

**SUMMARY OF CASE LAWS ON FOREIGN CONTRIBUTION (REGULATION)
ACT, 1976**

SUPREME COURT CASE

State Rep. by C.B.I. VS M. Kurian Chief Functionary of the Cross

According to Sec 6(1) (b) and 23 of FCRA

- A** Receipt of contribution and depositing the same in a bank other than the bank indicated in the application form FC-1, would be a violation of the provisions of sec 6(1) (b) itself inasmuch as no association is entitled to accept foreign contribution, unless the association agrees to receive the foreign contribution *only through such one of the branches of the bank, as it may specify in its application for registration.* The violation being a violation of the provisions of sec 6(1) (b) , it would constitute an offence under Sec 23.
- B** Form FC-1 prescribed under Rule 3 for obtaining permission to receive foreign contribution is statutory form - Violation of the terms of form constitutes an offence under Sec 6 and 23.

Facts

The respondent-society, submitted an application in the prescribed form for registration under Section 6 of the Act for receiving foreign contribution. It was indicated therein that the foreign contribution will be received only through the main branch of the State Bank of India, Hyderabad and a separate bank account was opened for the purpose. The society was allotted a registration number by the Central Government in accordance with Section 6(1) (a) of the Act. The said society entered into an agreement with M/s. HEKS, Switzerland and the latter agreed to finance the project of "teaching aid non-formal education". The said M/s. HEKS issued instructions to the Canara Bank, Cantonment Branch, Bangalore, pursuant to which two Bank Drafts were issued amounting to Rs. 2 lacs and Rs. 1.65 lacs, in favor of the respondent-society by the Canara Bank, Bangalore.

The respondent society instead of depositing the same in the main branch of the State Bank of India, Hyderabad, in accordance with the terms of the agreement, deposited the same into the account of Canara Bank, M.G. Road, Secunderabad. It was further alleged that the respondent society even failed to intimate the Central Government about the receipt of the contribution from M/s. HEKS, as required under Section 6(1) (b) of the Act.

The Central Government in exercise of its power under Section 10(b) of the Act, issued a notification, requiring the society to have prior permission of the Government before accepting any contribution. But that notification was quashed by the High Court on a writ petition being filed. The Central Government, thereafter got the accounts of the respondent society inspected by the Assistant Director, appointed under Foreign Contribution (Regulation) Act, in the Ministry of Home Affairs and on the basis of reports submitted by the said Assistant Director, two First Information Reports were lodged against the society. The investigating agency, after inspecting into the allegations, submitted a charge-sheet under Section 6 read with Section 20(3) and it is at that stage, the respondent filed the petition under Section 482 of the Code of Criminal Procedure for quashing of the criminal proceedings.

Decision

A plain reading of Section 23 would make it clear that any receipt of foreign contribution in contravention of the provisions of the Act or Rules thereunder becomes punishable. Section 30 confers power on the Central Government to make Rules for carrying out the provisions of the Act. In exercise of such powers, the Central Government has framed the Rules called the Foreign Contribution (Regulation) Rules, 1976 [hereinafter referred to as 'the Rules']. The expression 'Form' has been defined in Rule 2(b) to mean a form appended to the rules. Rule 3 provides that an application for obtaining prior permission of the Central Government to receive foreign contribution under sub-section (1) of Section 5, or clause (a) of sub-section (2) of that Section, shall be made in Form FC- 1

The aforesaid Form FC-1 at serial No.5, stipulates that the applicant should intimate the

mode/channel of receipt. The form also provides the declaration, which the applicant must declare to the effect that the particulars furnished by the applicant are true and correct. This form must be held to be a statutory form being appended to the Rules and being the form prescribed under Rule 3 for obtaining permission to receive foreign contribution. Reading the aforesaid provisions together and giving a literal meaning to the expressions contained in the aforesaid provisions, the conclusion is irresistible that receipt of contribution and depositing the same in a bank other than the bank indicated in the application form FC-1, would be a violation of the provisions of Section 6(1)(b) itself inasmuch as no association is entitled to accept foreign contribution, unless the association agrees to receive the foreign contribution only through such one of the branches of the bank, as it may specify in its application for registration.

The violation being a violation of the provisions of Section 6(1) (b), it would constitute an offence under Section 23 and, therefore, the High Court, in our opinion, committed serious error in quashing the criminal proceedings on a finding that it does not tantamount to violation of any provisions of the Act. Needless to mention that if associations and political parties would be allowed to receive foreign contribution and would deposit the same in any bank they like notwithstanding their declaration with the Central Government at the time of registration, then the very purpose of conferring power on the Central Government 'to regulate, would be frustrated and all other provisions for inspections and auditing conferring power on the Central Government would be futile.

SUPREME COURT CASE

State Vs Cross, Hyderabad

Citation : 2001 SOL Case No. 213
Decision date : 2001-03-26
(yyyy-mm-dd)

Petitioner : State Rep by C.B.I

Respondent : M. Kurian Chief Functionary of the Cross

Subject : Foreign Contribution (Regulation) Act, 1976 Section 6 (1) (b) and 23-
Receipt of contribution and depositing the same in a bank other than the bank indicated in
the application form FC-1 , would be a violation of the provisions of section 6 (1) (b)
itself as much as no association is entitled to accept foreign contribution , unless the
association agrees to receive the foreign contribution only through such one of the
branches of the bank, as it may specify in its application for registration- The violation
being a violation of the provisions of section 6 (1)(b), it would constitute an offence
under section 23.

Citation: 2001 SOL Case No. 213

Supreme Court of India

Before: - G.B Pattanaik and U.C Banerjee, JJ.

Criminal Appeal Nos. 377- 379 of 2001 (Arising out of SLP (Criminal) Nos. 84-86 of
2001) D/d .26.3. 2001

State Rep. by C.B.I. - Appellants

Versus

M. Kurian Chief Functionary of the Cross- Respondent

For the appellant: - Mr. Altaf Ahmed, Additional Solicitor General, Mr. Syed Naqvi and
Mr. P. Parmashwaram, Advocates.

For the respondents: - Mr. M.P Raju and Mr S.P Sharma, Advocates

- A. Foreign Contribution (Regulation) Act, 1976 Sections 6(1) (b) and 23 Receipt of contribution and depositing the same in a bank other than the bank indicated In the application form FC-1, would be a violation of the provisions of Section 6(1)(b) itself inasmuch as no association is entitled to accept foreign contribution, unless the association agrees to receive "the foreign contribution *only through such one of the branches of the bank, as it may specify in its application for registration* - The violation being a violation of the provisions of Section 6(1)(b), it would constitute an offence under Section 23. [Para 7]**
- B. Foreign Contribution (Regulation) Act, 1976 Sections 6(1)(b) and 23 Foreign Contribution (Regulation) Rules, 1976, Rule 3 - Form FC-I prescribed under Rule 3 for obtaining permission to receive foreign contribution is statutory form - Violation of the terms of form constitutes an offence under Sections 6 and 23. [Para 7]**

JUDGMENT

G.B. Pattanaik, J. - Delay condoned. Leave granted.

2. These appeals by the Central Bureau of Investigation are directed against the judgment dated 27th September, 1999 of a learned Single Judge of Delhi High Court. By the impugned judgment, the High Court in exercise of power under Section 482 of the Code of Criminal Procedure, has come to hold that a breach of the undertaking given by an Association under Section 6(1)(b) of the Foreign Contribution (Regulation) Act, 1976 [hereinafter referred to as 'the Act'] would not amount to contravention of the provisions of the Act within the meaning of Section 23 of the said Act and as such the criminal prosecution that had been launched, would not lie. The High Court having quashed the criminal proceedings, arising out of the two F.I.Rs., the Central Bureau of Investigation is in appeal.
3. The respondent-society, submitted an application in the prescribed form for registration

under Section 6 of the Act for receiving foreign contribution. It was indicated therein that the foreign contribution will be received only through the main branch of the State Bank of India, Hyderabad and a separate bank account was opened for the purpose. The society was allotted a registration number by the Central Government in accordance with Section 6(1) (a) of the Act. The said society 'entered into an agreement with-M /s. HEKS, Switzerland and the latter agreed to finance the project of "teaching aid non-formal education".

The said M/s. HEKS issued instructions to the Canara Bank, Cantonment Branch, Bangalore, pursuant to which two Bank Drafts were issued amounting to Rs. 2 lacs and Rs. 1.65 lacs, in favour of the respondent-society by the Canara Bank, Bangalore. The respondent society instead of depositing the same in the main branch of the State Bank of India, Hyderabad, in accordance with the terms of the agreement, deposited the same into the account of Canara Bank, M.G. Road, Secunderabad.

It was further alleged that the respondent society even failed to intimate the Central Government about the receipt of the contribution from M/s. HEKS, as required under Section 6(1) (b) of the Act. The Central Government in exercise of its power under Section 10(b) of the Act, issued a notification, requiring the society to have prior permission of the Government before accepting any contribution. But that notification was quashed by the High Court on a writ petition being filed.

The Central Government, thereafter got the accounts of the respondent society inspected by the Assistant Director, appointed under Foreign Contribution (Regulation) Act, in the Ministry of Home Affairs and on the basis of reports submitted by the said Assistant Director, two First Information Reports were lodged against the society. The investigating agency, after inspecting into the allegations, submitted a chargesheet under Section 6 read with Section 20(3) and it is at that stage, the respondent filed the petition under Section 482 of the Code of Criminal Procedure for quashing of the criminal proceedings. As stated earlier, the High Court having allowed the petitions and having quashed the criminal proceedings, the Central Bureau of Investigation is in appeal before

this Court.

4. Mr. Altaf Ahmed, the learned Additional Solicitor General, appearing for the appellants contends that a conjoint reading of Section 6(1)(b) and Section 23 of the Act read with Section 3(a) and the prescribed form FC-1, required to be filed, seeking permission of the Central Government for accepting foreign contribution would unequivocally indicate that the contravention and/ or violation of any terms and conditions contained in the very application form, would constitute the contravention of the provisions of the Rules made under the Act and as such would be punishable under Section 23 of the Act and the High Court committed an error in holding that there has been no contravention of the provisions of the Act.

Learned Additional Solicitor General further contended that the Act in question having been enacted to regulate the acceptance and utilization of foreign contribution or foreign hospitality by persons or associations with a view to ensure that parliamentary institutions, political associations and other voluntary organisations may function in a manner consistent with the values of sovereign democratic republic, any contravention of the provisions of the Act or the Rules made thereunder should be strictly construed, and on being so construed, if an applicant indicates the mode or channel of foreign contribution in his application and in violation of the same receives through a different mode or channel, that would constitute an infraction of the relevant provisions of the Rules, on the information given by the persons concerned and such infraction must be held to be punishable under Section 23 of the Act and the same cannot be lightly brushed aside.

