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INDIA'S LEGAL TURNING POINTS IN 2021

A Photo Feature on
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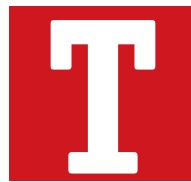


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YOUR WITNESS PLEASE!

The Cryptic Case of Non-Fungible Tokens

■ **Sudeep Chatterjee & Aamna Ahmad**



he last few years have seen a mammoth of advancement in technology and digitalization with respect to blockchain.

This headway is primarily based on the concerns embedded in the digital asset makers about plagiarism, copyright or theft of their digital work. This copyright problem has been addressed with the creation of non-fungible tokens (NFTs), a technology that turns digital assets into crypto assets, encouraging unique and original digital content creators to publish their work in the form of an NFT. The incentives being a transparent system, a valid verification in a digital ledger regarding the author of such work and the ease of transaction enabling any crypto assets to be sold without removing the copyright badge from the creator of the digital work. An example of NFT is the video of LeBron James performing a slam-dunk which is bought on TopShot marketplace. The said card may be sold for a huge amount of money; however, the NBA still owns copyright in the original video and a further reproduction of the same is subject to licensing terms from the NBA.

Non-fungible, in Economics means possessing absolutely unique qualities that cannot be replaced or interchanged with another token. Non-Fungible Token is a virtual deed or a unique form of cryptocurrency that conveys ownership of a digital or physical asset such as video highlights, trading cards, etc. This certificate of ownership protects its value for future transactions. NFTs are based on blockchain technology which was first conceptualised by Satoshi Nakamoto, in a white paper titled "Bitcoin: A Peer-to-Peer Electronic Cash System"¹ published in the year 2008. Simply put, blockchain technology is a computer programme that maintains an electronic ledger of transactions in a way that does not follow the conventional set up and negates the scope of manipulation and fraud.

This technology representing each token establishes exactly what the asset is, its value, its appearance, and its owner. While cryptocurrencies are designed to behave like physical currencies, NFTs are more like physical collectibles such as art. Behind these artworks, there is an absolutely distinctive and non-interchangeable set of data stored on a digital ledger that establishes proof of ownership. For a better understanding, they are very

similar to the serial numbers associated with products of various luxury brands to verify their authenticity. NFTs provide a sense of uniqueness and rarity creating scarcity which makes the whole concept even more appealing. It is evident from a Reuters report² which stated that sales volumes of NFTs had reached \$10.7 billion globally in July 2021, making an eightfold increase since April 2021. These tokens were taken into the spotlight by one of the first blockchain projects called CryptoKitties in 2017 which gave users the experience of breeding, trading and selling virtual kittens. The value of these kittens is based on the rarity of their traits with the value of one such token being as high as \$170,000. However, the first ever NFT created was in 2014, long before the explosion in the crypto market and was called “Quantum” which was recently sold at \$1.4 Million. In February 2021, Amrit Pal Singh, who is a Delhi-based animator and art director, sold two pieces on Foundation which were toy face renditions of Daft Punk, the French Music duo for Rs 18 Lakh as a part of series of toy faces which included Frida Kahlo, Vincent van Gogh, Sherlock homes, Malala Yousafzai.

Non-Fungible Tokens have shot to mainstream prominence in the last few months in India. Twitter through a survey, said that between April and June, 2021 the volume of conversations around NFTs spiked by 43 percent in India indicating a sense of inquisitiveness towards this digital gold rush. Vignesh Sundaresan, a crypto entrepreneur and Anand Venkateswaran, who switched from the world of media and communications to crypto, shook the world of digital art with the purchase of Beeple’s First 5000 days, a digital NFT – based artwork for \$69 million, making it the most expensive non-fungible token



ever sold. After announcing the launch of NFT marketplace for creators in India, WazirX has become the first marketplace for NFTs in India. Rahul Pagidipati, CEO, ZebPay said, “India has lakhs of traditional artisans who could benefit from using NFTs to verify their original work. Add to that growing number of artisans working in the digital media who can protect their creations with a tokenized “wrapper” to show that it is an original work.”

One of the biggest obstacles in NFT trading is the obscurity and lack of clarity surrounding the legal sanctity of cryptocurrencies in India as they are tradable only in cryptocurrencies. The Government of India in November, 2017 set up an Inter-Ministerial Committee constituting representatives of the Ministry of corporate Affairs, MeitY and the Central Board of Direct Taxes to look into the issues pertaining to virtual currencies and recommend a regulatory framework. The Committee acknowledged the technological innovations underlying virtual currencies and the efficiency and ease that such a financial system brings with it. In its report, the

Committee critically analyzed other jurisdictions and their legal structures around virtual currencies. It observed that private cryptocurrencies have not gained recognition as a legal tender in any of them and the same should be banned in India. Further, it expressed the obscurity of jurisdiction of cross-border transactions. However, it advised that an official digital currency should be introduced with an open mind and regulated by the Reserve Bank of India under Section 22 of RBI Act, 1934³. The Committee went on to propose the Banning of Cryptocurrency & Regulation of Official Digital Currency Bill, 2019⁴ that prohibits mining, buying, holding, selling, dealing in, issuance, disposal or use of cryptocurrency in the country attracting criminal penalties, including imprisonment up to 10 years.

