IN THE SUPREME COURT OF INDIA

CIVIL ORIGINAL JURISDICTION

(UNDER ARTICLE 32 OF THE CONSTITUTION OF INDIA)

WRIT PETITION (C.) _____/2021

IN THE MATTER OF:

JEEVAN JYOTHI CHARITABLE TRUST

& ORS. ...PETITIONERS

Versus

UNION OF INDIA & ORS. …RESPONDENTS

With

I.A. No. / 2021 Application for interim relief/directions

PAPER BOOK

(FOR INDEX KINDLY SEE INSIDE)

ADVOCATE FOR THE PETITIONERS: MS. SRISHTI AGNIHOTRI

SYNOPSIS

This Petition, under Article 32 of the Constitution, has been filed by the Petitioners against the restrictive and unconstitutional requirement of opening a bank account exclusively at the SBI Main Branch, New Delhi ("**SBI Main Branch, New Delhi**"/"**NDMB**") in order to receive foreign contribution under Section 17 of the Foreign Contribution (Regulation) Act, 2010 ("**FCRA / FCRA, 2010**") along with MHA Notification No. S.O. 3479 (E) dated 7 October 2020 ("**MHA Notification**"), irrespective of where the Petitioners are located. Accordingly, they seek the following reliefs:

I. A declaration that Section 17 of the FCRA is violative of Articles 14, 19(1)(c), 19(1)(g), and 21 of the Constitution, in so far as it requires that the primary FCRA account is to be opened exclusively in a branch of the State Bank of India, New Delhi, as notified by the Respondent No.1;

II. Quashing of the MHA Notification No. S.O. 3479 (E) dated 7 October 2020 issued by Respondent No. 1 as being violative of Articles 14, 19(1)(c), 19(1)(g), and 21 of the Constitution;

III. Quashing of the public notice bearing F.No.II/21022/23/(35)/2019-FCRA-III dated 13 October 2020 as being violative of Articles 14, 19(1)(c), 19(1)(g), and 21 of the Constitution.

IV. Quashing of the public notice bearing No. II/21022/36/(58)/2021-FCRA-III dated 18 May 2021 as being violative of Articles 14, 19(1)(c), 19(1)(g), and 21 of the Constitution.

V. Any other orders/directions as deemed fit in the interests of justice.

Contribution of the Development Sector

Non-profit organizations and voluntary organizations such as the Petitioner organizations contribute enormously to India's GDP and provide livelihood to millions both through direct employment and social giving. However, due to limited fiscal spending on the social sector, *inter alia*, organizations such as the Petitioners are constrained to tap into global philanthropy. A joint report by the Centre for Social Impact and Philanthropy, Ashoka University, and the Niti Aayog states that foreign contributions increased from Rs 10,282 crore in 2009-10 to Rs 16,343 crore in 2018-19 as per the data of Respondent No. 1. This Hon'ble Court has also recognized the indispensable role played by non-profit organizations in matters of development such as in ***Public Union for Civil Liberties (PUCL) v. State of T.N.*****,** reported in **(2004) 12 SCC 381**, wherein it was observed as under:

> *"In modern days civil Society is playing a greater role in nation building exercise. The commendable roles played by NGOs in very many situations strengthen the confidence of general public in NGOs. Always the State may not be in a position to reach out to the needy. As we have experienced in the past, Civil Society could efficiently fill up this gap. Now it is time for more interaction between Civil Society and State machinery in implementing social service schemes. The services of philanthropic organizations or NGOs could very well be utilized…."*

The Foreign Contribution Regulation Act

The Foreign Contribution Regulation Act, 1976 ("**1976 Act**") was first enacted in 1976. It was amended from time to time until the FCRA was enacted. Most recently, the FCRA was amended on 28 September 2020 by the Foreign Contribution Regulation (Amendment) Act, 2020 ("**2020 Amendment Act**") and the Foreign Contribution

Regulation (Amendment) Rules, 2020 ("**2020 Amendment Rules**"), bringing about vast changes in the scheme of the enactment.

The FCRA regulates the acceptance and utilization of foreign contribution by, as a first step, requiring the registration of certain persons with the Central Government. Section 11 of the Act provides that no person having a definite cultural, economic, educational, religious, or social programme shall accept foreign contribution unless it obtains a **certificate of registration** from the Government. Any person not so registered may accept foreign contribution for a specific purpose only after obtaining **prior permission** of the Central Government for that purpose.

Section 12 of the FCRA provides for the grant of a certificate of registration/the giving of prior permission. Sub-section (1-A) of Section 12, as inserted by the 2020 Amendment Act, states that every person who applies for a certificate of registration/prior permission shall be required to open an "FCRA Account" in the manner specified in Section 17 and mention details of such account in his application. The said Section 12(1-A) states as follows:

> *12. (1-A) Every person who makes an application under sub-section (1) shall be required to open "FCRA Account" in the manner specified in Section 17 and mention the details of such account in his application.*

The unamended Section 17 of the FCRA, prior to the 2020 Amendment Act, required FCRA registered persons to open an exclusive FCRA bank account **at any of the 279 scheduled banks** across the country. It read as follows:

> *17. Foreign contribution through scheduled bank. -*
> ***1. Every person who has been granted a certificate or given prior permission under section 12 shall receive foreign contribution in a single account only through such one of the branches of a bank as he may specify in his application for grant of certificate:***

Provided that such person may open one or more accounts in one or more banks for utilising the foreign contribution received by him:
Provided further that no funds other than foreign contribution shall be received or deposited in such account or accounts.
2. Every bank or authorized person in foreign exchange shall report to such authority as may be specified--
a. prescribed amount of foreign remittance;
b. the source and manner in which the foreign remittance was received; and
c. other particulars, in such form and manner as may be prescribed.

(emphasis supplied)

On 28 September 2020, the FCRA was amended through the 2020 Amendment Act. Section 17 of the newly amended Act states as follows:

17. Foreign contribution through scheduled bank.—
(1) Every person who has been granted certificate or prior permission under Section 12 shall receive foreign contribution ***only in an account designated as "FCRA Account" by the bank, which shall be opened by him for the purpose of remittances of foreign contribution in such branch of the State Bank of India at New Delhi, as the Central Government may, by notification, specify in this behalf:***
Provided that such person may also open another "FCRA Account" in any of the scheduled bank of his choice for the purpose of keeping or utilising the foreign contribution which has been received from his "FCRA Account" in the specified branch of State Bank of India at New Delhi:
Provided further that such person may also open one or more accounts in one or more scheduled banks of his choice to which he may transfer for utilising any foreign contribution received by him in his "FCRA Account" in the specified branch of the State Bank of India at New Delhi or kept by him in another "FCRA Account" in a scheduled bank of his choice:
Provided also that no funds other than foreign contribution shall be received or deposited in any such account.
(2) The specified branch of the State Bank of India at New Delhi or the branch of the scheduled bank where the person referred to in sub-section (1) has opened his foreign contribution account or the authorised person in foreign exchange, shall report to such authority as may be specified,—
(a) the prescribed amount of foreign remittance;
(b) the source and manner in which the foreign remittance was received; and
(c) other particulars,
in such form and manner as may be prescribed.

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(emphasis supplied)

As seen above, Section 17 of the pre-amended Act allowed foreign contribution registered persons to open an FCRA account **at any scheduled bank** across the country. Under the amended Section 17, all persons are now required to open a bank account **only at such branch of the State Bank of India at New Delhi** as may be prescribed by the Central Government by notification.

During the Lok Sabha debate on the 2020 Amendment Act, members of the Opposition raised salient objections to the said Section 17. For instance, the Ld. Member of Parliament from Baramati strongly criticised the amendment to Section 17 as follows:

> *Another question is what you have recommended. I have absolutely no problem in using good banks.* ***Why is it only State Bank of India? What logic does it make in this technology world where everything can be managed so well? I cannot understand and why only State Bank of India and why not other banks?*** *Are you trying to show suspicion that other banks are not capable of opening of FCRA account or managing them or are you incapable of doing it? Can you please clarify why only State Bank?*
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> (emphasis supplied)

Respondent No. 1 thereafter issued notification bearing S.O. No. 3479 (E) dated 7 October 2020 under the amended Section 17. According to this MHA Notification, the designated account is to be opened at the "*State Bank of India, New Delhi Main Branch, 11, Sansad Marg, New Delhi-110001*". The said MHA Notification reads as follows:

> *S.O. 3479(E).—In exercise of the powers conferred by sub-section (1) of section 17 of the Foreign Contribution (Regulation) Act, 2010 (42 of 2010), the Central Government hereby specifies the* ***State Bank of India, New Delhi Main Branch, 11, Sansad Marg, New Delhi-110001*** *as the branch for the purposes of the said sub-section.*
>
> (emphasis supplied)

After the amendment of the Act and issuance of the MHA Notification, all persons seeking foreign contribution, whether registered or seeking registration/permission, have now been forced to prefer applications to open their new designated FCRA account at the SBI Main Branch, New Delhi with copies of all the relevant documents.

The deadline for opening the account was specified by Respondent No. 1 as 31 March 2021 by "public notice" F.No.II/21022/23(35)/2019-FCRA-III dated 13 October 2020. This public notice expressly states at Paragraphs 6 and 11 that after the date of opening the account, or from 1 April 2021, existing FCRA account holders "***shall not be eligible to receive FC in any account other than the "FCRA Account" opened in the NDMB***." (NDMB refers to New Delhi Main Branch of the SBI). This deadline was later extended to 30 June 2021 vide a second "public notice" No. II/21022/36(58)/2021-FCRA-III dated 18 May 2021.

