

CHIEF JUSTICE'S COURT
HON'BLE THE CHIEF JUSTICE DY CHANDRACHUD
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE B.R. GAVAI
HON'BLE MR. JUSTICE JB PARDIWALA
HON'BLE MR. JUSTICE MANOJ MISRA

**SERIAL No. 501, COURT NO.1 SECTION PIL-W
SUPREME COURT OF INDIA
RECORD OF PROCEEDINGS**

Writ Petition (Civil) No.880/2017

ASSOCIATION FOR DEMOCRATICS REFORMS & ANR. (Petitioner)

Versus

UNION OF INDIA & ORS. (Respondent)

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PRASHANT BHUSHAN: May I, please Your Lordships?

CHIEF JUSTICE DY CHANDRACHUD: Now, we've got the lineup. Mr. Prashant Bhushan has said 4 hours, Mr. Sibal 4 hours...

PRASHANT BHUSHAN: That's because My Lord, I have to lay out the factual details also, that's why I will take...

KAPIL SIBAL: I will take 4 hours.

CHIEF JUSTICE DY CHANDRACHUD: Mr. Bhushan, you'll also 4 hours would be too long because we have to cut short the...

PRASHANT BHUSHAN: Because the laying out of factual details itself will take over an hour. Otherwise, my argument should not take more than two and a half hours max.

CHIEF JUSTICE DY CHANDRACHUD: You can cut it down to about 2 hours so that we will...

PRASHANT BHUSHAN: I'll try. I'll try.

CHIEF JUSTICE DY CHANDRACHUD: Within two hours just supplement it.

PRASHANT BHUSHAN: I'll try. First of all, My Lord, I wish to say that this is a case which goes to the very root of our Democracy. And I'm glad, My Lord, that the Court has finally fixed it for hearing and constituted a Constitutional Bench given the importance of the case. My Lord, I have been in the PIL space for many years, but I have never seen this kind of public interest involved in any PIL that I have ever done. The amount of interest that this has aroused is absolutely astounding. My Lord, there are... I'll just show Your Lordship what the Electoral Bond scheme is. By this petition My Lord... I am appearing for ADR and we have filed written submissions, which are in Volume 1 and start at page 1. We have, in our written submissions My Lord mentioned that we are challenging in our petition, also, we are challenging the amendments brought in FCRA by the Finance Act of 2016. So, first, My Lord in 2016 and the issue about whether they could have been brought through the Finance Act or not, I am not

1 pressing right now. Though we have taken that issue in our petition, but I am not pressing it
2 for the reason that I want this case to be decided before the elections. I don't want because, I
3 know that Your Lordship has issued the Finance Bill issue to a 7 Judge Bench. And I don't
4 want this to await that. So I am restricting myself to the other grounds of challenge. So first
5 My Lord, we have challenged the finance, the amendments brought to the Foreign
6 Contribution Regulation Act by the Finance Act of 2016, and in essence, My Lord, those
7 amendments were that prior to that amendment, we have actually in our written submissions
8 My Lord we have given a chart of the amendments and the amendment regarding the FCRA is
9 at page 10.

10

11 **TUSHAR MEHTA:** I'm sorry. Generally, we don't interrupt, but by a judicial order, My Lords
12 have been pleased to separate and de-tag the issue regarding FCRA. There is a judicial order
13 passed by Your Lordships. Because he has started with that, My Lord...

14

15 **PRASHANT BHUSHAN:** I was pointing out what we have challenged in this petition. If
16 Your Lordship just sees, in this petition, which is before Your Lordship today we have
17 challenged the amendments made to the FCRA also, by way of the Finance Bill of 2016. And
18 the amendment was that prior to that the foreign contributions were prohibited to political
19 parties and candidates and public servants. By this amendment they have effectively permitted
20 foreign contributions by saying that any contribution made by way of donation through a
21 subsidiary of a foreign company which is registered in India, will not be treated as a foreign
22 source. So by this amendment effectively you have allowed... So, for example, My Lord,
23 suppose I'm just giving an example, a foreign company wanted to donate money to a political
24 party. It was earlier, totally prohibited from doing so. And in fact, one of these cases went to
25 the... in fact, this amendment was, in a way brought in order to overcome a judgment of the
26 Delhi High Court by which the Delhi High Court held that both the BJP and the Congress Party
27 had received foreign contributions through a subsidiary of a foreign company. At that time it
28 was Sterlite, which was a subsidiary of Vedanta Resources, which was a UK based company.
29 And they said that therefore, appropriate action should be taken against these political parties.
30 To overcome that, My Lord, a retrospective amendment was brought through the Finance Act
31 into FCRA, by saying that if the donation is made by a subsidiary of a foreign company... in
32 that case, also, that was a subsidiary. Sterlite was a subsidiary of Vedanta Resources UK. Then
33 that will not be treated to be a foreign source. So this is the amendment which has been
34 brought and we have mentioned this My Lord at page 10 of our written submissions.

35

36 **CHIEF JUSTICE DY CHANDRACHUD:** That is, strictly speaking, no relevance to the
37 challenge on the Electoral Bond Scheme.

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PRASHANT BHUSHAN: True, true. But I am only saying that...

CHIEF JUSTICE DY CHANDRACHUD: Which is perhaps why the Solicitor mentioned that. That is being...

PRASHANT BHUSHAN: Yes, but that Electoral Bond Scheme...

TUSHAR MEHTA: 31st January '23 order, Your Lordships please to segregate...

PRASHANT BHUSHAN: In this My Lord, the original amendment brought in by the Finance Bill of 2016 to the FCRA has been challenged.

CHIEF JUSTICE DY CHANDRACHUD: What is the next challenge in your petition? We'll just at least have a broad purview and then we can go on to the...

PRASHANT BHUSHAN: Yes. So the challenges are all in this chart, if Your Lordship just sees. Page 7. Volume 1, page 7 in our written submission. Yes. So first is the amendment made to the Representation of People Act. Earlier, My Lord, the Act said, 29C. On the left side is the original, and the right side is the amendment, amended. Earlier My Lord the Act said, RP Act said - 'The Treasurer of a political party or any other person authorized by the political party in this behalf, shall each, in each financial year, prepare a report in respect of the following namely. A) The contributions in excess of Rs. 20,000 received by such political party from any person in that financial year. B) The contribution in excess of Rs. 20,000 received by such political party from companies other than Government companies in that financial year.'

JUSTICE SANJIV KHANNA: Mr. Bhushan, you are at page 10?

PRASHANT BHUSHAN: Pardon My Lord?

JUSTICE SANJIV KHANNA: You are at page 10?

PRASHANT BHUSHAN: Page 10. At the bottom. 7...7. Sorry. I'm sorry. Page 7. Page 10 was that FCRA. Page 7. So left side is the original provision and then My Lord 4 said - 'Where the Treasurer...' on the left side original. 'Where the Treasurer of any political party or any other person authorized by the political party in this behalf fails to submit a report under Sub-Section 3, then, notwithstanding anything contained in the Income Tax Act, such political

1 party shall not be entitled to any tax relief under that Act.' Because contributions to political
2 parties are exempted at both ends. That is it is exempted at the end of the party which receives
3 the donations from tax and it is also exempted at the end of the donor that is, the donor can
4 claim an exemption by way of the donations that they have given to a political party. Now,
5 Your Lordship will see the amendment. I have highlighted the relevant part, provided... on the
6 right side... 'Provided that nothing in this sub-section shall apply to contributions received by
7 way of Electoral Bonds.' So therefore, the reporting requirement as to who has donated to you
8 in excess of 20,000, which was earlier there, has been removed for donations received through
9 Electoral Bonds. This is the first amendment to the Representation of People Act. Then they
10 amended simultaneously the Companies Act. All these amendments were brought in through
11 the Finance Bill of 2017. Finance Act of 2017. Now the Companies Act. 182 originally
12 prescribed 'Notwithstanding anything contained in any other provision, a company other than
13 a Government company, and a company which has been in existence for less than three
14 financial years, may contribute any amount, directly or indirectly to any political party
15 provided that the amount referred to in Sub-Section 1 as the case may be the aggregate of the
16 amounts that may be so contributed by the company in any financial year shall not exceed...' -
17 this is important - 'shall not exceed 7.5% of its average net profits during three immediately
18 preceding financial years.' So there was a limit. There was a cap of 7.5% of last three years
19 average profit on the amount of corporate donations that any company could give to a political
20 party. That proviso, has been omitted by this amendment. So, this is another thing, other than
21 Electoral Bond. Simultaneously, My Lord, a slew of changes were made. One was... and all
22 these have been challenged in our petition. Then, My Lord, 182(3), every company shall
23 disclose in its annual profit and loss account, any amount or amounts contributed by its to any
24 political party during the financial year to which the account relates, giving particulars of the
25 total amount contributed, and the name of the party which has... to which, such amount has
26 been contributed. So, earlier the requirement was, that you have to disclose which political
27 party, you have donated to. Now, My Lord in the amendment, they say provided, now they say,
28 every company shall disclose in its profit and loss account, the total amount contributed to it
29 under this section during the financial year to which the account relates. Provided that the
30 Company may make contribution through any instrument issued pursuant to the scheme
31 notified under the Act, for the time being enforced for contribution to political party. So,
32 therefore, now, after the amendment, all that they have to disclose is, that total amount, not
33 the donee political party. They don't have to disclose which is the political party, to whom they
34 have given these Electoral Bonds. Earlier, there was a requirement to disclose that. Then,
35 Income Tax Act. This has also been amended by this. Then My Lord, Income Tax Act. So earlier
36 13-A said, any income of a political party, which is chargeable under the head income from
37 house, property, income from other sources or income by way of voluntary contributions

1 received by a political party from any person shall not be included, in the total income of the
2 previous year of such political party. And then proviso said, provided that...

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4 **CHIEF JUSTICE DY CHANDRACHUD:** Yes.

5

6 **PRASHANT BHUSHAN:** Such party, such political party keeps and maintains such books
7 of account or other documents, as would enable the assessing officer to properly deduce its
8 income therefrom. b) in respect of each such voluntary contribution in excess of Rs. 10,000.
9 Such political party keeps and maintains a record of such contributions and names and
10 addresses of the person who have made the contribution. So therefore, therefore, the
11 requirement in the Income Tax Act, that every political party should maintain accounts of
12 where they have received the donations from, who has given them the donation. Now by the
13 amendment, it says... proviso says, provided that b) in respect of each such voluntary
14 contribution, other than contribution by way of Electoral Bond in excess of 10,000, such party
15 keeps and maintains record of such contribution and the name, address and address of the
16 person who has made such contribution. So, again, the requirement of keeping a record is
17 omitted for Electoral Bonds. And then, My Lord, d) no donation exceeding Rs. 2000 is
18 received by such political party otherwise, than by account payee cheque drawn on a bank or
19 an account payee draft or use of electronic clearing system through a bank account or through
20 Electoral Bond. So, everywhere, My Lord, Electoral Bonds, have been not only introduced,
21 they have been exempt from disclosure under the Companies Act, under the Income Tax Act,
22 under the Representation of Peoples Act, etc. And then My Lord at page 10...This is, of course,
23 the Reserve Bank Reserve Bank Act only says, that this will be a new financial instrument
24 which has been introduced, issue of Demand Bills and Notes. And here it says the amendment
25 at 3 says, notwithstanding anything contained in the section, the Central Bank may authorize
26 any scheduled bank to issue Electoral Bonds. At the bottom of page 10 towards. And then, as
27 I said, My Lord, in the FCRA which has also been challenged in this petition. Now prior to the
28 amendment of 2016, this is important for the reason that when I make my argument as to what
29 this slew of amendments has done, it has, on the one hand, My Lord, introduced an opaque
30 instrument by which nobody can come to know, other than the Government. It is only the
31 Government who may be able to come to know as to who has contributed to whom, because
32 under the scheme State Bank has to issue the Electoral Bond, so State Bank has a record of
33 who has purchased which Electoral Bond. Now, of course, the bonds are Bearer Bonds. They
34 are freely transferable. So suppose I purchase the bond, State Bank will know that yes, I have
35 purchased this form, but I can hand it over to somebody else. And that somebody else can give
36 it to a political party. The political party also may not come to know who has donated. Political
37 party, it's open for a political party to say that well, we opened our office in the morning and

1 we saw these 100 crores of Electoral Bonds lying under our, under our door. We deposited
2 these Electoral Bonds. We don't know who has given them, but these are Bearer Bonds. So,
3 therefore, all that the political party will disclose in their accounts would be that out of the
4 total contributions that they have received, donations that they have received. They have
5 received 500 crores by way of Electoral Bonds. That they have received total 700 crores, out
6 of which 500 crores are from Electoral Bonds, that's all. But that match of who purchased this
7 Electoral Bond and which party encashed this particular Electoral Bonds, that match if at all,
8 it can only be done by the State Bank, which is a Government of India institution. Of course,
9 State Bank is also effectively prohibited from disclosing it. But the scheme says that if a law
10 enforcement agency needs to know this, get this information. It may ask the State Bank to
11 disclose this. So, if at all only a law enforcement agency, which are all essentially controlled by
12 the Government or the Government itself, because it controls the State Bank can come to know
13 only this much. That this particular bond was purchased by this company and this was
14 encashed by this party, but nobody else can come to know this information under the scheme
15 of Electoral Bonds. Nobody else. They are... not even the Election Commission because the
16 only account that is submitted to the Election Commission by the political party is that we
17 receive so much by way of Electoral Bonds. They are not obliged to disclose who gave them. In
18 fact, they may even say we don't know who gave it. We opened our office. It was lying under
19 the door, we encashed it. So therefore they may even turn around and say that in fact, there is
20 an interim order of this Court in this very case by which this court said that all political parties
21 should disclose the donors of these Electoral Bonds to the Election Commission. Pending the
22 hearing of this case, there is an interim order to that effect. But when that information is
23 finally seen I daresay My Lord, that some of these political parties would have said we don't
24 know... we don't know.

25

26 **JUSTICE SANJIV KHANNA:** ...on the SBI issuing bonds to persons who are not residents
27 in India?

28

29 **PRASHANT BHUSHAN:** Yes, the requirement is that they have to give a KYC, whoever
30 purchases Electoral Bonds. So the identity of the person who purchases Electoral Bonds will
31 be known to the State Bank of India. But, but because they have now opened the route by
32 making this amendment that the limit of 7.5% of the annual profits has been totally removed.
33 So, even if you are a loss making company, or even if you are a company which does no
34 business just a pure shell company... let's say, My Lord, Your Lordship is aware that in that
35 **Adani- SEBI** matter, they are saying SEBI is saying - we don't know who are... whether these
36 companies who have invested in the Adani companies from Mauritius, and from these tax
37 havens, whether they are in fact owned by Adani or not, or whether they are related to Adani

1 or not. Now, it is open to any of these companies to set up a subsidiary in India and donate to
2 any political party of their choice, any amount, even if it's a pure shell company, which means
3 no business, no profits, just an amount is received from its parent company, which is
4 registered in a tax haven and that amount is given to a political party. So, one of my arguments,
5 My Lord, I have three main arguments, which I am going to argue before Your Lordship
6 against these Electoral Bonds. The first is that it defeats the people's right to be informed about
7 the sources of funding of political parties which, in my respectful submission and in the light
8 of several judgments of this Court, is a fundamental right of citizens under Article 19(1)(a).
9 That's the first argument. Because Right to Information has been held to be a fundamental
10 right under Article 19(1)(a). In fact, in that ADR judgment, and then in the follow up *PUCL*
11 judgment, this Court said that every citizen has a fundamental right to know about the assets
12 and liabilities of every candidate, about the criminal antecedents. And when that was sought
13 to be overcome by means of an amendment, that amendment was struck down on this precise
14 ground.

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16 **CHIEF JUSTICE DY CHANDRACHUD:** Alright, that's the first submission. What is the
17 second?

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19 **PRASHANT BHUSHAN:** That's the first. Second is that this opaque instrument,
20 anonymous instrument in fact promotes corruption in the country because there is good
21 reason to believe and I'll show, My Lord, why, that these bonds are being given by way of
22 kickbacks. Kickbacks to parties in power. Almost all the bonds have been received only by
23 parties in power. More than 50% have been received only by the ruling party at the Centre and
24 the rest have been received only by the ruling party in the States. Virtually nothing, not even
25 1% has been received by opposition parties which are not ruling in the Centre or at the States.
26 And virtually, all the bonds have been purchased by corporates, by companies because they
27 are almost all of denomination of 1 Crore and above. 95% are in the denomination of 1 Crore.
28 1 Crore. Therefore, My Lord, and you have simultaneously amended the... you have removed
29 the cap on corporate donations and amended FCRA.

30

31 **CHIEF JUSTICE DY CHANDRACHUD:** All right. That's the second submission. The
32 third?

33

34 **PRASHANT BHUSHAN:** That's the second submission. Third submission is My Lord that
35 it disturbs and indeed destroys democracy in this country because it does not allow a level
36 playing field between political parties which are ruling versus political parties, which are in
37 opposition or between political parties and independent candidates. It will have, in fact, just

1 to give Your Lordships, a small figure, in the last five years of which, since the Electoral Bonds
2 were introduced, 2017, they were introduced 1017-18 to 2021-22. 5 years? 5 years. The
3 contribution to political parties by way of Electoral Bonds, has far exceeded any other method
4 of contributing to political parties. Not only that, the amounts are so large... just take one party,
5 the ruling party at the centre, the contributions by way of Electoral Bonds to just this one part
6 ruling at the Centre, is more than 5000 crores, in just a period of less than five years. Now,
7 just look at that figure. The limit for spending on each candidate fixed by the Legislature, is
8 less than 1 crore, per Lok Sabha constituency. Less than 1 crore. If you set up candidates in all
9 the constituencies in the country, the total amount that can be spent by the political... by the
10 candidates of any political party is less than 500 crores in a Lok Sabha election. In just these
11 5 years, one party which has received the bulk of the political funding by way of Electoral
12 Bonds, is getting more than ten times, more than ten times, the maximum permissible
13 expenditure on elections by its candidates. More than ten times. So, just see, My Lord, what
14 this is doing to our democracy.

15

16 **JUSTICE B.R. GAVAI:** What is the maximum permissible limit for a candidate?

17

18 **PRASHANT BHUSHAN:** 70 lakhs or so.

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20 **KAPIL SIBAL:** Parliamentary constituency...

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22 **CHIEF JUSTICE DY CHANDRACHUD:** 70 lakhs?

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24 **PRASHANT BHUSHAN:** Of course, My Lord, this limit is not adhered to, we all know that,
25 because candidates are spending ten times, sometimes 100 times, 100 times, the amount in
26 cash. Now, Election Commission says, though it's a corrupt practice, spending more than the
27 limit is a corrupt practice, but Election Commission says, look, we can't catch them. Everybody
28 knows, that many candidates are spending many times by cash. One of the arguments in this
29 for introducing Electoral Bonds was... the stated argument of the government was that, well,
30 this goes through the bank. These Electoral Bonds can only be purchased through bank
31 transactions by cheque, draft, or direct transfer. Therefore, it will reduce cash. That was their
32 argument. But, very simple if you wanted to curb, the role of cash in elections, all that you had
33 to do was to pass a simple amendment, saying no political party or candidate shall be allowed
34 to spend or take any money, through non-banking channels. Everything will have to go
35 through banking channels. And if you do that, it will be a corrupt practice. Suppose such an
36 amendment, when this note ban was brought My Lord, one of the objectives given, stated
37 objectives of the government was, that we want to make a cashless economy, because we want

1 role of cash to be reduced. Now, I can understand that ordinary person on the streets can't be
2 made cashless. He can't be expected to do all his transactions through cheque and banking
3 channel, but, political parties and candidates contesting elections, they could have been made
4 cashless, by the simple law saying, that you have to... if you are a candidate or if you are a
5 political party, all your transactions have to be through banking channels. But that was not
6 done.

7

8 **CHIEF JUSTICE DY CHANDRACHUD:** Alright. Now, Mr. Bhushan, let's do this. Let's
9 forget the scheme of the Electoral Bond.

10

11 **PRASHANT BHUSHAN:** Yes.

