
ELECTORAL BOND SCHEME: PRIVACY V/S TRANSPARENCY

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ABSTRACT

The Preamble to the Constitution of India reveals that the nature of the Indian state is “Sovereign, Socialist, Secular, Democratic and Republic”. India, the world’s largest democracy, failed to develop a transparent system of financing political parties, which is essential for a free and fair electoral process in growing of democratic polity. The supreme court has several times asked the Parliament and Election Commission of India to bring Electoral reforms in the process of political funding. In response, the government has introduced many schemes to ensure transparency in election. Electoral Bond Scheme is one of them. This scheme aims to prevent corruption and brought transparency in election. The Finance Act, 2017 had introduced the system of Electoral Bonds Scheme whereby amendments were made into various statutes including Companies Act, 2013, The Income Tax Act, 1961 and The Representation of Peoples Act, 1951. Accordingly, the Electoral Bonds Scheme was notified on January 02, 2018 and the State Bank of India(SBI) was authorised to issue the Electoral Bonds. This paper discusses in detail the impact of Electoral Bond Scheme and amendments made by the Finance Act, 2017.

Keywords: Privacy, Transparency, Democracy, Electoral Bond Scheme (EBS), Electoral Reforms

INTRODUCTION

On January 02, 2018, the Central Government introduced the Electoral Bond Scheme to ensure transparency in political funding¹. It is like a promissory note payable to the bearer on demand and can be purchased by any citizen of India or any company incorporated in India from the notified branches of the *State Bank of India* only. It can be issued in the denominations of Rs. 1,000, Rs. 10,000, Rs. 1,00,000, Rs. 10,00,000, and Rs. 1,00,00,000. Every donor is required to provide KYC details to his bank and the bank may also demand additional KYC for electoral bonds. The bank will have full details of the purchaser of the electoral bond, which will be kept confidential. It is an obligation on political parties to provide information to the election commission about how much they have received from electoral bonds. The electoral bond can be purchased only in the first 10 days of the months of January, April, July, and October every year. The election commission issues separate account numbers to the political parties for the transactions during the election. The political parties can redeem their bonds only from their designated accounts within 15 days of their issuance, failing which SBI will donate that sum to the P.M. National Relief Fund.

The electoral bond scheme was proposed to achieve the objectives of the Finance Act of 2017, and that the following acts were amended: *the Income Tax Act of 1961, the Representation of the People Act of 1951, the Reserve Bank of India Act of 1934, and the Companies Act of 2013*.

Section 13A of the Income Tax Act² exempts companies that use electoral bonds from having to maintain records of their donations and that no questions can presumably be asked by Income Tax authorities.

Section 29C of Representation of Peoples Act³ which mandates the publication of “Contribution Reports,” which disclose “contribution in excess of Rs. 20,000 from companies and individuals. Political parties were exempted from a requirement for contributions made through electoral bonds by the amendment. Even more, the Representation of People Act has been amended to require exempt parties to inform the Election Commission of any amount received above Rs 2,000 if made through electoral bonds. The bond can be donated only to that political party that is registered under Section 29A of the Act and secured at least 1% of the

¹ Govt. notifies Electoral Bond Scheme, 2018 vide Notification No. S.O. 29(E) dated 2nd January 2018, Ministry of Finance (Department of Economic Affairs) New Delhi. Available at Electoral Bearer Bond Scheme 2018 (pib.gov.in). Last seen on 26/12/2023

² Income Tax Act, 1961 (Act 43 of 1961).

³ Representation of Peoples (Act 43 of 1951).

vote in the preceding election of Lok Sabha, or state legislative assembly. "The details of person donating shall be kept confidential by the scheduled bank and shall not be revealed to any authority except when asked by any competent court or upon institution of any criminal case by any law enforcement agency."⁴ The object of the electoral bond was to prevent cash transactions during the election and to maintain transparency.

Under Section 31 of the RBI Act⁵, 1934, the Government of India is required to authorize any scheduled bank to issue electoral bonds. In this way, only the State Bank of India (SBI) has been authorized to issue electoral bonds⁶.

The Companies Act, 2013 has also been amended after the introduction of the electoral bond scheme. Earlier, no foreign company could donate to any political party under the Companies Act, 2013. Now, such restrictions have done away and it can donate under this scheme. Earlier, as per section 182⁷ A partnership firm could donate maximum of 7.5% of its average three year net profit as political donations. Now, there is no such limit. Now, under the Amendment Act, companies may contribute any amount, directly or indirectly, to any political party. To make sure that this provision would not apply to companies in the event of electoral bonds, the government proposed an amendment to the Finance Bill. So, without having to disclose their contributions to any person, foreign, Indian, and even shell companies can now make donations to political parties.⁸

GOVERNMENT'S PERSPECTIVE

The electoral bond scheme was introduced with the aim of preventing cash transactions and maintaining transparency in elections. The scheme says that the information furnished by the donor shall be treated as confidential by the authorized bank and shall not be disclosed to any authority for any purpose except when demanded by a competent court or upon registration of a criminal case by any law enforcement agencies. So, it is clear that the privacy of the donor shall be insured, and only in extraordinary circumstances can an authorized court demand the details of the donor. It was claimed by the central government that the electoral bonds secure the privacy of the donors and prevent the use of black money during elections. The secrecy of

⁴ Confidentiality and disclosure of returns and return information. available at 26 U.S. Code § 6103 - Confidentiality and disclosure of returns and return information | U.S. Code | US Law | LII / Legal Information Institute (cornell.edu) last seen on 30/12/2023

⁵ The Reserve Bank of India Act, 1934 (Act No. 2 of 1934).

