R-1 to R-7

$~

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

\+ W.P.(CRL) 3595/2017 & Crl.M.A.3758/2019

M/S ADVANTAGES INDIA & ANR ..... Petitioners

Through Mr. N. Hariharan, Sr.Advocate with Mr.Tanveer Ahmed Mir, Mr.Arjun Singh Bhati, Mr. Dhruv Gupta, Mr.Pranav Ralli, Mr.Vaibhav Suri, Mr. Nikhil Rohatgi, Ms. Narayani Bhattacharya, Mr. Vaibhav Sharma, Ms. Rekha Anjara, Mr. Siddharth Yadav, Mr. C. Govind Venugopal, Mr. Sharang Dhulia, and Mr. Pratheek Bhalla, Advocates.

versus

UNION OF INDIA & ORS ..... Respondents

Through Mr. Amit Mahajan, Mr.Ripu Daman Bhardwaj, Mr. Vinod Diwakar with Mr.Dhruv Pande and Ms. Mallika Hiramath, Advocates for UOI.

Mr.Anil Grover, SPP for CBI with Mr.Shivesh P.Singh, Noopur Singhal and Mr.Mishal Vij, Advocates.

WITH

\+ W.P.(CRL) 1884/2018 & Crl.M.A.2155/2019

M/S CAPITAL PRINT PROCESS PVT LTD & ORS ..... Petitioners

Through Mr.Dhruv Gupta with Mr. Shaishav Manu, Advocates.

versus

UNION OF INDIA & ORS ..... Respondents
Through Mr. Amit Mahajan, Mr.Ripu Daman Bhardwaj, Mr. Vinod Diwakar with Mr.Dhruv Pande and Ms. Mallika Hiramath, Advocates for UOI.
Mr.Anil Grover, SPP for CBI with Mr.Shivesh P.Singh, Noopur Singhal and Mr.Mishal Vij, Advocates.

WITH

\+ W.P.(CRL) 1885/2018 & Crl.M.A.Nos.1172/2019, 2266/2019

M/S CAPITAL IMPEX ..... Petitioner
Through Mr.Dhruv Gupta with Mr. Shaishav Manu, Advocates.

versus

UNION OF INDIA & ORS ..... Respondents
Through Mr. Amit Mahajan, Mr.Ripu Daman Bhardwaj, Mr. Vinod Diwakar with Mr.Dhruv Pande and Ms. Mallika Hiramath, Advocates for UOI.
Mr.Anil Grover, SPP for CBI with Mr.Shivesh P.Singh, Noopur Singhal and Mr.Mishal Vij, Advocates.

WITH

\+ W.P.(CRL) 1933/2018 & Crl.M.A.Nos.11916/2018, 2154/2019

ACCORDIS HEALTHCARE P. LTD. & ORS. ..... Petitioners
Through Mr. Sudhir Nandrajog, Senior Advocate with Mr.Shivek Trehan, Advocate.

versus

UOI & ORS. ..... Respondents

Through Mr. Amit Mahajan, Mr.Ripu Daman Bhardwaj, Mr. Vinod Diwakar with Mr.Dhruv Pande and Ms. Mallika Hiramath, Advocates for UOI.
Mr.Anil Grover, SPP for CBI with Mr.Shivesh P.Singh, Noopur Singhal and Mr.Mishal Vij, Advocates.

WITH

\+ W.P.(CRL) 2012/2018 & Crl.M.A.Nos.12333/2018, 2263/2019

M/S ADVANTAGE INDIA & ORS ..... Petitioners

Through Mr. N. Hariharan, Sr.Advocate with Mr.Tanveer Ahmed Mir, Mr.Arjun Singh Bhati, Mr. Dhruv Gupta, Mr.Pranav Ralli, Mr.Vaibhav Suri, Mr. Nikhil Rohatgi, Ms. Narayani Bhattacharya, Mr. Vaibhav Sharma, Ms. Rekha Anjara, Mr. Siddharth Yadav, Mr. C. Govind Venugopal, Mr. Sharang Dhulia and Mr. Pratheek Bhalla, Advocates.

versus

UNION OF INDIA & ORS ..... Respondents

Through Mr. Amit Mahajan, Mr.Ripu Daman Bhardwaj, Mr. Vinod Diwakar with Mr.Dhruv Pande and Ms. Mallika Hiramath, Advocates for UOI.

Mr.Anil Grover, SPP for CBI with Mr.Shivesh P.Singh, Noopur Singhal and Mr.Mishal Vij, Advocates.

WITH

\+ W.P.(CRL) 2013/2018 & Crl.M.A.Nos.12336/2018, 2032/2019

TARUN KUMAR KAPOOR & ANR ..... Petitioners
Through Mr.Laksh Khanna, Advocate.

versus

UNION OF INDIA & ORS ..... Respondents
Through Mr. Amit Mahajan, Mr.Ripu Daman Bhardwaj, Mr. Vinod Diwakar with Mr.Dhruv Pande and Ms. Mallika Hiramath, Advocates for UOI.
Mr.Anil Grover, SPP for CBI with Mr.Shivesh P.Singh, Noopur Singhal and Mr.Mishal Vij, Advocates.

WITH

\+ W.P.(CRL) 2483/2018 & Crl.M.A.Nos.30414-30415/2018, 2030/2019

AYKA TRADINGS P.LTD. & ORS. ..... Petitioners
Through Mr.Avishkar Singhvi with Mr.Kshitij Kumar Advocates.

versus

UOI & ORS. ..... Respondents
Through Mr. Amit Mahajan, Mr.Ripu Daman Bhardwaj, Mr. Vinod Diwakar with Mr.Dhruv Pande and

Ms. Mallika Hiramath, Advocates for UOI.
Mr.Anil Grover, SPP for CBI with Mr.Shivesh P.Singh, Noopur Singhal and Mr.Mishal Vij, Advocates.

% Date of Decision: 23rd August, 2019

CORAM:
HON'BLE MR. JUSTICE MANMOHAN
HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL

J U D G M E N T

MANMOHAN, J: (Oral)

1. The present batch of writ petitions seek to challenge the constitutional validity of Section 43 of the Foreign Contribution (Regulation) Act, 2010 (hereinafter referred to as 'FCRA') and Rule 22 of Foreign Contribution (Regulation) Rules, 2011 (hereinafter referred to as FCRR) on the ground that they are arbitrary, unreasonable, ultra vires and violative of Articles 14 and 21 of the Constitution of India. The petitioners further seek quashing of the letter dated 4th August, 2017 entrusting the investigation of their cases to the Central Bureau of Investigation (for short 'CBI'). The petitioners also seek quashing of the investigation being carried out by the CBI and Enforcement Directorate in pursuance to RC-DAI-2017-A-0036 dated 16th November, 2017 (hereinafter referred to as 'RC 36/2017') and ECIR bearing no. ECIR/HQ/19/2017. Section 43 of FCRA as well as Rule 22 of FCRR are reproduced hereinbelow:-

A) Section 43 of FCRA:-

"43. Investigation into cases under the Act – *Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), any offence punishable under this Act may also be investigated into by such authority as the Central Government may specify in this behalf and the authority so specified shall have all the powers which an officer-in-charge of a police station has while making an investigation into a cognizable offence."*

B) Rule 22 of FCRR:-

"22. Returns by the Investigating Agency to the Central Government. *- The Central Bureau of Investigation or any other Government investigating agency that conducts any investigation under the Act shall furnish reports to the Central Government, on a quarterly basis, indicating the status of each case that was entrusted to it, including information regarding the case number, date of registration, date of filing charge sheet, court before which it has been filed, progress of trial, date of judgment and the conclusion of each case."*

RELEVANT FACTS

2. The relevant facts of the present cases are that Government of India, Ministry of Home Affairs, Foreigners Division (FCRA Wing), Monitoring Unit vide its letter dated 04th August, 2017 requested the CBI to carry out investigation in accordance with Section 43 of FCRA. In the said letter, it was averred that M/s. Advantage India and its office bearers had obtained registration under FCRA and during the years 2012 to 2016 had received foreign contributions of about Rupees Ninety crores for undertaking social/educational activities. It was further averred that during inspection under Section 23 of FCRA it was found that M/s. Advantage India had falsely claimed to have spent about Rupees Seventy Two crores on medical facilities and stationery. It was alleged that the claim of M/s.

Advantage India, that it had purchased medicines worth Rupees Twenty six crores ninety seven lakhs from M/s. Aastha Pharma and M/s. Hind Pharma was found to be false. It was also stated that M/s. Advantage India had claimed expenses on the basis of forged and fabricated bills raised by its associates. It was pointed out in the said letter dated 04th August, 2017 that the Managing Director, Shri Raman Kapoor of M/s. Accordis Health Care Private Limited company had confessed before the Income Tax Authorities that he had booked bogus expenses and had indulged in over pricing of mobile medical units. CBI was requested to investigate whether the activities of the entities as stated in the said letter also attracted the provisions of other laws, i.e., IPC etc. for having diverted the funds for personal benefit of the office bearers or any other individuals apart from the violations of various provisions of FCRA. The letter dated 04th August, 2017 along with its annexures is reproduced hereinbelow:-

"F.No.II/21022/58(0641)/2016-FCRA(MU)//S-3
Government of India
Ministry of Home Affairs
Foreigners Division (FCRA Wing)
(Monitoring Unit)

NDCC-II Building, Jai Singh Marg,
New Delhi, the ***4th August, 2017***

To

The Director,
Central Bureau of Investigation*,*
Plot No.5-B, CGO Complex, Lodhi Road,
New Delhi-110003

Subject: ***Investigation under Section 43 of the FCRA, 2010 for contravention of FCRA-2010 by Advantage India, New Delhi-reg****.*

Sir,

M/s. Advantage India, 101-102, Oriental House, Gulmohar Enclave, New Delhi, is registered under the Foreign Contribution (Regulation) Act 2010 vide Registration No.231660389R for carrying out educational and social activities. The association has received total foreign contribution amounting to Rs.90.72 crores during FYs 2012-13 to 2015-16 and also received bank interest amounting to Rs.6.69 crores on foreign contributions during the said period. The background of the foreign donors as well as utilization of foreign contribution is enclosed at Annexure I and the details of major beneficiaries of foreign contribution by the Association Advantage is enclosed at Annexure II.