12

13 **CHIEF JUSTICE DY CHANDRACHUD:** And then you can make your submission. We've
14 seen the amendments, which have been made.

15

16 **KAPIL SIBAL:** I fought the elections in 2014 and it was 70 today when I did 95 or 75 for a
17 Parliamentary Constituency.

18

19 **CHIEF JUSTICE DY CHANDRACHUD:** How much? 95?

20

21 **KAPIL SIBAL:** 95 or 75, depending on the State. For example Andhra Pradesh is 95 ,
22 Arunachal is 75 and for State Elections it's 40 and 28.

23

24 **JUSTICE SANJIV KHANNA:** Do you have to maintain a separate account for all this? Open
25 a...

26

27 **PRASHANT BHUSHAN:** Every candidate has to do that.

28

29 **KAPIL SIBAL:** My Lord, we have to submit what we have spent every day,

30

31 **JUSTICE B.R. GAVAI:** Every candidate as well as every political party.

32

33 **KAPIL SIBAL:** Yes. Every political party. [UNCLEAR] Election Rule 90 gives this, so that
34 Your Lordships...

35

36 **PRASHANT BHUSHAN:** Just one last thing. I wanted to show the amendment in the FCRA
37 just for Your Lordships clarity. That is at page 10, at the bottom of page 10. So earlier My Lord

1 foreign source included three years of a foreign company and by this amendment at page 11,
2 My Lord. It said provided proviso, at the bottom of that highlighted part, provided that where
3 the nominal value of the share capital is within the limit specified under FEMA or rules or
4 regulations made thereunder. Then, notwithstanding the nominal value of the share capital of
5 a company being more than one half of such value at the time of making the contribution, such
6 company shall not be a foreign source. So if you are a subsidiary of a foreign company and you
7 own even 100% of the shares of your subsidiary, provided it is within FEMA, it's not regarded
8 as a foreign source. So, even the subsidiary of a foreign company can now donate to political
9 parties. That's why this is important. Actually, this was a whole slew of amendments brought
10 almost together, 2016 and 2017. It's a bouquet. And by this bouquet, because that limit has
11 also been removed. Therefore, My Lord, it's allowing, allowing shell companies also to donate.
12 Earlier, shell companies could not have because there was a limit, 7.5%. Now, shell companies
13 can also donate. You can set up, you have a foreign company which is in a tax haven, you set
14 up a subsidiary here as a shell company and through that you buy Electoral Bonds and donate
15 to a political party. And nobody comes to know that a foreign company is now financing this
16 political party or these companies are financing this particular political party, etc. Now, My
17 Lord, we have mentioned the salient features of the scheme here at the bottom of page 11. But
18 I can show Your Lordship, the scheme itself, which is in Volume 4, page 118. Volume 4, page
19 118. But I have mentioned all the salient features, even in the written submissions. Electoral
20 Bond means a bond. I am now reading the scheme. Page 118, Electoral Bond means a bond
21 issued in the nature of a promissory note, which shall be a bearer banking instrument and
22 shall not carry the name of the buyer or the payee, it's like cash. Only difference is that it's a
23 cash which can go up to 1 crore. It's a note which can go up to 1 crore from 10,000 to 1 crore.
24 Today, My Lord, we have only notes of Rs. 500, or less. Even Rs. 2000 has now been
25 demonetized. But here it's 10,000 to 1 crore... 1000 to 1 crore. Now eligibility for purchase of...
26 3). Eligibility for purchase and encashment of Electoral Bonds. 'The Bond under the scheme
27 maybe purchased by a person who is a citizen of India or incorporated or established in India.'
28 So it can be an individual or a company. A person being an individual can buy a Bond either
29 singly or jointly with other individuals. 3). Only political parties registered under 29-A of the
30 RPA Act and have secured not less than 1% of the votes polled in the last general election to
31 the House of People or the Legislative Assembly as the case maybe, shall be eligible to receive
32 the Bond. So this itself restricts it to only those parties, not all parties are eligible. Those who
33 have received at least 1% vote, either in the Lok Sabha or in the State Assembly. The Bond shall
34 be encashed by an eligible political party only through a bank account with an authorised bank.
35 Denomination - The Bond should be issued in the denomination, shall be issued in the
36 denomination of 1000 to 1 Crore. Validity of the Bond - The Bond shall be valid for 15 days

1 from date of issue, and no payment shall be made to any payee political party, if the Bond is
2 deposited after the expiry of the validity period.'

3 I might just point out, My Lord, on occasions they have increased the validity period under
4 this also.

5 Then, 4- 'The information furnished by the buyer shall be treated as confidential by the
6 authorized bank, and shall not be disclosed to any authority for any purposes, except when
7 demanded by a competent court or upon registration of a criminal case by any law
8 enforcement agency. So therefore, this has to be treated as confidential by the State Bank. This
9 information about who has purchased the bonds, and it can be disclosed only to a law
10 enforcement agency, which is pursuing some investigation. But I am saying, My Lord, that if
11 at all anybody... at one point the Government had said and this Court by one interim order has
12 also recorded that there is at least some transparency in this because the company, which
13 purchases it has to disclose. Because the political party which receives it has to disclose, not
14 the identity, but has to disclose how much bonds. They have to disclose how much they have
15 purchased. The company has to disclose. The party has to disclose how much they have
16 received, total. They say you can do some mix and match and find out who has donated. Now
17 mix and match can't be done by ordinary citizens for several reasons.

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19 **JUSTICE B.R. GAVAI:** Who said that you can do mix and match?

20

21 **PRASHANT BHUSHAN:** The Court in some order has recorded this. These are on the basis
22 of the submission of the Government. On the basis of the Government's submission, the Court,
23 in one interim order, has recorded this. I'll show. I'll show. Now mix and match can't be done
24 by ordinary citizens. In fact, My Lord even if I wanted to find out which companies have
25 purchased Electoral Bonds. There are 23 Lakh registered companies in India. 23 Lakh. I would
26 have to scan the... of course, every company is obliged to file the returns of their income and
27 expenditures in the Ministry of Corporate Affairs' website. And by paying some fee, I as a
28 citizen can also access that website of that company to see what is the income and expenditure
29 of that company. So, theoretically it is possible for me to find out which company has
30 purchased Electoral Bonds worth how much. Purchased and given. But I won't know who have
31 they given it to. All that I will know is total amount purchased by them. Now, citizen can't be
32 expected to go through. Of course, they found out about some companies which I'll be coming
33 to. I'll give those examples which have purchased Electoral Bonds because that can be seen
34 from their disclosure to the Corporate Affairs. But I can't be expected to find out from 23 Lakh
35 registered companies who has purchased how much Electoral Bonds But Government can.
36 State Bank of India knows and because State Bank is owned by the Government therefore
37 theoretically, My Lord they can. If they exert sufficient pressure on the State Bank. They can

1 find out who has purchased this particular Electoral Bond because State Bank has that
2 information. Though they are prohibited by law from disclosing it to anybody by the scheme,
3 but they have that information. And they also have the information as to which political party
4 has encashed which Electoral Bond. So, State Bank is the only authority which can do that mix
5 and match.

6

7 **JUSTICE B.R. GAVAI:** Mix and match.

8

9 **PRASHANT BHUSHAN:** Which can do that mix and match. Citizens can't do it. And I am
10 saying, My Lord, that this defeats the citizens' rights to know about, who is funding these
11 political parties. In fact, in a recent judgment, the Central Information Commission, has ruled,
12 that these 6 national parties, are public authorities under the Right to Information Act. Now,
13 unfortunately despite that judgment, most of these political parties are not obeying that. They
14 are not appointing information officers, which they are obliged under the RTI Act, so that
15 people can ask them questions. We have, in fact, filed a petition in this Court on the basis of
16 that CIC Judgment, as well as the RTI Act, as well as the Fundamental Right of people to know,
17 etc., which is pending, which has been separated by this Court. But I am pointing out, that
18 here you have completely made mincemeat of people's right, to be informed about funding of
19 political parties, by introducing an instrument which today forms the bulk of donations to
20 political parties. They are the bulk of donations to political parties today, this instrument. Then
21 My Lord, 12 of the scheme says, the bond can be encashed only by an eligible political party by
22 depositing the same in their designated bank account. So these are the broad, salient features
23 of the scheme, that however, these are Bearer Bonds. And as I said, My Lord, even the person
24 who has purchased it may just hand it over to another XYZ, and that XYZ may give it to the
25 political party. And therefore the political party can also turn around and say, I don't know
26 who gave me this Electoral Bond. Somebody came and gave it to me, I don't know. In fact I
27 have been the recipient myself of... there was this register of the CBI Director. Somebody came
28 to my residence at night and gave me 2 volumes of the Residents' Register. Original register of
29 that CBI Director. And actually, I didn't know who is that person, there were these two people
30 who came and gave it to me. But when I looked at the register, I could make out that this has
31 to be original. Nobody can fabricate these kind of details, the time, date, car number, persons,
32 and so on visiting the CBI Director. And on the basis of that, this Court then ordered an SIT to
33 be constituted, because he was being visited by several people, who were being investigated by
34 the CBI at that point of time. But I'm saying that sometimes, I get information from people
35 whom I don't know. But I know that this is authentic information, because I can make out by
36 looking at it that this has to be authentic. In that case My Lord, initially, the court asked me to
37 disclose who gave you the register. So this was a petition by CPIL. We held the meeting of

1 CPIL, and we decided that, of course, I didn't even know, but we decided to take a principal
2 stand that whistleblower has given it, and we can't disclose the name of the whistleblower. So,
3 I'm saying that a political party can easily turn around and say, we don't know who has given
4 it. Somebody left it because this is a Bearer Bond. Now, My Lord, coming to... coming back to
5 the submissions. So, I have stated the salient features, In this there are one or two other things
6 also, that the window, if Your Lordship turns to page 12 of my written submissions, the window
7 of sale of Electoral Bonds...

8

9 **JUSTICE SANJIV KHANNA:** Can you come to the 3 points?

10

11 **PRASHANT BHUSHAN:** Yes, I'm coming My Lord.

12

13 **CHIEF JUSTICE DY CHANDRACHUD:** We've seen the scheme now. Let's go straight to
14 your submissions.

15

16 **PRASHANT BHUSHAN:** Right, right. Now My Lords, coming to my submissions, they start
17 at page... First, Your Lordship, may see the previous orders of this case, which I have quoted
18 at page 15, I just wanted to read the justification given by the Government for these electoral
19 bonds. At page 14 of my written submissions, I have quoted the relevant part. Para 15 of my
20 written submissions. 'On 07-01-18...'

21

22 **JUSTICE B.R. GAVAI:** Volume 1?

23

24 **PRASHANT BHUSHAN:** Volume 1, page 14 of my submissions. 'On 7th January 2018, five
25 days after the introduction of the scheme, the PIB published an article written by the then
26 Finance Minister on the necessity for introducing Electoral Bonds. The stand of the
27 Government was that expenditures of all political parties runs into thousands of crores.
28 However, there has not been a transparent funding mechanism of the political system. The
29 said PIB released quotes from the then Finance Minister's article.'

30 'The conventional system of political funding is to rely on donations. These donations, big or
31 small, come from a range of sources from political workers, sympathizers, small business
32 people and even large industrialists. The conventional practice of funding political system was
33 to take donations in cash and undertake these expenditures in cash. Sources are anonymous
34 or pseudonymous. The quantum of money was never disclosed. The present system ensures
35 unclean money coming from unidentifiable sources. It is wholly a non-transparent system.
36 Most political groups seem fairly satisfied with the present arrangement and would not mind
37 the *status quo* to continue. The effort therefore, is to run down any alternative system which

1 is devised to cleanse the political funding mechanism. It further said that most donors are
2 reluctant to disclose the details of quantum of donations given to a political party. A major
3 step was taken by Shri Atal Bihari Vajpayee. The Income Tax Act was amended to include a
4 provision that donations made to parties would be treated as expenditure and would thus give
5 a tax advantage to the donor. If the political party disclosed its donations in a prescribed
6 manner, it would also not be liable to pay tax. A political party was expected to file its returns
7 both with the Income-tax authorities and the Election Commission. It was hoped that the
8 donors would increasingly start donating money by cheque. Some donors did start following
9 this practice, but most of them were reluctant to disclose the details of quantum of donation
10 given to a political party. This was because they feared consequences visiting them from
11 political opponents. The law was further amended through UPA Government to provide for
12 pass through Electoral Trust so that donors would park their money with the Electoral Trust,
13 which in turn would distribute them to various political parties. Both these reforms, taken
14 together, resulted in only a small fraction of the donations coming in the form of cheques.' And
15 therefore, they say - we have now introduced these Electoral Bonds because... in fact, My Lord,
16 this is the whole...

17

18 **JUSTICE B.R. GAVAI:** What was the Electoral Trust?

19

20 **PRASHANT BHUSHAN:** Electoral Trust is now... is a kind of...

21

22 **JUSTICE SANJIV KHANNA:** That was 2013. That was 2013.

23

24 **PRASHANT BHUSHAN:** Semi anonymous instrument. This is what it is. So any company
25 can form or set up what is called an Electoral Trust, so long as it is recognized by the Income
26 Tax Department. In this Electoral Trust, any company can donate. So let's say that any
27 company has... Company A has set up an Electoral Trust. Companies, B, C, D, E, etc. They all
28 donate to that Trust, and that Trust then donates to different political parties. So, it's a kind of
29 semi-anonymous system. Semi-anonymous meaning, of course in income tax, they have to
30 disclose, who are the companies who have donated to this Trust. They are also expected to
31 disclose, which are the political parties to which the Trust has donated. But, which company
32 has donated to which political party is not known. Sometimes they may say, well, we didn't
33 say, but in fact My Lord, what would be happening, I expect would be, every company donating
34 to an Electoral Trust would say, look, I am giving this Trust 50 crores and we want this 50
35 crores to be donated to A and B political parties. Normally, that's what is likely to have been
36 happening, likely to be happening through these Electoral Trust. So this is also a kind of semi-
37 anonymous way, not totally anonymous, because you can come to know, which are the

1 companies who have donated to this Electoral Trust. And you can also come to know, which
2 are the political parties that this Electoral Trust has donated, how much money to. So in that
3 sense, there is more information than you have by way of Electoral Bond. But now the
4 justification. So, the government said, that we want to reduce cash. Earlier people were
5 donating through cash and therefore they also said, that we have reduced this disclosure
6 requirement from anything above Rs. 20,000 to anything above Rs. 2000, though My Lord,
7 that amendment was only made in Income Tax Act, not followed through in the
8 Representation of People Act. But let's assume that it would have been made even in the
9 Representation of People Act. That means, the law earlier was, that you have to disclose any
10 donations above Rs. 20,000. The political party has to disclose to the Income Tax as well as to
11 the Election Commission, anything received above Rs. 20,000. That has been brought down
12 to 2000. How will that reduce cash? Because earlier the party said that look, we have received
13 'x' crores by way of donations, small donations below 20,000. Now they will say, we have
14 received the same 'x' crores, by way of small donations, below 2000. That's not going to make
15 any difference because, all that the party has to say is, we put out a sheet, we held a rally, we
16 put out a *chaddar*, and people put money in that. Somebody put Rs. 500, somebody put Rs.
17 200, somebody put Rs. 100 etc., and they have collected 'x' number of crores, from small
18 donations in this manner. So, therefore that is not going to make any difference. If you had
19 said on the contrary, that every political party will only take money through banking channels
20 and cash receipts are prohibited, they are a corrupt practice or that the party shall be
21 deregistered, if it starts taking money or the candidate will be disqualified, if he takes money
22 by cash, then yes, you could have done something to stop this menace of cash, etc. This has
23 not stopped the menace of cash. Today My Lord, candidates are still spending, many times the
24 amount by way of cash and they are not being caught. They are not being caught unfortunately,

25

26 **CHIEF JUSTICE DY CHANDRACHUD:** All right now let's get into the submission. You
27 can just show us...

28

29 **PRASHANT BHUSHAN:** Just one more thing...

30

31 **VIJAY HANSARIA:** Section 13-B of Income Tax Act read with Section 2 [UNCLEAR].

32

33 **PRASHANT BHUSHAN:** Now My Lord, coming to the previous orders of this court, in this
34 matter...

35

36 **JUSTICE B.R. GAVAI:** Section 13-B, read with?

37

1 **VIJAY HANSARIA:** 13-B.

2

3 **JUSTICE B.R. GAVAI:** Read with?

4

5 **VIJAY HANSARIA:** With the Income Tax Act.

6

7 **JUSTICE B.R. GAVAI:** No, read with?

8

9 **VIJAY HANSARIA:** [INAUDIBLE]

10

11 **PRASHANT BHUSHAN:** Now, My Lords, one of the justifications given by the
12 Government, for Electoral Bonds was that donor are reluctant to donate openly to political
13 parties because of fear of whatever. Now so we ask this question under RTI, so that response
14 RTI response, My Lord is, in Volume 4, page 536. Volume 4, page 536. They say, 2). SO and
15 CPIO Budget Division gave their inputs in respect of Electoral Bond Scheme 2018 pertaining
16 to pre-budget division subsequent to 07-06-2017 the date of assigning the job to the Budget
17 Division as follows. As regards Point A and B, no representation or petition or communication
18 has been received from the donors regarding the need for maintaining confidentiality of the
19 identity while making donations to political parties.

20

21 **JUSTICE SANJIV KHANNA:** This may not...

22

23 **CHIEF JUSTICE DY CHANDRACHUD:** This may not be really very relevant

24

25 **JUSTICE SANJIV KHANNA:** Because they already know it's confidentiality is in a way
26 maintained under the...

27

28 **PRASHANT BHUSHAN:** So that justification given by the, I'm only showing this to show
29 that one of the justifications given by the Government for introducing the Electoral Bond
30 Scheme was, they said that look, we are introducing this anonymous instrument of funding
31 political parties because donors are reluctant to disclose who they are funding to. So we asked
32 this question. Was any representation received from any donor whatsoever that look...

33

34 **CHIEF JUSTICE DY CHANDRACHUD:** No, but you don't have to have a representation
35 from a donor to perceive that reluctance. I mean we're just trying to analyse RTI responsibly
36 will not carry your submission any further.

37

1 **PRASHANT BHUSHAN:** No, I'm saying that Government should have some...

2

3 **CHIEF JUSTICE DY CHANDRACHUD:** There is an assumption that look if you disclose
4 the name of the donor, there'll be other political parties who will know that you have
5 contributed to this political party and therefore they might be subject to... suppose a donor is
6 carrying on business in the State. If the name of the donor is made available to all the political
7 parties, the rival political parties will say, well especially if you're making a contribution to a
8 party which is not in power.

9

10 **PRASHANT BHUSHAN:** Only fear would be from the party.

11

12 **CHIEF JUSTICE DY CHANDRACHUD:** That's the logic. Whether it's valid or not, in what
13 you have to decide.

14

15 **PRASHANT BHUSHAN:** Correct. Now, Your Lordship may come back to my written
16 submission.

17

18 **JUSTICE SANJIV KHANNA:** Mr. Prashant Bhushan you're on the first argument was right
19 to information under 19..?

20

21 **PRASHANT BHUSHAN:** I'm coming to that. I just wanted to lay out the few other factors.

22

23 **CHIEF JUSTICE DY CHANDRACHUD:** Now let's look at the material, what you are
24 supporting...

25

26 **PRASHANT BHUSHAN:** Now interim orders My Lord, two things. Interim orders....

27

28 **CHIEF JUSTICE DY CHANDRACHUD:** Let's see the interim orders. Where are they?

29

30 **PRASHANT BHUSHAN:** Page 15. Bottom.

31

32 **CHIEF JUSTICE DY CHANDRACHUD:** Volume?

