

IN THE SUPREME COURT OF INDIA
CIVIL ORIGINAL JURISDICTION

I.A. NO. OF 2020

IN

WRIT PETITION (CIVIL) NO. 1038 OF 2020

IN THE MATTER OF:
BINOY VISWAM

UNION OF INDIA & ORS.

VERSUS

PETITIONER

RESPONDENTS

AND IN THE MATTER OF:

YEDHU KRISHNA MENON

APPLICANT/RESPONDENT

S/O. SHRI N. MADHUSUDHANAN MENON

R/O. 285, L.I.G. HASTSAL, UTTAM NAGAR,

NEW DELHI-110059.

APPLICANT/RESPONDENT

**APPLICATION FOR PERMISSION TO SEEKING IMPLEADMENT
PARTY APPLICANT / RESPONDENT OF MR. YEDHU KRISHNA
MENON IN THE ABOVE MENTIONED WRIT PETITION**

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

THE HUMBLE APPLICATION ON BEHALF
OF THE APPLICANT/RESPONDENT ABOVE NAMED

MOST RESPECTFULLY SHOWETH:

1. That the abovementioned Writ Petition filed under Article 32 of the Constitution of India is pending before this Hon'ble Court, one of the main prayers in which is a direction to the Respondents RBI and NPCI

to ensure that Respondent WhatsApp "is not permitted to launch full-scale operations of "WhatsApp Pay" in India, without fulfilling all legal compliances to the satisfaction of this Hon'ble Court regarding the requisite regulatory compliances".

2. That it has recently come to the knowledge of the Applicant through various media reports that WhatsApp Pay is all set to launch full scale operations in India, after obtaining the permission from RBI and NPCI, despite the above titled Petition being pending before this Hon'ble Court, and without satisfying this Hon'ble Court regarding the requisite regulatory compliance in order to launch full-scale operations in India. Pertinently, some of the prominent issues, with respect to the launch of full scale operations of WhatsApp Pay in India vis-à-vis non-compliance of rules and regulations and violation of fundamental Rights guaranteed under the Constitution of India still remain unaddressed and the same have not been raised in the above titled petition. For the said reason, the applicant herein is constrained to approach this Hon'ble Court by way of the present application for impleadment in the present petition. The Applicant herein seeks liberty to assist this Hon'ble Court, owing to the subject matter of the petition that involves public interest of all the citizens of India. The above-titled petition is listed before this Hon'ble Court on 20.11.2020, and the present Application raises issues pertaining

to National security, sovereignty and integrity, along with issues relating to data privacy and security of Indian citizens.

3. That the applicant is an independent Information Technology professional. He is the founder of "Helping Brainz" and is an active social worker. His initiative, a weekend volunteer group, is actively involved in social causes such as food drives, volunteering in old age homes and advocating for women's rights. He is an engineering graduate, a Risk Management Professional and a passionate Social Entrepreneur. The field of work of the Applicant includes third party risk management, project management, cryptography, network security, data communication, business intelligence and data analytics. Being a responsible citizen of India and actively involved in probono consulting and volunteering, the Applicant feels obligated to raise issues before this Hon'ble Court which relate to privacy and data theft risks to such an extent that it may endanger the sovereignty and integrity of India. Pertinently, the Applicant has filed an Impleadment Application in W.P. (C) 427 of 2020, pending before this Hon'ble Court. However, the same has not yet been listed before this Hon'ble Court since the last three months.
4. That there are numerous Petitions pending before this Hon'ble Court, including the above titled Petition challenging the privacy policy of "Whatsapp" and legality of "WhatsApp Pay". **Notice has been by this**

Hon'ble Court in all such Petitions, and the same remain pending before this Hon'ble Court. For the sake of convenience of this Hon'ble Court, the Applicant herein is reproducing below a table showcasing the developments in and status of all such Petitions:

S. No.	Case Title and No.	Order
1.	Special Leave Petition (Civil) No. 804 of 2017, titled as <i>Karmanya Singh Sareen & Anr. Vs. UOI & Ors.</i>	Privacy Policy of WhatsApp is challenged as being violative of the Constitution of India. The said challenge eventually led to the Constitution of a committee of experts to deliberate on a Data Protection framework for India, headed by Justice B.N. Shrikrishna, former Judge, Supreme Court of India, vide Order dated 06.09.2017. A true copy of the order dated 06.09.2017 passed by this Hon'ble Court in Special Leave Petition (Civil) No. 804 of 2017 is annexed herewith and marked as <u>ANNEXURE A-1 (PAGES 19 TO 22)</u> .