2. ***Based on the news in the print media regarding the Income Tax search of M/s. Advantage India and thereafter a field inquiry, an off-site inspection of Book/records of the Association was conducted on 21.02.2017. On examination and scrutiny of the records of the Association, it was observed that the Association has not substantiated its various expenses that it has claimed to have incurred during FYs 2012-13 to 2015-16. The Ministry's inquiry has prima-facie revealed that the said Association has violated various provisions of Foreign Contribution (Regulation) Act, 2010 as per details given below:-***

I. ***On record the Association has claimed to have purchased medicines worth Rs.26.97 Crores for various health camps from two Pharma entities i.e. M/s. Aastha Pharma adjoining AIIMS Trauma Centre, New Delhi and M/s. Hind Pharma, Bhagirath Palace, New Delhi. Whereas association had also made agreements with M/s. Accordis Health Care stating that M/s. Accordis Health Care shall be solely responsible for the operational aspects of the projects and it will be the responsibility of the Accordis Health Care to ensure availability of requisite medical instruments,***

apparatus, medicines along with sufficient number of doctors and paramedical staff. The said point i.e. need for purchase of medicines from M/s.Aastha Pharma and M/s. Hind Pharma point has not been satisfactorily replied by the association. Further, on enquiries both the firms have categorically stated in their letters dated 11.05.2017 and 28.04.2017 respectively that they have not dealt with the Association. The Bills and vouchers furnished by the Association in respect of the above two Pharma firms were found to be fictitious and bogus. *The contention of the association vide its letter dated 27th June, 2017 claiming that the invoices of these firms were genuine was not found to be tenable. Independent enquiries made by the Income tax department in regard to the above two firms revealed that there was no such concerns at the given addresses and the amount received by these two firms from Advantage India were rotated through many bank accounts which prima facie were found to be bogus. The Income tax department has therefore found these two concerns as bogus and the expenses claimed on purchase of medicines from these two concern as fictitious and bogus. The facts on record clearly make out violation of Section 8(1)(a) (utilization of FC for the purpose it has been received), Section 18 (intimation), Section 19 (maintenance of accounts) and Section 33 of FCRA, 2010 (making of false statement, declaration or delivering false accounts).*

II. ***Agreements dated 05.10.2010, 18.12.2010 & 17.01.2013 with M/s. Accordis Health Care by the Association in support of its purchases of Mobile Medical Units/medicines etc. From the said company were verbatim, self-serving, full of contradictions and appeared to have been made on same day but signed for different dates. The said***

agreements are thus concocted. As per the documents provided by Income Tax authority, it is revealed that during the search by Income Tax authority in the premises of M/s Accordis Health Care Private Limited company, the managing director Sh. Raman Kapoor, confessed that he has booked bogus expenses and has done overpricing of the MMUs supplied to the Association. The association could not substantiate the geniuses of the expenses claimed to have incurred in regard of M/s. Accordis Health Care Private Limited. The reply of the Association is evasive *and does not cover all the issues. Thus, Association has violated Section 8(1)(a) (utilization of FC for the purpose it has been received), Section 18 (intimation), Section 19 (maintenance of Accounts) and Section 33 of FCRA, 2010 (making of false statement, declaration or delivering false accounts).*

III. ***It is on record that Rs.30,37,458/- were spent by Association for foreign travel of Sh. Deepak Talwar during the period 09.05.2015 to 23.01.2016 without due justification. The reply of Association that the travels were undertaken for the welfare of NGO is neither explained specifically nor substantiated****. The same is therefore not convincing. Thus making it clear that the funds of the Association have been utilized for making payment related to other business activities and personal purposes of the founder member of the Trust implying violation of section 8(1)(a) and Section 12(4)(vi) of FCRA, 2010 by the Association knowingly.*

IV. ***The ownership of premises of Association i.e. 101-Oriental House, Gulmohar Enclave, Commercial Complex, New Delhi-49 belongs to Sh. Deepak Talwar. The Association has made rent payment amounting Rs.79,83,441/- to shri Deepak Talwar for the period 2012-2013 to December 2015. This act of***

Association proved that foreign contribution was used for providing personal gain to sh. Deepak Talwar *and is against the purpose for which the same was received. Thus, violating the Section 12(4)(vi) of FCRA, 2010.*

V. ***The Association made a paymenet of Rs.4,92,89,993/-*** *(Rs. Four Crores Ninety Two Lakhs Eighty Nine Hundred Ninety Three) to two publishers i.e.* ***M/s. Capital Print Process Pvt. Ltd., Chandigarh & M/s. Capital Impex Ltd., New Delhi for the procurement of huge quantities of Exercise Note Books without following quotation/tender process****. This is in a violation of Section 12(4)(vi) and Section 33 of the FCRA.*

VI. *During the scrutiny of agreements, it was observed that the Association has given the following two bank account numbers while signing the agreements:-*

S. No.	*Donor Name*	*Bank Name*	*Account Number*	*Address of Branch*
1.	*AIRBUS*	*Indian Overseas*	*026502000002166*	*70 Golf Link New Delhi*
2.	*MBDA*	*Indian Overseas*	*026502000002377*	*70 Golf Link New Delhi*

Received foreign contribution in more than one FCRA designated bank account is violation of Section 17 under FCRA, 2010. In the instant matter the Association has not intimated Government about opening of more than one account for the purpose of utilizing the foreign contribution. The Association has admitted the facts stating that it was done due to ignorance of provisions of FCRA, 2010. The reply of Association is not acceptable because ignorance of law is no excuse. Moreover, the Association has claimed to have been taking financial advice from

professionals. Thus Associations violated Section 17 under FCRA, 2010 on both counts.

VII. *The Association has transferred considerable domestic contribution to the foreign contributions accounts. Mixing of foreign and domestic contribution is not permissible as per FCRA, 2010 and FCRR, 2011. The reply of the Association on this count is of evasive nature. The Association has thus violated Section 17 of FCRA, 2010.*

VIII. *The Association has changed its registered office from 5-E, white House, 10, Bhagwan Dass Road, New Delhi to 101-102, Oriental House, Gulmohar Enclave, Commercial Complex, Yusuf Sarai, New Delhi-110048 without intimating the Ministry. Association could not produce any proof of their sending intimation to the Ministry. Association has also changed many functionaries including Chief Functionary i.e. Sh. Deepak Talwar without intimating the Ministry. The Association's contention that they have intimated the Ministry is without any documentary proof except Annual Return. The Association has thus violated Rule 17A under FCRR, 2011.*

IX. ***The Association had appointed M/s. T. Kapoor as consultant and paid an amount of Rs.1,03,63,360/- (Rs. One Crore Three Lakh Sixty Three Thousand Three Hundred Sixty Only) during the year 2013-14 to 2015-16. However, the nature of consultancy that M/s. T. Kapoor provided has not been given in any of the documents produced before the inspection party*** *or in the reply of the show cause notice from this Ministry. The contention of the Association is contradictory to a report sought by the Ministry from the Income Tax Authorities thereby* ***it is established that M/s. T. Kapoor was taking salary/remuneration from NGO but was providing consultancy to Wave***

Impex (P) Ltd. And Wave Hospitality (P) Ltd. *This indicates that the Association has mis-utilized foreign contribution for personal gains/other business purposes. Thus Association violated Section 12(4)(vi) of FCRA, 2010.*

X. ***The Association has Fixed Deposits of various amounts received from Donor entities and using the FDs as a guarantee for providing overdraft facilities to M/s. Wave Impex Pvt. Ltd., a company under the control of Sh. Deepak Talwar and his family. During Income Tax search Sh. Deepak Talwar has accepted using the Association's fund for business activity of M/s. Wave Impex (P) Ltd. in violation of the provisions of FCRA, 2010 and Rules made thereunder***. *Thus Association violated Section 12(4)(vi) of FCRA, 2010.*

XI. *The Association has not placed the receipt and utilization of FC amounting more than one crore in the public domain. The reply of the Association is of routine nature and shows casualness of highest order. Thus Association violated Rule 13 under foreign Contribution (Regulation) Rules, 2011.*

2. ***Advantage India, New Delhi, has violated various provisions of FCRA Act 2010. It is a fit case for detailed investigation and criminal prosecution if found fit. The Central Bureau of Investigation (CBI) is, therefore, requested to conduct an investigation in terms of Section 43 of FCRA, 2010. CBI may also investigate whether the activities of these entities also attract the provisions of other penal laws i.e. IPC etc. For having diverted the funds for personal benefit of the officer bearer or any other individual***.

3. ***It is requested that the investigation report in the matter may kindly be submitted to the Ministry at the earliest. Further, in terms of Rule 22 of Foreign Contribution (Regulation) Rules, 2011, the CBI is required to furnish***

reports to the Central Government on quarterly basis*, indicating the status of each case that was entrusted to it, including information regarding the case number, date of registration, date of filing charge-sheet in the court, progress of trial, date of judgment and the conclusion of each case.*

Encls. As above

Yours faithfully,

Sd/-
(Santosh Sharma)
Director (FC&MU)*"*

Annexure –I

Background of the Donors:- As an initiative of Corporate Social Responsibility Airbus S.A.S., Paris, France and Advantage India had agreed and entered into an agreement dated 10.5.12 in Paris, where under Airbus S.A.S. agreed to provide a donation of 9 (nine) million Euros (payable annually in three equal installments of 3 million Euros each) to Advantage India and a similar agreement was also entered into by Advantage India with MBDA, England, U.K. where under MBDA has agreed to provide a donation of 6 (six) million Euros (payable annually in three equal instalments of 2 million Euros each) to Advantage India, the agreement was signed by on behalf of Advantage India was then association president Sh. Deepak Talwar, R/o C-17, 2nd floor, Green Park Extension, New Dehi-110016. It is pertinent to mention here that the AIRBUS which is the European leader in the aeronautic industries and MBDA which is one of the European leading Missile manufacturing company in the defense industry*.***

2. Utilization of Foreign Contribution:

The association has received and utilized the amount of foreign contribution mostly in purchasing Mobile Medical Unit, expensive vehicle or creating Fixed Deposits Receipts*:-*

Financial Year	*Previous Balance (1)*	*FC Received (2)*	*Interest earned (3)*	*Total FC utilize*	*Balance (1+2+3 +4)*
2012-2013	*4,586*	*34,57,69,316*	*1,7939,469*	*18,42,23,030*	*17,94,90,341*
2013-2014	*17,94,90,341*	*42,76,99,135*	*2,64,74,903*	*26,05,62,035*	*37,31,02,344*
2014-2015	*37,31,02,344*		*1,85,10,565*	*32,34,59,792*	*6,81,53,117*
2015-2016	*6,81,53,117*	*13,37,39,331*	*40,49,740*	*20,62,89,883*	*(-)3,47,695*
Grand Total		*90,72,07,782*	*6,69,74,677*	*97,45,34,740*	

It is pertinent to mention here that this association did not receive any foreign contribution during 2006-2007 to 2011-2012."

Annexure –II

Details of Major beneficiary of F.C. by the Association Advantage India, New Delhi

S. No.	***Description/Beneficiaries***	***Amounts (in crores)***	***Remarks***
1.	***M/s. Accordis Health Care Pvt. Ltd. main Mandi Road, Jonpur, New Delhi***	***20.39***	***For acquiring mobile medical vans***
2.	***M/s. Accordis Health Care Pvt. Ltd. main Mandi Road, Jonpur, New Delhi***	***21.41***	***Service charges for providing doctor, nurses, support staff in mobile medical vans***
3.	***M/s. Hind Pharma Chandni Chowk, New Delhi***	***10.91***	***For purchase of medicines***
4.	***M/s Asha Pharma, Ring Road, New Delhi***	***16.06***	***For purchase of medicines***
5.	***Payment made to M/s. Capital Print process & M/s. Capital Impex, New Delhi***	***4.93***	***For printed exercise note book***
6.	***Purchase of expensive vehicles i.e. Toyota, Duster, Regent Garage***	***.84***	

7.	***Office rent paid to Sh. Deepak Talwar***	***.80***	***Former President of the association***
8.	***Foreign tour expenses paid to Sh. Deepak Talwar***	***.30***	***Former President of the association***
9.	***Payment made to consultant M/s. T. Kapoor***	***1.04***	***Consultancies charges***
	G.T.	***76.68***	

(emphasis supplied)

3. The letter dated 04th August, 2017 became the basis of registration of FIR bearing No. RC 36/2017 under Sections 33, 35 and 37 of FCRA and Sections 120B/199/468/471/511 read with Section 417 of IPC with Anti Corruption Wing, CBI, New Delhi. The FIR bearing No. RC 36/2017 is reproduced hereinbelow:-

"FIRST INFORMATION REPORT (Under Sec.154 Cr.P.C.)

