

Foreign Contributions to Charitable Trusts in India: The Futuristic Approach

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Abstract - Charitable trusts have played an important role in providing support to the downtrodden classes in India. The working of Charitable Trusts becomes even more essential during times when crisis like pandemic hit humanity. In last few decades the foreign contributions are found as the most valuable leading support available to these charitable trusts. The Foreign Contribution (Regulation) Act, 2010 is a very crucial legislation regulating these contributions. On September 28, 2020, the Parliament has passed the Foreign Contribution (Regulation) Amendment Act, 2020 (Act No. 33 of 2020). The amendment has introduced many decisive changes to the FCRA. The amended Act controls individuals, organisations, and businesses' receipt and the use of foreign contributions. Here, the term "foreign contribution" refers to the gift or transfer by a foreign source of any cash, security, or product (within a specific value range). The researchers have discussed the amendment made to the FCRA in 2020 and its futuristic impact on the Charitable Trusts especially during the pandemic.

Index Terms – Amendment to FCRA, 2010; Charitable Trust; COVID 19 Pandemic; Foreign Contribution (Regulation) Act, 2010; Foreign Contributions.

INTRODUCTION

In India, non-profit organisations, charitable trusts, and the laws regulating the same, may be traced back to a wide range of religious beliefs and activities prevailing since immemorial time. The underprivileged in India have historically been helped by religious organisations such as Christian missionaries. As a result, charitable non-profit organisations began to form and flourish since British Rule. India's independence war saw a rise in the popularity of non-profit organisations. Those, who had

the means to do so, formed charity organisations like schools and orphanages, and they made donations to keep them running. Due to increased wealth and prosperity brought on by the industrial revolution, the number of charitable trusts and non-profit organisations dedicated to social good grew significantly. Thousands of non-governmental organisations (hereinafter referred as NGOs) in India that perform wonderful job in reaching out to the downtrodden and assisting them are registered under the Foreign Contribution (Regulation) Act, 1976, which allowed them to accept foreign contributions to fund their work. To ensure that foreign donations do not jeopardise national security, the Foreign Contribution (Regulation) Act, 2010 (hereinafter referred as FCRA, 2010) has created a mechanism for supervising the organisations, institutions and individuals receiving foreign funds.

It has been alleged that the Amendment of 2020 to the FCRA may drastically affect our struggle with COVID 19 as it has potentials to prevent NGOs from receiving foreign contribution. Many new provisions added by way of this Amendment has increased complications in compliances and thereby creating difficulties in collecting and distributing the foreign contributions at grassroots level for purchasing lifesaving drugs and equipments. Against this background, it is necessary to understand what these amendments are and how they may pose challenges for the organisations receiving foreign contribution as a substantial financial source for their survivals.

THE CONTEXT OF FUTURISTIC APPROACH

Recently, one US based organisation, Global Peace Initiatives, approached Hon'ble Supreme Court of

India challenging the expiry of the FCRA licences of approximately 6,000 NGOs and requested the court to let these NGOs continue their licences until further orders. It has background of Covid 19. However, the Apex Court declined to pass any interim order directing the government to extend the validity of such expired licences. The Court opined that it could take up the pending cases (Noel Harper v. Union of India, Jeevan Jyothi Charitable Trust and others v. Union of India) on the validity of the amendments made to the FCRA in 2020 before making any conclusion about the request made. This requires a futuristic approach to resolve such issues immediately.

THE FOREIGN CONTRIBUTION (REGULATION) ACT, 2010

The FCRA is in charge of overseeing foreign donations to make sure they don't compromise national security. It was first enacted in 1976, and the currently applicable regulation came in existence in 2010. FCRA applies to all non-profit organisations that want to accept donations from overseas sources. Sec. 11 of FCRA, 2010 requires that every person shall accept foreign contribution only with the certificate of registration from the Central Government and only if it have a definite cultural, educational, economic, religious or social programmes. So, Insights Editor (2022) has argued that in India, all the NGOs expecting foreign contributions must be registered with the FCRA. The FCRA also provides that the original registration certificate is valid for five years and it can be further extended for a specified purpose and a specific period if all the standards of the law are met. If any person is not registered as required u/sec. 11 (1) of FCRA, 2010, the person can accept foreign contribution only after obtaining a prior permission of the Central Government and such prior permission will remain valid for a specific purpose and for contribution from the specific sources only. The Central Government is empowered to conduct a summary inquiry and, during pending enquiry, to direct that such received contributions shall not be utilized or no further contribution to be received if the Central Government has reason to believe that there is violation of any provision of FCRA. It is also provided

that the unutilized or un-received amount, if violation is proved, shall not be utilized or received. It can be utilized or received only after the prior permission of the Central Government. The Central Government is also empowered to notify in the official Gazette to specify the person or class of persons who shall obtain prior permission before accepting foreign contributions and the area or areas in which the foreign contribution shall be accepted or the purpose or purposes for which foreign contributions can be accepted or utilized or the source or sources from which the foreign contribution shall be accepted.