The Respondent No. 1 also released a "*Standard Operating Procedure (SOP) to open and operate the "FCRA Account" as provided under Section 17(1) of the amended Foreign Contribution (Regulation) Act, 2010 with SBI, New Delhi Main Branch in terms of FCRA (Amendment), 2020*" dated 20 November 2020 ("**SOP**"). The SOP sets out the procedure for opening the account, as well as the process flow for persons already in possession of a certificate of registration/prior permission. It states that the SBI Main Branch, New Delhi is required to wait for Respondent No. 1 to confirm the applicant's prior permission/certificate of registration before allowing inflow of foreign contribution into the account. It states as follows:

> "*The NDMB will allow receipt of foreign contribution only in the "FCRA Account" opened in NDMB after confirming that the MHA has already*

granted a certificate or prior permission under section 12 of FCRA, 2010."

However, the resurgence of the COVID-19 pandemic brought activities across all sectors to a standstill and the accounts of many organizations are not yet opened/operationalised. It was only on 18 May 2021, several days after the said deadline of 31 March 2021, that the Respondent No. 1 extended the deadline to 30 June 2021.

Impact of Section 17 and MHA Notification upon the Petitioners and other similarly placed organizations

As a result of the 2020 Amendment Act, the Petitioner organizations, which are not based in Delhi, are required to open their primary FCRA account in New Delhi, at the SBI, Main Branch. Once this account is opened, the only mode available to operate their account is the net banking facilities of SBI. The Petitioners are, thus, prevented from having physical access to a local bank account of their choice to speedily resolve any issues that might arise during banking transactions. This creates unnecessary operational delays in receiving fund transfers/withdrawing money or sorting out technical issues and also limits the Petitioners' choice as consumers.

In fact, the amendment incorrectly pre-supposes that all charitable organizations, in each part of the country, have access to the kind of infrastructure, electricity and internet supply, which will make access to net banking simple for them.

Even if the closest local SBI branch may be used for offline transactions by the Petitioner organizations, it is not the home branch for the purposes of the FCRA account of that organisation (as the home branch is the SBI Main Branch, New Delhi). As such,

there is likely to be delay in forwarding their requests to the home branch at New Delhi from the local SBI branch. The Petitioner organizations are thus at a disadvantage due to the delay so caused.

Further, operational costs will also increase for the Petitioners since they will operate at a distance from the nearest SBI branch. They may be closer to branches of other scheduled banks, but cannot receive any foreign contribution at their accounts in those banks. They are now forced to travel to the closest SBI branch to try and operate their FCRA accounts. All persons and organizations registered under the FCRA are now required to maintain three bank accounts – an individual account, the new FCRA account, as well as their existing accounts which already contain foreign funds.

The RBI Know Your Customer (KYC) Direction, 2016 requires offline verification of documents in certain instances. The Petitioners may thus be forced to appoint a designated person in New Delhi to manage their FCRA accounts, as they will be unable to make frequent trips to New Delhi for reporting a change in name, address, aims, objectives, or key members of the association under Rule 17-A of the Foreign Contribution Regulation Rules, 2011 ("**FCR Rules, 2011**"), offline KYC verification, and other offline banking requirements as mandated by the Reserve Bank of India as well as SBI policy. In cases where the local branch cannot verify the signature of the authorised signatory, the Petitioner organizations will have no alternative but to go to New Delhi to rectify the issue in person.

It is for these reasonably foreseeable difficulties that it is a fundamental norm in banking that a person's primary bank account is close to where they reside and in a bank of their choice. Section 17, in requiring that a primary FCRA account can only be opened in the

State Bank of India, at the Main Branch in New Delhi, violates these fundamental tenets, and imposes an unreasonable restriction on the freedoms of the Petitioner organizations.

Further, Section 17 read with the MHA Notification violates the consumer's right to choose from a variety of services under Section 2(9)(iii) of the Consumer Protection Act, 2019. It may be noted that the functions expected to be performed by the Respondent No. 3 may be undertaken by any other scheduled bank in the country, including local branches of the SBI itself.

The operational difficulties faced by organizations due to the requirements of Section 17 are already evident. Approximately 23,000 organizations with FCRA registration are facing difficulties in moving from 279 scheduled banks across various branches in the country to one branch of one bank in one city, New Delhi. The extension dated 18 May 2021 was granted in the second public notice of the same date, in view of immense difficulties faced by organizations in submitting their KYC details to a branch outside the area of their operations. There are large delays in account opening and receiving of foreign remittances due to the volume of transactions, and the said branch did not have the infrastructural capacity to handle queries (by email/ phone) from thousands of organizations across the country. Often, the Respondent No. 3 for complying with KYC/ Net-banking/ foreign remittance requirements required additional verification from local bank accounts, a process that was time consuming and caused onerous administrative burdens on organizations trying to provide relief to affected communities during the COVID-19 pandemic. Additionally, there were large delays in receiving foreign contributions, as well as the cheque books and net banking details to utilise and transfer the foreign contribution.

Assuming, but not admitting, that the purported objective behind the onerous obligations of Section 17, is effective monitoring of foreign contribution received, in order to prevent misutilization of such funds, the mechanism adopted by the Section is excessive, irrational, arbitrary and squarely fails the test of proportionality for the following reasons:

a. Under the prior scheme of the FCRA, 2010, every organization was already mandated to open an exclusive FCRA account in a scheduled bank, which account details were required to be registered with the MHA/ Respondent No. 1 and linked to the organizations' FCRA registration number.
b. All FCRA registered organizations, since 2017, have been registered on an electronic portal known as 'DARPAN' that had a unique ID, and provided the Respondent No. 1 with the financial details and activity reports of such organizations, which was linked to their FCRA number and registered bank accounts.
c. All FCRA registered organizations are to submit regular returns in terms of Section 18 read with Rule 17 of the FCR Rules, that bear out their banking transactions and the activities carried out by such organizations to be submitted through the DARPAN portal.
d. Rule 16 of the FCR Rules requires **any bank** to report within 48 hours the details of any contribution received in any FCRA registered account, to the Respondent No.1.

Violation Of Article 14 On The Ground Of Arbitrariness

The impugned Section 17 and the MHA Notification, as well as the public notices, violate Article 14 for bring *arbitrary and unreasonable*. A blanket requirement of opening a bank account at one specific branch of the SBI, New Delhi for *all* organizations receiving FCRA is absurd, irrational and serves no rational purpose under the FCRA or any other law. This Hon'ble Court in ***Shayara Bano v. Union of India*****,** reported in **(2017) 9 SCC 1** held as under:

> *"**The test of manifest arbitrariness**, therefore, as laid down in the aforesaid judgments **would apply to invalidate legislation as well as subordinate legislation under** Article 14. Manifest arbitrariness, therefore, must be **something done by the legislature capriciously, irrationally and/or without adequate determining principle**. Also, when something is done which is excessive and disproportionate, such legislation would be manifestly arbitrary."*
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> (emphasis supplied)

Thus, the doctrine of manifest arbitrariness is applicable even in the present case, where Section 17, the MHA Notification, as well as the public notices impose onerous requirements without any determining principle whatsoever.

<u>Violation Of Article 19 On The Ground Of Disproportionate Restrictions</u>

The restrictions imposed by the impugned Section 17 and the MHA Notification of opening a bank account only in one branch of one bank, as well as the public notices, fail the test of proportionality and are thus not reasonable or in the interests of the sovereignty or integrity of India, or public order, or morality under Article 19(2). Article 19(2) permits only *reasonable* restrictions upon the fundamental rights enumerated in Article 19(1). A 5-judge Constitution Bench of this Hon'ble Court in ***KS Puttaswamy v. Union of India,*** reported in **(2019) 1 SCC 1** has held the proportionality test is

applicable for examining whether restrictions under Article 19 are reasonable. This Hon'ble Court in ***KS Puttaswamy*** listed the components of the proportionality test as under:

> *"(a) A measure restricting a right must have a legitimate goal (legitimate goal stage).*
> *(b) It must be a suitable means of furthering this goal (suitability or rational connection stage).*
> *c) There must not be any less restrictive but equally effective alternative (necessity stage).*
> ***(d) The measure must not have a disproportionate impact on the right holder (balancing stage)."***
>
> (emphasis supplied)

This Hon'ble Court, in the case of ***Anuradha Bhasin* v. *Union of India*,** reported in **(2020) 3 SCC 637**, placed reliance on the seminal book of Justice Aharon Barak for its definition of proportionality. It noted that the Hon'ble Court in ***Modern Dental College & Research Centre v. State of M.P.*,** reported in **(2016) 7 SCC 353**, relied upon the said definition, and stated as follows in the said judgment:

> *60. … a limitation of a constitutional right will be constitutionally permissible if:*
>
> *(i) it is designated for a proper purpose;*
>
> *(ii) the measures undertaken to effectuate such a limitation are rationally connected to the fulfilment of that purpose;*
>
> *(iii) the measures undertaken are necessary in that there are no alternative measures that may similarly achieve that same purpose with a lesser degree of limitation; and finally*
>
> *(iv) there needs to be a proper relation ("proportionality stricto sensu" or "balancing") between the importance of achieving the proper purpose and the social importance of preventing the limitation on the constitutional right.*