5. Dr. M.P. Raju, appearing for the respondent, on the other than contended that Section 23 of the Act makes only the contravention of any provisions of the Act or any Rule made thereunder punishable, and the information provided in form FC-1 and violation thereof, would not constitute a contravention of the provisions of the Act or Rules made thereunder and as such, the High Court rightly quashed the criminal proceedings.

The learned counsel contends that the penal statutes which create offences, must be construed strictly and there is no rhyme or reason for construing the same liberally and thus construed, violation of any particulars given, in the form foreign receipt of the contribution in a particular bank would not constitute a violation of either the provisions of the Act or Rules made thereunder and as such, it would not be an offence within the ambit of Section 23 of the Act.

6. In order to appreciate the correctness of the rival stand, it would be" necessary to examine some of the provisions of the Act and the Rules made thereunder. But before focusing attention on the same, it may be noticed that when "political associations and voluntary organisations as well as individuals working in important areas of national life were found to be in receipt of foreign contribution and foreign hospitality, the Parliament came forward to enact the Act.

The main object was to regulate and keep a control over the acceptance and utilization of foreign contribution. The entire purpose behind the Act was that the recipients of such foreign contribution may not act in a manner inconsistent with the values of the sovereign republic which our founding fathers have given to us.

Without prohibiting the receipt of such foreign contribution, the Act intends to regulate the same and it is for that purpose, it is required that recipient of such contribution must intimate the Central Government within the time and in the manner to be prescribed by the Rules. Since several recipients did not send the intimations, for effectively monitoring the receipt of foreign contribution, Section 6(1) of 1976 Act was amended by Act 1 of 1985, making it obligatory for the associations to get themselves registered with the Central Government and then they could accept the contribution only through a specified branch of a bank. The act enables the Central Government even to inspect the accounts of persons or associations by insertion of Section 15-A. The Act also has inserted Section 25-A even prohibiting acceptance of foreign contribution under certain circumstances.

This indicates the legislative intent and purpose behind the Act and, therefore, the provisions of the Act are required to be construed accordingly. Section 6 of the Act prohibits receipt of foreign contribution by an association unless the association gets itself registered with the Central Government, and agrees to receive contribution only through such one of the branches of a bank, as it may specify in its application for such registration. Section 6(1) of the Act is extracted herein below in extenso:

"Section 6(1): No association [other than an organisation referred to in sub-section (1) of Section 5] having a definite cultural, economic, educational, religious, or social programme shall accept foreign contribution unless such association,

(a) registers itself with the Central Government in accordance with the rules made under this Act; and

(b) agrees to receive such foreign contributions only through such one of the branches of a bank as it may specify in its application for such registration, and every association so registered shall give, within such time and in such manner as may be prescribed, an intimation to the Central Government as to the amount of each foreign contribution received by it, the source from which and the manner in which such foreign contribution was utilised by it:

Provided that where such association obtains any foreign contribution through any branch other than the branch of the bank through which it has agreed to receive foreign contribution or fails to give such intimation within the prescribed time or in the prescribed manner, or gives any intimation which is false, the Central Government may, by notification in the official Gazette, direct that such association shall not, after the date of issue of such notification, accept any foreign contribution without the prior permission of the Central Government."

Section 23 which is the penal provisions provides thus:

"Section 23. Punishment for the contravention of any provision of the Act- (1) Whoever accepts, or assists any person, political party or organisation in accepting, any foreign contribution or any currency from a foreign source, in contravention of any provision of this Act or any rule made thereunder, shall be punished with imprisonment for a term which may extend to five years or with fine or with both.

(2) Whoever accepts any foreign hospitality in contravention of any provision of this Act or any rule made thereunder shall be punished with imprisonment for a term which may extend to three years; or with fine, or with both."

A plain reading of Section 23 would make it clear that any receipt of foreign contribution in contravention of the provisions of the Act or Rules thereunder becomes punishable. Section 30 confers power on the Central Government to make Rules for carrying out the provisions of the Act. In exercise of such powers, the Central Government has framed the Rules called the Foreign Contribution (Regulation) Rules, 1976 [hereinafter referred to as 'the Rules']. The expression 'Form' has been defined in Rule 2(b) to mean a form appended to the rules. Rule 3 provides that an application for obtaining prior permission of the Central Government to receive foreign contribution under sub-section (1) of Section 5, or clause (a) of sub-section (2) of that Section, shall be made in Form FC-1.

The aforesaid Form FC-1 at serial No.5, stipulates that the applicant should intimate the mode/channel of receipt. The form also provides the declaration, which the applicant must declare to the effect that the particulars furnished by the applicant are true and correct. This form must be held to be a statutory form being appended to the Rules and being the form prescribed under Rule 3 for obtaining permission to receive foreign contribution. Reading the aforesaid provisions together and giving a literal meaning to the expressions contained in the aforesaid provisions, the conclusion is irresistible that receipt, of contribution and depositing the same in a bank other than the bank indicated in

the application form FC-1, would be a violation of the provisions of Section 6(1) (b) itself inasmuch as no association is entitled to accept foreign contribution, unless the association agrees to receive the foreign contribution *only through such one of the branches of the bank, as it may specify in its application for registration.*

The violation being a violation of the provisions of Section 6(1) (b), it would constitute an offence under Section 23 and, therefore, the High Court, in our opinion, committed serious error in quashing the criminal proceedings on a finding that it does not tantamount to violation of any provisions of the Act. Needless to mention that if associations and political parties would be allowed to receive foreign contribution and would deposit the same in any bank they like notwithstanding their declaration with the Central Government at the time of registration, then the very purpose of conferring power on the Central Government to regulate, would be frustrated and all other provisions for inspections and auditing conferring power on the Central Government would be futile.

In the aforesaid premises, we have no hesitation to come to the conclusion that the High Court committed serious error by quashing the criminal proceedings in the impugned judgment on an erroneous interpretation of the provisions of the Act and the Rules made thereunder, as stated above and we, accordingly set aside the same. These appeals are allowed. The Magistrate is directed to proceed with the matter expeditiously.

Appeals allowed.

HIGH COURT CASE-SUMMARY

Association of Voluntary Agencies for Rural Development

Vs.

Union of India

Facts:

This appeal is filed by the Association of Voluntary Agencies for, Rural Development (AVARD) under section 21(2) of the Foreign Contribution (Regulation) Act, 1976 against the order dated May 19, 1988, passed by the Ministry of Home Affairs (MHA), Government of India, under section 10(b) of the Act. Through the said impugned order the appellant was directed to obtain prior permission of the Central Government to accept any foreign contribution from the date of the order until further orders. The impugned order is attacked on the ground of non-existence of objective material vitiating the alleged "satisfaction" and breach of the principles of natural justice. No show-cause notice was given to the appellant *before* the order was passed and no reasons were stated in the order although it was alleged that the conduct of the appellant was "prejudicial to the public interest."

The appellant association was working as a voluntary association since 1958. . Between 1979 and 1981 the association received approximately a sum of Rs. 20 lakhs in Indian currency from the Ford Foundation office in India which had obtained prior permission and no-objection certification from the Ministry of Finance, Government of India. In April, 1988, the MHA issued a show-cause notice to the association under section 6 of the Act for alleged violations of the Act. A detailed reply to the same was filed on April 26, 1988. After the receipt of the said reply no action was taken by the Government pursuant to section 6. But, suddenly the impugned order was passed under section 10(b) of the Act on May 19, 1988. .

Decision:

From the scheme of the Act it is clear that where the association is a registered association under section 6 of the Act, it is sufficient for the association to give intimation

in regard to foreign contribution and their utilization. It is not required to obtain prior permission for receipt of foreign contributions. The provision in regard to registration was introduced by the Amending Act of 1985. the appellant-association was already working as a voluntary association since 1953. The appellant- association got itself registered under section 6 of the Act after the said amendment. Section 6 is a self-contained code with its proviso containing sanctions for non-compliance.

Section 10 provides a very drastic power to the Central government to prohibit receipt of foreign contributions, where the actions of an association are likely to prejudicially affect sovereignty and integrity of India or public interest or freedom or fairness of elections to any Legislature or friendly relations with any foreign state or harmony between religious, racial, linguistic or regional groups, castes or communities, the impugned order is purportedly passed under this section.

Admittedly, no show-cause was issued to the appellants before passing an order under section 10 of the Act. It is stated in the counter-affidavit that no notice to show cause is required to be given before action under section 10 is taken. It is also averred that although no notice was required to be given, a notice was, in fact, given to the appellants on April 4, 1988, and their reply was duly considered before the impugned order was passed. It is also asserted in the counter -affidavit that the Act does not require any reasons to be stated in the order passed under section 10(b) of the Act.

It is now a well-settled proposition of law that even if the requirement of natural justice is not laid down in a statute, the court can read the same if the provisions of the statute are likely to have Civil consequences to citizens.

Section 10 is not merely 13 violation or an injury of a civil right, but an adverse predicament or the functioning of any voluntary agency. Any order passed under section 10, therefore, must be passed on objective material and facts disclosed to the concerned association. A show-case notice and an opportunity of explaining alleged objective material must be given to the voluntary association. The final order must disclose that the

"satisfaction" is founded on, objective material and must furnish proper reasons for non-acceptance of the explanation of the association against which the order is to be passed. None of these requirements of ensuring fair play are observed in passing the impugned order.

The impugned order also suffers from the serious lacuna of not stating the reasons for passing the order. Existence of objective material is a pre-condition for proper satisfaction and furnishing of cogent reasons is a sine qua non of application of mind. The assertion in the counter-affidavit that section 10 (b) does not require any reason to be stated is untenable in law and is to be rejected. We have held that the counter-affidavit cannot be looked into for improving upon the impugned order. This would amount to passing of a fresh order based on different grounds. For the reasons stated above, the impugned order is quashed and set aside.

In The High Court of Delhi

R.F.A No. 557 of 1988
Decided on: 21.09.1990

Appellants: **Association of Voluntary Agencies for Rural Development**

Vs.

Respondent : **Union of India**

[MANU/DE/0051/1990]

Hon'ble Judges:

S. B Wad and Usha Mehra, JJ

Counsels:

For Appellant/ Petitioner/Plaintiff: S.C Malik, Senior Malik adv. And Vijay Kishan, Adv

For Respondents/ Defendents: Rajiv Nayyar and Amrita Sanghi, Advs.

