IN THE SUPREME COURT OF INDIA

CIVIL ORIGINAL JURISDICTION

WRIT PETITION (C) NO. 751 of 2021

IN THE MATTER OF:

Jeevan Jyothi Charitable Trust & Ors. … Petitioners

Versus

Union of India & Ors. … Respondents

REJOINDER ON BEHALF OF THE PETITIONERS TO THE COUNTER AFFIDAVITS OF RESPONDENT NOS. 1, 2 AND 3.

PAPER-BOOK

(FOR INDEX: PLEASE SEE INSIDE)

ADVOCATE FOR THE PETITIONERS:

MS. SRISHTI AGNIHOTRI

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MOST RESPECTFULLY SHOWETH THAT:

1. The present Petition challenges the constitutional validity of Section 17 of the FCRA, 2010 [**Foreign Contribution Regulation Act**]. The Petitioners seek to file this **preliminary rejoinder** to the Counter Affidavits of Respondent Nos. 1, 2 and 3 ["**Counter Affidavits**"], so as to press for urgent interim reliefs. The leave of this Hon'ble Court is sought to file a more detailed rejoinder to the Counter Affidavit of the Respondents at a later stage. The Petitioners also submit that no averments in the Counter Affidavits are admitted herein for want of any specific denial.

Petitioners Contentions

2. The Petitioners' challenge to Section 17 of the FCRA is narrow. Section 17 of the FCRA Act mandates that all persons [non-profit organisations or individuals] registered to receive foreign contribution under the FCRA must mandatorily open a primary FCRA bank account exclusively with the State Bank of India (SBI) at a branch as notified by the Central Government. The Petitioners take no grievance to the opening of an exclusive FCRA account for receiving foreign contribution [FC] or any of the onerous reporting requirements that come with the opening of such an account. The Petitioners' sole grievance rests with the manifestly arbitrary, unreasonable and even irrational requirement of having to open a primary FCRA account ***only*** with the State Bank of India, at its New Delhi main branch as notified by the public notification dated 13 October, 2021, irrespective of the person receiving foreign contribution being based in at any location across India. In fact, the position in law prior to the passage of the Foreign Contribution Amendment Act, 2020 ["**Amendment Act**"] was that under the erstwhile Section 17, the primary FCRA account for the exclusive receipt and utilization of foreign contribution could be opened at any schedule bank at any branch in the country, allowing every organisation the liberty to open their bank account within the local jurisdiction of their registered office, as is generally a norm

or even pre-requisite for any banking in India and globally. However, the impugned Section 17 came to be passed by way of Section 12 of the Amendment Act which came into effect on 28.9.2020. A comparative table of the changes in Section 17 are as under:

Section 17 prior to amendment	**Section 17 post amendment**
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.*	*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.*

3. Accordingly, the Petitioners seek to:

a. Set aside Section 17 of the FCRA in so far as it mandates the opening of a primary FCRA account only with the State Bank of India at a branch as notified by the Central Government.

b. Quashing of the MHA Notification No. S.O. 3479 (E) dated 7 October 2020 issued by Respondent No. 1 [that notifies the SBI New Delhi Main

Branch as the only branch in the country for opening a primary account]. [Annexed at Annexure-P-9 of the Petition]

c. *Quashing of the public notice bearing F.No.II/21022/23/(35)/2019-FCRA-III dated 13 October 2020 which mandated the opening of a primary FCRA account mandatorily with the SBI NDMB by 31st of March 2021. [Annexed at Annexure P-10 of the Petition]*

d. *Quashing of the public notice bearing No. II/21022/36/(58)/2021-FCRA-III dated 18 May 2021, which extended the aforementioned deadline for opening the account to the 30th of June, 2021. [Annexed at Annexure P-11 of the Petition]*

4. The Petitioners herein are carrying on various charitable activities that range from providing quality medical care for the extremely marginalized and elderly, providing care to poor children with disabilities, providing rations to those who have suffered unemployment due to covid-19, educating children in slum communities etc. As an example, Petitioner No.2 over the recent month of September 2021 provided 648 meals to 180 children over the course of the month in a slum community in Kolkata. A brief report with photographs of Petitioner No.2's charitable work in the month of September 2021, is marked and annexed as Annexure A-1 to this rejoinder. **(Pages 41-42)**

5. The contribution of the social sector to the development of our country is critical to nation building, as recognized by this Hon'ble Court in ***Public Union for Civil Liberties (PUCL) v. State of T.N***., **(2004) 12 SCC 381**, wherein it was observed as under: "***In modern days civil Society is playing a greater role in nation building exercise…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...***" Just as special efforts are being consistently taken by the government to attract foreign direct investment [FDI] for commercial purposes to grow our economy and build the nation, foreign contribution for social purposes also contributes to nation building with the added advantage that philanthropical donation does not grant any ownership rights to foreign persons as in the case of FDI for commercial purposes.