This Hon'ble Court in ***Anuradha Bhasin*** went on to hold as follows:

> *70. In view of the aforesaid discussion, we may summarize the requirements of the doctrine of proportionality which must be followed by the authorities before passing any order intending on restricting fundamental rights of individuals. In the first stage itself, the possible goal of such a measure intended at imposing restrictions must be determined. It ought to be noted that such goal must be legitimate. However, before settling on the aforesaid measure, the authorities must assess the existence of any alternative mechanism in furtherance of the aforesaid goal. The appropriateness of such a measure depends on its implication upon the fundamental rights and the necessity of such measure. It is undeniable from the aforesaid holding that only the least restrictive measure can be resorted to by the State, taking into consideration the facts and circumstances. Lastly, since the order has serious implications on the fundamental rights of the affected parties, the same should be supported by sufficient material and should be amenable to judicial review.*
>
> *71. The degree of restriction and the scope of the same, both territorially and temporally, must stand in relation to what is actually necessary to combat an emergent situation.*
>
> *72. To consider the immediate impact of restrictions upon the realization of the fundamental rights, the decision maker must prioritize the various factors at stake. Such attribution of relative importance is what constitutes proportionality. It ought to be noted that a decision which curtails fundamental rights without appropriate justification will be classified as disproportionate. The concept of proportionality requires a restriction to be tailored in accordance with the territorial extent of the restriction, the stage of emergency, nature of urgency, duration of such restrictive measure and nature of such restriction. The triangulation of a restriction requires the consideration of appropriateness, necessity and the least restrictive measure before being imposed.*

In the instant case, it is submitted that none of the components of the proportionality test are satisfied by the scheme of Section 17 and the notification/public notices issued for its implementation. With respect to *the legitimate goal stage*, there is no legitimate goal evident from the impugned Section 17 and MHA Notification.

With respect to *the rational connection stage*, assuming but not admitting that the Respondents do indeed have a legitimate goal such as monitoring foreign remittance,

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forcing all persons seeking foreign contribution to open bank accounts only in one branch of one bank in India is by no means suitable for promoting any State interest. In fact, in addition to the heightened compliance costs, it will lead to great inefficiency and delay in the making of transactions related to foreign funding. According to the data uploaded on the FCRA website of Respondent No. 1 (*https://fcraonline.nic.in/fc_dashboard.aspx*), there are close to 50,000 persons who are registered under the FCRA.

With respect to *the necessity stage*, there already existed much less restrictive means to achieve the same goal: under the prior scheme of the Act every organization was already mandated to open an exclusive FCRA account in a scheduled bank, which account details were required to be registered with the MHA/ Respondent No. 1 and linked to the organizations' FCRA registration number. All FCRA registered organizations, since 2017, have been registered on 'DARPAN'. All FCRA registered organizations are to submit regular returns in terms of Section 18 read with Rule 17 of the FCR Rules, that bear out their banking transactions and the activities carried out by such organizations. Finally, Rule 16 of the FCR Rules requires **any bank** to report within 48 hours the details of any contribution received in any FCRA registered account, to the Respondent No. 1. Thus, assuming, but not admitting, that the purported objective behind the onerous obligations of Section 17, is effective monitoring of foreign contribution received, in order to prevent misutilization of such funds, the mechanism adopted by the Section is excessive, irrational, arbitrary and squarely fails the third limb of the test of proportionality.

Finally, with respect to *the balancing stage*, as explained in the facts of this instant petition, Section 17, the MHA Notification, and the public notices have a most disproportionate impact upon the rights holders, namely the Petitioner Nos. 1-4 and their members, as well as Petitioner No. 5. On applying the test for proportionality as laid down by this Hon'ble Court, and considering its observations in ***Anuradha Bhasin*** that the triangulation of a restriction requires "*the consideration of appropriateness, necessity and the least restrictive measure*" before being imposed, Section 17 and the MHA Notification and the public notices are neither appropriate nor necessary and are not the least restrictive measure. They thus unreasonably restrict, and therefore violate, the rights of Petitioner Nos. 1-4, their members, and Petitioner No. 5 to form associations under Article 19(1)(c) and their right to carry on occupation under Article 19(1)(g).

The requirements imposed by Section 17 and the MHA Notification/public notices have caused various operational difficulties at the outset. As stated earlier, there are at least 23,000 organizations with FCRA registration, that are facing difficulties in moving from 279 scheduled banks across various branches in the country to one branch of one bank in one city, New Delhi.

Violation Of Article 21 For Lack Of Fair Procedure

The impugned Section 17 along with the MHA Notification and the public notices violate the test of fairness and reasonableness of procedure. In the case of ***Maneka Gandhi v. Union of India,*** reported in **(1978) 1 SCC 248**, this Hon'ble Court has held that the procedure established by law, as contemplated by Article 21 did not mean any procedure howsoever arbitrary or fanciful. The unamended Section 17, allowing

persons to open FCRA accounts at any scheduled bank in India, shows that that a far less intrusive method could be used to achieve the same assumed objective of financial accountability of non-profits not receiving foreign funding. Moreover, Section 17, the MHA Notification, and the public notices, are both unfair and unreasonable under Article 21. Specifying just one branch of one bank for the Petitioners to open their accounts in is unfair and arbitrary not only to the Petitioners, but also to the thousands of organizations based outside of Delhi or those in remote areas who do not have access to mobile technology.

Hence, this Writ Petition.

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LIST OF DATES

Date	Particulars
01.05.2011	The FCRA, 2010 came into force along with the FCR Rules framed thereunder. The Petitioner organizations received their FCRA Registration and renewed it from time to time. As per the unamended Section 17 of the FCRA, the Petitioner organizations were operating their non-SBI bank accounts for receiving foreign contributions.
28.09.2020	The FCR (Amendment) Act, 2020 was enacted, requiring FCRA holders to open a designated FCRA account in a specific SBI branch at New Delhi.
07.10.2020	The MHA thereafter issued its Notification bearing S.O. No. 3479 (E). According to this MHA notification, the designated account is to be opened at the "*State Bank of India, New Delhi Main Branch, 11, Sansad Marg, New Delhi-110001*".
13.10.2020	The deadline for opening the account was specified by Respondent No. 1 as 31 March 2021 by "public notice" bearing no. F.No.II/21022/23(35)/2019-FCRA-III. The "public notice" states that after the date of opening the account, or from 1 April 2021, existing FCRA account holders "*shall not be eligible to receive FC in any account other than the "FCRA Account" opened in the NDMB.*" (NDMB refers to New Delhi Main Branch).
20.11.2020	Respondent No. 1 released a "*Standard Operating Procedure (SOP) to open and operate the "FCRA Account" as provided under Section 17(1) of the amended Foreign Contribution (Regulation) Act, 2010 with SBI, New Delhi Main Branch in*

	terms of FCRA (Amendment), 2020". The SOP requires the SBI Main Branch, New Delhi to wait for Respondent No. 1 to confirm the applicant's prior permission/certificate of registration before allowing inflow of foreign contribution into the account.
	The Petitioner Nos. 1-4 took steps to open a bank account with Respondent No. 3.
04.2021	The second wave of the COVID-19 pandemic hit India, leading to limited functioning of offices around the country, including the office of Respondent No. 1.
18.05.2021	Respondent No. 1 issued Public Notice dated 18 May 2021 bearing No. II/21022/36(58)/2021-FCRA-III, and thereby extended the time limit for opening accounts at the SBI Main Branch, New Delhi under Section 17 of the FCRA to 30 June 2021.
09.07.2021	Present petition filed.

IN THE SUPREME COURT OF INDIA

CIVIL ORIGINAL JURISDICTION

(UNDER ARTICLE 32 OF THE CONSTITUTION OF INDIA)

WRIT PETITION (C.) _____/2021

IN THE MATTER OF:

1. **Jeevan Jyothi Charitable Trust**

[redacted]

[redacted]

[redacted] ...PETITIONERS

Versus

1. **Union of India**
   Ministry of Home Affairs
   Through its Principal Secretary,
   North Block
   New Delhi -110001

2. **Union of India**
   Ministry of Law and Justice
   Through its Principal Secretary,
   4th Floor, A-Wing, Shastri Bhawan
   New Delhi -110001

3. **State Bank of India**
   Through the Managing Director,
   Main Branch, 11 Sansad Marg,
   New Delhi – 110001 ...RESPONDENTS

ALL ARE CONTESTING RESPONDENTS

WRIT PETITION UNDER ARTICLE 32 OF THE CONSTITUTION SEEKING A DECLARATION THAT SECTION 17 OF THE FOREIGN CONTRIBUTION (REGULATION) ACT, 2010, MHA NOTIFICATION NO. S.O. 3479 (E) DATED 7 OCTOBER 2020, PUBLIC NOTICE NO. F.NO.II/21022/23/(35)/2019-FCRA-III DATED 13 OCTOBER 2020, AND PUBLIC NOTICE NO. II/21022/36/(58)/2021-FCRA-III DATED 18 MAY 2021 ARE VIOLATIVE OF ARTICLES 14, 19(1)(C), 19(1)(G), AND 21 OF THE CONSTITUTION