In 2018, RBI through its circular prohibited RBI-regulated entities from “providing any service in relation to the purchase or sale of virtual currencies”. The Hon’ble Supreme Court in *Internet and Mobile Association of India v. Reserve Bank of India (IAMAI case)*⁵ struck down this circular and opined



that the impugned circular was violative of Article 19(1)(g) of the Constitution of India⁶. The leading policy think tank working for Government of India, Niti Aayog published a strategy document 'Blockchain: The India Strategy – Towards Enabling Ease of Business, Ease of living and Ease of Governance' in February 2021 and recognized how essential it is to devise a potential framework for cryptocurrency.⁷ In early 2021, the Finance Minister also stated that the government was not considering a blanket ban and that it intends to allow window for people to experiment. In a recent article, Congress MP Shashi Tharoor has called for an effective and transparent regulatory framework around cryptocurrency. He is of the opinion that in previous phases of digital revolution, India has been relatively late and with the evolution of blockchain technologies, India must use its young human capital, resources and expertise to stay on top of the game. In the case of *Tata Consultancy Services v. State of Andhra Pradesh*⁸, the Hon'ble Supreme Court held that a transaction sale of computer software is a sale of good. The judgment was not in relation to virtual currencies or definition of goods under Foreign Exchange Management Act, 1999 (FEMA), however it did provide useful inputs as 'goods'

has not been defined under the Act. It is pertinent to note that the IAMAI⁹ case categorises virtual currencies as intangible property, which also act as money. One can interpret that the existing provisions of FEMA classifies crypto-assets and NFTs as intangible assets.

Non-fungible tokens may find it difficult to adjust in the Indian market owing to the ambiguity and lack of a well-reasoned legal structure that surrounds it affecting the legitimacy of these tokens. On 23rd November, 2021 the Lok Sabha introduced Cryptocurrency and Regulation of Official Digital Currency Bill, 2021¹⁰ for the winter session 2021 with the purpose of formulating a uniform framework for the creation of an official digital currency to be issued by the RBI along with prohibiting all private cryptocurrencies in India subject to certain exceptions causing confusion and panic in the crypto market. The legality of crypto-currency exchanges is co-dependent on the regulatory framework that will be granted to them. As of the current landscape, crypto currencies are not in violation of existing laws, they simply exist in a legally void space. There is a need to develop our legal system in a way that aligns with these technological advancements. ❏



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Aamna Ahmad is working with Singh and Singh LLP as an associate under Sudeep Chatterjee, Partner and holds a bachelor's degree in Economics and Law. Her practice areas include Copyright and Trademark litigation. Prior to her engagement with Singh and Singh LLP, Aamna was working as a research associate with a think tank with focus on esports, data protection and blockchain technology.

¹Bitcoin: A Peer-to-Peer Electronic Cash System, Satoshi Nakamoto, 2008

²NFT sales surge to \$10.7 bln in Q3 as crypto asset frenzy hits new highs, 2021

³Section 22, Reserve Bank of India Act, 1934 - . Right to issue bank notes. —

⁴(1) The Bank shall have the sole right to issue bank notes in 1[India], and may, for a period which shall be fixed by the 2[Central Government] on the recom—mendation of the Central Board, issue currency notes of the Government of India supplied to it by the 2[Central Government], and the provisions of this Act applicable to bank notes shall, unless a contrary intention appears, apply to all currency notes of the Government of India issued either by the 2[Central Govern—ment] or by the Bank in like manner as if such currency notes were bank notes, and references in this Act to bank notes shall be construed accordingly.

⁵Banning of Cryptocurrency & Regulation of Official Digital Currency Bill, 2019

⁶Internet and Mobile Association of India vs Reserve Bank of India AIR 2021 SC 2720

⁷Article 19(1)(g) Constitution of India - to practise any profession, or to carry on any occupation, trade or business

⁸Blockchain: The India Strategy – Towards Enabling Ease of Business, Ease of living and Ease of Governance', NITI Aayog

⁹Tata Consultancy Services v. State of Andhra Pradesh, MANU/SC/0950/2004

¹⁰Supra note 4

¹¹Cryptocurrency and Regulation of Official Digital Currency Bill, 2021