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## Association for Democratic Reforms & Another v Union of India & Another: Supreme Court deciding on the Constitutional Validity of the Electoral Bond Scheme

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### INTRODUCTION

In the current geopolitical situation of ongoing wars and inter-state ‘cold conflicts’, a pervasive tactic is going largely unnoticed, i.e. Targeted Killings.

*“If things go wrong in the new Constitution, the reason will not be that we had a bad Constitution, what we will have to say that Man was vile...”*

**- Dr. B. R. Ambedkar**

The makers of the Indian Constitution and the Members of our first Parliament had the vision of building a transparent and fair democratic system. However, after passing the Finance Act, 2017<sup>1</sup> some major amendments were made to our electoral system. One of the important drawbacks of the act was that Indian citizens were given no information on the candidates'

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<sup>1</sup> Finance Act 2017

backgrounds contesting for the elections, a fundamental right protected by Article 19(1)(a)<sup>2</sup>. This lack of transparency allowed the criminalisation of politics which has become a challenge to overcome. Gradually, this ‘criminalisation of politics’ has led to limited voter choice, hindered good governance, compromised the integrity of public offices, and fostered a culture of violence and malpractices in the election system.

Today, the confidence of our public in the integrity and effectiveness of India’s democratic process has vanished. The issue further gets complicated due to insufficient legal measures to stop politicians of criminal backgrounds from entering the political arena. It is a pressing need of the time for appropriate steps to be taken in this regard. To rebuild trust, it is important to strengthen and strictly enforce contemporary laws, increase transparency in political funding and decision-making, and ensure the election of good political leaders.

The case of ‘The Association for Democratic Reforms<sup>3</sup>’ underscores the significance of transparency and accountability regarding the criminal backgrounds of candidates, allowing the information to reach to the masses and media thus helping them to make informed decisions. This would ultimately lead to a more informed electorate and cleaner politics. This case is considered one of the landmark cases where the Apex court took a progressive step in the direction of an ongoing battle against corruption and unwanted influences in politics.

## **FACTS OF THE CASE**

During the 2017-18 Union Budget presentation, former Union Finance Minister Arun Jaitley pointed out a longstanding issue in India: the lack of transparency in political funding despite decades of independence. To address this, he introduced the Electoral Bonds Scheme, designed to bring clarity to political finance.

The legal framework for implementing the Electoral Bonds Scheme included amendments through the Finance Acts of 2016 and 2017. These amendments revised several key laws, including the Foreign Contribution Regulation Act 2010 (FCRA)<sup>4</sup>, the Representation of the

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<sup>2</sup> Constitution of India 1950, art 19(1)(a)

<sup>3</sup> *Association for Democratic Reforms & Anr v Union of India & Anr* (2024) 3 SCR 417

<sup>4</sup> Foreign Contribution Regulation Act 2010

People Act, 1951 (RoPA)<sup>5</sup>, the Reserve Bank of India Act, 1934<sup>6</sup>, the Income Tax Act, 1961<sup>7</sup>, and the Companies Act, 2013<sup>8</sup>.

Specific amendments under the Finance Act 2017<sup>9</sup> [Dated 31st March 2017] exempted political parties from detailed record-keeping of contributions received via electoral bonds under Section 13A of the Income Tax Act<sup>10</sup>. It also empowered the government to authorize scheduled banks to issue electoral bonds under Section 31 of the RBI Act<sup>11</sup>. Furthermore, changes exempted political parties from disclosing contributions received through electoral bonds in Contribution Reports, as mandated by Section 29C<sup>12</sup>. Additionally, the amendment to Section 182<sup>13</sup> removed the previous limit on corporate donations.

An electoral bond operates like a promissory note, payable to the bearer on demand. Unlike traditional promissory notes that specify payer and payee details, electoral bonds maintain complete anonymity and confidentiality regarding the parties involved in the transaction.

Under the 2018 Scheme, certain branches of the State Bank of India (SBI) were authorised to sell electoral bonds. Bonds can be purchased in denominations of ₹ 1,000, ₹10,000, ₹1,00,000, ₹10,00,000, and ₹ 1,00,00,000 from the SBI. They are to be sold for 10 days in January, April, July, and October each year. The identity of the purchaser remains anonymous to everyone, except the SBI, who must record the buyer's Know Your Customer (KYC) details.

