



IN THE HIGH COURT OF DELHI AT NEW DELHI  
W.P. (C) NO. 9592 of 2015

IN THE MATTER OF:  
ASSOCIATION FOR DEMOCRATIC  
REFORMS & ANR. .... PETITIONERS  
VERSUS  
UNION OF INDIA .... RESPONDENT

COUNTER AFFIDAVIT FILED IN COMPLIANCE OF ORDER  
DATED 24.11.2015

A. That I Ms. Rajalakshmi Devaraj D/O J. Devaraj aged about 43 years, Director (FCRA/MU), Ministry of Home Affairs, NIDCC-II Building, Jai Singh Road, New Delhi-110001, do hereby state and declare that as such I am conversant with the facts of the case and that I am competent and authorized to swear this affidavit.

B. That the present affidavit is being filed in compliance with the order dated 24.11.2015 passed by this Hon'ble Court whereby notice was issued to the Respondent to explain the present system of administering the Foreign Contribution (Regulation) Act, 2010 (hereinafter referred to as "FCRA, 2010").

C. The present counter affidavit is being filed on the issue of the present system of administering FCRA, 2010 only and the Respondent craves leave to file a detailed counter affidavit if called upon to do so.

I. PRELIMINARY OBJECTIONS

1. That till 30<sup>th</sup> April, 2011, foreign contribution was regulated under the provisions of the Foreign Contribution (Regulation) Act, 1976 (hereinafter referred to as "FCRA, 1976") and the Foreign Contribution (Regulation) Rules, 1976. That the FCRA, 1976 has since been repealed and foreign contribution is now regulated under FCRA, 2010 and the Foreign Contribution (Regulation) Rules, 2011 (hereinafter referred to as "FCRR, 2011"). Both FCRA, 2010 and

FCRR, 2011 have come into force with effect from 1<sup>st</sup> May, 2011 and are a complete Code in themselves with an inherent system of checks and balances.

2. That the FCRA, 1976 was repealed and replaced with the FCRA, 2010 due to the change in internal security scenario in the country, ever increasing influence of voluntary organizations, quantum jump in the amount of foreign contribution being received et al. These and many other factors led to the repeal of FCRA, 1976 and enactment of FCRA, 2010.

3. That the present Writ Petition has been filed by the Petitioner stating since Ministry of Home Affairs (hereinafter referred to as "MHA") is administratively subordinate to Political Executive, and thus there is *likelihood or a possibility that there may not be an impartial probe in matter of FCRA violations committed by Political Parties*. It has been also been stated by the Petitioners that since proceedings under FCRA, 2010 are quasi-judicial in nature, there is necessity to insulate FCRA Proceedings from Political Executive and constitute a separate judicial tribunal to administer the provisions of the FCRA, 2010.

4. That it is submitted that the Petition itself is based on surmises and conjectures. That the same can be clearly obtained from the representation preferred by the Petitioner No.2 to the Respondent on 13.03.2015. That the Petitioner No.2 in the said representation has stated that it is possible that the political executive *may* abuse the provisions of FCRA, 2010 as the MHA is under the administrative control of the political executive. The Petitioner No. 2 thus admits that the Respondent has not abused any provision of FCRA, 2010. Thus, the unfounded apprehension of the Petitioners that just because a provision is capable of abuse, would not mean that the provision of the Act shall be abused leading to invalidating the provision. Furthermore, the Court would not judge the administration of an Act in a vacuum, where admittedly no provisions have been abused. Thus, the aspersions cast on the political executive are baseless and are vehemently denied.

5. That it is submitted that the Petitioner No.2 has stated in its representation dated 13.03.2015 that the creation of tribunal or a body would require an amendment to the FCRA, 2010. That the Courts have time and again stated that the amendment of an Act is a legislative function and a Court should eschew from legislating as the same would fly in the face of the doctrine of "separation of powers". *In P. Ramachandra Rao Vs. State of Karnataka, (2012) 9 SCC 430,* the Hon'ble Apex Court lucidly captured the reasons for this self-imposed restraint and the same is reproduced below:

27. In an monograph "Judicial Activism and Constitutional Democracy in India" commended by Professor Sir William Wade, Q.C. as a "small book devoted to a big subject", the learned author, while recording appreciation of judicial activism, sounds a note of caution-"it is plain that the judiciary is the least competent to function as a legislative or the administrative agency. For one thing, courts lack the facilities to gather detailed data or to make probing enquiries. Reliance on advocates who appear before them for data is likely to give them partisan or inadequate information. On the other hand if court have to rely on their own knowledge or research it is bound to be selective and subjective. Courts also have no means for effectively supervising and implementing the aftermath of their orders, schemes and mandates, since courts mandate for isolated cases, their decrees make no allowance for the differing and varying situations which administrators will encounter in applying the mandates to other cases. Courts have also no method to reverse their orders if they are found unworkable or requiring modification". Highlighting the difficulties which the courts are likely to encounter if embarking in the fields of legislation or administration, the learned author advises "the Supreme Court could have well left the decision-making to the other branches of government after directing their attention to the problems rather than itself entering the remedial field".