Book No. 1195 *Serial No. 01*

1. ***District: PS: Year: FIR No.: Date:***
   New Delhi CBI/ACB/ 2017 RC-DAI-2017-A-0036 16.11.2017 New Delhi
2. ***(1) Act IPC Sections: 120B, 199, 468, 471 and 511 r/w 417***
   (2) Act FCRA, 2019 Sections: 33, 35, 37
3. ***(a) Suspected Offence – Violation of FCRA, 2010,Criminal Conspiracy, Forgery, making False Statement before Authority, Use of forged document, Attempt to Cheat.***

   (b) Day: Date: Time:
   2012 to 27.06.2017
   Information received at PS: CBI, ACB, New Delhi
   Dated: 09.08.2017
   Entry No. 3 Date 16.11.2017 Time 11.00 A.M.

4. *Type of Information (Written/Oral): Written*

5. Place of occurrence *Delhi and other places.*

(a) Direction & Distance from
Beat No.
Address.

(b) In case, outside the limit of this Police Station, then
Name of PS *District*

6. Complainant/Informant.

(a) Name ***: Sh. Santosh Sharma***
(b) Father's Name *:*
(c) Date of Birth *:*
(d) Nationality *:*
(e) Passport No. *Date of Issue* *Place of Issue*
(f) Profession ***: Director, (FC&MU), FCRA Wing, MHA, New Delhi***
(g) Address *: NDCC-II Building, Jai Singh Marg, New Delhi*

7. Details of known/suspected/unknown accused with full particulars: (Attached separate sheet, if necessary)
(1) M/s Advantage India
(2) M/s Accordis Health Care Pvt. Ltd.
(3) Sh.Deepak Talwar, M/s Advantage India
(4) Sh. Sunil Khandelwal, M/s Accordis Health Care Pvt. Ltd.
(5) Sh. Raman Kapoor, MD, M/s Accordis Health Care Pvt. Ltd.
(6) M/s T. Kapoor Consultant and other unknown persons.

8. Reasons for delay in reporting by the complainant/informant:

9. Particulars of properties Stolen (Attach separate sheet, if necessary):

10. Total value of property stolen:

11. Inquest Report/U.D. Case No., if any:

12. First Information contents (Attach separate sheet, if required):

A written complaint no. F.No.II/21022/58 (0641)/2016-FCRA (MU)//S-3 dtd. 4.8.17 lodged by Sh.Santosh Sharma Director (FC&MU) was received in CBI which is annexed as attachment to column no.12.

MHA has requested to conduct investigation in terms of Section 43 of FCRA, 2010. The analysis of the complaint prima facie revealed commission of offence U/s 120B, 199, 468, 471,511 r/w 417 IPC & U/s 33, 35, 37 FCRA 2010 against M/s Advantage India.

M/s Accordis Health Care Pvt. Ltd. Sh. Deepak Talwar, Sh. Sunil Khandelwal, Sh.Raman Kapoor and T.Kapoor & other unknown persons.

Hence, a regular case is registered against M/s Advantage India, M/s Accordis Health Care Pvt. Ltd. Sh. Deepak Talwar, Sh. Sunil Khandelwal, Sh.Raman Kapoor and T.Kapoor & other unknown persons U/s 120B, 199, 468, 471, 511 r/w 417 IPC & U/s 33, 35 & 37 of FCRA Act 2010 and entrusted to Sh. Shyam Prakash, Dy. SP, CBI, ACB, New Delhi for investigation."

4. CBI states that investigation is underway to verify the claimed supply of medicines, stationery and medical units worth more than Rupees Seventy Two crores and as to who were allegedly involved in fabrication of false documents and opening of bank accounts apart from identifying who is the actual beneficiary of the whole transactions.

ARGUMENTS ON BEHALF OF PETITIONERS

5. Mr. N. Hariharan and Mr. Sudhir Nandrajog, learned senior counsel as well as Mr. Tanveer Ahmed Mir, Mr. Avishkar Singhvi and Mr. Dhruv Gupta, learned counsel for petitioners submit that in terms of Section 23 read with Section 43 of the FCRA, the Central Government can authorise either a Gazetted Officer or any other officer or authority or organisation for the purpose of investigation of commission of offences under the FCRA. According to them, as per the said provisions whosoever is authorized to inspect is vested with complete powers to investigate. They emphasise that once the Central Government has chosen the route of

empowering and authorising a particular officer/authority to conduct inquiry and investigation into commission of alleged offences by appointing and authorizing him under Sections 23 to 26 and 42 of the FCRA, then it is only that authority which can investigate and file a criminal complaint, if so warranted in terms of Section 40 of the Act. They submit that letter dated 04th August, 2017 requesting the CBI to investigate is unsustainable after completion of investigation by the authorized officer. Though learned counsel for petitioners admit that there cannot be any doubt that prosecution can be instituted by the authorized officer, if sanction is granted by the Central Government under Section 40, based on material collected in the investigation pursuant to such exercise of powers conferred under Sections 23 to 26 and 42 of the FCRA, yet they emphasise that the impugned communication dated 04th August, 2017 requesting the CBI to conduct investigation is unsustainable as in the present cases, the authorized officer had already carried out detailed investigation. They contend that if the action of the respondents is accepted then the same would lead to absurdity as it would amount to multiple, parallel and re-investigation and prosecution in regard to same offences. They state that to somehow justify the issuance of the impugned communication dated 04th August, 2017, the respondents are erroneously interpreting the expression *"may also be investigated into by"* in Section 43. According to them, the said expression means that apart from those officers/authorities/organisations authorized by Central Government under Sections 23 to 26 and 42 of FCRA, investigation can also be done by CBI or Crime Branch officials, as the case may be, subject to the fact that authorization is issued in their favour at the very inception/first

instance. In support of their submission, learned counsel for petitioners rely upon the Supreme Court's judgment in ***Directorate of Enforcement vs. Deepak Mahajan & Anr., (1994) 3 SCC 440*** wherein it has been held as under:-

> *"113. Though an authorised officer of Enforcement or Customs is not undertaking an investigation as contemplated under Chapter XII of the Code, yet those officers are enjoying some analogous powers such as arrest, seizures, interrogation etc. Besides, a statutory duty is enjoined on them to inform the arrestee of the grounds for such arrest as contemplated under Article 22(1) of the Constitution and Section 50 of the Code. Therefore, they have necessarily to make records of their statutory functions showing the name of the informant, as well as the name of the person who violated any other provision of the Code and who has been guilty of an offence punishable under the Act, nature of information received by them, time of the arrest, seizure of the contraband if any and the statements recorded during the course of the detection of the offence/offences.*
>
> *xxx xxx xxx*
>
> *115. The above table manifestly imparts that all the powers vested on various authorities as given in the table are equipollent as being enjoyed by a police officer under the Code and exercised during investigation under Chapter XII because the investigation is nothing but an observation or inquiry into the allegations, circumstances or relationships in order to obtain factual information and make certain whether or not a violation of any law has been committed.*
>
> *116. It should not be lost sight of the fact that a police officer making an investigation of an offence representing the State files a report under Section 173 of the Code and becomes the complainant whereas the prosecuting agency under the special Acts files a complaint as a complainant i.e. under Section 61(ii) in the case of FERA and under Section 137 of the Customs Act. To say differently, the police officer after consummation of the investigation files a report under Section*

173 of the Code upon which the Magistrate may take cognizance of any offence disclosed in the report under Section 190(1)(b) of the Code whereas the empowered or authorised officer of the special Acts has to file only a complaint of facts constituting any offence under the provisions of the Act on the receipt of which the Magistrate may take cognizance of the said offence under Section 190(1)(a) of the Code. After taking cognizance of the offence either upon a police report or upon receiving a complaint of facts, the Magistrate has to proceed with the case as per the procedure prescribed under the Code or under the special procedure, if any, prescribed under the special Acts. Therefore, the word 'investigation' cannot be limited only to police investigation but on the other hand, the said word is with wider connotation and flexible so as to include the investigation carried on by any agency whether he be a police officer or empowered or authorised officer or a person not being a police officer under the direction of a Magistrate to make an investigation vested with the power of investigation.

xxx xxx xxx

131. The submission that as there is no investigation within the terms of the Code in the field of FERA or Customs Act, Section 4(2) of the Code can have no part to play, has to be rejected for the reasons given by us while disposing of the contention "What investigation means and is" in the preceding part of this judgment."

6. Learned counsel for petitioners submit that the Central Government cannot pick and choose, according to their whims and fancies, the investigative agency, i.e., whether the investigation should be carried out by the officer authorised by the Central Government or the CBI under Section 43 of FCRA. They submit that the manner in which the respondents seek to implement the provisions of Section 43 of FCRA and Rule 22 of FCRR confers uncontrolled or unguided power upon the

respondents, which renders Section 43 manifestly arbitrary, unreasonable, ambiguous, unconstitutional and ultra vires on the vice of Articles 14 and 21 of the Constitution of India. Learned counsel for the petitioners suggest that the condition precedent of "recording of reasons" as envisaged under Section 23 FCRA should be read into Section 43 to render it constitutional. In support of their submission, they rely upon Supreme Court's judgment in ***State of Punjab vs. Khan Chand (1974) 1 SCC 549*** wherein it has been held as under:-

> *"8. We may state that the vesting of discretion in authorities in the exercise of power under an enactment does not by itself entail contravention of Article 14. What is objectionable is the conferment of arbitrary and uncontrolled discretion without any guidelines whatsoever with regard to the exercise of that discretion. Considering the complex nature of problems which have to be faced by a modern State, it is but inevitable that the matter of details should be left to the authorities acting under an enactment. Discretion has, therefore, to be given to the authorities concerned for the exercise of the powers vested in them under an enactment. The enactment must, however, prescribe the guidelines for the furtherance of the objects of the enactment and it is within the framework of those guidelines that the authorities can use their discretion in the exercise of the powers conferred upon them. Discretion which is absolute, uncontrolled and without any guidelines in the exercise of the powers can easily degenerate into arbitrariness. When individuals act according to their sweet will, there is bound to be an element of "pick and choose" according to the notion of the individuals. If a Legislature bestows such untrammelled discretion on the authorities acting under an enactment, it abdicates its essential function for such discretion is bound to result in discrimination which is the negation and antithesis of the ideal of equality before law as enshrined in Article 14 of the Constitution. It is the absence of any principle or policy for the guidance of the authority concerned in the exercise of discretion*

which vitiates an enactment and makes it vulnerable to the attack on the ground of violation of Article 14. It is no answer to the above that the executive officers are presumed to be reasonable men who do not stand to gain in the abuse of their power and can be trusted to use "discretion" with discretion…..

9. It has been observed by this Court in the case of Shri Ram Krishna Dalmia v. Shri Justice S.R. Tendolkar [AIR 1958 SC 538 : (1959) SCR 279, 299 : (1959) SCJ 147] that a statute may not make any classification of the persons or things for the purpose of applying its provisions but may leave it to the discretion of the Government to select and classify persons or things to whom its provisions are to apply. In determining the question of the validity or otherwise of such a statute the Court will not strike down the law out of hand only because no classification appears on its face or because a discretion is given to the Government to make the selection or classification but will go on to examine and ascertain if the statute has laid down any principle or policy for the guidance of the exercise of discretion by the Government in the matter of the selection or classification. After such scrutiny the Court will strike down the statute if it does not lay down any principle or policy for guiding the exercise of discretion by the Government in the matter of selection or classification, on the ground that the statute provides for the delegation of arbitrary and uncontrolled power to the Government so as to enable it to discriminate between persons or things similarly situate and that, therefore, the discrimination is inherent in the statute itself. In such a case the Court will strike down both the law as well as the executive action under such law."

