

Date: 21-11-2022

To,

Shri Rajiv Kumar
Chief Election Commissioner
Election Commission of India (ECI)

Shri Anup Chandra Pandey
Election Commissioner
Election Commission of India (ECI)

Matter related to the notification dated 7th November, 2022 amending the Electoral Bonds Scheme, 2018 by adding another additional period of 15 days for the purchase of bonds in the year of General elections to State Legislative Assemblies and UTs.

Subject: Request for an immediate intervention and appropriate action by the Commission against the amendment brought by the government to the Electoral Bonds Scheme, 2018 during the Model Code of Conduct (MCC) period.

Dear Sir (s),

1. The Ministry of Finance vide notification dated 7th November, 2022 had amended the Electoral Bond Scheme, 2018 by providing ***“an additional period of 15 days”*** for the sale ***“in the year of general elections to the State Assemblies and Union Territories”***. (Notification attached as Annexure 1)
2. The aforementioned amendment which qualifies as a policy decision was brought by the government while the Model Code of Conduct (MCC) is still in force owing to the upcoming State Assembly elections to be held in the States of Himachal Pradesh and Gujarat. It is to be noted that this Hon’ble Commission through its press notes dated 14th October, 2022, 5th November, 2022 and 10th November, 2022 had notified 12th November, 2022 as the date of poll in the State of Himachal Pradesh while Assembly elections in Gujarat are to be held in 1st and 5th December, 2022.
3. This arbitrary exercise of power by bringing an amendment and allowing the sale of electoral bonds for additional 15 days during the MCC period reflects government’s blatant disregard towards the plenary powers of this Commission as well as the mandatory guidelines issued under the Model Code of Conduct (MCC). Needless to say, this calculated move of the government is to ensure that more and more donations can be made in a completely opaque manner before State Assembly elections in Himachal Pradesh and Gujarat. Such an act also shows government’s total inability to adhere to Constitutional ethos and due process of law which is a hallmark for *‘free and fair elections.’*
4. The Election Commission is already aware of the extent and seriousness of the rampant issue of money power during pre and post elections period. Clearly, this **unprecedented amendment brought by the government is not just an attempt to manipulate the voters to**

influence their choice but such an illegal step dilutes all efforts aimed towards a transparent, credible and democratic electoral process.

5. This Election Commission through its letter dated 26 May, 2017 to Ministry of Law and Justice had already accepted that political funding through electoral bonds ***“will have a serious impact on Transparency aspect of political finance/funding of political parties and donations received through electoral bonds is a retrograde step.”***

6. At this juncture, ADR would like to underline Article 324 of the Constitution that gives sufficient and wide powers to the Election Commission for ***‘superintendence, direction and control of elections’***. The Supreme Court of India has also held that the Election Commission can take action under special circumstances, in matters where there is no law, or the law is silent. ***In Association for Democratic Reforms & Ors. vs. Union of India & Anr.; (2002) 5 SCC 29;***

“49.It is to be stated that the Election Commission has from time to time issued instructions/orders to meet with the situation where the field is unoccupied by the legislation.....In other words, till the Parliament applied its mind and came forward with appropriate legislation to give effect to the right available to a voter-citizen, the Court felt that the said goal has to be translated into action through the media of Election Commission, which is endowed with ‘residuary power’ to regulate the election process in the best interests of the electorate....

7. In addition, the guidelines stipulated under the Model Code of Conduct (MCC) acts as a ***“reservoir of powers” by filling up the vacuum left by the existing election law.*** The Hon’ble Supreme Court of India has not only recognised but endorsed the concept of MCC. ***In S. Subramaniam Balaji vs State of Madras 13(2009) SCC659*** the Hon’ble Supreme Court had observed;

“The Election Commission, in order to ensure level playing field between the contesting parties and candidates in elections and also in order to see that the purity of election process does not get vitiated, has been issuing instructions under Model Code of Conduct. The fountainhead of the powers under which the Election Commission issues these orders is Article 324 of the Constitution, which mandates the Election Commission to hold free and fair elections.”

8. It is mandatory for the government including every government department, authority or agency to take prior permission of the Commission before announcing any new scheme, policy or law etc. Except for certain public welfare schemes and policies, the government is completely prohibited from making any law or bringing any new amendment in law while the MCC is operational.
9. Through this letter ADR would like to bring the kind attention of this Commission to some deeply shocking revelations received from the RTI responses from Ministry of Finance. As per the file noting **File No. 12(5)-B(W&M)/2021** received through RTI application dated 18-11-

2022 filed by Commodore Lokesh Batra, it was found that **the subordinate officials from the Ministry of Finance, Department of Economic Affairs and Ministry of Law and Justice had warned the senior officials of the Finance Ministry against the aforementioned amendment to the Electoral Bond Scheme, 2018 since the matter is sub-judice before the Supreme Court in W.P (C) 880/2017 and MCC period is in force. In addition, these officials had also suggested that “any modification on the issuance of the dates from the ones envisaged by Clause 8 of the said Electoral Bonds Scheme will require; a) Obtaining a legal opinion on the matter from Ministry of Law and Justice; b) Obtaining a clearance from Election Commission of India since the MCC is in place on account of announcement of State Assembly elections.”**