Subject: Company

Catch Words

Accounts, Amendment , association, audit, Branch , Citizen , Concern, Disclosure, Donation, Finance, Foreign Exchange, Foreign Security, Illegal , Inspection, Interest, Local Limit, Natural Justice, Notice, Office, Principle Office, Prior permission, Quasi-judicial , Registration, Return, Secretary, Show cause notice, Special Audit

Acts/ Rules/ Orders

Foreign Contribution (Regulation) Act, 1976- Section 6 and 10

Case Note:

Trust and Societies- prior permission- Section 10 (b) of Foreign Contribution (Regulation) Act, 1976 – appeal against order directing appellant to obtain prior permission of Government before accepting any foreign contribution – no false information given by appellants- returns furnished alongwith reply of show cause – audited accounts and progress report being sent to Ford Foundation from time to time- no justification given by Central Government to resort to drastic provision – impugned order illegal.

JUDGEMENT**S.B Wad, J**

1. This appeal is filed by the association of Voluntary Agencies for Rural Development (AVARD) under section 21 (2) of Foreign Contribution (Regulation) Act, 1976 (hereinafter referred to as “the Act”), against the order dated May 19, 1988, passed by the Ministry of Home Affairs, Government of India, under section 10 (b) of the Act. Through the said impugned order of the appellant was directed to obtain prior permission of the Central Government to accept any foreign contribution from the date of the orders until the final orders. The impugned orders is attacked on the ground of non-existence of objective material vitiating the alleged “satisfaction” and breach of the principles of natural justice. No show-cause notice was given to the appellant before the order was

passed and no reasons were stated in order although it was alleged that the conduct of the appellant was “prejudicial to the public interest”

2. The appellant-association was registered as a society under the Societies Registration Act on December 16, 1958. The principle object of the Association is the Welfare of the Rural communities. With this end in view, the association works for the mutual co-operation of the Voluntary agencies. It works as a cleaning house for information on rural welfare and publishes monogram, periodicals, journal etc., for that purpose. It also holds seminars on the welfare of rural population. It carries on other activities for rural development, including preparation of master plan and assistance in its implementation. Smt. Kamla Devi Chattopadhyay was the founder president of the association. Later on, late Shri Jai Prakash Narain was elected as its president and continued as such till 1979.

3. Between 1979 and 1981 the association received approximately a sum of Rs. 20 lakhs in India currency from the Ford Foundation office in India. Before making this contribution the Ford Foundation had obtained a prior permission and no-objection certification from the Ministry of Finance, Government of India. In April, 1988, the Ministry of Home Affairs, Government of India, issued a show cause notice to the association under section 6 of the Act for the alleged violation of the Act. The notice stated that intimation as required by Form 3 prescribed under the rules framed under the Act was not given by the association for contributions received during the year 1980-81. For the year 1982 it was alleged that the audited accounts for Rs. 11, 620 were not furnished. It was also alleged that return in Form FC3 for the period {July 1, 1983 to June 30, 1984, and for the year ending 30, 1986, were not furnished.

4. In reply to the said show-cause notice the appellants filed a detailed reply on April 26, 1988. In the said reply they clarified that the amounts were received as far back as 1979-81. They categorically stated that the amounts were not received in U.S. dollars but were received in Indian currency from the Ford Foundation office in India. The association further stated that since the Ford Foundation had already obtained the permission in writing from the Government of India, their understanding was that no information was

required to be furnished by the association under the Act, they being the second recipients. The first recipients were the Ford Foundation in India. They had further stated that they had furnished the audited accounts and the progress report to the Ford Foundation from time to time ending with April, 1988. The association further stated in its reply that for the period subsequent to 1982 no funds were, received and, therefore, the only return that could have been furnished were "nil" returns. However, along with the reply the association filed all the returns under Form FO for all the years and requested the Government to accept the same. Admittedly, the show-case notice which was issued by the Government in March, 1988, was in terms of section 6 of the Act. After the receipt of the said reply no action was taken by the Government pursuant to section 6.

5. But, suddenly the impugned order was passed under section 10(b) of the Act on May 19, 1988. The order reads:

"Whereas the Association of Voluntary Agencies for Rural Development, 5(F), Institutional Area, Deen Dayal Upadhyaya Marg, New Delhi-110 002, was registered as an association under sub-section (1) of section 6 of the Foreign Contribution (Regulation) Act, 1976 (49 of 1976), vide registration No. I 231650021;

Whereas the Central Government is satisfied that acceptance of foreign contribution by the said Association of Voluntary Agencies for Rural Development, 'New Delhi, is likely to affect prejudicially the public interest;

Now, therefore, in exercise of the powers conferred by clause (b) of section 10 of the Foreign Contribution (Regulation) Act, 1976, the Central Government hereby requires, in public interest, the said Association of Voluntary Agencies for Rural Development, 5(F), Institutional Area, Deen Dayal Upadhyaya Marg, New Delhi-110 002 (including its branches and units), to obtain prior permission of the Central Government to accept any foreign contribution from the date of this order, until further orders.

The said association may make a representation against this order, if it so desires, within thirty days of the receipt of this order.

(Sd) Indira Misra,

Joint Secretary to the Govt. of India"

It may be necessary at this stage to know some provisions of the Act. The Foreign Contribution (Regulation) Act, 1976, was passed with a view to regulate acceptance and utilisation of foreign contributions and to ensure that the political associations and voluntary agencies function in a manner consistent with the values of Sovereign Democratic Republic. Some amendments were made in the Act in the year 1985, particularly in section 6 of the Act.

6. Section 2(c) of the Act defines "foreign contribution" as:

"Foreign contribution' means the donation, delivery or transfer made by any foreign sources, -

- (i) of any article, not being an article given to a person as a gift for his personal use, if the market value, in India, of such article, on the date of such gift, does not exceed one thousand rupees;
- (ii) of any currency, whether Indian or foreign;
- (iii) of any foreign security as defined in clause (i) of section 2 of for Foreign Exchange Regulation Act, 1973 (46 of 1973);

Explanation. - A donation, delivery or transfer of any article, currency or foreign security referred to in this clause by any person who has received it from any foreign source, either directly or through one or more persons, shall also be deemed to be a foreign contribution within the meaning of this clause;

Section 6 of the Act deals with associations running cultural, economic and social programmes, such as the appellant- association. The provisions of section 6(1) read:

"6(1) No association (other than an organisation referred to in sub-section (1) of section 5) having a definite cultural, economic, educational, religious or social

programme shall accept foreign contributions unless such association,

(a) registers itself with the Central Government in accordance with the rules made under this Act; and

(b) agrees to receive such foreign contributions only through such one of the branches of a bank as it may specify in its application for such registration, and every association so registered shall give, within , such time and in such manner as may be prescribed, an intimation to the Central Government as to the amount of each foreign contribution received by it, the source from which and the manner in which such foreign contribution was received and the purposes for which and the manner in which such foreign contribution was utilized by it :

Provided that where such association obtains any foreign contribution through any branch other than the branch of the bank through which it has agreed to receive foreign contribution or fails to give such intimation within the prescribed time or in the prescribed manner or gives any intimation which is false, the Central Government may, by notification in the Official Gazette, direct that such association shall not, after the date of issue of such notification, accept any foreign contribution without the prior permission of the Central Government."

7. Section 10(b) of the Act gives power to the Central Government to prohibit receipts of foreign contributions in certain contingencies, although the association falls within the provisions of section 6(1). The said provision reads:

"10. The Central Government may - ...

(b) without prejudice to the provisions of sub-section (1) of section 6, require any association specified in that sub-section, to obtain prior permission of the Central Government before accepting any foreign contribution:

Provided that no such prohibition or requirement shall be made unless the Central Government is satisfied that the acceptance of foreign contribution by such association or person or class of persons, as the case may be, the acceptance of foreign hospitality by

such person, is likely to affect prejudicially

(i) the sovereignty and integrity of India; or

(ii) the public interest; or

(iii) freedom or fairness of election to any Legislature; or

(iv) friendly relations with any foreign State; or

(v) harmony between religious, racial, linguistic or regional groups, castes or communities."

8. If the Central Government suspects of a contravention of the provisions of the Act, it can direct special inspection under section 14 and can even seize the records under section 15. Under section 15A the Central Government, can direct special audit of the association's accounts. Any order passed by the Central Government under section 10 is appealable, to the High Court within a period of 60 days.

9. Section 21(2) of the Act reads;

"Any organisation referred to in section 5, or any person or association referred to in section 9 or section 1a, aggrieved by an order made in pursuance of the Explanation to sub-section (1) of section 5 or by an order of the Central Government refusing to give permission, or by any order made by the Central Government under section 5 or section 9 or section 1a, as the case may be, may within 60 days from the date of such order prefer an appeal against such order to the High Court within the local limits of whose jurisdiction the appellant ordinarily resides or carries on business or personally works for gain, or, where the appellant is an organisation or association, the principal office of such organisation or association is located."

10. From the scheme of the Act it is clear that where the association is a registered association under section 6 of the Act, it is sufficient for the association to give intimation in regard to foreign contribution and their utilization. It is not required to obtain prior permission for receipt of foreign contributions. The provision in regard to registration was introduced by the Amending Act of 1985. The appellant-association was already working as a voluntary association since 1958.

The appellant- association got itself registered under section 6 of the Act after the said amendment. Section 6 is a self-contained code as it not only lays down the duty of voluntary associations in regard to intimation, but through its proviso lays down also the sanctions for non-compliance. In case of failure of the association to comply with the provisions of section 6(1) the Central Government can require the association to obtain prior permission of the Central government before any contribution is accepted. The Central Government can do it by issuing an official notification in the Gazette in regard to the date from which the permission is necessary. It is implied in the provisions of section 6 that before taking such an action, a show-cause notice would be given to the erring association and the orders would be passed on objective material and considerations. But, if the Central Government has reasonable suspicion in regard to an association, it can direct special inspection, seizure of accounts and records and special audit. These powers are given to the Central Government to see that the provisions of the Act in regard to receipt of foreign contribution and its utilisation are complied with by the association. Section 10 provides a very drastic power to the Central government to prohibit receipt of foreign contributions, where the actions of an association are likely to prejudicially affect sovereignty and integrity of India or public interest or freedom or fairness of elections to any Legislature or friendly relations with any foreign state or harmony between religious, racial, linguistic or regional groups, castes or communities. The impugned order is purportedly passed under this section.

