

IN THE HIGH COURT OF DELHI AT NEW DELHI

W. P. (C) 566/2011

Reserved on: May 24, 2011

Decision on: June 1, 2011

SARVAJAN UNNATI BODHINI

..... Petitioner

Through: Mr. Rakesh Kumar Khanna, Senior
Advocate with Mr. Rajiv Tyagi,
Advocate.

versus

SECRETARY TO THE GOVERNMENT
OF INDIA AND ANR

..... Respondents

Through: Ms. Maneesha Dhir, Sr. Panel Counsel
with Ms. Preeti Dalal, Advocate.

CORAM: JUSTICE S. MURALIDHAR

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| 1. Whether Reporters of local papers may be
allowed to see the judgment? | No |
| 2. To be referred to the Reporter or not? | Yes |
| 3. Whether the judgment should be reported in Digest? | Yes |

JUDGMENT
01.06.2011

1. This petition involves the interpretation of Section 11 (2) of the Foreign Contribution (Regulation) Act, 1976 ('FCRA 1976') read with Section 6 (1A) thereof and the effect of the repeal of the FCRA 1976 by the Foreign Contribution (Regulation) Act, 2010 ('FCRA 2010').

Factual background

2. The Petitioner, Sarvajan Unnati Bodhini, is a trust registered under the Indian Trusts Act, 1882 and was created by a Trust Deed dated 4th May 2007. The Petitioner states that its objects include the provision of education and medical care to the under privileged. It also collaborates with non-governmental organizations (NGO's) functioning in remote and backward areas for imparting education about the benefits of health care, health insurance and risk sharing coverage at the grassroots level. The

Petitioner is dependent on funding from philanthropic organizations. It is stated that the Petitioner has, since its inception and until the recent past, received foreign contributions/donations after obtaining prior permission from Respondent No. 1 Ministry of Home Affairs ('MHA'), FCRA Division under Section 6 (1A) of the FCRA 1976. The Petitioner completed three financial years of existence and became entitled to apply for permanent registration in Form FC 8 under the Foreign Contribution (Regulation) Rules, 1976 ('FCR Rules 1976') read with Section 6 (1) of the FCRA 1976. The Petitioner states that it has been regularly furnishing returns to the MHA, FCRA Division, Government of India in Form FC 3 in respect of the source and application of the foreign contributions received by it from time to time. It is stated that returns have been accepted by the MHA.

3. The Petitioner received a communication dated 1st December 2009 from Erasmus Universiteit, Rotterdam for remittance of the balance grant of Euros 2,80,701 from European Community in respect of the project titled "Developing efficient and responsive community based Micro Health Insurance for India". It is stated that the Petitioner had earlier received the first part of the donation of Euros 70,000 from the same University for which prior permission was applied for and granted by a letter dated 11th November 2009. Subsequently, on 3rd December 2009, the Petitioner applied online to the FCRA Division for prior permission to receive an amount of Euros 2,80,701 from Erasmus Universiteit, Rotterdam. The application was also filed physically on 7th December 2009.

4. By a letter dated 5th January 2010, the FCRA Division informed the Petitioner that they expected to take a final view of the application within ninety days and therefore, it would be appreciated if queries about the status of the application are made "only after two months from the date of issue of this letter". This was followed by a letter dated 5th March 2010 of the MHA informing the Petitioner as under:

"2. Due to certain difficulties, it is not possible to dispose of your application within ninety days. Accordingly, you are informed that it will take another thirty days from 7th March 2010 to dispose of your application".

5. Thereafter on 25th March 2010, the MHA wrote the following letter to the

Petitioner:

“I am directed to refer to your application dated 3rd December 2009 seeking grant of prior permission for receiving foreign contribution under Section 6 (1A) of the Foreign Contribution (Regulation) Act, 1976 and to inform that the permission of Central Government **cannot be granted at present** under the said Act as it will take further time to dispose of your case.

2. Further you are advised that no foreign contribution should be accepted by you **till prior permission for receiving foreign contribution is issued by this Ministry.**” (emphasis in original)

6. It is stated that further information was sought by the MHA from the Petitioner by letters dated 5th April 2010 and 9th April 2010 with respect to the Petitioner’s application dated 3rd December 2009. According to the Petitioner, it did not hear anything on the said application thereafter.