Political parties that secured more than one per cent votes in the last general election to the House of the People or a Legislative Assembly are eligible to accept donations through electoral bonds. The political parties must encash the bond within 15 days of receiving it. After this period ends, the funds are deposited to the Prime Minister's Relief Fund.

Shortly after the amendments were enacted, various petitions were filed in the Supreme Court in September 2017 and January 2018 by two Non-Governmental Organizations—the

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<sup>5</sup> Representation of the People Act 1951

<sup>6</sup> Reserve Bank of India Act 1934

<sup>7</sup> Income Tax Act 1961

<sup>8</sup> Companies Act 2013

<sup>9</sup> Finance Act 2017

<sup>10</sup> Income Tax Act 1961, s 13A

<sup>11</sup> Reserve Bank of India Act 1934, s 31

<sup>12</sup> Representation of Peoples Act 1951, s 29C

<sup>13</sup> Companies Act 2013, s 182

Association for Democratic Reforms (ADR) and Common Cause—and the Communist Party of India (Marxist). These petitions challenged the amendments because the Finance Acts were improperly classified as money bills to avoid extensive scrutiny by the Rajya Sabha. They also argued that the Electoral Bonds Scheme promoted opacity in political funding and condoned large-scale electoral corruption. The object and purpose of bringing Electoral bonds, i.e. to bring transparency and weed out corruption from political funding itself got defeated by the very purpose, scheme and genesis of the Electoral bonds and hence the constitutionality of the Electoral bonds was challenged by filing petitions in Hon'ble Supreme Court of India.

### **LEGAL ISSUES BEFORE THE HON'BLE SUPREME COURT**

1. Whether unlimited corporate funding to political parties, as envisaged by the amendment to Section 182(1) of the Companies Act 2013<sup>14</sup> infringes the principle of free and fair elections and violates Article 14 of the Constitution.
2. Whether the non-disclosure of information on voluntary contributions to political parties under the Electoral Bond Scheme and the amendments to Section 29C of the Representation of People's Act 1952, Section 182(3) of the Companies Act 2013 and Section 13A(b) of the Income Tax Act 1961 are violative of the right to information of citizens under Article 19 (1) of the Constitution of India, 1950.

### **ARGUMENTS PUT FORTH BY BOTH THE PARTIES**

#### **A. ARGUMENTS ADVANCED BY PETITIONER**

**1. Violation of the Right to Information:** The Electoral Bonds Scheme mandates non-disclosure of electoral funding information, which contradicts the principles of transparency essential for monitoring political funding under the Representation of the People Act (RPA) and corporate funding under the Companies Act. This lack of transparency infringes on the voter's right to information about government affairs. The opacity in political contributions facilitated by the EBS fosters corruption and quid pro quo arrangements, violating the right to life and personal liberty under Article 21 of the Indian Constitution.

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<sup>14</sup> Companies Act 2013, s 182(1)

**2. Failure to Meet Proportionality Standards:** The restriction on the right to information does not satisfy the proportionality test, as non-disclosure is not the least restrictive means to achieve the goal of curbing black money. Less restrictive measures could be more effective in addressing this issue.

**3. Ineffectiveness in Curbing Black Money:** While Clause 14 of the EBS prohibits the legal trading of electoral bonds, it allows such trading in practice, raising doubts about the scheme's ability to effectively curb black money. Further, the removal of the cap on corporate contributions is arbitrary, as it treats loss-making and profit-making companies equally, permitting unlimited contributions without shareholder oversight. This undermines democratic principles by reducing shareholder control over corporate political contributions.

## **B. ARGUMENTS ADVANCED BY THE UNION OF INDIA**

**1. Objective of Reducing Black Money:** The EBS was introduced to curb the flow of black money into politics. By ensuring that donations are made through banking channels, the EBS maintains a clear and complete trail of all contributions, reducing the chances of illicit cash transactions.

