

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

Judgment reserved on: 11th August, 2011
% **Judgment pronounced on: 16th September, 2011**

+ **WP(C) No.5793/2011**

Indian Social Action Forum(INSAF) Petitioner
Through: Mr.Sanjay Parikh, Mr. Aagney Sail,
Ms. Mamta Saxena and Mr.Pranav
Raina, Advocates.

versus

The Union of India Respondent
Through: Mr.Himanshu Bajaj, Advocate.

CORAM:
HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE SANJIV KHANNA

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| 1. | Whether reporters of the local papers be allowed to see the judgment? | Yes |
| 2. | To be referred to the Reporter or not? | Yes |
| 3. | Whether the judgment should be reported in the Digest? | Yes |

DIPAK MISRA, CJ

The petitioner, Indian Social Action Forum (INSAF), has preferred this writ petition for declaring Sections 5(1) & 5(4) of the Foreign Contribution (Regulation) Act, 2010 (for brevity, 'the Act') and Rules 3(i), 3(v) & 3(vi) of the Foreign Contribution (Regulation) Rules, 2011 (for

short, ‘the 2011 Rules’) as ultra vires the Articles 14, 19(1)(a), 19(1)(c) and 21 of the Constitution of India.

2. At the very outset, we may note that the petitioner has stated about its status and the social activity it carries out and how the Act came into force. They need not be adverted to, for we are only concerned with the constitutional validity of the aforesaid provisions of the Act.

3. To appreciate the controversy, it is appropriate to refer to Section 3 of the Act, which reads as follows:

“3. Prohibition to accept foreign contribution. –

(1) No foreign contribution shall be accepted by any –

- (a) candidate for election;
- (b) correspondent, columnist, cartoonist, editor, owner, printer or publisher of a registered newspaper;
- (c) Judge, Government servant or employee of any corporation or any other body controlled or owned by the Government;
- (d) member of any Legislature;
- (e) political party or office-bearer thereof;
- (f) organisation of a political nature as may be specified under sub-section (1) of section 5 by the Central Government;

(g) association or company engaged in the production or broadcast of audio news or audio visual news or current affairs programmes through any electronic mode, or any other electronic form as defined in clause (r) of sub-section (1) of section 2 of the Information Technology Act, 2000 (21 of 2000) or any other mode of mass communication;

(h) correspondent or columnist, cartoonist, editor, owner of the association or company referred to in clause (g).

Explanation. – In clause (c) and section 6, the expression “corporation” means a corporation owned or controlled by the Government and includes a Government company as defined in section 617 of the Companies Act, 1956 (1 of 1956).

(2)(a) No person, resident in India, and no citizen of India resident outside India, shall accept any foreign contribution, or acquire or agree to acquire any currency from a foreign source, on behalf of any political party, or any person referred to in sub-section (1), or both.

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

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

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

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

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

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

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

[Emphasis supplied]

4. Section 5 of the Act is as follows:

“5. Procedure to notify an organisation of a political nature. – (1) The Central Government may, having regard to the activities of the organisation or the ideology propagated by the organisation or the programme of the organisation or the association of the organizations with the activities of any political party, by an order published in the Official Gazette, specify such organisation as an organisation of a political nature not being a political party, referred to in clause (f) of sub-section (1) of section 3:

Provided that the Central Government may, by rules made by it, frame the guidelines specifying the ground or grounds on which an organisation shall be specified as an organisation of a political nature.

(2) Before making an order under sub-section (1), the Central Government shall give the organisation in respect of whom the order is proposed to be made, a notice in writing informing it of the ground or grounds, on which it is proposed to be specified as an organisation of political nature under that sub-section.

(3) The organisation to whom a notice has been served under sub-section (2), may within a period of thirty days from the date of the notice, make a representation to the Central Government giving reasons for not specifying such organisation as an organisation under sub-section (1):

Provided that the Central Government may entertain the representation after the expiry of the said period of thirty days, if it is satisfied that the organisation was prevented by sufficient cause from making the representation within thirty days.