33

34 **PRASHANT BHUSHAN:** Volume 1 in my written submissions itself. I have quoted it. And
35 I've given the name of the convenience compilation for the original. We have considered the
36 matter, including amendments to the statutes brought in by the Finance Act 2016 and 2017.
37 We have closely examined the stand taken by the respective parties and what has been stated

1 by the Election Commission in its affidavit, details of which have been set out. All that we
2 would like to state for the present is that the rival contentions give rise to weighty issues which
3 have a tremendous bearing on the sanctity of the electoral process in the country. Such weighty
4 issues, which require an in depth hearing which cannot be concluded, and the issues answered
5 within the limited time that is available before the process of funding through Electoral Bonds
6 come to, comes to a closure, as per the schedule noted earlier. In the above perspective
7 according to us, the just and proper interim direction would be to require all political parties
8 who have received donation through Electoral Bonds to submit to the Election Commission in
9 a sealed cover detailed particulars of the donors against each bond. The amount of each bond
10 and the full particulars of the credit received against each bond, namely, the particulars of the
11 bank accounts to which the amount has been credited and the date of each such credit. Pausing
12 here My Lord, I pointed out that the political party can well turn around and say, we don't even
13 know. I'm saying that and ultimately My Lord...

14

15 **CHIEF JUSTICE DY CHANDRACHUD:** So, the purchaser of the bond may not be the
16 person who is actually handing it over to the political party.

17

18 **PRASHANT BHUSHAN:** Correct. That's why. That's why they may say that we don't know.
19 And they can also say that it was not even handed over in person. It was just left at our doorstep
20 or couriered to us. Anything they can say.

21

22 **CHIEF JUSTICE DY CHANDRACHUD:** The Election Commission is appearing before us.

23

24 **PRASHANT BHUSHAN:** Yes, I'll just read out... I will read out...

25

26 **CHIEF JUSTICE DY CHANDRACHUD:** Who's appearing for the Election Commission?
27 Mr. Sharma, you have details of, you have detailed this data which has been submitted
28 pursuant to the Interim Order.

29

30 **AMIT SHARMA:** We have that in a sealed cover. We brought that My Lord.

31

32 **CHIEF JUSTICE DY CHANDRACHUD:** Do keep it with you in the court. That at an
33 appropriate time we'd like to look at it.

34

35 **AMIT SHARMA:** But this is pertaining 2019. That interim order was passed in 2019.
36 Pertaining to that the data is with us.

37

1 **PRASHANT BHUSHAN:** This data... but this was a continuing interim order.

2

3 **CHIEF JUSTICE DY CHANDRACHUD:** But this is not only confined to the 2019 election.

4 The mandate is that you must continue to maintain this data.

5

6 **AMIT SHARMA:** As far as the data of 2019 is concerned that's there in the sealed cover. If

7 My Lords require data...

8

9 **JUSTICE SANJIV KHANNA:** Mr. Sharma, let's be clear. This is an interim order.

10

11 **AMIT SHARMA:** That's right.

12

13 **JUSTICE SANJIV KHANNA:** It will continue till the decision.

14

15 **TUSHAR MEHTA:** Para 14 if Your Lordships [UNCLEAR], possibly that's the...

16

17 **AMIT SHARMA:** Para 14 of...

18

19 **JUSTICE SANJIV KHANNA:** That's for the past.

20

21 **PRASHANT BHUSHAN:** 'The above details will be furnished forthwith in respect of

22 Electoral Bonds received by a political party till date. The detail of such other bonds received

23 by such political party up to the date fixed for issuing such bond as per note of the Ministry of

24 Finance dated so and so will be submitted on or before 30th May 2019.'

25

26 **JUSTICE SANJIV KHANNA:** Just one thing now. You are reading paragraph 13, as

27 restricted by paragraph 14? And you have not carried forward the data with regard to post the

28 Interim order?

29

30 **AMIT SHARMA:** I'll have to seek the instructions.

31

32 **JUSTICE SANJIV KHANNA:** Please take instructions on that.

33

34 **AMIT SHARMA:** We'll do that.

35

36 **JUSTICE SANJIV KHANNA:** 14 does not restrict it to... restrict paragraph 13. Paragraph

37 14 is for the past. Paragraph 14 is from that period onwards.

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AMIT SHARMA: My Lords, I'll take instructions.

CHIEF JUSTICE DY CHANDRACHUD: What paragraph 14 says is that in respect to the past period, the data will be submitted forthwith. But para 13 is a continuing direction. This is not only confined to the 2019 election.

AMIT SHARMA: My Lords, I'll seek instructions.

PRASHANT BHUSHAN: Then My Lord, the next order at para 20 which I have quoted is that mix and match thing. I said this Hon'ble Court in its interim order dated 26-03. Subsequent interim order. 'However, based on the Government's claims while rejecting the Petitioner's prayer for interim stay as noted. The financial statements of Company is registered under the Companies Act which are filed with the Registrar of Companies are accessible online on the website of the Ministry for anyone. They can also be obtained in physical form from the Registrar of Companies upon payment of prescribed fee. Since the scheme mandates political parties to file audited accounts of statements and also the Companies Act requires financial statements of registered companies to be filed with the Registrar of Companies, the purchase, as well as encashment of Bonds happening only through banking channels, is always reflected in documents that eventually come to the public domain. All that is required is a little more effort to cull out such information from both sides, purchaser of Bond and political party and do some match the following. Therefore, it is not as though the operation of the scheme as behind iron curtains, incapable of being pierced.'

Pausing here, My Lord, this is not correct. Because you can't... citizen can't do this match the following etc. Because the company does not disclose who they have given the Bond to. Company only discloses the total Bonds purchased. The political party only discloses the total Bonds received. So you can't... no citizen can match. Only the State Bank, only the State Bank. State Bank, and any law enforcement agency which asks such information from the State Bank. Strictly speaking, only that. Otherwise citizens certainly can't. It completely defeats the citizen's rights. Now My Lord, I just want to read out the objections of the Election Commission. Para 25 - 'When this Bond Scheme was introduced, the Election Commission, as well as the Reserve Bank strongly objected to it.' Election Commission, paragraph 25. In its letter, and they have given the pages of the primary documents from Volume 4 of the compilation. I am, in the interest of conserving time, I am just reading these relevant parts. Volume 4, then Your Lordship may turn to the Election Commission's... page 467. This is an important communication by the Election Commission.

1 **JUSTICE B.R. GAVAI:** Volume 4, page?
2

3 **PRASHANT BHUSHAN:** 467 of Volume 4. That's document number 37. Document
4 number 37. In the Finance Act, 2017. Sir, I am directed to draw your attention to Finance Act
5 2017, which has introduced certain amendments to the Income Tax Act, Representation of
6 People Act, Companies Act and will have serious impact on transparency aspect of political
7 finance funding of political parties. Then they mentioned the amendments, etc. and then they
8 say... 2(2) It is evident from the amendment that has been made that any donation received
9 by a political party through an Electoral Bond has been taken out of the ambit of reporting
10 under the contribution report, prescribed under Section 29-C of the RP Act, and therefore this
11 is a retrograde step as far as transparency of donations is concerned and the proviso needs to
12 be withdrawn. Moreover, in a situation where contributions received through Electoral Bonds,
13 are not reported on perusal of the contribution reports of political parties, it cannot be
14 ascertained whether the political party has taken any donation in violation of the provisions
15 of 29-B of the RP Act, which prohibits political parties from taking donations from government
16 companies and foreign sources. Income Tax Act - An amendment has been made to Section
17 13-A, of the Income Tax Act, whereby no donation exceeds Rs. 2000 can be received by a
18 political party other than by account payee cheque etc. However, the limit for anonymous
19 donations by political party still remains at 20,000 in Section 29-C of the RP Act. The RP Act
20 needs to be amended, to reduce the limit of anonymous cash donations to 20,000, so as to
21 bring these two Acts in consonance to each other. Pausing here, My Lord, it makes no
22 difference in my respectful submission, because the political party earlier said, that we have
23 received 'x' crores, from 20,000 or less, now they'll say we have received the same 'x' crores
24 from 2000 or less. If they don't want to disclose those cash donations, they don't have to. So,
25 it's not going to make any substantial difference whether the limit is 20,000 or 2000. Then My
26 Lords, Companies Act, certain amendments have been proposed to Section 182 of the
27 Companies Act, where the first proviso, has been omitted and consequently, the limit of 7.5%
28 of the average net profits in the preceding three financial years, on contributions by companies
29 has been removed from the statute, this opens up the possibility of shell companies being set
30 up for the sole purpose of making donations to political parties, with no other business of
31 consequence having disburseable profits. So, the Election Commission had pointed this out,
32 that, look, you are doing this, but this will open up the gates to shell companies being used to
33 donate money to political parties. The Second Amendment in 182(3), abolishes the provision,
34 that firms must declare their political contributions on their profit and loss account, that this
35 requirement is now reduced to only showing the total amount under this head, which would
36 again compromise transparency. In view of the position explained above, I am directed to state
37 that, the amendments made in RP Act, Companies Act, introduced by the Finance Act referred

1 to in para so and so, may be reconsidered so as to provide a transparent reporting of
2 contributions received by political party through Electoral Bond and the provision should be
3 made in the Companies Act to declare party wise contributions made by companies, in the
4 profit and loss account so that transparency in the fundraising by political parties is
5 maintained with respect to para 4(1), the Commission has expressed its apprehension, that
6 the abolition of relevant provision of 182 would lead to increase...

7

8 Yes, I was just reading the last paragraph of that EC's letter, para 6, at page 469.

9

10 Yes My Lord, I was just reading the last part of that EC's letter. The last part is at page 469.
11 Last paragraph, para 6. With respect to para 4.1, the Commission has expressed its
12 apprehension that the abolition of the relevant provision of Section 182 would lead to
13 increased use of black money for political funding through shell companies. As I have said, My
14 Lord, what would be happening is that, let's say one of the allegations in that Adani matter is
15 that the money which was siphoned out by over invoicing to companies which are registered
16 in tax havens were thereafter funnelled these companies. Now, suppose that money is now
17 funnelled through a subsidiary to political parties that's really black money. It's really black
18 money and in a way, foreign money, which is coming to political parties through these shell
19 companies, which have been set up as subsidiaries.

20

21 **CHIEF JUSTICE DY CHANDRACHUD:** Now, Mr. Bhushan, can we go straight to your
22 formulation now.

23

24 **PRASHANT BHUSHAN:** Yes.

25

26 **CHIEF JUSTICE DY CHANDRACHUD:** I think we seen the scheme. We've seen the RBI
27 reply.

28

29 **PRASHANT BHUSHAN:** Just one RBI reply.

30

31 **CHIEF JUSTICE DY CHANDRACHUD:** RBI reply perhaps. They now can formulate then
32 we can go to Mr. Sibal.

33

34 **PRASHANT BHUSHAN:** Now just My Lord. Just the RBI letter and the Government's
35 reply under, on this, they said. Government said not RTI. Government in Parliament said.

36

37 **CHIEF JUSTICE DY CHANDRACHUD:** Let us see that

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PRASHANT BHUSHAN: Yes page 489,

CHIEF JUSTICE DY CHANDRACHUD: Volume 4?

PRASHANT BHUSHAN: Volume 4, page 489. They were asked whether you have received any concern from the Election Commission and they said no. Page 489, 'Will the Minister of Finance please, be pleased to state, Question D, whether it is a fact that the Election Commission has raised concerns on the issue of Electoral Bonds. If so, details as well as reasons thereof'. Now see the answer to Question D, at Page 490. The Government has not received any concerns from the Election Commission on the issue of Electoral Bonds. They treat that so casually. You can just say whatever you want and get away with it and the RBI's objection is at page 437. 437 of the same Volume, Document Number 29.

JUSTICE SANJIV KHANNA: Foreign funding probably. This is mainly on account of foreign funding, or otherwise.

PRASHANT BHUSHAN: This is 30th January, 2017 letter by the RBI.

CHIEF JUSTICE DY CHANDRACHUD: What page is that Mr. Bhushan?

PRASHANT BHUSHAN: Page 437 of Volume 4, Document 37, yes. 29. 'Please refer to your email dated January 28, 2017 forwarding a proposal to amend Section 31 of the RBI Act so as to enable scheduled banks to issue Electoral Bonds as a mode of donation to registered political parties. We have examined the proposal and our views are as follows:

1) The move will result in multiple non-sovereign entities being authorised to issue Bearer Instruments as such the proposed mechanism militates against the RBI's sole authority for issuing Bearer Instruments such as cash. Bearer Instruments have the potential to become currency and if issued in sizable quantities can undermine the faith in bank notes issued by the Central Bank. Amending 31 would seriously undermine a core principle of Central Banking Legislation and so would set a bad precedent.

2) Even the intended purpose of transparency may not be achievable as the original buyer of the Instrument need not be the actual contributor to the political party. The Bonds are Bearer Bonds and are transferable by delivery. Hence, who finally and actually contributes Bonds to the political party will not be known.

1 3) While the person buying the Bearer Bond will be as per KYC parameters, the identities of
2 the intervening persons will not be known. Thus, principles and the spirit of PMLA Act will get
3 affected.

4 4) If it is the intention that the person/entity buying such Bonds is expected to tender it to a
5 political party, such intention can be accomplished today by a normal cheque, demand draft
6 or any other electronic or digital mode of payment. There is no special need for or advantage
7 by creation of an Electoral Bearer Bond and that to by disturbing the established international
8 practice.

9 We are therefore, of the opinion that it will not be advisable to amend Section 31 of the RBI
10 Act just for the sake of providing a formal mechanism to persons, entities contributing to
11 political parties when existing Banking Instruments such as cheques, drafts, digital mode can
12 equally be achieving the said purpose and objective.'

13
14 Now My Lord, I'll come back to my legal submissions. I have in my written submissions, I am
15 not reading that, I have quoted several letters of the RBI. I don't need to... Your Lordships can
16 go through it and just for the interest of time. Now my grounds for challenge My Lord. Page
17 23. First ground is that it violates the Citizen's Right to Information about funding of political
18 party. That, My Lord, I have quoted **Anjali Bhardwaj**, recent judgment of this Court in the
19 case of Information Commissions. First, My Lord para 39 - 'Right to Information has been
20 held to be part of the fundamental Right of Freedom of Speech and Expression in terms of
21 19(1)(a) and 21 of the Constitution. Political parties hold a very important constitutional status
22 explained above, having significant powers in the form of decisive control over the formation
23 of Central/State Governments, voting by MPs and MLAs, passage/non-passage of important
24 bills in State Assemblies. For the purpose of properly giving effect to the citizens... said citizen's
25 Right to Information about political parties, including voter's.' One other thing that is that
26 political parties are given a common symbol. So therefore, political parties are part of the
27 instrumentalities of the State and this has been held by this Court, and even the CIC has held
28 that political parties are public authorities under the Right to Information Act. 'For the
29 purpose of properly giving effect to the right of citizens to have information about political
30 parties, including voter's fundamental rights, information about who all have donated to a
31 particular political party is an essential information for the common people. Without any
32 knowledge of which political party is being funded, by which corporate house/ individuals,
33 and whether policies are being carved in favour of such corporate entities, a citizen is bereft of
34 critical information. This Court has, in a large number of decisions held that transparency and
35 Right to Information are cherished fundamental rights under 19(1)(a) and 21.'

36

1 In **Anjali Bhardwaj**, just one short quote - ' Much before the enactment of the RTI act, which
2 came to the Statute book in 2005, this Court repeatedly emphasized People's right to
3 information to be a facet of 19(1)(a) of the Constitution. It has been held that the Right to
4 Information is a fundamental right and flows from 19(1)(a), which guarantees the Right to
5 Speech. This right has also been traced to Article 21, which concerns about Right to Life and
6 Liberty. There are umpteen number of judgments declaring that transparency is a key for
7 functioning of a healthy democracy. Judgments of this Court, such as the five Judge Bench in
8 **State of UP vs Raj Narain**, seven Judge Bench in **SP Gupta**, then in **Reliance Petro**
9 **Chemicals, Jayantilal Mistry**, and scores of others have recognized the Right to
10 Information and transparency to be a fundamental right and a basic facet of democracy and
11 Rule of Law.' All these judgments My Lord, are in the judgments compilation. In fact, if Your
12 Lordship wants, I'll just give the relevant paragraphs of each of these judgments. This **Anjali**
13 **Bhardwaj**, My Lord, is in Volume 5 document... It's the first document, and the relevant
14 para is para 10. This **Raj Narain** is the second document in the judgments compilation and
15 the relevant para is para 74. Page 69, para 74. Pardon My Lord?

16

17 **JUSTICE B.R. GAVAI:** Have you referred to them in your submission? Paras?

18

19 **PRASHANT BHUSHAN:** No. In this, the paras are not referred. That's why I'm just telling
20 Your Lordships, which are the relevant paras.

21

22 **JUSTICE B.R. GAVAI:** **Raj Narain** is para?

23

24 **PRASHANT BHUSHAN:** **Anjali Bhardwaj** is the first document. Page 19, para 10. That
25 I think I have quoted. Then My Lord, UP vs... **State of UP vs Raj Narain**. That is second
26 document in the documents compilation... In the judgments compilation. And in that para 74,
27 page 69. Then the third is **SP Gupta**. Relevant para is para 67, page 319. The third document.
28 **Reliance Petrochemicals** is the fourth document, the relevant para is para 34, page 1136.

29

30 **JUSTICE B.R. GAVAI:** Para?

31

32 **PRASHANT BHUSHAN:** Para. 34, page 1136 of the compilation. Then **Association for**
33 **Democratic Reform**. Now, this was a very, very important case, My Lord. I have quoted it
34 here also, because this was the case where they mandated the disclosure of assets, liabilities,
35 criminal antecedents, and educational backgrounds of candidates, contesting election by
36 means of an affidavit. And here the important thing is, that they said, that this flows out of
37 Article 19(1)(a) rights. And when the government tried to overturn this by means of a

1 legislation, that legislation was struck down, on the ground that this violating fundamental
2 right of the citizens to know about candidates. And I submit My Lord, if the citizens have a
3 right to know about candidates, as to what are the assets, liabilities, what are the criminal
4 antecedents, etc., by way of an affidavit, then, equally or more importantly, citizens have a
5 right to know about, funding of political parties, who's funding them. Political parties are
6 playing a very important role in our Democracy. They get a common symbol. They contest as
7 a party. They form the government, they have given a right under the 10th Schedule for
8 disqualification of those who flout the party as mandate, etc. as to how to vote and so on. So
9 therefore citizens... If citizens have a right to know about candidates, about the assets,
10 liabilities, etc. They certainly have a right to know, about parties as to who's funding them.
11 And then My Lord, I have given the relevant quote from this ADR.

12

13 **JUSTICE B.R. GAVAI:** Para 42.

14

15 **PRASHANT BHUSHAN:** At page, of my written submission, page...

16

17 **JUSTICE B.R. GAVAI:** Para 42?

18

19 **PRASHANT BHUSHAN:** Yes. Para 42. And My Lord, the quote is, now we would refer to
20 various decisions of this Court, dealing with citizens' right to know which is derived from the
21 concept of freedom of speech and expression. The people of this country have a right to know
22 every public act, everything that is done in a public way by public functionaries. MPs and MLAs
23 are undoubtedly public functionaries, so are political parties. The public education is essential
24 for functioning of the process of popular government and to assist the discovery of truth and
25 strengthening the capacity of an individual in participating in the decision making process.
26 The decision making process of a voter, would include his right to know, about public
27 functionaries, who are required to be elected by him, equally about political parties also. In
28 *State of UP vs Raj Narain*, the Constitution Bench considered a question, whether
29 privilege can be claimed by the Government of UP, under 123 of the Evidence Act, in respect
30 of what has been described as the Blue Book summoned from the Government of UP and
31 certain documents summoned from the SP. The Court observed that, the right to know which
32 is derived from the concept of freedom of speech, though not absolute, is a factor, which should
33 make one vary, when secrecy is claimed for transactions which can at any rate have no
34 repercussion on public security. The Court pertinently observed, as under, in a government of
35 responsibility like ours, where all the agents of the public must be responsible for their
36 conduct, there can be but few secrets. The people of this country have a right to know, every
37 public act, everything done that is done in a public way, by their public functionaries. They are

1 entitled to know the particulars of every public transaction, in all its bearing. From the
2 aforesaid paragraph, it can be deduced that members of a democratic society, should be
3 sufficiently informed so that they may influence intelligently the decisions which affect
4 themselves. And this would include their decisions of casting votes, in favour of a particular
5 candidate. If there is disclosure by a candidate as sought for, then it would strengthen the
6 voters in taking appropriate decisions of casting their votes. To sum up, the legal and
7 constitutional position which emerges, can be stated that, to maintain the purity of elections
8 and in particular, to bring transparency in the process of election, the Commission can ask the
9 candidates, about the expenditure incurred by the political parties and this transparency, in
10 the process of election would include transparency of a candidate, who seeks election or re-
11 election. In a democracy, the electoral process has a strategic role. The little man of this
12 country, would have basic elementary right to know full particulars of a candidate who is to
13 represent him in Parliament, where laws to bind his liberty and property may be enacted.
14 Obviously, My Lord, this would apply with greater force to political parties. The right to get
15 information in a democracy is recognized all throughout and it is a natural right flowing from
16 the concept of democracy. At this stage we would refer to Article 19(1) and (2) of the
17 International Covenant of Civil and Political Rights, which is as under:

18 Everyone shall have the right to hold opinions without interference. Everyone shall have the
19 right to freedom of expression. This right shall include freedom to seek, receive, and import
20 information and ideas of all kinds, regardless of the frontiers, etc., etc. And para 7, My Lord,
21 under our Constitution 19(1)(a) provides for freedom of speech and expression.