**2. Support for Political Parties:** In a vibrant democracy, political parties play a crucial role and need financial support to function effectively. The EBS provides a regulated and legitimate method for transferring funds to political parties through banking channels, reducing reliance on illegal and unregulated methods.

**3. Confidentiality and Privacy:** Protecting the confidentiality of donor contributions is essential to prevent donors from being targeted by other political parties or opponents. This confidentiality upholds the donor's right to privacy, suggesting that citizens do not have an absolute right to know the specifics of political party funding.

**4. Curbing Black Money and Ghost Parties:** The EBS includes provisions specifically aimed at curbing black money. It also sets preconditions for political parties, ensuring that only legitimate parties receive funding. Ghost political parties, which often lack transparency and legitimacy, are barred from receiving funds, promoting a cleaner political environment.

## **OBSERVATION OF THE HON'BLE SUPREME COURT OF INDIA**

### **The important observations of the Hon'ble Supreme Court, while rendering judgment in the aforesaid case are as follows:**

1. At a primary level, political contributions give the contributors a seat at the table i.e. it enhances access to legislators. This access also translates into influence over policymaking. There is also a legitimate possibility that financial contributions to a political party would lead to quid pro quo arrangements because of the close nexus between money and politics. Quid pro quo arrangements could be in the form of introducing a policy change or granting a licence to the person making financial contributions to the party in power.
2. The Electoral Bonds scheme is not the only means for curbing black money in electoral financing. There are other alternatives that substantially fulfill the purpose and impact the right to information minimally when compared to the impact of electoral bonds on the right to information.
3. The deletion of the mandate of disclosing the particulars of contributions violates the right to information of the voter since they would not possess information about the political party to which the contribution was made, which is necessary to identify corruption and quid pro quo transactions in governance—information which is necessary to exercise an informed vote.
4. The ability of a company to influence the electoral process through political contributions is much higher when compared to that of an individual. A company has a much graver influence on the political process both in terms of the quantum of money contributed to political parties and the purpose of making such contributions.
5. Contributions made by companies are purely business transactions made with the intent of securing benefits in return.
6. The provision permitting unlimited corporate contributions authorizes the unrestrained influence of companies in the electoral process. This is violative of the principle of free and fair elections and political equality captured in the value of one person one vote.

7. The Supreme Court affirmed that the right to information is part of the freedom of speech and expression under Article 19(1)(a). Any restriction on this right must align with the grounds listed in Article 19(2)<sup>15</sup>, which include interests like the sovereignty and integrity of India, security of the state, public order, decency, or morality, among others. The Court observed that the purpose of curbing black money does not fall under the grounds specified in Article 19(2). This implies that restrictions on information related to electoral bonds cannot be justified merely on the pretext of combating black money. Referring to the ***Puttaswamy judgment***<sup>16</sup>, which recognized the right to privacy under Article 21, the Court noted that the right to informational privacy includes political affiliations. However, applying the proportionality test, the Court held that the right to privacy does not cover donations made with the intent to influence policies. In such cases, the public's right to know who is funding political parties takes precedence over donor anonymity.

8. The Court found no valid rationale for allowing corporations to make unlimited contributions to political parties, regardless of their profitability. This could lead to undue influence over political decisions by wealthy corporations. The lack of transparency in political funding was seen as disproportionately restrictive and arbitrary, failing to balance donor privacy with the public interest in knowing the sources of political funding.

## DECISION

In a significant ruling on February 15, 2024, The Hon'ble Supreme Court by its five-judge bench of the Supreme Court, led by the Chief Justice of India, rendered the Electoral Bond scheme unconstitutional. This decision was informed by the Court's reflections on the scope of judicial review, particularly in matters concerning economic policy, citing key judgments such as ***Swiss Ribbons v UOI***<sup>17</sup> and ***Pioneer Urban Land and Infrastructure Limited v Union of India***<sup>18</sup>. These cases underscored those challenges to laws, including those affecting electoral processes, requiring prima facie evidence of infringement of fundamental rights or constitutional provisions, shifting the burden to the State to justify any such infringements.

