

(2001) 08 KAR CK 0015
In the Karnataka High Court
Case No : Writ Petition No. 5765 of 2001

Union of India and Another	Vs	APPELLANT
C. Dinakar and Others		RESPONDENT

Date of Decision : 14-08-2001

Acts Referred:

All India Services Act, 1951 — Section 3 (1)
Civil Procedure Code, 1908 (CPC) — Section 11

Citation : (2001) 6 KarLJ 213

Hon'ble Judges : G.C. Bharuka, J;Chidananda Ullal, J;Ashok Bhan, J

Bench : Full Bench

Advocate : Soli J. Sorabjee, Attorney General and Dinesh Kumar, Central Government Standing, for the Appellant; G. Kasturi, B. Manohar, A.G.A. and C. Dinakar, Party in person, for the Respondent

Final Decision : Dismissed

Judgement

1. Union of India has filed this petition to challenge the order passed by the Central Administrative Tribunal (for short, "the Tribunal") in O.A. No. 1020 of 1999, dated 8-2-2001 wherein the Tribunal has quashed the appointment of Sri R.K. Raghavan, (respondent 7) as the Director of Central Bureau of Investigation (for short, the CUD, at the instance of Sri C. Dinakar, IPS, respondent 1, herein on the ground that the petitioner had acted against the rule laid down by the Supreme Court of India in the case of Vineet Narain and Another v Union of India and Others, regarding the procedure to be followed for the selection and appointment of Director of CBI.

2. Facts.--The basic premise laid down by respondent 1 in the O.A. before the Tribunal is that both he and respondent 7 were appointed to the Indian Police Service (hereinafter referred to as "the IPS") in the year 1963. On the date of appointment of Director of CBI on 31-12-1998 the inter se seniority positions of the first four officers in the All India IPS seniority list were as follows:

(i) R.K. Sharma(1962);

- (ii) H.P. Kumar (1962);
- (iii) R.K. Raghavan (1963) - respondent 7;
- (iv) C. Diriaakar (1963) - applicant.

As on the date of selection which led to the issuance of the order impugned, the IPS Officers at SI. Nos. (i) and (ii) above, namely, R.K. Sharma and H.P. Kumar were reportedly facing enquiries on some allegations and hence were not considered for the said selection.

3. It was averred that the post of Director of CBI was one of the two senior most posts in the IPS in the country and is under the Government of India. It is a selection post in the IPS. IPS being an All India Service, the IPS Officers are governed by the All India Services Act, 1951. The conditions of service of IPS Officers are regulated by the IPS Pay Rules, 1954, made u/s 3(1) of the All India Services Act (for short, "the 1954 Rules"). That the post of CBI Director is one of the "posts carrying pay above the timescale of pay" as mentioned in Schedule III-C to the IPS (Pay) Rules, 1954 with fixed pay of Rs. 26,000/- per month as revised with effect from 1-1-1996, and hence appointment to this post should be in accordance with Rule 3(2-A) of these Rules. Rule 3(2-A) reads:

"Appointment to the selection grade and posts carrying pay above the timescale of pay in the Indian Police Service shall be made by selection on merit with due regard to seniority".

4. Specific case pleaded by respondent 1 in his application was that the post of the Director of CBI is a post under the Government of India and only the IPS Officers of various cadres who are found fit and put on the panel of Government of India are eligible for consideration. It was further stated therein that IPS Officers of and above the grade of DIG of Police are put on such panel by selection on merit with due regard to seniority according to the prescribed procedure once in every year. Empanelling of DIGP and Inspectors General of Police ("IGP, for short) is done by the Central Police Establishment Board under the Union Ministry of Home Affairs, and that of Director General of Police CDGP", for short) and the Additional DGP is done by the Cabinet Secretariat. IPS Officers are selected from these panels and appointed to various posts under the Government of India as and when vacancies arise.

5. It was further averred that respondent 1 had learnt and which he believed to be true that he had been selected as per prescribed procedure and put in the panel of DGP (Central), respondent 7 was not put in the panel of DGP (Central) in the year 1997. In the month of February 1997, respondent 1 was asked by the then Prime Minister of India Sri H.D. Devegowda, whether he was willing to go on deputation to the Government of India to serve as Director, CBI as there was a proposal to change the then Director, Sri Joginder Singh. Respondent 1 was DGP, Corps of Detectives, Training, Special Units and Economic Offences in Bangalore at that time. On expressing his willingness for this assignment, the Government

of India reportedly asked the Government of Karnataka whether it was willing to spare the services of respondent 1. State of Karnataka reportedly agreed to the proposal. Before respondent 1 could be appointed as the Director, CBI, Congress (I) withdrew support to the Government of Sri H.D. Devegowda and Sri I.K. Gujral became the Prime Minister of India. Sri R.C. Sharma who was junior to respondent 1 was appointed as the Director, CBI. Sri Sharma retired from service on 31st of January, 1998.

6. Meanwhile Supreme Court of India pronounced the judgment in Vineet Narain's case, supra, on 18th of December, 1997. Pending appointment of the Central Vigilance Commissioner (for short, "the CVC"), the CBI Director's post which fell vacant, could not be filled up.

7. Respondent 1 sent a detailed letter on 1st of March, 1998 to the Union of India and CVC requesting for considering him for appointment to the post of CBI Director. On 26th of August, 1998, Union of India promulgated an ordinance providing for the appointment of the CVC. On 1st of September, 1998 Sri N. Vittal, an IAS Officer (retired) on 1960 batch was appointed as the CVC. He took charge of his office on 3rd of September, 1998. On 31st of October, 1998 Sri Vittal told "Star News" that the committee consisting of himself, Secretary, Department of Personnel and Secretary, Ministry of Home Affairs, met and prepared a panel of names of three IPS Officers for the post of Director, CBI and sent it to the Union of India. Respondent 1 had learnt and which he believed to be true that the said three names were as follows in the order of merit:

Sriyuths:

1. C. Dinakar(1963);
2. R.K. Raghavan (1963);
3. Trinath Mishra.

8. It was then submitted that the Intelligence Bureau gave an incorrect adverse report about respondent 1 and the ACC acting on the report of the Intelligence Bureau denied the post of Director of CBI to respondent 1. On the basis of the above facts and grounds challenge was laid to the appointment of respondent 7. That respondent 1 had better merit than respondent 7. He had been awarded Meritorious Medal and Presidential Medal, whereas respondent 7 had been awarded Meritorious Medal only, That Sri R.K. Raghavan, had connection with the political leaders and in particular Ms. Jayalalitha, then C.M. of Tamil Nadu. Ms. Jayalalitha was not made a party respondent.

9. Union of India filed its statement of objection to the aforesaid application, in the counter-affidavit it was pointed out that the statements made by respondent 1 (paragraphs 4,5 and 4.19) with regard to the empanelment of respondent 1 as well as the fact that he was in the panel of three names recommended by the CBI Selection Board to the ACC was factually erroneous, and therefore, the whole basis of the application was on an incorrect factual premise. It was pointed

out that the respondent 1 was considered by the concerned selection committee for inclusion in the panel of DGP at the Centre twice, the first time in 1996 and again in 1998, but on both the occasions the committee did not recommend his name for inclusion in the panel for holding DG level post at the Centre. The requirement of empanelment was pointed out with reference to the Central Bureau of Investigation (Senior Police Post) Recruitment Rules, 1996 (for short, "the 1996 Rules").

10. Reference was also made to the direction given by the Supreme Court with regard to the selection process for appointment of the Director, CBI and the consequential Office Memorandum issued by the Central Government dated 20-5-1998 wherein the procedure for selection was laid down consistent with the observations of the Supreme Court in Vineet Narain's case, *supra*. It was then stated in paragraph 5 of the preliminary submissions that with regard to the present appointment, the CBI Selection Board met on 11-11-1998, under the Chairmanship of the Central Vigilance Commissioner and that the ACRs and the service profiles of 33 IPS Officers belonging to the 1962, 1963, 1964 and 1965 batches and empanelled to hold the post of Director General of Police under the Central Government were considered. It was further stated that respondent 7 had been empanelled as DGP (Central) and considered for the post of Director, CBI along with other empanelled officers. Respondent 1 was not considered as he had not been empanelled as DGP (Central). The ACRs and service profiles of the officers were assessed on the basis of their seniority, integrity and their experience in investigation and anti-corruption work. A panel of three names indicated in the descending order of preference was prepared. The panel included the name of respondent 7. The aforesaid panel of names were thereafter sent to the ACC for its consideration and orders. ACC selected respondent 7 for the post of Director, CBI and consequential orders thereafter were issued. Respondent 7 took over as Director of CBI on 31st of December, 1998. In view of the above submission inter alia it was submitted that the application filed by respondent 1 was without merit and liable to be dismissed.

11. In view of the repudiation of the factual averment made by respondent 1 by the Union of India in its counter-statement regarding the empanelment of respondent 1 as DGP, Central under the 1996 Rules and his empanelment by the CBI Selection Board recommending him for the post of Director of CBI, respondent 1 filed Miscellaneous Application No. 147 of 2000 requesting that Sri Devegowda, the then Prime Minister be summoned to give evidence; for a direction to the CVC to produce the proceedings and other relevant records of the meeting of the committee under his Chairmanship held on 31st of October, 1998 and also file an affidavit touching upon this aspect; direct the Union of India, to produce the relevant files about the empanelment to the grade of DGP conducted during the years 1996, 1997 and 1998 and permit respondent 1 to peruse all the records so produced. On the strength of the interview of CVC to "Star News", respondent 1 had pleaded that the names had been prepared by the committee on 31st October, 1998. Sri H.D. Devegowda filed his affidavit. CVC

in his affidavit stated that he had appeared on the "Star TV News" on 30th October, 1998 and not on 31st October, 1998, as suggested by respondent 1; that he had indicated in the above said interview that the OBI selection Board would be meeting the next day, i.e., 31st of October, 1998. CBI Selection Board held its meeting and took some preliminary decision but insofar as the question of recommending the panel for selection for appointment to the post of Director, CBI is concerned, no discussion or decision was taken on that day. The Selection Board held its meeting on 11th of November, 1998 on which date the decision regarding empanelment was taken. CVC specifically denied that he had stated in the interview to the "Star News" that the CBI Selection Board under his Chairmanship held a meeting on 31-10-1998 and recommended a panel of three names for the post of CBI Director to the Government.