(4) The Central Government may, if it considers it appropriate, forward the representation referred to in sub-section (3) to any authority to report on such representation.

(5) The Central Government may, after considering the representation and the report of the authority referred to in sub-section (4), specify such organisation as an organisation of a political nature not being a political party and make an order under sub-section (1) accordingly.

(6) Every order under sub-section (1) shall be made within a period of one hundred and twenty days from the date of issue of notice under sub-section (2):

Provided that in case no order is made within the said period of one hundred and twenty days, the Central

Government shall, after recording the reasons therefor, make an order under sub-section (1) within a period of sixty days from the expiry of the said period of one hundred and twenty days.”

5. In this context, we may refer to Rule 3 of the 2011 Rules. It is as follows:

“3. Guidelines for declaration of an organisation to be of a political nature, not being a political party. – The Central Government may specify any organisation as organisation of political nature on one or more of the following grounds:-

(i) organisation having avowed political objectives in its Memorandum of Association or bylaws;

(ii) any Trade Union whose objectives include activities for promoting political goals;

(iii) any voluntary action group with objectives of a political nature or which participates in political activities;

(iv) front or mass organizations like Students Unions, Workers’ Unions, Youth Forum and Women’s wing of a political party;

(v) organisation of farmers, workers, students, youth based on caste, community, religion, language or otherwise, which is not directly aligned to any political party, but whose objectives, as stated in the Memorandum of Association, or activities gathered through other material evidence, include steps towards advancement of political interests of such groups;

(vi) any organisation, by whatever name called, which habitually engages itself in or employs common methods of political action like 'bandh' or 'hartal', 'rasta roko', 'rail roko' or 'jail bharo' in support of public causes."

6. It is contended by Mr.Sanjay Parikh, learned counsel for the petitioner, that the terms that have been used in Section 5(1) of the Act, namely, activity, ideology and programme are extremely vague and they have not been defined in the Act and the Rules. It is urged that because of such vague expressions, it confers unbridled and unfettered power on the executive and, hence, the provision invites the frown of Article 14 of the Constitution. It is canvassed by him that by virtue of the proviso to Section 5(1) which stipulates that the Central Government may, by rules made by it, frame the guidelines specifying the ground or grounds on which an organisation shall be specified as an organisation of a political nature the legislature in actuality has abandoned its basic legislative power. It is his further submission that though the Rules have been framed, yet they really do not cover the situation envisaged by the terms, namely, activities, ideologies and programmes and, hence, the Rules travel beyond the conferment of power under the main provision making the same ultra vires

of the Act. The learned counsel for the petitioner would contend that the term authority which has been mentioned in sub-section (4) of Section 5 has nowhere been defined and it is not clear whether the authority would be independent of the Central Government and thereby a state of uncertainty has crept in. It is further argued that the restriction imposed is unreasonable and, therefore, it offends the right to freedom of expression.

7. Criticizing the validity of the Rules, it is contended that the guidelines specified in the Rules are without any checks and balances and confer an arbitrary and wide discretion on the authorities which can be misused and abused. That apart, the Rules suffer from total unreasonableness, arbitrariness and do not create a discernible specification between the political activities and other social or public activities. It has been highlighted that the Rule nowhere defines what it is meant by political objective and that is why any action taken by a democratic institution in a democratic manner is likely to be covered within it and such an act clearly offends the right to protest and right to freedom of expression. Mr. Parikh has also advanced a contention that certain activities are sometimes undertaken for the advancement of the political interest of marginalized

