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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of decision: 10th JANUARY, 2023

IN THE MATTER OF:

\+ **W.P.(C) 9592/2015**

ASSOCIATION FOR DEMOCRATIC REFORMS & ANR

..... Petitioners

Through: Mr. Prashant Bhushan, Ms. Neha Rathi and Ms. Suroor Mandar, Advocates.

versus

UNION OF INDIA ..... Respondent

Through: Ms. Shiva Lakshmi, CGSC with Ms. Srishti Rawat, Advocate.

CORAM:
HON’BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

JUDGMENT

SATISH CHANDRA SHARMA, C.J.

1. The instant Writ Petition has been filed by the Association for Democratic Reforms (‘Petitioner’) seeking directions to constitute an independent tribunal or committee to oversee the enforcement of the Foreign Contribution (Regulation) Act, 2010 (‘FCRA Act’).

2. The instant Petition has been filed in an attempt to remedy the various lacunas that purportedly plague the functioning of the FCRA. To begin with, the Petitioners have stated that the political party at the helm of affairs could have differing perspectives on development, public policy and national interest. Such political ideology and leaning of differing political parties also

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has a bearing on how they may use the FCRA i.e., some political parties, at the helm of affairs, may use the FCRA to suppress dissent from independent organisations and NGOs alike. Furthermore, the Petitioners have expressed apprehension regarding enforcement of the FCRA against the actions of political parties as well. The Petitioners apprehend that as the bureaucracy works in close connection with the political executive, there is possibly a conflict of interest which could possibly mean that certain political parties are not penalised for transgressions under the FCRA. The Petitioners have also stated the FCRA may also hinder judicial independence as the FCRA can be wrongfully used against judicial officers, who are also prohibited from accepting foreign contributions. Due to such possibilities of misuse within the FCRA, the Petitioners have filed the instant petition seeking the establishment of an independent body to carry out the functioning of the FCRA. This according to the Petitioners would help bring consistency, uniformity, continuity in the functioning of the FCRA, and would also help keep the FCRA away from political interference.

3. Mr. Prashant Bhushan, learned Counsel appearing for the Petitioner, an NGO which has been at the forefront of electoral reforms in the country, states that the FCRA fails to meet this objective of restricting political parties from accepting foreign contribution due to the interference of the central government in its functioning. To this end, he draws the attention of this Court to Section 3(1)(e) of the FCRA, which prohibits a political party from accepting any foreign contributions. He then draws attention to Section 43 which gives the Central Government the power to specify an authority to investigate offences under the FCRA. Further, Section 46 gives the Central Government the power to give directions to any authority to execute the

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FCRA. Section 47 envisages the delegation of the central government's functions to any subordinate authority. Mr. Prashant Bhushan, learned Counsel appearing for the Petitioner argues the enforcement of the FCRA is clouded by government discretion and political executive influence, due to the unbridled and excessive powers accorded to the Central Government. In sum and substance, the case of the Petitioner is that the proceedings under FCRA need to be independent and insulated from any extraneous influence from the Central Government in order to ensure that it functions effectively.

4. *Per contra,* it has been argued by the Respondent that the Petition has been filed on the unfounded apprehension that the Central Government is likely to abuse its power under the FCRA. It is further argued that since only a miniscule number of cases are pending under the FCRA, establishing an independent tribunal or body would only be a waste of manpower of the judiciary and executive. The learned Counsel for the Respondent has also argued that the prayer seeking establishment of a tribunal or committee, if allowed, would be a transgression into the domain of the legislature.

5. Heard the counsels for the Petitioner and Respondent and perused the material on record.

6. The FCRA was enacted to regulate the acceptance and utilisation of foreign contribution or hospitality by individuals, associations, and companies. Further, it sought to prohibit the acceptance of foreign contribution or hospitality for activities detrimental to national interest. Pertinently, one stated objective of the FCRA is also to prohibit political parties from accepting foreign contributions.

