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JUDICIAL ACTIVISM: SERVING SUMMONS THROUGH DIGITAL MODE NEEDS LEGISLATIVE AMENDMENT

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ABSTRACT

The COVID-19, also known as Coronavirus, has been declared to be a pandemic by the World Health Organisation. All facets of living have been ostentatiously affected and the judicial system is no exception to it. There are numerous unprecedented issues that are being faced by the Courts, Litigants, and lawyers. One of the problems faced by the lawyers was regarding the services of summons. During lockdown, physical delivery of summons became a cumbersome task, so the Supreme Court decided to allow the usage of technology in judicial proceedings in the existing COVID-19 scenario and passed an order regarding issuance of court summons and notices to persons through “emails, fax and instant messaging applications” like “WhatsApp”.

BRIEF OVERVIEW OF THE PROBLEM

In the modern era of technology, internet is easily accessible and more affordable to people. The technological transformation brought a swift change in the Indian judicial system in the form of “Digitalisation in Courts”. Considering the epoch of technology, we dwell in, the usage of instant messaging application like WhatsApp in the Court of law is neither astonishing nor novel. Indian Courts have seen multiple instances where it allowed usage of electronic modes of communication in order to ease proceedings of the court so that the justice can be rendered or dispensed on time. Agreed that digitalisation in the courts will lead to timely delivery of justice, which is even regarded as a constitutional right of every citizen.¹ Permitting the usage of instant messaging application “WhatsApp” to serve summons by the courts has now become a controversial issue.

¹ Speedy trial is regarded as a fundamental right enshrined under Article 21 of the Constitution of India, 1950. A person can approach Supreme Court under Article 32 if he is denied this right of Speedy trial.

This article highlights the need of a legislative amendment regarding digitalisation in courts so that the proceedings can become less complex and more effective.

LEGAL PROVISIONS FOR SUMMONS

A summon is regarded as a court order to a person to appear before the court at a specified place and time. A summon can be served in both civil as well as in criminal cases. Statutory provisions regarding summon is specified under Section 61-69 of the Code of Criminal Procedure, 1973 and under Order V and Section 27 of the Civil Procedure Code, 1908.

IS SUMMON SERVED THROUGH AN ELECTRONIC MODE IS TREATED AS A VALID SUMMON?

According to Order V Rule 9(2) of the Civil Procedure Code, 1908, the Court is allowed to issue summon in any mode as the court may find appropriate. further, the expression used in Order V Rule 9(3) is “any other means of transmission” which also empowers the court to include any kind of electronic means to serve summon. Therefore, the usage of WhatsApp in serving summon is neither new nor against any statutory provision.

CASES WHERE LEGAL SUMMONS/NOTICES SERVED THROUGH AN ELECTRONIC MEANS

There have been multiple instances in India where the court of law have permitted the usage of email or SMS to issue legal summons/notices. In 2G Spectrum case², the court allowed issuance of summon through email and considered it as a valid summon.

It is pertinent to note that there is an urgent need for a legal statutory framework for service of summon through electronic means otherwise it may arise questions regarding validity of issued summon and notices through electronic means. There are legal provisions such as Part X of the

² Hindustan Times Correspondent, *Summons through SMS, e-mail valid: 2G case Court*, PRESS TRUST OF INDIA, NEW DELHI, February 22, 2012.

<https://www.hindustantimes.com/delhi/summons-through-sms-e-mail-valid-2g-case-court/story-A1iBVVGJVvOWChnu0vnQGI.html>

CPC, 1908 (5 of 1908) and Order V, Rule 9 of CPC, 1908 that empowers the Court of record to make necessary rules and regulations in the same regard.

The Apex Court in the case of Central Electricity Regulatory Commission vs National Hydroelectric Power Corporation Ltd³, observed that there are plenty of unresolved cases due to non-serving of summons and then the Supreme Court allowed the service of notice through an electronic mail.

In the case of Ksl and Industries Ltd vs Mannalal Khandelwal and the State of Maharashtra through the office of Government Pleader⁴, the Court of law stated that all the feasible techniques including an electronic mail should be used to serve summon in order to evade any delay in judicial proceedings.

CASES WHERE LEGAL SUMMON SERVED THROUGH WHATSAPP

The Court of law while extending the purview of electronic means for the purpose of service of summon allowed usage of WhatsApp to serve summon.

The first case when the court allowed service of summon through WhatsApp was in the sovereign state of Haryana where Finance Commission (FC) administered by Ashok Khemka in a property related dispute permitted the service of summon to the respondent via WhatsApp.⁵

Later, the High Court of Delhi in the case of Tata Sons Limited & Ors vs John Does⁶ allowed that summons can be served to defendant through an email or via instant messaging app “WhatsApp”. In the case of Kross Television India Pvt Ltd & Vikhayat Chitra Production & Others⁷, the Court permitted the service of summons through WhatsApp only after it has been proved that Service of summon through normal means failed.

³ (2010) 10 SCC 280

⁴ Criminal Writ Petition No. 1228 of 2004

⁵ Ajay Sura, *In a First, court to send summons via WhatsApp*, THE TIMES OF INDIA, April 8, 2017. <https://timesofindia.indiatimes.com/city/chandigarh/in-a-first-court-to-send-summons-via-whatsapp/articleshow/58074835.cms>

⁶ CS(COMM) 1601/2016

⁷ 2017 SCC OnLine Bom 1433.