sections and the same cannot be put under the category of political interest and the organisation engaged in it cannot be said to be an organization of a political nature. It is contended that an organisation engaged in political actions which include 'bandh', 'hartal' or 'jail bharo' cannot be regarded as an organisation involved in political activities to be denied foreign contribution. To bolster the said submission, reliance has been placed on *State of W.B. v. Anwar Ali Sarkar*, AIR 1952 SC 75, *Shri Ramakrishna Dalmiya v. Justice Tendulkar*, AIR 1958 SC 538, *K.T. Moopil Nair v. State of Kerala*, AIR 1961 SC 552, *Kameshwar Prasad and others v. State of Bihar and another*, AIR 1962 SC 1166, *Smt. Damyanti Naranga v. The Union of India & Ors.*, (1971) 1 SCC 678, *Himmat Lal K Shah v. Commissioner of Police Ahmedabad*, (1973) 1 SCC 227, *Rohtas Industries Ltd. v. Rohtas Industrial Staff Union*, (1976) 2 SCC 82, *Maneka Gandhi v. Union of India*, (1978) 1 SCC 248, *PUCI v. Union of India and other*, (1997) 3 SCC 433 and *Kapila Hingorani v. State of Bihar*, (2003) 6 SCC 1.

8. Mr. Himanshu Bajaj, learned counsel for the respondent, has submitted that the provisions under challenge do not violate any of the

provisions of the Constitution and the Rules do not transgress the postulates engrafted under the Act. It is contended by him that a misuse or abuse of power cannot be a ground to strike down a provision as that would come within the illegal exercise of power. The learned counsel further submits that the guidelines clearly provide guidance and therefore it cannot be said that unbridled or unfettered power is conferred on any authority. It is urged by him that the purpose of the Act is to regulate the foreign contribution in a certain sphere and the purpose of the Act has a specific object and addresses a concern and, therefore, it does not deserve to be declared ultra vires.

9. First, we shall advert to the issue whether Sections 5(1) and 5(4) contravene Articles 14 and 19 of the Constitution of India. Section 3 of the Act provides for prohibition to accept foreign contribution. Sub-section (1)(f) of the said provision covers organisation of a political nature as may be specified under sub-section (1) of Section 5 by the Central Government. Section 5 lays down the procedure to notify an organisation of a political nature. Thus, the power flows from Section 3(1)(f). Section 5 deals with the procedure to notify. Section 5(1) provides that the Central Government by rules shall frame guidelines specifying the ground or grounds on which

an organisation shall be specified as an organisation of a political nature. The main section postulates that while publishing in the Official Gazette specifying an organisation as an organisation of a political nature, due regard shall be given to the activities of the organisation or the ideology propagated by the organisation or the programme of the organisation or the association of the organisation.

10. On an x-ray of the provision of Section 5 of the Act, it is evincible that there is ample guidance inherent in it inasmuch as it refers to “activities of the organisation”, or “the ideology propagated by the organisation” or the “programme of the organisation” having nexus with the activities of any political nature. The said terms are in large expanse but can never be regarded as vague or uncertain. That apart, the proviso clearly sets out that the Rules shall be framed specifying the grounds on which the organisation shall be classified and regarded as an organisation of a political nature. On a scrutiny of the language employed, it is quite vivid that the rule making authority has been empowered to specify the grounds. Thus, the legislature after stating and laying down the area has left the specific grounds to the rule making authority. It by no means, can be regarded or treated as an

abdication of the essential legislative function. At this juncture, we may state that despite the widening spectrum of Article 14 of the Constitution, it is to be borne in mind that the challenge on lack of guidance cannot be thought of in a vacuum. In ***Bidi Supply Co. v. Union of India*, AIR 1956 SC 479** it has been held that Article 14 is a way of life rendering precise rule of law and in a given case that it falls this side of the line or that, and because of that decisions on the same point will vary as conditions vary, one conclusion in one part of the country and another somewhere else; one decision today and another tomorrow when the basis of society has altered and the structure of current social thinking is different. It is not the law that alters but the changing conditions of the times and Article 14 narrows down to a question of fact which must be determined by the highest Judges in the land as each case arises. While scrutinizing the constitutional validity of a provision on the anvil of Article 14, it is to be seen whether it confers unbridled and unfettered power on an authority to act at his whim or caprice. The learned counsel for the petitioner has submitted that the terms used in the provision are vague. We have already opined that the said terms are in a larger canvass, a greater expanse and a broader spectrum but not vague.