22

23 **JUSTICE SANJIV KHANNA:** In a nutshell Mr. Bhushan. Your argument is the citizens
24 must know what are the sources of fund of a political party. That is in larger public interest...

25

26 **PRASHANT BHUSHAN:** Not just in larger public interest. I's the citizen.....

27

28 **JUSTICE SANJIV KHANNA:** There will be always the conflict which will come up. Some
29 people will say it may have its own repercussions, but it's in larger public interest and therefore
30 it will be covered by the Article 19(1)(a).

31

32 **PRASHANT BHUSHAN:** And as contrary to what the Government is arguing, they are
33 saying, that there are reasonable restrictions which can be imposed on the rights under 19
34 (1)(a). But those reasonable restrictions. Firstly, they have to be reasonable proportionate.
35 Secondly, they have to be covered by one of the 6, 7 things which are mentioned there. Public
36 order, etc., etc. Obviously, My Lord, the funding of political parties cannot be covered by any
37 one of those grounds, which are mentioned in 19(2) as grounds on which restrictions can be

1 imposed on this fundamental right under 19(1)(a). So, therefore, therefore My Lord, and
2 moreover about funding of political party there is also this problem. If I know that this party
3 is being funded by companies who are getting benefits from this political party. Then I know
4 that this particular party is corrupt because it is essentially getting a *quid pro quo*. And I
5 suspect and I'll show the figures. The figures about Electoral Bonds show that number 1 they
6 are almost all in denominations of 1 crore. So, they are being largely purchased by corporates
7 etc., companies. Number 2, that they are essentially only being given to ruling parties. Bulk
8 goes to the ruling party at the Centre, more than 50%, the remaining go to ruling parties in the
9 States. And virtually nothing, virtually nothing by way of Electoral Bond goes to parties which
10 are not ruling parties either in the Centre or the State. And today, My Lord, this Electoral Bond
11 forms the bulk of the political funding of parties. It forms the vast bulk of political funding of
12 parties, so therefore by making this non-transparent, you are defeating a very important right
13 of citizens to know about who is funding these political parties. Where are they getting their
14 money from? Whether this is tainted money, whether this is black money, whether this is
15 laundered money. Whether this is shell company through shell companies, whether whatever.
16 So therefore all that is being defeated. Therefore, this will clearly violate Article 19(1)(a) rights.
17 And this 19(1)(a) that right to information about public functional is public...

18

19 **CHIEF JUSTICE DY CHANDRACHUD:** Let's go to the next legal ground. 19(1)(a) you
20 have now indicated.

21

22 **PRASHANT BHUSHAN:** One judgment which I wanted, which I have not mentioned in my
23 written submission, which I wanted to show is a judgment of Justice Chagla of Bombay High
24 Court. Very, very important judgment.

25

26 **JUSTICE SANJIV KHANNA:** 57?

27

28 **PRASHANT BHUSHAN:** Yes, 1957 Judgment. Tata.

29

30 **CHIEF JUSTICE DY CHANDRACHUD:** Can you give us a citation?

31

32 **PRASHANT BHUSHAN:** Yes. That citation is, that's the 40th document in the compilation
33 of judgment. It's in Volume 5 page 4249. All the judgments are in Volume 5.

34

35 **JUSTICE B.R. GAVAI:** Page 4?

36

1 **PRASHANT BHUSHAN:** 4249. That's the citation is AIR 1958, Bombay, page 155 or it's
2 also, 1957 SCC Online, Bombay, page 82. This is an important judgment. Actually, My Lord,
3 though it came fairly early in our constitutional history. But you can see how prescient Justice
4 Chagla was even in 1957, when he delivered this judgment. This was a case where one of the
5 Tata companies wanted to amend its Articles of Association to be able to give donations to the
6 Congress Party. Now, in that context, My Lord, this discussion takes place and he says right at
7 the beginning, page 4249 of Volume 5, where this judgment is given. He says - 'It is with
8 considerable uneasiness of mind.

9

10 **JUSTICE B.R. GAVAI:** You're reading para?

11

12 **PRASHANT BHUSHAN:** First para. Right in the beginning. Right in the beginning of that
13 judgment. 'It is with considerable unease of mind and a sinking feeling in the heart that we
14 approach this appeal and the proposal of TISCO that they should be permitted by an
15 amendment in the Memorandum to make contributions to political parties. Democracy in the
16 country is nascent, and it is necessary that Democracy should be looked after, tended and
17 nurtured so that it should rise to its full and proper stature. Therefore, any proposal or
18 suggestion which is likely to strangle that Democracy almost in its cradle, must be looked at
19 not only with considerable hesitation, but with a great deal of suspicion. Now, Democracy in a
20 political system which ensures decisions by discussion and debate, but the decision and debate
21 must be conducted honestly and objectively, and the decisions must be arrived at on merits,
22 without being influenced or actuated by extraneous considerations. On first impression, it
23 would appear that any attempt on the part of any one to finance the political party is likely to
24 contaminate the various springs of Democracy. Democracy would be vitiated if results were
25 arrived at not on their merits, but because money played a part in bringing about those
26 decisions. The form up and trappings of Democracy may continue, but the spirit of underlying
27 Democratic Institutions will disappear. History of Democracy has proved that in other
28 countries Democracy has been smothered by big business and money bags playing an
29 important part in the working of Democratic Institutions. And it is the duty not only of
30 politicians but also... not only of politicians, not only citizens, but even of a Court of Law to the
31 extent that it has got the power to prevent any influence being exercised upon the voter, which
32 is an improper influence and may be looked at from any point of view as a corrupt influence.
33 The very basis of Democracy is the voter, and when in India we are dealing with adult suffrage,
34 it is even more important than elsewhere that not only the integrity of the representative who
35 is ultimately elected to Parliament is safeguarded, but that the integrity of the voter is also
36 safeguarded. And it may also be said... and it may be said that it is difficult to accept the
37 position that the integrity of the voter and that of a representative is safeguarded, if large

1 industrial concerns are permitted to contribute to political funds to bring about a particular
2 result.' Thereafter, he says... then...

3

4 **JUSTICE J.B. PARDIWALA:** Read para 17, Mr. Bhushan.

5

6 **PRASHANT BHUSHAN:** 7?

7

8 **JUSTICE J.B. PARDIWALA:** 17.

9

10 **PRASHANT BHUSHAN:** 17. Yes, yes. 'The learned Judge, trial Judge has very rightly
11 wanted to impose certain conditions before he would make the order as he was entitled to do.
12 And it must again be said in fairness to the company, that the company volunteered,
13 voluntarily offered to accept those terms, and they now form part of the Order. And the terms
14 are that all contributions made by the company to any political party should be clearly shown
15 in the Profit and Loss account and the balance sheet of every year of the company. Now even
16 Mr. Seervai, who was appearing for the Tata concedes that one way of controlling and curbing
17 this mischief is to give complete publicity to the donations made by trading and industrial
18 corporations to the political... to the political funds of different parties. It is essential that the
19 elector should know how a party is being financed and by whom and to what extent. It is
20 necessary in order to decide the credentials of a party to know with whose strength and with
21 whose support, it has come to the polls. Mr. Seervai says, that the conditions which the
22 company has voluntarily undertaken to comply with, is sufficient to ensure such publicity. In
23 our opinion, it is not. Mr. Seervai points out, that the report of the company will go to 37,000
24 shareholders and 37,000 keen eyes will peruse the report of the company. But we are not
25 interested with shareholders in this context. That is one section of which we are least
26 concerned or interested in. We are concerned with the millions of voters of this company, who
27 can never afford the luxury of buying or holding shares. And it is these people, whom we want
28 to protect and whose interests we want to safeguard. It is these people who should know, when
29 to go to the polls, when they go to the polls, for whom they are voting, and therefore, if publicity
30 is necessary, it is necessary to enlighten these voters, as to what form, and under what shape
31 and with whose support, the political parties come to polls. Therefore, we will add to the
32 condition already imposed by the learned Judge, and we will impose a condition on the order
33 passed by the learned Judge, confirming the alteration that the company at the end of each
34 financial year, will publish in two leading newspapers of India, one which must be published
35 in Bombay, a complete statement of all contributions and donations, made to it, by any
36 political party, or to any political institution, or any political cause. Before parting with this
37 case, we think it is our duty to draw attention of Parliament, to the great danger inherent in

1 permitting companies to make contributions to the funds of political parties'. Pausing here for
2 a moment, My Lord, The Supreme Court of Brazil has prohibited corporate donations to
3 political party, by a judicial order. By a judicial order, they have prohibited. They say that
4 corporates cannot be permitted to fund political parties. Here what we are doing is going
5 exactly the opposite direction. We have even removed that limit of 7.5%. We have permitted
6 foreign funding and so on. It is a danger that may and may even throttle democracy in this
7 country. Therefore, it is desirable for Parliament to consider, under what circumstances and
8 under what limitations, companies should be permitted to make these contributions. As Mr.
9 Seervai has pointed out, it is only because TISCO, did not have such provision in its
10 memorandum and had come to court, that we could impose such a condition upon it. The
11 other companies which already have such an object included in their memorandum, are under
12 no obligation to publish to the world, what funds they are contributing and to whom.
13 Democracy cannot function unless, voters have all the necessary information about parties,
14 for whom they are going to vote. In our information, 273 is not sufficient check on this evil, by
15 powers are conferred upon the directors, etc. So, they say that Parliament should bring about.
16 Here, we are doing the opposite, we are instead of providing for greater transparency, we are
17 removing whatever transparency that existed, by this means. Coming back, My Lord, to the
18 written submission. So, it's a very, very prescient remark made by Justice Chagla... I have My
19 Lord, in my written submissions, I have quoted, from some other judgments also, I am not
20 going to read it out because they are all effectively saying similar things.

21

22 **CHIEF JUSTICE DY CHANDRACHUD:** Then let's go to the next submission. On the
23 Right to Information, you've made your point.

24

25 **PRASHANT BHUSHAN:** Yes, yes. Now, My Lord. Coming to the next submission,

26

27 **CHIEF JUSTICE DY CHANDRACHUD:** 21.

28

29 **PRASHANT BHUSHAN:** Page 29, that they violate Article 21, by promoting corruption, by
30 legitimizing anonymous funding leading to *quid pro quo*, between political parties and
31 corporates individuals and also encourage money laundering on a large scale. Electoral Bonds
32 by the very nature bely the objective, for which they were introduced. These instruments allow
33 political parties to receive huge funds from anonymous entities and thereby facilitating a *quid*
34 *pro quo* in the form of kickbacks and preferential treatment to these funding entities. Large
35 contributions running into hundreds of crores from one corporate house to a political party,
36 which is more often than not the ruling party is bound to result in political favours, increasing
37 the influence on policy decisions and thus an increased control on democratic processes in the

1 country. The impugned amendments have facilitated and legitimized all of the above. RBI and
2 EC had also warned the government in strong words about the possible misuse of Electoral
3 Bonds. However, the views of these institutions were overruled in a bid to introduce Electoral
4 Bonds. The impugned amendments have in fact legitimized unlimited funding by corporates,
5 even foreign companies.

6

7 **CHIEF JUSTICE DY CHANDRACHUD:** You have really shown this actually. When you
8 are making your submissions, you've already argued the point, actually.

9

10 **PRASHANT BHUSHAN:** Yes, I was saying, now just see the data. Now just see the data My
11 Lord in Volume 4.

12

13 **CHIEF JUSTICE DY CHANDRACHUD:** Yes please show us that.

14

15 **PRASHANT BHUSHAN:** Volume 4 and just turn to page... the report starts.... this is a
16 report of the Association for Democratic Reforms, which does a very thorough job. Starts at
17 page 719 of Volume 4, Electoral Bonds and Opacity of Political Funding.

18

19 **JUSTICE B.R. GAVAI:** Page? Page?

20

21 **PRASHANT BHUSHAN:** Page 719, of Volume 4. That's where the report starts. But Your
22 Lordship may straight away come to this chart at page 726. So, first is... first is that chart at
23 page 726 which shows that 94.25%, or 12,999 crores of the total value of bonds purchased were
24 in denomination of 1 crore indicating that these bonds are being purchased by corporates
25 rather than individuals. So this is the...

26

27 **CHIEF JUSTICE DY CHANDRACHUD:** Where do we get that? Actually we of course,
28 have that bar chart. But where do you have the percentages? Oh yes, yes.

29

30 **PRASHANT BHUSHAN:** Actually, *haan* on top, Para 3. So now, by now actually 13,000
31 crores of bonds have been purchased. 13,000 crore this is vast bulk of now the political funding
32 of political party is only through this instrument. And then the next page 727. Sorry, not 727.
33 728. Now, this was only up till last 5 years. That is up till the financial year 2021-22 only that
34 the bar chart at the bottom of this page 728. Party wise Electoral Bond declared in the audit
35 reports for the last 5 years in crores. Now, if Your Lordship just sees BJP, the first party, in
36 total 5271 crores.

37

1 **CHIEF JUSTICE DY CHANDRACHUD:** Where do you get that?

2

3 **PRASHANT BHUSHAN:** The first line page 728 at the bottom of page 728, Party Wise
4 Electoral Bonds, the bars, the green bars.

5

6 **CHIEF JUSTICE DY CHANDRACHUD:** Yes.

7

8 **PRASHANT BHUSHAN:** At the bottom of, total is at the bottom and party by party it's
9 given. BJP 5271 crores. Now this was only up till 2021-22 after that more than 3500 crores
10 worth of more bonds have been purchased that is after between after financial year 2021-22,
11 another more than 3000 worth of Electoral Bonds. But this is up till 21-22. Now, see BJP total
12 is 5271 crores. Out of a grand total of 9191 crores. Grand total is on the right bottom.

13

14 **JUSTICE SANJIV KHANNA:** Mr. Bhushan, I'm sorry. Paragraph 10 says, BJP received
15 donations through Electoral Bonds, Rs. 1033.70.

16

17 **PRASHANT BHUSHAN:** That's year by year. I'm just saying total. Come to the bottom My
18 Lord.

19

20 **JUSTICE SANJIV KHANNA:** Bottom?

21

22 **PRASHANT BHUSHAN:** Bottom is the Total. Total for 5 years. Since the bonds were
23 introduced. At the bottom left of this chart, of this green bar chart, bottom left shows total BJP
24 - 5271. Has Your Lordship got it?

25

26 **CHIEF JUSTICE DY CHANDRACHUD:** Yes.

27

28 **PRASHANT BHUSHAN:** So, 5271 is the Total Bonds received by BJP. 952 is received by
29 Congress. 767 is received by Trinamool Congress. 63 crores is received by NCP. 383 is received
30 by TRS. 112 is received by TDP. 330 crores is received by YSR. 622 is received by Biju Janata
31 Dal. 431 is received by DMK. 101 crores is received by Shiv Sena. After that 48 Crores is
32 received by Aam Aadmi Party. 24 crores by JDU. 14 crores by Samaj... Now, after that they are
33 insignificant. Now if Your Lordship sees the only significant contribution are all to ruling
34 parties, either at the Centre or at the States. There is no significant contribution to any party
35 which is not in power in the Centre or in the States during this period. All these parties are in
36 power. And the central ruling party has received more than 50%, almost 60% of the total

1 contributions. And then Your Lordship may turn to page 736 of the same thing. Summary and
2 Highlights... This is for 5 years. This is for 5 years.

3

4 Now, just see summary and highlights. 'The total do donations received by the 31 political
5 parties analysed during the 6 year period, 6 year period was 16,000 an odd crore. Donations
6 worth 9188 crores were from Electoral Bonds. Therefore, that is 55.9% of the total donations
7 are only from this one Electoral Bonds. 4600 crores were received from the corporate sector.
8 2600 crores were received from other sources.' Then para 4, My Lord - 'Electoral Bonds are
9 the most preferred mode of donations for contributing to national and regional parties
10 amounting to so and so, followed by direct corporate donations worth 4600.' Out of this
11 corporate donation, large percentage would be through Electoral Trusts which are also kind of
12 semi-anonymous, though not fully anonymous.

13

14 Then they say 5 - 'The total donations declared by BJP is more than three times the total
15 donation declared by all other national parties put together. During the 6 year period, more
16 than 52% of BJP's total donations came from Electoral Bonds worth 5271 crores, while all
17 other national parties amassed 1783 crores, INC etc.' So, therefore, what this shows is that -
18 Number one - that Electoral Bonds has become the main source of donations to political...
19 funding political parties. It is by far the majority of the funding. Number 2 - that almost all the
20 donations through Electoral Bonds are being received by the ruling parties, primarily by the
21 ruling party at the Centre and secondarily, by ruling parties in the States. Number 3- that
22 essentially all the donations, because 94 point some percent, are in denominations of 1 crore,
23 and the remaining are in denomination of 10 lakhs. Virtually nothing below that. Almost not
24 even 0.1%, below that, it's all 10 lakhs and 1 crore. So therefore, is mostly corporate funding.
25 And then My Lord, I now want to show some interesting facts about, who is giving this money.

26

27 Para 52 of my written submissions, coming back to my written submissions page 30. A
28 company which is investing in a political, particular political party, does so with an expectation
29 that the receiver of such enormous funds, which is either already a party in power or a party,
30 whenever it ascends to power, will bring about favourable policies, legislations, regulations
31 and executive orders as also favourable contracts going to the donor company, their friends
32 and allies. This *quid pro quo* arrangement between the parties, politicians, and corporate
33 entities, is a premeditated and the most sophisticated arrangement, where, instead of breaking
34 a rule or regulation, the system is just bent enough, in such a way so as to benefit the corporate
35 or the rich donor. In this scheme of things, the party... the only party at loss, are the citizens.

36

37 **JUSTICE B.R. GAVAI:** This can be used as a kickback.

1

2 **PRASHANT BHUSHAN:** Yes. And I'm saying that there is circumstantial evidence showing
3 that it is being used as a kickback, because circumstantial evidence is that... Actually you have
4 legalized kickbacks. By this instrument, you have legalized kickbacks, because you can easily
5 give a kickback and get away by anonymizing this kickback. Para 53. So, it is also astonishing,
6 that if the government's arguments is to be accepted, that no one except SBI has the details
7 about donors then that would mean, that the Election Commission, Government of India,
8 Enforcement Directorate, have no access to the list of donors unless, some alleged criminal
9 offense is already being investigated and they have specific information, that money has been
10 routed through Electoral Bonds. This means that it is easy for Electoral Bonds, which are in
11 the nature of Bearer Bonds to be used for corruption, money laundering and violations of
12 FCRA and illicit contributions to political parties. Such is the effect of the impugned
13 amendments, that even subsidiaries of foreign companies, which have never carried out
14 legitimate business in India, can now secret secretly funnel hundreds of crores to a political
15 party. The corporates also do not have to disclose to whom they have made their contribution
16 in the balance sheet. The bonds are fashioned in a way that, the money could secretly pass
17 several hands to reach the ultimate political beneficiary political party, thereby creating
18 further layers of opaqueness and potential for money laundering. Now, this is important.
19 According to a Business Standard report dated 21-06-2023, that is page 766, Your Lordship
20 may note, page number is not given, Volume 766...