11. Admittedly, no show-cause was issued to the appellants before passing an order under section 10 of the Act. It is stated in the counter-affidavit that no notice to show cause is required to be given before action under section 10 is taken. It is also averred that although no notice was required to be given, a notice was, in fact, given to the appellants on April 4, 1988, and their reply was duly considered before the impugned order was passed. It is also asserted in the counter-affidavit that the Act does not require any reasons to be stated in the order passed under section 10 (b) of the act.

12. Counsel for the appellants strongly objects to these assertions in the counter-affidavit and similar submissions made by the counsel for the respondents during the hearing. Relying on the decisions of the supreme court in Commissioner of Police v. Gordhandas Bhanji, AIR 1952 SC 16 and in union of India vs. P. K. Roy, AIR 1968 SC 850 counsel submits that the impugned order has to be examined and understood on its own terminology and cannot be improved upon by the counter-affidavit. He has referred to the decisions of the Supreme Court in Mahabir Prasad Santhosh Kumar v. State of U.P., AIR 1970 SC 1302 and in Siemens Engineering and Manufacturing Co. of India Ltd. v. Union of India, AIR 1976 SC 1785 where the Supreme Court has emphasised on disclosure of material to the affected person and of passing a reasoned order where the Tribunal is acting in a quasi-judicial capacity. He has also referred to the subsequent decisions of the Supreme Court where the requirement of fair play and observance of natural justice, even in administrative matters, is laid down by the Supreme Court.

13. It is now a well-settled proposition of law that even if the requirement of natural justice is not laid down in a statute, the court can read the same if the provisions of the statute are likely to have civil consequences to citizens. The action taken under section 10 is capable of causing serious hurt and incalculable harm to the reputation of any association which is doing voluntary social work. If the Government publicly states that an association is receiving foreign contributions, which stand in the way of fair elections or which would harm the sovereignty and integrity of India, there will be such a public outcry that the association would be required to close down without even a chance of explaining it to the public as to what is the true nature of its activities. Thus, it is not merely a violation or an injury of a civil right, but an adverse predicament for the functioning of any voluntary agency. Any order passed under section 10, therefore, must be passed on objective material and facts disclosed to the concerned association. A show-cause notice and an opportunity of explaining alleged objective material must be given to the voluntary association. The final order must disclose that the "satisfaction" is founded on objective material and must furnish proper reasons for non-acceptance of the explanation of the association against which the order is to be passed. None of these requirements of ensuring fair play are observed in passing the impugned order.

14. In the impugned order, the Central Government merely states that it is "satisfied" that the AVARD is likely to affect prejudicially the public interest by its acceptance of foreign contributions. The order does not state the material on the basis of which the satisfaction is arrived at. It is silent as to whether any show cause notice was issued to the appellants and whether the explanation of the appellants has been considered before passing the impugned order. The respondents cannot be permitted to add to or to improve upon the impugned order by averments in the counter-affidavit. This would amount to passing of a fresh order based on different grounds.

The impugned order must stand or fall on its own legs and cannot be made to stand on the props furnished from without. The impugned order also suffers from the serious lacuna of not stating the reasons for passing the order. Existence of objective material is a pre-condition for proper satisfaction and furnishing of cogent reasons is a sine qua non of application of mind. The assertion in the counter-affidavit that section 10(b) does not require any reason to be stated is untenable in law and is to be rejected. We have held that the counter-affidavit cannot be looked into for improving upon the impugned order. But, even if it is examined, the assertion of the respondents that a show-cause notice was issued to the appellant-association and their explanation was considered before passing the impugned order is factually incorrect. We have already shown that the impugned order is totally silent in regard to the show-cause notice or the reply filed by the appellants. The respondents, in the counter- affidavit, have relied upon the notice dated April 4, 1988, and its reply. It is clear that the assertion is completely misconceived. The said show- cause notice was given under section 6 of the Act and not under section 10. The said notice merely stated of the technical non-compliance of furnishing the returns in terms of Form FC-3 under the Regulations. It does not talk of any activity which is "prejudicial to public interest." The appellants, thus, had no opportunity whatsoever to point out to the respondents that their conduct was not prejudicial to public interest. It may also be noted that section 6 is a code by itself, and an independent sanction is provided in the proviso to section 6(1).

It is clear that after initiating the proceeding under section 6 by issuing the show- cause notice in April, 1988, the Central Government abandoned the action under the said section. Although the last sentence of the impugned order speaks of show -cause notice of thirty days (which was replied to by the appellant), the respondents have not treated it as a show-cause notice but treated it as an order in the counter-affidavit. The said last sentence illustrates non-application of mind.

15. It is difficult to understand as to why the said action was abandoned and a more severe action under section 10(b) was resorted to by accusing the appellant association of actions "prejudicial to the public interest". In reply to the show-cause notice under section 6, the appellants had given an explanation as to why they did not file the Fe- 3 returns. Even if it is assumed that their explanations in not furnishing the returns in time was wholly wrong, they had actually furnished the said returns along with the reply to the show-cause notice.

They had also stated in their reply that the audited accounts and the progress report were being sent by them to the Ford Foundation from time to time. it is not the allegation in the impugned order that any false information was given by the appellants or that their conduct was suspicious. Apart from the fact that the impugned order is illegal, there was no justification given by the Central Government to resort to the drastic provisions of section 10 of the Act.

16. For the reasons stated above, the impugned order is quashed and set aside. The appeal is allowed with costs. Counsel fee Rs. 1,500.

High Court Case-Summary

Watch Tower Bible & Tract Society of India, Lonavala

Vs.

Union of India (UOI) and Ors.

Facts:

The appellant is the Legal entity was served with the show cause notice alleging there in breach of the provisions of the Act by the Society. The appellant society was called upon to show cause why acceptance of foreign contribution by them should not be restricted. The appellant Society replied in detail to the show cause notice in which society claims to have dealt with each and every point raised in the show cause notice. The respondent passed the impugned order prohibiting the receipt of Foreign Contribution by the appellant expressly stating therein that acceptance of Foreign Contribution by the appellant would affect prejudicially harmony between religious groups. The appellant being aggrieved by the above-impugned order filed the present appeal.

Decision:

The main point in case was on an impugned order prohibiting receipt of foreign contribution by the society on the ground that same would affect prejudicially harmony between religious groups. The prayer of the society for production of document formed the basis of the order in respect of which privilege was claimed by the Government. The document in question was a secret communication from the Ministry of Home Affairs. It was adjudged that its disclosure would lead to public injury. However, the above said document which forms the basis of the order, in respect of which privilege is being claimed by the Govt. should be placed before the court while deciding the issues involved in the case. Therefore the prayer for production of document (to the appellant) was rejected.

In the High Court of Bombay,

First Appeal No.37 of 2001

Decided on 06-12-2001

Appellants: **Watch Tower Bible & Tract Society of India, Lonavala**

Vs.

Respondent: **Union of India (UOI) and Ors.**

[MANU/MH/0567/2001]

Hon'ble Judges:

V.C. Daga, J.

Counsels:

For Appellant/Petitioner/Plaintiff: DJ. Khambata and Colabawala, Advs., i/b., Mulla & Mulla & Craigie Blunet & Caroe

For Respondents/Defendant :K.K.Tated, A.G.P. Subject: Civil

Catch Words:

Condition Precedent, Confidential Communication, Production of Document, Public Officer, Show Cause Notice

Acts/ Rules/ Orders:

Evidence Act - Section 124; Foreign Contribution (Regulation) Act, 1976 - Section 10

Cases Referred:

Chamanlal v. State of Punjab, AIR 1970 SC 1372; S.P. Gupta and Ors. v. President of India and Ors., AIR 1982 SC 149

Case Note:

The case debated on an impugned order prohibiting receipt of foreign contribution by the society on the ground that same would affect prejudicially harmony between religious groups - The prayer of the society for production of document formed the basis of the order in respect of which privilege was claimed by the Government - The document in question was a secret communication from the Ministry of Home Affairs - It was adjudged that its disclosure would lead to public injury - Therefore the prayer for production of document was rejected

ORDER**V.C. Daga, J.**

1. P.C.

INTRODUCTION

The substantive appeal in question is directed against the impugned order dated 8-112000 passed by the Joint Secretary, Government of India, Ministry of Home Affairs, New Delhi, issued in exercise of powers under Section 10(a) of the Foreign Contribution (Regulation) Act, 1976 CAct" for short), whereby the appellant society known as "The Watch Tower Bible and Tract Society" has been prohibited in public interest from accepting foreign contribution from the date of receipt of the impugned order as in the opinion of the Central Government, acceptance of the Foreign Contribution by the appellant - society is likely to affect prejudicially harmony between the religious groups.

BACKGROUND FACTS

2. The appellant is the legal entity used by the Jehovah's witnesses in India since 1978. The appellant is duly registered under Societies Registration Act, 1860 as well as under Bombay Public Trust Act, 1950. The appellant -Society, considering the provision of Section 6 of the Act got itself duly registered with the authorities under the Act.

3. The appellant society on 17-6-2000 was served with the show cause notice dated 6th June 2000 issued by the 2nd respondent alleging there in breach of the provisions of the Act by the society. Thus the appellant - society was called upon to show cause why acceptance of foreign contribution by them should not be prohibited. The appellant - society vide their reply dated 4-7-2000 replied in detail to the show cause notice in which society claims to have dealt with each and every point raised in the show cause notice.

4. The respondent No.3 on 8-11-2000 passed the impugned order prohibiting the, receipt of Foreign Contribution by the appellant expressly stating therein that acceptance of Foreign contribution by the appellant would affect prejudicially harmony between religious groups.

5. The appellant being aggrieved by the above impugned order filed the present appeal. This appeal came to be admitted on 29-1-2001. On being noticed the respondent appeared and filed their affidavit-in-reply, so as to oppose the appeal challenging the impugned order.

6. On the motion made by the appellant society, the above appeal was taken up for final hearing. While hearing this appeal request was made by the learned Counsel appearing for the appellant that the basic document forming basis of the impugned order, in respect of which privilege is being claimed by the respondents, should be before Court while deciding the issues involved in the appeal. In this view of the matter both the parties made a joint request that the issue with regard to the right of the respondents to claim privilege under Section 124 of the Evidence Act, should be considered and decided first before proceeding to hear the appeal on merits. Accordingly, parties were called upon to address this Court on the issue of 'privilege' claimed by the respondents. That is how the question of privilege came up for hearing and decision before this Court.

7. The learned Counsel appearing for the appellants heavily criticized the quality of the affidavit filed on record and contended that the privilege has not been properly claimed.