12. Though the Union of India had claimed privilege with regard to the proceedings of the meeting, but without prejudice to the claim of privilege, produced the proceedings of the meeting held on 31st of October, 1998 for the perusal of the Tribunal. The news clip of "Star News" was screened before the Tribunal. On perusal of the proceedings of the meeting of the Selection Board held on 31st of October, 1998, the Tribunal concluded that:

"No panel of names was prepared on that date. Those proceedings show that no names were even considered on that date for preparing the panel for the post of Director, CBI".

The Tribunal on 26th of April, 2000 passed an order, operative portion of which reads:

"As the question as to whether any panel was prepared on 31-10-1998 including the applicant's name is of vital importance, as a reading of the entire application would show that the applicant has sought for quashing the appointment of respondent 7 on that basis and as at this stage prima facie, from the proceedings of the meeting of 31-10-1998, we find that no panel at all was prepared on that date, we feel that question will have to be first considered and if the applicant is able to show that the panel was prepared on 31-10-1998 and submitted to the Government then we can consider the prayer of applicant for summoning records pertaining to the panels of DGP from 1996 onwards to investigate whether the applicant had been empanelled as DGP in 1997. As the applicant wants time to make available necessary material, this case is posted to 7-6-2000 for the applicant to place before the Tribunal the necessary material as indicated above. If the applicant is able to make out that a panel was prepared on 31-10-1998 and sent to the Government that the question of getting the relevant records regarding the empanelment as DGP from 1996 will be considered. It is open to the applicant if for any reason, he is unable to place material to show that a panel was prepared and sent on 31-10-1998, to convince the Tribunal, that still the applicant can challenge the appointment of respondent 7 on the basis of the facts and grounds urged in the original application. The question of privilege claimed by the respondents could be considered thereafter if necessary. The

documents are returned to the respondents Counsel".

13. The Tribunal again heard the matter at length on 2nd of November, 2000 and while rejecting the prayers of respondent 1, it observed in paragraph 12 as under:

"Thus in the facts and circumstances of the case, as discussed by us above, we hold that the records pertaining to the empanelment of IPS Officers for the post of DGPS at the Centre are not relevant for determining the issues arising from the main O.A. filed by the applicant which does not question the manner in which the panels of IPS Officers had been prepared for the post of DGPS at the Centre for the relevant years of 1996,1997 and 1998. On the other hand, the main case of the applicant as is explicitly stated in the O.A., is that he was duly empanelled for the post of DGP at the Centre and that he was also included in the panel for the post of Director, CBI, at the meeting of the Selection Board held under the Chairmanship of the Central Vigilance Commissioner on 31-10-1998. Since we have satisfied ourselves that the applicant was not at all empanelled for the post of DGP at the Centre and further that he was not at all empanelled for the post of Director, CBI, by the Selection Board at the meeting held on 31-10-1998, where similarly no other officer was empanelled either, we do not consider it necessary or proper to make the records available to the applicant pertaining to the preparation of the panels of IPS Officers for the post of DGP at the Centre for the years 1996,1997 and 1998. In our considered view, there can be no requirement, applying the principles of natural justice in the special facts and circumstances of the present case, as discussed by us above, for the Tribunal to make available to the applicant the records pertaining to the empanelment of IPS Officers as DGPS at the Centre for the years 1996,1997 and 1998".

14. In view of the above facts and the orders passed by the Tribunal nothing survived in the application. Respondent 1 was not empanelled as DGP at the Centre and, thus, there was no question of his name being on the panel prepared for the post of Director, CBI. Supreme Court in *Sarabjit Singh Vs. Ex. Major B.D. Gupta and Others*, , has held that an employee has a fundamental right to be considered for promotion only if he falls within the zone of consideration. The applicant could have a right to be considered for the post of Director, CBI post only if he had been empanelled as DG at the Centre. Scope of the application filed by respondent 1 was limited. Respondent 1 had not challenged his non-empanelment to the post of DGP, Central. Empanelment for the DG level post is done by a High Powered committee which is constituted pursuant to Government Order dated 19th February, 1993 and which consists of Cabinet Secretary, Principal Secretary to Prime Minister, Home Secretary, Secretary (Personnel) and Director, Intelligence Bureau. The empanelment is a pure and simple selection process where full autonomy has to be given to filter the best possible talent for such a sensitive post. Respondent 1 was considered twice, once in 1996, again in 1998 by the High Power committee for empanelment. Respondent 1 was not found fit. All these facts are noticed by the Tribunal in its two orders dated 26th

April, 2000 and 2nd of November, 2000,

15. Respondent 1 who had appeared in person then argued before the Tribunal that the procedure for empanelment of DGP (Centre) and Selection of Director of CBI from the panel of DGP (Centre) was against the law laid down by the Supreme Court under Articles 141 and 142 in Vineet Narain's case, supra. Tribunal accepted this contention and held that the law laid down by the Supreme Court under Articles 141 and 142 is required to be given effect to implicitly by all authorities in the country which doubtlessly included all official respondents in the O.A. It was observed:

"It should be utterly pointless, in our considered view, to reiterate the totally unexceptionable and well-established position that when the law governing a matter is laid down by the Hon''ble Supreme Court by invoking specifically the constitutional provisions of Articles 141 and 142 thereof, the said law is required to be given effect to implicitly by all authorities in the country which doubtless include all the official respondents in the present O.A. Unless the Hon''ble Supreme Court make an exception in particular, all other executive instructions and rules must, by definition, be deemed to have been set aside as far as the latter seek to regulate or govern the same or similar matter /matters".

(emphasis supplied)

It was held that limiting the consideration of the Selection Board (Committee), constituted by the Supreme Court, to only those IPS Officers who were first empanelled as DGPS at the Centre was unwarranted. It was observed that the very question of what should be the procedure for selection of an IPS Officer as the Director, CBI and, which committee should undertake that selection, and applying what criteria were precisely the questions which were decided by the Supreme Court in Vineet Narain's case, supra. Deviation from the procedure laid down by the Supreme Court could not be accepted. The matter was concluded by the Tribunal by observing thus:

"24. The result of the discussion made by us above is that the procedure followed by the CBI Selection Board which resulted in inclusion of the name of the 7th respondent in the panel comprising 3 names, based only on the consideration of the list of IPS Officers who have already been empanelled for the post of DGPS at the Centre, and communicated the Board as such by the Home Ministry, and not extending their consideration to all IPS Officers of a certain seniority, including the applicant, is directly violative of the rule laid down by the Hon''ble Supreme Court in this behalf.

26. The action of the CBI Selection Board in the present case, which has ultimately resulted in the appointment of the 7th respondent, while in the process not considering the case of the applicant at all can only be held as unsustainable in the circumstances and in the light of the law laid down by the Apex Court discussed by us in detail above. We have, therefore, no hesitation in quashing the appointment of the 7th respondent as the Director, Central Bureau

of Investigation, under the order of the Government of India dated 31-12-1998. We do so accordingly".

16. The only question which requires to be determined in this writ petition is whether the statutory rules and the executive instructions issued by the Government of India from time to time would be deemed to have been set aside by the Supreme Court in Vineet Narain's case, supra? If not, what is its effect?

17. To appreciate what was laid down by the Supreme Court in Vineet Narain's case, supra, it would be useful and relevant to refer to a few facts in the said case on the basis of which the directions were issued by the Supreme Court which fall for interpretation in the present case. On 25th of March, 1991, one Ashfak Hussain Lone, alleged to be an official of the terrorist organisation, Hizbul Mujahideen, was arrested in Delhi. Consequent upon his interrogation, raids were conducted by the Central Bureau of Investigation (CBI) on the premises of Surender Ku-mar Jain, his brothers, relations and businesses. Along with Indian and foreign currency, the CBI seized two diaries and two notebooks from the premises. They contained detailed accounts of vast payments made to persons identified only by initials. The initials corresponded to the initials of various high ranking politicians, in power and out of power, and of high ranking bureaucrats. As nothing was done in the matter of investigating the Jains or the contents of their diaries, Vineet Narain filed a public interest litigation in the Supreme Court, alleging therein that the Government agencies like the CBI and the revenue authorities had failed to perform their duties and legal obligations inasmuch as they had failed to investigate matters arising out of the seizure of the "Jain diaries". That the apprehension of terrorists had led to the discovery of financial support to them by clandestine and illegal means using tainted funds obtained through "havala" transactions; that this had also disclosed a nexus between politicians, bureaucrats and criminals, who were recipients of money from unlawful sources, given for unlawful consideration; that the CBI and other Government agencies had failed to investigate the matter and take it to its logical conclusion and prosecute all persons who were found to have committed an offence. This was done with a view to protect the persons involved, who were very influential and powerful; that the matter disclosed a nexus between crime and corruption at high places in public life and it posed a serious threat to the integrity, security and economy of the nation; that probity in public life, the rule of law and the preservation of democracy required that the Government agencies be compelled to duly perform their legal obligations and to proceed in accordance with law against every person involved irrespective of where he was placed in the political hierarchy. On the pleadings of the parties the Supreme Court formulated two points:

- (i) The first related to the investigation in the matter of "Jain diaries";
- (ii) The second related to the manner in which the investigation of offences of a similar nature that may occur hereafter should be conducted.

We are concerned with the second point.

18. Supreme Court drew the history of the CBI, how it came to be found etc. Relying upon the following observation of Lord Denning in *R. v Metropolitan Police Commissioner* :

"A question may be raised as to the machinery by which he could be compelled to do his duty. On principle, it seems to me that once a duty exists, there should be a means of enforcing it. This duty can be enforced. I think, either by action at the suit of the Attorney General; or by the prerogative order of mandamus".