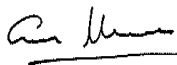
10. The Secretary, Economic Affairs in his response to the above contentions had that ***“since the similar amendment to Electoral Bonds Scheme was proposed in the March, 2021 which was noted by the ECI therefore another reference on the matter for ECI concurrence is not required.”*** “As per the aforementioned file noting File No. 12(5)-B(W&M)/2021 it is seen that these reservations against the amendment to the Electoral bonds Scheme by lower-level officials was discussed by the senior officials with the Finance Minister on 1st November, 2022. Sadly, as per the letter dated 2nd November, 2022 of the said file noting, the senior officials of the Ministry including the Finance Minister overruled the proposal of the subordinate officials and felt that ***“the concurrence of ECI for the amendment or for the issuance from the MCC perspective is not needed. However, ECI may be informed about the proposed issuances.”*** (File No. 12(5)-B(W&M)/2021 attached as Annexure 2)
11. ***The fact that the Ministry of Finance had not considered it necessary to take prior approval of the Commission before bringing amendment to the Electoral Bonds Scheme, 2018 amounts to an absolute abuse of power by the party in power and indicates suspicion towards the intent behind the amendment as well as government’s averseness towards the idea of participatory democracy.*** This also shows that the ***Ministry had deliberately tried to withheld the information regarding amendment to the Electoral Bonds Scheme from the Commission.***
12. It is to be noted that the Election Commission of India ***vide letter No. 437/6/2009-CC&BE dated 5th March, 2009 addressed to the Cabinet Secretary, Govt. of India and the Chief Secretaries and Chief Electoral Officers of all States and UTs*** had stated; ***“After the Model Code of Conduct comes into effect, the Ministry of Finance will need to take prior approval of the Commission on any policy announcements, fiscal measures, taxation related issues and such other financial relief. Similarly, other Ministries/Departments will need to take prior approval of the Commission before announcing any relief/benefit.”*** In the aforementioned letter the Commission in Paragraph no. 10, Point no. d had clearly stipulated that ***“d. Area of operation of any existing project/scheme/programme cannot be extended or expanded and will require prior permission of the Commission.”*** (Letter attached as Annexure 3)
13. This Commission has on a few occasions resorted to its wide powers under Article 324 of the Constitution to combat the widespread incidents of corrupt practices and abuse of power by party in power during MCC period. The Election Commission has issued a plethora of instructions and taken action, wherever necessary, against the lawmakers, political parties,

politicians and public functionaries violating these directions. The Courts, from time to time, have upheld the Election Commission's such directions/ actions. To illustrate a few;

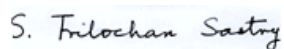
- I. In 2017, the Election Commission noted that in certain cases, the Ministries/Departments, particularly NITI Aayog, Ministry of Defence and Ministry of Finance took decisions, which had effect of disturbing level playing fields of poll bound states and asked the Cabinet Secretary to issue necessary instructions to all Ministries/Departments of Government of India to strictly adhere to the Election Commission's guidelines.
 - II. In 2014, the Election Commission had directed the State government to file necessary FIRs immediately and to take criminal proceedings against the then President of Bharatiya Janata Party and one cabinet minister of Samajwadi Party government of Uttar Pradesh who were found of indulging in some highly inflammatory speeches.
 - III. In 1993, the Election Commission cancelled bye-elections to Haryana State Assembly from Kalka Assembly constituency and Ranipet Assembly Constituency in Tamil Nadu, on the ground of announcement of certain new development schemes by the then Chief Ministers of the State in breach of Model Code.
14. On 10th January, 2017, the Election Commission **vide letter No. 437/6/2017(Policy) dated 10th January, 2017 addressed to President/ Secretary/General secretary of all recognized National and State political Parties** maintained that **"the Commission will not remain a silent spectator if the provisions of law or MCC are violated and no one can do it with impunity. The Commission will take stern action for any violation under all powers available."** (Letter attached as Annexure 4)
15. In this backdrop it is requested that the Election Commission should take cognizance of the aforementioned incident of violation of Model Code of Conduct (MCC) by the government and would act more assertively and promptly by taking necessary action.
16. At the outset, ADR would also like to request the Commission to consider taking following steps in view of powers conferred under Article 324 of the Indian Constitution and in the light of '*Participatory democracy, Level playing field and Free and fair elections*';
- I. The Commission should **call upon** all the concerned officials from the Ministry of Finance and other involved departments who were involved behind the aforementioned policy of amending the Electoral Bond Scheme, 2018 and who deliberately withheld the information from the Commission.
 - II. **A "show cause notice"** should be send to the Finance Ministry, concerned officials, party in power and all decision-making authorities involved asking for valid reasoning as to why no prior approval was taken by them before amending the Electoral Bond Scheme, 2018.
 - III. The Commission should also **initiate an inquiry** for the said violation.
 - IV. The Commission should also consider **imposing fine** for the said violation.

We hope that the Election Commission will take swift action in this regard and uphold the faith of the public by taking firm and quick action.

Yours sincerely,



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