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29. Professor S.P. Sathe, in his recent work (Year 2002) "Judicial Activism in India-Transgressing Borders and Enforcing Limits", touches the topic "Directions: A New Form of Judicial Legislation". Evaluating legitimacy of judicial activism, the learned author has cautioned against Court "legislating" exactly in the way in which a Legislature legislates and he observes by reference to a few case that the

*guidelines laid down by court, at times, cross the border of judicial law making in the realist sense and trench upon legislating like a Legislature. "Directions are either issued to fill in the gaps in the legislation or to provide for matters that have not been provided by any legislation. The Court has taken over the legislative function not in the traditional interstitial sense but in an overt manner and has justified it as being an essential component of its role as a constitutional court." (p.242). "In a strict sense these are instances of judicial excessive that fly in the face of the doctrine of separation of powers. The doctrine of separation of powers envisages that the legislature should make law, the executive should execute it, and the judiciary should settle disputes in accordance with the existing law. In reality such watertight separation exists nowhere and is impracticable. Broadly, it means that one organ of the State should not perform a function that essentially belongs to another organ. While law-making through interpretation and expansion of the meanings of open-textured expressions such as 'due process of law', 'equal protection of law,' of 'freedom of speech and expression' is a legitimate judicial function, the making of an entirely new law.thought directions.... is not legitimate judicial function." (p.220).*

6. That it is the contention of the Petitioner's that as certain functions performed by the executive under the FCRA, 2010 are quasi-judicial in nature thus the same can only be performed by a judicial tribunal. It is submitted that various arms of the executive discharge quasi-judicial functions and it has been held by the Hon'ble Apex Court, that just because an authority performs quasi-judicial functions it is not necessary that they must have a judicial background. Thus, the said contention of the Petitioners is also without merit.

7. That the number of Court Cases pending in relation to enforcement of FCRA, 2010 is 12. The miniscule number of Court Cases indicates that there is no justification of establishment of separate Judicial Tribunals for enforcement of FCRA, 2010 as it may lead to wastage of precious resources in terms of money and man-power, both of judiciary as well as of executive. Thus, even the statistics do not support the cause allegedly being espoused by the petitioner.

8. It appears that the present Petition has been preferred on behalf of various Non-Government-Organizations (hereinafter referred to as

“NGO’s”) whose registration under the FCRA, 2010 had been cancelled for various irregularities and statutory non-compliances by the answering Respondent after following the due process of the law. Thus it is clearly a vindictive Petition on behalf of various NGO’s which amount to an abuse of process of law and thus deserves to be dismissed at the very threshold.

## **II. PRESENT SYSTEM OF ADMINISTERING FCRA, 2010**

9. That at the outset it is submitted that the Preamble of the Act i.e. Foreign Contribution Regulation Act, 2010 states that :

*“ An Act to consolidate the law regulating the acceptance and utilization of foreign contribution or foreign hospitality by certain individuals or association or companies and to prohibit acceptance and utilization of foreign contribution or foreign hospitality for any activities detrimental to the national interest and for matters connected therewith. ”*

That it is clear that the objective of enactment of FCRA, 2010 is to regulate the acceptance and utilization of foreign contribution or foreign hospitality by certain persons or associations with a view to ensure that Parliamentary institutions, political associations and academic and other voluntary organizations as well as individuals working in important areas of national life may function in a manner consistent with the values of a Sovereign Democratic Republic.

10. That Section 2(h) and 2(j) of FCRA, 2010 define “foreign contribution” and “foreign source” respectively. That Section 3 states that no foreign contribution can be accepted by electoral candidates, correspondents, judges, members of legislature, political parties, organizations of a political nature etc.

11. That under Section 5 of the FCRA, 2010 the Central Government can by an order published in the official gazette declare an organization to be one of a political nature not being a political party. The order would disentitle the said association from receiving foreign contribution. That before making such an order, sub-section(2) of section 5 mandates that the Central Government must give notice to

the said organization of the grounds on which the Central Government wants to declare the organization as one of having political nature though not being a political party. The said organization has thirty days to reply to the said notice and only after considering the same the Central Government and after considering inputs/report of any authority in terms of sub-section (4) & (5) thereof, may make an order declaring the organization as one having a political nature though not being a political party. The said elaborate procedure shows that the power under Section 5 does not give untrammelled or uncanalised power to the Central Government but can only be utilized after following the due process of law.