It was held:

"There can hardly be any doubt that the obligation of the police in our constitutional scheme is no less".

The Court examined the powers of the Supreme Court as to what directions could be given. Relying upon the judgment in *Vtskaka and Ors. v State of Rajasthan and Ors.* , it was observed in paragraphs 56 and 57:

"As pointed out in *Vishaka*'s case, *supra*, it is the duty of the executive to fill the vacuum by executive orders because its field is coterminous with that of the legislature, and if there is inaction even by the executive, for whatever reason, the judiciary must step in, in exercise of its constitutional obligations under the aforesaid provisions to provide a solution till such time as the legislature acts to perform its role by enacting proper legislation to cover the field.

57. On this basis, we now proceed to give the directions enumerated hereafter for rigid compliance till such time as the legislature steps in to substitute them by proper legislation. These directions made under Article 32 read with Article 142 to implement the rule of law wherein the concept of equality enshrined in Article 14 is embedded, have the force of law under Article 141 and by virtue of Article 144, it is the duty of all authorities, civil and judicial, in the territory of India to act in the aid of this Court. In the issuance of these directions, we have accepted and are reiterating as far as possible the recommendations made by the IRC".

19. Final directions in this regard were given in paragraph 63. Direction given to fill up the post of the Director, CBI is Direction No. 6. The other directions are: the Director of CBI should have minimum of 2 years, his transfers, freedom to allocate etc., with which we are not concerned. Paragraph 6 reads:

"Recommendations for appointment of the Director, CBI shall be made by a committee headed by the Central Vigilance Commissioner with the Home Secretary and Secretary (Personnel) as members. The view of the incumbent Director shall be considered by the committee for making the best choice. The committee shall draw up a panel of IPS Officers on the basis of their seniority, integrity, experience in investigation and anti-corruption work. The final selection shall be made by the Appointments committee of the Cabinet (ACC) from the

panel recommended by the Selection Committee. If none among the panel is found suitable, the reasons thereof shall be recorded and the committee asked to draw up a fresh panel".

In terms of the directions issued by the Supreme Court, the Government of India issued an Office Memorandum No. 202/8/98-AVD.IIA), dated 20th of May, 1998. After reproducing the directions issued by the Supreme Court, in paragraph 1, the memorandum lays down the procedure to constitute a committee to be called the CBI Selection Board, with its composition, functions and procedure. Paragraph 2 of the said memorandum reads:

"2. It has been decided by the Government to accept the above recommendations. Accordingly, it is proposed to constitute a committee to be called the CBI Selection Board with its composition/functions and procedure as follows.-

A. Composition of CBI Selection Board

Central Vigilance Commissioner - Chairperson;

Home Secretary - Member;

Secretary (Personnel) - Member.

The incumbent Director shall be a permanent special invitee for meetings of the Board. He shall be consulted in all matters except in cases where extension or curtailment of his tenure is under consideration of the Board.

The Joint Secretary/Additional Secretary in the Department of Personnel and Training in charge of the administrative matters of the CBI shall be the Secretary of the Board.

B. Functions

(i) Making recommendations regarding selection on deputation, extension of tenure and premature transfer from the organisation of personnel of the rank of Joint Director and above in the CBI.

C. Procedure

(i) The Board shall draw up a panel of IPS Officers on the basis of their seniority, integrity, experience in investigation and anti-corruption work, for appointment as Director/Special Director/Additional Director/Joint Director in the CBI. Incumbent Director shall be consulted in the matter of suggesting a list of suitable personnel for the preparation of the panel by the Selection Board. The consideration of suitable personnel by the Selection Board would not be restricted by the list suggested by the incumbent Director.

(ii) The Selection Board shall suggest a panel of 3 names in descending order of preference for consideration by the ACC. In the event of none among the panel being found suitable by the ACC, the Board shall draw up a fresh panel, keeping

in view the reasons recorded by the ACC for non-acceptance of the first panel.

(iii) The decision of the Selection Board about extension or curtailment of tenure of incumbent personnel below the level of Joint Director shall be acted upon without reference to the ACC.

(iv) Insofar as personnel of the rank of Joint Director and above are concerned, the recommendation made by the Selection Board regarding extension of curtailment of the tenure shall be placed before the ACC for decision".

20. Another fact which requires to be highlighted, and which would have a direct bearing on the present case is, the procedure adopted for making appointments of IPS Officers at the Centre, to man the Central agencies. Prime Minister on 19th of February, 1993 constituted the Selection Committees for considering the senior level appointments of IPS Officers at the Centre. The Letter dated 19th of February, 1993 reads:

"The Prime Minister has approved the constitution of the following Selection Committees for considering senior level appointments of IPS Officers at the Centre.-

(1) For the posts in the scale of Rs. 7300-7600 (instead of Central Police Establishment Board):

Cabinet Secretary;

Home Secretary;

Secretary (Personnel);

Director, Intelligence Bureau;

E.O. to be Secretary to the Committee.

(2) For the posts in the scale of Rs. 8.000/- (fixed):

Cabinet Secretary;

Principal Secretary to P.M.;

Home Secretary;

Secretary (Personnel).

Sd/- (Mata Prasad) Establishment Officer and Additional Secretary to the Government of India".

21. President of India in exercise of powers conferred by proviso to Article 309 of the Constitution and in supersession of the Central Bureau of Investigation (Senior Police Posts) Recruitment Rules, 1975, framed the rules called Central Bureau of Investigation (Senior Police Posts) Recruitment Rules, 1996, (for short, "the 1996 Rules"). Rules were to come into force from the date of the publication in the Official Gazette and the same were published in the Gazette on 31st of

January, 1997. The rules were made applicable to posts specified in Column 1 of the Schedule annexed to the Rules. Method of recruitment to the said post, age limit, qualification and other matters relating thereto were specified in Columns 5 to 14 of the Schedule. Method of recruitment to the post of Director, CBI is given in Column 12 of the Schedule. The same reads as under:

"Transfer on deputation. Officers of Indian Police Service who have been approved for appointment as Director General of Police under the Government of India.

Note.--Deputation shall be regulated in terms of IPS tenure".

22. The proved case of the parties is that neither respondent 1 was selected as DGP (Central) nor was he recommended by the CBI Selection Board, for the post of Director, CBI to the ACC. He was considered for empanelment to the post of DGP (Central) twice, the first time in 1996 and again in 1998, but on both the occasions, the committee did not recommend his name for inclusion in the panel for holding DG level post at the Centre. Case pleaded by respondent 1 was that since the post of Director, CBI was under the Government of India, only IPS Officers of various cadres were found fit and put on the panel of DGP (Central) were eligible for consideration. Once it is found that respondent 1 did not fall in the zone of consideration, the question of his being considered for the post of Director, CBI did not arise. Procedure for selection of DGP, Central was not under challenge. Submission of respondent 1 that his non-placement as DGP, Central was bad for lack of transparency in the procedure could not be accepted. Letter dated 19th of February, 1993 constituting the Selection committee for considering senior level appointments of IPS Officers at the Centre had also not been questioned.

23. In Vineet Narain's case, supra, as well procedure for selection of DGP, Central or that of Director of CBI from amongst the DGPS empanelled for Central posting was not questioned. 1996 Rules prescribing the method of limiting the zone of consideration of recruitment and classification from amongst the DGP (Central) for the post of Director, CBI, was also not under challenge. It seems that 1996 Rules were not even brought to the notice of the Supreme Court in Vineet Narain's case, supra.

24. Vineet Narain's case, supra, proceeds on the assumption that there were no rules on the subject. It was observed on this assumption that since the executive whose duty it was to fill the vacuum by executive orders; its field being coterminous with the legislature had also failed to do so, for whatever reason, the judiciary must step in exercise of its constitutional obligation under Articles 141 and 142 to provide a solution till such time as the legislature acts or performs its role by enacting proper legislation to cover the field. Supreme Court directed that the recommendation for appointment of Director of CBI, shall be made by a committee headed by CVC with the Home Secretary, Secretary (Personnel) as members. Further direction was that the view of the incumbent

Director shall be taken into consideration by the committee for making the best choice. The committee shall draw up a panel of IPS Officers on the basis of their seniority, integrity, experience in investigation and anti-corruption work. The final selection was left to be made by the Appointments committee of the Cabinet from the panel of names recommended by the CBI Selection Board. This direction of the Supreme Court cannot be understood to mean that the Rules of 1996, or the executive instructions, would be deemed to have been set aside by the Supreme Court in Vineet Narain's case, *supra*, as observed by the Tribunal. At best it could only mean that the committee constituted to select the senior level police officers for the posts in the scale of Rs. 8,000/-(fixed) (in which category the post of Director of CBI falls), under the letter dated 19-2-1993 which consisted of Cabinet Secretary, Home Secretary, Secretary (Personnel), insofar as the selection for the post of Director, CBI was concerned, was replaced by a committee headed by a Central Vigilance Commissioner with Home Secretary and the Secretary (Personnel) as members. Restricting the zone of consideration to DGPS (Central) for the post of Director, CBI, was neither adverted to nor commented upon by the Supreme Court in Vineet Narain's case, *supra*. Otherwise also a careful reading of the direction of the Supreme Court would also suggest that the committee was constituted for drawing up the panel of IPS Officers for the post of Director, CBI on the basis of their seniority coupled with the other factors like integrity, experience in investigation and anti-corruption work. This could not mean to read that Director, CBI has to be selected from amongst the IPS Officers on the basis of their All India Seniority as has been held by the Tribunal. The directions of the Supreme Court in Vineet Narain's case, *supra*, regulating the appointment of the CBI Director is to be construed as being limited to the subsequent stage of selection from amongst the IPS Officers, who have already been empanelled for the post of DGP at the Centre by the concerned Selection Committee. The direction of the Supreme Court was to provide a process of selection of CBI Director with a view to insulate the sensitive post from political interference. It was not and could not have been the intention of the Supreme Court to impliedly set at naught the statutory rules framed under Article 309 of the Constitution and that too, without advertent to the same. The direction of the Supreme Court could be read as to provide for an additional step of filtration in the form of CBI Selection Board chaired by CVC i.e., in between the statutory procedure of empanelment of DGP and selection by ACC. Central Government has a number of organisations which are required to be manned and headed by IPS Officers and the persons empanelled for DGP, Central are very senior officers of the IPS Cadre. The suggestion that the committee was to draw up a panel for the post of Director of CBI from amongst the IPS Officers on the basis of their All India Seniority cannot be accepted.