In his submission the affidavit claiming privilege should have contained an indication as to the nature of the document and as to why privilege is being claimed, what injury to public interest is apprehended and what public injury is involved. Mere statement that they are claiming privilege is not enough, the affidavit must indicate the nature of suggested injuries to the interest of public. The learned Counsel for the appellant also urged that the fair administration of justice itself is a matter of vital public interest. In this view of the matter, he prayed for rejection of privilege claimed by the respondents,

CONCEPT OF PRIVILEGE

8. Let me first examine the 'Concept of Privilege'. Ordinarily no privilege is created in law by the mere fact that a communication is made to a person in express confidence. No pledge or oath of secrecy can protect a communication from disclosure in a court when it is necessary for elicitation of truth or in the interest of justice. Privileged communications enjoy protection for unique reasons. The Law of Evidence generally seeks accuracy in fact-finding by receiving relevant evidence thought to be reliable, while rejecting that thought to be insufficiently probative or trustworthy. But privilege communications, which by usual evidentiary standards may be highly probative as well as trustworthy, are excluded because their disclosure is inimical to a principle or relationship that society deems worthy of preserving and fostering. For example, the law confers upon the individual the constitutional privilege of not incriminating himself; it also accords a privileged status to confidential communications between attorney and client, husband and wife and between certain other communicants in special, private relationships.

9. The Cost of evidentiary privilege is apparent in the court room probative and otherwise admissible evidence is suppressed, requiring the trier to decide factual issues without its benefit. Thus, the application of an evidentiary privilege obviously increases the probability that judicial disputes will be decided erroneously. A confidential communication to a clerk, to a Trust, to a Commercial Agency, to a Banker, to a Journalist, to a Broker or any other person not holding one of the special relations recognized by law, is not privileged from disclosure, but the law recognizes that some

communication between the person having special relations should be privileged such as communications between Spouses, Attorney and Client. Confidential communications which can be broadly placed into two categories State Secrets or Executive Privileges.

10. In the above backdrop one can turn to the provisions of Section 121 to 129 of the Evidence Act to understand the concept of privilege recognised by law. The case in hand needs to be considered on the text of Section 124 of the Evidence Act, which reads as under:

Section 124. Official Communications. - No public officer shall be compelled to disclose communications made to him in official confidence, when he considers that the public interests would suffer by the disclosure.

11. Public Policy also requires that a communication made to a Public Officer in "official confidence" should not be disclosed being detrimental to the public interest or service. The communication may be oral or in writing. The confidence reposed may be express or implied. The occasion for claiming privilege under Section 124 arises only when the evidence sought to be given is a communication made to the public officer "in official confidence". That is the condition precedent before privilege can be claimed. So long as this condition is not fulfilled there can be no claim of privilege.

12. The important question always needs to be decided first is whether or not the communication was made to him in "official confidence". The public officer concern is no Judge of this question, and for that purpose the court is empowered to order production and to inspect the document with a view to determine whether the communication was or was not made in official confidence. If the answer to the said question is in the negative then the document has to be produced, if the said answer is in the affirmative, then, it is for the officer concerned to decide whether the document should be produced or not. Privilege has been given not for the benefit of the person making the communication but for protection of the public interest alone. The dominant intention in the section is to prevent disclosures to the detriment of the public interest and it is settled that the decision as to such detriment is to be with the officer, to whom the

communication is made, and does not depend on the special use of the word "Confidential".

13. While deciding the question of privilege it is necessary to consider as to how the privilege has been claimed by the officer concerned. It is not proper for the authority to claim privilege without considering the documents. There should be some indication on the nature of suggested injury to the interest of the State or public interests by the disclosure. The Head of the Department should have the documents before him and give careful consideration before claiming privilege. It is true that affidavit should contain an indication as to the nature of the documents, as to why privilege is claimed, what injury to public interests is apprehended, or what affairs of the State are involved, otherwise the court is entitled to draw an adverse inference from non-production. A mere statement that in "my opinion the disclosure would be against public interest" is not enough. He should indicate the nature of the suggested injury to the interests of the public. He must apply his mind to the question whether public interests are likely to suffer by disclosure. It is always desirable that a statement should be put in saying that he has considered the document carefully and has come to the conclusion that it cannot be produced without injury to public interests.

14. The Phrase "Public Officer" used in Section 124 needs to be understood in the context in which it is used in the section itself. He is an officer with public as opposed to private duties who received communications made to him in official confidence of such a nature that disclosure in certain cases would cause injury to the public interests. This section follows the English Law and makes the officer the Judge, as to whether a communication made to him in official confidence should be or should not be disclosed. If he thinks that the public interest would suffer by such disclosure, he is entitled to refuse to disclose the communication.

On principle or public policy the official transaction between the heads of the department of the State and their subordinate officers are in general treated as privileged communications. The communications made by one Secretary to the Government is a communication in respect of which privilege can be claimed. Under the section whether

the communication was made in official confidence is matter for the Court to decide and whether the public interest would suffer by its disclosure is for the public officer to decide.

PRIVILEGE HOW DETERMINED

15. Where a public officer declines to produce certain documents, claims privilege under Section 124, it is for the Court at the first instance to satisfy itself that the documents relate to any affairs of the State or that their production would be detrimental to the public interests and it is not that a mere fact that their production is likely to create prejudice against the State, is not reason for non production. When privilege is claimed it is for the court to determine whether the documents really relates to the affairs of the State and Ipse Dixit for anyone on behalf of the State that it concerned the affairs of the State is not sufficient. The aforesaid question was the subject matter of debate before the Apex Court in the case of Chamanlal v. State of Punjab, AIR 1970 SC 7572, where in the Apex Court observed as under:

"..... A privilege extends only to a communication upon the subject with respect to which the privilege extends and the privilege can be claimed in exercise to the right or safeguard of the interest which creates the privileged."

16. In the leading judgment of the Apex Court, delivered in the case of S.P. Gupta and others vs. President of India and others, AIR 1982 SC 149, the Apex Court had occasion to express itself in the following words:

".....Undoubtedly there must be such affairs of the State involving security of the nation and foreign affairs where public interest requires that the disclosure should not be ordered. It is however equally well recognized that fair administration of justice is itself a matter of vital public interest. Therefore, if the two public interests conflict, the Court will have to decide whether the public interest which formed the foundation for claiming privilege would be jeopardized if disclosure is ordered and on the other hand whether fair administration of the justice would suffer by non disclosure and decide which way the balance tilts. In the ultimate analysis the approach of the Court while deciding the question of privilege would be that it has to balance public interest in just justice and just

administration of justice and State affairs at high level in respect of appointment to high constitutional offices and then decide which way the balance tilts.

Privilege could be claimed in respect of a document on two alternative grounds;

(a) that the disclosure of the contents of the documents would be injurious to the public interest by endangering national security or diplomatic relations and

(b) that the document belonged to a class which should not be disclosed to ensure the proper functioning of public service.

There is residual power in Court to decide whether the disclosure of a document is in the interest of the public and for that purpose, if necessary to inspect the document, and that the statement of the head of the department that the disclosure would injury public interest is not final."

17. The Apex Court ruled that on the parity of reasoning it can be safely concluded that in Statutory provisions of Sections 123 and 124 of the Evidence Act, the disclosure is prohibited in public interest unless the court is fully satisfied that the disclosure will not harm the public interest. The Apex Court in the very same judgment observed that the court is however not powerless to hold its own enquiry in order to test the bona fides of the plea of privilege. One form of such an enquiry may be, the inspection of the documents themselves by the court before disclosure. If after inspection the court finds that the plea of privilege is well grounded and its disclosure will lead to great public injury, it will be justified in upholding the plea of privilege.

APPLICATION OF THE ABOVE PRINCIPLE TO THE FACTS OF THE PRESENT CASE

18. The aforesaid principles enunciated by the Apex Court extracted hereinabove, compelled me to take survey of the affidavits-in-opposition filed by the respondents; wherein the plea of privilege has been raised in the very first para of the affidavit. The relevant paras of the affidavit, relevant to the controversy read as under:

"I V. K. Gupta, working as Under Secretary, Ministry of Home Affairs having my office at Lok Nayak Bhavan, New Delhi, do hereby state on solemn affirmation as under:

1. I say that I have gone through the papers and proceedings of the above mentioned matter and office files made available to me. I say that after going through the papers and proceedings of the above mentioned matter and office files, I am filing the present affidavit to oppose the interim relief order as claimed by the Appellant in the above mentioned matter. I say that I am filing the present affidavit on the basis of the available facts and reports. I am claiming the privilege not to disclose the said reports as per Section 124 of the Indian Evidence Act, 1971. I say that I am claiming the said privilege in the interest of public at large.

2.

3.

4.

5.

6...The receipt of foreign donations on a very large scale by the applicants and the absence of any tangible welfare project on the ground is indicative of the same being used for influencing the poor, illiterate and tribals to change their religion.

7.....It is therefore, submitted that the applicants have deliberately sought to camouflage the work of advancement of their religious activities of influencing the poor, illiterate and tribals by allurements and inducements of different kinds which they can very well afford with the enormous funds they receive from other countries.

8. Onwards"

19.In addition to the aforesaid affidavit one more affidavit dated 2-5-2001, sworn by Pravin Shrivastava, Joint Secretary, Ministry of Home Affairs, New Delhi is also on record; wherein the respondents have claimed privilege and stated on oath that in the interest of public at large, it is not possible for the Government to disclose the said report.

20. Having considered the affidavits placed on record, the affidavit by and large satisfies the broader requirements of the section and the law laid down by the Apex Court. The affidavit has been affirmed by the head of the department. It is no doubt that the better affidavit could have been filed, but that by itself cannot be a consideration for rejecting the affidavits filed on record. The technicalities cannot arrest the process of administration of justice. In order to satisfy my own conscience, I took liberty to inspect in camera and go through the document itself in respect of which privilege is being claimed by the respondents.

The document in question is a secret communication from the Ministry of Home Affairs, under the signature of Joint Director to the Intelligence Bureau, to the Cabinet Secretary, Principal Secretary to the Prime Minister of India, New Delhi. After having personally seen and examined the document in question I am satisfied that there is sufficient indication in the communication and the possible injury to the public interest, if the document is allowed to be disclosed. I am also satisfied that the public interest would subservise withholding production or disclosure or making the document part of the record.