In another case involving the issue of Domestic violence and maintenance, the High Court permitted a woman to serve the summons to her spouse who lived abroad through WhatsApp. Furthermore, the Court also regarded “double-tick” as a justifiable service of summons.⁸

In a recent case law of SBI Cards & Payments Services Pvt. Ltd. v. Rohidas Jadhav⁹, Attorney General KK Venugopal highlighted the technicalities of instant messaging application “WhatsApp” and said that a mere “double-tick” cannot be regarded as a served summon. He said that the Court of law failed to consider that whether the message serving summon actually read by the defendant. Since “Double-tick” is shown once the message is delivered to the defendant, but “Double blue tick” is shown once the message is read by the defendant. Then the CJI ordered that once the delivered message converts into “Double blue tick” then it would be regarded as a valid service of summon.¹⁰

COMPELLING ISSUES IN REVIEW OF THE ABOVE-MENTIONED CASE LAWS

- 1. DISABLED READ RECEIPTS:** WhatsApp users have access to the feature of disabling their read receipts which means that the sender will not be able to see the “Double blue ticks” even after the receiver has received the summon and seen it. So “Double blue ticks” cannot be considered as a conclusive proof of valid service of summon.
- 2. FALSE CONTACT DETAILS:** There can be an instance when party X successfully submits a screenshot of summon delivered to party Y. But party X has saved the contact details of Mr. A as party Y’s name and by showing the fraudulent screenshot party X convinces the Court that the summon has been successfully served to party Y. Moreover, Mr. A can use the same Display picture as used by party Y.

⁸ Akanksha Jain, ‘Double Tick’ on WhatsApp Prima Facie Shows Summons Have Been Delivered”, LIVE LAW, May 4, 2018.

<http://www.livelaw.in/double-tick-on-whatsapp-prima-facie-shows-summons-have-been-delivered-read-order/?infinitescroll=1>

⁹ 2018 SCC OnLine Bom 1262.

¹⁰ Dhananjay Mahapatra, *SC okays summons via WhatsApp, email*, THE TIMES OF INDIA, July 11, 2020.

<https://timesofindia.indiatimes.com/india/sc-okays-summons-via-whatsapp-email/articleshow/76902823.cms>

3. **WHATSAPP DATA IS END-TO-END ENCRYPTED:** In a recent case, Mr. K.K Venugopal submitted before the Court that service of summons should be allowed either through email or fax but not via WhatsApp. He then referred to a case law of Tamil Nadu where the Government of India requested WhatsApp for decryption of some messages in the interest of national security, but the request was denied by WhatsApp as the platform is end-to-end encrypted. So, it can be said that service of summon through WhatsApp might hamper the interest of parties and courts in crucial cases.¹¹
4. **MODIFICATIONS THROUGH APKs:** APK is a high-tech acronym for Android Application Package. Android bases operation systems use APK formats for the purpose of installing applications. Moreover, iOS uses IPA(iOS Application Archive) for the purpose of installing applications. Due to technological advancement, there are multiple APKs that provides multiple features which are not originally available on instant messaging Application “WhatsApp”. For instance, If party X wants to hide double ticks and create a last seen of three years ago then it can be done after installing modified APKs.

After considering all the above-mentioned case laws and limitations, it can be said that service of summon through WhatsApp has only stretched the purview of electronic means. However, the limitations of service of summon through WhatsApp cannot be neglected. With the enhancement of technology in this era, people can escape from any problem with the help of an ace in technological field. So, any person can escape from Court proceedings by using such hi-tech applications. So here the question arises that whether Sections 11, 12 and 13 of Information and Technology Act, 2000 is applicable in context of WhatsApp Conversations? It is crucial to understand that we should not ease ourselves after the Supreme Court’s judgement in regard to allowance of usage of WhatsApp for the purpose of serving summon. It is fallacious to expect that serving of summon through WhatsApp will thrash out all the possibilities of evasion from judicial proceedings.

¹¹ Samanwaya Rautray, *SC to hear WhatsApp message traceability petitions in January*, THE ECONOMIC TIMES, October 23, 2019.

<https://economictimes.indiatimes.com/news/politics-and-nation/sc-to-hear-whatsapp-message-traceability-petitions-in-january/articleshow/71715693.cms?from=mdr>

SUMMONS THROUGH WHATSAPP AWAITS CODIFICATION

It is pertinent to note that there is a critical need of statutory amendment to be brought in the Code of Criminal Procedure and the Code of Civil Procedure and other related laws. Moreover, serving summon through WhatsApp is not a right of the applicant as the same needs codification first. However, Sanctioning summon through WhatsApp entirely depends upon the preference of the Court of law as it may vary from case to case embracing distinctive conditions. In a case of *Bhim Rathke vs R.K. Sharma*¹², the Court rejected the petition of the applicant who served summon through an email or WhatsApp. Moreover, the Court also stated that the judicial system does not have any legal provision in regard to the service of summon through an electronic means. This clearly shows that usage of electronic means to serve summon is not a matter of right of the complainant, but it is on the discretion of the Court to sanction the same.

CONCLUSION

It is veracious to conclude that Indian Judicial System is willing to accept changes only if the change is necessary in upholding the law and enforcing fundamental rights of the citizens. Therefore, it is necessary that digitalisation of courts be brought into effect with various legislative amendments. This would not only aid in regulating the court proceedings more effectively, but it will also make the process less time consuming. Speedy trial is regarded as one of the fundamental rights of the citizens. Moreover, extending the scope of Service of summon through electronic means is an example of judicial activism. Digitalisation in Courts can be a boon during the existing circumstances of COVID-19, where service of summon have caused a huge delay in court proceedings. Therefore, serving summon through digital platforms can be proved to be a boon if proper legal prominence is given.

¹² Criminal Revision No. 16/2018