25. Respondent 1 had challenged the appointment of Sri R.K. Raghavan on the premise that respondent 1 was empanelled as DGP at the Centre and also in the panel of three names prepared by the CBI Selection Board and that respondent 1 was denied the appointment to the post of Director, CBI due to extraneous

reasons. His contention was not that the procedure was no longer followed in view of the decision of the Supreme Court in Vineet Narain's case, supra. The Tribunal failed to appreciate that the material on record established that the declaration made on affidavit by respondent 1 was proved to be false and the entire case on the basis of the so-called empanelment and the consideration of respondent 1 for the post of Director of CBI was totally devoid of any substance. Positive case pleaded by the Union of India before the Tribunal was that under 1996 Rules the grade from which promotion, deputation, transfer to the post of Director, CBI is to be made is from officers of IPS who have been approved for appointment as DGP under Government of India. The Tribunal has not even referred to these rules while holding that the decision in Vineet Narain's case, supra, would be deemed to have been set aside the executive instructions or rules to the contrary.

26. The 1996 Rules framed under Article 309 of the Constitution could not be held to have become invalid because of the decision in Vineet Narain's case, supra, because the 1996 Rules were neither referred to in that decision nor was there any challenge to their validity. The Supreme Court decision cannot be understood as having set aside or quashed the order without any argument or challenge. Neither has the Supreme Court specifically declared the rules as invalid. The statutory rules did not conflict with any of the directions or guidelines laid down by the Apex Court in Vineet Narain's case, supra. On the other hand prior to Vineet Narain's case, supra, the process of empanelment as DGP at the Centre and thereafter selection by ACC was the only procedure for selection of the CBI Director. The direction of the Supreme Court was only to lay down an additional selection process in-between the procedure for empanelment and selection by ACC.

27. The decision of the Supreme Court was implemented by the Government of India by adopting the procedure laid down therein vide O.M. dated 20th of May, 1998. Apart from the guidelines laid down by the Apex Court it was provided in paragraph 2-D of the office memorandum as under:

"D. General.-

This Selection Board shall make recommendations/decide matters strictly in accordance with the relevant rules, policy and guidelines having a bearing on the matter concerned. Recommendations regarding deviations from established policy, practices and guidelines require to be specifically brought to the notice of the ACC, giving reasons therefore. The decisions of the CBI Selection Board which involve relaxation of relevant rules, policy and guidelines shall be only recommendatory".

To me it seems unconceivable that a person not found fit for being empanelled as Director General of Police at the Centre, as in the case of respondent 1 should be considered for being appointed to the relatively more sensitive and important post of Director, CBI. This would be totally irrational.

28. Tribunal has totally misread the judgment in Vineet Narain's case, supra. Tribunal has proceeded on the unwarranted assumption that the direction of the Supreme Court in Vineet Narain's case, supra, have the effect of setting aside the statutory rules which have been consistently followed for the purpose of determining the eligibility of the candidates to be considered for the post of Director, CBI. Vineet Narain's judgment, supra, lays down the procedure for selecting the most suitable candidate from those who are eligible but lays down no procedure for determining the zone of consideration. That is left undisturbed in Vineet Narain's case, supra.

29. Supreme Court in a Constitution Bench judgment in Ranchhoddas Atmaram Vs. The Union of India (UOI), , held that where the question was never required to be decided by the Court then any passing reference on that point could not be treated to be a decision on that point. To appreciate as to what has been held in M/s. Ranchhoddas case, supra, a few facts relevant to the controversy leading to the above observation of the Supreme Court are:

The petitioners and appellants in the said cases were found by the Customs authorities, in the proceedings under the Sea Customs Act, 1978, to have imported goods in breach of Section 19 of that Act. The petitioner had without authority imported gold of the value of Rs. 25,000/- and the appellant, steel pipes of the value of Rs. 1,28,182. The Customs authorities by independent orders, imposed a penalty of Rs. 5,000/- on the petitioner and of Rs. 25,630/- on the appellant for those offences under Item No. 8 of the Schedule to Section 167 of the Act. A contention was raised on behalf of the petitioner and the appellant that the orders of the Customs authorities were invalid as they imposed penalties in excess of Rs. 1000/-. It was contended that the maximum penalty that could be imposed under Item No. 8 in Section 167 is Rs. 1,000A. This contention was based on two grounds, (i) it had been so held by the Supreme Court in Maqbool Hussain Vs. The State of Bombay, , Babulal Amthlal Mehta Vs. The Collector of Customs, Calcutta, and in F.N. Roy Vs. Collector of Customs, Calcutta, ; and (ii) that on a proper construction, Item No. 8 in Section 167 does not permit the imposition of penalty in excess of Rs. 1,000/-.

30. Supreme Court after referring to the facts in each of the cases cited before it, concluded that although the Court in earlier cases had held that the Customs Officers under Item No. 8 u/s 167 were invested with the power of adjudging confiscation, increased rates of duty or penalty but the question as to what could be the maximum penalty imposable under Item 8 in Section 167 had not arisen before the Supreme Court. The observations were made in a different context and were not intended to decide that the provision did not permit the imposition of higher penalty, regarding which no question had then arisen. That the judgment of the Supreme Court in Maqbool Hussain's Sain's case, supra, was not based on the question of imposing the maximum penalty which the Customs authority could impose. It was just an assumption by the Judges in Maqbool Hussain's case, supra, that the maximum penalty which could be imposed under

Item No. 8 in Section 167 was Rs. 1,000/-. The question was neither argued nor discussed in the judgment at all. The High Courts had followed the judgments and had held that a maximum penalty permissible under Item No. 8 in Section 167 was Rs. 1,000/-. Overruling the judgment of the High Court, it was held:

"The fact is that the question was never required to be decided in any of these cases and could not, therefore, have been, or be treated as, decided by this Court".

In other words, the Supreme Court held that once the question had not arisen before the Court, nor was the Court required to decide the same, then it could not be taken to have been decided by the Court. In Vineet Narain's case, *supra*, as well, it would be seen that the point regarding the validity or otherwise of 1996 Rules was not in question before the Supreme Court. It was neither raised nor decided. In the circumstances, we are of the view that Tribunal has erred in observing that 1996 Rules would be deemed to have been set aside in Vineet Narain's case, *supra*.

31. As stated in the earlier paragraph case pleaded by respondent 1 in his application before the Tribunal that he has been duly empanelled as DGP, Central putting him in the zone of consideration for the post of Director, CBI. His further case was that the CBI Selection Board constituted in compliance with the direction issued by the Supreme Court in Vineet Narain's case, *supra*, had put him in the panel and submitted the same for consideration of the ACC. That Sri R.K. Raghavan, who was less meritorious than respondent 1 was selected due to extraneous considerations. Tribunal returned the finding that he had neither been empanelled as DGP, Central nor was he put in the panel by the CBI Selection Board for the consideration of the ACC. On these findings respondent 1 turned around and challenged the process of DGP, Central and the selection by the CBI Selection Board for empanelling the officers for the consideration of the ACC. This was clearly beyond his pleadings. Tribunal accepted this contention which was beyond the pleadings and made out a new case entirely which had not been set out in the pleadings. It is not open to the Court to decide a question which did not form part of the pleadings and at which the parties are not at variance. Submission of respondent 1 that procedure followed in selection of CBI Director was not fair and proper or that it was not legal and in accordance with law cannot be accepted.

32. The view taken by the Tribunal is contrary and inconsistent to the pleadings of the parties. The argument raised by respondent 1 which was contrary and inconsistent with the pleadings set out in the application, is against the rules of equity and good conscience and prevent him from using it against his opponents. As observed by Chief Justice Garth in *Ganges Manufacturing Company and Ors. v. Soitnijmull*, it would be against the rules of equity and good conscience and it would operate as estoppel on a party. These findings were approved by the Supreme Court in *Union of India and Others v M/s. Anglo Afghan Agencies*. It was observed in paragraph (21):

"(21) In *Ahmad Yar Khan v Secretary of State*, the plaintiffs claimed title to a canal supplied with water from the Sutlej having been constructed at great expense by their predecessors for purposes of irrigation with the sanction and encouragement of the Government, partly on Government lands and partly on the lands of private owners under arrangements with them. It was held that the plaintiffs became proprietors of the canal and entitled to have the waters of Sutlej admitted into it so long as it was used for the purpose for which it was originally designed. Similarly in *Ganges Manufacturing Company's case*, supra, Garth, C.J. observed that a man may be estopped not only from giving particular evidence, but from doing any act or relying upon any particular argument or ? contention, which the rules of equity and good conscience prevent him from using as against his opponent".

(emphasis supplied)

33. Supreme Court in *Union of India Vs. E.I.D. Parry (India) Ltd.*, , held that it is not open to the Court to decide the question which did not form part of the pleadings or in respect of which the parties were not at variance and which was not the subject-matter of an issue. Paragraph 4 of the judgment reads as under:

"The suit was filed for the recovery of excess demurrage allegedly charged by the appellant from the respondent. The claim depended upon the Goods Tariff Rules, specially the rule quoted above, which authorises the respondent to claim damages in respect of the entire block of wagons supplied to a party which does not empty those wagons at the siding within the time permitted for that purpose. There was no pleading that the rule upon which the reliance was placed by the respondent was ultra vires the Railways Act, 1890. In the absence of the pleading to that effect, the Trial Court did not frame any issue on that question. The High Court of its own proceeded to consider the validity of the rule and ultimately held that it was not in consonance with the relevant provisions of the Railways Act, 1890 and consequently held that it was ultra vires. This view is contrary to the settled law that a question, which did not form part of the pleadings or in respect of which the parties were not at variance and which was not the subject-matter of any issue, could not be decided by the Court. The scope of the suit was limited. The pleadings comprising of the averments set out in the plaint and the defence put up by the present appellant in their written statement did not relate to the validity of the rule struck down by the High Court. The High Court, therefore, travelled beyond the pleadings in declaring the rule to be ultra vires. The judgment of the High Court, therefore, on this question cannot be sustained".