TO,

HON'BLE THE CHIEF JUSTICE OF INDIA AND OTHER COMPANION JUSTICES OF THE HON'BLE SUPREME COURT OF INDIA

THE HUMBLE PETITION OF THE PETITIONERS ABOVENAMED

MOST RESPECTFULLY SHEWETH:

1. This Petition, under Article 32 of the Constitution, has been filed by the Petitioners against the restrictive and unconstitutional requirement of opening a bank account exclusively at the SBI Main Branch, New Delhi ("**SBI Main Branch, New Delhi**"/"**NDMB**") in order to receive foreign contribution under Section 17 of the Foreign Contribution (Regulation) Act, 2010 ("**FCRA / FCRA, 2010**") along with MHA Notification No. S.O. 3479 (E) dated 7 October 2020 ("**MHA Notification**"). Accordingly, the Petitioners seek the following reliefs:

I. A declaration that Section 17 of the FCRA is violative of Articles 14, 19(1)(c), 19(1)(g), and 21 of the Constitution, in so far as it requires that the primary FCRA account is to be opened exclusively in a branch of the State Bank of India, New Delhi, as notified by the Respondent No.1;

II. Quashing of the MHA Notification No. S.O. 3479 (E) dated 7 October 2020 issued by Respondent No. 1 as being violative of Articles 14, 19(1)(c), 19(1)(g), and 21 of the Constitution;

III. Quashing of the public notice bearing F.No.II/21022/23/(35)/2019-FCRA-III dated 13 October 2020 as being violative of Articles 14, 19(1)(c), 19(1)(g), and 21 of the Constitution.

IV. Quashing of the public notice bearing No. II/21022/36/(58)/2021-FCRA-III dated 18 May 2021 as being violative of Articles 14, 19(1)(c), 19(1)(g), and 21 of the Constitution.

V. Any other orders as deemed fit in the interests of justice.

2. Section 17 of the FCRA mandates that any person seeking foreign contribution for social, educational, religious, or charitable purposes must open a bank account ("**FCRA account**") exclusively at a branch of the State Bank of India, New Delhi (Respondent No. 3 / "**SBI**") as may be specified by the Central Government by notification, in order to receive foreign contribution. The

MHA Notification dated 7 October 2020 specifies this branch to be the SBI Main Branch at New Delhi.

3. This onerous requirement in Section 17 and the MHA Notification is unconstitutional for being unreasonable, arbitrary, and violating the rights of the Petitioners to carry on their occupation and form associations. Moreover, Section 17, and its consequent impugned MHA notification/public notices, create a scheme that is without any determining principle, and has the effect of placing great hurdles on organizations, such as the Petitioner organizations, that are doing charitable work all across the country. This scheme of the statute also increases the costs of compliance manifold, and is proving to be an unreasonable restriction in the discharge of functions by the Petitioner organizations. Thus, Section 17 of the FCRA along with the impugned MHA notification/public notices have violated the rights of the Petitioner organizations, its members, as well as others similarly situated, under Articles 14, 19(1)(c), 19(1)(g), and 21 of the Constitution.

Array of Parties

4. Petitioners Nos. 1-4 are non-profit organizations from all over the country that are registered under the FCRA, and Petitioner No. 5 is an individual. [redacted]

[redacted] The Petitioners carry out various social, educational, and/or religious charitable activities for persons across communities. Such activities range from providing educational and vocational training and food, clothing, and medicine for the destitute, to supporting the disabled and the aged, conducting AIDS awareness camps, and taking care of the needs of widows and orphaned children. The Petitioners have played a pivotal role in COVID-19 relief efforts last year, for several poor families in need of financial and medical assistance.

A copy of the Petitioner No. 1's FCRA Registration Certificate dated [redacted] is annexed herewith and marked as **Annexure P-1 (Pages 45 to 46)**. A copy of the Petitioner No. 2's FCRA Registration Certificate dated [redacted] is annexed herewith and marked as **Annexure P-2 (Pages 47 to 48)**. A copy of the Petitioner No. 3's FCRA Registration Certificate dated [redacted] is annexed herewith and marked as **Annexure P-3 (Pages 49 to 50)**. A copy of the Petitioner No. 4's FCRA Registration Certificate dated [redacted] is annexed herewith and marked as **Annexure P-4 (Pages 51 to 52)**.

5. Respondent No. 1 is the Union of India through the Ministry of Home Affairs which *inter alia* governs all matters related to foreign and domestic security.

Respondent No. 2 is the Union of India, through the Ministry of Law and Justice, which is tasked with drafting principal legislation and various policies. Respondent No. 3 is the State Bank of India, at whose Main Branch at New Delhi all FCRA Accounts are to be opened in accordance with Section 17 and the MHA Notification.

QUESTIONS OF LAW

6. The present Writ Petition gives rise to the following substantial questions of law:

   I. Whether Section 17 of the FCRA is violative of Articles 14, 19 (1) (c), 19 (1) (g), and 21 of the Constitution, in so far as it requires that the primary FCRA account is to be opened exclusively in a branch of the State Bank of India, New Delhi, as notified by the Respondent No.1, irrespective of where the Petitioners/ similarly situated organizations are located?

   II. Whether the freedom to choose local banking facilities and to select a bank of one's choice is a part of the Petitioners' freedom to carry on business under Article 19(1)(g) of the Constitution?

   III. Whether Section 17, being premised on the understanding that each and every non-profit will have the necessary infrastructure and internet access to be able to operate a net-banking account, is ex-facie arbitrary and ignores the digital divide prevalent across the country?

IV. Whether the state has a positive obligation to create an environment with a strong functioning civil society and the impugned provisions blatantly disregard this obligation, by imposing onerous restrictions on the functioning of civil society organizations such as the Petitioners?

7. **FACTS OF THE CASE**

Contribution of the Development Sector

8. Non-profit organizations and voluntary organizations such as the Petitioner organizations contribute enormously to India's GDP and provide livelihood to millions both through direct employment and social giving. Their role ranges from service delivery and welfare works for community development, to promoting democracy, human rights, equitable governance and citizens' participation. The participation of NGOs is particularly significant in view of low social sector spending in India. However, due to limited fiscal spending on the social sector, *inter alia*, organizations such as the Petitioners are constrained to tap into global philanthropy. A joint report by the Centre for Social Impact and Philanthropy, Ashoka University, and the Niti Aayog states that foreign contributions increased from Rs 10,282 crore in 2009-10 to Rs 16,343 crore in 2018-19 as per the data of Respondent No. 1. A copy of the joint report by the Centre for Social Impact and Philanthropy, Ashoka

University, and the Niti Aayog dated October 2020 is annexed hereto and marked as **Annexure P-5 (Pages 53 to 66)**.

9. This Hon'ble Court has also recognized the indispensable role played by non-profit organizations in matters of development such as in ***Public Union for Civil Liberties (PUCL) v. State of T.N.*****,** reported in **(2004) 12 SCC 381**, wherein it was observed as under:

> *"In modern days civil Society is playing a greater role in nation building exercise. The commendable roles played by NGOs in very many situations strengthen the confidence of general public in NGOs. Always the State may not be in a position to reach out to the needy. As we have experienced in the past, Civil Society could efficiently fill up this gap. Now it is time for more interaction between Civil Society and State machinery in implementing social service schemes. The services of philanthropic organizations or NGOs could very well be utilized…."*

<u>The Foreign Contribution Regulation Act</u>

10. The Foreign Contribution Regulation Act, 1976 ("**1976 Act**") was first enacted in 1976. It was amended from time to time until the FCRA was enacted. Most recently, the FCRA was amended on 28 September 2020 by the Foreign Contribution Regulation (Amendment) Act, 2020 ("**2020 Amendment Act**") and the Foreign Contribution Regulation (Amendment) Rules, 2020 ("**2020 Amendment Rules**"), bringing about vast changes in the scheme of the enactment. A copy of the FCRA, 2010 prior to the amendment of 2020, has been annexed herewith and marked as **Annexure P-6 (Pages 67**

to 89). A copy of the 2020 Amendment Act dated 2020 is annexed hereto and marked as **Annexure P-7 (Pages 90 to 93)**. A copy of the 2020 Amendment Rules dated 2020 is annexed hereto and marked as **Annexure P-8 (Pages 94 to 121)**.

11. The FCRA regulates the acceptance and utilization of foreign contribution by, as a first step, requiring the registration of certain persons with the Central Government. Section 11 of the Act provides that no person having a definite cultural, economic, educational, religious, or social programme shall accept foreign contribution unless it obtains a **certificate of registration** from the Government. Any person not so registered may accept foreign contribution for a specific purpose only after obtaining **prior permission** of the Central Government for that purpose.

12. Section 12 of the FCRA provides for the grant of a certificate of registration/the giving of prior permission. Sub-section (1-A) of Section 12, as inserted by the 2020 Amendment Act, states that every person who applies for a certificate of registration/prior permission shall be required to open an "FCRA Account" in the manner specified in Section 17 and mention details of such account in his application. The said Section 12(1-A) states as follows:

> *12. (1-A) Every person who makes an application under sub-section (1) shall be required to open "FCRA Account" in the manner*

specified in Section 17 and mention the details of such account in his application.