7. At the outset, this Court finds it prudent to evaluate the scheme of the FCRA. Section 3 of the FCRA prohibits *inter alia* judges, media personnel,

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members of a state-owned corporation from receiving foreign contributions. For the sake of convenience, the following Section is being reproduced below:-

> *"**Section 3. Prohibition to accept foreign contribution**.*
>
> *(1) No foreign contribution shall be accepted by any--*
>
> *(a) candidate for election;*
>
> *... 1[(c) public servant, Judge, Government servant or employee of any corporation or any other body controlled or owned by the Government;]*
>
> *(d) member of any Legislature;*
>
> *(e) political party or office-bearer thereof;*
>
> *(f) organisation of a political nature as may be specified under sub-section (1) of section 5 by the Central Government;*
>
> *(g) association or company engaged in the production or broadcast of audio news or audio visual news or current affairs programmes through any electronic mode, or any other electronic form as defined in clause (r) of sub-section (1) of section 2 of the Information Technology Act, 2000 (21 of 2000) or any other mode of mass communication;*
>
> *(h) correspondent or columnist, cartoonist, editor, owner of the association or company referred to in clause (g).*
>
> *2[Explanation.1--For the purpose of clause (c), public servant means a public servant as defined in section 21 of the Indian Penal Code (45 of 1860).*
>
> *...*
>
> *(2) (a) No person, resident in India, and no citizen of India resident outside India, shall accept any foreign contribution, or acquire or agree to acquire any*

currency from a foreign source, on behalf of any political party, or any person referred to in sub-section (1), or both.

(b) No person, resident in India, shall deliver any currency, whether Indian or foreign, which has been accepted from any foreign source, to any person if he knows or has reasonable cause to believe that such other person intends, or is likely, to deliver such currency to any political party or any person referred to in sub-section (1), or both.

(c) No citizen of India resident outside India shall deliver any currency, whether Indian or foreign, which has been accepted from any foreign source, to--

(i) any political party or any person referred to in sub-section (1), or both; or

(ii) any other person, if he knows or has reasonable cause to believe that such other person intends, or is likely, to deliver such currency to a political party or to any person referred to in sub-section (1), or both.

(3) No person receiving any currency, whether Indian or foreign, from a foreign source on behalf of any person or class of persons, referred to in section 9, shall deliver such currency--

(a) to any person other than a person for which it was received, or

(b) to any other person, if he knows or has reasonable cause to believe that such other person intends, or is likely, to deliver such currency to a person other than the person for which such currency was received."

8. Section 3(1)(a) prohibits political candidates from accepting foreign contributions. Section 3(1)(d) prohibits members of a legislature from accepting foreign contributions, Section 3(1)(e) extends this restriction to political parties and office bearers, and Section 3(1)(f) prohibits

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organisations of a 'political nature', as defined by the Central Government, from receiving contributions from a foreign source. Hence, *inter alia,* political candidates, members of the legislature, political parties and office bearers and other organisations of a 'political nature' are disallowed from accepting foreign contributions.

9. Political parties are prohibited from accepting foreign contributions under the Representation of the People Act, 1951. The relevant portion of Section 29B of the Representation of the People Act, 1951 is reproduced below.

> *"29B. Political parties entitled to accept contribution. —*
> *Subject to the provisions of the Companies Act, 1956 (1 of 1956), every political party may accept any amount of contribution voluntarily offered to it by any person or company other than a Government company:*
>
> *Provided that no political party shall be eligible to accept any contribution from any foreign source defined under clause (j) of section 2 of the Foreign Contribution (Regulation) Act, 1976 (49 of 1976)."*

10. Other than this, as mentioned above, organisations which qualify as being of a 'political nature' are also prohibited from accepting foreign contributions. This is also, as stated, notified by the central government. Section 5 of the FCRA lays down the procedure to notify an organisation of political nature. Section 5(1) states that the Central Government may, having regard to the activities of the organisation or the ideology propagated by the organisation or the programme of the organisation or the association of the organisations with the activities of any political party, by an order published in the Official Gazette, specify such organisation as an organisation of a

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political nature. A proviso to this Section further states that the Central Government ought to frame guidelines specifying ground on which an organisation shall be specified as an organisation of a political nature. Hence, the central government is also supposed to notify which organisations qualify as political in nature. In this regard, Section 5 of the FCRA is being reproduced below:-