Accordingly it is held that it was neither open to respondent 1 to raise a plea contrary to or inconsistent with his pleadings nor was it open to the Tribunal to adjudicate on a point which was neither pleaded nor was the subject-matter of dispute.

34. Respondent 1 strenuously argued that the Tribunal was not bound by the

strict rules of pleadings, procedure laid down in the Code of Civil Procedure. For this he referred to Section 22 of the Administrative Tribunals Act which provides that the Tribunal is not bound by the procedure laid down in the Code of Civil Procedure, of the other Act and Rules provided therein. Even if the foundation of fact is not laid down in the pleadings before the Tribunal, regarding the procedure followed in the appointment of Director of CBI, the Tribunal could go into this question as it was open to it to formulate, its own procedure. I am not impressed by this argument. No doubt, the Tribunal for expeditious disposal of the case, could evolve its own procedure, but that does not mean that the Tribunal can adjudicate a point which is not the subject-matter of the dispute or record a finding on a question of fact or law for which the foundation of facts had not been laid by the parties.

35. Invoking the principle of sub-silentio, Sri Soli J. Sorabjee, Attorney General appearing for the petitioners argued that the directions issued by the Supreme Court in Vineet Narain's case, *supra*, did not by implication set aside the Rules of 1996, but in case it is taken to be so as observed by Tribunal then the same would be hit by the principle of sub-silentio. For this he placed reliance upon the judgment of the Supreme Court in *State of Uttar Pradesh and Another v Synthetics and Chemicals Limited and Anr.* The Supreme Court was examining the competence of the State Legislature with regard to levy of Central excise duty on industrial alcohol and scope of Entry 54 in List II. Allahabad High Court relying upon a Constitution Bench decision of the Supreme Court in *Synthetics and Chemicals Ltd. and Others Vs. State of U.P. and Others*, , declared that the Uttar Pradesh Sales of Motor Spirit, Diesel Oil and Alcohol Taxation (Amendment) Act, 1976 to be null and void in so far as it purported to levy purchase tax on industrial alcohol. Reversing the decision of the High Court it was held that the law declared by the Supreme Court in second *Synthetics and Chemicals Limited's* case, *supra*, could not be taken to be the law declared by the Supreme Court under Article 141 as it was hit by the principle of sub-silentio. The decision which is not expressed and founded on reasons or which did not proceed on consideration of the issue could not be deemed to be a law declared to have a binding effect as contemplated under Article 141. Paragraph 42 of the judgment reads:

"42. Effort was made to support the conclusion, indirectly, by urging that the State having raised same objections by way of review petition and the same having been rejected it amounted impliedly as providing reason for conclusion. Law declared is not that can be culled out but that which is stated as law to be accepted and applied. A conclusion without reference to relevant provision of law is weaker than even casual observation. In the order of Brother Thommen, the extracts from the judgment of the Constitution Bench quoted in extenso demonstrate that the question of validity of levy of sales and purchase tax was neither in issue nor was it raised nor is there any discussion in the judgment except of course the stray argument advanced by the learned Attorney General to the following effect: (SCC page 139, para 43)

"But alcohol not fit for human consumption are not luxuries and as such the State legislatures, according to Attorney General, will have no power to levy tax on such alcohol".

Sales tax or purchase tax under Entry 54 is levied on sale or purchase of goods. It does not contemplate any distinction between luxury and necessity. Luxuries are separately taxable under Entry 62. But that has nothing to do with Entry 54. What prompted this submission is not clear. Neither there was any occasion nor there is any constitutional inhibition or statutory restriction under the legislative entry nor does the taxing statute make any distinction between luxuries and necessities for levying tax. In any case the Bench did not examine it nor did it base its conclusions on it. In absence of any discussion or any argument the order was founded on a mistake of fact and, therefore, it could not be held to be law declared. The Bench further was not apprised of earlier Constitution Bench decisions in *Hoechst Pharmaceuticals Ltd. and Others Vs. State of Bihar and Others*, and *Ganga Sugar Corporation Ltd. and Others Vs. State of Uttar Pradesh and Others*, , which specifically dealt with the legislative competence of levying sales tax in respect of any industry which had been declared to be of public importance. Therefore, the conclusion of law by the Constitution Bench that no sales or purchase tax could be levied on industrial alcohol with utmost respect fell in both the exceptions, namely, rule of sub-silentio and being in per incuriam, to the binding authority of the precedents".

(emphasis supplied)

36. I have held that the Supreme Court in *Vineet Narain's* case, *supra*, neither struck down the Rules of 1996 nor was the intention of the Supreme Court to strike down the rules. The directions of the Supreme Court in *Vineet Narain's* case, *supra*, provided an additional step in process of selection of CBI Director with a view to insulate the sensitive post from political interference. It was not and could not have been the intention of the Supreme Court to impliedly set at naught the statutory rules framed under Article 309 of the Constitution, and that too, without adverting to the same. The judgment of the Supreme Court cannot be read to mean that by implication it has set aside the Rules of 1996. The observations made in *Vineet Narain's* case, *supra*, did not point in that direction. The decision has not expressed nor founded on reasons regarding the validity of 1996 Rules. Therefore it could not be deemed to be the law declared by the Supreme Court on this point. If it is to be taken as impliedly setting aside the Rules of 1996 as observed by the Tribunal, it would be hit by the principle of sub-silentio. Supreme Court in *Vineet Narain's* case, *supra*, was not even made aware of the 1996 Rules. The 1996 Rules were not even adverted to. The decision of the Supreme Court could not be taken to be a declaration of law having binding effect on the validity of 1996 Rules. This finding of ours is in the alternative.

37. Tribunal rejected the contention of respondent 1 that Sri R.K. Raghavan was appointed as Director, CBI, on extraneous consideration. Tribunal did not find any

illegality in the appointment of Director, CBI, except the fact that the exclusion of respondent 1 from consideration, violated the guidelines laid down by the Supreme Court. Sri R.K. Raghavan had been empanelled as DGP, Central. CBI Selection Board after considering the record of 33 IPS Officers from batches 1962 to 1965 who had been empanelled as DGP at the Centre submitted a panel of three names to the ACC for being appointed as Director, CBI. CBI Selection Board had drawn up the panel after due deliberation and after assessing the comparative merit, experience and other relevant criteria while recommending the name of Sri R.K. Raghavan along with two others to ACC for its consideration. It could not be said that there was any arbitrariness or illegality in the selection of Sri R.K. Raghavan. Respondent 1 could not be considered for appointment to the post of Director, CBI as he did not fall within the zone of consideration. Question of his comparative merit vis-a-vis Sri R.K. Raghavan or any other IPS Officer who fell in the zone of consideration did not arise.

38. It has been held in number of judgments by the Supreme Court insofar as comparative merit is concerned the same has to be left to the body making the selection and we may refer to the following:

- (i) Sant Ram Sharma Vs. State of Rajasthan and Another, ;
- (ii) Dalpat Abasaheb Solunke and Others Vs. Dr. B.S. Mahajan and Others, ;
- (iii) Union of India (UOI) and Another Vs. Samar Singh and Others, ;
- (iv) Union of India and Others Vs. Lt. Gen. Rajendra Singh Kadyan and Another,

It has been noticed by the Tribunal in paragraph 23 of its order that the Courts did not enter into the discussion of the relative merits of candidates who have already been assessed by an expert and/or a duly constituted body or authority, and on the relevance of the duly prescribed zone of consideration for preparation of a final select list.

39. Respondent 1 argued before us that he had better merit than Sri R.K. Raghavan. That respondent 1 had received President's Medal as well as Meritorious Medal, whereas Sri R.K. Raghavan received only Meritorious Medal and that he had been adversely commented upon in the Verma Commission headed by the former Chief Justice, Sri J.S. Verma which was constituted as a fact-finding body to go into the facts leading to the murder of Sri Rajiv Gandhi, former Prime Minister of India. He read out the extracts from the report adversely commenting on Sri R.K. Raghavan. That Sri R.K. Raghavan had political connections particularly with Ms. Jayalalitha, who helped him in becoming the Director, CBI. All these points have been negated by the Tribunal. This apart it was brought to our notice by the Attorney General that respondent 1 had extracted only these portions of the Justice Verma Commission Report which were adverse to Sri R.K. Raghavan. At number of places Sri Raghavan had been praised for the good work done by him in the performance of his duty. Attorney General also brought to our notice that the Supreme Court in State through

Superintendent of Police, CBI/SIT Vs. Nalini and Others, which were the appeals filed in Rajiv Gandhi murder case had commended the work done by Sri R.K. Raghavan, then Inspector General of Police who was on duty at the time when Sri Rajiv Gandhi was murdered at Sriperambudur. It was observed in paragraph 639:

"We have also a word of praise for Mr. R.K. Raghavan, who was at the relevant time Inspector General of Police, Forest Cell (CID), Madras and was entrusted with the election arrangements in Chinglepet Range. He was on duty at the time the crime was committed at Sriperumbudur. He immediately realised the gravity of situation. He stayed on at the scene of crime, organised relief and ensured that material evidence was not tampered with. It was he who found the camera (M.O. 1) on the body of Haribabu which provided a breakthrough in the case".

40. Although on the inter se merit between respondent 1 and Sri R.K. Raghavan or their suitability is not being examined by us but still we have put these facts in this order to keep the records straight.