21

22 **CHIEF JUSTICE DY CHANDRACHUD:** We've got the page number over here in para 55.
23 You have given the page number.

24

25 **PRASHANT BHUSHAN:** Right, Vedanta Limited, a multinational mining company
26 headquartered in Mumbai, donated 457 crores, so this one company, from whose returns we
27 have been able to see, that they donated 457.... they disclosed in the Stock Market, in the last
28 five year

29 s to political parties through these bonds. Vedanta's donation only for Financial Year '23 was
30 155 crores, which was higher than 123 crores donated in Financial Year '23 according to the
31 Stock Exchange disclosures by the Company. It is interesting to note, that in Financial Year
32 '23 Vedanta Limited had been declared as a preferred bidder for various mining licenses,
33 namely, Bicholim Iron Ore Block, in Goa, something bauxite, some coal blocks in Odisha and
34 in Chhattisgarh. While various newspaper portals have reported that Vedanta is facing severe
35 financial crisis, it is under a lot of debts. It is still donating 100's crores. The same raises severe
36 concerns about... regarding the fact as to why such high donations are being made when the
37 company is under debt. An investigative report by the International Investigative Group

1 Organized Crime and Corruption Reporting Project, a global network of investigative
2 Journalists titled Inside Indian Energy and Mining Giant, Vedanta's campaign to weaken key
3 environmental regulations revealed backroom lobbying between Vedanta and Union
4 Government where key environmental regulations were modified in favour of Vedanta, who
5 had been an important donor to the BJP. Two entities linked to Vedanta subsidiary, Bhadram
6 Janhit Shalika and Janhit Electoral Trust gave a combined 43 crores to the party between 2016
7 and 2020. So, this is what I was saying about Electoral Trust there is some transparency,
8 though not full transparency. This Electoral Trust was created by Vedanta. So, the donation
9 from just one of the trusts...

10

11 **CHIEF JUSTICE DY CHANDRACHUD:** We'll continue after lunch.

12

13 **PRASHANT BHUSHAN:** I'll finish in an hour, by 3 o' clock....

14

15 **CHIEF JUSTICE DY CHANDRACHUD:** Try and do it in about 15 or 20 minutes. You
16 made your point, really. Now what remains?

17

18 **PRASHANT BHUSHAN:** No, there is about democracy. The effect on democracy.

19

20 **CHIEF JUSTICE DY CHANDRACHUD:** Half an hour, we'll give you half an hour. 1:30. I
21 give some time.

22

23 **PRASHANT BHUSHAN:** I'll finish by 3 o'clock. I'll definitely finish by...

24

25 **CHIEF JUSTICE DY CHANDRACHUD:** We'd like to wrap up this side by 04:00 today.
26 So that then we can put the others in.

27

28 **JUSTICE B.R. GAVAI:** Mr. Bhushan rather than reading your submissions, you can
29 formulate your submissions.

30

31 **PRASHANT BHUSHAN:** I'll finish in 45.

32

33 **CHIEF JUSTICE DY CHANDRACHUD:** What is the next point you want to make Mr.
34 Bhushan?

35

1 **PRASHANT BHUSHAN:** If Your Lordship just see that *IFB Agro*, so they disclosed under
2 Volume 4, page 784. Right. I told Your Lordship, that Vedanta has been given various
3 contracts. Several, they've...

4

5 **JUSTICE B.R. GAVAI:** You've already told us that in spite of it being in losses, still it is
6 paying Electoral Bonds.

7

8 **PRASHANT BHUSHAN:** Not just losses. I'm just saying that there are a number of mining
9 contracts, etc. that Vedanta has been getting. It's also the largest donors of Electoral Bonds to
10 political parties. So, that much we know. Now, just see this Agro, *IFB Agro* case. Page 784 of
11 Volume 4. Document 77. These are just examples which will show that there is substantial
12 indication that these bonds are being given by way of kickbacks to influence either government
13 decisions or influence government policy. Now, let's see 784 of Volume 4. This is a disclosure
14 made by this company called IFB Agro Industries limited, under the LODR requirements of
15 SEBI. It says- 'we write in continuation of our earlier letters to the Stock Exchanges, wherein
16 we have intimated about excise related issues being faced by or affecting the company. The
17 Board of Directors in its meeting dated 31st March, 2022, considered such issues and in the
18 best interest of the company and all its stakeholders decided to approve contributions to
19 political parties by way of subscription to Electoral Bonds, in one or more tranches aggregating
20 to not more than 40 crores in financial year 2022-23'. So, this is a somewhat direct indication
21 that they have given that this, one company has given, that it has subscribed and given
22 Electoral Bonds for, because that was facing excise related issues. So, to ward off excise related
23 issues, they have paid these Electoral.

24

25 **CHIEF JUSTICE DY CHANDRACHUD:** Perhaps Mr. Bhushan, we will keep individual
26 cases out of reckoning because the reason is those companies are not before us.

27

28 **PRASHANT BHUSHAN:** No, no. I understand.

29

30 **CHIEF JUSTICE DY CHANDRACHUD:** Also, any observation which we make in regard
31 to those companies may implicate them in criminal wrongdoing.

32

33 **PRASHANT BHUSHAN:** I'm not saying that Your Lordship...

34

35 **CHIEF JUSTICE DY CHANDRACHUD:** So, we will take it as a sort of an illustration by
36 you to buttress your argument.

37

1 **PRASHANT BHUSHAN:** Of course. Of course.

2

3 **CHIEF JUSTICE DY CHANDRACHUD:** The constitutional argument can't rest on that.

4

5 **PRASHANT BHUSHAN:** Yes, yes, it is an illustration.

6

7 **CHIEF JUSTICE DY CHANDRACHUD:** Also, as a matter of first principle, they are not
8 before us.

9

10 **PRASHANT BHUSHAN:** I understand. Now My Lord, para 59 of my written submissions.
11 There is a quote from PUCL, that is that judgment by which this Court struck down that
12 Section 33-B, which was brought in the Representation of People Act, to obviate the disclosure.
13 Now this is actually a quotation from... given in that judgment, from the National Commission
14 for Review of the Constitution... Review of Working of the Constitution. This says 'High cost
15 of elections and abuse of money power'. One of the critical problems in the matter of electoral
16 reforms, is the hard reality that for contesting an election, one needs large amounts of money.
17 The limits of expenditure prescribed are meaningless and almost never adhered to. As a result,
18 it becomes difficult for the good and honest to enter legislatures. It also creates a high degree
19 of compulsion for corruption in the political arena. This has progressively polluted the entire
20 system. Corruption, because it erodes performance, becomes one of the leading reasons for
21 non-performance and compromised protection, unaccounted funds from business groups who
22 expect a high return on this investment, kickbacks or commissions on contracts, etc. No matter
23 how we look at it, citizens are directly affected, because apart from compromised governance,
24 the huge amount... the huge money spent on elections, pushes up the cost of everything in the
25 country. It also leads to unbridled corruption, and the consequences of widespread corruption
26 are even more serious than many can imagine. Electoral Compulsions for funds, becomes the
27 foundation for the superstructure of corruption'. And then My Lord, there is a quote from
28 Subramanian Swamy, that's what...

29

30 **CHIEF JUSTICE DY CHANDRACHUD:** That we not read. It's about corruption in politics
31 and...

32

33 **PRASHANT BHUSHAN:** Yes. And that corruption actually erodes everything in a
34 democracy. And then in the supplemental Judgment, page 34, Justice Ganguly's judgment, he
35 clearly and directly says, 'Today corruption in our country...' Para 81. 'Today, corruption in our
36 country, not only poses a grave danger to the concept of constitutional governance, it also
37 threatens the very foundation of Indian democracy and the rule of law. The magnitude of

1 corruption in our public life is incompatible with the concept of a secular, socialist, democratic,
2 republic. It cannot be disputed that where corruption begins, all rights and... corruption
3 devalues human rights/development, and undermines justice, liberty, equality, fraternity, that
4 are the core values of our preamble vision. Therefore, the duty of the Court...'

5

6 **CHIEF JUSTICE DY CHANDRACHUD:** Mr. Bhushan, actually, we can go to your last
7 point, which is that, this is a subversion of democracy.

8

9 **PRASHANT BHUSHAN:** Yes, yes.

10

11 **CHIEF JUSTICE DY CHANDRACHUD:** We will read your judgments. We have all the
12 judgments now. How would you actually conceptualize it? How would you conceptualize it?

13

14 **PRASHANT BHUSHAN:** So then My Lord, the argument is...

15

16 **CHIEF JUSTICE DY CHANDRACHUD:** That's your third last?

17

18 **PRASHANT BHUSHAN:** Electoral Bond... yes. If Your Lordship sees, the third argument
19 starts at page 36. Now, if Your Lordship first looks at the quotation that I have given from the
20 Law Commissions Report at page... bottom of page 36. This is the Law Commission's Report
21 on Electoral Reforms, and this comes just before the Electoral Bonds were introduced, March
22 2015. So, there's a quote from there. 'First is the undeniable fact that financial superiority
23 translates into electoral advantage, and so richer candidates and parties have a greater chance
24 of winning elections. This is best articulated by the Supreme Court in *Kanwar Lal Gupta*
25 *versus Amar Nath Chawla*', where there's a quote from that. 'Money is bound to play an
26 important part in the successful prosecution of an election campaign. Money supplies assets
27 for advertising and other forms of political solicitation, that increases the candidate's exposure
28 to the public. Not only can money buy advertising and canvassing facilities such as hoardings,
29 posters, handbills, brochures, etc., and all the other paraphernalia of an election campaign,
30 but it can also provide the means for quick and speedy communication and movement, and
31 sophisticated campaign techniques, and is also a substitute for energy, in that, paid workers
32 can be employed, where volunteers are found to be insufficient. The availability of large funds
33 does ordinarily tend to increase the number of votes a candidate will receive. If therefore, one
34 party or individual has a larger resource... has larger resources available to it than another
35 individual...'

36

1 **CHIEF JUSTICE DY CHANDRACHUD:** It can be formulated like this. Maybe your
2 submission will be like this, that the party in power, is in a much more vantage position to
3 secure a greater amount of funding through the electoral bonds because of its ability to dole
4 out a *quid pro quo* in the form of government contracts or government leases or licenses or
5 concessions.

6
7 **PRASHANT BHUSHAN:** Or policy changes or...

8
9 **CHIEF JUSTICE DY CHANDRACHUD:** Or policy changes which will benefit that
10 particular industry

11
12 **PRASHANT BHUSHAN:** Or warding off excise issues, etc., etc. So there are all those...

13
14 **JUSTICE B.R. GAVAI:** All those favours.

15
16 **CHIEF JUSTICE DY CHANDRACHUD:** All those favours and by therefore concentrating
17 the allocation of electoral bonds to the Party in power. This is a very important source of
18 perpetrating power and therefore it is contrary to democracy.

19
20 **PRASHANT BHUSHAN:** Yes, in fact, My Lord...

21
22 **CHIEF JUSTICE DY CHANDRACHUD:** I think that could be the formulation really.

23
24 **PRASHANT BHUSHAN:** Today, money is universally recognized by the Law Commission,
25 by various bodies, including judgments of this court that money power or the very unequal use
26 of money power erodes the concept of free and fair elections, or a level playing field in elections
27 etc. And what this electron bond is doing is, that it is further making that playing field uneven
28 by as I showed My Lord, almost all the electoral bonds, 99.9% have gone either, more than
29 50% have gone only to the ruling party at the Centre, and the remaining, almost all the
30 remaining have gone to ruling parties in the States. Only one party I am told that is CPM,
31 which is before Your Lordship has consciously refused to take Electoral Bonds. So, even
32 though they are the ruling party in one state., they have not received any Electoral Bonds. But,
33 otherwise almost all the Electoral Bonds have gone only to ruling parties and therefore and
34 Electoral Bonds cannot even be taken by smaller parties which receive less than 1% votes, and
35 they cannot be taken by individual candidates. Therefore, what this instrument is doing is by
36 privileging the ruling parties because it's easy way of getting your policies changed, your
37 decisions changed, various other favours from the ruling parties, obviously, favours can only

1 be given by the ruling party, the party, which is in control of the government. Therefore, it is
2 further skewing the level playing field in elections. It was already skewed but instead of setting
3 that right in fact, there should have been a limit on the expenditure of political parties. Instead
4 of doing those things or saying that political parties and candidates should only take money
5 and spend money through banking channels is doing exactly the opposite. This Electoral
6 Bonds. It's allowing, in fact My Lord, there are a large number of companies which do not have
7 so much black money. They have only white money.

8
9 **CHIEF JUSTICE DY CHANDRACHUD:** In the erstwhile regime, prior to the Electoral
10 Bonds, a corporate entity could make contributions as well. It was 7.5% of your profits.

11
12 **PRASHANT BHUSHAN:** Yes, but they had to disclose.

13
14 **CHIEF JUSTICE DY CHANDRACHUD:** That's right. That's what I was coming to. The
15 difference there was that you had your duty to disclose, so that by your disclosure, there can
16 be a public scrutiny into whether, this is really a *quid pro quo* for any benefits that you have
17 received in terms of government contracts, licenses, policies, concessions.

18
19 **PRASHANT BHUSHAN:** So, there are two separate arguments resting on this, My Lord.
20 One is, that this is promoting corruption. This instrument of anonymized donations is
21 promoting corruption, that's one separate argument. And corruption has been held to be part
22 of or a corruption free society is part of Article 21, Rights of the Citizens. So, this is one
23 argument. The other argument is, that it is actually eroding democracy itself. Because it is
24 queuing the level playing field between ruling parties and opposition parties on the one hand
25 and between parties and candidates on the other hand.

26
27 **CHIEF JUSTICE DY CHANDRACHUD:** And another point, perhaps which you may also
28 want to explore is that this is not an anonymized donation in relation to the donee. It's an
29 anonymized donation in relation to the rest of society. The donee, may or may not, but could
30 know who the source is.

31
32 **PRASHANT BHUSHAN:** Normally they would know. Normally they would know because...

33
34 **CHIEF JUSTICE DY CHANDRACHUD:** That's what I said. So, according to you therefore,
35 when you say anonymized donation it's not really anonymized in relation to the donee to
36 receive the fund.

1 **PRASHANT BHUSHAN:** Correct. Absolutely, absolutely right. It's anonymized for the rest
2 of society.

3
4 **CHIEF JUSTICE DY CHANDRACHUD:** it's anonymized in terms of the disclosure of the
5 name to the wider public.

6
7 **PRASHANT BHUSHAN:** So, it's anonymized at two ends. It's anonymized at the end of the
8 company or the person who buys the bonds by the scheme itself. Meaning that nobody else
9 other than the person and the State Bank can come to know who's buying the bonds and law
10 enforcement agencies, if they are investigating some act of corruption in relation to these
11 bonds, etc. The second is that the political parties which receive...

12
13 **JUSTICE SANJIV KHANNA:** That's because of the exceptions carved out in the rules, the
14 investigating agencies can verify that, but obviously the general public is not aware of that.

15
16 **PRASHANT BHUSHAN:** Yes, yes, general public will not come to know. So therefore, it's
17 at the one hand, on one hand, it is promoting corruption and thereby violating Article 21 rights.
18 And on the other hand, it is skewing the electoral system in favour of the ruling parties and in
19 favour of parties vis-a-vis candidates further skewing...

20
21 **JUSTICE SANJIV KHANNA:** But Mr. Bhushan, even if the earlier regime was there, the
22 donations to the ruling party will be always more sizable in number compared to the non-
23 ruling party.

24
25 **PRASHANT BHUSHAN:** True to some extent. Yes, they would be more sizable in number.
26 But I'm saying that here...

27
28 **JUSTICE SANJIV KHANNA:** So, whether we have this system or the earlier system...

29
30 **PRASHANT BHUSHAN:** So, here you are giving kickbacks. Earlier...

31
32 **JUSTICE B.R. GAVAI:** Earlier system also it could have been, but at least the donor and
33 donee, they had to make the disclosures.

34
35 **PRASHANT BHUSHAN:** There you could be prosecuted. If you had given donations to a
36 political party who in turn, had given you some favours by way of mining contracts, etc., you
37 could be prosecuted for corruption. But now, because nobody will come to know as to who has

1 donated, whether you have received some *quid pro quo*, etc., therefore, it is promoting
2 corruption. It is privileging. And if Your Lordship will see, that now virtually all the donations
3 or most of the donations are coming by way of Electoral Bonds. So therefore, and the bulk is
4 going to the ruling party.

5

6 **CHIEF JUSTICE DY CHANDRACHUD:** In the case of a company, now even the
7 shareholders will not be told who you are contributing to. The shareholders will only be given
8 the net result.

9

10 **PRASHANT BHUSHAN:** Correct.

11

12 **CHIEF JUSTICE DY CHANDRACHUD:** That we have contributed as a company, 250
13 crores this year.

14

15 **PRASHANT BHUSHAN:** Correct.

16

17 **CHIEF JUSTICE DY CHANDRACHUD:** Shareholders now have no access to who you
18 have contributed that amount to.

19

20 **PRASHANT BHUSHAN:** That's why in that Justice Chagla's judgment, the **TATA**
21 **judgment**, they said that, yes, we are allowing you to change your memorandum because you
22 are permitted. But, you will have to advertise in the newspapers saying where and to whom
23 you have donated. And they said that, we are doing it because they have come to us with
24 permission to amend the memorandum. But other companies may have already this provision
25 in their memorandum or in their Articles that they can donate to political parties. And
26 therefore, at the end they have cautioned that we are now advising Parliament to bring in a
27 law which will make it mandatory for public disclosure. Of course, even earlier in the regime,
28 citizens could find out who has donated to whom, because even when companies donated to
29 particular parties, they were still obliged to maintain accounts and disclose their accounts in
30 the company website. But, ordinary citizen is not expected to be able to go through all the
31 websites of all these 23 lakh companies to find out who has donated to whom, etc. Therefore,
32 they said in that judgment, that we are placing this condition upon you that you disclose it by
33 way of advertisement to the public. And they said, that because this requirement is not there
34 for other companies who may already have political donations in their Articles of Association.
35 Therefore, we are now advising Parliament to bring in a law to make this disclosure
36 compulsory. Now, instead of doing that, we have gone exactly in the opposite direction. That
37 we have now anonymized to the public, even that possibility of coming to know from the

1 returns of these companies, who has donated and to whom, because that has been removed.
2 So therefore,... therefore, my submission is, that this will, this will destroy democracy. It's
3 already, our democracy was almost a money game. It had become a money game.

4

5 **CHIEF JUSTICE DY CHANDRACHUD:** We've got your third point also; you've made
6 your point. We then conclude now?

7

8 **CHIEF JUSTICE DY CHANDRACHUD:** Just...

9

10 **CHIEF JUSTICE DY CHANDRACHUD:** You can just wrap up now and...

11

12 **PRASHANT BHUSHAN:** Your Lordship may just see it. I mean, I don't even have to read...

13

14 **CHIEF JUSTICE DY CHANDRACHUD:** If there's something crucial that we have missed
15 out, you can show that. Just flag it for us, and then we'll look at it, definitely.

16

17 **PRASHANT BHUSHAN:** So, I have, My Lord, at page 37... 36. I have given the quotations
18 from the Law Commission's Report on...

19

20 **CHIEF JUSTICE DY CHANDRACHUD:** Fair enough. That we'll have a look at.

21

22 **PRASHANT BHUSHAN:** Now, these are quite important, because they were suggesting
23 exactly the opposite. They also suggested that this 7.5% is also too much. Large corporates can
24 donate huge amounts of money. And My Lord, Brazil Supreme Court, which we have also
25 mentioned, Brazil Supreme Court has banned... Para 73.

26

27 **JUSTICE SANJIV KHANNA:** That may have its own consequences in terms of source of
28 collection of money.

29

30 **PRASHANT BHUSHAN:** Pardon My Lord?