> *"Section 5. procedure to notify an organisation of a political nature*
>
> *(1) The Central Government may, having regard to the activities of the organisation or the ideology propagated by the organisation or the programme of the organisation or the association of the organisations with the activities of any political party, by an order published in the Official Gazette, specify such organisation as an organisation of a political nature not being a political party, referred to in clause (f) of sub-section (1) of section 3:*
>
> *Provided that the Central Government may, by rules made by it, frame the guidelines specifying the ground or grounds on which an organisation shall be specified as an organisation of a political nature.*
>
> *(2) Before making an order under sub-section (1), the Central Government shall give the organisation in respect of whom the order is proposed to be made, a notice in writing informing it of the ground or grounds, on which it is proposed to be specified as an organisation of political nature under that sub-section.*
>
> *(3) The organisation to whom a notice has been served under sub-section (2), may, within a period of thirty days from the date of the notice, make a representation to the Central Government giving reasons for not specifying such organisation as an organisation under sub-section (1):*

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> *Provided that the Central Government may entertain the representation after the expiry of the said period of thirty days, if it is satisfied that the organisation was prevented by sufficient cause from making the representation within thirty days.*
>
> *(4) The Central Government may, if it considers it appropriate, forward the representation referred to in sub-section (3) to any authority to report on such representation.*
>
> *(5) The Central Government may, after considering the representation and the report of the authority referred to in sub-section (4), specify such organisation as an organisation of a political nature not being a political party and make an order under sub-section (1) accordingly.*
>
> *(6) Every order under sub-section (1) shall be made within a period of one hundred and twenty days from the date of issue of notice under sub-section (2)…"*

11. The penalty for contravening the above section is provided under Section 35. According to Section 35 of the FCRA, if any person accepts or aids any political party in accepting any foreign contribution or any currency or security from a foreign source, in contravention of any provision of FCRA, such person shall be punished with imprisonment for a term which may extend to five years, or with fine, or with both.

12. The regime envisaged under the FCRA allows only a person, who is registered and granted a certificate or given prior permission under the FCRA Act to receive foreign contribution. This has been provided under Section 11(1) of the FCRA. The procedure to obtain such certificate has been provided under Section 12(1) of the FCRA. Foreign contribution received by such certified organisations is supposed to be used only for the stated purpose for which the organisation was given the certificate, as stated

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under Section 8(1). Pertinently, the central government has the power to suspend or cancel such certification under Sections 13 and 14 of the FCRA Act respectively. Hence, these Sections give the Central Government the power to provide organisations with certification, thereby allowing them to obtain foreign contributions, and also allows the central government to suspend or cancel the certification so provided.

13. It is pertinent to look at certain provisions of the FCRA which give the central government the power to enforce the provisions of the FCRA. Section 40 of the FCRA states that a prior sanction of the Central Government is a prerequisite for any court to take cognizance of any offence under the FCRA. Further, Section 43 allows the Central Government to investigate offences under the FCRA by any authority, as it deems fit. For sake of convenience, this Section is reproduced below:-

> *"43. Investigation into cases under the Act.*
>
> *Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), any offence punishable under this Act may also be investigated into by such authority as the Central Government may specify in this behalf and the authority so specified shall have all the powers which an officer-in-charge of a police station has while making an investigation into a cognizable offence."*

14. Similarly, Section 46 gives the Central Government the power to give directions to any authority to execute the FCRA. Section 47 allows the Central Government to delegate its powers under the FCRA to any authority. Hence, Sections 43, 46 and 47 give the Central Government the power to select an authority to investigate offences under the FCRA, the power to help execute the FCRA by any other authority and also allows it to delegate its powers to another body, if it deems fit. Aside from this, the

Central Government by virtue of Section 48(1) of the FCRA also has the power to make rules for carrying out the provisions of the FCRA. These rules are then placed before the parliament, as stated under Section 49 of the FCRA Act.

15. From the foregoing Sections, it is abundantly evident that the central government has wide ranging powers to oversee the enforcement of the FCRA. Not only does it have the authority to bestow upon an organisation certification to get foreign contributions, it also has the power to specify an authority to investigate offences under the FCRA. In effect, the Central Government plays an instrumental role in enforcing the provisions of the FCRA.

