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THE BOMBAY INCORPORATED LAW SOCIETY

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26th May 2020

To,
The Hon'ble Mr. Justice Dipankar Datta
The Chief Justice, Bombay High Court

Dear Chief Justice Datta,

SUBJECT: Suggestions for your appropriate consideration for resumption/continuation of the working of Courts on the relaxation/lifting of the lockdown in Mumbai

1. We refer to the joint meeting held on May 18, 2020 with you and the senior judges of the Bombay High Court, and the Advocate General of Maharashtra, the Additional Solicitor General of India, and representatives of the Bombay Incorporated Law Society, Bombay Bar Association and Western India Advocates' Association, in anticipation of the lockdown in Mumbai being relaxed/ lifted in phases, and offer our suggestions to assist the Hon'ble Court.
2. The experience of the Bench and the Bar during the recent weeks when courts functioned partially through video-hearings in the High Court and its subordinate Courts have had some technological challenges, which have to some extent been overcome with better platforms and improvements, and which we understand that the High Court is addressing these issues at its end.

PART I -- IMMEDIATE MEASURES DURING CONTINUED LOCKDOWN

3. **Continued Working of Courts.** The extraordinary changed environment, keeping in view Government/ health authorities, requiring social distancing norms/ restrictions/ parameters being met to have working Courts to continue administration of justice for instilling faith and confidence amongst all citizens from all strata of society.
4. **Geographical Clusters of Staff Residences.** We understand and believe that a fairly large number of staff/ members/ officers of the High Court/other courts within the vicinity of the High Court reside in geographical clusters of Bandra (East) / Dombivali / Kalyan/ Vasai. Even on a partial relaxation/lifting of the lockdown, it is unlikely that the local trains and public buses will normally operate. Even the limited public transportation services would expose the staff/ members/ officers to the infections by carriers of the COVID 19 virus.

5. **High Court Staff Transportation.** A limited number of buses of Maharashtra State Road Transport Corporation (MSRTC)/ BEST could be specially made available for transporting (to and fro) such staff/members/officers from the identified locations in the aforementioned geographical clusters to the High Court and the subordinate courts in the vicinity. The social distancing norms and other restrictions could be complied with in such buses. As a temporary measure in this COVID-19 crisis a notification/notice dated May 22, 2020 is issued by Brihanmumbai Electricity Supply and Transport Enterprise (“BEST”) whereby the BEST buses are made available for transportation of the employees of Bombay High Court and the employees working in the Office of the Public Prosecutor. A copy of the notification/notice dated May 22, 2020 is enclosed as **Annexure 1**.
6. **Precautions to be Observed by Staff and Others.** The staff/ members/ officers and any third party entering the Court precincts and/or are attending the Courts, may be required to mandatorily and scrupulously observe the stipulated, detailed precautionary measures for the protection of such persons and other persons as set out in the Circular issued by the Hon'ble Court on May 4, 2020. A copy of the circular dated May 4, 2020 is enclosed as **Annexure 2**.
7. The Hon'ble Court may also consider supplementing the existing circular dated May 4, 2020 with a few extra protective measures as per the guidelines issued by the health ministry/authorities. As a source of information, the Hon'ble High Court of Karnataka by issue of notification/notice/advisory dated April 21, 2020 had also formulated/issued some extra/ additional basic protective measures that are to be mandatorily followed by staff/ members/ officers in the Court precincts. The Hon'ble Court has also issued another notification dated May 8, 2020 whereby any breach on part of any staff/ member/ officer of the above-mentioned rules would be considered misconduct and dealt with accordingly. A copy of the notification/notice/advisory dated April 21, 2020 of the Hon'ble High Court of Karnataka is enclosed as **Annexure 3** and a copy of the notification dated May 8, 2020 is enclosed as **Annexure 4**.

PART II -- VIRTUAL COURT HEARINGS – ISSUES AND SUGGESTIONS

8. We do appreciate the difficulties the Hon'ble Court is facing in the conduct and hearing of cases through video conferencing. Being mindful of the fact that the Bombay High Court administration is relentlessly working on strengthening the platforms for the video-hearings/links for access/logging in for the hearings, our Society would be happy to assist the Court's team of IT personnel for providing assistance and troubleshooting purposes.
9. To assist the High Court in understanding some of the difficulties, we enumerate our Members' experience which has demonstrated that the effective hearings have got disrupted on account of :
 - i. **Log-in Problems.** The Advocate(s) are unable to log in on the links provided for entry to the virtual court. There have been instances where the Hon'ble Judges are unable to enter for a video - hearing due to technical glitches on the links provided;
 - ii. **Inaudible Reception on Video Hearing Platform.** A number of instances have also occurred where either the Ld. Judge is unable to hear one or more

of the Advocate (s) OR one or more of the Advocate(s) being unable to hear the Ld. Judge OR the Advocate(s) being unable to hear the submissions of the other Advocate(s);