6. While the object of the FCRA is to prevent the mis-utilization of foreign contribution and protect democratic interests a "***balance has to be drawn between the object that is sought to be achieved by the legislation and the rights of the voluntary organisations to have access to foreign funds***" as specifically held by this Hon'ble Court in **INSAF v. Union of India** reported

in **2020SCConlineSC310**. This is in keeping with Part III of the Constitution which prohibits arbitrariness in legislation under Article 14 and unreasonable restrictions that violate the freedom of association or occupation under Article 19. The Petitioners further argue that the impugned Section fails the test of arbitrariness, reasonableness, proportionality and even bears no rational nexus to its purported objective. This violates not just Articles 14, 19 and 21 of the Constitution but also Article 22 of the International Covenant on Civil and Political Rights which India acceded to in 1979. Article 22 states as under:

> ***"Everyone shall have the right to freedom of association with others… No restrictions shall be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals, or the protection of the rights and freedoms of others."***

Prior to making legal submissions to the counter-affidavits, the Petitioners wish to specifically draw out the ***disproportionate consequences*** of the impugned provisions that are causing grave and imminent difficulties.

Challenges with opening and operating an exclusive primary FCRA account with SBI, New Delhi Main Branch.

7. 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 [**NDMB]. The difficulties in opening an NDMB account are as under:**

a. **AOF forms**: The account opening forms [AOF] which are to be submitted through the local SBI branch requires continuous physical forwarding to the New Delhi Main Branch and this causes a lot of back and forth between the local branch/main branch with regard to the submission of documents and curing of any defects. A copy of the account opening form issued by SBI is hereby marked and annexed as **Annexure-A-2** to this Rejoinder**. (Pages 43-59)**

b. **Insufficient assistance and infrastructure:** While even the NDMB branch is insufficiently staffed and its helpline numbers are often not available, the local SBI branches do not have dedicated support persons to assist with the processing of documents and physical verification of signatories which is mandatory. There is no streamlined or seamless online process for the same.

c. **Board members location:** Board members are generally located in larger numbers closer to the registered office of local non-profit organisations and since SBI mandatorily requires physical board resolution signing, it becomes extremely tedious to coordinate signing of KYC documents for account opening or any board resolutions where required.

d. **Forced opening of local SBI Bank account:** Some office bearers in the Petitioner organisations were even requested to open a local SBI account on instructions of their local bank in an attempt to facilitate more seamless communication.

8. **Once this account is opened, the following operational difficulties are being faced:**

a. **Difficulty with no physical access to primary bank**: As admitted by the Respondents' Counter Affidavits, the only mode available to operate a primary FCRA account for a non- Delhi based organization is through 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. Such organisations will face

a severe disruption in their regular banking operations for lack of physical access to their primary FCRA bank.

b. **Delay in availing regular banking services:** Several banking services such as simply applying for a cheque book will have to be done with the SBI, NDMB. Applying remotely without having physical access to a bank within the local registered office of an organisation is both absurd and causes grave difficulty. For example, an email attached by an organisation seeking to apply for cheque book shows grave delay and apology by an official of the NDMB for delay in issuing cheque book remotely from main branch. A copy of the email apology received by the organization in response to the email dated 5.10.2021 that there was a delay in receiving the cheque book has been annexed herewith and marked as **Annexure A-3. (Page 60)**

c. **Increase of operational and administrative costs:** The need to coordinate with a local branch and the main branch; operate a primary account and a domestic account and in cases where there is a secondary account [where opened for utilization] requires more administrative assistance and costs for non-profit organisations which places a

disproportionate burden on them. This is in addition to operating any individual accounts for trustees of organisations, where local SBI branches cajole trustees into opening one on the pretext of easier coordination. In some circumstances, additional travel to New Delhi maybe required for sorting out problems with the main branch or meeting KYC verification requirements. An extract from the RBI Know Your Customer (KYC) Direction, 2016 is marked as Annexure P-13 to the Writ Petition (Pages 132 to 146)

d. **No recourse in case of outage:** 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.