What is urged by Mr. Parikh basically relates to an abstract standard but a provision is not to be tested on the parameters of abstraction. As we find there is guidance and further grounds have been envisaged to be set out regard being had to the activities and other facets and, hence, it cannot be termed as arbitrary. Thus, the assail under the touchstone of Article 14, is without any substance.

11. The next plank of submission related to attack under Article 19(1)(a) of the Constitution of India. It is submitted by Mr.Parikh that the right to freedom of speech and expression and to voice the grievances of the people has been curbed in an extremely unreasonable manner. The 2010 Act has been brought into existence to consolidate the law to regulate the acceptance and utilization of foreign contribution or foreign hospitality by certain individuals or associations or companies and to prohibit acceptance and utilization of foreign contribution or foreign hospitality for any activities detrimental to the national interest and for matters connected therewith and incidental thereto. The law has been enacted by the Parliament to ensure that the parliamentary institutions, political association and academic and other voluntary organizations as well as individuals working in important

areas of national life should function in a manner consistent with the values of Sovereign Democratic Republic of India. Article 19(1)(a) confers on all citizens the right of freedom of speech and expression. Article 19(2) enables the State to impose reasonable restrictions in the interest of sovereignty and integrity of India, security of the State, friendly relations with foreign States, public order, decency or morality, etc. Thus, an imposition of reasonable restriction is permissible. In this regard, we may refer to the Constitution Bench judgment in *Virendra v. The State of Punjab and another*, AIR 1957 SC 896 wherein after referring to the decision in *The State of Madras v. V.G. Row*, AIR 1952 SC 196 it has been held as follows:

“The surrounding circumstances which the impugned law came to be enacted, the underlying purpose of the enactment and the extent and the urgency of the evil sought to be remedied have already been adverted to. It cannot be overlooked that the Press is a mighty institution wielding enormous powers which are excepted to be exercised for the protection and the good of the people but which may conceivably be abused and exercised for anti-social purposes by exciting the passion and prejudices of a section of the people against another section and thereby disturbing the public order and tranquility or in support of a policy which may be of a subversive character.”

12. In *Ajay Goswami v. Union of India and others*, (2007) 1 SCC 143, it has been held that the Constitution of India guarantees the right to freedom of speech and expression to every citizens but the said right is not absolute. It is subject to reasonable restriction. In the said decision, it has been opined that there is need to balance various aspects and rights to protect the society. In the case at hand, there is no prohibition of freedom of speech or expression. What is prohibited is acceptance of foreign contribution by the notified organisation for their activities and propagates of ideals and ideologies which are political in nature which have been specified in the Rules. We have referred to the aforesaid decision only to highlight even the right to freedom of speech and expression is not an absolute right. On a studied scrutiny of the factual matrix, it is quite vivid that a detailed procedure has been prescribed before an organisation is notified and prohibited from accepting the foreign contribution, so that the object and reasons of the Act is in consonance with the preamble of the Constitution.

13. Tested on the anvil of the aforesaid pronouncement of law, it is extremely difficult to accept the submission of Mr.Parikh that the restrictions imposed are unreasonable as they affect the freedom of speech

and expression. What is restricted is acceptance of foreign contribution. There is no prohibition or restriction on voicing the plight or grievances of the marginalized sections of people or to protest as permissible in a democratic body polity under the framework of the Constitution. In this context, we may profitably reproduce a passage from the locus classicus, that is, ***Ram Krishna Dalmia and Ors. v. Shri Justice S.R. Tendolkar and Ors.***, AIR 1958 SC 538, wherein the Apex Court had laid down many a principle pertaining to class legislation and also the presumption as to the constitutionality of a statutory provision. Looking at the role of a court while dealing with the presumption of constitutionality, the two principles which are relevant for the present purpose are reproduced below:

“(e) that in order to sustain the presumption of constitutionality the Court may take into consideration matters of common knowledge, matters of common report, the history of times and may assume every state of facts which can be conceived existing at the time of legislation; and

(f) that while good faith and knowledge of the existing conditions on the part of a Legislature are to be resumed, if there is nothing on the face of the law or the surrounding circumstances brought to the notice of the Court on which the classification may reasonably be regarded as based, the presumption of constitutionality cannot be carried to the extent of always holding that

there must be some undisclosed and unknown reasons for subjecting certain individuals or corporations to hostile or discriminating legislation.”