2.	Writ Petition (Civil) No. 921 of 2018, titled as C.A.S.C. vs. Union of India & Ors.	This Hon'ble Court was pleased to issue notice vide Order dated 27.08.2018. A true copy of the order dated 27.08.2018 passed by this Hon'ble Court in Writ Petition (Civil) No. 921 of 2018 is annexed herewith and marked as <u>ANNEXURE A-2 (PAGES 23).</u>
3.	Writ Petition (Civil) No. 427 of 2020 titled as Good Governance Chambers v. NPCI & Ors.	The said petition challenges the legality of "Whatsapp Pay" in light of the serious risks which it poses to the sovereignty of India. On 13.05.2020, Respondent Whatsapp undertook before this Hon'ble Court not to launch its full-scale operation in India without complying with all the concerned rules and regulations. A true copy of the order dated 13.05.2020 passed by this Hon'ble Court in Writ Petition (Civil) No. 427 of 2020 is annexed herewith and marked as <u>ANNEXURE A-3 (PAGES 24 TO 25).</u>

4.	Writ Petition (Civil) No. 1038 of 2020, titled as <i>Binoy Viswam v. Reserve Bank of India & Ors.</i>	The legality of full-scale launch of operations of "Whatsapp Pay" has been challenged in the present Petition, while praying for complete requisite regulatory compliance on part of Whatsapp, before it goes "live", throughout India. This Hon'ble Court was pleased to issue Notice in the present Petition vide Order dated 15.10.2020. A true copy of the Order dated 15.10.2020 passed by this Hon'ble Court in Writ Petition (C) No. 1038 of 2020 is annexed herewith and marked as <u>ANNEXURE A-4 (PAGES 26)</u> .
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5. That the Applicant has been following the legal issues raised before this Hon'ble Court, pertaining to Respondent Whatsapp and other social media, from the Karmanya Singh case and has been closely following news with relations to the developments regarding "Whatsapp Pay" in India. **Pertinently, Whatsapp still hasn't completely complied with data localization norms, and thus, permission to launch full-scale**

operations of WhatsApp Pay ought not to have been given by the NPCI. Recently, the following events came to the knowledge of the Applicant, in chronological order:

- (i) RBI, at the first instance, submitted before this Hon'ble Court in 2019 that Whatsapp is not complying with its guidelines and data localization norms, for which reason, permission should not be given to "Whatsapp Pay" for full-scale operations in India.
- (ii) Thereafter, RBI submitted before this Hon'ble Court in March, 2020, that RBI is not concerned with giving permissions to entities like "Whatsapp", rather NPCI is authorised to give the requisite permissions in this regard and any commissions/omissions in respect of the same would be a liability of NPCI.
- (iii) Thereafter, Whatsapp submitted before this Hon'ble Court, in May, 2020, in the present Petition, that it will not go-live without fully complying with all the regulations.
- (iv) Thereafter, RBI submitted before this Hon'ble Court in July, 2020 that NPCI has written letters to RBI, seeking final permission of the RBI to go-live all with "Whatsapp Pay", all across India.
- (v) Thereafter, NPCI stated that it has given permission to "Whatsapp Pay" to launch full-scale operations in India on the basis of alleged compliance with data localization norms. **However, no**

document or report, on the basis of which compliance is assessed, has yet been submitted before this Hon'ble Court.

- (vi) Thereafter, there have been media reports that Whatsapp will soon be launching its full-scale operations across the Nation.

Pertinently, the above chain of events has created immense doubt and legitimate apprehensions regarding (i) whether permission from RBI or NPCI or both is mandatory for a final go-live of Whatsapp Pay in India?; (ii) whether RBI has in fact granted permission for final go-live of Whatsapp Pay in India?; (iii) whether Whatsapp Pay has actually complied with all the regulations? The said questions involve National security and interest and in view of the above, kind interference of this Hon'ble Court is warranted at the earliest.