The foreign contributions for social, educational, religious, economic, and cultural programmes can be accepted by registered groups only. The compulsory filing of annual tax returns is also required mandatorily. India's Ministry of Home Affairs (MHA) has issued guidelines in 2015 that required non-governmental organisations (NGOs) to sign an undertaking that accepting foreign funding would not compromise India's sovereignty and integrity or harm cordial ties with any foreign state. To provide real-time access by security authorities, all such NGOs must have bank accounts with ationalized or privately owned institutions with core banking capabilities.

"Any acts damaging to the national interest" are prohibited under the FCRA, 2010, which limits access to foreign contributions for individuals, organisations, and corporations. To accept foreign money, NGOs in India has to apply first to the Central Government (Ministry of Home Affaires) for FCRA Certificate and then comply with onerous procedural regulations for reporting, disclosure, the transfer of cash, and the use of funding. Guidelines for the Act's implementation were established under Section 48 of the FCRA 2010, and these FCRA Rules 2011 comply with that section. In short, the charitable organisations are required to follow the FCRA, 2010, which governs how foreign donations are accepted and put to use. There is an attempt to guarantee that these donations do not harm national interests by passing the 1976 legislation. Every organisation in the country hoping to collect donations from outside must comply with the law. For a period of five years, each of these organisations must be registered with the FCRA, which is renewable if they continue to abide by the standards set out.

According to Sec. 2 (1) (h) of FCRA the term foreign contribution includes all the donations, deliveries and transfers made by foreign sources, any currency or foreign security. The articles given as a gift to a person for his personal use are excluded from the definition.

THE FCRA AMENDMENT, 2020

On September 28, 2020, in the midst of the coronavirus epidemic, the Foreign Contribution (Amendment) Regulation Act, 2020 has modified the FCRA, 2010. The significant changes brought through the amendment have been discussed below.

Prohibition to accept foreign contribution: The Act has prohibited certain persons to receive foreign contribution. It includes the editors and publishers of newspapers, election candidates, and members of Legislature at Union or State level, political parties and organisations as specified. The Amendment of 2020 has included the judges, public servants, government servant or employees of the corporation either controlled or owned by the government.

Prohibition on the Transfer: The Amendment Act of 2020 regulates the transfer of foreign contributions received by any person, even if the foreign contribution is received after prior permission or registration certificate u/Sec. 11. The prohibition is u/Sec. 7 which provides that the foreign contribution cannot be transferred to any other person unless the person to whom it is to be transferred is also registered to receive foreign contributions or has obtained prior permission as required under FCRA, 2010 to receive any foreign contribution. It means one registered NGO can't transfer its foreign contribution to another registered NGO if both the NGOs are not eligible to receive foreign contributions under FCRA, 2010. Hence, now one National level NGO cannot collaborate with local NGOs for efficient working at grassroots level, if it involves transfer of foreign contributions, unless the receiving NGOs are registered to receive foreign contribution or has obtained prior permission from the Ministry of Home Affairs for receiving that foreign contribution. In the course of time it will increase administrative cost of the National level NGO as it will have to develop its own network at grassroots level.

Establishment of a bank account with the State Bank of India in New Delhi: Previously, Sec. 17 of the FCRA, 2010 authorised the beneficiary of foreign contributions to receive them in an account created with any of the scheduled institutions. The Amendment Act of 2020 repealed the old Sec. 17 of the FCRA, and now, the new Sec. 17 requires that the foreign contribution shall be received in only one FCRA account in a branch of a scheduled bank as specified by the government. For that purpose the Government has specified the State Bank of India, New Delhi to open and maintain FCRA Account. It requires every NGO to receive the foreign contribution in only one single bank account, designated as a "FCRA account" in the State Bank of India at New, Delhi. It is to be noted that the FCRA, 2010 has allowed NGOS to register another bank account in any scheduled bank for retaining or utilising the foreign contribution. It means every NGO has to maintain one FCRA account in the State Bank of India to receive foreign contribution and then after it can be transferred to any other bank account in a scheduled bank throughout India to use that contribution.

