

## Social Sector Hotline

April 14, 2022

### FCRA AMENDMENTS REMAIN CONSTITUTIONALLY VALID

- Fundamental rights are subject to reasonable restrictions;
- Right to receive foreign contribution is not a fundamental right;
- Mere inconvenience cannot be a basis to challenge the *vires* of a legislation;
- To protect national sovereignty from adverse influence of foreign contributions, it is imperative that charity should be more inward-looking

The Supreme Court recently upheld the *vires* of amendments made to Section 7, Section 12(1A) and Section 17(1) of the Foreign Contribution Regulation Act, 2010 ("FCRA") in the case of *Neal Harper and Ors. V. Union of India*<sup>1</sup>. The court ruled that FCRA 2020 amendment does not contravene fundamental rights guaranteed under Article 14, 19(1) (c) 19(1)(g) and Article 21 of the Indian Constitution, while holding that rights guaranteed under Part III are not absolute and subject to reasonable restrictions. Further, the Court noted that a right to receive foreign contribution is not a fundamental right guaranteed to any legal person in India. However, the Court read down Section 12A and allowed Indian applicants to produce passports as identification document instead of Aadhar for obtaining prior permission under Section 11, or applying for grant of certificate under Section 12, or renewal of certificate under Section 16 of FCRA.

### BACKGROUND

In 2021, chairperson of Care & Share Charitable Trust along with others had challenged the constitutionality of Section 7, Section 12A, Section 12(1A) and Section 17(1) of the FCRA 2020 amendments ("**Amendments**") which sought to enforce stricter mandates for receiving, utilizing and transferring the foreign funds received by the registered NGOs. The challenged provisions entailed a complete ban on transfer of foreign contributions to other NGOs/persons; mandatory production of the Aadhaar card as identification document for registration or certification under the FCRA and opening of a new FCRA account exclusively at a specified branch of the State Bank of India in New Delhi. The petitioners had challenged the amendment of being manifestly arbitrary which suffered from "*vice of ambiguity, over-breadth or over-governance*" and alleged imposition of unreasonable restriction on the usage of foreign contribution. The Central Government, in affidavit filed by the Ministry of Home Affairs ("**MHA**"), justified the amendment as an inevitable necessity to prevent alleged malpractices amongst NGOs, which has a direct bearing on the politics and social order of the State.

### THE RULING

Constitutionality of Section 7 of FCRA 2020 amendment

The Supreme Court affirmed the validity of Section 7 which disallows the transfer of goods and funds received from foreign sources, from one NGO to another. Pertinently, prior to the amendment, such transfer of funds was allowed after obtaining prior permission from the MHA. The petitioners alleged that provision would act as a complete prohibition on the use of foreign funds instead of acting as a reasonable restriction. The Court emphasised that a successive chain of transfer of foreign contribution amongst organisations and successive utilisation of same towards administrative costs under FCRA was detrimental to the purpose of the principle statute act. As the expression 'transfer' and 'utilization' have not been defined in the statute, the Court interpreted 'transfer' to be a *simpliciter* transfer by the recipient of foreign funds to a third party. However, it was clarified that payments made by recipient of foreign contribution to a third party in exchange of services or towards outsourced activities should be considered 'utilisation' for a specified purpose per Section 8 of the amendment.

While noting that malpractices of misappropriation and misutilization of funds by certain NGOs had led to cancellation of thousands of registrations, the Court emphasised upon the need to protect national sovereignty from adverse influence of foreign contributions and urged to look for charity 'within the country'.

The vires of Section 8, which puts a cap of 20% on administrative expenses was not challenged before the Court. However, the Court clarified that section 8 is a reasonable restriction for fixing accountability and mandating maximum utilisation of funds for permitted purposes. The court noted that the restrictions of Section 7 and Section 8 applies to all '*persons who are permitted to accept foreign donation*' for permitted purposes and thus has a rational nexus with the object of the principle act. Relying on the dictum of *Rustom Cavasjee Cooper v. Union of India*<sup>2</sup> and *R.K. Garg v. Union of India*<sup>3</sup> it was held that any legislation which applies uniformly to a class of persons cannot be held to be arbitrary or irrational. The Court held that the amendment does not absolutely prohibit the inflow of

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foreign contributions and therefore it cannot be held *ultravires* for being manifestly arbitrary within the meaning of Article 14 or Article 21 of the Constitution.