21. It is no doubt true that on the one side there is a public interest to be protected; on the other side of the scale is the interest of the litigant who legitimately wants production of document, "which 'he' believes will "support his own and defeat his adversary's case. Both are matters of public interest, for it is also in the public interest that justice should be done between litigating parties by production of all relevant documents for which public interest immunity has been claimed: They must be weighed one competing public interest in the balance as against equally on other competing public administration of justice shall not be frustrated by withholding the document which must be produced if justice is to be done. As distinct from private interest the principle on which protection is given is that where the conflict arises between public and private interest, private interest must give way to the public interest.

In this view of the matter, I propose to uphold the claim of privilege set up by the respondents. In my opinion the plea of privilege is well founded and its disclosure will

lead to great public injury. Thus, considering the facts and circumstances of the present case, this court would be justified in upholding the plea of privilege. In the circumstances plea of privilege stands sustained. Prayer for production of document made by the appellant-society therefore, stands. rejected with no order as to costs.

22. The aforesaid matter was on my board. The same was treated as part heard. However, in view of the change in assignment, I do not propose to keep this matter part heard. Hence not to be treated as part heard. Matter stands released. The office of this Court is directed to place it before appropriate bench for further hearing

Netherlands Organisation For International Cooperation

Vs.

U.O.I. & Ors.

Facts:

The petition was filed by Netherlands Organisation for International Development Corporation (NOVIB) an NGO based at Netherlands funding and supporting various NGOs in the developing countries seeking, investigation by a proper investigating Agency into the affairs of the respondent Awakening in Rural Environment (AWARE) and in particular, into its accounts and utilization of funds of foreign and local grants for the previous years (1988-1993).

In substance the grievance of NOVIB against AWARE was that for the period ending 31st March, 1993, AWARE submitted two different sets of accounts to NOVIB and to Income Tax Department each ,audited by different Chartered Accountants. Further, accounts sent to NOVIB reported only Rs.82 Lakhs as unutilised foreign contribution whereas in the accounts submitted to Income Tax Department the accumulated foreign contribution as on 31st March, 1993 was to the tune of Rs.20.07 crores. An amount of RS.13.76crores was shown to have been withdrawn from the account of AWARE during the period ending 31st March, 1993 although the said amount in fact had not been withdrawn.

The repayment of the loans given to Tribals and Harijans was used as source of the revolving fund and the repaid loan amount was not considered by AWARE as part of foreign contribution; interest earned on foreign contribution was not considered by AWARE as part of foreign contribution and loan of *Rs.12* Lakhs had been "taken against fixed deposit receipts of RS.16 Lakhs held in Andhra Bank, Hyderabad.

The further allegation of NOVIB was that as soon as NOVIB began its enquiries into the matter of dual and completely different sets of accounts being maintained by AWARE, it seems AWARE began to take action of withdrawing/ transferring huge sums running into

tens of crores of rupees from its accounts to various accounts (including to AWARE ,India Foundation, a related party to AWARE) in order to prevent NOVIB from recovering the unutilized amounts of grants regarding which AWARE had been falsely representing that they had utilized them.

Decision

It was held that the matter related to cheating and fraudulent transactions could be gone into through detailed examination of accounts of the alleged person. Thus an independent indepth inquiry into the accounts in the facts and circumstances of the case, were necessary. It was decided to refrain the matter for registration of the case and investigation by CBI or any other investigating agency. Further, the court was of the view that pending receipt of the report on accounts, it was not presently necessary to issue directions for cancellation of registration of AWARE under FCRA or cancellation of exemption under the provisions of Income Tax Act. The Court, however, directed the income tax Act Authorities to expeditiously conclude the special audit in accordance with law.

In the High Court of Delhi

C.W.P. 5254/97

Decided On 09-11-1998

Appellant: Netherlands Organisation For International Development Cooperation

Vs.

Respondent: U.O.I. & Ors.

[MANU/DE/1334/1998]

Hon'ble Judges:

Y.K. Sabharwal and K.S. Gupta, JJ.

Counsels:

For Appellant/Petitioner/Plaintiff:, Mr. Prashant Bhushan and Mr. Sanjeev Kapoor, Advs.

For Respondents/Defendant: Mr. P. Chiddambaran, Senior Advocate, Mr. A.K. Vali, Ms.

Pallavi Shroff and Mr. A.K. Roy, Advs.

For Income Tax Deptt: Nr. R.D. Jolly and Mr. Ajay Jha, Advs.

Subject: Direct Taxation

Catch Words:

Accountancy, Accountant, Accounts, Act, Assessment, Assets, Audit, Bank Deposit, Benefit, Board, Case, Central Board, Central Board of Direct Taxes, Commission, Company; Competent Authority, Concern, Deposit, Development, Director, Donation, Exemption, Expenditure, Financial Year, Firm, Foreign Source, Income, India, Interest, Person, Previous Year, Regional Project, Registration, Return, Rural Development, Security, Service, Status, Technical Assistance, Transfer, Trust; Work

Acts/Rules/ Orders:

Constitution of India - Article 226

Case Note:

The case dealt with a writ petition filed against a non-Governmental organisation (NGO) on the allegations of misappropriation and siphoning of funds received by it as aid from the petitioner - The petitioner was also an NGO based at Netherlands and was funding and supporting various NGO in the developing countries - The AWARE had sent two different sets of accounts prepared by two separate chartered accountants - It was held that the matter related to cheating and fraudulent transactions could be gone into through detailed examination of accounts of AWARE - Thus an independent enquiry into the matter was necessary and the same was *not* required to be directed to the central board of investigation for in-depth enquiry, at the current stage of the matter

ORDER

Y.K. Sabharwal, J.

1. The Petitioner - Netherlands Organisation *for* International Development Corporation (for short 'NOVIB' has filed this; petition seeking investigation by a proper investigating Agency into the affairs of Respondent No.3, namely, Action *for* Welfare and Awakening in Rural Environment (AWARE) and in particular, into its accounts and utilization of funds of foreign and local grants *for* the previous years. NOVIB has further prayed that Union of India and Central Board of Direct. Taxes be directed to take action against AWARE and its officials including Chairman *for* having committed various offences. According to NOVIB, briefly the facts are as notice hereinafter.

2. NOVIB is a non-governmental organisation based in Netherlands and has been funding and supporting various non-governmental organisations (NGOs) in developing countries including India which are engaged in the task of development. The NOVIB is part of a four member Consortium which has been supporting and funding development organisations and activities in India *for* last more than a decade. From 1988 till 1993 NOVIB alongwith other donors in the Consortium have given to AWARE grants in excess of Rs. 50 crores which includes NOVIB's contribution of approximately Rs. 25 crores. AWARE has been reporting to NOVIB that it has been utilizing almost the entire grant and funds given to it in the previous years *for* the projects *for* which the funds are granted. NOVIB received complaints in 1993 against AWARE that it has been furnishing false statement of accounts to NOVIB. AWARE is guilty of having committed fraud, misappropriation of public funds, falsification of accounts and has committed various other offences under IPC, Foreign Contribution (Regulation) Act, 1976 {(or short 'FCRA') and the Income Tax Act.

3. NOVIB says that AWARE by falsification of accounts has apparently siphoned out huge sums of money running into tens of crores and thereby defrauded the people of India and Netherland of public money meant for development of rural poor of this country. In January 1994 when Mr. Madhvan visited Netherlands NOVIB asked him to send a copy of the audited statement of accounts which AWARE had furnished to Government of India. In response the statement of account for the year 1992-93 certified by *M/s. G. Ramakrishna & Associates*, Chartered Accountants, Hyderabad, was sent. NOVIB also received a copy of the entirely different audited balance sheet 'for the same year 1992-93. It was audited by *M/s. Natraja Iyer & Co.*, Chartered Accountants, Hyderabad. The two balance sheets were entirely different. The, statement of account certified by *G. Ramakrishna & Co.*, showed an accumulated balance of foreign contribution of only about Rs.82 lakhs and further showed the utilisation of foreign contribution for the year 1992-93 at about Rs.5.67 crores as compared to sum of about Rs.1.66

crores shown in the account audited by M/s. Natraja Iyer & Co. Both the balance sheets were at complete variance. On 18th April 1994 NOVIB received a faxed letter sent by several Directors of AWARE stating that the statement of account audited by M/s. Natraja Iyer & Co. was not an authentic document. On receipt of the letter dated 18th April 1994 Mr. Hans Pelgrom, Director of Projects of NOVIB spoke to Chairman of AWARE and intimated him of the intention of NOVIB to send an investigating team from Netherlands to enquire into the matter. In response to this Mr. Madhavan faxed letter dated 28th April, 1994 containing a veiled threat of violence against the investigating team which might be sent to look into the accounts of AWARE. The enquiry was conducted by Mr. Wim Jacobs, a Chartered Accountant from Netherlands and M/s. Thakur Vaidyanath Aiyar & Co., New Delhi. Enquiry took place, in May 1994 and report was submitted on 26th May 1994. The report confirmed that AWARE had indeed been maintaining two completely different sets of accounts, one which was submitted to the Government of India and another which was submitted to NOVIB. The salient findings of the enquiry were as follows:

- (i) AWARE has accumulated foreign contributions (as of 31.3.93) of Rs. 20.7 crores while reporting only Rs. 82 lakhs to the donors;
- (ii) AWARE has employed two accountancy firms to produce different accounts regarding their income, expenditure, assets and balances;
- (iii) AWARE has requested additional funds from the donors as recently as April 1994, claiming that they were facing a shortage of funds;
- (iv) For the financial year 1990-91, AWARE has produced two different sets of accounts, both purporting to bear the signature of Mis. Nataraja Iyer & Co;
- (v) AWARE has failed to cooperate with the inquiry set up by the donors under the terms of agreements with AWARE."

