

IN THE SUPREME COURT OF INDIA

(CIVIL ORIGINAL JURISDICTION)

I.A. NO. OF 2020

IN

WRIT PETITION (CIVIL) NO. 921 OF 2018

IN THE MATTER OF:

CENTRE FOR ACCOUNTABILITY AND
SYSTEMIC CHANGE (C.A.S.C.)

...PETITIONER

Versus

UNION OF INDIA AND ORS

...RESPONDENT

APPLICATION SEEKING INTERIM DIRECTIONS

PAPER BOOK

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COUNSEL FOR THE PETITIONER: **ARCHANA PATHAK DAVE**

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TO,

THE HON'BLE CHIEF JUSTICE OF INDIA AND HIS
COMPANION JUDGES OF THE SUPREME COURT OF
INDIA.

MOST RESPECTFULLY SHOWETH:

- 1) That the Petitioner/Applicant has filed Writ Petition (C) No. 921 of 2018 praying the Hon'ble Court to issue the writ of Mandamus or any other writ or direction to the Respondents to ensure compliance of data localization as mandated by Reserve Bank of India (RBI) Circular dated 06.04.2018; and for appointment of Grievance Officer in India as mandated by law.

2) That this Hon'ble Court vide its Order dated 02.08.2019 had directed RBI to submit its report about status of compliance of RBI Circular by WhatsApp. Pursuant to directions of this Hon'ble Court on 02.08.2019, the Respondent No. 7, i.e. the Reserve Bank of India (RBI) has filed an affidavit dated 07.11.2019, stating that Respondent No. 6, i.e. WhatsApp Inc. is not following the data localization norms as mandated by RBI. Without submission of compliance status, any go-ahead to the Respondent No. 6 is suspicious and needs urgent directions of this Hon'ble Court.

3) That the Respondent No. 6, which is in violation of data localization norms as per RBI, is clandestinely continuing beta testing of its Payments Systems on 1 million Indian users. Moreover, it has now been reported that WhatsApp Pay will be rolled out to more customers, despite there being no report submitted to this Hon'ble Court about WhatsApp's full compliance with RBI Data Localization norms.

True Typed Copy of News Report, "WhatsApp may get to roll out payments service in phases" published in the Times of India dated 08.02.2020 is attached herewith as **ANNEXURE P-1**.

- 4) That the Respondent No. 6 has been testing its Payments Services for about two years, without complying with data localization norms. The Respondent No. 6, in its rejoinder affidavit dated 10.04.2019 filed in response to RBI's Counter Affidavit dated 27.03.2019, has admitted that "in February 2018, the NPCI authorized WhatsApp to commence beta-testing of its Payments Service".
- 5) The RBI Circular dated 06.04.2018 mandated a deadline of 15.10.2018 for compliance of data localization rules. It is submitted that 1 million Indians cannot be reduced to guinea pigs. Their sensitive personal data, including financial data cannot be stored outside India in contravention to the RBI Circular, after 15.10.2018. Incidentally, WhatsApp is the only 3rd party app as listed on the NPCI website, which is live for limited users, despite non-compliance of RBI Circular.
- 6) That the permission for trials of WhatsApp Pay was given in February 2018, and the RBI Circular came in April 2018. It is submitted that the circular does not mandate any exception, and hence beta testing is not permissible without complying with data localization norms. Thus, the trials being carried out by

Respondent No. 6 are completely illegal. Moreover, furthering of WhatsApp Payment Services to even more users, despite adverse report of RBI through its affidavit before this Hon'ble Court, cannot be allowed.

- 7) That in addition to the circular, RBI has released its FAQs on 26.06.2019 with respect to RBI Circular dated 06.04.2018. It is submitted that through backdoor of FAQs, RBI Circular dated 06.04.2019 is toned down.
- 8) That Section 17 and 18 of the Payment and Settlement Systems Act, 2007 (PSS Act) give RBI the power to issue directions. Section 19 mandates compliance of RBI directions. It is submitted that the Circular dated 06.04.2018 has a statutory backing under the PSS Act, and the same cannot be toned down by FAQs released on the RBI website, and which are without any date, file number or notification number. It is submitted that the FAQs are ultra vires the Circular dated 06.04.2018.