VALIDITY OF SECTION 12(1A) AND SECTION 17(1)

Section 12(1A) read with Section 17 (1) in amended form, makes it obligatory for NGO's receiving foreign funds to open a new FCRA Account at specified branch of SBI Bank in New Delhi. The Petitioners argued manifest arbitrariness and unreasonableness, resulting in violation of fundamental rights under Article 14, 19 and 21. The Union government stated that the previous framework, which only required organisations to open accounts at scheduled banks, was inadequate and incapable of monitoring the flow of foreign funding in current times. This lacuna was detrimental to the interest of national security, and paved way for malpractices among NGOs. The Court held that a change in framework of acceptance of foreign contribution cannot become a basis to question the validity of amended provisions. Further clarified that a mere inconvenience cannot attract constitutional inhibition specially when the mandate under section 12(1A) and Section 17 is a one-time exercise. Under the amended provisions, the concerned organisation can utilise the amount received in FCRA account, through multiple accounts in the scheduled branches thereafter. Looking at the amendment through the lenses of State security and public order, the Court upheld the validity of section 12(1A) and Section 17.

VALIDITY OF SECTION 12A

The court 'read down' Section 12A which mandates the production of Aadhar Card of all office bearers or Directors or other key functionaries as identification document for registration and certification under FCRA. The petitioner relied on the dictum of *K.S. Puttaswamy (Retired) & Anr. v. Union of India & Anr*<sup>1</sup>, and alleged arbitrariness and lack of nexus with the intent of the principle act. The Court while observing that section 12A was only for the purpose of identification of key functionaries, read down to construe it as acceptance of Indian passport for Indian nationals instead of Aadhar Card.

ANALYSIS

The Supreme Court has looked at the amendment as a necessity to prevent the interference in nations polity and social order by misusing foreign contribution. While consistently referring to 'past experience' of the government which had led to cancellation of 19000 NGO's for non-compliance under the previous framework the Court remarked that *"The courts ought not to adopt a doctrinaire approach in construing the amended provisions and undermine the legislative intent of strengthening the regulatory mechanism concerning foreign contribution,"*. The verdict has given prominence to the decisions of parliament w.r.t to legislations concerning national security, which may prove counter-productive to the theory of checks and balances.

The Court interpreted that payments made for outsourced work to third parties should be 'utilizations' under section 8. This interpretation gives a much needed clarification on scope of 'transfers' under section 7. This interpretation should enable organisations with international funding and intermediary organisations to engage in collaborative projects and deliver last mile services. However, keeping the 20% cap on utilization towards 'administrative expenses' should still pose functional and logistical limitations towards such collaborative efforts. Administrative expenses, per Rule 5 of the FCRA, includes payment of wages, salaries, expenditure towards report writing etc. Therefore, it was imperative for the Court to revisit the ceiling on 'administrative expenses' as it has a direct bearing on payments towards professional fees for many grassroot workers. By reading down Section 12A, the Court has tried to strike a balance between right to privacy and national interest. Thus, the Apex Court's decision places state interest at the highest pedestal and legitimise the actions of parliament to take necessary stringent steps to protect the same. Such precedents when accepted as a blanket law of the land may have adversarial sectoral consequences.

– Rahul Rishi & Dr. Milind Antani

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You can direct your queries or comments to the authors

<sup>1</sup> Writ Petition Civil No. 566 of 2021

<sup>2</sup> (1970) 1 SCC 248

<sup>3</sup> (1981) 4 SCC 675

<sup>4</sup> (2019) 1 SCC 1

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