

RBI also partially modified paragraph 3(1) of its circular dated May 26, 2016, with respect to public disclosure of compounding orders. Accordingly, in respect of the compounding orders passed on or after March 01, 2020, summary information, instead of the compounding orders, shall be published on the bank's website in the format given in the said circular.

TAX Laws

Extension of date of Vivad Se Vishwas Scheme

The Central Board of Direct Taxes (CBDT) vide Notification in S.O. 471(E) dated 31/01/2021 has further extended the due date for filing declaration under the 'Vivad Se Vishwas' (VSV) scheme till February 28, 2021.

As per a CBDT's notification, the date for payment of tax without additional interest under Scheme remains unchanged at March 31, 2021.

Article

Limitation during Pandemic: unceasing Battle

Plenary Powers of Supreme Court

The Indian economy on account of Covid-19 has suffered a severe blow and the situation of judicial system and legal fraternity is no different as we lag behind in the digital infrastructure. In wake of this, the Supreme Court in a suo motu writ petition, i.e. In re: *Cognizance for Extension of Limitation* [Suo Motu Writ Petition (Civil) No. 3/2020], ordered for extension of limitation period for all proceedings effective from 15.03.2020. The order was pursuant to Article 142 of the Indian Constitution which empowers Supreme Court to make orders necessary to do complete justice in a matter before it, read with Article 141 which provides that such order shall be binding on all courts within India. The broad powers under Article 142 to ensure 'complete justice' has been discussed by the court in various judgments. The recent being *Supreme Court Bar Association v. Union of India* (AIR 1998 SC 1895), wherein the court recognized that amplitude of power is wide and curative in nature. It further clarified that it does not authorize the court to supersede substantive law as applicable in a case.

The Order: Upto Scratch?

There were though no specific remarks on what period of limitation would be extended, however, the SC in the latest case of Sagufa Ahmed & Ors. v. Upper Assam Plywood Products Pvt. Ltd. & Ors. [Civil Appeal No. 30073008 of 2020] held that extension does not apply to cases where normal period of limitation has already expired. Therefore, the period of limitation was extended and not the period upto which delay can be condoned in exercise of its discretion under the statute. The Court clarified that the order is to favour the vigilant litigants following the maxim '*Vigilantibus Non Dormientibus Jura Subveniunt*' which means that law assist those

Naina Agarwal,
Intern

who are vigilant about their rights and not those who sleep over them. It further held that 'period of limitation' must be taken as 'prescribed period' and drew a parallel with provisions of General Clauses Act,1897, Limitation Act, 1963 and its decision in Assam Urban Water Supply and Sewerage Board v. Subash Projects and Marketing Limited [(2012) 2 SCC 624] to describe that period of limitation is different from discretion to condone delay.

However, the decision tunes an unfortunate twist of fate to litigants as a whole because various litigants might have genuinely been unable to file appeal due to pandemic. This ruling denies the benefit to litigants who rely upon powers of concerned authority to condone delay. Moreover, what would happen in such a case when the condonable period had ended post 24.03.2020, i.e. after lockdown. Though the court does not create distinction, thereby the underlying fact remains that the litigant is no longer seen as non-vigilant. Therefore, it is to be seen as to how the court will react to this situation.

Another pertinent question that rises due to the order is whether the same shall be applicable on cases or appeals governed by the statutes that doesn't describe any time period for condonation of delay. For instance, in case of tax litigation. In the pre-GST time, the powers of CESTAT to condone delay was not restricted by the prescribed period. The tribunal was authorized to admit appeal by condoning delay if sufficient cause was presented. Therefore, the decision of the Supreme Court seems to have negligible or no impact.

The Conundrum

On further order dated 06.05.2020, the Apex Court extended the limitation period applicable to proceedings under Arbitration and Conciliation Act, 1996 and Negotiable Instruments Act, 1881 for 15 days after lifting of lockdown, thereby making extension comprehensive. However, the same seems to be a fallacy as lawyers and litigants have travelled to their hometown and travelling back again to their destinations may not occur immediately upon lifting of lockdown.

The Honorable Delhi High Court in *Rategain Travel Technologies v. Ujjwal Suri* [O.M.P. No. 14 of 2020, decided on May 11, 2020] emphasized that the limitation under Arbitration Act has been extended and directed that the parties have a time period of 2 weeks after the lockdown is lifted. However, it is ambiguous as to whether the clarification is applicable in cases other than the Arbitration Act and Negotiable Instruments Act and hence, this requires interpretation in light of both the orders.

The Madras High Court in Settu S/O Govindaraj v. State [CRL OP(MD). No.5291 of 2020, decided n May 8, 2020] had interpreted both the orders in a way that they are not applicable to proceedings under Section 167(2) of Code of Criminal Procedure. However, conversely the order passed in S. Kasi v. State [CRL OP(MD). No.5296 of 2020, decided on May 11, 2020], three days after the Settu case, the Madras High Court interpreted 'all proceedings' in such a way to comprise such proceedings. In light of these contradictory orders the matter was referred to a larger bench.

From the conflicting judgments it is apparent that the term 'all proceedings' is open to multiple interpretations. It is imperative that the clarification should be applicable to all cases and not just the ones pertaining to Arbitration Act and Negotiable Instruments Act to ensure complete justice. The pandemic has opened pandora box for the judicial system which are being faced de novo. The honorable courts are trying their level best to cope up the situation and issuing necessary directions from time to time to ensure justice even in such unprecedented times.