True Typed Copy of RBI FAQ dated 26.06.2019 is attached herewith as **ANNEXURE 2**.

- 9) That the Respondent No. 6 has not brought all material facts before this Hon'ble Court. Respondent No. 6 has not put on record the permission granted to

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it for trials. It is submitted that in any case, there cannot be any blanket permission for trials, and same should be restricted by duration, number of banks involved and monetary limits. WhatsApp on many occasions has claimed compliance with RBI data localization norms, even though RBI's affidavit clearly proves that it is not the case.

10) That the recent Pegasus Spyware episode highlights the need of having secured data systems. Respondent No. 6, which is owned and provided security services by Facebook Inc., was compromised by the Pegasus virus. Moreover, Facebook, WhatsApp and Instagram, which all are Facebook group companies are integrating their data, thus rendering the entire user data, irrespective of the service, at risk. Hence, compliance of standards, including data localization should be a must before allowing anyone to have access to financial data, which is classified as sensitive personal data under the law.

11) That on one hand, France is fining Apple for USD 27.3 million for intentionally slowing the performance of older iPhones, but on the other hand, no action is taken in India against companies which have scant regards for privacy of Indians. WhatsApp has not

complied with data localization norms, and its other related companies have a poor data security record. Its parent company, Facebook's own Instagram and Twitter accounts were hacked by hacking group OurMine which posted "even Facebook is hackable". Apart from this, Facebook has suffered numerous data breaches, e.g. data of 267 million users was leaked in December 2019 and data of 419 million users was leaked in September 2019. For these repeated data breaches, Facebook is being fined USD 5 billion in the United States but no action has been taken in India, despite its involvement in Cambridge Analytica.

- 12) That the rule of law is maintained when law is enforced. It is submitted nothing contrary to law, including certain digital payment systems can be allowed. It is submitted that India is the biggest market for social media companies including WhatsApp, but they neither have any office in India, nor the Grievance Officer in India. The Petitioner seeks this Hon'ble Court to look into the behind the door activities of the Respondents, without providing all details to this Hon'ble Court. Respondent No. 6 or Respondent No. 7 ought to put on record, all the

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documents relating to the permission granted to Respondent No. 6.

PRAYER

It is therefore respectfully prayed that this Hon'ble Court may be pleased to-

- i) Direct for stopping the trials of Payment Systems of Respondent No. 6 being unlawfully done on 1 million users in India;
- ii) Direct Respondent No. 7 to put on record the permission granted to Respondent No. 6 for trial of Payment Services;
- iii) Direct Respondent No. 7 to put on record all communication between RBI, WhatsApp and NPCI;
- iv) Order any other relief, as may be deemed fit, in light of facts and circumstances

And for this act of kindness, the Applicant shall forever pray

Through

Drawn by:
Vanya Gupta, Advocate
Drawn on: 09.02.2020
Filed on: 10.02.2020

Filed by
Archana Pathak Dave
Advocate for the Petitioner

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AFFIDAVIT

I, Dr. P.K Seth, aged about 71 years, S/o Sh. Vishnu Dayal Seth, Chairman of C.A.S.C., having its Office at 104, Oriental House, 20, Yusuf Sarai Community Centre, Yusuf Sarai, New Delhi-49, presently at New Delhi do hereby solemnly affirm and state as follows:-

1. That I am the Chairman of the Petitioner organization in the aforesaid matter and am conversant with the facts and circumstances of the case and am competent to swear this affidavit.
2. That I have read and understood the contents of accompanying Application and say that the facts stated therein are true and correct to the best of my knowledge.
3. That the Annexures are true copy/true typed copy of their originals.
4. That the Applicant has no personal gain, private motive or oblique reason in filing the PIL.