14. Thus, the submission on this score by Mr.Parikh leaves us unimpressed and we repel the same.

15. The other challenge is to the Rule 3 of the 2011 Rules on the ground that it transgresses the statutory provision and in a way supplants it. The basic test is to determine whether a rule to have effect must have its source of power which is relatable to the rule making authority. Similarly, a notification must be in accord with the rules, as it cannot travel beyond it. In this context, we may refer with profit to the decision in ***General Officer Commanding-in-Chief v. Dr. Subhash Chandra Yadav***, AIR 1988 SC 876 wherein it has been held that before a rule can have the effect of a statutory provision, two conditions must be fulfilled, namely (1) it must conform to the provisions of the statute under which it is framed; and (2) it must also come within the scope and purview of the rule making power of the authority framing the rule. If either of these two conditions is not fulfilled, the rule so framed would be void.

16. In *Additional District Magistrate (Rev.), Delhi Administration v. Shri Ram*, AIR 2000 SC 2143, it has been held that it is a well recognized principle that conferment of rule making power by an Act does not enable the rule making authority to make a rule which travels beyond the scope of the enabling Act or which is inconsistent therewith or repugnant thereto.

17. In *B.K. Garad v. Nasik Merchants Co-op. Bank Ltd.*, AIR 1984 SC 192, it has been held that if there is any conflict between a statute and the subordinate legislation, the statute shall prevail over the subordinate legislation and if the subordinate legislation is not in conformity with the statute, the same has to be ignored.

18. We have to test the Rule on the aforesaid parameters. We have already scanned the statutory provision. Section 5(1) refers to the activities of the organisation, ideology propagated by the organisation, the programmes of the organisation or the association of the organisation with the activities and having nexus with any political party. The language employed in the Rule uses the words “about political objective”, “activities for promoting political goals”, “participation in political activities”, “front

organisation of any political party”, “organisation involved in advancement of political interest” and “political actions like ‘bandh’ or ‘hartal’, ‘rasta roko’, ‘rail roko’ or ‘jail bharo’ in support of public causes.

19. Reading the Rule as a whole, we really fail to fathom, how it can be urged that it travels beyond the statutory provision. What is urged before us is that the right to raise the voice of the people to advance public causes is curtailed. The provision under Section 5(1) carves out an exception when an organisation can be notified and thereafter barred from accepting foreign contribution. Section 3(1)(f), Section 5(1) and Rule 3 have to be read together in harmony. The Rule effectuates the two sections and complements them. The Rule at every place refers to the political actions. Therefore, the Rule, according to us, is within the rule making power of the statutory authority. It confirms to the provisions of the statute and comes within the scope of purview of the rule making power of the authority of framing the Rule. Therefore, the Rules cannot be declared as ultra vires the Act.

20. We will be failing in our duty if we do not take note of another submission which has been urged with immense vehemence by Mr.Parikh to

the effect that the manner in which the guidelines have been termed, it is most likely to be abused by the executive. It is trite law that there is a distinction between conferment of power and exercise of power. If the power by an authority is not properly exercised, the same can always be assailed in a court of law. It has nothing to do as regards the constitutional validity of a Rule or a guideline. The apprehension in the mind of the petitioner that there would be abuse of power and some organizations may be unnecessarily harassed, we are disposed to think, is not to be taken note of while dealing with the validity of a statutory provision or the Rule made thereunder. The same shall be subject to judicial scrutiny when the order is passed. Thus, the aforesaid submission, being bereft of merit, is rejected.

21. Ex-consequenti, the writ petition, being sans substratum, stands dismissed without any order as to costs.

CHIEF JUSTICE

SANJIV KHANNA, J.

SEPTEMBER 16, 2011
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