41. This apart respondent 1 had filed W.P. No. 6361 of 2001 which was dismissed by this Court on 19-2-2001. The point regarding inter se merit of respondent 1 vis-a-vis Sri R.K. Raghavan and that Sri R.K. Raghavan was appointed on extraneous consideration was not raised in the said writ petition. These points were available to respondent 1 at the time when he filed W.P. No. 6361 of 2001. These points could and ought to have raised in the earlier writ petition. Since the same was not raised, it would be deemed to have been directly and substantially in issue in the earlier writ petition and hit by the principle of constructive res judicata. Explanation IV to Section 11 of the CPC reads thus:

"Explanation IV.--Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit".

42. The Supreme Court in Forward Construction Co. and Others Vs. Prabhat Mandal (Regd.), Andheri and Others, held that Explanation IV of Section 11 of the CPC is applicable in the writ proceedings as well and a matter which might and ought to have been made the ground for defence for attack in the former case, shall be deemed to have been a matter directly and substantially in issue in such suit. The point not taken earlier would be deemed to have been heard and decided. It was observed in paragraph 20 as under:

"20. So far as the first reason is concerned, the High Court in our opinion was not right in holding that the earlier judgment would not operate as res judicata as one of the grounds taken in the present petition was conspicuous by its absence in the earlier petition. Explanation IV to Section 11 of the CPC provides that any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit shall be deemed to have been a matter directly and substantially in issue in such suit. An adjudication is conclusive and final not

only as to the actual matter determined but as to every other matter which the parties might and ought to have litigated and have had it decided as incidental to or essentially connected with the subject-matter of the litigation and every matter coming within the legitimate purview of the original action both in respect of the matters of claim or defence. The principle underlying Explanation IV is that where the parties have had an opportunity of controverting a matter that should be taken to be the same thing as if the matter had been actually controverted and decided. It is true that where a matter has been constructively in issue it cannot be said to have been actually heard and decided. It could only be deemed to have been heard and decided. The first reason, therefore, has absolutely no force".

43. For the reasons stated above, this petition is accepted. The order of the Tribunal is set aside and is held that the appointment of Sri R.K. Raghavan as Director, CBI was in accordance with the Rules, direction issued by the Supreme Court and the M.O. No. 202/8/98-AVD.II(A), issued by the Government of India in pursuance to the direction issued by the Supreme Court of India in Vineet Narain's case, supra. Parties shall bear their own costs.

ORDER

Chidananda Ullal, J.—After we completed the hearing in the writ petition, we have reserved the matter for judgment. Upon that, my brother Judge had written the draft judgment. He had also circulated the same for my benefit. I have gone through the same in its entirety. I respectfully disagree with the same. Therefore, this dissenting judgment by me.

2. I have gone through the writ papers and the copy of the official memorandum dated 6-4-2000, Central Bureau of Investigation (Senior Police Posts) Recruitment Rules, 1996, interim order dated 19-2-2001 granted earlier by the Division Bench presided over by the Hon'ble Chief Justice, etc., and further the relevant decisions cited by the petitioners on the one side and the contesting respondent 1 on the other.

3. It is not necessary for me to advert to the facts and circumstances of the case, for as I see, that had been very well covered succinctly by my learned brother in his judgment. All the more, I feel it appropriate to set out the reliefs sought for by the respondent 1 before the Central Administrative Tribunal, Bangalore Bench, Bangalore, for short, the "CAT in O.A. No. 1020 of 1999.

4. The reliefs set out in para 8 of the original application read as hereunder:

"Wherefore, the applicant humbly prays that this Hon'ble Tribunal be pleased:

(i) to call for the records leading to the issue of the order dated 31-12-1998 appointing respondent 7 as CBI Director by the Government of India, and on perusal to quash the same as illegal, arbitrary and unjust;

(ii) to direct respondents 1 to 6 to take immediate action for selection and

appointment afresh of CBI Director on the basis of merit as disclosed by the "Confidential Roll" and other legally permissible records as on 31-12-1998;

(iii) to grant such other reliefs as this Hon"ble Court deems fit in the facts and circumstances of the case, including cost of this application".

5. In allowing the original application of the respondent 1, the CAT had quashed the appointment order dated 31-12-1998, appointing the respondent 7 as CBI Director holding that the same was not done in consonance with the direction of the Supreme Court in Vineet Narain and Others Vs. Union of India (UOI) and Another, , inasmuch as the Selection Board of the CBI presided over by the Central Vigilance Commissioner, in brief the "CVC" was out of the 33 IPS Officers already empanelled for appointment as Director General of Police, in brief, "DGP at the Centre" by totally an extraneous and different Committee, the Selection Committee for considering senior level appointments of IPS Officers at the Centre as approved by the Prime Minister, in brief, the Selection committee of the DGP at the Centre is not justified and further directed the respondents- authorities, more particularly the petitioner 1 herein (it was respondent 1 before the CAT), to appoint CBI Director strictly in consonance with the decision of the Supreme Court in Vineet Narain's case, supra. The directions to the respondent 2-CAT are at para 27 of the order and the same reads as hereunder:

"27. We further direct the respondents, particularly the respondent 1, to initiate immediately respondent 2 and thereafter complete the process of selection of an IPS Officer for the post of Director, CBI, Central Bureau of Investigation strictly in accordance with the law laid down in this behalf by the Hon"ble Supreme Court in Writ Petition (Criminal) Nos. 340 to 343 of 1993 i.e., Vineet Narain's case, supra, and as quoted above, these directions shall be carried out by the respondents 1 to 6 in the present original application within a period of 2 months from the date of receipt of a copy of this order. For the purpose of maintaining continuity of adequate control and supervision in a very crucial organisation like the Central Bureau of Investigation in the interregnum, we also consider it necessary to direct that till an incumbent is so appointed, in compliance with the directions given by us, the present incumbent of the post of Director, CBI, may be permitted, if found necessary by the first respondent, the Union of India, to continue to function at that post, subject to other rules and executive directions regulating such continuance. There shall be no order as to costs".

6. In filing the instant writ petition before this Court, the respondents 1 and 2 in the original application before the CAT have challenged the above order dated 8-2-2001 in original application i.e., O.A. No. 1020 of 1999 passed by the CAT. The main grounds of attack in the writ petition being that, the CAT had made out a new case neither pleaded nor argued by the respondent 1, that in view of the findings and conclusions in its orders dated 26-4-2000 and 2-4-2000 on the two miscellaneous applications filed by the respondent 1, the CAT would have consequently rejected the original application of the respondent 1 as a corollary, that the respondent 1 having been not empanelled as DGP at the Centre by the

Selection committee of the DGP at Centre, question of he being considered for the post of Director of CBI by the CBI Selection Board consisting of the CVC, the Secretary, Home, Government of India and Secretary, Department of Personnel, Government of India, as per the directions in Vineet Narain's case, supra, did not arise at all, that the CAT failed to appreciate that the direction of the Apex Court in Vineet Narain's case, supra, regulating the appointment of CBI Director, was only an additional step in the process of selection of CBI Director with a view to further insulate the said sensitive post from political interference, that the Central Bureau of Investigation (Senior Police Posts) Recruitment Rules, 1996, in brief, the "CBI Recruitment Rules, 1996" framed under Article 309 of the Constitution holds the field in the matter of selection and appointment of the CBI Director.

7. It is on the above lines on behalf of the petitioners the learned Attorney General of India had argued his side of the case. On the other side, the respondent 1 had counter-argued that the strict rules of pleadings in the CPC are not applicable and that it is the principle of natural justice which is applicable to the applications before the CAT. That submission he made while taking us through the provisions in Section 22 of the Administrative Tribunals Act, 1985. To sura up his arguments, he had also added that the appointment of the respondent 7 made by the petitioner 1 on 31-12-1998, appointing him as CBI Director was illegal, arbitrary and unjust, inasmuch as, opposed to the law laid down by the Supreme Court in Vineet Narain's case, supra, and he thus justified the impugned order passed by the CAT.

8. According to me, the points that arise for consideration in the writ petition are:

- (i) Whether the statutory rules and the executive instructions issued by the Government of India from time to time deemed to have been set aside by the Supreme Court in Vineet Narain's case, supra, as held by the CAT?
- (ii) Whether the appointment of the respondent 7 as the CBI Director was in consonance with the direction of the Supreme Court in Vineet Narain's case, supra, if not what to follow?

9. I feel it convenient to deal with the above two points in that order.

10. Now I consider the first point.

Point No. (i).--It is relevant in this context to examine the circumstances in which the three Judges Bench of the Supreme Court presided over by the Chief Justice of India in Vineet Narain's case, supra, issued certain directions in the matter of the appointment of the CBI Director. As a matter of fact, the three Judges Bench of the Supreme Court in para 3 of the said judgment stated therein as to what made it to do so. It had been observed therein that the experience revealed that there was need for insulation of the agencies as that of the CBI from any extraneous influence to ensure permanent insulation against extraneous influences to enable the agencies to do their duties for proper implementation of

the rule of law and that the circumstances in the case occasioned to deal with the structure, constitution and the permanent measures necessary for having a fair and impartial agency to ensure the guarantee of the very survival of the democracy of which rule of law is the bedrock.

11. In para 3 of the judgment in Vineet Narain's case, supra, the Supreme Court had observed as hereunder:

"3. This experience revealed to us the need for the insulation of these agencies from any extraneous influence to ensure the continuance of the good work they have commenced. It is this need which has impelled us to examine the structure of these agencies and to consider the necessary steps which would provide permanent insulation to the agencies against extraneous influences to enable them to discharge their duties in the manner required for proper implementation of the rule of law. Permanent measures are necessary to avoid the need of every matter being brought to the Court for taking ad hoc measures to achieve the desired results. This is the occasion for us to deal with the structure, constitution and the permanent measures necessary for having a fair and impartial agency. The faith and commitment to the rule of law exhibited by all concerned in these proceedings in the surest guarantee of the survival of democracy of which rule of law is the bedrock. The basic postulate of the concept of equality: "Be you ever so high, the law is above you", has governed all steps taken by us in these proceedings".