6. That it has recently come to the knowledge of the Petitioner that the NPCI has granted permission to WhatsApp Inc. to launch its full-scale operations of WhatsApp Pay in India after assessing the SAR submitted before it by a third party pertaining to compliance of data localization norms. Notably, there is no separate, dedicated application for the services offered by "Whatsapp Pay". Thus, under such circumstances, the issue of irregularities pertaining to data localization cannot be viewed separately and must be viewed together with the serious illegalities in the

privacy policy of “Whatsapp”, which is already challenged before this Hon’ble Court and is pending disposal.

7. That considering the facts that (i) Special Leave Petition (Civil) No. 804 of 2017, titled as *Karmanya Singh Sareen & Anr. Vs. UOI & Ors.*, is still pending before this Hon’ble Court; (ii) The Data Protection Bill drafted on the basis recommendations by Justice Srikrishna Committee is still not enacted as law and; (iii) “Whatsapp Pay” is not a separate application but merely an add-on feature of “Whatsapp”, the clearances given by the NPCI for expansion of the services of “Whatsapp Pay” on the ground of alleged compliance of data localization norms cannot be the basis of permitting “Whatsapp Pay” to expand its services to its entire user base in India, unless and until the issues pertaining to the privacy policy of “Whatsapp” are heard, adjudicated upon and finally decided by this Hon’ble Court. In light of the same, it would only be in the interest of justice that (i) the SAR(System Audit Report) submitted before the NPCI on the basis of which clearance has been given to WhatsApp Pay to launch full scale operations in India be submitted before this Hon’ble Court and; (ii) the same committee headed by Justice (Retd.) Srikrishna may requested to assist this Hon’ble Court with regards to audit and the statutory and legal compliance of “Whatsapp” and “Whatsapp Pay” to the concerned laws, rules and regulations pertaining to privacy, data security and data localization and submit a

report of the same before this Hon'ble Court. The continuation of "Whatsapp Pay" in India shall be subject to the said report.

8. That pertinently, Respondents RBI and NPCI filed their respective Counter affidavits in the "G2 Chambers" petition pending before this Hon'ble Court. Respondent RBI has denied its responsibilities of ensuring regulatory compliance on part of big players entering the Indian financial sector, and has rather shifted the entire liability on Respondent NPCI. On the other hand, Respondent NPCI in its Counter Affidavit has mentioned "22... *It was also observed by this Hon'ble Court that the Reserve Bank may inform this Hon'ble Court as to whether WhatsApp is compliant with the RBI Circular within six weeks after receipt of the SAR from the NPCI*".

However, the same has not yet been done. As many as 4 Petitions are still pending before this Hon'ble Court challenging the legality of "WhatsApp" and "WhatsApp Pay". Further, Respondents RBI and NPCI have still not satisfied this Hon'ble Court regarding the requisite regulatory compliance on part of Respondent WhatsApp Pay. Under such circumstances, the permission granted by NPCI for final "go live" of WhatsApp Pay is arbitrary and unreasonable. A true copy of the Counter Affidavit dated 12.08.2020 filed by Reserve Bank of India in Writ Petition (Civil) No. 427 of 2020 before this Hon'ble Court is annexed herewith and marked as ANNEXURE A-5 (PAGES 27 TO 52).

and A true copy of the Counter Affidavit dated 20.08.2020 filed by NPCI in Writ Petition (Civil) No. 427 of 2020 before this Hon'ble Court is annexed herewith and marked as **ANNEXURE A-6 (PAGES 53 TO 75)**.

9. That the Applicant seeks the permission of this Hon'ble Court to raise the following questions before the concerned Respondents herein which concern the National interest and security:

A. For Whatsapp:

- (i) What is the exact scope of service will "Whatsapp Pay" be providing? Whether it will be payment wallet or a payment gateway or a payment application?
- (ii) What type of "cardholder information" will be accessible by Whatsapp?
- (iii) What type of citizens' Personal Identifiable Information (PII) will be accessible by Whatsapp?
- (iv) Where will all the data of Indian users, to which "Whatsapp Inc." will have access to, be stored, accessed, processed and transmitted?
- (v) Does Whatsapp possess any third-party audit documentations or reports (preferable a PCI DSS v3.2.1 AOC/ROC, SSAE 18 SOC 2 TYPE 2 report, ISO 27001:2013 certificate) which would confirm best security protocols and practices of

locations, applications, assets and infrastructures where all the data of Indian users will be stored, accessed, processed and transmitted?