13. The unamended Section 17 of the FCRA, prior to the 2020 Amendment Act, required FCRA registered persons to open an exclusive FCRA bank account **at any of the 279 scheduled banks** across the country. It read as follows:

> *17. Foreign contribution through scheduled bank. -*
> ***1. Every person who has been granted a certificate or given prior permission under section 12 shall receive foreign contribution in a single account only through such one of the branches of a bank as he may specify in his application for grant of certificate:***
> *Provided that such person may open one or more accounts in one or more banks for utilising the foreign contribution received by him:*
> *Provided further that no funds other than foreign contribution shall be received or deposited in such account or accounts.*
> *2. Every bank or authorized person in foreign exchange shall report to such authority as may be specified--*
> *a. prescribed amount of foreign remittance;*
> *b. the source and manner in which the foreign remittance was received; and*
> *c. other particulars, in such form and manner as may be prescribed.*
>
> (emphasis supplied)

14. On 28 September 2020, the FCRA was amended through the 2020 Amendment Act. Section 17 of the newly amended Act states as follows:

> *17. Foreign contribution through scheduled bank.—*
> *(1) Every person who has been granted certificate or prior permission under Section 12 shall receive foreign contribution* ***only in an account designated as "FCRA Account" by the bank, which shall be opened by him for the purpose of remittances of foreign contribution in such branch of the State Bank of India at New Delhi, as the Central Government may, by notification, specify in this behalf:***
> *Provided that such person may also open another "FCRA Account" in any of the scheduled bank of his choice for the purpose of keeping or utilising the foreign contribution which has been received from*

his "FCRA Account" in the specified branch of State Bank of India at New Delhi:
Provided further that such person may also open one or more accounts in one or more scheduled banks of his choice to which he may transfer for utilising any foreign contribution received by him in his "FCRA Account" in the specified branch of the State Bank of India at New Delhi or kept by him in another "FCRA Account" in a scheduled bank of his choice:
Provided also that no funds other than foreign contribution shall be received or deposited in any such account.
(2) The specified branch of the State Bank of India at New Delhi or the branch of the scheduled bank where the person referred to in sub-section (1) has opened his foreign contribution account or the authorised person in foreign exchange, shall report to such authority as may be specified,—
(a) the prescribed amount of foreign remittance;
(b) the source and manner in which the foreign remittance was received; and
(c) other particulars,
in such form and manner as may be prescribed.

(emphasis supplied)

As seen above, Section 17 of the pre-amended Act allowed foreign contribution registered persons to open an FCRA account **at any scheduled bank** across the country. Under the amended Section 17, all persons are now required to open a bank account **only at such branch of the State Bank of India at New Delhi** as may be prescribed by the Central Government by notification.

15. During the Lok Sabha debate on the 2020 Amendment Act, members of the Opposition raised salient objections to the said Section 17. The Ld. Member of Parliament from Dum Dum commented on Section 17 as follows:

> *"…Sir, earlier, the money which came from abroad could be kept in any Scheduled Commercial Bank or Nationalised Bank. Now, they are saying that all the money must come into an account with the State Bank of India, Delhi. One can open it anywhere in the country, and then, that money has to be transferred wherever the organisation opens an Account. Now, this is another way of controlling foreign contributions coming in by having one specific Account in only one specified bank."*

The Ld. Member of Parliament from Baramati strongly criticised the amendment to Section 17 as follows:

> *Another question is what you have recommended. I have absolutely no problem in using good banks.* ***Why is it only State Bank of India? What logic does it make in this technology world where everything can be managed so well? I cannot understand and why only State Bank of India and why not other banks?*** *Are you trying to show suspicion that other banks are not capable of opening of FCRA account or managing them or are you incapable of doing it? Can you please clarify why only State Bank?*
>
> (emphasis supplied)

The Ld. Member of Parliament from Shillong too voiced his opposition to Section 17 as follows:

> ***The FCRA account has to be opened only in Delhi. Why should the account be opened only in Delhi? Why is it only in the State Bank of India? Why not in other parts of the country?*** *People like in the North East, South and other parts of the country, stay very far. With the latest technology, I think we can open accounts anywhere. This is nothing but harassment....*
>
> (emphasis supplied)

16. Respondent No. 1 thereafter issued notification bearing S.O. No. 3479 (E) dated 7 October 2020 under the amended Section 17. According to this MHA Notification, the designated account is to be opened at the "*State Bank of*

India, New Delhi Main Branch, 11, Sansad Marg, New Delhi-110001". The said MHA Notification reads as follows:

> *S.O. 3479(E).—In exercise of the powers conferred by sub-section (1) of section 17 of the Foreign Contribution (Regulation) Act, 2010 (42 of 2010), the Central Government hereby specifies the* ***State Bank of India, New Delhi Main Branch, 11, Sansad Marg, New Delhi-110001*** *as the branch for the purposes of the said sub-section.*
>
> (emphasis supplied)

A copy of MHA Notification No. S.O. 3479 (E) dated 7 October 2020 is annexed hereto and marked as **Annexure P-9 (Page 122)**.

17. After the amendment of the Act and issuance of the MHA Notification, all persons seeking foreign contribution, whether registered or seeking registration/permission, have now been forced to prefer applications to open their new designated FCRA account at the SBI Main Branch, New Delhi with copies of all the relevant documents.

18. The deadline for opening the account was specified by Respondent No. 1 as 31 March 2021 by "public notice" F.No.II/21022/23(35)/2019-FCRA-III dated 13 October 2020. This public notice expressly states at Paragraphs 6 and 11 that after the date of opening the account, or from 1 April 2021, existing FCRA account holders "***shall not be eligible to receive FC in any account other than the "FCRA Account" opened in the NDMB***." (NDMB refers to

New Delhi Main Branch of the SBI). This deadline was later extended to 30 June 2021 vide a second "public notice" No. II/21022/36(58)/2021-FCRA-III dated 18 May 2021. A copy of public notice F.No.II/21022/23(35)/2019-FCRA-III dated 13 October 2020 is annexed hereto and marked as **Annexure P-10 (Pages 123 to 125)**. A copy of public notice No. II/21022/36(58)/2021-FCRA-III dated 18 May 2021 is annexed hereto and marked as **Annexure P-11 (Page 126)**.

19. The Respondent No. 1 also released a "*Standard Operating Procedure (SOP) to open and operate the "FCRA Account" as provided under Section 17(1) of the amended Foreign Contribution (Regulation) Act, 2010 with SBI, New Delhi Main Branch in terms of FCRA (Amendment), 2020*" dated 20 November 2020 ("**SOP**"). The SOP sets out the procedure for opening the account, as well as the process flow for persons already in possession of a certificate of registration/prior permission. It states that the SBI Main Branch, New Delhi is required to wait for Respondent No. 1 to confirm the applicant's prior permission/certificate of registration before allowing inflow of foreign contribution into the account. It states as follows:

> "*The NDMB will allow receipt of foreign contribution only in the "FCRA Account" opened in NDMB after confirming that the MHA has already granted a certificate or prior permission under section 12 of FCRA, 2010.*"

A copy of the "*Standard Operating Procedure (SOP) to open and operate the "FCRA Account" as provided under Section 17(1) of the amended Foreign Contribution (Regulation) Act, 2010 with SBI, New Delhi Main Branch in terms of FCRA (Amendment), 2020*" dated 20 November 2020 is annexed hereto and marked as **Annexure P-12 (Pages 127 to 131)**.

20. However, the resurgence of the COVID-19 pandemic brought activities across all sectors to a standstill and the accounts of many organizations are not yet opened/operationalised. Initially, the Respondent No. 1 failed to extend the deadline of 31 March 2021 in its first public notice, despite repeated requests and representations. Due to COVID-19 and administrative delays, the applications of several organizations remained pending on the Respondents' end well beyond the deadline. Many found themselves unable to receive foreign contribution in their old FCRA accounts while they were waiting for their new accounts to open. This caused untold hardship to such persons and their members for days on end. It was only on 18 May 2021, several days after the said deadline of 31 March 2021, that the Respondent No. 1 extended the deadline to 30 June 2021.

Impact of Section 17 and MHA Notification upon the Petitioners and other similarly placed organizations

21. As a result of the 2020 Amendment Act, the Petitioner organizations are required to open their primary FCRA account in New Delhi, at the SBI, Main Branch. Once this account is opened, the only mode available to operate their account is the net banking facilities of SBI. Many voluntary organizations are located in remote areas of the country, with lack of regular electric supply and limited access to internet/computer facilities. As such, they are completely unable to make transactions via net-banking or any other online mode. The foreign funds received in their SBI account are virtually inaccessible to them. They cannot access funds for administration of their organisation, which is crippling for small organizations reliant on foreign funding. Many of the organizations who stand to be affected are small organizations with charitable, religious, educational, or other social purposes. In fact, the amendment incorrectly pre-supposes that all charitable organizations, in each part of the country, have access to the kind of infrastructure, electricity and internet supply, which will make access to net banking simple for them.

22. Moreover, in cases where the online system of the Respondent No. 3 is down for maintenance or out of service due to system issues, the Petitioners will have no recourse whatsoever for the duration of the outage, as they cannot go to the home branch of their FCRA account (SBI Main Branch, New Delhi) to withdraw and manage their foreign funds.

23. Even if the closest local SBI branch may be used for offline transactions by the Petitioners, it is not the home branch for the purposes of the FCRA account of that organisation (as the home branch is the SBI Main Branch, New Delhi). As such, there is likely to be delay in forwarding their requests to the home branch at New Delhi from the local SBI branch. The Petitioner organizations will be at a disadvantage due to this delay.