7. The Petitioner received a communication from another donor – Deutscher Gennossenschafts und Raiffeisenverband E.V. (DGRV), stated to be a renowned economic organization in Germany, expressing its commitment to contribute an amount of Euros 80,000 to the Petitioner. The Petitioner applied to the MHA online on 16th June 2010 for prior permission to receive the donation of Euros 80,000. It is also stated that the Petitioner applied physically on 17th June 2010. The Petitioner mentioned that during the financial year 2009-10 it had received an amount of Euros 95,000 from the same donor DGRV for which the Respondents had granted prior permission by its letter dated 11th November 2009.

8. On 6th October 2010 the MHA wrote the following letter to the Petitioner:

“I am directed to refer to your application dated 16th June 2010 seeking grant of prior permission for receiving foreign contribution under Section 6 (1A) of the Foreign Contribution (Regulation) Act, 1976 and to inform that the permission of Central Government **cannot be granted at present** under the said Act as it will take further time to dispose of your case.

2. Further you are advised that no foreign contribution should be accepted by you **till prior permission for receiving foreign contribution is issued by this Ministry.**” (emphasis in original)

9. Thereafter, the Petitioner did not hear from the MHA even after the expiry of ninety days. Aggrieved by the letters dated 25th March 2010 and 6th October 2010 of the MHA, the Petitioner, in this petition, seeks quashing of the said letters and a declaration that the Petitioner is entitled to unconditionally accept donations for which it had applied for prior permission by applications dated 3rd December 2009 and 16th June 2010.

Submissions of counsel

10. Mr. Rakesh Khanna, learned Senior counsel appearing for the Petitioner submits that in terms of the Proviso to Section 11 (2) FCRA 1976 there was a deemed grant of permission on the expiry of the period of ninety days after the date of the receipt of the respective applications by the MHA. It is submitted that once there is a deemed grant of prior permission, it cannot be affected by subsequent repeal of the FCRA 1976 by the FCRA 2010 which came into effect from 26th September 2010. Mr. Khanna pointed out that as far as the letter dated 6th October 2010 was concerned, the MHA had not informed the Petitioner of any special difficulty.

11. Appearing on behalf of the Respondents Ms. Maneesha Dhir, learned counsel submitted that the letters dated 25th March 2010 and 6th October 2010 must be construed as refusal to grant permission although the letters stated that the FCRA Division would take further time to dispose of the applications dated 3rd December 2009 and 16th June 2010 respectively. According to her, the deeming provision under the Proviso to Section 11 (2) FCRA 1976 was not attracted. It is further submitted that in terms of Section 54 (2) of the FCRA 2010 all applications pending as on the date of coming into force of the FCRA 2010, i.e. 26th September 2010, must be treated as pending under the corresponding provisions of the FCRA 2010 and therefore, if at all, would have to be processed under the FCRA 2010. Ms. Dhir submitted that under Section 12 of the FCRA 2010 (which corresponds to Section 11 of the FCRA 1976) there was no deemed grant of permission on the expiry of ninety days. According to her, since the amounts for which prior permission was sought by the Petitioner was substantial and since reports of the State Government on the activities of the Petitioner were not forthcoming despite reminders, the prior permission could not be granted within the prescribed time limit. Ms. Dhir reiterated the stand taken in the counter affidavit that during the course of processing of the applications for receipt of foreign

contributions under the FCRA 1976, unless it was convinced that the verification reports are in order and the targeted people are actually benefited, no permission may be given by the central government especially when the applicant has received huge foreign funds previously. Hence, it may not be possible that all the prior permission cases can be decided within the stipulated period of ninety days. Often the exact reasons are not conveyed to the applicants due to security considerations.