16. In light of this, the question that arises before this Court is whether the apprehension of unnecessary interference by the Central Government necessitates the establishment of a Tribunal or Committee, which would insulate the decisions taken under the FCRA from being influenced by the Central Government. This need, according to the Petitioner, is exacerbated since the proceedings under the FCRA are quasi-judicial in nature and according to the Petitioner, the tribunal or committee which is sought to be established under the FCRA may be presided over by a retired High Court or Supreme Court judge.

17. A perusal of the scheme of the Act shows that the Central Government plays an important role in enforcing and bringing into action the provisions of the FCRA. It has the power to delineate what organisations qualify as 'political' in nature so as to prohibit them from receiving foreign contribution. It also designates the authority which investigates offences under the FCRA. It is trite law that decisions taken by the Central

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Government are assumed to be *bona fide* in nature, unless something to the contrary is placed on record. It goes without saying the authority designated by the Central Government to investigate offences exercises a statutory power. It is trite law that when a body or person, as prescribed by the Central Government, passes an order under the FCRA, the law presumes that such order is *bona fide*. This Court cannot assume *mala fides* and misuse of power in such a situation, unless material to the contrary is placed on record. (Refer to: MCD v. Qimat Rai Gupta, **(2007) 7 SCC 309**).

18. It is well settled that there is a presumption of constitutionality in favour of a Statute and mere apprehension that an Act is capable of being misused is no ground for replacing the wisdom of the legislature with that of the judiciary. The Apex Court on a number of occasions has reiterated that sweeping attacks made on the likelihood of misuse of a Statute, in the future, cannot succeed, and the occasion to complain only arises when such alleged misuse occurs. (Refer to: Indira Nehru Gandhi v. Raj Narain, **1975 Supp SCC 1**; Dr B.N. Khare v. State of Delhi, **AIR 1950 SC 211**; State of W.B. v. Anwar Ali Sarkar, **(1952) 1 SCC 1**; R.K. Dalmia v. Justice Tendolkar, **AIR 1958 SC 538**; T.K. Musaliar v. Venkitachalam, **AIR 1956 SC 246**; Chitralekha v. State of Mysore, **AIR 1964 SC 1823**; M.R. Deka v. N.E.F. Rly, **AIR 1964 SC 600**]. In this regard, a five Judge Bench of the Hon'ble Supreme Court of India in Collector of Customs v. Nathella Sampathu Chetty, **(1962) 3 SCR 786**, has stated as under:-

> *"34. ...The possibility of abuse of a statute otherwise valid does not impart to it any element of invalidity. The converse must also follow that a statute which is otherwise invalid as being unreasonable cannot be saved by its being administered in a reasonable manner. The constitutional validity of the statute would*

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> *have to be determined on the basis of its provisions and on the ambit of its operation as reasonably construed. If so judged it passes the test of reasonableness, possibility of the powers conferred being improperly used is no ground for pronouncing the law itself invalid and similarly if the law properly interpreted and tested in the light of the requirements set out in Part III of the Constitution does not pass the test it cannot be pronounced valid merely because it is administered in a manner which might not conflict with the constitutional requirements. In saying this we are not to be understood as laying down that a law which might operate, harshly but still be constitutionally valid should be operated always with harshness or that reasonableness and justness ought not to guide the actual administration of such laws."*
>
> (emphasis supplied)

19. Hence, the mere possibility of a law being administered in a manner which may conflict with constitutional requirements does not render it invalid. The judiciary always circumspect in substituting its wisdom with that of the legislature. In light of this, the prayer made by the Writ Petitioner seeking a direction to constitute an independent Tribunal Committee to oversee the enforcement of FCRA cannot be accepted. This Court cannot presume that just because there is a possibility of the Act being misused or in some stray cases it has been found to be misused a body must be created to oversee the functioning of FCRA.