Limitations on the use of foreign contribution: The Amendment Act of 2020 requires all the NGOs to use the funds received for the specified purpose for which they were obtained. The Amendment has changed Sec. 8 of the Act by decreasing the administrative expenditure threshold from 50% to 20%. Previously, the beneficiary may utilise 50% of the foreign contribution to cover administrative expenditures such as salaries, wages, travel expenses, and costs associated with employing people. The Amendment has reduced it to 20% only.

Freezing the foreign contribution: The FCRA, 2010 empowered the Central Government to conduct inquiry, on the basis of any information or report, to find out the alleged contraventions of the provisions of FCRA, 2010. The Amendment of 2020 has added a provision providing that the Government may restrict further use of unutilized foreign contribution, even if prior permission was given to receive such contribution, if the Government believes that any person has contravened the provisions of FCRA, 2010. This power can be exercised by the Central

Government even during the summary inquiry, pending the final outcome of the inquiry.

Surrendering the Registration Certificate: The Amendment Act of 2020 has inserted Sec. 14A in FCRA, 2010 which provides for surrendering the registration certificate. Under this newly added provision, the Central Government may permit any person to surrender registration certificate obtained for receiving foreign contribution u/Sec. 11 of FCRA, 2010. This provision has paved a way for voluntary surrendering of registration certificate. Such surrender can be allowed if the Central Government is satisfied that the person surrendering certificate has not contravened any provision of the FCRA, 2010 and that the foreign contribution and the asset created out of it has been vested in the authority as per the norms of the Central Government.

Suspension of certificate for more than 180 days: The FCRA, 2010 had a provision for suspension of certificate for a period not exceeding 180 days. Now the Amendment has added a provision for extended suspension for additional time which may be extended up to an additional 180 days.

Aadhaar number as identification document: The Amendment has included Sec. 12A empowering the Central Government to require any person to give information about Aadhaar number or a copy of the passport or overseas citizen card of all office bearers, directors and other key personals as a proof of identification.

These are the major changes, among some other small changes, made by the Amendments in 2020 to the FCRA, 2010. These changes are challenged through many litigations and are pending before Hon'ble Supreme Court of India. So, the real and long lasting impact of these changes is not perfectly predictable today. However, following are some of the major situations and circumstances, required to be considered in these regard.

IMPACT OF THE AMENDMENT ON CHARITABLE TRUSTS

The Amendment has introduced many “extremely vague and open to abuse” concepts to the FCRA, 2010. The concepts which were already declared as “vague

and open to abuse” were again used by the government through this Amendment. While dealing with the FCRA Rules 2011, Hon'ble Supreme Court held that the NGOs having no connection with party politics or active politics have right to have foreign contribution and the scope of “political nature” shall not be expanded beyond the NGOs involved in “active politics” and by any means in the “party politics.” The Court found that the word “political interests” used in Rule 3(v) of the FCRA Rules 2011 was extremely “vague” and “open to abuse.” It also opined that the valid forms of “political actions,” such as bandhs and hartals, as defined in Rule 3(vi), are protected [under the Constitution of India] and that the FCRA cannot be utilized to deny an organisation its constitutional right to receive foreign contributions.

The inclusion of public servants and government servant or employees, u/Sec. 3 of FCRA, 2010, in the provision prohibiting receipt of foreign contribution will affect them as they could not receive foreign contributions even for some valid reasons. Similarly, the smaller NGOs will be notably affected by the provisions made u/Sec. 7 prohibiting transfer of foreign contributions. The Amendment of 2020 has put restrictions which have shown a clear intention of the Central Government to make it more difficult for NGOs to provide their services at the grassroots level. Most of the time, the national level NGOs don't have their own network at the grassroots levels and they depends on the network of local NGOs to reach people. The National level NGOs may receive foreign contribution and transfer it to the local level NGOs to carry on the charitable work efficiently. Under such circumstances, Sec. 7 of FCRA, 2010 will drastically affect the existence of some NGOs. Without this network, it would be nearly impossible for the majority of NGOs to continue and fulfil their mission and the local level smaller NGOs will face lack of sufficient funds.

Additionally, the FCRA Amendment of 2020 reduced the amount of administrative costs that may be allocated to foreign donations from 50% to 20%, while also increasing governmental control, restrictions, and certification procedures for NGOs. Reducing the percentage of administrative expenditures in order to ensure that “the precise aim of the contribution is met”

is troubling. It was found (International Commission of Jurists, 2020a) affecting efficient working of NGOs, when the second wave of COVID-19 was killing more people than ever before in India, many NGOs took up the cause and diverted their focus away from their normal operations toward assisting those affected by the second wave. Other groups were required to contribute to the availability of essentials such as medical oxygen, ventilators, hospital beds, and medications. This specific amendment most emphatically did not take the gravity of the circumstance into account and more stringent requirements for registration were established in the FCRA Amendment Rules 2020.

