
BONDAGE OF THE ELECTORATE AND ELECTORAL BONDS

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ABSTRACT

India is the largest democracy, and it exercises the largest election where people elect the prime minister of the country by voting in the Lok Sabha election, which is conducted once every five years. The Articles 324-329 of part XV of the constitution of India deals with the election-related provisions. To ensure the establishment of a democratic country, elections are needed. Ever since the first election of Independent India in 1951, elections have undergone several changes. Since then, there have been problems like Vote-buying, Freebies, corruption, etc., which still continue. The Election Commission of India is the Constitutional body that performs functions like superintendence, direction, and control of the election. Article 324 of the Constitution of India vests these powers to the Election Commission. But lately, the credibility of the Election Commission and elections conducted by them are facing widespread criticism. This paper focuses on discussing some of the critical issues relation to issuing of Electoral Bonds and aims to address the issue of misuse of money received as election funding and also the anonymity and opaqueness of the Electoral Bonds. Along with this, the idea of state funding of elections and amendments made in laws such as the Foreign Contribution Regulation Act, 1976 and Companies Act, 2013 will also be analysed along with the approach of the honourable supreme court in this issue.

Keywords: Election Commission, Electoral Bonds, Foreign Contribution Regulation Act, 1976, Companies Act, 2013

Introduction

The major purpose of any democratic political system is to reflect the aspirations of the citizens in the process of governance. This noble objective could be achieved only by ensuring an electoral process that is capable of arresting any tendency to skew the outcome of the elections towards any particular interest group. Our higher judiciary and the political system of the country had been protecting these constitutional values ever since our independence. The launching of the electoral bond scheme in the country recently has raised serious concern among legal and political analysts due to its possibility to topple these values which we cherish.

The electoral bond system was launched in the country through the 2017 Union budget. The proposal permits corporates and individuals to anonymously donate any extent of money they wish to any political party registered under Section 29 A of the Representation of Peoples Act 1951.¹ The avowed purpose of the proposal was to ensure transparency and to reduce corruption in Indian election scene. But it is criticized that spreading the illusion of transparency, the attempt is to legalize corruption.² In a political system where money power is becoming a more powerful weapon to win electoral battle than ideology or policy proposals the new electoral bond system distorts democratic ideal of fair competition.³

Electoral Bond; The Product

Electoral Bond is a new financial instrument introduced by the Central Government for making donations to political parties. The bonds could be purchased by any person who is a citizen of India either individually or jointly with others. Body corporates which are incorporated or established in India also could purchase these bonds. The consideration for the purchase of bonds could be given only through cheque or digital mode which facilitates the verification of the donor, if required. But the name of the purchaser of bonds will not be mentioned in the bonds.

There is no limit to the maximum amount that could be deposited in the electoral bonds. However, it is issued in multiples of Rs, 1000, 10,000, 1,00,000, 10 lakhs and 1 crore. The

¹ The other requirement is that the party should have secured not less than one per cent of the votes polled in the last general election to the House of the People or a Legislative Assembly.

² Hemanth, *Electoral Bonds - the legalized form of corruption*, LEGAL SERVICE INDIA E JOURNAL , <https://www.legalserviceindia.com/legal/article-1358-electoral-bonds-the-legalized-form-of-corruption.html> (last visited Mar 13, 2022).

³ Editorial, *Transparency and Electoral Bonds: Will transparency foster accountability in India's electoral system*, 54 ECON. POLIT. WKLY. 7–8 (2019).

bonds are made available for ten days during the months of January, April, July and October. The only institution that is authorised to sell these bonds is State Bank of India and again, through its specified branches only. These bonds are valid for fifteen days from the date of issuance. The bonds can be redeemed only through the designated account of a registered political party.⁴

Controversial provisions

There is wide spread opposition to the provisions regarding issue of electoral bonds. One major criticism is regarding the facility to not disclose the name of the donor of money and the identity of the political party which receives the amount. In spite of this provision of anonymity, it is accused that the Government in power at the Centre may be in a position to identify the details regarding the donor and the receiver since all payments could be effected only through the State Bank of India. Another risk is that the donors of funds to the opposition parties could be identified by the Government and punitive measures may be adopted by the Government against those companies. This will make electoral financing a really difficult task for the opposition parties.⁵

Another controversial provision is regarding political contributions by corporate bodies. Section 182 of the Companies Act 2013 provided that such payments could be made only if the company satisfies several important conditions. The company should be in existence for at least 3 financial years before it makes the payment. A Government Company is not permitted to make contributions. The aggregate amount which may be contributed by the company as political contribution in any financial year shall not exceed seven and a half per cent. of its average net profits during the three immediately preceding financial years. The contribution shall be made only through a resolution passed in a duly convened meeting of the Board of Directors of a Company. The contribution shall be made by an account payee cheque drawn on a bank or an account payee bank draft or through a bank account using electronic clearing system. The profit and loss account should also give the particulars of the total amount contributed and the name of the party to which such amount has been contributed.