4. According to accounts for 1992-93 audited by M/s. Nataraja Iyer & Co. and sent to Ministry, AWARE had cash, bank deposits and other investment accumulations of approximately Rs. 43 crores as on 31st March, 1993. According to accounts sent to the donors, which AWARE claims also to have been sent to Home Ministry, certified by M/s. G. & Associates, the cash and bank deposit accumulations were approximately Rs. 7.08 crores. The variations in the figures of foreign contribution (utilized, unutilized, brought forward and received) between the accounts sent by M/s. G. Ramakrishna & Associates and M/s. Nataraja Iyer & Co. relating to foreign contribution are as under :

Description and period Accounts	Nataraja Iyer & Co. Accounts.	G. Ramakrishna & Associates
Brought forward Foreign contributions (1.4.1992)	18,72,74,997	2,87,67,214
Foreign contributions received (1.4.92 to 31.3.1993)	3,64,28,147	3,62,38,147
Unutilised foreign contributions as at 31.3.1993	20,70,25,718	82,86,336
Utilisation of foreign Contributions (1.4.1992 to 31.3.1993)	1,66,77,426	5,67,19,026

5. The further allegation is that soon after NOVIB began its enquiries into the matter of dual and completely different set of accounts being maintained by AWARE, it seems AWARE began to take action of withdrawing/transferring huge sums running into tens of crores of rupees from its accounts to various other accounts in order to prevent NOVIB from recovering the unutilised amounts of grants regarding which AWARE had been falsely representing that they had utilised them. With this end in mind, AWARE and its

Chairman in particular, issued letters to their bankers dated March 1994 asking the bank to transfer huge amounts of money amounting to more than Rs.10 crores from the account of AWARE to various other accounts. NOVIB subsequently learnt that AWARE had transferred an amount of Rs.13.76 crores in May 1994. Out of this amount Rs. 9 crores were transferred to various accounts in the name of Chairman, AWARE. Based on the letters dated 21st March, 1994 (acknowledged and acted upon by bankers on 21st May, 1994) accounting entries have been made during the year ending 31st March, 1994 treating the demand drafts/pay orders issued in May 1994 as advance for expenses which amount to Rs.13.76 crores.

6. The loan of Rs.12 lakhs was taken against fixed deposit receipt of Rs.16 lakhs held in Andhra Bank, Saifabad, Hyderabad and the entire loan amount with interest thereupon totalling over Rs.14 lakhs was paid to the bank in cash and the Loan account was closed on 29th January 1995. Reliance has been placed on the letter dated 24th March, 1994 written by Mr.Madhvan to the bank to show that he was aware of the pledge of the FDR against the loans which had been availed and it was incorrect for him to state that he had neither authorised nor was he aware of the loan transaction.

7. On application (I.A. 7465/98) of NOVIB, AWARE INDIA FOUNDATION (AIF) was impleaded as a respondent in this matter. It was submitted in the application that from the reply to the writ petition filed by AWARE and, in particular from the report of KPMG relied upon by AWARE, NOVIB had learnt that a large part of the funds amounting to approximately Rs.12.13 crores which had been given by it to AWARE for rural development had been misappropriated and diverted to another company under Section 25 of the Companies Act which had been formed and controlled by AWARE and its Chairman. According to the report of KPMG, it was alleged, that the manner in which the funds given by NOVIB to AWARE had been diverted to AIF was as follows:

(A)The funds given by the Petitioner to respondent No.3 were shown as loans to Tribals and Harijans by Respondent No.3 and their repayments to Respondent No.3 were placed in a fund known as "Revolving Fund"(See Para 9.5.1 of the KPMG report).

(B)AIF was incorporated in November, 1994 as a Company (Para 9.5.11 of KPMG).

(C) AIF is not independent of AWARE as its operations are "ultimately controlled by AWARE" (Para 9.5.14 - Page 95 of the report). In Para 1.12.3 of page 8 of the executive summary, KPMG says that three of AIF's five directors are common to AWARE. Thus, AIF according to KPMG is a related party to AWARE.

(D)The bank balances in the Revolving Fund accounts of AWARE have been progressively transferred to AIF mainly in December, 1995.

(E) As at 31.12.96 AIF's investment amount to Rs.12.30 crores.

(F)AIF has opened people's banks in 16 towns and operations are similar to commercial banks.

G) As per figure 9.18 (Para 9.5.23 of page 99 of the report). AWARE has transferred out of its revolving funds a sum of Rs. 97416000 in the year ended 31. 3.96and Rs. 18177000 in the year ended 31.3.97."

8. It has also been submitted that Chairman of AIF was same Mr. G. Ramakrishna who had certified fraudulent accounts of AWARE which were sent to NOBIB. It was pointed out that report of KPMG relied upon by AWARE itself opines that operations of AIF were ultimately controlled by AWARE and that it was not independent of AWARE.

9. In substance the grievance of NOVIB against AWARE are that for the period ending 31st"March, 1993, AWARE submitted two different sets of accounts to NOVIB and to Income Tax Department: the AWARE in accounts sent to NOVIB reported only Rs. 82 lakhs as unutilised foreign contribution whereas in the accounts submitted to Income Tax Department the accumulated foreign contribution as on 31st March, 1993 was to the tune of Rs. 20.07 crores: an amount of Rs. 13.76 crores was shown to have been withdrawn from the account of AWARE during the period ending 31st March 1993 although the said

amount in fact had not been withdrawn: the repayment of the loans given to Tribals and Harijans was used as source of the revolving fund and the repaid loan amount was not considered by AWARE as part of foreign contribution; interest earned on foreign contribution was not considered by AWARE as part of foreign contribution and loan of Rs.12 lakhs had been taken against fixed deposit receipts of Rs.16lakhs held in Andhra Bank, Hyderabad.

10. Further grievance of NOVIB is that AWARE, its Chairman Sh. P.K.S. Madhvan and its other office bearers instead of cooperating with an independent enquiry into its financial affairs, began to take action of withdrawing/transferring huge funds running into crores of rupees from its accounts to various other accounts in order to prevent NOVIB from recovering unutilised amounts of grants regarding which AWARE had been falsely representing that they had utilised the same.

11. The NOVIB has prayed that registration of AWARE under FCRA should be cancelled, audit of AWARE accounts be ordered under Section 15A of FCRA and action should be initiated under Section 25 of the said Act. Further submission is that action shall also be taken against AWARE for prosecution under the provisions of Income Tax Act and under IPC for various offences i.e. cheating, fraud, criminal breach of trust etc. NOVIB says that full investigation into the affairs of AWARE and its officers including Chairman deserves to be conducted by a proper and independent investigating agency. Reference has been made to documents placed on record in support of the plea that it is a fit case where independent investigation deserves to be ordered. It has also been submitted that pending such investigation, the registration of AWARE under FCRA deserves to be cancelled as also its exemption granted under the provisions of the Income Tax Act.

12. The petition has been strenuously opposed by AWARE. AWARE has also placed on record certain documents in support of the contention that the prayer for investigation or prosecution deserves to be rejected and the petition merits summary dismissal. It has also pleaded that the allegations made by NOVIB were examined by M/s. KPMG, an

internationally known and reputed firm of Chartered Accountants and after detailed examination of accounts and enquiries, M/s. KPMG submitted its report categorically stating that in the course of enquiry nothing has come to their attention that the AWARE has misappropriated or misutilised the funds provided to it. KPMG report has been placed on record by AWARE.

13. AWARE has inter alia submitted in its reply affidavit that the writ petition has been filed maliciously with a view to defaming it. The fund flow system in AWARE has been explained. It has also been submitted that statement of account prepared by M/s. G. Ramakrishna & Co. deals only with foreign contributions received in respect of only IRDP projects during the year 1992-93 while the balance sheet prepared by M/s. Nataraja Iyer & Co. deals with the foreign as well as Indian contributions in respect of all projects. In fact, the statement of account prepared by M/s. G. Ramakrishna & Co. consists of only a part of account contained in the Balance sheet of M/s Nataraja Iyer & Co. An attempt has been to explain that in the end of 1993 and beginning of 1994, AWARE decided to take up new projects entitled “ Tribals March Towards 21st century “ for the preparation of which NOVIB and ICCO has provided technical assistance for their representatives to AWARE. AWARE submitted the project report in January 1994 for the approval of NOVIB and ICCO so as to obtain funding from them for the proposed project. They wanted balance sheet of AWARE for two years in order to sanction the funding for the project (1994-2001 First phase) since a part of the grant received from NOVIB and ICCO was still lying with AWARE for current projects which were in the process of implementation. The AWARE was anxious to go ahead with the new projects since it would benefit millions of tribals to whom promise has been made by AWARE along with the representatives of NOVIB and ICCO. It was under these circumstances that AWARE acting through its employees, one Mr. Vimal Kumar, who was subsequently dismissed on account of corruption, got statement of accounts for the year 1991-92 and 1992-93 prepared by M/s G. Ramakrishna & Co. who were also selected and appointed by Mr. Vimal Kumar. These statement of accounts were prepared on the basis that the amounts were earmarked for the projects which were in the process of implementation may be treated as deemed expenditure and taken into account as such preparing the

statement of account since these amounts were reserved for the projects and were to be spent in implementation of those projects only. These two statements of accounts prepared by M/s G. Ramakrishna & Co., therefore showed deemed expenditure and that is how the balance of unutilised foreign grant as on 31st march 1993 showed a figure of approximately Rs. 82 lakhs instead of actual balance of about Rs. 20 crore which naturally appeared in the closing balance in the Balance sheet prepared by M/s Natraja Iyer & Co. It was, therefore, submitted that the second statement of account was not prepared with a view to siphon off the funds as alleged. Regarding the transfer of amounts lying at Central office it was submitted that the amount so lying to the credit of Vyasa Bank Ltd. Were held in the name of Chairman, AWARE, which is the official account and the said amounts were debited to the said account and pay orders obtained in the name of Chairman, AWARE or Zonal / Regional Coordinator as Project Coordinator for onward submission to various project accounts all of which are the official accounts of AWARE and not he personal account of the Chairman. It was submitted that alleged amount of over Rs. 13 crore was only transferred from the Central account of Chairman, AWARE to the regional account of Chairman, Aware and accounts of Zonal/Regional Project Coordinator. This was done as a process of earmarking the amount for the particular project as the account maintained in the Zonal/Regional headquarters and Project headquarters are for specific projects. Regarding Wim Jacob it has been submitted that he had requested the AWARE to appoint him as Auditor of AWARE and the same was refused and, therefore, Mr. Jacob bore a grudge against AWARE and thus he submitted a biased report without any basis. Thus in the aforesaid manner, the AWARE has tried to explain the allegations of its having submitted two sets of accounts, one to NOVIB and other to Income Tax Department and having accumulated foreign contributions of over Rs. 20 crores as on 31st March 1993 while reporting only about Rs. 82lakhs to NOVIB and the transfer of over Rs. 13 crores.

14. Mr. Chidambaram submitted that AWARE may have been ill advised to say that it had utilised the foreign contributions but as is evident from the aforesaid facts, it had no guilty intention and its intentions were to have grant for the new projects referred to above.