7. They also contend that in view of the prior registration of RC 9/2013 and ECIR 10/2017, the present FIR bearing RC 36/2017 amounts to reinvestigation inasmuch as the primary ground in the said ECIR 10/2017 dated 17th August 2017 and RC 9/2013 is the same. They submit that it is settled law that there cannot be multiple FIRs when the offences pertain to the *'same transaction'*. In support of their submission, they rely

upon Supreme Court's judgment in ***Amitbhai Anilchandra Shah vs. The Central Bureau of Investigation &Ors., (2013) 6 SCC 348*** wherein it has been held as under:-

> *"31. All the above assertions made by CBI support the stand of the petitioner. It is also relevant to note the stand taken by CBI and reliance placed on the same by this Court in the order dated 8-4-2011 in WP (Crl.) No. 115 of 2007 i.e. Narmada Bai [(2011) 5 SCC 79 : (2011) 2 SCC (Cri) 526] . The relevant excerpts are quoted verbatim hereunder: (SCC pp. 83-84, 86, 89-92, 94-96 & 101, paras 8, 19, 21, 30-32, 34-35, 39, 47-48 & 65)*
>
> > *"8. It is the further case of the petitioner that the deceased being a key eyewitness to the murder of Sohrabuddin and his wife Kausarbi, the team of Mr D.G. Vanzara and others planned to do away with him to avoid his interrogation by Ms Geeta Johri, Inspector General of Police. ... Hence, the petitioner has preferred this petition before this Court praying for direction to CBI to register an FIR and investigate the case.*
> >
> > *xxx xxx xxx xxx*
> >
> > *Stand of CBI, Respondent 21*
> >
> > *19. The investigation conducted in RC No. 4(S) of 2010, Special Crime Branch, Mumbai, as per the directions of this Court in its order dated 12-1-2010 [(2010) 2 SCC 200 : (2010) 2 SCC (Cri) 1006] , vide Writ Petition (Crl.) No. 6 of 2007 revealed that the alleged fake encounter of Tulsiram Prajapati on 28-12-2006 was done in order to eliminate him as he was the key witness in the criminal conspiracy of the abduction and killing of Sohrabuddin and Kausarbi by the powerful and the influential accused persons. ...*
> >
> > *xxx xxx xxx xxx*
> >
> > *21. The murder of Tulsiram Prajapati took place on 28-12-2006, case was registered on 28-12-2006 and Gujarat CID commenced investigation on 22-3-2007. However, even after a lapse of 3 years, no action was taken against*

any of the accused. As directed by this Court, only on the investigation of Tulsiram Prajapati's case, the 'larger conspiracy' would be established and the mandate and tasks assigned by this Court to CBI would be accomplished both in letter and spirit towards the goal of a fair trial, upholding the rule of law. If Tulsiram Prajapati's fake encounter case is not transferred to CBI for investigation, it may lead to issue estoppel or res judicata against the prosecution.

xxx xxx xxx xxx

30. As pointed out by the learned counsel for the petitioner and CBI, the said judgment records that there is strong suspicion that the 'third person' picked up with Sohrabuddin was Tulsiram Prajapati. ...

31. ... Pursuant to the said direction, CBI investigated the cause of death of Sohrabuddin and his wife Kausarbi. CBI, in their counter-affidavit, has specifically stated that as per their investigation Tulsiram Prajapati was a key witness in the murder of Sohrabuddin and he was the 'third person' who accompanied Sohrabuddin from Hyderabad and killing of Tulsiram Prajapati was a part of the same conspiracy. It was further stated that all the records qua Tulsiram Prajapati's case were crucial to unearth the 'larger conspiracy' regarding Sohrabuddin's case which despite being sought were not given by the State of Gujarat.

32. (vi) CBI submitted two reports—Status Report No. 1 on 30-7-2010 and a week thereafter, they filed the charge-sheet. In pursuance of the charge-sheet, Accused 16, Amit Shah was arrested on 25-7-2010 and released on bail by the High Court of Gujarat on 29-10-2010. The order releasing him on bail is the subject-matter of the challenge in SLP (Crl.) No. 9003 of 2010. Status Report No. 1, filed by CBI before the Bench on 30-7-2010 informed the Court that Tulsiram Prajapati was abducted along with Sohrabuddin and Kausarbi and he was handed over to Rajasthan Police. ....

xxx xxx xxx xxx

34. Inasmuch as the present writ petition is having a bearing on the decision of the writ petition filed by Rubabbuddin Sheikh and also the claim of the petitioner, the observations made therein, particularly, strong suspicion about the 'third person' accompanying Sohrabuddin, it is but proper to advert to factual details, discussion and ultimate conclusion of this Court in Rubabbuddin Sheikh case [(2010) 2 SCC 200 : (2010) 2 SCC (Cri) 1006] .

35. ... In Writ Petition No. 6 of 2007, Rubabbuddin Sheikh prayed for direction for investigation by CBI into the alleged abduction and fake encounter of his brother Sohrabuddin by the Gujarat Police Authorities and also prayed for registration of an offence and investigation by CBI into the alleged encounter of one Tulsiram Prajapati, a close associate of Sohrabuddin, who was allegedly used to locate and abduct Sohrabuddin and his wife Kausarbi, and was thus a material witness against the police personnel. ...

xxx xxx xxx xxx

39. It is clear that the above judgment records that there was a strong suspicion that the 'third person' picked up with Sohrabuddin was Tulsiram Prajapati. It was also observed that the call records of Tulsiram were not properly analysed and there was no justification for the then Investigation Officer Ms Geeta Johri to have walked out of the investigation pertaining to Tulsiram Prajapati. The Court had also directed CBI to unearth 'larger conspiracy' regarding Sohrabuddin's murder. In such circumstances, we are of the view that those observations and directions cannot lightly be taken note of and it is the duty of CBI to go into all the details as directed by this Court.

xxx xxx xxx xxx

47. If we analyse the allegations of the State and other respondents with reference to the materials placed with the stand taken by CBI, it would be difficult to accept it in its

entirety. It is the definite case of CBI that the abduction of Sohrabuddin and Kausarbi and their subsequent murders as well as the murder of Tulsiram Prajapati are one series of acts, so connected together as to form the same transaction under Section 220 CrPC. As rightly pointed out by CBI, if two parts of the same transaction are investigated and prosecuted by different agencies, it may cause failure of justice not only in one case but in other trial as well.

48. It is further seen that there is substantial material already on record which makes it probable that the prime motive of elimination of Tulsiram Prajapati was that he was a witness to the abduction of Sohrabuddin and Kausarbi.

xxx xxx xxx xxx

65. ... In view of various circumstances highlighted and in the light of the involvement of police officials of the State of Gujarat and police officers of two other States i.e. Andhra Pradesh and Rajasthan, it would not be desirable to allow the Gujarat State Police to continue with the investigation, accordingly, to meet the ends of justice and in the public interest, we feel that CBI should be directed to take the investigation.

37. This Court has consistently laid down the law on the issue interpreting the Code, that a second FIR in respect of an offence or different offences committed in the course of the same transaction is not only impermissible but it violates Article 21 of the Constitution. In T.T. Antony [(2001) 6 SCC 181 : 2001 SCC (Cri) 1048] , this Court has categorically held that registration of second FIR (which is not a cross-case) is violative of Article 21 of the Constitution. The following conclusion in paras 19, 20 and 27 of that judgment are relevant which read as under:

"xxx xxx xxx

27. A just balance between the fundamental rights of the citizens under Articles 19 and 21 of the Constitution and

the expansive power of the police to investigate a cognizable offence has to be struck by the court. There cannot be any controversy that sub-section (8) of Section 173 CrPC empowers the police to make further investigation, obtain further evidence (both oral and documentary) and forward a further report or reports to the Magistrate. In Narang case [Ram Lal Narang v. State (Delhi Admn.), (1979) 2 SCC 322 : 1979 SCC (Cri) 479] it was, however, observed that it would be appropriate to conduct further investigation with the permission of the court. However, the sweeping power of investigation does not warrant subjecting a citizen each time to fresh investigation by the police in respect of the same incident, giving rise to one or more cognizable offences, consequent upon filing of successive FIRs whether before or after filing the final report under Section 173(2) CrPC. It would clearly be beyond the purview of Sections 154 and 156 CrPC, nay, a case of abuse of the statutory power of investigation in a given case. In our view a case of fresh investigation based on the second or successive FIRs, not being a counter-case, filed in connection with the same or connected cognizable offence alleged to have been committed in the course of the same transaction and in respect of which pursuant to the first FIR either investigation is under way or final report under Section 173(2) has been forwarded to the Magistrate, may be a fit case for exercise of power under Section 482 CrPC or under Articles 226/227 of the Constitution."

The above referred declaration of law by this Court has never been diluted in any subsequent judicial pronouncements even while carving out exceptions.

xxx *xxx* *xxx*

47. The learned ASG placed reliance on the following decisions: (i) Anju Chaudhary v. State of U.P. (ii) Babubhai v. State of Gujarat, (iii) sender Kaushik v. State of U.P. , (iv) Nirmal Singh Kahlon v. State of Punjab, (v) Ram

Lal Narang v. State (Delhi Admn.), (vi) Upkar Singh v. Ved Prakash and (vii) Kari Choudhary v. Sita Devi.

48. In Anju Chaudhary this Court was concerned with a case in which the second FIR was not connected with the offence alleged in the first FIR. After carefully analysing the same, we are of the view that it has no relevance to the facts of the present case."

8. Learned counsel for the petitioners contend that *"a delegatee cannot sub-delegate".* They contend that the entrustment of investigation in the case "by respondent No.2" instead of "by Central Government" renders the issuance of the impugned communication dated 04th August, 2017 wholly without jurisdiction. Consequently, according to them, reference by respondent No.2 to CBI is *per-se* illegal and is, therefore, beyond the command of law. In support of their contention, they rely upon Supreme Court's judgment in ***Hussein Ghadially Alias M.H.G.A. Shaikh & Ors. Vs. State of Gujarat, (2014) 8 SCC 425*** wherein it has been held as under:-

"20. What falls for determination is whether these approvals can be said to be sufficient compliance with the provisions of Section 20-A of TADA that reads as under:

"20-A. Cognizance of offence.—(1) Notwithstanding, anything contained in the Code, no information about the commission of an offence under this Act shall be recorded by the police without the prior approval of the District Superintendent of Police.

(2) No court shall take cognizance of any offence under this Act without the previous sanction of the Inspector General of Police, or as the case may be, the Commissioner of Police."

21. A careful reading of the above leaves no manner of doubt that the provision starts with a non obstante clause and is couched in negative phraseology. It forbids recording of

information about the commission of offences under TADA by the police without the prior approval of the District Superintendent of Police. The question is whether the power of approval vested in the District Superintendent of Police could be exercised by either the Government or the Additional Police Commissioner, Surat in the instant case. Our answer to that question is in the negative. The reasons are not far to seek:

21.1. We say so firstly because the statute vests the grant of approval in an authority specifically designated for the purpose. That being so, no one except the authority so designated, can exercise that power. Permitting exercise of the power by any other authority whether superior or inferior to the authority designated by the statute will have the effect of rewriting the provision and defeating the legislative purpose behind the same—a course that is legally impermissible. In Joint Action Committee of Air Line Pilots' Assn. of India v. DG of Civil Aviation [(2011) 5 SCC 435] this Court declared that even senior officials cannot provide any guidelines or direction to the authority under the statute to act in a particular manner.