⁶ *Explanation* to sub-section (3) of section 31 of the Reserve Bank of India Act, 1934 (2 of 1934).

⁷ Companies Act, 2013 (Act 18 of 2013)

⁸ What is electoral bond - Benefits, Validity, Conditions, Controversy, News (business-standard.com) last seen on 20/12/2023.

the donor will save him from political persecution or harassment, and it will encourage other individuals who wish to donate because the information of the buyer will be kept confidential and known only to banks. It will bring transparency to political funding. Further, it is an initiative of the government to make cashless transactions and to strengthen the economy, i.e., "cashless digital economy." It is a good scheme for electoral reforms because all the money spent during the election is white. On January 01, 2024, The State Bank of India(SBI), has been authorised to issue Electoral Bonds through its 29 Authorised Branches w.e.f. 02.01.2024 to 11.01.2024 and it shall be valid for fifteen calendar days from the date of issue and no payment shall be made to any payee Political Party if the Electoral Bond is deposited after expiry of the validity period. The Electoral Bond deposited by an eligible Political Party in its account shall be credited on the same day⁹.

LEGAL LACUNAE IN ELECTORAL BOND SCHEME

Since its inception, the electoral bond has been a matter of controversy. This scheme was widely criticized in public. Though the bond ensures the privacy of individuals, there are certain loopholes in it.

1. Blackmoney can be pumped in through Rs. 2,000 limit cash-channel because the scheme provides that cash can be given for an amount less than Rs. 2,000. So, there may be a possibility that an individual can deposit less than Rs. 2,000 by himself and in the name of several other people. Further, the amended Section 29-C of the R.P. Act, 1951, provides that it is not an obligation on political parties to disclose the source of these bonds. The scheme has protected the interests of political parties and donors but fails to save the interests of voters. In this way, the government has given priority to the donor's privacy in comparison to the voter's right to know.
2. "Free and fair elections" is the fundamental feature of parliamentary democracy¹⁰. From time to time, new political parties form, but the Act says that the newly formed political parties are ineligible for the benefit of this scheme. The parties should have contested the election at least once. In this way, government policy has discouraged the establishment of new political parties. Further, the Act provides that a party that has secured less than 1% of the votes in the preceding Lok Sabha or state legislative elections

⁹ Press release, PIB, available at pib.gov.in/PressReleaseIframePage.aspx?PRID=1992136 (last visited on 01/01/2024)

¹⁰ Indira Nehru Gandhi vs Rajnarain AIR 1975 SC 2299.

is ineligible. It was argued by activists that the bond scheme is designed for one-party dominance; in this way, only the ruling party will win elections.

3. If information is not to be shared by anyone, then why was it collected? The bonds are transferable like currency; their inherent anonymity can be exploited for money laundering.
4. The Election Commission of India (ECI) and The Reserve Bank of India (RBI) had objected against the issuance of electoral bonds as a mode for donation to political parties as it increased opaqueness in political funding.
5. Donors Identity may be leaked by anybody in the chain e.g. political parties, bank officials, government etc.
6. The amendments have removed the existing cap of 7.5% of net profit in the past three years on campaign donations by companies and have legalized anonymous donations. There is no upper limit to the quantum of donations.
7. The Government has amended the FCRA Act itself, and exempted from scrutiny all foreign funding to parties. Thus foreign money is allowed which can endanger national interests and sovereignty.
8. Justice Sharad Bobde, raised concern that political parties could misuse electoral bonds. The court asked if there is any mechanism to control the use of money. Justice Sanjeev Khanna, during a hearing objected, “merely knowing KYC information would not block the entry of black money into political funding. Justice Khanna said that black money can be converted to white money by routing it through several shell companies. Earlier, R.B.I. had also raised similar objections.

SUPREME COURT’S VIEW

Who’s paying for parties? There is a need for making transparency in the funding of political parties. The Association for Democratic Reform has come up with a report and said more than 50% of the funds of political parties come from unknown sources. Prominent among them are voluntary donations of up to Rs. 20,000 or donations made through electoral bonds. In both of these cases, the donor information is either kept secret or is not required to be revealed. *The Association for Democratic Reform* seeks a stay on the electoral bond scheme in particular.”¹¹

¹¹ Association for Democratic Reforms v. Union of India, WP (CIVIL) NO. 333 OF 2015 decided on 12/04/2019.