An overwhelming issue with regard to the FCRA's impact on NGO, as pointed out by the International Commission of Jurists, (2020b), is that the legislation is subject to abuse and arbitrary interpretation because of the FCRA's vague and wide language. Organizations of a "political nature" and those engaged in actions contrary to "public interest," "economic interest," or "security" are barred from obtaining an FCRA licence because of the restriction on receiving foreign funding for such organisations and those engaged in such activities. This has created rooms for misuse of powers and arbitrariness.

DISCUSSION AND ANALYSIS

Prima facie the provisions of FCRA, 2010 and the Rules made there under are not in accordance with the India's obligation to the freedom of association under the international human rights law and the treaties to which India is a party. It is also notably imposing unreasonable restrictions on the exercise of freedom of speech and expression, freedom of association and right of participation in public affairs. It affects work of human rights defenders and NGOs working at International level with collaborations and supports of local NGOs in India.

The futuristic approach requires that the funding shall reach to the grassroots NGOs, most of which do the real work. But the provision about restriction on the transfer of funds to other persons under Sec. 7 will affect co-ordination and collaboration between different NGOs and prevent percolation of funding to

the grassroots NGOs. It will also increase the administration cost of the large NGOs, if they themselves have to create network at the grassroots level. Again there is provision providing restriction on it. It is Sec. 8 which has reduced use of foreign contribution from 50% to 20%. The futuristic approach requires increasing the said limits from 50% to 60% or even more than that as too many expenses are covered under the administrative cost. With inflation, the administrative cost is increasing and hence the limit of foreign contribution to be used for administrative cost has to be increased and not to be decreased as it is done through the Amendment of 2020.

The futuristic approach requires that the accounts of the NGOs shall not get frozen for indefinite period on the basis of preliminary inquiry as provided under Sec. 11. Because, there is no time limit for the completion of enquiry and indefinitely suspending account on the grounds of suspicion is violation of the principles of natural justice. There can be recovery of amount, if in future, any NGO is found guilty of contravening any provision of the FCRA, 2010. The provision about inquiry and review before every renewal provided u/Sec. 16 is also not according to futuristic approach. Because it provides room for harassments and it is not necessary, specifically when there is provision about mandatory obligation of disclosure of receipts and expenses. This is not necessary specifically when there is provision about FCRA account to be maintained at State Bank of India, New Delhi Branch under amended Sec. 17 of FCRA, 2010.

Hence, we can safely conclude that the provisions added through Amendment of 2020 to the FCRA, 2010 are unnecessary and needs revision for better future of NGOs receiving foreign contributions. This is very true, specifically when there is no record to show that there has been large scale misappropriation or miss-management of the foreign contributions received till date. Due to such drastic laws the foreign contributions received in last few years have shown sharp decline. One research study (Bain and Company, 2019) in this regard has shown that there has been 40% reduction in a foreign contribution in the last few years. For example, in 2018, out of the total 70,000

Crores received from the private sources, only 13,000 Crores were received from the foreign sources.

Similarly, the Government has been empowered under Section 9 to prevent any individual or organisation from accepting donations from overseas if the funds will jeopardise India's sovereignty and integrity, the public interest, or the harmony of religious, racial, socioeconomic, linguistic, or regional groups. By themselves, these regulations ensure that no foreign element ever intervenes in the country's everyday activities through their gifts. So the Amendment of 2020 was not called for, at least during the COVID 19 pandemic.

CONCLUSION

The flaws mentioned in this research cast considerable doubt on the government's accountability and goals. Recently, in response to various petitions filed by NGOs in the Delhi High Court, the Ministry of Home Affairs, has extended the deadline for opening of the FCRA account in the State Bank of India at New Delhi. However, taking such a measure in isolation will not solve India's current problems in receiving foreign contributions for the smooth working of the NGOs engaged in charitable purposes. Considering the gravity of the issue, the Government should reconsider whether these modifications will benefit the country and should take proactive efforts to decrease the obstacles in the working of the NGOs seeking foreign contribution by focusing on the futuristic approach as discussed in this research.

It is illogical to create obstacles in the working of genuine organisations operating for decades for charitable purposes. There are many laws helping the Government to root out the NGOs engaged in antisocial activities. So the drastic provisions inserted by way of Amendment of 2020 are superfluous and redundant, specially during a raging pandemic situations. The FCRA, 2010 before such Amendment of 2020 has sufficient measures authorising the Central Government to control the foreign contribution if the Government suspects the NGOs of violating any provision of the Act.

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