31

32 **JUSTICE SANJIV KHANNA:** That they have its own consequences, because for election
33 funding is a major issue; it's not something very simple.

34

35 **PRASHANT BHUSHAN:** Yes. Yes.

36

37 **JUSTICE SANJIV KHANNA:** It's a complicated issue. Anyway, we have understood your...

1
2 **PRASHANT BHUSHAN:** No. What is happening as a result of this is, as it is, the reason
3 why elections became a money game, which is mentioned in all these reports, whether it's Law
4 Commission or the Constitution Review Committee or various judgments of this Court. One
5 of the reasons is that, we have first passed the post in our system at two levels - when we vote
6 for our candidates, and then when we select the government. First pass of the post is that, only
7 that candidate who receives the highest number of votes, even if he gets only 30% vote,
8 becomes the sole representative of that constituency. Second first passed of the post is, only
9 that party or coalition which has a majority gets the whole government, and the rest of the
10 opposition, even if it's there 49% seats, gets nothing. The result of these two first passed the
11 posts system is, that when you vote for your candidate at the time of elections, you are not
12 necessarily voting for the candidate or the party that you consider to be the best. If you feel
13 that that best party has no chance of winning, you don't want to waste your vote. So, then you
14 say, "All right, these are the only two parties which have some chance of winning or forming
15 the government. I will choose the least bad, in my perception, among these two parties".

16

17 **JUSTICE B.R. GAVAI:** How is that relevant Mr. Bhushan?

18

19 **PRASHANT BHUSHAN:** Pardon My Lord?

20

21 **JUSTICE B.R. GAVAI:** How is this argument relevant?

22

23 **PRASHANT BHUSHAN:** Because...

24

25 **JUSTICE B.R. GAVAI:** Are we going to change the Constitution?

26

27 **PRASHANT BHUSHAN:** No, no, I'm not saying that. I'm saying that, reason why elections
28 have become a game of money, is partly because of this first pass the post system, because the
29 perception as to which party has some chance of winning, is formed on the basis of the visibility
30 of the parties and this is stated by the Election Commission very clearly... by the Law
31 Commission very clearly in their report. That visibility is a function of money. Because with
32 money, you can advertise, you can put up holdings, billboards, you can have paid workers, you
33 can do everything with money. Today, even rallies are organized.

34

35 **CHIEF JUSTICE DY CHANDRACHUD:** All right. I think we'll wrap up now Mr. Bhushan.
36 Yes.

37

1 **PRASHANT BHUSHAN:** What I was saying is, that instead of curbing, instead of going...

2

3 **JUSTICE B.R. GAVAI:** You have already said, instead of curbing, it promotes corruption. It
4 interferes in free and equal...

5

6 **CHIEF JUSTICE DY CHANDRACHUD:** Mr. Bhushan, we'll hear you now in rejoinder
7 once we hear the other side. There will be lot of... they will cover some ground which...

8

9 **PRASHANT BHUSHAN:** All that I wish to say is that, I thank this Court for giving me this
10 opportunity, and I thank all my colleagues who have put together such an excellent note and...

11

12 **CHIEF JUSTICE DY CHANDRACHUD:** Thank you, Mr. Bhushan. Yes, Mr. Sibal.

13

14 **KAPIL SIBAL:** My Lords, my learned friend has with great perspicacity raised the points
15 before Your Lordships, and I will not repeat them. My Lords, lets in four, five, seven minutes
16 let me broadly tell Your Lordships, what my submissions are. Your Lordships, must assume
17 as a given that capital and influence go hand in hand. In fact, under the very concept of a
18 market economy, capital symbolises power. And it may be in any sector of the economy as it
19 is in politics. The more capital you have, the more power you have. That's number one. Point
20 number two, the electoral process must be such that it must provide a level playing field to all
21 participants. Fair and and free elections, or free and fair elections is the basic structure of the
22 Constitution. Concept number two.

23

24 **CHIEF JUSTICE DY CHANDRACHUD:** Just a second. Yes.

25

26 **KAPIL SIBAL:** Concept number three, the moment you allow the corporate sector to donate,
27 whether with transparency or without transparency. I'll come to that a little later, it is
28 inconsistent with the concept of a corporate sector which is in the business of doing business.
29 You have a Memorandum of Association, which tells you what the objects of the corporation
30 are. The shareholders put in their money to ensure that the corporation functions within the
31 framework of the Memorandum of Association. Now, you give the power through an
32 amendment of this nature to allow shareholder's money to be used inconsistent with the
33 Memorandum of the Association. It's a very serious issue. And without consultation and
34 without the consent of the shareholders. Under which law, My Lords, then I asked myself this
35 question, can this ever be allowed? I buy shares in a company. It may be listed. It may not be
36 listed.

37

1 **CHIEF JUSTICE DY CHANDRACHUD:** But just one caveat Mr. Sibal, which is that we
2 are not here on the challenge to the legality of a law providing for corporate donations per se.
3 That wider issue is not before us.

4

5 **KAPIL SIBAL:** I agree, but I...

6

7 **CHIEF JUSTICE DY CHANDRACHUD:** For the reason, that's what Justice Chagla
8 flagged, even Chief Justice Chagla flagged even in 1958. He said there should be no corporate
9 donations, but we are not really dealing with that. So, let's not really go into that area at all...

10

11 **KAPIL SIBAL:** I'm not into that area at all.

12

13 **CHIEF JUSTICE DY CHANDRACHUD:** Because 293 anyway allowed it.

14

15 **KAPIL SIBAL:** I am not on that. I am on a wider...

16

17 **CHIEF JUSTICE DY CHANDRACHUD:** On what you said on the latter part of your
18 formulation without the consultation and the approval of the shareholders.

19

20 **KAPIL SIBAL:** That's the point. That's the point. That's why I said My Lords...

21

22 **CHIEF JUSTICE DY CHANDRACHUD:** Otherwise, the broader philosophical
23 perspective that look allowing corporate donations is really permitting some form of *quid pro*
24 *quo*.

25

26 **KAPIL SIBAL:** No, no, My Lords, I'm not on that because my learned friend has argued that.

27

28 **CHIEF JUSTICE DY CHANDRACHUD:** We needn't bring that broad area here, because
29 in that sense, the moment we accept it, 293, our society legitimized corporate *quid pro quo*.
30 But, there is an element of *quid pro quo* the moment you have corporate donations.

31

32 **KAPIL SIBAL:** Exactly, exactly, there is no doubt about it. That's why...

33

34 **CHIEF JUSTICE DY CHANDRACHUD:** Therefore, a large public limited company who
35 makes a donation doesn't give it for charity or for you know [UNCLEAR].

36

37 **KAPIL SIBAL:** Exactly, that's why I said capital and influence are Siamese twins.

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CHIEF JUSTICE DY CHANDRACHUD: We shouldn't really in that sense...

KAPIL SIBAL: I am not going there, My Lord. That's why I said, that what you're doing in this process is that you are allowing through the Electoral Bond process to not inform the shareholder, as to how his money is going to be spent. Right. And that's a very serious issue because he has invested in the company, not for the purposes of donating to X and Y. That's the third concept. The fourth is even more important. This is nothing to do with Electoral Bonds if you ask me. It is donation to a political party to use the funds as they like. The nomenclature suggests Electoral Bonds means this is for the purposes of the election. There is nothing in the scheme. There is nothing in the scheme which connects the donation made to the participation in the electoral process. Nothing. It is a means for political parties to be enriched. Why do I say that? I make a donation of 10 crores to a political party, through an Electoral Bond. The political party opens a current account and 10 crores goes into that account. Now, that political party can actually give that money to the mainstream media channel and say, you propagate my ideology or give a present to somebody or do what you want to do with it.

CHIEF JUSTICE DY CHANDRACHUD: There's no spending requirements.

KAPIL SIBAL: None, none. Zero. That's the most serious issue. Because you can spend this money any way you like. You can build your offices. You can build your offices all over the country with that money. You can set up a whole internet, said network throughout the country with that money. You can use advertising campaign for whatever you like with that money. Show your face 20 times a day. And see the nexus. The corporate sector gives money to the political party. The political party and the corporate sector owns a media house. Just look at the nexus. The corporate donor owns the media house. The corporate donor gives it to the political party. The political party uses the media house. No questions asked.

TUSHAR MEHTA: This is a constitutional argument. He is going on for some personal instances.

KAPIL SIBAL: No, I'm not talking of any instance. I'm talking about the scheme. Please do not interfere. I'm talking about the scheme. I'm not talking about any instance. That's the law.

TUSHAR MEHTA: This is a Constitution Bench.

1 **KAPIL SIBAL:** This is of course, hopefully it is. I thought I was sitting before five judges. I
2 thought I realized by now it is.

3

4 **TUSHAR MEHTA:** Yeah, it is.

5

6 **KAPIL SIBAL:** Thank you. Got to know about it from you.

7

8 **CHIEF JUSTICE DY CHANDRACHUD:** The Article 14 argument...

9

10 **KAPIL SIBAL:** Yes. Yes, My Lords. The scheme is wholly arbitrary. It has to be struck down
11 on its terms. It has nothing to do only with elections and how you spend your money in the
12 electoral process. Now My Lords, kindly have a look at Volume 4, and PDF 142. These are
13 FAQs My Lords, that were asked, *qua* the scheme, from the SBI.

14

15 **CHIEF JUSTICE DY CHANDRACHUD:** 142?

16

17 **KAPIL SIBAL:** Yeah. First, I'll give you... show you My Lords, 138, which is a given My Lords.
18 Actually, I need not even mention this. At 138, the question is - What is the minimum and
19 maximum limit for donation? The minimum amount for donation is 1,000. There is no
20 maximum amount.

21

22 **CHIEF JUSTICE DY CHANDRACHUD:** 138, Mr. Sibal?

23

24 **KAPIL SIBAL:** Question My Lords, at 31.

25

26 **CHIEF JUSTICE DY CHANDRACHUD:** 31?

27

28 **KAPIL SIBAL:** Yes. Just note it ... Your Lordships know... You know about it already.

29

30 **CHIEF JUSTICE DY CHANDRACHUD:** Yeah, that's okay.

31

32 **KAPIL SIBAL:** Now come to 142. 142. Question 6 - Can a political party use this current
33 account for other operations also? Answer is, yes. Next question is 9 - Can political party close
34 this current account after the election? The account may be continued for normal banking
35 operations. However, if required, the account can be closed at any time by the political party.

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37 **JUSTICE SANJIV KHANNA:** What are you hinting at Mr...?

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KAPIL SIBAL: I'm sorry?

JUSTICE SANJIV KHANNA: What are you hinting at?

KAPIL SIBAL: My Lords, if you close the account, that's the end of the matter.

JUSTICE SANJIV KHANNA: You get the money, close the account. But...

KAPIL SIBAL: That's it. And then you spend it the way you want. My Lords, this is not a scheme for... I can understand. Quite frankly, I can understand the corporate sector being told that we impose a cess, like Education Cess. You impose a cess on the corporate functioning of companies. With that cess you have a capital, and capital you distribute in accordance with their representation in the Lok Sabha. So, everybody has the same amount. And the same money can be used for that. What you are doing now is entirely different. You are saying you give me as much money as you want to give me. That as he has argued that...

CHIEF JUSTICE DY CHANDRACHUD: Your submission is, this is not money for electoral participation, but money for...

KAPIL SIBAL: ... enriching the party.

CHIEF JUSTICE DY CHANDRACHUD: ... the political party, the beneficial party.

KAPIL SIBAL: Yes, it's just enriching the party.

CHIEF JUSTICE DY CHANDRACHUD: There are no spending requirements, there's no auditing requirement as to how the money is utilised. Nothing.

KAPIL SIBAL: No accountability. Absolutely no accountability.

CHIEF JUSTICE DY CHANDRACHUD: What's the next point?

KAPIL SIBAL: The last point, the fifth point is that, in fact, it protects... the nature of the scheme protects those who have committed a crime. I'll give you an example. Under the Prevention of Corruption Act, My Lords... Section 7 of the Prevention of Corruption Act, you give money to a public servant... Members of Parliament are public servants. Many members

1 of the political party who are in the fray are public servants. Now, as Your Lordships knows,
2 under Section 7, you can also prosecute a person in anticipation of a favour; not just having
3 granted a favour. So, you give a donation. No questions asked. You get a favour. You don't...
4 cannot correlate one with the other. And I can't prosecute you. This is a scheme to protect
5 criminals from being prosecuted. Just read Section 7 with me. Prevention of Corruption Act.
6 This is also true under the PMLA. Because the predicate offense has been committed, it results
7 in proceeds of crime. You'll never get to know. Rather than furthering the rule of law, it tines
8 it. That's the other Article 14 argument. You'll never know who bribed whom? How much was
9 the bribe? For what *quid pro quo* was there? You never get to know. That there is *quid pro quo*
10 My Lords, is in my first submission, that capital and influence go together. Nobody can doubt
11 that proposition My Lords. So, in effect through this scheme, you are trying to protect those
12 people where the source of the money is, my learned friend has argued, I don't want to repeat
13 anything that he has said. And My Lords, see what is the scheme. If it's less than Rs. 2000, its
14 cash. If it's more than Rs. 20,000, the name of the donor has to be given. And if it is Electoral
15 Bonds, nothing. That's the three layers of the scheme. So, while the donor's name will be given
16 if it's more than Rs. 20,000. And so, ordinary, ultimately, let's put it this way, this Constitution
17 is for the citizens of this country to participate in the election. The corporate sector is not a
18 voter. The citizen is the voter. The citizen should be entitled, is entitled to contribute. If he
19 gives more than Rs. 20,000 his name will be there. But the corporate sector, who is not a
20 citizen, can donate 10 crores, 100 crores, his name would not be there. What's the rationale
21 for that? I, as a citizen named I'll have to be disclosed. So, is the corporate sector is being
22 granted a privilege over a citizen of this country? That privilege of anonymity. How is he more
23 privileged than a citizen who is at the heart of the Constitution of India? How is he being given
24 a preferential treatment? Why? Because you want to enrich yourself through this scheme. And
25 enrich yourself because you're in power. My Lords, the opposition may be in power in a state,
26 they will also enrich themselves. This is not political. Because all business will actually be
27 attracted towards this game because this is one way of getting access. I just, pardon me for
28 saying so from personal experience, if people donate, My Lords, we know who has donated.
29 He will give me a call and say, "Sir, I want to come over". I will hear him. But if I don't know
30 his name, who has donated, I won't listen. I mean, how many calls will I answer? So, you get
31 access, straight away you get access. And all this anonymity that we are talking about is really
32 not anonymous. Because the person who donates will go and tell him orally that I gave you
33 such and such money. This is the amount I gave you. 100 crores. Only he will know that he
34 gave.

35

36 **CHIEF JUSTICE DY CHANDRACHUD:** The anonymity would exist only if it was truly
37 fungible.

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KAPIL SIBAL: That's right.

CHIEF JUSTICE DY CHANDRACHUD: In which case, if it's truly fungible like a demat account. In which case you give it to say the election committee and then it is...

KAPIL SIBAL: Then it is anonymity.

CHIEF JUSTICE DY CHANDRACHUD: Then it becomes anonymous.

KAPIL SIBAL: That's right. Now it is not. In fact, it is not anonymous if you ask me. That's my submission. Because I have given a 100 crores. I know that I bought a bond. My learned friend, Mr. Prashant Bhushan said, no, no he gave it to a third person. Doesn't matter. But who is interested in, in that bond? The person 'Y', who bought the bond. So, I will go and tell whoever I want to tell, that I gave you. So, he doesn't have to go to the State Bank of India. Let's talk practical politics. He doesn't have to go to the State Bank of India to find out. Nor does the State Bank of India have to disclose it. The person who gave it will disclose it. Because he knows why he gave it. So, what is anonymous about this? This is protecting the rich.

CHIEF JUSTICE DY CHANDRACHUD: There is another thing...

[NO AUDIO]

CHIEF JUSTICE DY CHANDRACHUD: The issue which we were just discussing, on which perhaps the learned Attorney may give us an answer. But since Mr. Sibal is on his leg, we will just put it to him. Mr. Attorney and Mr. Solicitor, you can also lend your... then you can answer. Suppose, A purchases the bond.

KAPIL SIBAL: Yes, My Lord.

CHIEF JUSTICE DY CHANDRACHUD: A purchases bonds worth X amount, 100 crores.

KAPIL SIBAL: Yes.

CHIEF JUSTICE DY CHANDRACHUD: A is only the person who's been put up to purchase the bond because A has the KYC etc. A has to only physically hand over the bond to B. Right. Who in... B gives it to C, who will in turn give it to a political party. Now B... there is

1 no control over the transaction between A and B. So, B can trade on that bond for cash or for
2 whatever other consideration. B acquires that bond. B hands it over to a political party or B
3 gives it to C and C hands it over to a political party. The person who has satisfied the
4 requirement of the transaction being through the normal banking channel, because A is the
5 purchaser, the ostensible purchaser of the bond.

6

7 **KAPIL SIBAL:** Correct.

8

9 **CHIEF JUSTICE DY CHANDRACHUD:** But this does not obviate the fact that the people
10 who are really...

11

12 **KAPIL SIBAL:** Behind it.

13

14 **CHIEF JUSTICE DY CHANDRACHUD:** ... behind it.

15

16 **KAPIL SIBAL:** Yes.

17

18 **CHIEF JUSTICE DY CHANDRACHUD:** But they have used authorized banking channel.
19 All that they have to do is...

20

21 **KAPIL SIBAL:** Get somebody's KYC.

22

23 **CHIEF JUSTICE DY CHANDRACHUD:** They say trading is prohibited, but there's no way
24 you can prohibit trading in the bond.

25

26 **KAPIL SIBAL:** Absolutely. Absolutely, My Lord.

27

28 **CHIEF JUSTICE DY CHANDRACHUD:** He doesn't have to buy the bond from A through
29 official banking channel because there's no record of any transactions of the bond. It just goes
30 from hand to hand.

31

32 **KAPIL SIBAL:** That's right.

33

34 **JUSTICE SANJIV KHANNA:** Because of the curtain, then there cannot be any questions
35 with regard to *quid pro quo*.

36

1 **KAPIL SIBAL:** That's right. And then ultimately, the person who is actually invested in it is
2 the person who will tell the political party who is the holder, ultimately.

3

4 **JUSTICE SANJIV KHANNA:** No. In this case, probably they know who is the purchaser.

5

6 **KAPIL SIBAL:** It could be B or C.

7

8 **JUSTICE SANJIV KHANNA:** They'd know the purchaser, but the actual purchaser is A.

9

10 **KAPIL SIBAL:** Exactly.

11

12 **JUSTICE SANJIV KHANNA:** Whereas in the KYC, etc, A is the one who is...

13

14 **KAPIL SIBAL:** That's right. Absolutely right. So My Lord, it perpetuates...

15

16 **CHIEF JUSTICE DY CHANDRACHUD:** Also, B may be an aggregator of the bonds, by
17 having 10 different people

18 subscribe to, or 100 different people subscribe to bonds worth one crore each.

19

20 **KAPIL SIBAL:** That's right. My Lord, there the human... at least the Indian human mind is
21 ingenious in these matters. We control the economy of the world in many ways. And the RBI
22 raised these concerns repeatedly.

23

24 **KAPIL SIBAL:** We now look at question C. Frequently Asked Questions, FAQ, page 138.
25 Question No. 36.

26

27 **JUSTICE SANJIV KHANNA:** 128?

28

29 **KAPIL SIBAL:** 138, question 36. My Lord has that? Who is the bona fide owner of the
30 Electoral Bond? PDF 138. Who is the electoral owner of ... Who is the bona fide owner of that
31 bond? Electoral Bonds are bearer banking instruments. It's exactly what My Lord, the Chief
32 Justice said... And the holder of Electoral Bonds is the bona fide owner of the same. Nothing
33 can be more anonymous than this. All that you need is the KYC, that's it. And then see 17, at
34 page 31... sorry page 131. PDF 131, Question 17. Can Electoral Bonds be purchased multiple
35 times by the same applicant? Yes. Yes, every application will be treated as fresh request for
36 Electoral Bonds purchased, and every time fresh KYC documents... So, you will have bond

1 brokers, you'll have in between, you'll have all kinds of people participating in this. So, it's not
2 just a question of transparency, it's much wider than that.