DEPONENT

VERIFICATION

I, the deponent above named do hereby verify that averments made in this affidavit are true and correct to the best of my knowledge and belief. No part of it is false and nothing material has been concealed therefrom. Verified at New Delhi on this the ____ day of _____ 2020.

DEPONENT

THE TIMES OF INDIA**WHATSAPP MAY GET TO ROLL OUT PAYMENTS SERVICE IN PHASES**

8 February 2020

WhatsApp will finally be able to roll out its payments services in a phased manner in India after it submitted a revised proposal regarding compliance in January, two sources aware of the matter said. The messaging application, owned by social networking giant Facebook, has over 400 million monthly active users in India.

The move could see WhatsApp enter the payments battlefield to take on Google Pay, Walmart-backed PhonePe and Alibaba & SoftBank-backed Paytm. This, after being stuck in trial phase for two years where it was restricted to just 1 million users.

The National Payments Corporation of India (NPCI), which manages the Unified Payments Interface (UPI) system that WhatsApp plans to develop its payments business on, had discussed the matter with the Reserve Bank of India (RBI) earlier this week.

“After clarification was sought from NPCI, WhatsApp India submitted a revised proposal to NPCI earlier in January. The same was sent to the RBI as well. There is a likelihood that WhatsApp will be gradually opened up to more consumers, instead of a full rollout in India,” the person aware of the matter said.

The changes WhatsApp has made regarding compliance and details in its proposal could not be immediately ascertained. But the government has not given up its demand for traceability of messages, said a third source briefed on the

matter. In the next week or so, there could be a final decision on the matter, he added.

For almost two years, WhatsApp Pay has been testing its payments in beta mode with troubles around its data-localisation compliance along with the government's demand for traceability of messages on the platform. Then, the Israeli spyware Pegasus' hacking of WhatsApp users, including Indians, further delayed approval for the popular messaging platform last year.

From a base of 1 million in the first phase, WhatsApp could be allowed to take its payments service to about 10 million, according to current options the NPCI has considered with the RBI. Even a phased rollout will impact rivals like Paytm, PhonePe and Google Pay, who have so far dominated UPI transaction volumes as WhatsApp has the deepest penetration, ease of use and engagement in India among major social applications.

In November, following the Pegasus controversy, the RBI had told the SC that WhatsApp Pay is non-compliant with data-localisation and it will give permission only after full compliance. Talks of a phased rollout for WhatsApp Pay comes when the NPCI is looking to fire up growth on a high base of 1 billion monthly transactions, and WhatsApp's large active consumer base could act as a catalyst.

As reported in November by TOI, the RBI told the SC that the Menlo Park-based firm was still storing various payment data elements outside India, which include transaction IDs, expiry of collect request, and retrieval reference number.

“When a customer raises a dispute, WhatsApp application (client) logs, query screenshots uploaded by a customer, and

consumer email messages are shared with the support team located in Hyderabad and the US and are stored for a period of 90 days. Although the logs do not contain payments data as contented by auditor, screenshots uploaded by customers and customer email message may contain payments data," the RBI had added in its response to the SC.

This was owing to a petition by the Centre for Accountability and Systemic Change (CASC), a think-tank that challenged WhatsApp's compliance standards and absence of local grievance officer in India. In April, WhatsApp had identified a third-party auditor for data compliance, the company had told the SC.

A WhatsApp India spokesperson said it did not have any new comment to offer on the matter. An emailed query sent to the NPCI did not elicit any response. Sources close to WhatsApp India said the company had not yet received any communication from the central bank or the NPCI.

It is not clear yet if WhatsApp has agreed to the government's demand to allow it to trace messages that spread rumours or eventually create violence. "They (WhatsApp) have been working on suggestions made by the regulator. Based on that, it should now be able to go live to more people, gradually," one of the people mentioned above added.