A P.I.L.¹² was filed before Supreme Court on the issue of subversion of democracy through foreign funding and lack of transparency in the accounts of political parties. The petitioners seeks directions to struck down certain amendments made through Finance Act, 2017 passed as money bills. Use of Electoral Bonds for political donations was in dispute because the Electoral bonds, which are physical instruments given to political parties to encash, maintain anonymity in donor identities. Political parties know who is donating, while general citizens remain unaware, thereby increasing the anonymity of political donations. The requirement to disclose the political party's name in profit and loss accounts has been removed, allowing only the total amount of donations to be disclosed. The removal of the 7.5% cap on a company's net profits has increased corporate funding, allowing even loss-making companies to donate to political parties. Moreover, the contribution received by any eligible political will be exempt from income tax under Section 13A of the Income Tax Act.

On April 12, 2019, while hearing the petition of an NGO, the Association of Democratic Reform, the Supreme Court has passed the interim directions by the bench, consisting of CJI Ranjan Gogoi Justice Deepak Gupta and Justice Sanjeev Khanna in respect of electoral bond scheme that the political parties receiving donations through Electoral Bonds have to provide detailed donor information, bond amounts, credit details, bank account details, and credit date to be submitted by May 31, 2019, with sealed cover envelope in the custody of Election Commission of India¹³. On behalf of the government, Attorney-General K. K. Venugopal pleaded that so long as funds are being collected in a legal manner, the voters are not concerned. Political parties may raise fund from where they want as long as it is legitimate and “allowing anonymity in political funding will promote transparency in funding and donations received by political parties¹⁴.”

The apex court has not refused to stay the scheme because the same cannot be decided in a short period of time. The bench observed that it is essential for transparency to know from where and how much money political parties have received. The bench headed by then-CJI Ranjan Gogoi remarked that, *“If the identity of the donor is unknown, your entire exercise to eliminate black money becomes a futile exercise. Black money only becomes white.”*

¹² Article 32 of Indian Constitution, 1950

¹³ Association for Democratic Reforms v. Union of India, WP (CIVIL) NO. 333 OF 2015 decided on 12/04/2019.

¹⁴ Samanwaya Rautray, *The Donors' privacy trumps voter right to know*, The Economics Times. Available at the attorney general: Donors' privacy trumps voter right to know, says government - The Economic Times (indiatimes.com). last seen on 25/11/2023.

In 2021, an application was filed again before 3-judge bench of S.A. Bobde, CJ., A.S. Bopanna and V, Ramasubramanian, JJ to seek a stay of the scheme. The court has rejected to intervene in the challenge against the political parties' intention to issue "electoral bonds" because it allows donors of political parties to stay anonymous, which is detrimental to democracy. The Court declared that while the Scheme provides anonymity, ensuring that transactions only occur through banking channels is its primary objective.

A prayer was made before the court to declare that all the national & regional political parties are "public authorities" under the RTI Act, 2005 and give direction to Election Commission to gather information concerning the finances of political parties; and to mandatorily disclose detail particulars about their income; expenditure, donations as well as full details of the donors. The Court stated that even if the bond's buyer's name is kept secret, it is guaranteed that anonymous or unidentifiable individuals cannot buy the bonds and donate them to political parties¹⁵.

A fresh petition has been filed before 3 judges on October 10, 2023, to hear the case prior to the General Election of 2024. The Bench headed by Chief Justice D.Y. Chandrachud, as argued considered it an important issue and referred to constitutional bench of five judges. The case is still pending and it is expected to be decided by 2024.

CONCLUSION

Right to Privacy has been declared as a fundamental right under Article 21 of the Indian Constitution¹⁶. 'Right to Know' & 'Right to Privacy' are two sides of the same coin. Neither "right to know" nor "right to privacy" is an absolute right and reasonable restrictions can be imposed on it. In the name of privacy, transparency should not be compromised. The Bonds may be purchased by citizens of India or a company established in India. So, Foreign companies will be out from influencing the electoral process in the country. Government should completely ban any cash deposit for political parties. The drafters of the finance bill probably kept this bad door of Rs 2,000 limit cash-channel but this provision has become the cause of great criticism of the scheme. A political party may become rich with corporate money (E.B money), compared to others but that does not guarantee it will be victorious in

¹⁵ 'Prachi Bhardwaj, seconline, Electoral Bonds Scheme not behind iron curtains incapable of being pierced'; Read why Supreme Court refused to interfere with the Scheme Available at Electoral Bonds Scheme not behind iron curtains incapable of being pierced'; Read why Supreme Court refused to interfere with the Scheme | SCC Blog (seconline.com) visited on 20/12/2023.

¹⁶ K S Puttaswamy and Anr. vs UOI (2017) 10 SCC1.

elections. Combination of eternally vigilant voters and fair election practices will not allow single party dominance, rather 'vote bank' politics will be destroyed. Hon. Justice (ex-CJI) Sharad Bobde has said that money received by political parties through electoral bond should be quarterly audited and the law enforcement agencies should be given more authority to track misuse of money by political parties.