24. Further, operational costs also increase for the Petitioners, since they will operate at a distance from the nearest SBI branch. Even though the Petitioners are closer to other bank branches, where they may have their existing FCRA account, they will not be able to receive any foreign contribution at their accounts in those banks. The Petitioners will be forced to travel to the closest SBI branch to try and operate their FCRA accounts. The Petitioners are thus now required to maintain three bank accounts – an individual account, the new FCRA account, as well as their existing accounts which already contain foreign funds.

25. The RBI Know Your Customer (KYC) Direction, 2016 requires offline verification of documents in certain instances. The Petitioners may be forced to appoint a designated person in New Delhi to manage their FCRA accounts, as they will be unable to make frequent trips to New Delhi for reporting a change in name, address, aims, objectives, or key members of the association

under Rule 17-A of the Foreign Contribution Regulation Rules, 2011 ("**FCR Rules, 2011**"), offline KYC verification, and other offline banking requirements as mandated by the Reserve Bank of India as well as SBI policy. In cases where the local branch cannot verify the signature of the authorised signatory, the representative of the Petitioner organizations will have no alternative but to go to New Delhi to rectify the issue in person. An extract from the RBI Know Your Customer (KYC) Direction, 2016 is annexed herewith and marked as **Annexure P-13 (Pages 132 to 146)**.

26. It is for these reasonably foreseeable difficulties that it is a fundamental norm in banking that a person's primary bank account is close to where they reside and in a bank of their choice. Section 17, in requiring that a primary FCRA account can only be opened in the State Bank of India, at the Main Branch in New Delhi, violates these fundamental tenets, and imposes an unreasonable restriction on the freedoms of the Petitioner organizations.

27. Section 2(9)(iii) of the Consumer Protection Act, 2019 reads as follows:

> *2. (9)(iii) the right to be assured, wherever possible, access to a variety of goods, products or services at competitive prices;*

Section 17 read with the MHA Notification violates the consumer's right to choose from a variety of services under the Consumer Protection Act, 2019. It may be noted that the functions expected to be performed by the Respondent No. 3 may be undertaken by any other scheduled bank in the country,

including local branches of the SBI itself. The Petitioners and other organizations have the right to be assured of access to a variety of banking services in connection with their foreign contribution, and not just those of one branch of Respondent No. 3. The impugned Section 17 along with the MHA Notification thus interferes with the consumer's right to choose.

28. Concentrating all foreign contribution in one branch also creates grave security concerns. Once a single bank employee's details are compromised in some manner, the person with access to such compromised details will also have ready access to the accounts, funds, and personal data of thousands of persons registered under the FCRA. Evidently, not only are Section 17 and the MHA Notification unconstitutional, they are also unfeasible and unworkable and cause great hardship to many.

Impact of Section 17 and MHA Notification upon the Respondents

29. Further, not only will these hardships continue for organizations, the Respondents themselves will suffer immensely from the fallout of these provisions. The administrative costs associated with directing all foreign contribution into one bank account are extremely large. The Respondents are now required to set up additional infrastructure to deal with the increased number of customers and transactions, and also appoint nodal officers

specifically for this purpose. Respondent No. 3 itself may be unable to take on the immense workload associated with the transactions of thousands of persons who have registered under the FCRA and have been forced to open a bank account at Respondent No. 3. Rule 16 of the FCR Rules, 2011 requires banks to report any receipt of foreign contribution within a mere *forty-eight* hours. Respondent No. 3's Main Branch may receive several deposits from foreign sources in a day, but it has to report each of them within a very narrow window. Thus, the scheme of Section 17 serves no purpose for the State itself, and is of hindrance rather than help for any assumed objective of effectively monitoring foreign contribution.

30. The operational difficulties faced by organizations due to the requirements of Section 17 are already evident. Approximately 23,000 organizations with FCRA registration are facing difficulties in moving from 279 scheduled banks across various branches in the country to one branch of one bank in one city, New Delhi. The extension dated 18 May 2021 was granted in the second public notice of the same date, in view of immense difficulties faced by organizations in submitting their KYC details to a branch outside the area of their operations. There are large delays in account opening and receiving of foreign remittances due to the volume of transactions, and the said branch did not have the infrastructural capacity to handle queries (by email/ phone) from thousands of organizations across the country. Often, the Respondent No. 3

for complying with KYC/ Net-banking/ foreign remittance requirements required additional verification from local bank accounts, a process that was time consuming and caused onerous administrative burdens on organizations trying to provide relief to affected communities during the COVID-19 pandemic. Additionally, there were large delays in receiving foreign contributions, as well as the cheque books and net banking details to utilise and transfer the foreign contribution.

31. Assuming, but not admitting, that the purported objective behind the onerous obligations of Section 17, is effective monitoring of foreign contribution received, in order to prevent misutilization of such funds, the mechanism adopted by the Section is excessive, irrational, arbitrary and squarely fails the test of proportionality for the following reasons:

a. Under the prior scheme of the FCRA, 2010, every organization was already mandated to open an exclusive FCRA account in a scheduled bank, which account details were required to be registered with the MHA/ Respondent No. 1 and linked to the organizations' FCRA registration number.

b. All FCRA registered organizations, since 2017, have been registered on an electronic portal known as 'DARPAN' that had a unique ID, and provided the Respondent No. 1 with the financial details and activity reports of such organizations, which was linked to their FCRA number and registered bank accounts.

c. All FCRA registered organizations are to submit regular returns in terms of Section 18 read with Rule 17 of the FCR Rules, that bear out their banking transactions and the activities carried out by such organizations to be submitted through the DARPAN portal.

d. Rule 16 of the FCR Rules requires **any bank** to report within 48 hours the details of any contribution received in any FCRA registered account, to the Respondent No.1.

32. In light of the above, the Petitioners are therefore left with no alternate remedy than to approach this Hon'ble Court in its Writ Jurisdiction, on the following grounds which are without prejudice to each other:

GROUNDS

A. BECAUSE non-profit organizations and voluntary organizations such as the Petitioner organizations have an indispensable role in India's social sector. They contribute enormously to India's GDP and provide livelihood to millions both through direct employment and social giving. This Hon'ble Court has also recognized the indispensable role played by non-profit organizations in matters of development such as in ***Public Union for Civil Liberties (PUCL) v. State of T.N.*****,** reported in **(2004) 12 SCC 381**, wherein it was observed as under:

"In modern days civil Society is playing a greater role in nation building exercise. The commendable roles played by NGOs in very many situations strengthen the confidence of general public in NGOs. Always the State may not be in a position to reach out to the needy. As we have experienced in the past, Civil Society could efficiently fill up this gap. Now it is time for more interaction between Civil Society and State machinery in implementing social service schemes. The services of philanthropic organizations or NGOs could very well be utilized…."

VIOLATION OF ARTICLE 14 ON THE GROUND OF ARBITRARINESS

B. BECAUSE the impugned Section 17 and the MHA Notification, as well as the public notices, violate Article 14 for bring *arbitrary and unreasonable*. A blanket requirement of opening a bank account at one specific branch of the SBI, New Delhi for *all* organizations receiving FCRA is absurd, irrational and serves no rational purpose under the FCRA or any other law. This Hon'ble Court, in ***Ajay Hasia v. Khalid Mujib Sehravardi*****,** reported in **(1981) 1 SCC 722,** held that,

> "16…***Wherever therefore there is arbitrariness in State action whether it be of the legislature*** *or of the executive or of an 'authority' under Article 12, Article 14 immediately springs into action and strikes down such State action.*"
>
> (emphasis supplied)

This Hon'ble Court in ***Shayara Bano v. Union of India*****,** reported in **(2017) 9 SCC 1** held as under:

> *"**The test of manifest arbitrariness**, therefore, as laid down in the aforesaid judgments **would apply to invalidate legislation as well as subordinate legislation under** Article 14. Manifest arbitrariness,*

> *therefore, must be* ***something done by the legislature capriciously, irrationally and/or without adequate determining principle****. Also, when something is done which is excessive and disproportionate, such legislation would be manifestly arbitrary."*
>
> (emphasis supplied)

The applicability of manifest arbitrariness to the provisions of a statute was upheld by this Hon'ble Court in ***Navtej Singh Johar v. Union of India*****,** reported in **(2018) 10 SCC 1**. One of the grounds on which this Hon'ble Court held Section 377 of the Indian Penal Code, 1860 to be unconstitutional was the manifest arbitrariness of the said provision in penalising consensual homosexual intercourse. Thus, the doctrine of manifest arbitrariness is applicable even in the present case, where Section 17, the MHA Notification, as well as the public notices impose onerous requirements without any determining principle whatsoever.

C. BECAUSE any State action in connection with foreign contribution must necessarily be non-discriminatory and unbiased in order to satisfy Article 14. This Hon'ble Court in ***Natural Resources Allocation, In re, Special Reference No.1 of 2012*****,** reported in **(2012) 10 SCC 1,** held as under**:**

> *"…a State action has to be tested for constitutional infirmities qua Article 14 of the Constitution. The action* ***has to be fair, reasonable, non-discriminatory, transparent, non-capricious, unbiased, without favouritism or nepotism, in pursuit of promotion of healthy competition and equitable treatment.*** *It should conform to the norms which are rational, informed with reasons and guided by public interest, etc. All these principles are inherent in the fundamental conception of Article 14."*
>
> (emphasis supplied)

There is no such requirement at law, for foreign funding / investment to be deposited only in one branch of one bank, for companies, industrial enterprises, and even the defence sector. As such, Section 17 and the MHA Notification, as well as the public notices, by imposing such an unreasonable requirement of opening a bank account in a specific branch of one bank, are arbitrary and effectively discriminate against voluntary organizations and other persons under the FCRA. They thus violate Article 14.