e. **Lack of online system to track movement between SBI local branch and NDMB:** There is no online system to track movement of any requests between the local branch and NDMB which causes grave confusion and delay with the local branch often not being aware of

procedures with regard to FCRA account operation and bearing no responsibility for the same.

f. **Violation of basic consumer choice:** The Petitioners and other organizations have the right to be assured of access to a variety of banking services at competitive costs and with competitive interest rates in connection with their foreign contribution, and not just those of one branch of Respondent No. 3, SBI. Further, there are additional costs associated with transfer of funds between NDMB and any utilization accounts where opened. The impugned Section 17 along with the MHA Notification thus interferes with the consumer's right to choose. This violates Section 2(9)(iii) of the Consumer Protection Act, 2019 which grants the right to be assured, wherever possible, access to a variety of goods, products or services at competitive prices.

RESPONSE TO THE COUNTER AFFIDAVIT ON BEHALF OF THE UNION RESPONDENT NOS. 1 AND 2.

9. Paras 3 to 12 of the Union's Counter Affidavit generally set out the reliefs sought in the Petition and the nature of provisions under challenge and hence warrant no reply.

10. With regard to para 13 of the Counter Affidavit, it is submitted that the contentions of the Petitioner are being misrepresented as an unbridled right to receive foreign contribution. The Petitioners claim no right to an unbridled access to foreign contribution but rather submit that mandating the opening of an ***exclusive*** FCRA primary account only with the SBI Main Branch, New Delhi is an arbitrary and unreasonable restriction on their right to receive foreign contribution which in turn impinges their right to equality under Article 14, their freedoms of speech, association and occupation under Article 19 and their right to life under Article 21. This Hon'ble Court, as a custodian of fundamental rights, has repeatedly held that the Constitution must be purposively interpreted and has carved out several unenumerated rights in the Constitution [such as the fundamental right to privacy upheld in ***Justice K.S. Puttaswamy (Retd) & Anr. v. Union of India & Ors.*** [(2017) 10 SCC 1], without which the full scope and effect of various fundamental rights would remain illusory. Moreover, this Hon'ble Court in **INSAF** held that "*Support to public causes by resorting to legitimate means of dissent like bandh, hartal etc.* ***cannot deprive an organisation of its legitimate right of receiving foreign contribution***" and accordingly Rule 3 (vi) of the Foreign Contribution Regulation Rules, 2011 was read down for being violative of

Article 14 of the Constitution. This Hon'ble Court already having recognized a right to receive foreign funding as a concomitant to the right to equality, albeit subject to reasonable regulation, negates the Respondents' contention that the present petition makes no case out for the violation of fundamental rights and that it cannot be entertained under Article 32 of the Constitution. It is further submitted that the Court in ***INSAF*** did not examine the effect of the impugned provisions on the rights under Article 19 of the Constitution since no Petitioners in their individual capacity were arrayed, and that Article 19 rights were held to be available only to individual citizens. As a corollary, it is submitted that since the Petitioner No.5 herein is an individual, an examination of the impugned provision against the tenets of Article 19 (1) (a), 19 (1) (c) and 19 (1) (g) of the Constitution is also warranted. The Respondents' contention that the FCRA does not regulate domestically received funds does not justify manifestly arbitrary regulations on persons right to receive foreign contribution by forcing twenty-three thousand organisations to resort to banking only with an SBI branch at New Delhi.

11. With regard to Para 14 of the Counter Affidavit, the Union's assertion that the amendments are all in "***furtherance of the objective and the scope of the***

Act and its spirit" does not hold true of the impugned Section 17. An assertion that it would be detrimental to national interest which FCRA seeks to protect by merely banking with or receiving FC at any of the 279 schedule banks all regulated by the Reserve Bank of India, including other government owned public sector banks or even local branches of the State Bank of India itself is simply absurd and irrational. It effectively casts undue, unwarranted and wholly unsubstantiated suspicion on the entire Indian banking system including the esteemed Reserve Bank of India. It is pertinent here to point out that the RBI, and various banks including Respondent No.3, SBI, in its comments over the FCRA Bill, 2006 being examined by the Parliamentary Standing Committee, had stated that extensive reporting requirements which require all foreign contribution banking transactions to be shared with the MHA are unnecessary since there is already an effective mechanism for banks to report suspicious transaction to the Financial Intelligence Unit [FIU] and that to prevent unnecessary reporting burden the threshold limit of reporting is set at transactions of 10 lakhs or above [Page 342 of the Union Counter Affidavit at Annexure-R-8]. Respondent No.1 herein in fact also agreed that sufficient measures would be taken to prevent burdensome reporting and the threshold limit would be kept at around 10 lakhs for reporting foreign contribution. In the same breadth the RBI categorically