<sup>15</sup> Constitution of India 1950, art 19(2)

<sup>16</sup> *Puttaswamy v Union of India* 2019 (1) SCC 1

<sup>17</sup> *Swiss Ribbons v UOI* (2019) SCC Online SC 73

<sup>18</sup> *Pioneer Urban Land and Infrastructure Limited v Union of India* 2019 (8) SCC 416

Furthermore, the Court reaffirmed the Right to Information as a fundamental right, initially recognized in the *State of Uttar Pradesh v Raj Narain*<sup>19</sup>. It emphasized that this right extends beyond public affairs to encompass information critical for participatory democracy, including electoral processes. The ruling drew on precedents like *Rameshwar Prasad v Union of India*<sup>20</sup>, which prioritized the role of political parties in the governmental structure and incorporated principles from cases such as *Kihoto Hollohan v Zachillhu*<sup>21</sup> regarding political accountability.

Ultimately, the Supreme Court concluded that anonymous electoral bonds under the scheme violated the right to information guaranteed by Article 19(1)(a) highlighting the importance of transparency in political funding for the integrity of democratic processes.

## ANALYSIS

The case under discussion raises serious questions regarding the transparency and fairness in the political funding process which has the serious effect of undermining the very foundation of democracy in our country. While the government argues that mandatory KYC compliance for donors provides an audit trail, this trail is accessible only under substantial suspicion but the recent legislative amendments, particularly to the Companies Act, 2013, reveal a growing trend of corporate contributions to political parties, potentially leading to quid pro quo deals which have threatened the principle of free and fair elections. Public interest cannot be sacrificed to protect the anonymity of donors.

The Supreme Court's ruling declaring the Electoral Bond Scheme unconstitutional validates concerns raised by the RBI and the Election Commission of India. It acknowledges the threat to the democratic framework and the vision of free and fair elections established by the Constitution. This decision disrupts the potential flow of funds from shell companies and money laundering through corporate contributions, especially from loss-making companies. The judgment marks a significant electoral reform, recognizing that the Electoral Bond Scheme did not effectively address the issue of black money. A proposed solution is to reimpose limits on corporate funding to political parties, similar to those in place before 2017. The Court's

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<sup>19</sup> *State of Uttar Pradesh v Raj Narain* 1975 AIR 865

<sup>20</sup> *Rameshwar Prasad v Union of India* 2006 (2) SCC 1

<sup>21</sup> *Kihoto Hollohan v Zachillhu* 1992 SCR (1) 686



directive for prompt disclosure of political funding, with clear instructions to the State Bank of India, emphasizes the need for transparency.

Furthermore, this ruling reinforces the role of the Election Commission of India as a constitutional guardian, promoting increased transparency in the origins and expenditures of election funds. The Electoral Bond Scheme, criticized for its lack of transparency and infringement on voters' right to information, now calls for the government to enact clear legislation on electoral funding, moving beyond schemes or executive directives.

## **CONCLUSION**

The Supreme Court's verdict of upholding the Electoral Bonds Scheme (EBS) unconstitutional has reinforced the various concerns that were raised by the Reserve Bank of India (RBI) and the Election Commission of India (ECI) on the issue of potential threats to the democratic integrity of the country and the vision of free and fair elections as envisaged by the makers of the Constitution. This ruling further deals with the risks that are attached to funds being funnelled through shell companies and the laundering of money via corporate contributions, particularly from loss-making firms. The judgment marks a significant step in a major electoral reform by clarifying that the issue of curbing black money was not addressed by the EBS. A better solution to be applied was to fix a cap on political funding, especially from big corporate giants similar to the pre-2017 regulations.

This decision has played a major role in strengthening the Election Commission, by enhancing its powers to regularise the election procedures. It is crystal clear that EBS, from its inception, compromised the transparency of elections as well as the fundamental right of information of the voters. The Government by following the guidelines and direction of the court should introduce specific legislation for the establishment of a transparent electoral funding system. The electoral process is fundamental to democracy, ensuring that citizens freely exercise their right to choose representatives. Central to this process is upholding the right to information, which empowers voters by providing transparent and comprehensive data on candidates, policies, funding, and governance. As societies progress, it remains vital to strengthen both the electoral process and the right to information, acknowledging their interdependence in preserving democratic values and empowering individuals.