D. BECAUSE Article 14 is a fundamental right of the Petitioners. It is applicable to "persons" and not just "citizens", and has force against both juristic persons and natural persons. This view has been expressed and adopted by this Hon'ble Court in ***Indra Sawhney v. Union of India*****,** reported in **AIR 1993 SC 477.** Thus, in the instant case, Article 14 is necessarily applicable to non-profit organizations and non-governmental organizations such as the Petitioners Nos. 1-4.

E. BECAUSE the attitudes of the Legislature must necessarily be relevant in determining whether there has been manifest arbitrariness under Article 14. In the context of colourable legislation, this Hon'ble Court in ***K.C. Gajapati Narayan Deo*** **v.** ***The State of Orissa***, reported in **AIR 1953 SC 375** held that it may appear on scrutiny that "*the real purpose*

of a legislation is different from what appears on the face of it". Such test may also be applied to arbitrariness under Article 14. In the instant case, assuming but not admitting that on the face of it, there is some state interest in requiring FCRA accounts to be opened only at one branch of one bank, the real purpose of Section 17 and the MHA Notification cannot serve any objective whatsoever given the increased costs of compliance and the stifling of competition.

VIOLATION OF ARTICLE 19 ON THE GROUND OF DISPROPORTIONATE RESTRICTIONS

F. BECAUSE Article 19 of the Constitution, *inter alia* granting citizens the rights to form associations [19(1)(c)] and to practise any profession, or to carry on any occupation, trade or business [19(1)(g)], is a fundamental right of the Petitioners and their members. The FCRA covers associations as stated in Section 2(1)(a). The Petitioner Nos. 1-4 are Societies/Trusts. In ***TMA Pai Foundation v. State of Karnataka***, reported in **(2002) 8 SCC 481**, this Hon'ble Court held qua Article 19(1)(g) that:

> *"The establishment* ***and running of an educational institution where a large number of persons are employed as teachers or administrative staff****, and an activity is carried on that results in the imparting of knowledge to the students, must necessarily be regarded as an occupation, even if there is no element of profit generation.* ***It is difficult to comprehended that education, per se, will not fall under any of the four expressions in Article***

19(1)(g). "Occupation" would be an activity of a person undertaken as a means of livelihood or a mission in life."

(emphasis supplied)

If educational institutes (whether minority or not) were considered to have the right to run their institutions under Article 19 (1) (g), then as a corollary, other rights under Article 19 may also be made available to non-juristic persons, depending on the context.

G. BECAUSE even if it is assumed that Article 19 may not be invoked by the Petitioner organizations on their own, it is pertinent to note that Petitioner No. 5 is a party to the present petition in his individual capacity. [redacted] The rights to freedom of association and freedom of occupation under Article 19 of Petitioner No. 5, an individual citizen, are at stake in the present case. This Hon'ble Court in ***Indian Social Action Forum (INSAF) v. Union of India*****,** reported in **2020 SCC OnLine SC 310** held that:

"In the absence of any member of the association as a petitioner in the Writ Petition, the Appellant-organisation cannot enforce the rights guaranteed under Article 19 of the Constitution."

Thus, as Petitioner No. 5 is a petitioner to the present writ petition, the Petitioner Nos. 1-4 as organizations can also enforce the rights guaranteed under Article 19 of the Constitution.

H. BECAUSE the restrictions imposed by the impugned Section 17 and the MHA Notification of opening a bank account only in one branch of one bank, as well as the public notices, fail the test of proportionality and are thus not reasonable or in the interests of the sovereignty or integrity of India, or public order, or morality under Article 19(2).

Article 19(2) permits only *reasonable* restrictions upon the fundamental rights enumerated in Article 19(1). A 5-judge Constitution Bench of this Hon'ble Court in ***KS Puttaswamy v. Union of India,*** reported in **(2019) 1 SCC 1** has held that the proportionality test is applicable for examining whether restrictions under Article 19 are reasonable. This Hon'ble Court in ***KS Puttaswamy*** listed the components of the proportionality test as under:

> *"(a) A measure restricting a right must have a legitimate goal (legitimate goal stage).*
> *(b) It must be a suitable means of furthering this goal (suitability or rational connection stage).*
> *c) There must not be any less restrictive but equally effective alternative (necessity stage).*
> ***(d) The measure must not have a disproportionate impact on the right holder (balancing stage)."***
>
> (emphasis supplied)

I. BECAUSE this Hon'ble Court, in the case of ***Anuradha Bhasin* v. *Union of India*,** reported in **(2020) 3 SCC 637**, placed reliance on the seminal book of Justice Aharon Barak for its definition of proportionality. It noted that the Hon'ble Court in ***Modern Dental College & Research Centre v. State of M.P.*,** reported in **(2016) 7 SCC 353**, relied upon the said definition, and stated as follows in the said judgment:

> *60. … a limitation of a constitutional right will be constitutionally permissible if:*
>
> *(i) it is designated for a proper purpose;*
>
> *(ii) the measures undertaken to effectuate such a limitation are rationally connected to the fulfilment of that purpose;*
>
> *(iii) the measures undertaken are necessary in that there are no alternative measures that may similarly achieve that same purpose with a lesser degree of limitation; and finally*
>
> *(iv) there needs to be a proper relation ("proportionality stricto sensu" or "balancing") between the importance of achieving the proper purpose and the social importance of preventing the limitation on the constitutional right.*

This Hon'ble Court in ***Anuradha Bhasin*** went on to hold as follows:

> *70. In view of the aforesaid discussion, we may summarize the requirements of the doctrine of proportionality which must be followed by the authorities before passing any order intending on restricting fundamental rights of individuals. In the first stage itself, the possible goal of such a measure intended at imposing restrictions must be determined. It ought to be noted that such goal must be legitimate. However, before settling on the aforesaid measure, the authorities must assess the existence of any alternative mechanism in furtherance of the aforesaid goal. The appropriateness of such a measure depends on its implication upon*

the fundamental rights and the necessity of such measure. It is undeniable from the aforesaid holding that only the least restrictive measure can be resorted to by the State, taking into consideration the facts and circumstances. Lastly, since the order has serious implications on the fundamental rights of the affected parties, the same should be supported by sufficient material and should be amenable to judicial review.

71. The degree of restriction and the scope of the same, both territorially and temporally, must stand in relation to what is actually necessary to combat an emergent situation.

72. To consider the immediate impact of restrictions upon the realization of the fundamental rights, the decision maker must prioritize the various factors at stake. Such attribution of relative importance is what constitutes proportionality. It ought to be noted that a decision which curtails fundamental rights without appropriate justification will be classified as disproportionate. The concept of proportionality requires a restriction to be tailored in accordance with the territorial extent of the restriction, the stage of emergency, nature of urgency, duration of such restrictive measure and nature of such restriction. The triangulation of a restriction requires the consideration of appropriateness, necessity and the least restrictive measure before being imposed.

J. BECAUSE in the instant case, it is submitted that none of the components of the proportionality test are satisfied by the scheme of Section 17 and the notification/public notices issued for its implementation. With respect to *the legitimate goal stage*, there is no legitimate goal evident from the impugned Section 17 and MHA Notification. Even so, while the first port of receipt of any foreign contribution must be the designated primary SBI account, Section 17 allows a secondary foreign contribution account to be opened by a registered person before any other scheduled bank for the further

utilization of foreign contribution. However, even with this concession, Section 17 read with the MHA Notification serves absolutely no legitimate objective. To the contrary, it only increases compliance costs for registered persons all over the country, stifles competition in the banking sector, and allows the government increased surveillance by having instant access to running ledgers of foreign contribution accounts across the country.

K. BECAUSE with respect to *the rational connection stage*, assuming but not admitting that the Respondents do indeed have a legitimate goal such as monitoring foreign remittance, forcing all persons seeking foreign contribution to open bank accounts only in one branch of one bank in India is by no means suitable for promoting any State interest. In fact, in addition to the heightened compliance costs, it will lead to great inefficiency and delay in the making of transactions related to foreign funding. According to the data uploaded on the FCRA website of Respondent No. 1 (*https://fcraonline.nic.in/fc_dashboard.aspx*), there are close to 50,000 persons who are registered under the FCRA. A copy of the FCRA website of Respondent No. 1 (*https://fcraonline.nic.in/fc_dashboard.aspx*) showing the number of persons with FCRA dated 28 June 2021 is annexed herewith and marked as **Annexure P-14 (Pages 147 to 152)**.

L. BECAUSE with respect to *the necessity stage*, there already existed much less restrictive means to achieve the same goal: under the prior scheme of the Act every organization was already mandated to open an exclusive FCRA account in a scheduled bank, which account details were required to be registered with the MHA/ Respondent No. 1 and linked to the organizations' FCRA registration number. All FCRA registered organizations, since 2017, have been registered on an electronic portal known as 'DARPAN' that had a unique ID, and provided the Respondent No. 1 with the financial details and activity reports of such organizations, which was linked to their FCRA number and registered bank accounts. All FCRA registered organizations are to submit regular returns in terms of Section 18 read with Rule 17 of the FCR Rules, that bear out their banking transactions and the activities carried out by such organizations to be submitted through the DARPAN portal. Finally, Rule 16 of the FCR Rules requires **any bank** to report within 48 hours the details of any contribution received in any FCRA registered account, to the Respondent No.1. Thus, assuming, but not admitting, that the purported objective behind the onerous obligations of Section 17, is effective monitoring of foreign contribution received, in order to prevent misutilization of such funds, the mechanism adopted by the Section is excessive, irrational, arbitrary and squarely fails the third limb of the test of proportionality.