stated that "***Voluminous Data on Foreign Remittances will put an extra financial burden on the financial institutions which will increase the costs on the banks. It will also divert the focus on monitoring of suspicious transactions"*** [Page 342 of the Union Counter Affidavit at Annexure-R-8]. Respondent No.1, MHA had again in response undertaken not to place burdensome financial reporting on banks. This recommendation of Respondent No.1 was accepted and the Department Related Parliamentary Standing Committee on Home Affairs in its 134th report on the Foreign Contribution Regulation, Bill 2006 dated 31 October 2008 recommended at para 7.8.4 that a threshold limit 10 lakhs can be set for a reporting of suspicious transactions and the same incorporated at Section 17 (2). This was on the evidence of the Union Home Secretary that each and every transaction need not be recorded was noted at para 7.8.3 of the report [Page 194 of the Union Counter Affidavit at Annexure-R-8]

12. Accordingly, the reasons stated by the Union for mandating the operation of a primary FCRA account only with the SBI, NDMB at para 28 and 29 of their counter affidavit as for the "***monitoring inflow and outflow of all foreign contribution***" from accounts across the country and gather information at "***any point of time***", runs contrary to the expert opinion of the

RBI that this would unnecessarily increase administrative burden and costs and even distract from reporting truly suspicious transactions. The admitted object behind the impugned Section 17 hence effectively amounts to surveillance with no rational nexus to its stated purpose. Further, Section 36(1) of the Banking Regulation Act, 1949 tasks the RBI with the power to caution or prohibit banks or any bank from making a particular class of transactions. Therefore, the mandate of impugned Section 17 which prohibits all banks other than the State Bank of India from opening a primary account for the receipt of foreign contribution and the ensuing public notice issued by Respondent No.1 bearing No. S.O. 3479 (E) and dated 7 October 2020 which designates the branch as NDMB, ought to be set aside for running afoul of Section 36 (1) of the Banking Regulation Act, 1949 and usurping the powers of the RBI. Without the mandate of the RBI, the public notices bearing F.No.II/21022/23/(35)/2019-FCRA-III dated 13 October 2020 and No. II/21022/36/(58)/2021-FCRA-III dated 18 May 2021 which prohibit banks other than the SBI from directly receiving foreign contribution from a foreign source after the cut-off date of June 30 are also illegal and without the authority of law. This position is further borne out by the fact that under the pre-amended Section 17 the RBI had vide Circular dated 06.02.2012 in exercise of its powers under section 36(1)(a) of Banking Regulation Act,

1949, issued requisite guidelines under which schedule of banks across the country were designated as eligible to open designated FCRA Accounts. A copy of the master circular issued by the RBI dated 1.7.2014 consolidating the guidelines issued to banks (including the circular dated 6.1.2012) has been annexed herewith and marked as **Annexure A-4 (Pages 61-72).**

13. With regard to the Union's averments at Paras 30 to 37 of the Counter Affidavit that the object of enacting the impugned Section 17 was to strengthen the "compliance mechanism' and "accountability" of NGOs receiving foreign contribution to address the problem of many NGOs mis utilizing funds and not filing annual accounts, it is submitted that the bank with which an NGO opens a primary FCRA account has no rational nexus to furthering such an objective. For example, banking with the State Bank of India instead of the Punjab National Bank does not help increase accountability for NGOs. If this was the case, such fetters of mandating a particular bank branch at SBI, New Delhi ought to equally apply to ensure better financial accountability towards foreign direct investment received by Companies to protect national security, prevent money laundering and tax evasion, particularly for sensitive areas such as the defence sector.

14. With regard to the averments made at Para 38 of the Counter Affidavit, that the objective of the impugned amendment was to "insulate democratic polity" and "public individuals working in the national democratic space", the restriction of using any bank regulated by the RBI within the local jurisdiction of an organisation for the direct receipt of foreign contribution has no nexus with such objective. Even assuming a secondary account can be used for utilization, the various difficulties outlined at paragraphs 7 and 8 of this rejoinder such as serious delays, burdensome administrative costs etc. are reiterated. It is also submitted that on the one hand, amendments are made to the FCRA to enforce prohibitive restrictions on the receipt of foreign contribution by non profit organisations to protect democratic interest while on the other hand, Section 2(vi) of the FCRA was amended by Section 236 of the Finance Act, 2016 with retrospective effect from 1976 to treat donations from any Indian registered Company that is wholly foreign investor owned as domestic contribution and even make political donations permissible.