(TRUE TYPED COPY)

RESERVE BANK OF INDIA

FREQUENTLY ASKED QUESTIONS

STORAGE OF PAYMENT SYSTEM DATA

The Reserve Bank of India issued a directive vide circular DPSS.CO.OD.No 2785/06.08.005/2017-18 dated April 06, 2018 on 'Storage of Payment System Data' advising all system providers to ensure that, within a period of six months, the entire data relating to payment systems operated by them is stored in a system only in India.

Payment System Operators (PSOs) have sought clarification on certain implementation issues, from time to time, from Reserve Bank. The FAQs are intended to provide clarity on those issues to facilitate and ensure expeditious compliance by all PSOs.

1. Applicability of the direction

The directions are applicable to all Payment System providers authorised / approved by the Reserve Bank of India (RBI) to set up and operate a payment system in India under the Payment and Settlement Systems Act, 2007.

Banks function as operators of a payment system or as participant in a payment system. They are participants in (i) payment systems operated by RBI viz., RTGS and NEFT, (ii) systems operated by CCIL and NPCI, and (iii) in card schemes. The directions are, therefore, applicable to all banks operating in India.

The directions are also applicable in respect of the transactions through system participants, service providers, intermediaries, payment gateways, third party vendors and other entities (by whatever name referred to) in the payments

ecosystem, who are retained or engaged by the authorised / approved entities for providing payment services.

The responsibility to ensure compliance with the provisions of these directions would be on the authorised / approved PSOs to ensure that such data is stored only in India as required under the above directions.

2. Where should the payment data be stored?

The entire payment data shall be stored in systems located only in India, except in cases clarified herein.

3. Clarification regarding data that needs to be stored in India

The data should include end-to-end transaction details and information pertaining to payment or settlement transaction that is gathered / transmitted / processed as part of a payment message / instruction. This may, inter alia, include - Customer data (Name, Mobile Number, email, Aadhaar Number, PAN number, etc. as applicable); Payment sensitive data (customer and beneficiary account details); Payment Credentials (OTP, PIN, Passwords, etc.); and, Transaction data (originating & destination system information, transaction reference, timestamp, amount, etc.).

4. Storage of data pertaining to cross-border transactions

For cross border transaction data, consisting of a foreign component and a domestic component, a copy of the domestic component may also be stored abroad, if required.

5. Processing of payment transactions

There is no bar on processing of payment transactions outside India if so desired by the PSOs. However, the data shall be stored only in India after the processing. The

complete end-to-end transaction details should be part of the data.

In case the processing is done abroad, the data should be deleted from the systems abroad and brought back to India not later than the one business day or 24 hours from payment processing, whichever is earlier. The same should be stored only in India.

However, any subsequent activity such as settlement processing after payment processing, if done outside India, shall also be undertaken / performed on a near real time basis. The data should be stored only in India.

In case of any other related processing activity, such as chargeback, etc., the data can be accessed, at any time, from India where it is stored.

6. Can the data processed abroad be retained abroad till the window for customer dispute resolution / chargeback is available?

As indicated above, the payment data sent abroad for processing should be deleted abroad within the prescribed time line and stored only in India. The data stored in India can be accessed / fetched for handling customer disputes whenever required.

7. Can the payment system data be shared with overseas regulators?

The data may be shared with the overseas regulator, if so required, depending upon the nature / origin of transaction with due approval of RBI.

8. Scope and coverage of the System Audit Report (SAR)

The System Audit Report (SAR), from a CERT-In empanelled Auditor, should inter-alia include Data Storage, Maintenance of Database, Data Backup Restoration, Data Security, etc.

9. Clarification in respect of entities earlier permitted to store banking data abroad?

In the case of banks, especially foreign banks, earlier specifically permitted to store the banking data abroad, they may continue to do so; however, in respect of domestic payment transactions, the data shall be stored only in India, whereas for cross border payment transactions, the data may also be stored abroad as indicated earlier.


(True Typed Copy)