M. BECAUSE finally, with respect to *the balancing stage*, as explained in the facts of this instant petition, Section 17, the MHA Notification, and the public notices have a most disproportionate impact upon the rights holders, namely Petitioner Nos. 1-4 and their members, as well as Petitioner No. 5. For those organizations not based in Delhi and located in remote areas of the country, with lack of regular electric supply and limited access to internet/computer facilities. They are completely unable to make transactions via net-banking or any other online mode. The foreign funds received in their SBI account are virtually inaccessible to them. Moreover, in cases where the online system of the Respondent No. 3 is down for maintenance or out of service due to system issues, all organizations outside Delhi have no recourse whatsoever for the duration of the outage, as they cannot go to the home branch of their FCRA account (SBI Main Branch, New Delhi) to withdraw and manage their foreign funds. There is likely to be delay in forwarding their requests to the home branch at New Delhi from the local SBI branch.

Organizations are forced to appoint a designated person in New Delhi to manage their FCRA accounts, as they are unable to make frequent trips to New Delhi for reporting a change in name, address, aims, objectives, or key members of the association under Rule 17-A of the FCR Rules, 2011, offline KYC verification, and other offline banking requirements

as mandated by the Reserve Bank of India as well as SBI policy. In cases where the local branch cannot verify the signature of the authorised signatory, organizations have no alternative but to go to New Delhi to rectify the issue in person. As such, the impugned section and notification evidently have a disproportionate impact on the rights holders.

On applying the test for proportionality as laid down by this Hon'ble Court, and considering its observations in ***Anuradha Bhasin*** that the triangulation of a restriction requires "*the consideration of appropriateness, necessity and the least restrictive measure*" before being imposed, Section 17 and the MHA Notification and the public notices are neither appropriate nor necessary and are not the least restrictive measure. They thus unreasonably restrict, and therefore violate, the rights of the Petitioner Nos. 1-4, their members, and Petitioner No. 5 to form associations under Article 19(1)(c) and to carry on occupation under Article 19(1)(g).

N. BECAUSE Section 17, in requiring that a primary FCRA account can only be opened in the State Bank of India, at the Main Branch in New Delhi, violates the fundamental norm in banking that a person's primary bank account is close to where they reside and in a bank of their choice, and imposes an unreasonable restriction on the freedoms of the Petitioner organizations.

O. BECAUSE the requirements imposed by Section 17 and the MHA Notification/public notices have caused various operational difficulties at the outset. As stated earlier, there are at least 23,000 organizations with FCRA registration, that are facing difficulties in moving from 279 scheduled banks across various branches in the country to one branch of one bank in one city, New Delhi. Several organizations suffered due to non-receipt of FCRA until Respondent No. 1 granted an extension dated 18 May 2021 in the second public notice of the same date. Organizations had great difficulty submitting their KYC details to a branch outside the area of their operations. Several delays were caused in the receipt of foreign contributions. Many are yet to receive the cheque books and net banking details to withdraw their foreign contribution. This has resulted in several such organizations being unable to pay their workers their salaries and engage in other charitable, social, educational and vocational activities. They are struggling to remain in operation due to a lack of funding. A copy of an article in Livemint titled, "*Crippled by restraints, NGOs struggle to help with Covid*" dated 15 May 2021 is annexed hereto and marked as **Annexure P-15 (Pages 153 to 159)**.

P. BECAUSE Section 17 read with the MHA Notification violates the consumer's right to choose from a variety of services under Section

2(9)(iii) of the Consumer Protection Act, 2019. The Petitioners and other organizations have the right to be assured of access to a variety of banking services in connection with their foreign contribution, and not just those of one branch of Respondent No. 3.

Q. BECAUSE concentrating all foreign contribution in one branch also creates grave security concerns. Once a single bank employee's details are compromised in some manner, the person with access to such compromised details will also have ready access to the accounts, funds, and personal data of thousands of persons registered under the FCRA.

VIOLATION OF ARTICLE 21 FOR LACK OF FAIR PROCEDURE

R. BECAUSE the impugned Section 17 along with the MHA Notification and the public notices violate the test of fairness and reasonableness of procedure. In the case of ***Maneka Gandhi v. Union of India,*** reported in **(1978) 1 SCC 248**, this Hon'ble Court has held that the procedure established by law, as contemplated by Article 21 did not mean any procedure howsoever arbitrary or fanciful. The procedure has to be fair, just and reasonable. In the present case, in addition to the massive administrative costs incurred by applicants, Section 17 read with the

MHA Notification and the public notices virtually creates a running ledger that is maintained by the authority/central government of each foreign remittance received by an organization. The unamended Section 17, allowing persons to open FCRA accounts at any scheduled bank in India, shows that that a far less intrusive method could be used to achieve the same objective of financial accountability of non-profits not receiving foreign funding. Thus, given that a less intrusive method exists, the impugned provision along with the notification fails the test of proportionality. Moreover, Section 17, the MHA Notification, and the public notices, are both unfair and unreasonable under Article 21. Specifying just one branch of one bank for the Petitioners to open their accounts in is unfair and arbitrary not only to the Petitioners, but also to the thousands of organizations based outside of Delhi or those in remote areas who do not have access to mobile technology.

S. BECAUSE Respondent No. 3 itself may be unable to take on the immense workload associated with the transactions of thousands of persons who have registered under the FCRA and have been forced to open a bank account at Respondent No. 3. Rule 16 of the FCR Rules, 2011 requires banks to report any receipt of foreign contribution within a mere *forty-eight* hours. Respondent No. 3's Main Branch may receive several deposits from foreign sources in a day, but it has to report each

of them within a very narrow window. The requirements of Section 17 create avoidable administrative burdens on the Respondents and cause unnecessary expenditure of resources to ensure adequate infrastructure and sufficient personnel to transact for over 23,000 FCRA registered organizations from one branch of one bank in one city. Evidently, not only are Section 17 and the MHA Notification unconstitutional, they are also unfeasible and unworkable and cause great hardship to many.

T. The Banking Charter issued by Respondent No.1 is not issued under any specific provision, is without the force of law, and goes beyond the scope of Respondent No. 1 to oversee banking functions in the country, which lies with the Reserve Bank of India. A copy of the "FCRA Charter for the Banks" dated nil is annexed hereto and marked as **Annexure P-16 (Pages 160 to 164)**.

U. BECAUSE Section 17, being premised on the understanding that each and every non-profit will have the necessary infrastructure and internet access to be able to operate a net-banking account, ignores the digital divide prevalent across the country. As mentioned before, many non-profits operate from remote areas and/ or many have small budgets and operations, making compliance with the requirements of the impugned section and the consequent notices extremely difficult.

V. BECAUSE the state has a positive obligation to create an environment with a strong functioning civil society. A strong civil society, organized in the form of non-profit and voluntary organizations, does more than ensuring philanthropy or financial assistance: it enables public participation in governance. The impugned provisions blatantly disregard this obligation, by imposing onerous restrictions on the functioning of civil society organizations. The requirements imposed by the impugned notification have the effect of severely curtailing the functioning of non-profit organizations. This violates a more basic fundamental right: namely that of citizens to organize in the form of civil society groups and demand accountability from the government in a democratic set up.

33. The Petitioners crave leave of this Hon'ble Court to submit additional grounds as deemed necessary.

34. No other Petition seeking the same or similar relief has been filed by the Petitioners in this Hon'ble Court or any other Court in India.

PRAYER

The Petitioners therefore pray that in the facts and circumstances of the present case, this Hon'ble Court may be pleased to issue:

a. A writ of mandamus or any other writ/order declaring that Section 17 of the FCRA is violative of Articles 14, 19(1)(c), 19(1)(g), and 21 of the Constitution, in so far as it requires that the primary FCRA account is to be opened exclusively in a branch of the State Bank of India, New Delhi, as notified by the Respondent No.1;

b. A writ of certiorari or any other writ/order quashing the MHA Notification No. S.O. 3479 (E) dated 7 October 2020 issued by Respondent No. 1 as being violative of Articles 14, 19(1)(c), 19(1)(g), and 21 of the Constitution;

c. A writ of certiorari or any other writ/order quashing the public notice bearing F.No.II/21022/23/(35)/2019-FCRA-III dated 13 October 2020 as being violative of Articles 14, 19(1)(c), 19(1)(g), and 21 of the Constitution;

d. A writ of certiorari or any other writ/order quashing the public notice bearing II/21022/36/(58)/2021-FCRA-III dated 18 May 2021 as being violative of Articles 14, 19(1)(c), 19(1)(g), and 21 of the Constitution.

e. Any other orders as deemed fit in the interests of justice.

DRAWN BY

NUPUR RAUT
ADVOCATE

Filed by:

SRISHTI AGNIHOTRI
Advocate for the Petitioners

Drawn on: 09.07.2021

Place: New Delhi