15. The Union's reliance on ***Rajeev Suri v. Union of India*** at para 39 of the Counter Affidavit is wholly misplaced since this Hon'ble Court categorically held in ***Rajeev Suri*** that the role of the court extends to "***examining the***

constitutionality, including legality of the policy and government actions" which is squarely the Petitioners' case.

16. The Union's submission at Para 40 to Para 46 of the Counter Affidavit where the development of US Constitutional jurisprudence from the Court's activist striking down of laws in ***Lockner v. New York 198 US 45 (1905)*** to the dispensing of the said position first in ***Williamson v. Lee Optical*** 348 U.S 483 (1955) and thereafter in ***Ferguson v. Skrupa 372 US 726 (1963)*** has absolutely no application in the facts and circumstances of the present case. The aforesaid string of decisions concerned an entirely different set of facts and circumstances wherein regulations not restricting fundamental rights but having an economic bearing were under question. To the contrary, as submitted above, the present case involves the examination of the restrictions on the right to receive foreign contribution that directly affect the Petitioners fundamental rights to equality, freedom of association, freedom of occupation and the right to life for which the deferential standard of review accorded by the US Supreme Court post the Lockner era has no bearing.

17. It is the Petitioners' case is that civil society organisations occupy an important role in national life particularly in complementing the welfare

initiatives of the State and upholding the constitutional values of economic and social equality. As recognized by this Hon'ble Court in ***INSAF***, *"those voluntary organisations which have absolutely no connection with either party politics or active politics cannot be denied access to foreign contributions".* All persons have a right to raise resources from within or outside the Country to pursue social, religious, economic or cultural programs without denigrating the national democratic interests. Arbitrary restrictions on accessing resources that are not proportionate to protecting democratic interests are abrogative of the freedom of legitimate expression, freedom of association and even freedom of occupation since NGOs also employ persons using such resources. In this light, the various cases cited by the Union at paragraph 47 to 59 such as ***Union of India v. Radiological and Imaging Association 2018 5 SCC 773*** and ***State of MP v. Narmada Bachao Andolan 2011 7 SCC 639*** has no applicability since the instant challenge does not question the wisdom or value judgement of any economic policy but rather questions its constitutionality on several counts.

18. The Union's arguments at Para 60 to Para 64 of the Counter Affidavit that the impugned Section 17 does not run afoul of the reasonable classification test under Article 14 of the Constitution, has no relevance or bearing on the

Petitioners' case. The Petitioners mount their challenge to the impugned section under Article 14 of the Constitution on the ground that it violates the test of arbitrariness which has been recognized as a distinct ground to invalidate any legislation under Article 14. This Hon'ble Court in ***Shayara Bano v. Union of India, (2017) 9 SCC 1*** categorically 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, 25 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."*** The applicability of manifest arbitrariness to the provisions of a statute was reaffirmed by a Constitutional bench of this Hon'ble Court in ***Navtej Singh Johar v. Union of India, (2018) 10 SCC 1.*** The Petitioners submit that the impugned Section fails the test of arbitrariness on two counts:

1. As advised by the RBI, Respondent No.3 SBI**,** and other banking institutions and accepted by Respondent No.1 in the 134th Parliamentary Standing Committee Report of Home Affairs dated 8 October, 2008, the reporting of all financial transactions only increases administrative burden and distracts from reporting

suspicious financial activity. Therefore, the enactment of impugned Section 17 which is purportedly to ensure more extensive and real time reporting of all transactions of foreign contributions received by all persons across India [Refer to para 28 and 29 of the Counter Affidavit], is irrational and runs contrary to its purported objective.

2. Even without questioning the aforesaid means of achieving the purported objective of the need to collect all financial information, the prohibition on receiving FC at any of the 279 schedule banks all regulated by the Reserve Bank of India, including other government owned public sector banks or even local branches of the State Bank of India itself is simply absurd and irrational given the internet and infrastructure technology that the Respondents state is readily available across the country.

19. With regard to the Respondents' submissions at para 68 of the Counter Affidavit, it is submitted that it is incorrect by Respondent No.1 and Respondent No.3's own admission in the 134th Parliamentary Standing

Committee Report on home affairs that the amendment to Section 17 increases or provides efficacy to the existing system. The Respondents' submission that the impugned amendment does not restrict any fundamental rights guaranteed under Articles 19 (1)(c) and 19 (1) (g) holds no water, for it is one thing to say that such restrictions are reasonable, and another altogether to deny that accessing financial resources have no bearing at all on the right to association or right to occupation.