(emphasis supplied)

12. It is also relevant to observe here that in para 54 of the judgment, the Supreme Court had also referred to certain directions in Vishaka and others Vs. State of Rajasthan and Others, , and furthermore, in para 55 thereof, it had observed that it is on the basis of Vineet Narain's case, supra, it had proceeded to give the directions enumerated separately for strict and rigid compliance thereof till such time as the legislature steps in to substitute them by proper legislation. The Supreme Court had also observed further therein that the directions given by it are under Article 32 read with Article 142 to implement the rule of law to uphold the equality concept enshrined in Article 14 of the Constitution.

13. To quote paras 54 and 55 of the judgment in Vineet Narain's case, supra, the same read as hereunder:

"54. As pointed out in Vishaka's case, supra, it is the duty of the executive to fill the vacuum by executive orders because its field is conterminous with that of the legislature, and where there is inaction even by the executive, for whatever reason, the judiciary must step in, in exercise of its constitutional obligations under the aforesaid provisions to provide a solution till such time as the legislature acts to perform its role by enacting proper legislation to cover the field.

55. On this basis, we now proceed to give the directions enumerated hereafter for rigid compliance till such time as the legislature steps in to substitute them by proper legislation. These directions made under Article 32 read with Article 142 to implement the rule of law wherein the concept of equality enshrined in Article 14 is embedded, have the force of law under Article 141 and, by virtue of Article 144, it is the duty of all authorities, civil and judicial, in the territory of India to act in aid of this Court. In the issuance of these directions, we have accepted and are reiterating as far as possible the recommendations made by the IRC".

(emphasis supplied)

14. From the above, it appears to me that the Supreme Court had issued the directions in Vineet Narain's case, supra, to have the force of law under Article 141 assimilating the facts and circumstances in Vishaka's case, supra, vis-a-vis the facts and circumstances in Vineet Narain's case, supra.

15. It would be useful and relevant to give few facts of Vishaka's case, supra, on the basis of which certain guidelines and norms by way of directions that came to be issued by the Supreme Court in that case as preventive steps to be treated as the law declared under Article 141 of the Constitution. The facts and circumstances are as follows:

That, the cause for filing that writ petition was an incident of alleged gang rape of a social worker in a village of Rajasthan. That incident was the subject-matter of a criminal action. The incident reflected the hazards of working women who may be exposed to sexual harassment and the depravity to which sexual harassment can degenerate. That the writ petition in that case came to be filed by certain social activists and NGOs with the sole aim of focussing the attention to the societal aberration and to assist in finding suitable methods for realisation of true concept of gender equality and to prevent sexual harassment of working women in all workplaces through the judicial process to fill in the vacuum in the existing legislation. The Supreme Court in so doing drew support from the view taken in Smt. Nilabati Behera alias Lalita Behera Vs. State of Orissa and others, that "an enforceable right to compensation is not alien to the concept of enforcement of a guaranteed right", as a public law remedy under Article 32, distinct from the private law remedy in torts and that there is no reason why these international conventions and norms cannot, therefore, be used for construing the fundamental rights expressly guaranteed in the Constitution of India which embody the basic concept of gender equality in all spheres of human activity.

16. Finally, in view of the above and in the absence of enacted law to provide for enforcement of basic human right of gender equality and guarantee in sexual harassment and abuse, more particularly at workplaces, the Supreme Court laid down the guidelines and norms for due observation at all workplaces, until a legislation is enacted for the purpose as a preventive measure and the Supreme

Court did that in exercise of the powers available under Article 32 of the Constitution for enforcement of the fundamental rights and had further emphasised that the guidelines issued be treated as the law declared by the Apex Court under Article 141 of the Constitution.

17. From the above it is clear that the Supreme Court having found void in the matter of dealing with the above hazard of sexual harassment stepped, as if into the shoes of the legislature to make the law to tide over the immediate need and requirement of the law pending suitable legislation in that regard by the legislature.

18. As stated above in para 55 of the judgment in Vineet Narain's case, supra, the Supreme Court had distinctly observed that it is on the basis of the decision in Vishaka's case, supra, it had proceeded to give the direction enumerated in para 59 thereof. It looks as if the Supreme Court had observed so in unambiguous terms by assimilating the void and no-law situation as it prevailed in Vishaka's case, supra, vis-a-vis Vineet Narain's case, supra, no matter in fact there existed the CBI Recruitment Rules, 1996, in the matter of appointment of CBI Director, framed under Article 309 of the Constitution and the Notification No. 36(15)-EQ/93 (SM-1), dated 19-2-1993 with regard to constitution of Selection committee for considering senior level appointments of IPS Officers such as DGP at Centre approved by the Prime Minister, copy as at Annexure-E to writ petition.

19. In my considered view, the Supreme Court did mean to say in Vineet Narain's case, supra, that there was no law in the matter of the appointment of the CBI Director in a way the Supreme Court desired that Agency or Authority be appointed - an Agency or Authority free from extraneous influence to enable it to discharge its duties by providing permanent, "the insulation". Had it been otherwise, the Supreme Court would not have assimilated the void situation, as if there was no law to deal with the situation as in Vishaka's case, supra and issued definite directions as it did in para 59 of the judgment. At the cost of repetition it is to be noted in this context that the direction in Vishaka's case, supra, was when there was total void in the matter of legislation, domestic law occupying the field to formulate effective measures, check the evil of sexual harassment of working women at all workplaces, only exception being the International Conventions and the norms on the subject for which the Government of India was a signatory, thus having force of law, for the purpose of interpretation of gender equality- and right to work with human dignity as enshrined in Articles 14, 15, 19(1) and 21 of our Constitution in the matter of safeguards as against sexual harassments.

20. The learned Attorney General for and on behalf of the petitioners, vehemently argued with emphasis that in the direction in Vineet Narain's case, supra, there was an "additional insulation". That he argued, as I understood, to sustain firstly the CBI Recruitment Rules, 1996, secondly the notification dated 19-2-1993 bearing No. 36(15)-EQ/93 (SM-1), copy at Annexure-E to writ

petition, on the subject, constitution of Selection Committees for considering senior level appointments of IPS Officers at the Centre as approved by the Prime Minister, and thirdly, the subsequent Official Memorandum No. 202/8/98-AW2/EK2), dated 20-5-1998 that came to be issued by the Ministry of Personnel, Public Grievances and Pension, Department of Personnel and Training, Government of India (Annexure-R3 to the objection statement by way of counter-affidavit filed by the petitioners and the respondent 4, before the CAT, copy at Annexure-C to writ petition). The official memorandum dated 20-5-1998 referred to above was issued on the subject, constitution of committee for matters related to selection and extension or curtailment of tenure of Joint Directors and above in the CBI, pursuant to the decision in Vineet Narain's case, supra.

21. As it can be seen, the above official memorandum dated 20-5-1998 came to be issued subsequent to the decision in Vineet Narain's case, supra, whereas, the CBI Recruitment Rules, 1996 and the notification dated 19-2-1993, copy at Annexure-E to writ petition referred to above were earlier to it. Since the Supreme Court had issued a direction in Vineet Narain's case, supra, firstly, terming the same as "the insulation" and secondly, on the basis of Vishaka's case, supra, it appears to me that the CBI Recruitment Rules, 1996 and the above referred Annexure-E notification dated 19-2-1993 rendered themselves as redundant, inasmuch as they appeared to be of no relevance in the matter of appointment of the CBI Director on recommendation of the panel of names by the Selection Board of CBI presided over by the CVC. Furthermore, it also appears to me that, even the directions issued in official memorandum dated 20-5-1998, Annexure-R3 to the objection statement before the CAT, insofar as the same related to the guidelines therein as at "D. General" to say that, the Selection Board shall make recommendations/decide matters strictly in accordance with the relevant rules, policy and guidelines having a bearing on the matter concerned and recommendations regarding deviations from established policy, practices and guidelines require to be specifically brought to the notice of the ACC, giving reasons therefore and that the decisions of the CBI Selection Board which involve relaxation of relevant rules, policy and guidelines shall be only recommendatory, has to be taken, as no guidelines by the Department of Personnel and Training of the petitioner 1 and as such is also redundant and of no consequence as the same in my view is in negation and contrary to the direction in Vineet Narain's case, supra; nevertheless, I hold that the other guidelines at serial No. 3 therein to say that, the Administrative Vigilance Division of the Department of Personnel and Training shall provide the necessary administrative support by initiating action at least two months in advance and that the necessary proposals will be submitted by the Secretary of the Board for consideration by the Board, holds good as the same is not in aid and contrary to the directions of the Supreme Court in Vineet Narain's case, supra, in the matter of appointment of CBI Director.

22. That I say for the reason that in para 61 of the judgment in Vineet Narain's case, supra, the Supreme Court had observed that, though it had issued

directions in the case based on the report of the "Independent Review Committee" in brief "IRC" set up by it, its (IRC's) recommendations which are similar to the extent of direction issued by the Supreme Court be read to the extent of the direction issued for a proper appreciation of the directions in the case.

23. It is to be noted here that the IRC came to be constituted by the Supreme Court in the case only to assist itself on the perception of the petitioner 1 that there was need of improving the procedure in the constitution and monitoring the functioning of intelligence agencies including the agency in the CBI, and that exercise could not be delayed further and thus constituted the IRC consisting of (i) B.G. Deshmukh, the former Cabinet Secretary, (ii) N.N. Vohra, Principal Secretary to the Prime Minister, and (iii) Sri S.V. Giri, Central Vigilance Commissioner (Sri N.N. Vohra being the Convenor of the IRC) with definite terms of reference to IRC, more fully set out in para 18 of the judgment in Vineet Narain's case, supra.