- (vi) Is Whatsapp currently involving or plans to involve in future any sub-contractors or sub-service/ sub-vendor organizations, who would have access to customers' information of Indian users?
- (vii) How does Whatsapp protect data in transit and data at rest? Are any encryption techniques used to safeguard and protect the customers' information and their transaction details?

B. For RBI:

- (i) Did RBI or any sub-service organization of RBI directly confirm whether Whatsapp Pay is complying with the concerned industrial standards, and the concerned rules and regulations?
- (ii) Did RBI or any sub-service organization of RBI perform any third-party due diligence or information security review on Whatsapp Pay?
- (iii) Did RBI or any sub-service organization of RBI perform any application security review or network architecture review of Whatsapp Pay?

- (iv) How does RBI or any sub-service organization of RBI ensure data security and privacy of the Indian users?
- (v) Does RBI assure that services of Whatsapp Pay are being permitted in India only after validating the security controls and best and safest industrial practices?

10. That the above mentioned questions go to the roots of the matter, and are concerned with the privacy and data security of millions of Indian citizens, which could be jeopardized in the blink of an eye, thereby causing irreparable damage to the Nation at large, if even smallest flaws in regulatory compliance go unnoticed. Thus, it would also be in the interest of justice that this Hon'ble Court permits the applicant herein to file a detailed affidavit in the present Writ Petition before this Hon'ble Court in relation to the issues concerning the above mentioned questions pertaining to full scale launch of operations by WhatsApp Pay in India.

11. That in the absence of a proper Legislation, the people of India have entire and absolute faith in the Hon'ble Supreme Court of India as "The Personal Data Protection Bill, 2019" has not attained the statutory status and the outcomes of Justice BN Shrikrishna Committee report like:

- i. Individual Consent
- ii. Right to be forgotten
- iii. Data Protection Authority:
- iv. Protection of Personal Data
- v. Data Storage

- vi. Appellate Tribunal
- vii. Penalties
- viii. Obligations on Fiduciaries and rights to principles
- ix. Data Protection Fund
- x. Exceptions
- xi. Cross border data transfers
- xii. Data of Children

Are also to be implemented and followed.

12. That pertinently, Special Leave Petition (Civil) No. 804 of 2017, titled as *Karmanya Singh Sareen & Anr. Vs. UOI & Ors.*, is still pending before this Hon'ble Court, wherein the Privacy Policy of WhatsApp is challenged as being violative of the Constitution of India. The said challenge eventually led to the Constitution of a committee of experts to deliberate on a Data Protection framework for India, headed by Justice B.N Shrikrishna, former Judge, Supreme Court of India. The Committee headed by Justice B.N Srikrishna, Former Judge , Supreme Court of India in Special Leave Petition (Civil) No. 804/2017 was tasked with furnishing a report on the following Terms of Reference vide order dated 06.09.2017:

- (a) To study various issues relating to data protection in India; and
- (b) To make specific suggestions for consideration of the Central Government on principles to be considered for data protection in India and suggest a draft data protection bill.

13. That the Report so submitted had a variety of recommendations pertaining to jurisdiction and applicability of the proposed data protection law; the degree, extent and meaning of consent and the definition and kinds of data, among others. It was recommended that there was a duty on the data fiduciary to ensure proper care of the data entrusted to it by the Data Principal. It was observed in the said report that, *“Fairness pertains to developing a regulatory framework where the rights of the individual with respect to her personal data are respected and the existing inequality in bargaining power between individuals and entities that process such data is mitigated in such a framework, the individual must be the “data principal”, since she is the focal actor in the digital economy . the relationship between the individuals and the entities with whom the individual shares her personal data is one that is based on the fundamental expectation of trust. Notwithstanding any contractual relationship, an individual expects that her personal data will be used fairly, in a manner that fulfils her interests and is reasonably foreseeable. This is the hallmark of a fiduciary relationship. In the digital economy, depending on the nature of data that is shared, the purpose of such sharing and the entities with which such sharing happens, data principals expect varying levels of trust and loyalty. For entities, this translates into a duty of care to deal with such data fairly*

and responsibly for purposes reasonably expected by the principals. This makes such entities “data fiduciaries”. ”