20. The Petitioners have stated that that there have been several instances of political parties and legislators accepting contributions and hospitality from foreign sources which is, *prima facie*, in violation of the FCRA. To substantiate such submission the Petitioner has placed reliance on W.P.(C) No. 131/2013 wherein this Court had *vide* Order dated 28.03.2014 held against a political party, and directed the Ministry of Home Affairs to look

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into whether this was a one off stray incident or not. To show that the FCRA is not effective, the Petitioner pointed out that such directions had not been complied with, and that instead such political party had filed an appeal before the Hon'ble Supreme Court assailing the Order dated 28.03.2014. However, the Petitioner has lost sight of how the remedy for non-compliance of an Order of this Court lies in filing a contempt petition, and that drawing attention to the pending appeal filed against the Order dated 28.03.2014 does not shed any light on the purported ineffectiveness of the FCRA. Hence, it appears that the case of the Petitioner is entirely built on the possibility of misuse.

21. The Petitioner has failed to place on record any data indicating the number of political parties which have availed of foreign contribution, and have failed to be penalised under the FCRA. The apprehension of the Petitioner that the FCRA may be misused for oblique motives is a bald averment and is entirely unfounded. Courts cannot pass a direction only on hypothesis. Nothing has been placed on record to show that the FCRA is being used selectively against NGOs and other independent organisations as well. The entire case of the Petitioner is premised on the possibility of a political party, who is also at the helm of affairs at the Centre, abusing the provisions of the FCRA to suppress dissent and receive foreign contributions in its own favour. The instant Writ Petition is entirely built on surmises and conjectures.

22. Further, there exists a basic difference between legislative and judicial functions, elucidated by the basic structure doctrine, which states that while the legislature makes laws, the executive enforces and administers it, and the judiciary tests the validity of legislation formulated by the Legislature. It has

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been laid down in a catena of judgments the courts cannot direct the legislature to frame or enact a law and in a particular manner. Furthermore, it cannot amend a statute or add provisions to the statute, as that too would be tantamount to judicial legislation. The role of the judiciary is initiated only after a law is enacted to test the legality of a statue on the known principles of judicial review (Refer to: Kalpana Mehta v. Union of India, **(2018) 7 SCC 1**; SC Chandra v. State of Jharkhand; and Suresh Seth v. Indore Municipal Corp., **(2005) 13 SCC 287**).

23. Setting up of such Tribunals/Authorities/Committee is purely a policy decision, taken by the Legislature. A direction for setting up a Committee or Tribunal would effectively be an amendment of the FCRA, which is beyond the scope of judicial review by this Court. Hence, an attempt by a judicial body to set up a tribunal is directly in the teeth of the doctrine of separation of powers. Recently, the Hon'ble Supreme Court *vide* Judgment dated 16.04.2021 in John Paily v. The State of Kerala, **W.P. (C) No. 428/2021**, has held that Courts do not possess the power to set up an adjudicatory committee or a tribunal by way of issuing a writ of mandamus. In light of this, the direction sought by the Petitioner to set up a Committee or Tribunal to oversee the functioning of the FCRA is unsustainable. This Court cannot direct setting up of a Committee or a Tribunal, simply due to the possibility of misuse of the FCRA.

24. It is evident that the entire case of the Petitioner rests on the possibility of misuse of the FCRA by the political party at the helm of affairs. This misuse, it is apprehended, may be directed towards hindering the independence of judicial officers, targeting NGOs and stifling dissent. Further, the Petitioner apprehends that due to a conflict of interest, the

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FCRA may not be effective to curb political parties from accepting foreign contributions. The mere possibility that a statute will not be administered adequately is not ground for the statute to be invalidated or for this Court to supplement its wisdom with the Legislature's. To set up a committee or tribunal is a purely policy decision. The legislature alone has the power to set up a tribunal or committee, under the requisite statute, to adjudicate disputes arising from it. If the prayer sought by the Petitioner is allowed, it would essentially be an exercise in judicial legislation, and would be beyond the power of judicial review accorded to this Court. Due to the aforementioned reasons, this Court is not inclined to allow the present petition.

25. In light of this, the instant Writ Petition is dismissed, along with pending application(s), if any.

SATISH CHANDRA SHARMA, C.J.

SUBRAMONIUM PRASAD, J

JANUARY 10, 2023
S. Zakir/Sh