Deemed permission under Proviso to Section 11 (2) FCRA 1976

12. The first issue to be considered is whether there was deemed permission in terms of the proviso to Section 11 (2) FCRA 1976. Under Section 6 (1) of the FCRA 1976 it is incumbent on the applicant association “having a definite cultural, educational, religious or social programme” to register itself with the central government in accordance with the FCR Rules before it accepts any foreign contributions. Once registered, the association shall give within such time and in such manner as may be prescribed, an intimation to the central government as to the amount of each foreign contribution received by it, and the source from which and the manner in which such foreign contribution was utilized by it. An association not registered with the central government in accordance with the FCR Rules 1976 can in terms of Section 6 (1A), accept any foreign contribution “only after obtaining the prior permission of the central government”. As far as the Petitioner was concerned, since it had applied in Form FC 8 and was awaiting grant of registration under Section 6 (1) FCRA 1976, it was incumbent upon the Petitioner to apply in Form FC 1A for prior permission in terms of Section 6 (1A) of the FCRA 1976 read with Rule 3 (aa) of the FCR Rules 1976.

13. Section 11 of the FCRA 1976 reads as under:

“11. Application to be made in prescribed form for obtaining prior permission to accept foreign contribution or hospitality

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(1) Every individual, association, organization or other person, who is required by or under this Act to obtain the prior permission of the central government to accept any foreign contribution or foreign hospitality, shall, before the acceptance of any such contribution or hospitality, make an application for such permission to the Central Government in such form and in such manner as may be prescribed.

(2) If an application referred to in sub-section (1) is not disposed of within ninety days from the date of receipt of such application, the permission prayed for in such application shall, on the expiry of the said period of ninety days, be deemed to have been granted by the Central Government.

Provided that, where, in relation to an application, the central government has informed the applicant the special difficulties by reason of which his application cannot be disposed of within the said period of ninety days, such application shall not, until the expiry of a further period of thirty days, be deemed to have been granted by the Central Government.”

14. Under Section 11 (2) of FCRA 1976 if an application for prior permission is not disposed of within ninety days from the date of receipt of such application, the permission prayed for in such application is, on the expiry of the said period of ninety days, deemed to have been granted by the central government. The Proviso to Section 11 (2) FCRA 1976 states that if the central government has informed the applicant about the “special difficulties by reason of which his application cannot be disposed of within the said period of ninety days” such application shall not “until the expiry of a further period of thirty days, be deemed to have been granted by the central government”.

The first application dated 3rd December, 2009

15. The first application dated 3rd December 2009 was, admittedly, received online by the FCRA Division on that date itself. The ninety day period would come to an end on 2nd March 2010. On 5th March 2010 the central government in terms of the Proviso to Section 11 (2) stated that “it will take another thirty days from 7th March 2010” to dispose of the application. In other words, the FCRA Division was treating the date of the physical filing of the application, i.e. 7th December 2009, as the date of the application and was seeking for further thirty days after the expiry of ninety days in terms of the Proviso to Section 11 (2). The thirty day extension period was coming to an end on 7th April 2010. By a letter dated 25th March 2010 the Petitioner was simply informed that “permission of the central government cannot be granted **at present**” and that “it will take another thirty days from 7th March 2010 to dispose of your application.” The subsequent letter dated 25th March 2010 indefinitely extended the time for granting the permission notwithstanding the deeming provision in the form of

the Proviso to Section 11 (2) FCRA 1976. Clearly, the communication dated 25th March 2010 was not consistent with the Proviso to Section 11 (2) FCRA 1976. In other words, the expiry of thirty days beyond the period of ninety days would result in grant of deemed permission. The communication dated 25th March 2010 by the MHA defeated the Proviso to Section 11 (2) FCRA 1976 stating that “it will take further time to dispose of”. In light of the unambiguous wording of the Proviso to Section 11 (2) FCRA 1976, the MHA could not have kept the Petitioner’s application pending beyond 6th April 2010.

16. It is not possible to accept the contention of the MHA that the letter dated 25th March 2010 was in fact a refusal to grant permission. A reading of the letter only states that permission cannot be granted “at present” and further that “it will take further time to dispose of the case”. The Petitioner’s application dated 3rd December 2009 was still treated by the central government as pending on that date, i.e. 25th March 2010. There was no communication of refusal to grant permission and, there was no question of keeping the said application pending after the expiry of thirty days beyond 7th March 2010, i.e., beyond 7th April 2010. By that time the FCRA 1976 had not been repealed and the deemed permission automatically came into effect. Therefore, in terms of the Proviso to Section 11 (2) FCRA 1976, it must be held that insofar as the Petitioner’s application dated 3rd December 2009 is concerned there was a deemed permission of the central government for the Petitioner to receive foreign contribution covered by the said application.