⁴ See press release by Government of India dated Jan 2, 2018. https://dea.gov.in/sites/default/files/Electoral%20Bonds_Press%20RELEASE_2-1-2018.pdf (last visited Mar 13, 2022)

⁵ Barkha Shravani Sahu, *Electoral Bonds and Corruption Involved in it*, 24 SUPREMO AMIC. 672–678 (2021).

Many of these restrictions were removed by the Finance Bill 2017. The rule that a company should have been in existence at least for a period of three years before it makes a political contribution has been removed. The maximum cap on contribution of seven and a half percentage of the net profits of the Company was removed giving scope for unlimited contribution by a Company. The requirement to mention the name of the party to which contribution is made also is removed. The consequence is that the details of the transaction is veiled even from the share holders of the company. This is against the principle of corporate governance which requires maximum disclosure of details connected to the functioning of the company to all the stakeholders. The net effect of all these changes is that even a shell company can donate an unlimited amount anonymously to a political party. Even black money parked in tax havens may find its way to the coffers of political parties without any one's knowledge. These provisions have created a legal route to channel kick backs for political favours extended to any corporate entity.

The lack of whole-hearted support from the Reserve Bank of India and the Election Commission is read as a moral support to the opponents of the proposal for electoral bonds. RBI is critical of the scheme and it had warned that the system would encourage money laundering.⁶ Similarly, the Election Commission also has expressed its disapproval against the provisions for anonymous donations to political parties in the course of proceedings before the Supreme Court. The affidavit submitted before the Supreme Court states that it had informed the Ministry of Law and Justice that "certain provisions of the Finance Act 2017 and the Companies Act 2013, and the corresponding amendments carried out in the Income Tax Act, the Representation of the People Act 1951 and the Companies Act, 2013 will have serious repercussions on the transparency aspect of political finance/funding of political parties".⁷

RTI and Electoral Bonds

A long pending case before the Central Information Commission seeking disclosure of reports submitted by the State Bank of India related to the sale and encashment of electoral bonds was dismissed recently. SBI refused to share some of the documents on the ground that the

⁶ What is an electoral bond? Business Standard. <https://www.business-standard.com/about/what-is-electoral-bond>. (last visited Mar 12, 2022). See also; <https://www.huffpost.com/archive/in/entry/rbi-warned-electoral-bonds-arun-jaitley-black-money-modi-government-in-5dcbde68e4b0d43931ccd200>. For the copy of the response from RBI.

⁷ See the affidavit submitted before the Supreme Court by the Election Commission in the case Association for Democratic Reforms & Anr v Union of India & Ors. https://www.scobserver.in/wp-content/uploads/2021/10/Counter-Addidavit_by_Election_Commission_of_India2-compressed.pdf. p.7

documents are held in fiduciary capacity and claimed that it relates to personal information of third parties. SBI relied on Section 8(1) (e) and 8(1) (j) of the Right to Information Act. The case was filed by RTI activist Venkatesh Nayak and he sought several details regarding sale of bonds during March and April 2018. Among other details he sought copies of applications for bonds, denomination wise requests for bonds etc. SBI was reluctant to give these details and therefore he approached the CIC for information. CIC while dismissing the appeal relied on the pending case before the Supreme Court related to electoral bonds and also the fact that the Court did not issue a stay order as requested by the writ petitioners.⁸ The order of the court is criticised on the ground that primacy given to a few donors than the interest of 850 million voters.⁹ Interestingly, an RTI request has revealed that the printing cost of electoral bonds are borne by the government, indirectly, the tax payer and not the donors or the beneficiary political party .¹⁰

Supreme Court and electoral bonds

Since the issuance of notification of the Finance Ministry to issue electoral bonds in 2018, number of petitions are filed before the Supreme Court challenging the constitutional validity of the scheme. Petitioners approached the apex court twice to get the scheme stayed but the court refused to give orders. An NGO named Association for Democratic Reforms is in the forefront of this campaign to get the scheme scrapped. Civil society organisations and eminent intellectuals also have raised their concern over the long delay in adjudication of constitutional cases.¹¹ Opposition parties also has joined hands and in July 2021 Communist Party of India (Marxist) approached the Supreme Court seeking urgent hearing of petitions challenging the constitutional validity of the scheme.¹² But the petition is still remaining unheard before the Supreme Court. The interim order of the court has asked the political parties to give the data regarding the donations through bonds to the Election Commission in sealed envelopes. This

⁸ Electoral bonds: CIC dismisses appeal seeking disclosure of reports by SBI. Business Standard https://www.business-standard.com/article/elections/electoral-bonds-cic-dismisses-appeal-seeking-disclosure-of-reports-by-sbi-121121900257_1.html (last visited Mar 13, 2022)

⁹ Editorial, *Beyond electoral bonds*, 54 ECON. POLIT. WKLY. 7–8 (2019).