20. With regard to Para 69 it is wholly absurd for the Union to submit that restricting the operation of bank accounts to the SBI New Delhi branch alone furthers "national security", "public order" and "sovereignty" when the operation of a primary FCRA account with other banks, including public sector banks, is neither against national interest nor public order. Further, banking with a particular bank in itself cannot further misutilization, and the Petitioners are not challenging any banking reporting requirements which were in force prior and can continue through any bank, including a local SBI bank account. It is also submitted that if other banks can be allowed to be used to operate secondary accounts, which also have reporting requirements that need to be submitted to the MHA, why can such administrative burden

not be reduced by allowing the same banks to operate primary FCRA accounts, as has been the case from the year 1976 to September of 2020.

21. The Respondents' submissions at Para 70 to Para 73 that overbroad restrictions can be placed when it is hard to distinguish between those who must be controlled and those who must not be controlled and its reliance on the ratio in ***Babulal Parate v. State of Maharashtra (1961) 3 SCR 423*** to support that proposition is wholly misplaced. This, since banking with a particular branch of a particular bank serves no nexus whatsoever to controlling misuse of funds when any bank can meet the reporting requirements and any bank is still allowed to be used for secondary utilisation of Foreign Contribution. This also serves as an admission that the restrictions are overbroad and fails the test of proportionality which springs to life under Article 19.

22. In response to the submissions at Para 74 of the Respondents' counter affidavit, it is submitted that the prohibition of the impugned Section 17 in operating a local primary FCRA account has a chilling effect on the right to association of the Petitioners, as described by this Hon'ble Court, in ***Anuradha Bhasin v. Union of India, (2020) 3 SCC 637***. Further, the Hon'ble Court in ***Anuradha Bhasin*** relied on ***Modern Dental College &***

Research Centre v. State of M.P., ***(2016) 7 SCC 353***, to define the proportionality test as under: ***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.*** It is submitted that the impugned Section fails the test or proportionality in so far as banking exclusively with SBI, NDMB does not have any rational nexus with the purported objective of protecting national interest, 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, the mechanism adopted by the section is excessive, and squarely fails the third limb of the test of proportionality. Finally, for reasons stated at Para 7 and 8 of this rejoinder, the impugned section fails the balancing stage or proportionality since its restriction on the ease of accessing foreign funds by having a local primary FCRA account outweighs the purported objective of preventing the mis-utilisation of funds which the said restriction has no nexus with.

23. With regard to Para 75 of the counter affidavit it is submitted that the case of ***PUCL v. Union of India 2004 9 SCC 580*** that discusses the prohibition of terrorist designated association under the Prevention of Terrorism Act has no

relevance to the narrow challenge concerning the prohibition of using a non-SBI primary account under the FCRA.

24. With regard to the Respondents' submissions made at Para 76 to Para 80 of the counter affidavit, it is submitted that the Petitioners make no case that fundamental rights under Article 19 are absolute, but rather that the restrictions imposed by the impugned section are unreasonable and disproportionate for the reasons stated above. Accordingly, they cannot fall under any of the exceptions or protected spheres under Article 19 (4) or Article 19(6).

25. In response to the Respondents' averments at Para 81 to 84 of the Counter Affidavit, the Petitioners submit that the impugned section fails the test of Article 21 for being arbitrary and unreasonable. The impugned section fails the standard of review of a compelling or legitimate state interest that the Respondents rightly admit were laid down by this Hon'ble Court in ***K.S Puttaswamy v. Union of India [(2017) 10 SCC 1].*** This, since for the reasons stated above, the mandate to exclusively open a primary FCRA bank account with SBI NDMB, and not with any other schedule bank regulated by RBI, has no rational connection with any compelling state interest of preventing mis-utilisation of foreign contribution. Even assuming it pursues a

compelling state interest. the restrictions fail the test laid down in ***Puttaswamy*** which necessitates that the law does not suffer from "***palpable or manifest arbitrariness***" and that "***the means adopted by the legislature does not are proportional to the object and needs sought to be fulfilled by the law***" [Concurring Opinion of Chandrachud J.]

26. In response to the Respondents' submissions at Para 85 to 90, the Petitioners submit that for the reasons stated above, particularly at Para 22 of this rejoinder, the impugned restriction fails the test of proportionality as cited by the Respondents in the said paras.