3

4 Last of all My Lords, if I do not know these facts. If I don't get to know the name of the donor,
5 I don't get to know the transaction. I don't get to know the possible direct or indirect *quid pro*
6 *quo*, I can't participate in democracy. It is also a matter of participation in democracy. I will
7 then be sued for defamation that you made this allegation without the facts. But how will you
8 get to know... how will I get to know the facts if you hide the facts through an electoral scheme
9 like this? I can't raise questions in Parliament. I can't raise questions outside Parliament. But
10 this scheme has no definite objective. If it were a definite objective of funding through the
11 corporate sector, the process of election without funding a political party I can understand.
12 You can have Electoral Bonds to fund the election process. But what you are doing here is
13 you're funding a party. It's different. The object is different. Do you call it Electoral Bonds but
14 these are not Electoral Bonds and the limit of expenditure has nothing to do with it. 123(6) of
15 the Constitution of The Representation of People's Act talks of expenses, corruption, an act of
16 corruption beyond 95 lakhs now. So, the larger issue that Your Lordships will have to consider,
17 that this is no part of participatory democracy at all. Every scheme must have a legitimate
18 object. What's the legitimate object here? Which is constitutional. The scheme must be such,
19 it must be proportionate to the objects sought to be achieved. And the underlying principle
20 under the Constitution is free and fair election, which is a basic feature of the Constitution.
21 How are you serving these three purposes My Lords? You are serving none of these three. No
22 legitimate object because it is not limited to the elections. No proportionality because it's
23 unlimited. And no free and fair elections because, my learned friend has shown to Your
24 Lordships, how heavily it is loaded towards the party in power. So, you are creating a non-level
25 playing field through the Electoral Bonds. And that's violative of 324.

26

27 Now My Lords, historically, as Your Lordship knows, in 1969, through legislation we had
28 prohibited corporate donations altogether. In 1985, through an amendment we said, okay, the
29 corporate sector can donate but only to the extent of 5% of the average earnings in the last
30 three years. Three financial years.

31

32 **JUSTICE B.R. GAVAI:** 5% or 7.5%?

33

34 **KAPIL SIBAL:** I am sorry? Initially 5%. My Lords 1985 was 5%. Then through an
35 amendment, it was, 2013 Act, it was changed to 7.5.

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37 **JUSTICE B.R. GAVAI:** 2000?

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KAPIL SIBAL: 2013. The Companies Act. Actually, I put it all in the written submissions, but because my learned colleagues are waiting for me to end. So, I'm not wanting to take their time. Your Lordships have said that do it... be as short as possible. But whatever I have said to Your Lordships, are the propositions that emerge from the scheme itself.

CHIEF JUSTICE DY CHANDRACHUD: Mr. Sibal, submissions are in which Volume?

KAPIL SIBAL: Volume 1.

CHIEF JUSTICE DY CHANDRACHUD: Again, Volume 1, right?

KAPIL SIBAL: Yes. Volume 1. All the submissions are in Volume 1.

CHIEF JUSTICE DY CHANDRACHUD: Yes, please go ahead.

KAPIL SIBAL: It is page 48. PDF 48. And if you just... I'll take few minutes, My Lord. Then I'll be done. Because my learned friends, I want to give them time too. The first My Lord, few pages are just the scheme itself. The Electoral Bond Scheme itself. Goes up to, goes up to page, PDF page 63. My Lords have that? It's just the elements of the Electoral Bond Scheme, which have already been explained to Your Lordships. So, I will not trouble Your Lordships with that. That's been explained. But you come to 63. Then My Lords, I deal with the issue of free and fair elections under the constitution. And I say, it's the basic feature of the Constitution. And, it's now recognized, that para 15, I say, 'as will be developed below any nature of funding that is opaque and that seeks to hide the source of funding is contrary to the spirit of free and fair elections, which is part of the basic structure'. That's the transparency argument. Plus the free and fair in the context of which, in the context of my submissions before Your Lordships now. Then, election is a vehicle of representative democracy. I've given judgments My Lords. Page 66. And then, para 17 at 66, is the constitutional mandate of free and fair elections under the principle of Universal Adult Franchise is a central pillar of our democratic culture. Under our political system, elected representatives do not have any political legitimacy, independent of the will of the people, and must discharge their duties in public trust. It must never be forgotten that this Constitution is citizen centric. It is for the citizens to decide to donate. If you want corporate funding, then that corporate funding must be for the electoral process. Must not be for political parties. Otherwise, it would not be free and fair election. Then therefore, you must interpret superintendents direction and control of the conduct of elections in that context. That's set out at page 67, end of paragraph 19.

1
2 Then I differentiate between freedom and fairness, which is para 20. I won't trouble Your
3 Lordships with the language. And para 24, I say, 'economic power' at page 68. 'Economic
4 power presents a grave risk to any level playing field between individual citizens and groups
5 and can give some voices a disproportionate say in deciding the agenda of the political parties
6 and hence the laws and policies that will govern the entire country. In pluralistic democracies
7 like India, practices, must emerge that preserve the equal voice of all citizens, and that ensure
8 that the special needs of all groups are heard'. If the voice of the corporate sector drowns the
9 voices of citizens, My Lords, that's a very dangerous trend in democracy. Then Justice
10 Bhagwati's judgment in *Kanwar Lal Gupta's* case. Let's leave that out. I think that's one
11 extreme position, which I don't want to argue. And then, this is important. Kindly see para 36
12 at page 72, reiterating my learned friend's submission that it's the voter's right to know. That's
13 fine. And My Lords, this whole concept of black money. I mean, I don't understand... The cash
14 that is given below 2,000, can be black money. The Rs. 20,000 has to be disclosed that also
15 can be black money, whereas, you can say cash in hand, Rs. 20,000. And the Electoral Bond
16 can also be black money. And over and above that, there is that black money, because there is
17 cash that doesn't go into Electoral Bonds. So what is this black money issue about? The kind
18 of extravaganzas that we see, My Lords, is what? Is it white money? So, this has nothing to do
19 with black money. This is the case of the government, that black money was used earlier; no
20 doubt. Black money is used today; no doubt. There is more cash in the market than it was in
21 2014 or 2019. That's government's own statistics. So, black money is a bogey, and all three
22 elements can be part of black money. That can't be an argument. So dealt with... And then...
23 So, the three issues My Lords, I have raised at page... PDF 75, whether corporate donations
24 should be allowed at all? But that's not a question that Your Lordships has to answer. If yes,
25 what kinds of companies should be allowed to make such donations? If corporate donations
26 are allowed, what cap of net profits should be set, and who is the appropriate body within the
27 corporation to authorize such donations? That's, if you agree to all what the other side says. If
28 you agree to what the government says, My Lord, then these questions will arise. But that's
29 subject to my submissions that I've made to Your Lordships. The shareholder arguments My
30 Lords, I placed there at para 43 - The objects of the company and all that which I've already
31 commented upon. Then I've given the history. Then 2013, My Lord asked the question, the cap
32 of 7.5. That's at para 47. And actually, My Lords, there's a wonderful report of Justice Shah, I
33 think at the Law Commission, which actually sets out the practices in all the countries - UK,
34 US, Japan, Philippines, Australia and Germany. And on all those countries, there is no
35 question of any opacity. Most countries do not allow corporate donations at all. But where they
36 do allow, there's no opacity. And this is all at PDF page... Your Lordships may only note it...

1 296 in Volume 4. That Prashant Bhushan has covered. That's really it My Lords. I want to take
2 as little time as possible.

3

4 **CHIEF JUSTICE DY CHANDRACHUD:** Thank you, Mr. Sibal. Yes, Mr. Farasat.

5

6 **SHADAN FARASAT:** I appear My Lords, for Writ Petition 59, because we are the only
7 political party before Your Lordships. And My Lords, despite being a ruling party, we have
8 taken a principle stance not to accept any...

9

10 **KAPIL SIBAL:** May I be excused My Lords?

11

12 **CHIEF JUSTICE DY CHANDRACHUD:** Yes, Mr. Sibal.

13

14 **SHADAN FARASAT:** ... not to accept any Electoral Bonds. And we have not taken a single
15 Rupee of Electoral Bonds in the last five and a half years, if I may say so, My Lord, at much
16 cost to us. My Lords, there are three submissions, I'll try to make very quickly. First...

17

18 **CHIEF JUSTICE DY CHANDRACHUD:** That report of the ADR, it says that your party
19 has got some Electoral Bonds also.

20

21 **SHADAN FARASAT:** No, My Lords. They gave a this thing... We have just given the detail,
22 because they asked... when Your Lordship's order, the order was passed that every party has
23 to disclose details. So we would have just responded saying that we have not taken any
24 Electoral Bonds. There's no question of taking any. This is a principle stance, we have not taken
25 it. My Lords, the first submission.... I intend to make three submissions. My Lords, the first
26 submission is that the architecture and effect of the Electoral Bond Scheme is not to reduce
27 black money, but to reroute non-anonymous Banking Channel funding to anonymous
28 Electoral Bonds.

29

30 **JUSTICE B.R. GAVAI:** Please, please repeat.

31

32 **SHADAN FARASAT:** The architecture and effect of the Electoral Bond scheme is not to
33 reduce black money funding but to reroute the non-anonymous banking channel. That is a
34 conventional banking channel available.

35

36 **CHIEF JUSTICE DY CHANDRACHUD:** Not to... architecture and effect is not to?

37

1 **SHADAN FARASAT:** Not to reduce black money funding of political parties but to reroute
2 the non-anonymous Banking Channel funding.

3

4 **CHIEF JUSTICE DY CHANDRACHUD:** But to reroute...

5

6 **SHADAN FARASAT:** The non-anonymous Banking Channel funding to anonymous
7 Electoral Bonds.

8

9 **JUSTICE B. R. GAVAI:** To reroute?

10

11 **SHADAN FARASAT:** Non-anonymous Banking Channel funding to anonymous Electoral
12 Bonds. That's the first submission. The second is, that the legally ordained informational black
13 hole, which this creates, the Electoral Bonds scheme creates. It's a legally directed information
14 black hole, goes against the concept of informed electorate, under 19(1)(a), read with Article
15 326 of the Constitution. Both. So, it goes against the principle which is constitutionally
16 mandated of an informed electorate under Article 19(1)(a), read with Article 326. The third
17 submission for Your Lordship's consideration is, that it violates the Right to Conscience under
18 Article 25 of individual shareholders because they don't know where their money is? What
19 their money is being used for? My Lords, I will try to make that..

20

21 **JUSTICE B. R. GAVAI:** Mr. Sibal also argued.

22

23 **SHADAN FARASAT:** Mr. Sibal argued but he didn't pitch it on Right to Conscience under
24 25. I'm specifically saying it violates Right to Conscience under Article 25.

25

26 **CHIEF JUSTICE DY CHANDRACHUD:** Actually the 19(1)(g) right you can say.

27

28 **SHADAN FARASAT:** Also, I will try to make it good. I know it's not the usual argument to
29 be made My Lord, but I'll try and make it good. On the first, before I begin with those
30 submissions. Just one aspect, is this matter is essentially about two things, democracy and
31 disclosure. Those are the two fundamentals in my respectful submission which guide the
32 underlying issues which arise in this matter. My Lords, this matter is not about contribution
33 limit, except on that 7.5% issue or expenditure limit or expenditure timeline which is, when
34 can the parties spend, before election after election? My Lords, those are all aspects which are
35 litigated not just in our jurisdiction but across the world. This is about something which
36 pervades all those aspects, which is disclosure. Every aspect it pervades, which is disclosure
37 and disclosure, not just to authorities. There are two kinds of disclosures. One is, I should only

1 disclose to the Election Commission that may not be sufficient. This is about disclosure to the
2 authorities and to the public at large. That is where the rights under 19(1)(a), 326 come into
3 play. My Lords, in so far as why this is relevant from a perspective of democracy, the principle
4 of one man, one vote. It's not just about that I cast my vote. What is the substantive value of
5 that vote? My Lords, it basically entitles me to claim equal representation to my representative.
6 Equal influence over the democratic process and to show that my views have equal worth in
7 the system. This scheme, possibly changes that by shifting the centre of gravity from the
8 elected public to somewhere else of the political discourse and influence without the public
9 even getting to know about it. With that My Lords, I will enter the first submission, which is
10 the architecture. What does this scheme do? This scheme effectively is an alternative white
11 money channel which the government has created. There was already a disclosure based
12 channel. The normal banking channel, the RTGS, the bank draft, the check, which was
13 available. Now, this is a new white money channel. What they have added is anonymity to it.
14 By definition therefore, it cannot be including money, which would otherwise be black money.

15

16 It can only deal with money, which will anyways be white money, which a person can disclose
17 as white money. Two, the function of whether money is disclosed to a banking channel and
18 there declared as white, it is not a function of what it will be eventually used for, whether to
19 donate to a political party or something else. It's primarily a function, primarily. I don't say
20 exclusively. Primarily a function of two things. First, whether the money is legally obtained. If
21 it's illegal money, I can't disclose it to a banking system. Normally, unless I'm trying to launder
22 the money. And second, if I'm trying to suppress my income. My income is X and I'm trying to
23 show Y to save tax. This will not bring in any of that money, which is anywhere in the black
24 space in the cash economy. So, what does this do? By definition, what this will do is the existing
25 white money, which is in the system which was being donated to political parties through the
26 non-anonymous fully declared route, it will shift that to anonymous Electoral Bonds. That's
27 what was the scheme of, the architecture of the Electoral Bond Scheme itself. And, that is borne
28 out by data as well. Now I will just, I'll try to bring My Lords to the data straight away. First,
29 in terms of what is the cash usage in the economy, because of course, cash usage, there can't
30 be a perfect number, that this is the cash with an electoral system. We always have to go by
31 surrogate, some surrogate. So My Lords, in that context, will look at... I'll compare the 2014
32 Election Commission recoveries of cash during election, the 2014 General Election and 2019.
33 The amounts of cash recovered in 2014 have gone up by three times in 2019. Which by itself
34 is indicative, if the Commission is catching more money, that means there's more money in
35 circulation. A large chunk of it will be belonging to political parties. So, Your Lordships will
36 first have, page, Volume 4, My Lordships will have page 1825. This is the 2019. I'm only relying
37 on Election Commission data for my submissions. No outside data. Page 1825. This is all the

1 recoveries they made in the 2019 election. Your Lordships will have page 1826. At the bottom,
2 grand total. At the bottom My Lords have the grand total? On page 1826? My Lords, it says
3 cash 844. Your Lordships have that?

4

5 **JUSTICE SANJIV KHANNA:** To the extent that cash is used in the elections, maybe this
6 will show that. That's a limited extent.

7

8 **SHADAN FARASAT:** I agree. I'm grateful to My Lord. So my point is, that cash can only
9 increase. Cash cannot be controlled by definition by this scheme. My Lords, this scheme... let's
10 assume My Lords that cash was tomorrow even banned, for instance, by political party. Cash
11 can still be used by political party. That's a reality, unless the cash economy itself ceases to
12 exist. So this scheme, because I am trying to meet the argument which is in support of the
13 scheme by the Union, right since the beginning, including in their affidavits. That we are trying
14 to transfer what is there in the cash economy into this. My submission is that is just not
15 possible given the nature of this scheme. In fact, it's not possible unless even if you bar,
16 prohibit it, you possibly can't do it unless the cash economy itself ceases to operate,
17 independent of political parties. So, that is really a red herring argument is my submission for
18 Your Lordship's consideration.

19

20 **JUSTICE SANJIV KHANNA:** The argument of the other side on that is, they are trying to
21 experiment, if it is possible, they can do it. If they can wean away from the cash rationale. May
22 not really cut... we can't say that the attempt should not be made or experimentation should
23 not be done.

24

25 **SHADAN FARASAT:** But, what if it were to primarily impact the other side, which was
26 already being disclosed. So what's happening now, is you have two channels. Anonymous cash
27 channel and anonymous banking channel. So, both the white and the black channel are
28 anonymous now. My submission for Your Lordships consideration is this. There was earlier a
29 black channel, the cash channel, which was there, which needn't to be disclosed, etc. Now you
30 have created an anonymous white channel. So both are anonymous. And this is at the cost of
31 only one thing, which is 'disclosed white channel'. I'll try to make that good. I'll try to... even
32 through data, I'll try to make that good, because we have the benefit of five years of operation
33 of this scheme. My Lords, that's the benefit we have. So, what's the impact of it? Parties which
34 were getting 70% to 75% of their political disclosed contributions from cheque, bank, RTGS
35 (that's disclosed white channels), are now getting 20%, 15%. The electoral anonymous scheme
36 has taken over at the cost of white channels. So my submission for Your Lordship's
37 consideration is this. It's not to attack the black money, it's actually to attack the white

1 disclosed channel. And that's the actual impact as well, of the scheme. And I'll just place the
2 data, and then I'll go to my next point. What we have done, we did an exercise. What we have
3 done My Lords is, at 29(C), every party gives the Contribution Report above 20,000. Above
4 20,000, they're required to. My Lords, we collated the last ten years, from 2013 onwards, all
5 the reports, and Your Lordships will have page 542... just for a moment, at Volume 4.

6

7 **CHIEF JUSTICE DY CHANDRACHUD:** 542?

8

9 **SHADAN FARASAT:** 5542.

10

11 **JUSTICE SANJIV KHANNA:** Volume?

12

13 **SHADAN FARASAT:** Volume 4. At 5543. At 5543, this is for two parties. The two national
14 parties I have collated. The data is for all of them. But when I show the bar graph that is for
15 two parties, and I'll tell Your Lordships what we have done. 5543, Your Lordships will have.
16 My Lords have that?

17

18 **JUSTICE SANJIV KHANNA:** These are list of donors who can...

19

20 **SHADAN FARASAT:** That's right. So, from each of the lists, we have taken all the list of
21 donors, and it says against that... for instance, it says Cheque Number, DD, etc. Correct? My
22 Lords will have the first cash entry in this one, is at 5553.

23

24 **JUSTICE SANJIV KHANNA:** That's less than 2,000?

25

26 **SHADAN FARASAT:** No. It's more than 20,000. My Lords, more than 20,000 you have to
27 disclose whether cash or cheque. Either way, you have to disclose. That's the statutory
28 requirement.

29

30 **JUSTICE SANJIV KHANNA:** 55...?

31

32 **SHADAN FARASAT:** 5553. Look at 153, serial number 153 in that chart. Some Mr. V.V. – 1
33 lakh cash. My Lords have that? Page 5553.

34

35 **CHIEF JUSTICE DY CHANDRACHUD:** Yes. V.V.

36

1 **SHADAN FARASAT:** So, My Lords, what I have done, each entry we have added up for two
2 largest political parties for two years, to get the numbers. Because there was no other way to
3 do it. This is not information available in the public domain. This was the only way to do it. So,
4 we have added up each of the entries to determine what is the cheque amount which they were
5 getting as a percentage of their funding in 2013-14, and what they are getting post Electoral
6 Bonds. And My Lords, the net result of that, I've prepared a chart for Your Lordship's
7 consideration. The learned Court Master will kindly screen share that document which has
8 been emailed. Yes, we have copied to the Learned Solicitor. Your Lordships will have it on your
9 screens now. If the learned Court Master can bring it down a little? Yes, correct, yes. So, my
10 respectful submission is, now the entire political funding, substantially is anonymous, because
11 black channel continues. At the cost, at the cost... My Lords, if the objective is to have some
12 kind of disclosure, at the cost of disclosed white money, if you are increasing non-disclosed
13 white money, that's what the real... Your Lordships will have this chart, page 1. If the Court
14 Master can just bring it down a little?

15

16 **JUSTICE SANJIV KHANNA:** There's a little flaw, because the bearer bonds as such, are
17 bearer bonds. That's going to create... that's creating a problem. That's all. We have
18 understood that argument.