¹⁰ Taxpayers, Not Donors or Parties, Are Bearing the Cost of Printing Electoral Bonds: RTI. <https://thewire.in/rights/electoral-bonds-tax-payers-cost-printing-bank-commission>. (last visited Mar 13, 2022)

¹¹ Sedition, Farm Laws, Electoral Bonds: Over 200 Eminent Citizens Urge CJI to Hear Key Matters. <https://thewire.in/law/sedition-farm-laws-electoral-bonds-over-200-eminent-citizens-urge-cji-to-hear-key-matters>. (last visited Mar 13, 2022)

¹² As Electoral Bonds Go on Sale Again, Concerns on Scheme's Opacity Remain Unheard. The Wire. <https://thewire.in/government/as-electoral-bonds-go-on-sale-again-concerns-on-schemes-opacity-remain-unheard>. (last visited Mar 13, 2022)

exercise has been criticised as a futile exercise which has no significant impact on the issue at hand.¹³

To facilitate electoral bonds the Government amended four legislations, namely, Foreign Contribution Regulation Act, 2010, Representation of the People Act, 1951, Income Tax Act, 1961 and the Companies Act, 2013. The Scheme was introduced as a money bill with the intention of bypassing the scrutiny of Rajya Sabha, which is again an issue that is challenged before the Supreme Court.

It should be noted that the biggest beneficiary of the scheme is Bhartiya Janata Party (BJP) which for example, gathered 76% (Rs 2,555 crores) of the total electoral bonds (valued at 3,355 crores) sold in the financial year 2019-20. Another matter of worry is the fact that 92% of the total amount gathered through the scheme is by sale of bonds valued at one crore. Obviously, such huge amounts could be donated only by large corporates and the chances of *quid pro quo* is a matter of grave concern.

The present case pending before the Court should be seen in the light of a catena of cases filed by civil society organisations like Common Cause, Association for Democratic Reforms etc, in the past to entrench a political climate of transparency in the country.¹⁴ The cases filed before the apex court to mandate the political parties to disclose the criminal antecedents of the candidates, the educational qualifications, etc., and the opposition of the ruling dispensation against each of these moves helps us to see the significance of this new battle for transparency. The only difference is in the magnitude of the fight. If the fight is lost in this case, it will be a fatal blow to the democratic ideals of the country.

Counter arguments by the Government

The Government had been making a spirited defence of the provisions for electoral bonds. According to the Government one safeguard is that for the purpose of this section “political party” means only a political party registered under section 29A of the Representation of the People Act, 1951. They also should have secured not less than 1% of the votes polled in the previous elections. The money could only be paid through cheque or demand draft which the

¹³ A Anushi Kashyap & Gurupal Singh Gill, *Electoral Bond Scheme: The Legitimate Opacity in Political Funding*, 1 LAW ESSENTIALS J. 79–95 (2020).

¹⁴ Kamal Kant Jaswal, *Electoral Bonds: The Illusion of Transparency*, 21 ECON. POLIT. WKLY. 32–36 (2019).

government argue as a step forward compared to the old regime where even cash payments were made.

Most of these arguments fail to stand careful scrutiny. RTI activists have already identified that the requirement of securing one percentage vote is not assessed by any of the regulatory agencies. SBI do not have this data and Election Commission has not supplied any such information. More importantly the percentage of vote secured in the elections has no significance in the context of controlling electoral outcome through money power which is the prime area of concern.

The payment made by a bearer instrument does not leave any data regarding the person who has actually spend the money at the time of handing over the bond to any political party. Only possibility is to identify the person/entity which bought the instrument in the first instance from the Bank. This gives a lot of scope for hide and seek games by persons of shady credentials.¹⁵ When we look at the comparative position in countries like UK and USA, we find that there are strict norms regarding reporting the contributions. Indian model of anonymity appears odd in the light of such comparative studies.¹⁶

Conclusion

The story of electoral bonds in India is a tragic irony. The aim of the legal system of any country should be to make the functioning of political parties of the country more and more transparent and participatory. The scheme of electoral bonds unfortunately proceeds on the very opposite direction. What is most distressing is the failure of statutory and Constitutional bodies of the highest level like the Information Commission, Reserve Bank of India and The Election Commission to boldly align the law and practice related to elections with the Constitutional Ideals. The most serious consequence of the present scheme of electoral bonds and the statutory amendments effected to carry out the same is the weakening of the Election Commission. Now all hopes are pinned on the apex court and it is expected that the shroud of mystery that surrounds the law relating to electoral bonds shall be lifted and electoral democracy be restored. The bondage of electoral politics by money power makes a mockery of our democracy and therefore the electoral bond system need to be scrapped.

¹⁵ Alok Prasanna Kumar, *Supreme Court on Rafale Papers and Electoral Bonds: One and a Half Cheers for Transparency*, 54 ECON. POLIT. WKLY. 10–11 (2019).

¹⁶ Deepanshi Singhal, *How Electoral Bonds Open the Door for Legalizing Corruption in India?*, 28 SUPREMO AMIC. (2022).