27. The Respondents' submissions at Para 91 to Para 93 of the Counter Affidavit that a robust system is in place to ensure opening and easy operation of the primary FCRA account at SBI, NDMB from anywhere in the country is denied and does not bear out any of the ground realities faced by various organisations. In addition to the problems described at para 7 and 8 of the Petition, the common problems faced by the Petitioners are as under:

a. The helpline numbers at SBI NDMB often go unanswered and there is no designated physical account relationship manager assigned either at the NDMB or the local SBI branch to swiftly resolve any banking issues.

Such services were being enjoyed by the Petitioners when they were allowed to open a local primary FCRA account with any scheduled bank prior to the passage of the impugned amendment.

b. Petitioners No.2 and No.4 have managed to open an FCRA primary account but often face delays in receiving foreign remittances. Any calls to check the status of the same which have to be made with the SBI NDMB most often go unanswered and email queries received are either delayed or elicit no response. Coordinating the filing of FEMA forms between the local branch and the main branch is also extremely tedious.

c. There is no streamlined procedure to receive a bank passbook from the SBI NDMB and have the same updated as an official written record with donors and trustees as was being maintained in the past.

d. There is often a delay in receiving cheque books from the NDMB and each time a new book is required one has to wait for the same from the main branch.

e. There is poor co-ordination and communication between the local SBI branches and the SBI, NDMB with the local SBI branches not being able

to access adequate FCRA procedural training. In any case, the volume of transactions creates delayed communication between the SBI, NDMB and the local SBI branch.

f. There is no streamlined system for the deposit of foreign cheques from donors either at the SBI NDMB or the local SBI branch and there is difficulty availing this form of donations as was legally available earlier as per RBI regulations.

g. Various banking compliances such as a filing for a change in the authorized signatories require physical verification with the local bank and subsequent coordination with the SBI, NDMB including couriering of hard copy of KYC that again causes delay and administrative burden.

h. Difficulties in adding and approving beneficiaries and password setting often requires physical assistance from the bank, and following up on technical issues with the SBI, NDMB creates grave difficulty in smooth operation. Any loss of internet or electricity suffered by the Petitioners brings their banking operations to a complete standstill.

i. The opening of accounts with SBI NDMB is a time-consuming process that requires physical verification with the local branch, coordination between the local branch and SBI, NDMB, couriering of hard copies of extensive account opening form, curing of defects with SBI NDMB and co-ordination between different trustees. Accordingly, Petitioners No.1 and 3 are still in the process of account opening and after facing grave delays still lack a fully operational account with SBI NDMB.

A copy of the testimonials from various FCRA registered persons who are facing grave difficulties in operating their primary FCRA account at New Delhi dated nil has been annexed hereto and marked as **Annexure A-5 (Pages to 73-75).**

28. With regard to para 94 to para 95 of the Respondents' submissions that a secondary utilisation account may be opened with any scheduled bank, the same effectively forces organisations to keep accounts and file returns and reports with regard to their primary account, utilisation account and domestic account and coordinate with their local SBI account for any banking compliances. All of this undeniably creates unnecessary administrative and financial burdens.

29. The Respondents submissions at para 96 that opening of a secondary account would not amount to having to operate three accounts is erroneous and mistaken in so far as Section 7 and Section 17 of FCRA prohibit comingling of Foreign Contribution and domestically received donations and therefore a separate domestic account is also to be maintained, apart from having to constantly liaison with the local SBI branch.

30. The Respondents' submission at para 97 fails to appreciate that while internet or banking wire services are used to receive foreign contribution, internet breakdowns or electricity failures are faced from time to time, which makes a sole reliance on internet connectivity for all banking operations a difficult proposition. In any case, the existence of internet banking cannot forcefully deny the Petitioners of the right to have a local FCRA bank that is physically accessible for the purposes of maintaining a primary account. Further, admittedly the option of carrying out certain compliances with the SBI NDMB is only through the local branch and the transmission of certain documents physically between local and main SBI branch is unavoidable. This creates delay and additional administrative burden impeding the operations of the Petitioners.