19

20 **SHADAN FARASAT:** And My Lords, I'm making the argument solely to meet the Union's
21 justification of the scheme, which is that it's meant to bring in black money into the white
22 system. My respectful submission to meet that is, it actually does the opposite. It takes away
23 the non-anonymous white money and puts it in the anonymous kitty. That's my submission.

24

25 **JUSTICE B.R. GAVAI:** That you already have put.

26

27 **SHADAN FARASAT:** That's right. So, My Lords, I am saying, therefore, to that extent, a)
28 the justification is not valid, and b) for that reason, it's arbitrary as well. It doesn't meet even
29 the stated justification...

30

31 **JUSTICE B.R. GAVAI:** [UNCLEAR]

32

33 **SHADAN FARASAT:** My Lords, the determining principle... one of the tests of arbitrariness
34 Your Lordships have stated is, it is absent a determining principle. My Lords, here the stated
35 determining principle is contrary to what the scheme actually does and intends to do.

36

1 **CHIEF JUSTICE DY CHANDRACHUD:** What it basically according to you does is, that it
2 brings into the fold... earlier you had the non-anonymized white money.

3

4 **SHADAN FARASAT:** That's right.

5

6 **CHIEF JUSTICE DY CHANDRACHUD:** Now that is replaced increasingly by anonymized
7 white money.

8

9 **SHADAN FARASAT:** And that's the real victim or target of this scheme, not the black
10 money. That's my respectful submission. Because black money will continue irrespective, that
11 funding will keep on continuing. So, now the two channels, both are anonymized, white and
12 black. That's my respectful submission. That's the scheme. That's the real picture which this
13 scheme does to our political financing. That's what it does.

14

15 **CHIEF JUSTICE DY CHANDRACHUD:** All right. Anything else now, Mr. Farasat?

16

17 **SHADAN FARASAT:** Now, just two short submissions. I'll not labour them. My Lords, the
18 second point is Your Lordships, will consider that under Article 326, there is guaranteed adult
19 franchise. There's some debate on whether it's a Right to Vote or not, because a Right to Vote
20 actually, specifically, vis-a-vis, individual voter flows from Section-62 of the Representation of
21 People's Act. But, it is definitely, it defines what an electorate is. 326, at a minimum, defines
22 what an electorate is. My Lord, will just have 326 for a moment. The elections to the House of
23 the People and to the Legislative Assembly of every State shall be on the basis of adult suffrage,
24 that is to say, every person who's a citizen of India and who's not less than 18 years of age on
25 such date as maybe fixed in that behalf by or under any law made by appropriate Legislature
26 and is not otherwise disqualified under this Constitution or any law made by appropriate
27 Legislature, on the ground of non-residents and soundness of mind, crime or corrupt or illegal
28 practice, shall be entitled to be registered as a voter. This is a creation of an electoral list. You
29 are entitled to be registered as a voter. So, this gives you a, what is the electorate? It may not
30 give you a final Right to Vote, because that will still be regulated by the statute in terms
31 permitted by 326 itself. I don't want to get into that debate. Recently, there are differing views
32 of this court itself. Recently, in the Election Commission appointment court, a five judge Bench
33 of this court has taken the view, that although it is a statutory right, they are not giving a
34 definitive finding. Because, the earlier five judge Bench had said, that it is only a statutory
35 right. I don't want to get into that debate. Even assuming this is not a right, it is at least defines
36 the electorate and this when read with 19(1)(a), it envisages in my respectful submission an
37 informed electorate. So, when Your Lordships will nest the Right to Information, my

1 submission before Your Lordships is nested not just in 19(1)(a), but also nested in the
2 informed electorate under 326.

3

4 And My Lords, final submission, third and final submission. It impacts two kinds of democracy
5 this scheme. One is popular democracy and the other shareholder democracy. The only people
6 who are not... the only people who are part of the people in the company is the shareholders.
7 They also vote that is the natural shareholders. They are the only ones who are excluded from
8 knowledge of where the money is going.

9

10 **JUSTICE B.R. GAVAI:** Already argued by Mr. Sibal.

11

12 **SHADAN FARASAT:** Just on one aspect, on that, I have quite seen that. A share is a property
13 of a shareholder. My property's usufruct is being used to fund a certain purpose. My Lords, it
14 is in my written submission, I won't take Your Lordships through it. But political views have
15 also been recognized by this Honourable Court as part of Right to Conscience. I don't even
16 know who my money is being used to fund for? A person with A conscience may not like a right
17 wing party. A person with B conscience may not like a left wing party. It may infringe on its
18 conscience to support his property to fund that party. So, at least I should have a Right to Exit.
19 I can't certainly manage the company being a single shareholder, but I should have a Right to
20 Informed Exit. I'm even denied that by black-holing the information from me. So, now in that
21 sense, it actually violates the Article 25 right of a shareholder. I'm grateful for that.

22

23 **CHIEF JUSTICE DY CHANDRACHUD:** Thank you, Mr. Farasat. Yes Mr. Pasha.

24

25 **NIZAM PASHA:** I appear in item 501.3, which is *Spandan Biswas versus Union of*
26 *India*. Actually the petitioner is a practicing advocate of My Lord's court, and then, a specialist
27 in financial regulation. And so, it's in the perspective of placing this law into the context of
28 financial regulation that I stand before My Lords. Just before I begin with that, I just want to
29 round off the argument that was being made by my learned friend, Mr. Farasat, for which My
30 Lord I refer to Clause 11 of the Electoral Bond Scheme, which is the payment options. And I'll
31 read it out. My Lord, need not bother. It says, - 'all payments for the issuance of bond shall be
32 accepted in Indian rupees through demand draft or cheque or through electronic clearing
33 system or direct debit in the bank, in the buyer's account'. Now Your Lordships, cash is
34 noticeably absent from the forms of consideration which are permitted for purchasing an
35 Electoral Bond, and therefore, the question of any black money coming into the system has
36 been cut out at the inception itself, at the stage of purchase itself, is excluded. And I contrast
37 this, with the Bearer Bonds Scheme, which was under consideration of My Lords in **R K**

1 **Garg's** case where Lordship, the specific and stated objective of the government was to bring
2 black money into the white system, and therefore, purchase of those Bearer Bonds through
3 cash was permitted. And, that scheme was eventually upheld on the basis that all other... it's
4 just providing another instrument because all other laws, et cetera., will continue to apply and
5 wherever there is a financial irregularity found in terms of income tax, etc., the person will be
6 liable. But, just the cash which existed in the economy, which existed outside the white
7 economy, comes into the white economy, which is the one thing which is excluded in this case.
8 The one ground on which a similar scheme of Bearer Bonds, not in the context of elections,
9 was upheld by My Lords in **R K Garg**, is the one ground which is not available here.

10
11 Now, my primary argument is that this Electoral Bond Scheme is manifestly arbitrary. And for
12 that, Lordship, I will just read out the relevant few lines of My Lord's judgment, in which the
13 concept of manifest arbitrariness is defined. And just by way of an aside, I wish to point out
14 that it is commonly believed that the doctrine of manifest arbitrariness and the striking down
15 of legislation on the grounds of manifest arbitrariness came into our system and became the
16 law through Justice Nariman's opinion in **Shayara Bano**. I feel that that is actually not
17 correct because Justice Nariman was in a minority in terms of the doctrine, when he
18 expounded the doctrine. Justice Khehar's opinion said that personal law is not statutory and
19 therefore, the question of striking down a statute did not arise under Article 14. Justice Kurian
20 Joseph, while he is with Justice Nariman on the operative directive, disagrees with him on the
21 fact that it is statutory. And so in that sense, his one line saying that, - 'I agree with my brother's
22 opinion on the doctrine of manifest arbitrariness', is completely obiter for Justice Kurian
23 because he is saying that this is not statutory and therefore, not subject to part three. So in
24 that sense, that opinion is an opinion of two judges. But it was in **Puttaswamy** five judges,
25 where Justice Sikri, speaking for the majority, applied and adopted that doctrine of Justice
26 Nariman that I feel that it first, for the first time became law. But now that it is Lordship, I'm
27 just reading from para 95 of the opinion of Justice Nariman as adopted by Justice Sikri.

28
29 **CHIEF JUSTICE DY CHANDRACHUD:** So, how do you formulate that it is? Just give us
30 how according to you it is manifestly arbitrary.

31
32 **NIZAM PASHA:** Lordship, that...

33
34 **CHIEF JUSTICE DY CHANDRACHUD:** The doctrine of manifest arbitrariness, you have
35 referred to in your written submission. That we will look at. If you can formulate how it is
36 manifestly arbitrary.

1 **NIZAM PASHA:** Lordship please, what are the elements of manifest arbitrariness is
2 important for that and a constitutional infirmity is found in Article 14 itself. Whenever
3 legislation is manifestly arbitrary, that is, when it is not fair, not reasonable, discriminatory,
4 not transparent...

5

6 **CHIEF JUSTICE DY CHANDRACHUD:** How is it manifestly arbitrary?

7

8 **NIZAM PASHA:** Lordship, not transparent. So, *ipso facto*. Not transparent, capricious,
9 biased with favouritism, nepotism, and not in pursuit of promotion of healthy competition and
10 equitable treatment. Positively speaking, it should conform to norms which are rational,
11 informed with reason and guided by public interest.

12

13 **CHIEF JUSTICE DY CHANDRACHUD:** So, according to you, absence of transparency?

14

15 **NIZAM PASHA:** Absence of transparency and public interest. And for that Lordship, I am
16 just juxtaposing the legislative policy behind these amendments and the Electoral Bond
17 Scheme with the legislative policy that exists in the context of other financial regulation.
18 Lordship, in the Electoral Bond Scheme, in Rule No. 3 or Clause No. 3, which is eligibility to
19 purchase an encashment of Electoral Bonds. I am reading it out. 'The bond, under this scheme,
20 may be purchased by a person who is a citizen of India or incorporated or established in India'.
21 So Your Lordship, the only test for a company, is that it should be incorporated or established
22 in India. In all other financial regulations Your Lordship, I will point out, that there is a concept
23 of beneficial ownership, where if beyond a certain percentage there is foreign ownership in
24 that entity, it is treated like a foreign source. But here, to purchase an Electoral Bond, as long
25 as the company is incorporated in India, it is an eligible purchaser. And Your Lordship, what
26 this results in, is the absurdity, that while we do not permit investment by an entity which has
27 51% foreign shareholding... we don't permit that entity to invest in a company, which say, deals
28 in the media, because we don't want foreign control of our media. But we have no problem in
29 allowing such a company to purchase bonds and transfer it to a political party, and therefore,
30 in that sense, invest in an entity that runs the country. So, that's the absurdity that I wish to
31 point out, that in all financial regulations, the idea of control and beneficial ownership of
32 foreign corporations, and a different standard being applied to them, is the norm. And it was
33 the norm here as well, because under FCRA, before the amendment, an entity which had more
34 than 51% foreign shareholding was treated like a foreign source. But this amendment now does
35 away with that and treats all entities, as long as they are regulated in India, at par. And I wish
36 to point out, Your Lordship, some of the differences that exist between this scheme and the
37 scheme of any other method of funding coming into India. Your Lordship, foreign investment

1 in India is governed by the Foreign Investment Management-Non-Debt Instruments
2 Regulations, 2019, which are at page 9047.

3

4 **TUSHAR MEHTA:** Your Lordships made it clear in the morning. This issue is [UNCLEAR].

5

6 **NIZAM PASHA:** This is not FCRA. The learned Solicitor, is under the impression that I'm
7 dealing with FCRA. I'm talking about Foreign Exchange Management. So I'm just placing this
8 Electoral Bond Scheme in the context of foreign...

9

10 **TUSHAR MEHTA:** FEMA, they are doing the argument.

11

12 **NIZAM PASHA:** That's now a twin argument. FCRA is a separate argument there, which is...
13 I'm talking about Foreign Exchange Management Your Lordships. Because in this context,
14 when in Rule 3, it says that any entity incorporated in India may purchase Electoral Bonds.
15 So, by definition, a company with foreign investment is being allowed to purchase Electoral
16 Bonds. And so Your Lordship, I just wish to point out that...

17

18 **JUSTICE B.R. GAVAI:** You have already argued that any entity in India, which is barely
19 registered in India, even if it doesn't carry any activities here, doesn't earn any profit, still a
20 company which is situated abroad, can use this company as a shell company and permit it to
21 be transferred.

22

23 **NIZAM PASHA:** I'm going to pitch it a step higher Your Lordship. I will point out that the
24 government and the legislative policy does not permit a company from... incorporated in
25 certain jurisdictions, to even enter into procurement contracts with the Government. But for
26 purposes of funding political parties and thereby having a say in the electoral politics of this
27 country, there is no problem, by virtue of this amendment. So just the comparison Your
28 Lordship, points out, that the legislative absurdity of having a clause here, which allows...
29 which places all Indian corporate entities on a similar footing. Your Lordship, I was looking at
30 that. I was pointing My Lords out to the regulation at page 9047 of Volume 4. And, I am
31 reading Rule 23, 'Indian entity which has received indirect foreign investment, shall comply
32 with the entry routes, sectoral caps, pricing guidelines, and other attendant conditions as
33 applicable to foreign investment. Which means, that a company which has downstream
34 foreign investment... which has foreign investment in terms of its downstream investments, it
35 is treated like still a company which is a foreign investor, for purposes of foreign exchange
36 management'. So, Your Lordship... and hence, the absurdity that there are certain sectors, for
37 instance, which are prohibited for foreign investments, like atomic energy or defence or space.

1 There are certain sectors which are restricted to foreign investment, like, for instance, media,
2 where more than 49% ownership is not permitted. So, this company can't invest in all of those
3 sectors and in companies engaged in those businesses, but is allowed to invest in... or rather
4 allowed to transfer its funds to a political party, and therefore become a stakeholder and
5 participant in the electoral democracy of this country. I won't take My Lords to those pages,
6 but I'll just point out, My Lords, to the master directions, which are issued under this scheme
7 at page 8850. Lordships will note at page 8877, first at page 8875, downstream investment,
8 and the way it's worded is very relevant. The underlying principle of downstream investment
9 guidelines is that what cannot be done directly cannot be done indirectly. So therefore,
10 Lordship, foreign entities are not being permitted to purchase Electoral Bonds, but an Indian
11 entity with foreign investment, even if it's 100% is permitted to purchase Electoral Bonds,
12 which is prohibited in the context of business but is permitted in the context of political parties
13 Accordingly, downstream investments, which are treated as indirect foreign investments, are
14 subject to the entry route, sectoral caps, investment limits, as the case may be, and pricing
15 guidelines and attendant pure conditionalities, such as investment as laid down in the non-
16 debt instrument rules, which I read out. And ownership of an Indian company is the beneficial
17 ownership of more than 50% of the equity instruments of such a company under this FDI
18 policy.

19

20 [NO AUDIO]

21

22 **NIZAM PASHA:** Lordship may now take page 8900 of Volume 4,

23

24 **CHIEF JUSTICE DY CHANDRACHUD:** What is the submission now?

25

26 **NIZAM PASHA:** This is press note 3 of 2020, by which it has been stipulated that any
27 country which shares a land border with India, investments from such a country is treated on
28 a different footing from investment from any other country. And whereas, investments say in
29 the manufacturing sector may be 100% automatic, but if it is from a country that shares a land
30 border with India that is solely under the approval route, which means that it will not be
31 automatic. It will require an application to be made for approval to the Government of India,
32 Therefore, Lordship, what submissions that I'm trying to make is that, an investment from
33 China into a manufacturing entity is not treated as par as investment from anywhere else. But
34 if the same country then permits, purchases Electoral Bonds, then that is permissible. Again,
35 so, this land border sharing distinction that exists for business doesn't exist for...

36

1 **JUSTICE B.R. GAVAI:** Because that is taken to consideration in the interest of security of
2 the state.

3

4 **NIZAM PASHA:** Exactly. So, therefore, security of the state is impacted if a company merely
5 invests in the manufacturing sector in India. Is it not impacted if Chinese investment is coming
6 in, into political party? Lordships, so much is being made today.

7

8 **TUSHAR MEHTA:** It is coming. It has stopped now because of this...

9

10 **NIZAM PASHA:** Lordships, so, we are currently having this issue, which is in the press of a
11 news organization having received some fund from China. By this standard, a country like
12 China cannot invest into businesses in India, except through a separate approval route, where
13 it is monitored and scrutinized. But a Chinese company can fund a political party, and
14 theoretically fund millions of dollars into politics in India.

15

16 On a... presumably like my friend, have already argued a principle of *quid pro quo*. This in
17 fact, that difference in legislative policy for funds coming into India in any other context versus
18 in the context of political parties manifestly arbitrary is my submission. One or two more
19 instruments, I'll just point out to My Lords. My Lord, may see page 8827...

20

21 **CHIEF JUSTICE DY CHANDRACHUD:** It's a matter of policy really. You are saying that,
22 well, a company in China, because China shares the land border, they cannot bid for a contract.
23 But, your case is here that they may have invested in Electoral Bonds.

24

25 **NIZAM PASHA:** So therefore, we feel that there is a security threat if they bid for a contract
26 in India. But we feel no security threat...

27

28 **CHIEF JUSTICE DY CHANDRACHUD:** That's in the realm of policy.

29

30 **NIZAM PASHA:** In fact, that is why policy is subject to the doctrine of manifest arbitrariness,
31 If it is so absurd, where it is contrary to public interest, and it is non-transferable.

32

33 **CHIEF JUSTICE DY CHANDRACHUD:** Thank you. Now, tomorrow at the most, Mr.
34 Hansaria, 15 minutes for you and 15 minutes for Mr. Hegde now.

35

36 **CLAIMANT'S COUNSEL:** Just 10 minutes. I represent a regional party My Lords. I have
37 made an application, written submissions. I won't take more than 10 minutes.

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CHIEF JUSTICE DY CHANDRACHUD: We will have a look at the written submissions of Mr. Hansaria, Mr. Hegde and...

VIJAY HANSARIA: To be on the realistic side My Lord, 15 minutes. I was requesting My Lordships for an hour. I'll try to have it in 45 minutes. I have to take Your Lordships through the journey from 1958, how it developed since 2013. There's a long journey My Lord. The Parliament has accepted the recommendations made by Justice Chagla and I'll show to Your Lordships. I will try to be as brief as possible.

CHIEF JUSTICE DY CHANDRACHUD: Who are you appearing for Mr...

VIJAY HANSARIA: I am for intervener My Lords. I filed my written submissions, which are before Your Lordships.

CHIEF JUSTICE DY CHANDRACHUD: I have your written submissions. Based on that we'll decide how much time...

VIJAY HANSARIA: I will try to be as brief as possible.

KALEESWARAM RAJ: Shall I also make a very short submission before Your Lordship parts ways My Lord. Just one... I was listening to the entire deliberations. My Lords, I wanted to make a very short supplementary submission. It will only be with respect to the question of political liberties.

CHIEF JUSTICE DY CHANDRACHUD: We will look at your written submissions, all three of you, and then we will see how much... tomorrow begin with a clean slate....

VIJAY HANSARIA: [UNCLEAR] and then whatever Your Lordships say, we will go by that.

KALEESWARAM RAJ: Shall I make one request My Lord? Shall I make one request before Your Lordship leaves My Lord? I will just make a very short submission supplementing and emphasizing on a point which has not been addressed at all. That is to say, on political equality and the basic feature in the Indian constitutional context.

CHIEF JUSTICE DY CHANDRACHUD: You have filed your submissions Mr. Raj no?

1 **KALEESWARAM RAJ:** Yes. I wanted to make a submission, distinguishing...

2

3 **CHIEF JUSTICE DY CHANDRACHUD:** Have you filed your submissions? Have you filed
4 your written submissions?

5

6 **KALEESWARAM RAJ:** I can do it today if Your Lordships permit because I was.....

7

8 **CHIEF JUSTICE DY CHANDRACHUD:** Now it is too late. Now...

9

10 **KALEESWARAMN RAJ:** I can do it today if Your Lordships....

11

12 **CHIEF JUSTICE DY CHANDRACHUD:** We can't take the Attorney and the Solicitor by
13 surprise now. All right. Thank you .

14

15

16

END OF DAY'S PROCEEDINGS