21.2.Secondly, because exercise of the power vested in the District Superintendent of Police under Section 20-A(1) would involve application of mind by the officer concerned to the material placed before him on the basis whereof alone a decision whether or not information regarding commission of an offence under TADA should be recorded can be taken. Exercise of the power granting or refusing approval under Section 20-A(1) in its very nature casts a duty upon the officer concerned to evaluate the information and determine having regard to all attendant circumstances whether or not a case for invoking the provisions of TADA is made out. Exercise of that power by anyone other than the Designated Authority viz. the District Superintendent of Police would amount to such other authority clutching at the jurisdiction of the designated officer, no matter such officer or authority purporting to exercise that power is superior in rank and

position to the officer authorised by law to take the decision.

21.3.Thirdly, because if the statute provides for a thing to be done in a particular manner, then it must be done in that manner alone. All other modes or methods of doing that thing must be deemed to have been prohibited. That proposition of law first was stated in Taylor v. Taylor[(1875) LR 1 Ch D 426] and adopted later by the Judicial Committee in Nazir Ahmad v. King Emperor [(1935-36) 63 IA 372 : (1936) 44 LW 583 : AIR 1936 PC 253] and by this Court in a series of judgments including those in Rao Shiv Bahadur Singh v. State of Vindhya Pradesh[AIR 1954 SC 322 : 1954 Cri LJ 910] , State of U.P. v. Singhara Singh [AIR 1964 SC 358 : (1964) 1 Cri LJ 263 (2)] , Chandra Kishore Jha v. Mahavir Prasad [(1999) 8 SCC 266] , Dhanajaya Reddy v. State of Karnataka [(2001) 4 SCC 9 : 2001 SCC (Cri) 652] and Gujarat Urja Vikas Nigam Ltd. v. Essar Power Ltd. [(2008) 4 SCC 755] The principle stated in the above decisions applies to the cases at hand not because there is any specific procedure that is prescribed by the statute for grant of approval but because if the approval could be granted by anyone in the police hierarchy the provision specifying the authority for grant of such approval might as well not have been enacted."

9. They submit that the FCRA which is a later and consolidating Act, provides for "prosecution", but without any specific "power to arrest" contained therein, unlike many other Special Enactments such as Customs Act, 1962, Central Excise Act, 1944, PMLA 1999, Railway Property (Unlawful Possession) Act, 1966 and Prevention of Food Adulteration Act, 1954.

10. Further, according to learned counsel for the petitioners as the offences under FCRA are punishable under either of the two alternate punishments stipulated and separated with a disjunctive "OR" i.e. *"if*

punishable with imprisonment for less than 3 years "OR" if punishable with fine only", they are necessarily "non-cognizable" in accordance with the said two alternatives contained in the last entry of Part II of the First Schedule to Cr.P.C. They submit that irrespective of the alternative maximum term of imprisonment, each of the alleged offences under FCRA are covered by the term *"or punishable with fine only"*. They emphasise that as Section 41 of FCRA provides for composition/compounding of all the offences under FCRA, the said offences under FCRA are compoundable. Furthermore, Section 41 of FCRA is a unique provision as it allows compounding before initiating prosecution.

11. They submit that Section 43 of FCRA being an enabling provision permitting exercise of the same powers in respect of the investigation in FCRA as an officer in-charge of a police station may exercise in a cognizable offence, would not make the offences under FCRA 'cognizable offences' or give CBI *'through the back door'* the authority to arrest.

12. They lastly submit that FCRA is a special law dealing with a special field and hence general law cannot be applied. They state that Sections 33, 35 and 37 encompass and imbibe the substance and spirit of penal provisions pertaining to cheating, forgery of documents, falsification and fabrication of records, criminal misappropriation and hence, external penal provisions under Sections 199, 468, 471 and 511, IPC cannot be invoked qua FCRA. They emphasise that Section 40 of the FCRA provides for sanction for prosecution of only the offences mentioned under the FCRA which contemplates the procedure of a

complaint case and does not provide for the power of arrest. Hence, according to them, the registration of the FIR by CBI is non-est, unsustainable in the eyes of law and is thus liable to be quashed including all the proceedings emanating from registration of the said FIR.

ARGUMENTS ON BEHALF OF RESPONDENT-UNION OF INDIA

13. *Per* contra, Mr. Amit Mahajan, learned standing counsel for Union of India and Enforcement Directorate submits that the FCRA has been enacted with the avowed purpose of regulating the foreign contribution received from abroad so as to monitor that the same is not used for a purpose other than what has been specified under the said Act. He states that the foreign contribution can potentially be used for terror funding which has a direct bearing on security and sovereignty of the country. He points out, that in some cases, it has been seen that the receipt of foreign contribution vide FCRA has been misused for purposes of money laundering which has a direct bearing on the economic health of the nation. He contends that the potential misuse of such magnitude necessitates regular monitoring and inspection and in some cases, investigation by the notified agency.

14. He submits that Section 14 of FCRA empowers the Central Government to cancel the Certificate of Registration after conducting an enquiry. He contends that the Central Government under Section 23 of FCRA can authorise either a Gazetted Officer or any other officer or authority or organisation to inspect any account or record maintained by such persons or association, as the case may be, provided the Central Government has any reason to suspect, which is to be recorded in writing.

He admits that a show cause notice and an opportunity of hearing has to be given to the concerned person prior to the satisfaction being reached under Section 14 of the FCRA. According to him, Sections 24, 25 and 27 of FCRA define the manner and procedure in which such inspection is to be carried out as well as the power given to the Inspecting Officer. He states that on a report being furnished by such authorised officer to the Central Government, the action under Section 14 of FCRA, i.e., for cancellation of registration certificate can be taken. He further states that any person aggrieved by the action taken by the Central Government under Section 14 of FCRA can file a revision petition under Section 32 of FCRA.

15. He points out that the petitioner-M/s. Advantage India in the present cases has preferred a revision petition challenging the order of cancellation of registration passed by the Central Government under Section 14 of FCRA.

16. Learned standing counsel for Union of India further states that Chapter VIII of FCRA defines offences and penalties which are in addition to the action Central Government may take under Section 14 of the FCRA. In support of his submission, he relies upon Sections 33, 34, 35 36, 37 and 38 of FCRA. He submits that the notified investigative agency does not require a separate sanction under Section 40 of the FCRA for the purpose of investigation, as suggested by the petitioners. He, however, admits that Section 40 of FCRA provides that no court shall take cognizance of any offence under the FCRA, except with the prior sanction of the Central Government or any other officer authorised by the Central Government. He points out that vide Notification dated 27th October,

2011, the Central Government, in exercise of powers under Section 40 of FCRA, has already notified Union Home Secretary and Home Secretaries of the State Governments, as the case may be, as sanctioning authorities. The said Notification dated 27th October, 2011 is reproduced hereinbelow:-

> *" MINISTRY OF HOME AFFAIRS*
> *NOTIFICATION*
> *New Delhi, the 27th October, 2011*
>
> *S.O. 2445 (E).–**In excise of the powers conferred by Section 40** of the Foreign Contribution (Regulation) Act, 2010 (42 of 2010), **the Central Government hereby authorises the following officers for according previous sanction** as required under the said section, namely:-*
> *(i) **the Union Home Secretary in respect of offences investigated by the Central Bureau of Investigation;***
> *(ii) **the Home Secretary of the State Government concerned, in respect of offences investigated by the Investigating Agencies (Crime Branch)** of the State Governments.*
>
> *[F.No. II/21022/10(1)/2010-FC-III]*
> *GV.V.SARMA, Jt. Secy."*
> (emphasis supplied)

17. Learned standing counsel for Union of India also states that Section 41 of FCRA provides for compounding of certain offences for such sums as the Central Government may by notification specify. He points out that in exercise of powers under Section 41 of FCRA, the Central Government has specified the offences and quantum of penalties vide Notification dated 05th June, 2018.

18. He submits that in accordance with Section 43 of FCRA, the investigation for the purpose of prosecution is to be conducted by such authority as the Central Government may specify and such authority shall have the power of Officer-In-charge of the Police Station while making the investigation into a cognizable offence. He also states that as some of the offences specified in Chapter VIII of FCRA are cognizable offences, an FIR is registered by the stipulated agency for the purpose of investigation. He emphasises that the Central Government vide Notification dated 27th October, 2011 has already notified the CBI for the purpose of investigation where the amount of foreign contribution exceeds Rs. 1 crore and the State Crime Branch, if the amount is less than Rs. 1 crore, as the case may be.

19. Mr. Amit Mahajan emphasises that the scope of inspection by the officer empowered under Section 23 of FCRA and the investigation under Section 43 of FCRA is entirely different since both lead to different conclusions. According to him, while an enquiry under Section 23 leads to cancellation of registration under Section 14 of FCRA, Section 43 leads to criminal action under Section Chapter VIII of the FCRA. He submits that under Section 23 of FCRA, the role assigned to an officer or authority is of civil nature and limited only to carrying out book inspection of accounts/records as required and authorized under Chapter V of the FCRA. He further submits that the officer is authorized under Section 23 of the FCRA with power of search and seizure etc., however, he/she is not authorized to undertake any investigation into commission of offences under the FCRA, particularly when the Central Government vide notification dated 27th October, 2011 has already specified such

authorities.

20. He emphasises that since the very inception of the FCRA and more particularly since the notification dated 27th October, 2011, all the criminal investigations in relation to commission of offences under Chapter VIII of the FCRA have been carried out only by the agencies as notified in the above said notification by registering an appropriate FIR. In support of his contention, Mr. Mahajan, during the course of arguments had handed over an additional affidavit dated 08th August, 2019. Consequently, learned standing counsel for Union of India and Enforcement Directorate submits that from the scheme of FCRA it is apparent that no part of it is vague and arbitrary and powers of different authorities are clearly defined.

21. Mr. Amit Mahajan submits that the submission that the FIR bearing No. RC 36/2017 could not have been registered as it amounts to a second FIR with regard to the same transaction, is not a ground taken in the writ petitions. In any event, he states that such a submission cannot be a ground for challenging the vires of the provisions of FCRA as the same is an argument on merits, which will have to be dealt with by the Court of appropriate jurisdiction at the relevant stage.

22. In the alternative, he submits that the argument advanced by the Petitioners that there was already an FIR registered with regard to the same transaction, is not true inasmuch as the earlier RC 9/2013 and ECIR 10/2017 pertain to undue pecuniary advantage being given to Airbus Industry by public servants in abuse of their official position and the corresponding loss caused to Government of India, whereas, the impugned RC 36/2017 pertains to violation of FCRA provisions and as a

consequence of other offences being committed under IPC. Consequently, according to him, the two RCs have been registered for different offences with different scopes.

23. Learned standing counsel for Union of India and Enforcement Directorate lastly submits that the offence under FCRA and Section 468 IPC is distinct as the FCRA provision pertains to mis-utilisation of foreign contribution and false information, whereas Section 468 of IPC relates to forging of documents to make them appear genuine.