15. Regarding the achievements of Mr. Madhvan and AWARE, on which some stress was laid by Mr. Chidambaram, may be, AWARE has undertaken the rural development programmes, served the poor, oppressed, Tribals, Harijans and socio-economically depressed groups in Indian society and its Chairman Mr. Madhvan besides others may have devoted and have been responsible for the upliftment of these classes. All the same it has to be understood that these achievements and services to the society, either by the organisation or by an individual do not give anyone a license to indulge in falsification of accounts or to commit offences and act contrary to law. There cannot be any doubt that many NGO's are doing commendable work and serving the society with complete dedication, devotion and sincerity. But unfortunately, in every field there are some black sheeps. There are few NGO's which may fall in that category. In case appropriate action against such black sheeps are not taken, then those NGO's who are doing commendable job may also suffer a bad name and reputation. Therefore, a close look on the activities of such NGO's would be in public interest. On the other hand, if the complaint is found to be false and motivated appropriate stern action can also be taken against complainant.

16. Reverting now to the facts of the present case, from the material on record, there does not seem to be any doubt that two different set of accounts for the same period were sent by AWARE, one to NOVIB and the other to the Income Tax Department. The difference in the amount of unutilised foreign grant as shown in the two accounts is of crores of rupees. In the accounts sent to NOVIB, it is submitted on behalf of AWARE that deemed expenditure was shown as expenditure and that is how the balance of unutilised foreign contribution as on 31st March 1993 was shown as about Rs. 82 lakhs instead of actual balance of about Rs. 20 crores. It has been further claimed that the two statements of accounts were prepared by two different firm of Chartered Accountants. The fact that two separate firm of Chartered Accountants prepared two statement of accounts by itself deserves to be looked into in depth. The purpose and object behind this state of affairs deserve to be thoroughly enquired into. During the enquiry it may have to be considered as to why two different firms of Chartered Accountants were engaged and while so doing the explanation of AWARE in this regard can be examined. It will also have to be

examined whether the object of AWARE was only to get further grant from NOVIB or there was any other object. It has to be borne in mind that Rs.13.76 crores were shown to have been spent in the month of March, 1993 although the amount had not even been withdrawn from the Bank. The argument that Rs.13.76 crores during the period ending 31st March, 1993 was in fact shown as Advance also deserve to be thoroughly probed as it is not disputed that in reality this amount had not been withdrawn from the Bank. This amount has been later shown to have been utilized during the period ending 31st March, 1995 to 31st March, 1997. The effect of Chairman allegedly writing letters to the banks on 21st March, 1993 to prepare the drafts of about Rs.13 crores will also have to be thoroughly enquired keeping in view the fact that in fact all drafts were prepared during the next financial year i.e. on 23rd May, 1994. The explanation that the fixed deposit receipts were maturing in April and May 1993 and, therefore, the drafts were prepared on 23rd May, 1993 would also have to be examined in depth by examination of accounts etc. From the charts placed before us during the course of hearing by Mr. Chiddambaram, learned counsel for AWARE, it appears that the fixed deposit receipts of substantial amounts had matured about more than a month before the date of issue of the drafts. According to the petitioner the AWARE got these drafts prepared after NAVIB had started making enquiries and AWARE thought that the NAVIB may lay claim to recover amounts of unutilised grant.

17. The question as to whether the facts pointed out by NAVIB have the element of criminality or not or the same only shows irregularities in the working of AWARE as sought to be contended on its behalf, can be properly examined and considered only after thorough examination of accounts and records. Similarly, the status of the amount of loan repaid by those who are given interest free loan out of foreign contribution amount also deserves to be examined, keeping in view the provisions of FCRA, after thorough study of accounts and the end use of the amounts.

18. The matter relating to pledge of FDR by the AWARE for loan by Bank to an individual will also have to be thoroughly probed bearing in mind as well the manner of return and deposit of the loan amount with interest total amounting to RS.14lakhs in cash.

It may be over simplification at this stage to term all these aspects as irregularities. Many of these aspects are attributed by AWARE to their ex-employees Vimal Kumar or even to one of the Chartered Accountant and Babu Reddy. At this stage it is difficult to accept such an explanation without further in depth enquiry if the AWARE is innocent and victim of complaints made by Vimal Kumar and others and had no ulterior motive, it may be in their own interest to get their name cleared which is possible only after thorough independent enquiry.

19. The Income Tax Department has reopened the assessments and is conducting enquiries. It is also stated to have initiated action and issued a show cause notice for withdrawal of approval given under Section 12A and 80(G) of the Income Tax Act, on the basis of the complaints received. As per the affidavit filed on behalf of the Respondent No.2, AWARE has prepared two sets of statements. However, it is submitting only one set of statement to the Department consistently maintaining continuity. According to the affidavit of the Department, AWARE had submitted different sets of statements and during the enquiries it was submitted by its Chairman that it was so done for obtaining more funds. Further the accounts filed by AWARE with the Income Tax Department, as per the affidavit filed on behalf of Respondent No.2 show that as compared to the figures for the year 1991-92 and 1992- 93, the utilisation for the years 1993-94 and 1994-95 was quite substantial. In 1991-92 and 1992-93 the utilisation of foreign contributions was to the tune of approximately Rs.1.60 crores whereas in 1993-94 and 1994-95 the utilisation amounts increased to about Rs.13.5 crores and Rs.16 crores respectively. At this stage all these aspects cannot be glossed over as irregularities without further detailed examination of accounts by an independent person.

20. The Union of India while denying that the complaint dated 6th June, 1994 made by NOVIB to it was not examined by FCRA Division in the Ministry of Home affairs has filed a vague affidavit stating that the matter was thoroughly examined and submitted to the competent authority but considering the explanation regarding the reported

discrepancies in the accounts furnished on behalf of AWARE the competent authority decided that the case may be closed.

21. At this stage we may notice provisions of FCRA defining 'Foreign contribution' [Section 2(c)]. Its explanation provides that a donation, delivered or transferred by any legal currency or foreign security by any person who has received it from any foreign source, either directly or through one or more persons, shall also be deemed to be foreign contribution. The authorities may have to examine the real import of the explanation in relation to return of a loan granted out of a foreign contribution. The question to be examined would be that when the loan is returned would it be foreign contribution or not or would it depend on the facts of each case. For example, in some cases the return of the loan may be just after couple of days. Would such an amount received back cease to be a foreign contribution? Likewise the status of the interest earned on foreign contributions and that of the Revolving Fund would have to be examined. It may be useful to notice that AIF has no independent existence. That is also the report of KPMG. The answer to some of these legal questions can be properly given after atleast prima facie knowing factual matters by getting accounts examined by an independent person.

22. We have perused the file of Foreign Contributions Division of Ministry of Home which speaks volumes as to the main reasons for closing the case. For the present, we say no more till such time we receive the report on examination of accounts in terms of this order. However, it deserves to be emphasised that the public interest demands that the working of such NGO's inspires the public confidence. The examination of the accounts of such organisations has to be critical. A duty is cast on the authorities under FCRA to ensure that the violators are punished according to law though not permitting witch hunting by donor or anyone else. During the enquiry it may also become necessary to examine how the amounts were spent by AIF. The AIF is not registered under FCRA. The President of AIF was Mr. G. Ramakrishna, Chartered Accountant. It is claimed that he is no more the President. That may be so but the question would be whether Mr. G. Ramakrishna was used by AWARE or he was responsible for what is being attributed to AWARE. These matters can be properly examined by this court only on receipt of report

on accounts.

23. While we refrain from commenting on the proceedings initiated by Income Tax Department for reopening of assessments lest it may cause prejudice either to AWARE or to the Department but it deserves to be noticed that despite approval for conducting special audit having been 'granted by Commissioner of Income Tax on 5th March, 1998, no action seems to have been taken for a period of nearly 6 months. Mr. Jolly attributes it to inadvertence. Assuming it is so, we hope such inadvertence will not take place now.

24. Mr. Chiddambaram submitted that in the organisation of such large magnitude having various activities, the mistakes and irregularities are likely to occur and that is what has happened in the present case. It may be so but the facts are too serious to deserve dosing the case at this stage by terming the aspects in respect of accounts as noticed hereinbefore, as mistakes or irregularities without further probe. The facts noticed in this order are only illustrative. All detailed facts requiring examination have not been noticed in this order. We have only noticed some of the material facts. In any case if it is found to be a case of mistake or irregularity, after close examination by an expert on accounts, the matter can then be directed to be closed or further necessary directions on the facts of the case can be issued.

25. We also refrain from commenting upon report submitted by *M/s.* KPMG. Both NOVIB and AWARE had their own versions about that report. AWARE relied upon the report to press home the point that it has not found that AWARE had misappropriated or misutilised any funds. NOVIB challenges even the appointment of *M/s.* KPMG and Mr. Bhushan contended that no value can be attached to such a report. NOVIB did not join in the examination of accounts by KPMG. Mr. Bhushan also referred to some parts of the report in support of the case of NOVIB. The question whether AWARE was ill advised to inform NOVIB that it had utilised the foreign contribution which it had not and whether it had no guilty intention as sought to be made out on its behalf, is an aspect which will have to be considered by the court on examination of the report regarding accounts. The question as to whether it is a case of siphoning off the funds, cheating and fraudulent

transactions and whether prima facie offences of cheating etc were committed or not can also be appropriately gone into on detailed examination of the accounts. We feel that it is only thereafter it would be appropriate for this court to consider whether direction for registration of a case for commission of various offences deserves to be issued and investigation conducted by an investigating agency - Crime Branch or CBI or any other similar agency.

26. We have no doubt that an independent indepth enquiry into the accounts of AWARE and AIF in the facts and circumstances of the case, would be necessary. Thus, having considered the matter and rival submissions, we refrain from referring the matter, at this stage, for registration of the case and investigation by CBI or any other investigating agency. Further, we are of the view that pending receipt of the report on accounts it is not presently necessary to issue directions for cancellation of registration of AWARE under FCRA or cancellation of exemption under the provisions of Income Tax Act. We, however, direct the Income Tax Authorities to expeditiously conclude the special audit in accordance with law.

27. In view of the above, we appoint M/s. S.R. Batliboi & Co., Chartered Accountants to conduct an independent indepth enquiry into the financial affairs of AWARE and AIF in terms of the observations made hereinbefore in this judgment. The Chartered Accountants will also keep in view the allegations and counter allegations made by the parties in the writ petition and replies etc. On examination of accounts they would report whether there has been any misappropriation and misutilisation of funds by AWARE and AIF. The Registry alongwith copy of the judgment should also send forthwith a copy of all papers on the file of this writ petition to the Chartered Accountants. All concerned are directed to render necessary cooperation. The payments of fee and expenses of M/s. S.R. Satliboi & Co. will be made by NOVIB who at first instance shall place at their disposal a sum of Rs.1lakh in account. Any observations made in this judgement shall have no effect on any other proceedings.

28. For report put up the matter on 25th February, 1999.