12. That in order to regulate the receipt of foreign funds organizations seeking foreign contribution for definite cultural, social, economic, educational or religious program may either obtain 'registration' or 'prior permission' to receive foreign contribution from MHA by preferring an application in prescribed format under Section 11 of the FCRA, 2010.

13. That 'Registration' is granted to such 'Person(s)/Association(s)/Company(s)' which have a proven track record of functioning in the chosen field of work during the last three years. After a "Person/Association/Company" is registered it is eligible to receive foreign contribution from a foreign source for its stated objectives. 'Registration' is granted only after thorough security, vetting of the activities and antecedents of the organization and officer bearers thereof. That the said registration granted under the FCRA, 2010 is valid for a period of five years as specified in sub-section (6) of Section 12, after which the registration can be renewed.

14. That 'Prior Permission' is granted to such organizations which are newly established and do not have proven track record of functioning and may also receive foreign contribution, for a specific purpose and from a specific source after seeking project based 'Prior permission'.

15. That Section 12(4) of the FCRA, 2010 states certain conditions which have to be fulfilled for a person to be granted registration or prior permission under Section 11 of the FCRA, 2010 respectively.

They are inter alia that a person should use the funds for the purpose as stated in the application; should not have been prosecuted or convicted for creating communal tension or disharmony; should not contravened any provisions of the FCRA, 2010.

16. That if a registration is not granted to a person applying for the same, Section 12(3) mandates that the Central Government must record in writing the reasons for not granting the same and communicate the same to the applicant. That this is a check and balance measure encompassed in the Act, so that the Central Government does not exercise the power of denying registration in an arbitrary manner and also indicates that all decisions are taken in a transparent manner.

17. That it may be mentioned that during the period 01.01.2014 to 31.12.2014, 155 Associations were granted prior permission under the FCRA, 2010 to receive foreign contributions. During the period from 01.01.2014 to 31.12.2014, 1,108 Associations have been granted Registration under FCRA, 2010 to receive foreign contribution. The total receipt of Foreign Contribution reported by 20,373 associations during the year 2012- 13 was 12386,9854 Crores. The total receipt of Foreign Contribution during 2013-14 as reported by 17976 associations till 31.12.2014 is 14044.9786 Crores.

18. That under Section 13 and 14 the FCRA, the Central Government has the power to suspend registration certificate or cancel the registration certificate respectively. That Section 14(2) of the Act imbibes in it the principles of natural justice, whereby no registration certificate can be cancelled unless an opportunity of hearing is given to the person thereby ensuring that there is no arbitrary exercise of power.

19. That one of the purposes of the Act is to ensure that the foreign contribution received by any Person/Association/Company for a specific purpose is not misused or diverted for any activity detrimental to the national interest as is clear from the Preamble of the FCRA, 2010. To ensure the same a Monitoring Unit in the FCRA Wing has been designated to monitor the receipt and utilization of foreign contribution. This is done through monitoring the annual



returns submitted by the Associations receiving foreign contribution and identification of the Associations who have defaulted in filing annual returns.

20. That if a complaint is received from a Government or Security Agency, then a Standard Questionnaire (SQ) is served upon the Person/Association/Company. On receiving a reply to the SQ from the concerned Person/Association/Company the same is examined and thereafter a decision is taken whether or not inspection as per Section 23 is to be carried out. If it is decided that an inspection is to be carried out then a team of Officers, headed by a group 'A' officer from the MHA conducts the inspections either on-site or off-site depending on the requirement. These inspections have twin objectives – one, to educate the Person/Association/Company in respect of bonafide errors and two, to detect and prosecute willful violators. The main emphasis of the inspection is to ensure that the foreign contribution is utilized judiciously and in conformity with the avowed aims and objectives of the Person/Association/Company and for the purposes for which the same is received.

21. That if a complaint is received against a Person/Association/Company from the general public for contravention of the provisions of the FCRA, 2010. After that the same is sent to a security agency for verification and on the basis of reports/inputs of the Security Agency, if required SQ is sent to the Person/Association/Company and the procedure described in the above paragraph is followed *mutatis mutandis*.

