

A ASHWINI KUMAR UPADHYAY

v.

UNION OF INDIA AND ANR.

(Writ Petition (Civil) No. 43 of 2022)

B AUGUST 26, 2022

**[N. V. RAMANA, CJI, HIMA KOHLI AND
C. T. RAVIKUMAR, JJ.]**

C *Election laws: Freebies – Matter pertaining to promises made by political parties for the distribution of free goods- ‘freebies’ as a part of their election manifesto or during election speeches – In view of the complexity of the issues involved, and the prayer for reconsideration of two-Judge Bench decision of this Court in *S. Subramaniam Balaji, matter referred to three-Judge Bench – Reference to larger Bench.*

D ***S. Subramaniam Balaji v. State of Tamil Nadu (2013)
9 SCC 659 : [2013] 13 SCR 668 – To be reconsidered.**

*Minerva Mills Ltd. v. Union of India (1980) 3 SCC 625
: [1981] 1 SCR 206 – referred to.*

E **Case Law Reference**

[2013] 13 SCR 668	to be reconsidered	Para 12, 14
[1981] 1 SCR 206	referred to	Para 13

F CIVIL ORIGINAL JURISDICTION: Writ Petition (Civil) No. 43 of 2022.

Under Article 32 of The Constitution of India

With

Writ Petition (Civil) Nos. 87, 474, 496, 383 and 121 of 2022.

G Kapil Sibal, Sr. Adv. and Ms. Manisha Singh, Adv. (Amicus Curiae)

Vikas Singh, Gopal Sankarnarayanan, Arvind Datar, Vijay Hansaria, Sr. Advs., Ashwini Kumar Upadhyay, Chandra Shekhar, Kapish Seth, Ashwani Kumar Dubey, Ashwini Upadhyay, Ms. Asha Upadhyay,

H Nirmal Kumar Ambastha, Ms. Kavya Jhawer, Pranav Sachdeva, Kamal

Kishore, Ms. Tanya Srivastava, Gaurav Kumar Bansal, Ms. Shomila A
Bakshi, Ms. Nandita Bansal, Barun Kumar Sinha, Mrs. Pratibha Sinha,
Mudit Kaul, Abhishek, Advs. for the Petitioner.

Tushar Mehta, SG, K.M. Nataraj, ASG, Dr. Abhishek Manu B
Singhvi, S. Niranjan Reddy, Maninder Singh, Dr. A. M. Singhvi, P. Wilson,
Sr. Advs., Shailesh Madiyal, Kanu Agrawal, Vivek Narayan Sharma,
Mayank Pandey, Anirudha Bhatt, Anuj Srinivas Udupa, Nakul Chengappa C
K. K., Chitransh Sharma, Abhinav Raghav, Arvind Kumar Sharma,
Mahfooz A. Nazki, Polanki Gowtham, Ms. Rajeswari Mukherjee,
Ms. Akhila Palem, Abhishek Sharma, Sahil Raveen, Amit Sharma, Dipesh D
Sinha, Ms. Pallavi Barura, Varun Thakur, Ms. Shraddha Saran, Brajesh
Pandey, Varinder Kumar Sharma, Amit Bhandari, Shadan Farasat, Bharat
Gupta, Shourya Dasgupta, Aman Naqvi, Dhruv Bhatnagar, Ms. Hrishika
Jain, Nitesh, R. Nedumaran, Apoorv Malhotra, Ms. Vandana Sharma,
Dr. Sandeep Singh, Ms. Priya Gaur, Vinay Pal, Sanchit Garga, Amit
Kapur, Aksat Jain, Maibam N. Shyam Singh, Pratyush Singh, Aditya
Dubey, Prashant Bhushan, Prabodh Kumar, Mahfooz Ahsan Nazki, Advs.
for the Respondents.

The following Order of the Court was passed:

ORDER

1. The questions raised in the present set of petitions relates to E
promises made by political parties for the distribution of free goods
(‘freebies’) as a part of their election manifesto or during election
speeches. The main contention of the petitioners is that such pre-election
promises, which have a largescale impact on the economy of the State,
cannot be permitted. The petitioners submit that such pre-election promises
are being made by political parties without any assessment of the financial F
implications on the State is nothing but an attempt to attract the vote
bank. This goes against the spirit of responsible electioneering and is
adversely affecting free and fair elections. This severely affects the
level playing field between the different political parties. The money that
is being paid by the taxpayers is ultimately being misused for political
parties/candidates to gain or retain power.

2. In this batch of petitions there are two sets of writ petitions. G
The first batch relates to pre-elections freebies which may influence
voters at the time of elections. The second set of petitions challenge the
grant of benefits by Governments which do not relate to any welfare H

A measure or developmental activity but rather are a ploy to capture vote banks.