- iii. **Over-crowding.** Advocates and/or third parties using the links to view hearings of matters in which they are not concerned with and deny advocate(s) who are unable to log in because of such overloading of the system;
 - iv. **Court Attire.** The Ld. Judges have observed that Advocate(s) have not personally presented themselves in formal attire appropriate for a hearing;
 - v. **Poor quality of Digitalisation of Court Pleadings/Documents.** The Ld. Judge being handicapped and being unable to read or access the proceedings or documents including for reasons such as the soft copies of documents being illegible and folders wherein soft-copies of the proceedings were to be uploaded were blank;
10. **Help-Line / Video Demo.** A help-line(s) to assist Advocate(s)/parties in person may be provided to deal with any deficiency in visual acuity / audibility experienced by participants during the video-hearings.
 11. A video demo be provided to Advocates and Parties-in-Person to explain how to access and use the virtual hearing platforms.

PROTOCOLS AND RULES DURING VIDEO-HEARINGS

12. **Rules to be Published.** It is imperative that the protocols of discipline for video-hearings and rules are formulated and published on a war footing, with required publicity at prominent places within the Court precincts and the High Court website. The experience of the Supreme Court can perhaps be considered for the purpose of the Bombay High Court. The protocol published by the Supreme Court that could be appropriately adopted and modified as may be necessary, and published for the High Court of Bombay. The copies of the protocols as published by the Supreme Court is enclosed as **Annexure 5, 6 and 7** respectively.
13. Experience has demonstrated the necessity of better rules and procedures for avoiding overcrowding of courts, especially in recording of evidence in both civil and criminal cases via video conferencing with necessary safeguards in place. The same is especially applicable in Criminal cases which are more so for marking of attendances on dates fixed for hearing when no hearings take place nor when evidence of witnesses are recorded, except to be adjourned despite parties/witnesses being required to wait in court for the entire day(s). Moreover, the Information Technology Act, the Civil Procedure Code, the Criminal Procedure Code and the Evidence Act should also be suitably amended to enable video-hearings without such hearings being vulnerable to legal challenges.

NATURE OF MATTERS THAT MAY BE TAKEN UP FOR VIDEO-HEARINGS

14. **Alternate Dispute Resolution Mechanism.** The Ld. Judges may be requested to encourage parties to opt for time-bound Alternate Dispute Resolution mechanisms to ease the load on the Courts. For this purpose, a committee may be set up to constitute online dispute resolution platforms under the aegis of the courts itself.

15. **Priority Matters.** The Ld. Judges of the Trial Court may prioritise only cases relating to remand, bail, anticipatory bail, grant of injunction/interim relief or extension of stay where there is a possibility of irreparable damage otherwise, labour disputes concerning layoffs due to COVID, rent and eviction matters relating to COVID, cases relating to domestic violence and maintenance, and other miscellaneous cases which courts see as urgent and fit for virtual hearing. Apart from appeals, bail, remand petitions and POCSO matters and writ petitions from the categories of priority cases specified for trial courts above, the High Court ought to prioritise *habeus corpus* matters and matters relating to public interest concerns qua the pandemic and/or lockdown. Final Hearing matters in both the High Court and Trial Court maybe prioritised as they require only the presence of the lawyers, and as long as the records are available in digitised form, these matters may also be prioritised.
16. This Hon'ble Court may consider taking guidance from the list of **short category matters** while exploring the possibility of expanding the range of matters that this Hon'ble Court would be taking up in the forthcoming weeks. The **Supreme Court's list of short category matters** is enclosed hereto as **Annexure 8**. This Hon'ble Court may also publish an indicative list of commercial matters that warrant the Court's urgent attention, such as matters relating to *force majeure* and material adverse change, invocation of pledge, bank guarantees and letters of credit, and the like. It would be highly desirable, from the standpoint of providing continued access to justice, for this Hon'ble Court to begin hearing matters beyond those falling within the "very urgent" category. In addition and occasioned by the pandemic and the extraordinary circumstances prevailing today, a Special court (Bench) maybe assigned exclusively for COVID 19 and monsoon related issues which would also include, inter alia, matters related to incomplete public projects, infrastructure, insurance and other civic bodies issues.