ARGUMENTS ON BEHALF OF RESPONDENT-CBI

24. Mr. Anil Grover, learned Special Public Prosecutor for CBI states that the CBI is constituted under and governed by the provisions of the Delhi Special Police Establishment Act, 1946 (hereinafter referred to as "DSPE Act"). He further states that as per Section 3 of DSPE Act, the Central Government may notify in Official Gazette, offences or classes of offences which are to be investigated by CBI. Section 3 of DSPE Act is reproduced hereinbelow:-

> *"**3. Offences to be investigated by special police establishment.** The Central Government may, by notification in the Official Gazette, specify the offences or classes of offences which are to be investigated by the Delhi Special Police Establishment."*

25. He states that there is no dispute regarding carrying out investigation of offences committed under IPC by the CBI. He reiterates that as far as investigation under FCRA is concerned, the Central Government vide Notification dated 27th October, 2011 has authorised CBI to carry out investigation of offences committed under FCRA involving receipt of foreign contribution of an amount of Rs. 1 crore or

equivalent or more.

26. He emphasises that there is no duplicity of actions taken under Chapter V, VI and Section 43 of FCRA as offences punishable under the said Act as mentioned in Chapter VIII, can only be investigated by the authorities specified under Section 43 of FCRA. He states that perusal of Section 43 of FCRA shows that the offences under the Act have to be investigated as cognizable offence irrespective of anything contained in Code of Criminal Procedure.

27. He also points out that the Central Government by Notifications dated 26th August, 2011 and 16th June, 2016 has notified the offences under the FCRA that can be compounded on payment and in view of the said Notifications, offences under Sections 33, 35 and 37 of FCRA cannot be compounded in terms of Section 41 of FCRA.

REJOINDER ARGUMENTS

28. In rejoinder, Mr. N. Hariharan, learned senior counsel for petitioners reiterates that a *'pick and choose'* policy for referring cases to CBI has been arbitrarily resorted to under Section 43 of FCRA. He points out that out of 13,000 (Thirteen Thousand) NGOs whose licences had been cancelled under FCRA, only 4 (Four) cases have been referred to CBI for investigation. According to him, all the 13,000 (Thirteen Thousand) NGOs had violated Section 37 of FCRA and if the respondents' submissions were to be accepted, then FIR should have been filed by the CBI against all the 13,000 (Thirteen Thousand) NGO's. Mr. N. Hariharan also relies upon a judgment of the Supreme Court in ***Bhuwalka Steel Industries Ltd. vs. Bombay Iron and Steel Labour***

Board & Anr., (2010) 2 SCC 273 wherein it has been held as under:-

> *"76. The argument is clearly erroneous for the simple reason that it is not the task of the State Government, more particularly, the executive branch to interpret the law; that is the task of the courts. Even if the State Government understood the Act in a particular manner, that cannot be a true and correct interpretation unless it is so held by the courts. Therefore, how the State Government officials understood the Act, is really irrelevant."*

SUR-REJOINDER

29. In sur-rejoinder, Mr. Amit Mahajan, learned standing counsel for Union of India and Enforcement Directorate submits that the allegation that a *'pick and choose'* policy had been adopted by the respondents for referring investigation to CBI/Crime Branch is unfounded. He contends that the respondents refer only such cases for investigation under Section 43 of FCRA wherein serious offences like forgery, mis-appropriation or mis-utilisation of foreign contribution have been committed. He points out that every registered NGO has to ensure multiple compliances under the FCRA and most of them are procedural in nature. He states that a large majority of 13,000 (Thirteen Thousand) NGOs/Associations whose certificates of registration had been cancelled are those that had not filed their mandatory annual returns. He points out that such an offence is compoundable under Section 41 of FCRA since June, 2016.

30. Mr. Amit Mahajan has also filed a short affidavit dated 22nd August, 2019, in which it has been averred that the petitioner/NGO has committed serious violations and offences under Chapter VIII of FCRA along with offences under the IPC and accordingly, the cases of the petitioners fall in a separate class and were therefore referred to the CBI

for investigation. The relevant paragraphs of the affidavit dated 22nd August, 2019 are reproduced hereinbelow:-

> *"3. It is further submitted that there are multiple compliances that a registered NGO has to ensure under the FCRA, 2010. One of them relates to filing of Annual Returns which are in the nature of self-declaration by the Chief Functionary of the NGO and their Chartered Accountant. A very large majority of thousands of NGOs/associations whose certificates of registration have been cancelled belong to this category, i.e. they have not filed their mandatory Annual Returns. This offence has been notified as compoundable under Section 41 of the FCRA since June, 2016. Similarly, the offence of acceptance of foreign contribution without registration or prior permission of Central Govt. has also been notified as a compoundable offence since August, 2011. On June 5, 2018, Central Govt. notified a comprehensive compounding scheme which deals with compounding of minor violations of civil nature under the FCRA, 2010. Copies of compounding notifications dated 26th August, 2011, 16th June, 2016 and 5th June, 2018 are annexed herewith at Annexure R1, R2 and R3 respectively.*
>
> *4. However, the petitioner's NGO, i.e. M/s Advantage India has committed major violations of the provisions of FCRA, 2010, which lead to serious offences as enumerated under Chapter VIII of the FCRA, 2010 along with offences under various sections of IPC. Such violations have been committed wilfully and cannot be compounded. They call for investigation by the competent authority/Specified Authority to bring the guilty to book.*
>
> *5. It is further submitted that as per the available records, the cases of 32 NGOs have been referred to CBI and of 09 other NGOs to State police for investigation under Section 28 of FCRA, 1976 and Section 43 of FCRA, 2010 under notification dated 27th October, 2011. List of the NGOs whose cases have been referred to specified authorities for investigation are attached herewith at Annexure R-4 and R-5 respectively."*

COURT'S REASONING

THE COURT SHOULD EXERCISE JUDICIAL RESTRAINT WHILE JUDGING THE CONSTITUTIONAL VALIDITY OF THE STATUTE AND IT IS ONLY WHEN THERE IS CLEAR VIOLATION BEYOND REASONABLE DOUBT THAT THE COURT SHOULD DECLARE A PROVISION TO BE UNCONSTITUTIONAL

31. This Court is of the view that the principles for adjudicating the constitutionality of an enactment are well settled. An Act can be declared as unconstitutional only if the petitioner makes out a case that the legislature did not have the legislative competence to pass such an Act or the provisions of the Act violate the fundamental rights guaranteed by Part-III of the Constitution or the impugned provision is in any manner arbitrary, unreasonable or vague. The Supreme Court in ***Namit Sharma vs. Union of India, (2013) 1 SCC 745*** has held as under:-

> *"11. An enacted law may be constitutional or unconstitutional. Traditionally, this Court had provided very limited grounds on which an enacted law could be declared unconstitutional. They were legislative competence, violation of Part III of the Constitution and reasonableness of the law. The first two were definite in their scope and application while the cases falling in the third category remained in a state of uncertainty. With the passage of time, the law developed and the grounds for unconstitutionality also widened. D.D. Basu in Shorter Constitution of India (14th Edn., 2009) has detailed, with reference to various judgments of this Court, the grounds on which the law could be invalidated or could not be invalidated. Reference to them can be made as follows:*
>
> > *"**Grounds of unconstitutionality.— A law may be unconstitutional on a number of grounds**:*

(i) ***Contravention of any fundamental right****, specified in Part III of the Constitution. (Ref. Under Article 143: Special Reference No. 1 of 1964, In re.)*

(ii) ***Legislating on a subject which is not assigned to the relevant legislature*** *by the distribution of powers made by the Seventh Schedule, read with the connected articles. (Ref. Special Reference No. 1 of 1964, In re [AIR 1965 SC 745 : (1965) 1 SCR 413] .)*

(iii) ***Contravention of any of the mandatory provisions of the Constitution*** *which impose limitations upon the powers of a legislature e.g. Article 301. (Ref. Atiabari Tea Co. Ltd. v. State of Assam.)*

(iv) ***In the case of a State law, it will be invalid insofar as it seeks to operate beyond the boundaries of the State****. (State of Bombay v. R.M.D. Chamarbaugwala.)*

(v) ***That the legislature concerned has abdicated its essential legislative function as assigned to it by the Constitution*** *or has made an excessive delegation of that power to some other body. (Hamdard Dawakhana v. Union of India.")*

(emphasis supplied)

32. However, it is to be kept in mind that there is always a presumption in favour of constitutionality of an enactment and the burden to show that there has been a clear transgression of constitutional principles is upon the person who attacks such an enactment. Also, whenever constitutionality of a provision is challenged on the ground that it infringes a fundamental right, the direct and inevitable effect/consequence of the legislation has to be taken into account. The Supreme Court in ***Namit Sharma vs. Union of India,*** (supra) has also held as under:-

20. Dealing with the matter of closure of slaughterhouses in Hinsa Virodhak Sangh v. Mirzapur Moti Kuresh Jamat [(2008) 5 SCC 33] , the Court while noticing its earlier judgment Govt. of A.P. v. P. Laxmi Devi [(2008) 4 SCC 720] , introduced a rule for exercise of such jurisdiction by the courts stating that ***the court should exercise judicial restraint while judging the constitutional validity of the statute or even that of a delegated legislation and it is only when there is clear violation of a constitutional provision beyond reasonable doubt that the court should declare a provision to be unconstitutional****....."*

(emphasis supplied)

33. It is equally well settled principle of law that laws are not to be declared unconstitutional on the fanciful theory that power would be exercised in an unrealistic fashion or in a vacuum or on the ground that there is a remote possibility of abuse of power. In fact, it must be presumed, unless the contrary is proved, that administration and application of a particular law would be done *"not with an evil eye and unequal hand"*. The Supreme Court in ***Maganlal Chhagganlal (P) Ltd. Vs. Municipal Corporation of Greater Bombay & Ors., (1975) 1 SCR 1*** has held as under:-

"The statute itself in the two classes of cases before us clearly lays down the purpose behind them, that is that premises belonging to the Corporation and the Government should be subject to speedy procedure in the matter of evicting unauthorized persons occupying them. This is a sufficient guidance for the authorities on whom the power has been conferred. With such an indication clearly given in the statutes one expects the officers concerned to avail themselves of the procedures prescribed by the Acts and not resort to the dilatory procedure of the ordinary civil court. Even normally one cannot imagine an officer having the choice of two

procedures, one which enables him to get possession of the property quickly and the other which would be a prolonged one, to resort to the latter. ***Administrative officers, no less than the courts, do not function in a vacuum. It would be extremely unreal to hold that an administrative officer would in taking proceedings for eviction of unauthorised occupants of Government property or Municipal property resort to the procedure prescribed by the two Acts in one case and to the ordinary civil court in the other. The provisions of these two Acts cannot be struck down on the fanciful theory that power would be exercised in such an unrealistic fashion. In considering whether the officers would be discriminating between one set of persons and another, one has got to take into account normal human behaviour and not behaviour which is abnormal. It is not every fancied possibility of discrimination but the real risk of discrimination that we must take into account. This is not one of those cases where discrimination is writ large on the face of the statute. Discrimination may be possible but is very improbable.*** *And if there is discrimination in actual practice this Court is not powerless. Furthermore, the fact that the Legislature considered that the ordinary procedure is insufficient or ineffective in evicting unauthorised occupants of Government and Corporation property and provided a special speedy procedure therefore is a clear guidance for the authorities charged with the duty of evicting unauthorised occupants. We, therefore, find ourselves unable to agree with the majority in the Northern India Caterers case."*

(emphasis supplied)

BY VIRTUE OF ESTABLISHED PRACTICE/CONVENTION AND NOTIFICATION DATED 27TH OCTOBER, 2011 INVESTIGATION OF OFFENCES UNDER CHAPTER VIII OF FCRA IS CARRIED OUT EITHER BY CBI OR CRIME BRANCH OFFICIALS EXCLUSIVELY DEPENDING UPON THE PECUNIARY VALUE OF ALLEGED VIOLATION AND NOT BY AN OFFICER AUTHORISED BY THE CENTRAL GOVERNMENT UNDER SECTION 23 OF FCRA. THIS CONSISTENT PRACTICE, PRINCIPLE AND/OR POLICY IN THE

MATTER OF APPOINTMENT/SELECTION OF AN INVESTIGATIVE AGENCY UNDER SECTION 43 OF FCRA SAVES IT FROM ATTACK ON THE GROUND THAT IT VIOLATES ARTICLES 14 AND 21 OF THE CONSTITUTION.