31. With regard to the Respondents' submissions at Para 98 and 99 of the Counter Affidavit that tracking of every financial transaction made across the country would be easier from one SBI main account out of New Delhi so as to best protect democratic interests runs contrary to the unanimous opinion of Respondent No.1, Respondent No.3, the RBI and the standing parliamentary committee of Home Affairs in its 134th report dated October 8, 2008, that each and every transaction need not be recorded and a threshold limit at 10 lakhs can be set which will most effectively serve the object of preventing misutilization, and do away with unnecessary reporting. It is pertinent to also mention that the Financial Action Task Force, the intergovernmental government that makes recommendations against money laundering and terrorist financing that the Indian Government seeks to be compliant with has advised that measures against illegal financing of nonprofit organisations must be targeted and risk based. The said recommendations also call for assessing risk in the nonprofit sector and for the tailoring of measures to those NPOs that are vulnerable to terrorist financing. The overbroad position of the impugned section therefore runs contrary to such recommendations. A copy of relevant extracts from the recommendations of the Financial Action Task Force updated on June 2021 are annexed hereto and marked as **Annexure A-6 (Pages 76-83).**

32. The Petitioners in response to para 100 of the Union's Counter Affidavit submit that they are not shying away from any of the onerous reporting requirements including maintaining an exclusive FCRA account. Their grievance with regard to Section 17 only stands with regard to the unreasonable restrictions imposed on their operations in their not being able to operate a local bank account as a primary account to receive Foreign Contribution and being forced to open an SBI Account at New Delhi as their primary account.

33. With regard to the submissions made at para 100 of the Counter Affidavit, the submissions of the Petitioners at Para 7, 8 and 27 of this Rejoinder are reiterated.

34. With regard to the submissions made at para 101 of the Counter Affidavit, the Petitioners contend that the overbroad regulations of Section 17 and the impugned notifications are creating a "chilling effect" on genuine organisations that wish to open an FCRA account unable to do so and effectively operate one.

35. With regard to the submissions of the Respondents at Para 103 of the Counter Affidavit that the provisions of the Consumer Protection Act, 2019 cannot be invoked displays the stark departure in the impugned section that is overbroad and takes away a harmonious existence between the erstwhile section 17 and the consumer protection act, that allowed the opening of an FCRA primary account with any scheduled bank as notified by the RBI.

36. In response to the Respondents' contentions at Para 104 of the counter affidavit, the Petitioners reiterate their submissions at Para 7,8 and 27 of this rejoinder that go to show the inadequate infrastructure and support structure offered by SBI due to the unnecessary and burdensome restrictions under Section 17. The said contention of the Respondents also runs contrary to the assertion of Respondent No.3 SBI in the 134th report of the parliamentary standing committee on home affairs dated 31 October, 2008 which explicitly stated that extensive reporting of all transactions involving receipt of foreign contribution was burdensome and unnecessary.

37. With regard to Para 105 of the Respondent Counter Affidavit, it is submitted that the impugned Section 17 caused much hardship and to date 3500 organisations are still unable to open their bank accounts, while all 23,000 organisations are facing unreasonable restrictions and burdens in being

forced to operate an FCRA primary account exclusively with SBI NDMB. These unreasonable restrictions on receiving foreign funds under Section 17 of FCRA was further imposed during the Covid-19 pandemic which seriously hampered the operations of several nonprofit organisations and suffering to those in urgent need of aid. A copy of a newspaper report in *The Wire* dated 16.5.2021 showing the difficulties faced by NGOs in their work during the Covid-19 pandemic due to the impugned Section 17 of FCRA is annexed hereto and marked as **Annexure A-7.(Pages 84-86).**

38. With regard to Para 107, the impugned public notice dated 13.10.2020 cannot override the legislative mandate granted to the RBI under Section 36 (1) of the Banking Regulation Act, 1949 and hence the said public notices of October 2020 and May 2021 are illegal and without the force of law.

39. With regard to Para 108, it is submitted that most NGOs are involved in nation building and supplementing the welfare efforts of the states and the role of such NGOs during the unprecedented Covid-19 pandemic was indispensable. From providing masks to oxygen concentrators and providing assistance to migrant labourers, the NGO's played a pivotal relief effort. Any mis-utilisation of funds by some NGOs whether through domestic or foreign received contribution cannot make the work of all civil society organisations

as suspect. A copy of a newspaper report in *Scroll* dated 5.10.2021 on the role played by NGOs during the Covid-19 pandemic is hereto marked and annexed as **Annexure A-8. (Pages 87-93)**

40. In light of the above submissions, it is prayed that the relief sought in the Writ Petition may be allowed.

DRAWN BY

ABISHEK JEBARAJ

ADVOCATE

THROUGH

SRISHTI AGNIHOTRI

COUNSEL FOR THE PETITIONERS

New Delhi

Date: 27.10.2021