PART III -- PROCEDURAL CHANGES TO FACILITATE SPEEDY DISPOSAL OF PHYSICAL AND VIRTUAL HEARINGS

17. The problems with Video-conferencing and E-filings are teething problems and are not insurmountable. Video-conferencing and E-filings are to supplement open/physical hearings and not to supplant open/physical hearings. In order to deal with the challenge of time constraints in the eventuality that the range of matters taken up for hearing is expanded during the restricted functioning this Hon'ble Court, the following procedural suggestions may be considered for ensuring speedier disposal of cases, whether they are being heard physically or virtually:
- i. **Daily Cause List.** Boards should contain fewer matters, which, in turn, should be structured in a staggered fashion. For instance, routine applications and procedural hearings may be scheduled in the first half of the day, and longer, more complex hearings for arguments and the like may be scheduled in the second half of the day. This would ensure clarity, efficiency, focused approach and avoid wastage of time and encourage faster disposal of cases.
 - ii. **Case Management System.** A mandatory case management hearing should be held for both fresh and existing cases, in which parties should indicate the time required for their arguments. Hearings should accordingly be scheduled in a time-bound manner, and parties should not be permitted to exceed their time

limit beyond a reasonable leeway, except in extenuating circumstances. This would also help make boards more predictable, reliable and efficient.

- iii. **Pre-Hearing Procedures.** In order to facilitate time-bound hearings and otherwise, the importance of out-of-court preparation should be emphasised. Particularly, advance filing of written submissions containing an exhaustive list of authorities prior to the oral hearing should be made mandatory. This would give the judge as well as the opposite side time to prepare beforehand, thereby saving time during the hearing itself. Detailed rules for the format of written submissions may be notified, requiring, for instance, appropriate referencing of all evidence mentioned in the written submissions.
- iv. **Routine Matters and E-Filings.** Routine procedures such as mentioning, production, circulation, adjournment, discovery, inspection, bringing heirs/parties on record, directions, formal orders and the like that can be heard remotely should be shifted almost entirely to virtual platforms even in the long term. *E-praecipes* should be encouraged and mandated wherever necessary and/or appropriate. Longer hearings for final arguments should also be conducted via video conferencing. In the spirit of maintaining social distancing, only complex and contentious hearings should be held physically. However, trials and witness examination ought to be continued in physical courtrooms with appropriate social distancing norms and other restrictions.
- v. **Digitalisation and E-Filing.** As regards tendering of documents during a virtual hearing, parties should be required to upload them on a dedicated portal/server integrated with the e-filing platform prior to the hearing. This portal/server should be without restrictions on file size. IT personnel should be stationed as data entry operators within courtroom premises to assist lawyers and litigants in uploading their pleadings, applications, documents, etc. on the e-filing platform. Adjournments, ought not be granted unless in cases of dire and reasonable exigencies. Parties should be required to consult with the other side and apply for adjournment at least one week prior to the hearing, or, in extreme circumstances, the day before or on the day of the hearing. Applications for adjournment should be made via email or e-praecipe so as to save the court's time.
- vi. **Imposition of Costs.** Heavy costs should be imposed when the court finds that parties are filing frivolous/vexatious applications indiscriminately.
- vii. **Restriction of entry into Court Premises.** Considering the fact that the social distancing norms and restrictions will have to be followed as per state directives, a system of **e-passes** may be set in place for Advocates / court clerks / litigants and parties, appearing in person for declaration and/or affirmation or work of any nature, thereby allowing only limited number of people in the court premises. This includes preventing large teams of lawyers appearing for single matters in light of social distancing norms.
- viii. **Time-slots.** To list limited matters as per time slots so as to avoid overcrowding, and **ensure only those whose matter is listed in a particular slot are the only ones present at that time.** **Time limits on arguments** may also be considered to maintain quality and brevity whilst being efficient with time.
- ix. **E-filing of proceedings in court.** The Supreme Court has already begun the process of digitisation of all its cases, the Apex Court led by Hon'ble Mr. Justice D Y Chandrachud, Chairman of the Supreme Court's E-committee, has recently

introduced and shifted to a revolutionary, much needed new system of filing, for fresh cases as well. Acknowledging the situation occasioned by COVID 19, the Hon'ble Chief Justice of India, Hon'ble Mr. Justice SA Bobde, has stated, *“This period has provided us with a compulsory training to prepare for a new working environment. Eventually, it must settle down to a system that is a combination of the new and the old...”* In this regard it is pertinent to note and the High Court of Bombay may consider to:

- a) Lift the restriction and allow, **e-filings for all fresh filings** and not restricted to 'very urgent' or 'urgent' cases;
- b) **Operationalize the draft guidelines** that have been proposed by the Supreme Court for High Courts and District Courts which have been circulated but are yet to be implemented. This process may be expedited and completed at the earliest as this system, once launched and used, will help in integration with video enabled courts.
- c) **Online application for certified copies** including providing of e-certified copies against such applications being made.
- d) **Digitisation of existing records** – The prevailing justice system relies heavily on paper use. There is a pressing need to get rid of this archaic and environment degrading system, to shift to technological solutions so as to avoid excess reliance on hard copies. The High Courts in Delhi and Punjab and Haryana have taken steps to dispense with paper -everything is on a soft copy, through e-Filing and scanned documents. Lawyers and judges have made necessary adjustments to the new regime and the cases are conveniently heard and decided in **“paperless courts”**. A few other high courts initiated similar steps, but have yet to institutionalize “paperless courts”. This step can be instrumental in overhauling the traditional judicial system. Once the digitisation is done and the records are integrated, the transition to a digital environment can be more seamless. The High Court may consider appointing a dedicated technically qualified agency for digitising all the records. In this regard, it is but essential that all the digitised filings be replicated and filed in **fully searchable PDF format with hyperlinks and bookmarks**. In cases where the need arises, they may also request assistance from the advocates on record / litigants/ parties concerned to assist the court in this procedure.
- e) Even once the Courts resume functioning, **physical filing of new cases may be permitted in a manner in compliance with the social distancing norms and other restrictions put in place by the government and the health authorities**. In this regard, Lordship may consider, if necessary, the process/procedure set out in the notification /notice issued by the High Court of Karnataka on May 11, 2020 read with the notifications dated May 12, 2020 and May 15, 2020. Copies of the notifications issued on May 11, 2020, May 12, 2020 and May 15, 2020 are enclosed hereto as **Annexures 9, 10 and 11** respectively.

PART IV -- WAY FORWARD

18. The Chairman of the Bar Council of India (“BCI”) has voiced a concern that 90 per cent of the lawyers are not computer literate or tech savvy. Law and jurisprudence are not static but mirror societal needs and often shape them.

Therefore, the Bar Councils and Bar Associations must stretch every nerve to educate the district and taluka lawyers on the advantages of accepting technology. In this regard, the High Court of Bombay could consider organising workshops/webinars/help-desks to aid and assist the digital divide that will come about because of issues such as lack of access, language barriers, digital literacy, internet connectivity and such other issues. Charitable Educational Trusts, like the *Rajasthani Sammelan Education Trust*, have already been conducting computer courses through colleges run by them and they have volunteered to conduct such courses, free of any charges, for improving digital literacy. If your Lordship considers it appropriate, the Hon'ble Court may consider utilising the programs offered by such organisations to help build a digitally empowered community. It is indeed a long haul ahead and the task cannot be completed in a day or so — it might take a year, but a beginning has to be made now.

19. In their efforts to open up the access roads to justice which had been paralysed due to COVID 19, the Supreme Court has directed the courts in the country to transition to utilise technology so that the delivery of justice is not disrupted, and High Courts have been required to frame rules in this regard. Occasioned by this public health crisis coupled with the Supreme Court calling for robust and calibrated institutional responses, we have now welcomed many changes in processes that were otherwise steeped in tradition as the continuous shut down of the judiciary is an unsustainable option. In fact, this has not only highlighted gaps in the ability, but has also tested the willingness of courts to move online in situations such as these.
20. Open courts will remain as also open justice, but some definitions will change with a more aggressive use of technology, not only in conventional but also online and virtual courts. Several countries and courts have made adjustments not only for the period of the pandemic or lockdown, but also for the future. We should certainly not be left behind, but must also make a roadmap to meet the challenge.
21. The above suggestions would possibly be feasible either in the immediate future and/or the short term/long term in fulfilment of the constitutional duties for providing fair access to an effective justice delivery system. We can only confess that there are too many factors/facts that are required to be considered by your Lordship and which are beyond the Bar Associations or others who believe they had deep knowledge of how to work the courts or the working of the courts themselves. We commend the enormous efforts being made at every level in the country whether the Supreme Court of India or the several High Courts to resume the disrupted systems of administration of justice.
22. The Bombay Incorporated Law Society is pleased to deliberate of any or all of these preliminary suggestions, and any other suggestions already made to the High Court, at any time convenient to your Lordship, as your valuable views and approval would be pertinent for ultimate implementation of a hybrid system of courts, both virtual and physical, for effective justice delivery, that may continue even after this pandemic passes.

Yours sincerely,
For The Bombay Incorporated Law Society

Encl: 11 Annexures as above

Kaivan Kalyaniwalla

President