22. That if serious violations are established after inspections and due inquiry; punitive action, such as-

- (i) prohibiting the person/association/company from receiving foreign contribution
- (ii) freezing of its bank accounts
- (iii) prosecuting the person/association/company in a court of law
- (iv) cancellation of registration is taken under provisions of the FCRA, 2010 and FCRR, 2011 after giving reasonable

opportunity to the charged person/association and following the due process of law.

23. That further, Chapter VI and VII of the Act deals with Adjudication and Appeals which provides appropriate intervention of judiciary thereby providing enough safeguards against misuse of FCRA, 2010. That under Section 29 of FCRA, 2010, any confiscation of article or currency or security obtained in contravention of FCRA, 2010 may be adjudged by Court of Session or assistant Sessions Judge. Also, Section 31 of FCRA, 2010 states that any person aggrieved by an order made under Section 29 can prefer an appeal to the High Court or the Court of Sessions as the case may be. That furthermore all actions taken under the Act can and have been subject to judicial review under Article 226 of the Constitution.

24. That there is also a system of control over arbitrary action from the Legislature in the light of Section 49 of FCRA, 2010. Section 49 provides that every order made under Section 5 declaring an organization as one having a political nature not being a political party and every rule made by Central Government shall be laid before each house of Parliament.

25. The Government receives inputs from various security agencies, including intelligence Bureau, from time to time, about the violations of FCRA and action is initiated against the alleged violators after following due process as prescribed in the FCRA, 2010.

26. That instances of NGO'S violating provisions of the FCRA, 2010 and FCRR, 2011 have come to the Government's notice. Since implementation of FCRA and FCRR with effect from 01.05.2011, notices were issued to around 21,000 associations in 2011 and to 10,343 associations in 2014 for not filing annual returns continuously for three years. Consequently, registration of 4,138 associations was cancelled in July 2012 and of 10,117 in March 2015 after issue of Show Cause Notices to such associations and giving them adequate opportunity to reply to the same. After inspections and scrutiny of

accounts, 24 cases were referred to CBI and 10 to State Police for further investigation and prosecution. That the Accounts of 34 associations have been frozen and that 66 associations have been prohibited from receiving foreign contribution. That in 2014, penalty amounting to Rs.5,20,82,031/- had been imposed on 341 associations for late/ non-submission of mandatory annual returns and of Rs. 51,99,526/- on 24 associations for receipt and utilization of foreign contribution without obtaining registration or prior permission under the FCRA,2010.

27. That the number of Court Cases pending in relation to enforcement of FCRA, 2010 is 12. The miniscule number of Court Cases indicates that there is no justification of establishment of separate Judicial Tribunals for enforcement of FCRA, 2010 as it may lead to wastage of precious resources in terms of money and man-power, both of judiciary as well as of executive.

28. That the MHA has made all FCRA services on-line reducing the human interface to minimum ensuring maximum transparency in the administration of FCRA, 2010. This includes on-line acceptance of Applications for Registration, Prior Permission and renewal of registration under FCRA, 2010. All intimations under FCRA, 2010 like Annual Returns and loading of documents with the application have been made online. This facilitates the applicants a lot and also at the same time enables effective monitoring by the MHA.

29. That the Answering Respondent has recently amended FCRR, 2011 vide notification dated 14.12.2015. These amendments have made provisions for online reporting of Foreign Contribution by associations receiving foreign contribution and also by Banks. At the same time various forms for applying for permission, intimations etc have been made simpler.

30. That the services of FCRA Wing are being brought to platform of PFMS (Public Finance Management System) of Controller General of Accounts, MHA so that real time credit and debit in the Foreign Contribution designated accounts of the associations could be

accessed for scrutiny to ascertain violations of provisions of FCRA, 2010 and FCRR, 2011.

31. It may be stated that at present our system of administering FCRA, 2010 is robust, efficient, just and fair and there is no need for establishing separate body/tribunal for enforcing FCRA, 2010. That furthermore the safeguards entrenched in the Act should dispel any apprehension of abuse harboured by the Petitioners.

Place: New Delhi

Date:04/07/2016.

(राजलक्ष्मी देवारा)  
(RAJALAKSHMI DEVARA)  
निदेशक/Director  
जि. शाखा :  
Ministry of Home Affairs  
सरकार भारत/Govt. of India



DEPONENT

### Verification

Verified on this the 4<sup>th</sup> day of July, 2016 that whatever is stated herein above is true and correct on the basis of knowledge and information as derived from official records and legal advice received and that no part of it is false and nothing misleading has been concealed there from.

(राजलक्ष्मी देवारा)  
(RAJALAKSHMI DEVARA)  
निदेशक/Director  
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DEPONENT