34. As regards investigation of offences under FCRA is concerned, this Court is of the opinion that there is no possibility of any *'pick and choose'* of investigative agency or parallel investigation or re-investigation as from the additional affidavit dated 08th August, 2019 filed by Union of India, it is apparent that by virtue of established practice/convention/principle and notification dated 27th October, 2011 investigation of offences under Chapter VIII of FCRA is carried out either by CBI or crime branch officials exclusively depending upon the pecuniary value of alleged violation and not by an officer authorised by the Central Government under Section 23 of FCRA. The relevant portion of the notification dated 27th October, 2011 and said additional affidavit are reproduced hereinbelow:-

A. Notification dated 27th October, 2011

"MINISTRY OF HOME AFFAIRS
NOTIFICATION
New Delhi, the 27th October, 2011

*S.O. 2446 (E).–**In exercise of the powers conferred by Section 43 of the Foreign Contribution** (Regulation) **Act, 2010 (42 of 2010), the Central Government hereby specifies that** the officers not below the rank of **Sub-Inspector of Police of the following organisations shall be the authorities for investigation of offences punishable under the said Act:-***

***(i) Investigating Agencies (Crime Branch) of the State Governments**, cause of action which arises in their respective States in respect of the offences that*

involve a prima facie violation of the provisions of the Foreign Contribution (Regulation) Act, 2010 (42 of 2010) ***with regard to receipt of foreign contribution of an amount of less than one crore rupees or equivalent;***

(ii) Central Bureau of Investigation (CBI) with regard to offences that involve a prima facie violations of the Foreign Contribution (Regulation) Act, 2010 (42 of 2010) involving receipt of foreign contribution of an amount of one crore rupees or equivalent or above and in any other case which may be specifically entrusted to the CBI by the Central Government under the said Act.

[F.No. II/21022/10(1)/2010-FC-III]
GV.V.SARMA, Jt. Secy."

B. <u>Additional Affidavit on behalf of UOI dated 08th August, 2019</u>

"2. ***It is humbly submitted that the ambit and scope of sections 23 and 43 of The Foreign Contribution (Regulation) Act, 2010 (hereto referred as "FCRA") are entirely different and lead to separate conclusions.*** *Under Section 23 of FCRA, 2010, the role assigned to officer or authority is of civil nature and limited only to carrying out book inspection of accounts/records as required and authorized under Chapter V of the FCRA. It is further submitted that the officer is authorized under Section 23 of the FCRA with power of search and seizure etc, however, he/she is not authorized to undertake any investigation into commission of offences under the Act, particularly when the Central Government vide notification dated 27th October, 2011 has already specified such authorities.*

3. It is humbly submitted that inquiry/inspection under section 23 generally leads to action under Sections 13 & 14 of the Act, whereas, investigation under Section 43 of the Act leads to criminal action only under Chapter VIII of the Act.

4. It is humbly submitted that ***since the very inception of the Act and more particularly since the notification dated 27-***

10-2011, all the criminal investigation in relation to commission of offences under the Chapter VIII of the FCR Act, 2010 have been carried out only by the agencies as notified in the above said notification *by registering an appropriate FIR."*

(emphasis supplied)

35. In view of the aforesaid, this Court is of the opinion that there is a principle and/or policy for guidance of exercise of discretion by the Government in the matter of selection of an investigative agency and there is no arbitrary, vague and uncontrolled power with the Government so as to enable it to discriminate between persons or things similarly situated. Accordingly, this Court is of the view that Petitioner's reliance upon ***State of Punjab vs. Khan Chand*** (supra) is misconceived.

36. Also as the Notification dated 27th October, 2011 is neither an interpretation nor an understanding of Section 43 of FCRA but a convention/practice/policy to be followed by the Union of India while implementing Section 43, this Court is of the view that judgment of the Apex Court ***Bhuwalka Steel Industries Ltd. vs. Bombay Iron and Steel Labour Board & Anr.*** (supra) is inapplicable to the present case.

37. Consequently, the Notification dated 27th October, 2011 as well as the consistent practice followed by the Central Government lay down a principle and/or policy in the matter of appointment/selection of an investigative agency under Section 43 of FCRA and saves it from attack on the ground that it violates Articles 14 and 21 of the Constitution.

NEGATIVE EQUALITY IS NOT A VALID LEGAL GROUND

38. Just because out of thirteen thousand NGOs, whose licences had been cancelled under FCRA, only thirty two had been referred to CBI for

investigation, this Court is of the view that the petitioner cannot claim negative equality and that too without disclosing the nature of violations by the thirteen thousand NGOs.

39. In a catena of judgments, it has been held that negative equality is not a valid legal ground. In ***Union of India and Others vs. M.K. Sarkar, (2010) 2 SCC 59***, the Supreme Court has held as under:-

> *"25. There is another angle to the issue.* ***If someone has been wrongly extended a benefit, that cannot be cited as a precedent for claiming similar benefit by others. This Court in a series of decisions has held that guarantee of equality before law under Article 14 is a positive concept and cannot be enforced in a negative manner; and that if any illegality or irregularity is committed in favour of any individual or group of individuals, others cannot invoke the jurisdiction of courts for perpetuating the same irregularity or illegality in their favour also on the reasoning that they have been denied the benefits which have been illegally extended to others.*** *(See Chandigarh Admn. v. Jagjit Singh, Gursharan Singh v. NDMC, Faridabad CT Scan Centre v. D.G. Health Services, State of Haryana v. Ram Kumar Mann, State of Bihar v. Kameshwar Prasad Singh and Union of India v. International Trading Co.).*
>
> *26. A claim on the basis of guarantee of equality, by reference to someone similarly placed, is permissible only when the person similarly placed has been lawfully granted a relief and the person claiming relief is also lawfully entitled for the same. On the other hand, where a benefit was illegally or irregularly extended to someone else, a person who is not extended a similar illegal benefit cannot approach a court for extension of a similar illegal benefit. If such a request is accepted, it would amount to perpetuating the irregularity.* ***When a person is refused a benefit to which he is not entitled, he cannot approach the court and claim that benefit on the ground that someone else has been illegally extended such benefit. If he wants, he can challenge the benefit illegally granted to others. The fact that someone***

who may not be entitled to the relief has been given relief illegally, is not a ground to grant relief to a person who is not entitled to the relief.

(emphasis supplied)

BOTH THE LETTERS UNDER SECTIONS 23 AND 43 WERE ISSUED BY THE SAME AUTHORITY i.e. GOVERNMENT OF INDIA, MINISTRY OF HOME AFFAIRS, FCRA WING, DIRECTOR (FC & MU). CONSEQUENTLY, A DELEGATEE HAD NOT SUB-DELEGATED THE INVESTIGATION TO CBI IN THE PRESENT CASES.

40. In the present batch of cases, the matter had been referred to the CBI by the Central Government itself and not by the officer authorised by the Central Government to carry out inspection under Section 23 of FCRA. Perusal of the Authorisation letter dated 07th February 2017 issued by the Ministry of Home Affairs, FCRA Wing, signed by Director (FC & MU), shows that Ms. Anjana, Under Secretary (MU), FCRA, MHA had been appointed under Section 23 FCRA to inspect accounts and records of the petitioner association i.e. M/s Advantage India. The letter specifically states that the said officer shall exercise powers under Sections 23 to 26 and 42 of FCRA only while carrying out the inspection. The relevant portion of the authorisation letter dated 07th February, 2017 issued under Section 23 of FCRA is reproduced hereinbelow:-

*"**GOVERNMENT OF INDIA/BHARAT SARKAR***
MINISTRY OF HOME AFFAIRS/GRIH MANTRALAYA
FOREIGNERS DIVISIN/VIDESHI VIBHAG (FCRA WING)

.....

Dated 07 Feb'2017

AUTHORISATION UNDER SECTION 23 OF THE FOREIGN CONTRIBUTION (REGULATION) ACT, 2010.

XXXXXX

Now, the Central Government, by virtue of the powers conferred under Section 23 of the FCRA, 2010 authroize Ms. Anjana, Under Secretary (MU), FCRA, MHA,.....inspect account or record maintained by the said association......

The authorized officers shall exercise powers conferred on them under Section 23 to 26 and 42 of the FCRA, 2010 while carrying out the inspection of the accounts/records of the said association.

Sd/-
(Anuj Sharma)
Director (FC&MU)"
(emphasis supplied)

41. The letter dated 04th August 2017, issued by the Ministry of Home Affairs, FCRA Wing, signed by the Director (FC & MU), states that the inquiry conducted by the Ministry had prima facie revealed that the petitioner association i.e. M/s Advantage India had violated various provisions of FCRA and it was suggested to be a fit case for detailed investigation and criminal prosecution under Section 43 FCRA by CBI, *'if found fit'*. Accordingly, both the letters under Sections 23 and 43 were issued by the same authority i.e. Government of India, Ministry of Home Affairs, FCRA Wing, Director (FC & MU). Consequently, this Court is of the view that the judgment in ***Hussein Ghadially Alias M.H.G.A. Shaikh & Ors. Vs. State of Gujarat*** (supra) relied upon by the Petitioners does not apply to the present cases as the statutory provisions were followed and the inspecting officer as well as investigating authority, both were appointed by the Government of India and '*a delegatee had not sub-delegated the investigation to CBI*' in the present cases.

THE OFFICER AUTHORISED TO CARRY OUT INSPECTION OF RECORDS AND ACCOUNTS UNDER SECTION 23 OF FCRA IN THE PRESENT CASES WAS AUTHORISED AND HAD CARRIED OUT INSPECTION AND ENQUIRY ONLY UNDER CHAPTER V OF FCRA.

42. Further by virtue of authorisation letter dated 07th February, 2017 issued under Section 23 of FCRA, the officer appointed in the present cases had been authorised to exercise power under Sections 23 to 26 and 42 of FCRA only. No power to investigate offences under Section 43 had been conferred upon the said officer.

43. Just because the inspecting authority has been empowered to seize the account or record and produce the same before the Court, does not mean that it has to mandatorily carry out investigation under Section 43 of FCRA also.

44. Additionally, the proceedings under Chapter V of FCRA cannot be termed as "investigation" as the provisions under the said Chapter pertain to inspection and seizure of accounts/records only. Under Chapter V of FCRA, no procedure for filing of a complaint/charge-sheet has been mentioned.

45. There is also nothing to suggest either in the FCRA or in the letter dated 7th February, 2017 that investigation under Chapter VIII of FCRA had to be carried out by the Inquiry Officer.

46. Even in the letter dated 04th August, 2017 while referring the matter for investigation to CBI, the Ministry of Home Affairs had opined that its inquiry had '*prima facie'* and not '*conclusively*' revealed violation of various provisions of FCRA.