3. The learned Solicitor General of India has responded to the above submissions by stating that the Union has a very limited role when it comes to this issue and suggested that this Court may constitute a

B Commission to consider the same.

4. The Election Commission of India has consistently taken the stand before this Court that it has limited scope to interfere in such promises which are being made by political parties/candidates.

5. Additionally, some political parties have filed intervention C applications in this batch of petitions and have challenged the very maintainability of these petitions. The main thrust of their submissions is that the issues raised in these petitions relate to policy or fiscal decisions of the State, which decisions are clearly outside the scope of the Court's jurisdiction. They submitted that it is unimaginable that any Government D or Court can prescribe or curtail the rights of political parties to make such promises or announcement of schemes as is sought for in the present case. The political parties which are responsible for running of the Governments are conscious and aware of the problems of the people. It was, therefore, contended by the interveners to leave the issue open to the political parties.

E 6. When these matters were taken up on 03.08.2022, we had also sought the opinion of learned Senior counsel Mr. Kapil Sibal regarding the issues being raised. He was initially of the opinion that this is a serious issue which needs to be tackled in some manner. However, subsequently, he has expressed his doubts about the appropriateness of judicial F intervention on this issue.

7. Freebies may create a situation wherein the State Government cannot provide basic amenities due to lack of funds and the State is pushed towards imminent bankruptcy. In the same breath, we should remember that such freebies are extended utilizing tax payers money G only for increasing the popularity of the party and electoral prospects.

8. We have considered the issues raised in these batch of petitions from various angles, as well as the stands taken by the Union of India, the Election Commission of India and some political parties who have filed intervention applications before us.

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9. There can be no denying the fact that in an electoral democracy such as ours, the true power ultimately lies with the electorate. It is the electorate that decides which party or candidate comes to power, and also judges the performance of the said party or candidate at the end of the legislative term, during the next round of the elections. It is also necessary to highlight herein the point raised by some of the intervenors, that all promises cannot be equated with freebies as they relate to welfare schemes or measures for the public good. Not only are these a part of the Directive Principles of State Policy, but are also a responsibility of the welfare state. At the same time, the worry raised by the petitioners herein, that under the guise of electoral promises, fiscal responsibility is being dispensed with, must also be considered.

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10. This Court has generally stayed its hand when confronted with issues relating to policy or fiscal matters concerning the State, as the same falls outside the ambit of the Court's jurisdiction. Initially, with the objective of initiating a discussion about the issues highlighted, we were of the opinion that it might be appropriate to constitute an expert body to prepare a report or white paper which could suggest a way forward. To this end, *vide* order dated 03.08.2022 we sought for suggestions from the parties before us regarding the possible composition of such a body. Additionally, during the course of the last hearing, we had suggested to the Union of India that an All Party Meeting be called to consider this issue.

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11. Ultimately, it appears to us that the issues raised by the parties require an extensive hearing before any concrete orders can be passed. Certain preliminary issues that may need to be deliberated upon and decided in the present set of petitions are as follows:

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- a. What is the scope of judicial intervention with respect to the reliefs sought in the present batch of petitions?
- b. Whether any enforceable order can be passed by this Court in these petitions?
- c. Whether the appointment of a Commission/Expert Body by the Court would serve any purpose in this matter? Additionally, what should be the scope, composition, and powers of the said Commission/Expert Body?

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12. Apart from the above preliminary questions, many of the parties before us have also submitted that the judgment of this Court in *S.*

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- A ***Subramaniam Balaji v. State of Tamil Nadu, (2013) 9 SCC 659*** requires reconsideration. In ***S. Subramaniam Balaji (supra)***, this Court was called upon to determine whether pre-election promises amounted to corrupt practices under Section 123 of the Representation of the People Act, 1951. The Court in that case held that such promises do not fall within the ambit of corrupt practices as specified under Section 123 of the Representation of the People Act, 1951, and issued directions to the Election Commission of India regarding framing of certain guidelines, in the absence of any legislative enactment covering the field.

13. It is submitted by some of the parties herein that the reasoning in the above judgment is flawed as it has not considered various provisions of the Representation of the People Act, 1951. It was also submitted that the judgment incorrectly implies that the Directive Principles of State Policy can override the fundamental rights under Part III of the Constitution, which is against the law settled by a Constitution Bench of this Court in ***Minerva Mills Ltd. v. Union of India, (1980) 3 SCC 625***.

14. Looking at the complexity of the issues involved, and the prayer to overrule a judgment rendered by a two-Judge Bench of this Court in ***S. Subramaniam Balaji (supra)***, we direct listing of these set of petitions before a three-Judge Bench, after obtaining the orders of the Hon'ble the Chief Justice of India.

15. List the matter after 4 weeks.

Nidhi Jain

Directions issued.