14. That the Report states that this core of informational privacy, is the right to autonomy and self-determination in respect of one’s personal data, which must be the primary value that any data protection framework serves. It goes on to quote the Hon’ble Apex Court in ***Puttaswamy***, *“Formulation of a regime for data protection is a complex exercise which needs to be undertaken by a State after a careful balancing of the requirements of privacy coupled with other values which the protection of data sub-serves together with the legitimate concerns of the State”*.
15. That in light of the above, it would be in the interest of justice that the applicant herein is impleaded as Party Respondent in Writ Petition (Civil) No. 1038 of 2020 titled as ***“Binoy Viswam v. Reserve Bank of India & Ors.”***
16. That the Federative Republic of Brazil has also suspended WhatsApp Payment services amid security and fair competitive concern. In a statement, Brazil’s central bank said *“it was taking the decision to “preserve an adequate competitive environment” in the mobile payments space and to ensure “functioning of a payment system that’s interchangeable, fast, secure, transparent, open and cheap.”*
17. That it will not cause prejudice to any of the parties to the present Petition if the Applicant is impleaded as a Party Respondent in the present petition.

18. That the present application is bona fide and filed in the interests of justice.
19. That the present Application is filed purely for benefit of public at large and the Applicant has no personal interest out of the same.

PRAYER

In light of the facts and circumstances stated above, it is most respectfully prayed that this Hon'ble Court be pleased to:

- (i) Allow the present application and implead the Applicant herein as Party Respondent in Writ Petition (Civil) No. 1038 of 2020 titled as "*Binoy Viswam v. Reserve Bank of India & Ors.*", pending before this Hon'ble Court, and in all other related matters; and
- (ii) Permit the Applicant herein to file a detailed affidavit in Writ Petition (Civil) No. 1038 of 2020 titled as "*Binoy Viswam v. Reserve Bank of India & Ors.*", pending before this Hon'ble Court in relation to the vital issues pertaining to full scale launch of operations by "WhatsApp Pay" in India; and
- (iii) Pass such other orders/ directions as this Hon'ble Court deems fit in view of the facts and circumstances of the case.

**AND FOR THIS ACT OF KINDNESS THE APPLICANT/RESPONDENT
AS IN DUTY BOUND SHALL EVER PRAY.**

Filed by

DEEPAK PRAKASH
ADVOCATE FOR THE APPLICANT/RESPONDENT

Filed on: 19.11.2020
Place: New Delhi

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CIVIL ORIGINAL JURISDICTION

I.A. NO. OF 2020

IN

WRIT PETITION (CIVIL) NO. 1038 OF 2020

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PETITIONER

VERSUS
RESERVE BANK OF INDIA (RBI) & ORS.

RESPONDENTS

AND IN THE MATTER OF:


YEDHU KRISHNA MENON

APPLICANT/RESPONDENT

AFFIDAVIT

I, Yedhu Krishna Menon, Aged about 53 Years, S/o. Shri N. Madhusudhnan Menon, R/o. 285, LIG, Hastal, Uttam Nagar, New Delhi-110059, do hereby solemnly affirm and state as follows:

1. That I am the Applicant/Respondent in the above mentioned application for permission to seeking impleadment as party Applicant / Respondent and as such I am well conversant with the facts of the case and thus competent to swear this affidavit.
2. I say that the I have read and understood the contents of the application for permission to seeking impleadment as party Applicant / Respondent at Para 1 to 19 from Pages 1 to 17 and state that the facts mentioned therein are true to my knowledge and belief and information derived from the records of the case as per the legal advice received and believed by me. I say that the facts and circumstances stated in the application for permission to seeking impleadment as party Applicant / Respondent are true and correct.
3. That the annexures filed with the application for permission to seeking impleadment as party Applicant / Respondent are true copies of their respective originals.
4. I say that the averments of facts stated herein above are true to my knowledge and no part of it is false and nothing material has been concealed there from.

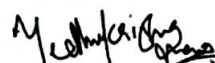


DEPONENT

VERIFICATION

I the above-named deponent affirms that the contents of Para 1 to 3 of this affidavit are true and correct to best of my knowledge and belief and no part of it is false and nothing material has been concealed there from.

Verified at New Delhi on this the 19th day of November, 2020.



DEPONENT