The second application dated 16th June, 2010

17. As regards the second application dated 16th June 2010, the period of ninety days came to an end on 15th September 2010. After the expiry of the ninety day period, the central government on 6th October 2010 simply stated that the permission could not be granted ‘at present’ and that ‘it will take further time to dispose of the case’. Importantly, the central government did not invoke the provisions of the FCRA 2010 which came into effect on 26th September 2010. In terms of the Proviso to Section 11 (2) FCRA 1976, the central government failed to inform the Petitioner of the special difficulties because of which the application could not be disposed of within a period of ninety days.

18. The central government has to necessarily inform the applicant of the ‘special difficulties’ in not granting the permission within ninety days of the receipt of the application. The wording of the Proviso to Section 11 (2) FCRA 1976 makes this requirement mandatory. Even after the expiry of ninety days no special difficulties were expressed by the central government as far as the Petitioner’s application dated 16th June 2010 was concerned. In fact, even the communication dated 6th June 2010 was not one under the Proviso to Section 11 (2) FCRA 1976 since the central government did not refer to any special difficulties it was encountering in granting the permission. This position becomes clear when the letter dated 6th October 2010 is contrasted with letter dated 5th March 2010 where special difficulties were expressed by the central government as the reason for not being able to dispose of the Petitioner’s first application dated 3rd December 2009. Thus even the thirty day extension in terms of the Proviso to Section 11 (2) FCRA 1976 was not available to the FCRA Division in respect of the second application dated 16th June 2010. The deemed permission became effective on 15th September 2010.

Effect of repeal of FCRA 1976 by FCRA 2010

19. The FCRA 2010 no doubt repeals the FCRA 1976. However FCRA 2010 also contains a savings clause in the form of Section 54 (2). The relevant portion of Section 54 (2) reads as under:

“54. Repeal and saving.

...

(2) Notwithstanding such repeal, –

(a) anything done or any action taken or purported to have been done or the provisions under the repealed Act shall, insofar as it is not inconsistent with the provisions of this Act, be deemed to have been done or taken under the corresponding provisions of this Act;”

20. The deemed permission became effective in respect of both the applications filed by the Petitioner under Section 6 (1A) read with the Proviso to Section 11 (2) of the FCRA 1976 prior to the coming into force of the FCRA 2010. That deemed permission would therefore remain undisturbed in terms of Section 54 (2) of the FCRA 2010. Further, the Proviso to Section 11 (1) FCRA 2010 reads as under:

“11. Registration of certain persons with Central Government. -

- (1) Save as otherwise provided in this Act, no person having a definite cultural, economic, educational, religious or social programme shall accept foreign contribution unless such person obtains a certificate of registration from the Central Government:

Provided that any association registered with the Central Government under section 6 or granted prior permission under that section of the Foreign Contribution (Regulation) Act, 1976 (49 of 1976), as it stood immediately before the commencement of this Act, shall be deemed to have been registered or granted prior permission, as the case may be, under this Act and such registration shall be valid for a period of five years from the date on which this section comes into force.”

21. The above Proviso to Section 11 (1) FCRA 2010 makes it clear that if there was a deemed permission that was already granted under the FCRA 1976 at the time of the FCRA 2010 coming into effect, such deemed permission should be taken to have been granted under the FCRA 2010. Viewed from the perspective of the FCRA 2010 as well, the deemed permission in respect of the two applications of the Petitioner dated 3rd December 2009 and 16th June 2010 in terms of the Proviso to Section 11 (2) FCRA 1976 remains unaffected. Also, the proviso to Section 11 (2) FCRA 1976 regarding deemed permission in respect of applications for prior permission cannot be defeated by the central government by simply keeping applications pending beyond the outer limit within which such applications were required to be disposed of in terms of the FCRA 1976.

Conclusion

22. For all the aforesaid reasons, this writ petition is allowed and the communications dated 25th March, 2010 and 6th October, 2010 of the MHA are hereby set aside. The Respondents will now pass necessary orders within four weeks from today clarifying the deemed permission granted in relation to the Petitioner’s applications dated 3rd December 2009 and 16th June 2010.

S. MURALIDHAR, J

June 1, 2011
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