47. In view of the aforesaid, since the officer authorized under Section 23 FCRA did not have any power to investigate offences under Chapter VIII, the judgment in ***Directorate of Enforcement vs. Deepak Mahajan & Anr.*** (supra) does not apply to the present cases.

48. Consequently, the officer authorised to carry out inspection of records and accounts under Section 23 of FCRA in the present cases was authorised and had carried out inspection and enquiry only under Chapter V of FCRA.

TO CONTEND THAT WHOSOEVER IS AUTHORIZED TO INSPECT IS VESTED WITH COMPLETE POWER TO INVESTIGATE IS NOT CORRECT. INVESTIGATION UNDER CHAPTER VIII CAN BE TRANSFERRED TO THE SPECIALISED AGENCIES LIKE CBI 'MIDSTREAM'.

49. To contend that whosoever is authorized to inspect is vested with complete power to investigate under Chapter VIII of FCRA is not correct. Though there is no statutory prohibition that inquiry and investigation cannot be carried out by the same authority, yet it is known to law that inquiry and investigation can be carried out by different authorities. At times inquiry report giving prima facie findings leads to subsequent criminal investigation by police or specialised agencies. For instance, departmental inquiry report concluding that an officer has committed malfeasance or violations to benefit himself personally can lead to subsequent criminal investigation and prosecution by the police. Similarly a sexual harassment committee report can lead to subsequent investigation by police into allegation of rape or outraging modesty of a woman.

50. Even under FCRA for instance, it is possible that an inspection ordered by Central Government may reveal that foreign funds received by an organisation certified by the Central Government had been used to fund terror activities in the country and in such circumstances, no one can say that investigation under Chapter VIII offences as well as IPC and other terror acts cannot be transferred to specialised agencies like CBI '*midstream*'. In fact, the officer appointed by the Central Government under Section 23 of FCRA would neither have the wherewithal nor the expertise to carry out such an investigation.

51. Consequently, to submit that once the Central Government has chosen the route of empowering and authorising a particular officer/authority to conduct inquiry under Sections 23 to 26 and 42 of the FCRA, then it is only that authority which can investigate and file a criminal complaint, if so warranted, is untenable in law.

THE ARGUMENT THAT THE POWER OF ARREST HAS BEEN GIVEN TO OFFICERS UNDER CUSTOMS ACT, CENTRAL EXCISE ACT, PMLA ETC. AND NOT UNDER FCRA IS FALLACIOUS AS IN CUSTOMS ACT, CENTRAL EXCISE ACT, PMLA ACTS, THE POWER IS GIVEN TO THE OFFICER CONDUCTING INVESTIGATION IN THE SAID ACTS WHO IS NOT A POLICE OFFICER. IN THE PRESENT CASES, THE POWER TO INVESTIGATE HAS BEEN GIVEN TO THE CBI WHICH HAS ALL THE POWERS LIKE AN OFFICER IN CHARGE OF A POLICE STATION HAS WHILE MAKING AN INVESTIGATION INTO A COGNIZABLE OFFENCE.

52. The argument that the power of arrest has been given to officers under Customs Act, Central Excise Act, PMLA etc. and not under FCRA is fallacious as in Customs Act, Central Excise Act, PMLA Acts, the power is given to the officer conducting investigation in the said Acts who

is not a police officer. In the present cases, the power to investigate has been given to the CBI which has all the powers which an officer in charge of a police station has while making an investigation into a cognizable offence. This Court has no doubt that the investigative agency and the Trial Courts shall keep in mind the maxim that *'bail is the rule and jail is an exception'*.

53. In any event, absence of power to arrest, if any, cannot be a ground either for seeking declaration that Section 43 of FCRA is ultra vires or for quashing of the impugned FIR.

IN THE PRESENT CASES, ALL THE OFFENCES WHICH ARE MENTIONED IN THE RC 36/2017 ARE NOT NON-COGNIZABLE BY VIRTUE OF PART-II OF FIRST SCHEDULE OF CR.P.C. FURTHER NOT ALL OFFENCES PUNISHABLE WITH IMPRISONMENT OR WITH FINE ARE NON-COGNIZABLE. MOREOVER, AS THE CASE RELATES TO TWO OR MORE OFFENCES OF WHICH AT LEAST ONE IS COGNIZABLE, THE CASE BY VIRTUE OF SECTION 155 (4) CR.P.C. SHALL BE DEEMED TO BE A COGNIZABLE CASE NOTWITHSTANDING THAT THE OTHER OFFENCES ARE NON-COGNIZABLE.

54. In the present cases, all the offences which are mentioned in the RC 36/2017 are not non-cognizable by virtue of Part-II of First Schedule of Cr.P.C, as contended by the learned counsel for the petitioners, because as per Schedule II of Cr.P.C., if any offence is punishable with imprisonment for less than three years or with fine, then only it shall be classified as non-cognizable. In the present cases, the impugned RC 36/2017 had been registered even under Section 35 of FCRA which provides for imprisonment upto five years or fine or both. Part-II of First Schedule of Cr.P.C is reproduced hereinbelow:-

II-CLASSIFICATION OF OFFENCES AGAINST OTHER LAWS

Offence	*Cognizable or non-cognizable*	*Bailable or non-bailable*	*By what court triable*
1	*2*	*3*	*4*
If punishable with death, imprisonment for life, or imprisonment for more than 7 years.	*Cognizable*	*Non-bailable*	*Court of Session.*
If punishable with imprisonment for 3 years and upward but not more than 7 years	*Cognizable*	*Non-bailable*	*Magistrate of the first class.*
If punishable with imprisonment for less than 3 years or with fine only.	***Non-cognizable***	***Bailable***	***Any Magistrate.***

55. Further not all offences punishable with imprisonment or with fine or both are non-cognizable. For instance, Section 429 IPC which prescribes imprisonment for five years or fine or both is cognizable. The definition of cognizable offence given under Section 2(c) of Cr.P.C. reads as under:-

> ***"2. Definitions.*** *In this Code, unless the context otherwise requires,-*
>
> *xxx xxx xxx*
>
> *(c)* ***"cognizable offence" means an offence for which, and "cognizable case" means a case in which, a police officer may, in 812 accordance with the First Schedule or under any other law for the time being in force, arrest without warrant****;"*

56. The impugned RC 36/2017 has been registered by CBI for offences not only under FCRA, but also under various sections of IPC like Section 468 IPC which is both cognizable and non-bailable. Consequently, as the case relates to two or more offences of which at least one is cognizable, the case by virtue of Section 155 (4) Cr.P.C. shall be deemed to be a

cognizable case notwithstanding that the other offences are non-cognizable. Section 155 (4) Cr.P.C. reads as under:-

> ***"155. Information as to non- cognizable cases and investigation of such cases.***
>
> *xxx* *xxx* *xxx*
>
> *(4)* ***Where a case relates to two or more offences of which at least one is cognizable, the case shall be deemed to be a cognizable case, notwithstanding that the other offences are non- cognizable****."*
>
> (emphasis supplied)

57. In any event, as this Court is of the opinion that Section 43 of FCRA is constitutionally valid, the offences punishable under FCRA will have to be investigated as cognizable offences irrespective of anything contained in the Cr.P.C.

OFFENCES MENTIONED IN FCRA ESSENTIALLY RELATE TO MIS-UTILISATION OF THE FOREIGN CONTRIBUTION AND GIVING FALSE INFORMATION, WHEREAS THE OFFENCES IN IPC LIKE SECTION 468 RELATE TO FORGING OF THE DOCUMENTS FOR PURPOSE OF CHEATING. CONSEQUENTLY, IPC OFFENCES ARE NOT SUBSUMED IN OFFENCES UNDER FCRA. IN ANY EVENT, THIS CANNOT BE A GROUND TO CHALLENGE CONSTITUTIONAL VALIDITY OF THE PROVISIONS OF FCRA.

58. The argument of the petitioners that Sections 33, 35 and 37 of FCRA encompass and imbibe the substance and spirit of penal provisions and hence, external penal provisions like Sections 199, 468, 471 and 511 IPC cannot be invoked is untenable in law. This Court is of the view that offences mentioned in FCRA essentially relate to mis-utilisation of the Foreign Contribution and giving false information, whereas the offences in IPC like Section 468 relate to forging of the documents for purpose of

cheating. Consequently, IPC offences are not subsumed in offences under FCRA.

59. Even if it is assumed that some of the IPC offences mentioned in the FIR overlap with the offences under FCRA, yet the same will not render the registration of the impugned FIR illegal. In any event, the said plea will have to be decided after the investigation is over and that too by the appropriate court. Further, this cannot be a ground to challenge the constitutional validity of the provisions of FCRA.

RC 9/2013 AND RC 36/2017 RELATE TO DIFFERENT OFFENCES AND ARE ENTIRELY DIFFERENT IN SCOPE AS THE PRIMARY ALLEGATION IN RC 9/2013 AND ECIR 10/2017 IS THAT THE CONCESSIONS OBTAINED BY THE EMPOWERED GROUP OF MINISTERS (FOR SHORT 'EGOM') REGARDING SETTING UP OF TRAINING CENTRE FOR US$ 75 MILLION AND CREATION OF MAINTENANCE, REPAIR AND OVERALL FACILITY (FOR SHORT 'MRO') FOR US$ 100 MILLION WERE DELIBERATELY NOT MADE PART OF THE FINAL AGREEMENT SIGNED BY INDIAN AIRLINES WITH AIRBUS INDUSTRIES, WHEREAS THE IMPUGNED RC 36/2017 RELATES TO VIOLATION OF FCRA PROVISIONS AS WELL AS THE OFFENCES COMMITTED UNDER IPC IN THE PROCESS OF COMMITTING VIOLATIONS UNDER FCRA BY THE PETITIONERS. CONSEQUENTLY, THE TWO FIRS CANNOT BE TERMED AS FIRS IN THE COURSE OF THE 'SAME TRANSACTION'.

60. Upon perusal of RC 9/2013, ECIR 10/2017 and RC 36/2017, this Court is of the opinion that while RC 9/2013 and ECIR 10/2017 have been registered in relation to undue pecuniary advantage given to Airbus Industry which has caused corresponding loss to the Government, impugned RC 36/2017 relates to violation of FCRA provisions as well as the offences committed under IPC in the process of committing violations

under FCRA by the petitioners. In fact, the primary allegation in RC 9/2013 and ECIR 10/2017 is that the concessions obtained by the Empowered Group of Ministers (for short 'EGOM') regarding setting up of training centre for US$ 75 million and creation of Maintenance, Repair and Overall facility (for short 'MRO') for US$ 100 million were deliberately not made part of the final agreement signed by Indian Airlines with Airbus Industries. Accordingly, RC 36/2017 has nothing to do with pecuniary advantage given to Airbus Industry by the public servants by abusing their official positions. Consequently, this Court is of the view that Petitioner's reliance upon ***Amitbhai Anilchandra Shah vs. The Central Bureau of Investigation & Ors.*** (supra) is wholly misconceived as RC 9/2013 and RC 36/2017 relate to different offences and are entirely different in scope and ambit and they cannot be termed as two FIRs in the course of the *'same transaction'*.

CONCLUSION

61. Keeping in view the aforesaid findings, this Court is of the view that present batch of writ petitions are without any merit. Accordingly, the writ petitions along with all pending applications are dismissed without any order as to costs and all interim orders stand vacated.

MANMOHAN, J

SANGITA DHINGRA SEHGAL, J

AUGUST 23, 2019
rn/js/KA