24. I feel it appropriate to Quote in this context the said para 18 thereof.

25. The same reads as hereunder;

"18. The same perception of the Government of India led it to constitute another committee by Order No. 226/2/97-AVD-II, dated 8th September, 1997 comprising of Sri B.G. Deshmukh, former Cabinet Secretary, Sri N.N. Vohra, Principal Secretary to the Prime Minister and Sri S.V. Giri, Central Vigilance Commissioner, called the Independent Review committee (IRC). The order reads as under:

"Whereas, the Government of India is of the opinion that it is necessary to set up a committee for going into the matters mentioned hereinafter;

2. Now, therefore, a committee of the following is hereby set up.-

- (i) Sri B.G. Deshmukh, former Cabinet Secretary;
- (ii) Sri N.N. Vohra, Principal Secretary to the Prime Minister;
- (iii) Sri S.V. Giri, Central Vigilance Commissioner. Sri N.N. Vohra shall act as Convenor.

3. The terms of reference of the committee are as under.-

(i) To monitor the functioning of the nodal agency established by the Ministry of Home Affairs in pursuance of the recommendations of the Vohra committee Report.

(ii) To examine the present structure and working of the Central Bureau of Investigation (CBI), the Enforcement Directorate and related agencies to suggest the changes, if any, needed to ensure:

(a) that offences alleged to have been committed by any person, particularly

those in positions of high authority, are registered, investigated and prosecuted fairly and expeditiously, ensuring against, inter alia, external pressure, arbitrary withdrawals or transfers of personnel etc., and ensuring adequate protection to the concerned functionaries to effectively discharge their duties and responsibilities;

(b) that there are sufficient checks and balances to ensure that the powers of investigation and prosecution are not misused;

(c) that there are no arbitrary restrictions to the initiation of investigations or launching of prosecutions.

4. The committee should give its report with regard to the items mentioned in paragraph 3(ii) above within a period of 3 months".

26. The IRC in the "Summary of Recommendations with regard to CBI and CVC" had recommended as hereunder:

"Summary of Recommendations

1. CBI and CVC

1. CVC to be conferred statutory status; appointment of Central Vigilance Commissioner to be made under the hand and seal of the President, (para 4.2)

2. Constitution of a committee for selection of CVC. (para 4.3)

3. CVC to overview CBI's functioning, (para 5)

4. CBI's reporting to Government to be streamlined without diluting its functional autonomy, (para 3.3)

5. CVC to have a separate section in its Annual Report on the CBI's functioning after the supervisory function is transferred to it. (para 6)

6. Constitution of a Selection committee for identifying a panel of names for selection of Director, CBI; final selection to be made by ACC from such panel, (para 8.2)

7. Central Government to pursue with the State Governments to set up credible mechanism for selection of Police Chief, (para 8.3)

8. Director, CBI to have a minimum tenure of 2 years, (para 8.4)

9. Transfer of incumbent Director, CBI would need endorsement of the Selection Committee, (para 8.6)

10. Director, CBI to ensure full freedom for allocation of work within the Agency, including constitution of investigation teams, (para 8.6)

11. Selection/extension of tenure of officers up to the level of Joint Director (JD) to be decided by a Board under Central Vigilance Commissioner, JD and above would need the approval of ACC. (para 8.7)

12. Change in existing Tenure Rules not recommended (para 8.8)
13. Proposals for improvement of infrastructure, methods of investigation, etc., to be decided urgently, (para 8.9.2)
14. No need for creation of a permanent core group in the CBI. (para 8.9.3)
15. Severe disciplinary action against officers who deviate from prescribed investigation procedures, (para 9.1)
16. Director, CBI to be responsible for ensuring time-limits for filing charge-sheets in Courts, (para 9.2)
17. Document on CBI's functioning to be published within three months, (para 9.4)
18. Essential to protect officers at the decision making levels from vexatious enquiries/prosecutions, (para 10.6)
19. Secretaries to adhere strictly to prescribed time frames for grant of permission for registration of PE/RC. CBI to be free to proceed if decision not conveyed within the specified time, (para 10.9)
20. Secretary of Administrative Ministry to convey a decision regarding registration of PE/RC within 2 months of receipt of request. If not satisfied with decision, Director, CBI free to make fresh reference to the committee headed by Cabinet Secretary within a period of four weeks and the latter to decide thereon within a period of four weeks, (para 10.10)
21. Protection under the single directive not to cover offences like bribery, when prima facie established in a successful trap, (para 10.12)
22. Cases of disproportionate assets of Central Government and All India Services Officers to be brought within the ambit of the single directive, (para 10.13)
23. Time-limit of 3 months for sanction for prosecution. Where consultation is required with the Attorney General or the Solicitor General, additional time of one month could be allowed, (paras 10.14 and 10.15)
24. Government to undertake a review of the various types of offences notified for investigation by the CBI to retain focus on anti-corruption activities which is its primary objective, (para 11.1)
25. Cases falling within the jurisdiction of the State Police which do not have inter-State or international ramifications should not be handed over to CBI by States/Courts, (para 11.2)
26. Government to establish Special Courts for the trial of CBI cases. (para 11.3)
27. Severe action against officials found guilty of high handedness; prompt action against those officials chastised by the Courts. (para 11.4)

28. Director, CBI to conduct regular appraisal of personnel to weed out the corrupt and inefficient and maintain strict discipline within the organisation, (para 11.5)".

27. As one can see, keeping in view the above summary recommendations in the matter of CBI and CVC, the Supreme Court gave the following specific directions in para 59 thereof:

"1. The Central Vigilance Commission (CVC) shall be given statutory status.

2. Selection for the post of Central Vigilance Commissioner shall be made by a committee comprising the Prime Minister, Home Minister and the Leader of the Opposition from a panel of outstanding civil servants and others with impeccable integrity, to be furnished by the Cabinet Secretary. The appointment shall be made by the President on the basis of the recommendations made by the Committee. This shall be done immediately.

3. The CVC shall be responsible for the efficient functioning of the CBI. While Government shall remain answerable for the CBI's functioning, to introduce visible objectivity in the mechanism to be established for over viewing the CBI's working, the CVC shall be entrusted with the responsibility of superintendence over the CBI's functioning. The CBI shall report to the CVC about cases taken up by it for investigation, progress of investigations; cases in which charge-sheets are filed and their progress. The CVC shall review the progress of all cases moved by the CBI for sanction of prosecution of public servants which are pending with the Competent Authorities, specially those in which sanction has been delayed or refused.

4. The Central Government shall take all measures necessary to ensure that the CBI functions effectively and efficiently and is viewed as a non-partisan agency.

5. The CVC shall have a separate section in its Annual Report on the CBI's functioning after the supervisory function is transferred to it.

6. Recommendations for appointment of the Director, CBI shall be made by a committee headed by the Central Vigilance Commissioner with the Home Secretary and Secretary (Personnel) as members. The views of the incumbent Director shall be considered by the committee for making the best choice. The committee shall draw up a panel of IPS Officers on the basis of their seniority, integrity, experience in investigation and anti-corruption work. The final selection shall be made by the Appointments committee of the Cabinet (ACC) from the panel recommended by the Selection Committee. If none among the panel is found suitable, the reasons thereof shall be recorded and the committee asked to draw up a fresh panel.

7. The Director, CBI shall have a minimum tenure of two years, regardless of the date of his superannuation. This would ensure that an officer suitable in all respects is not ignored, merely because he has less than two years to superannuate from the date of his appointment.

8. The transfer of an incumbent Director, CBI in an extraordinary situation, including the need for him to take up a more important assignment, should have the approval of the Selection Committee.

9. The Director, CBI shall have full freedom for allocation of work within the agency as also for constituting teams for investigations. Any change made by the Director, CBI in the head of an investigative team should be for cogent reasons and for improvement in investigation, the reasons being recorded.

10. Selection/extension of tenure of officers up to the level of Joint Director (JD) shall be decided by a Board comprising the Central Vigilance Commissioner, Home Secretary and Secretary (Personnel) with the Director, CBI providing the necessary inputs. The extension of tenure or premature repatriation of officers up to the level of Joint Director shall be with final approval of this Board. Only cases pertaining to the appointment or extension of tenure of officers of the rank of Joint Director or above shall be referred to the Appointments committee of the Cabinet (AGO for decision).

11. Proposals for improvement of infrastructure, methods of investigation, etc., should be decided urgently. In order to strengthen CBI's in-house expertise, professionals from the revenue, banking and security sectors should be inducted into the CBI.

12. The CBI Manual based on statutory provisions of the Criminal Procedure Code provides essential guidelines for the CBI's functioning. It is imperative that the CBI adheres scrupulously to the provisions in the Manual in relation to its investigative functions, like raids, seizure and arrests. Any deviation from the established procedure should be viewed seriously and severe disciplinary action taken against the concerned officials.

13. The Director, CBI shall be responsible for ensuring the filing of charge-sheets in Courts within the stipulated time-limits, and the matter should be kept under constant review by the Director, CBI.

14. A document on CBI's functioning should be published within three months to provide the general public with a feedback on investigations and information for redress of genuine grievances in a manner which does not compromise with the operational requirements of the CBI.

15. Time-limit of three months for grant of sanction for prosecution must be strictly adhered to. However, additional time of one month may be allowed where consultation is required with the Attorney General (AG) or any other law officer in the AG's office.

16. The Director, CBI should conduct regular appraisal of personnel to prevent corruption and/or inefficiency in the agency".

28. With regard to the final direction by the Supreme Court as above, at sub-para of para 61 of the judgment, the Supreme Court observed as hereunder:

"In the result, we strike down Directive No. 4.7(3) of the single directive quoted above and issue the above directions, which have to be constructed in the light of the earlier discussion. The report of the Independent Review committee (IRC) and its recommendations which are similar to this extent can be read, if necessary, for a proper appreciation of these directions. To the extent we agree with the conclusions and recommendations of the IRC and that is a large area, we have adopted the same in the formulation of the above directions. These directions require the strict compliance/adherence of the Union of India and all concerned".

29. On reading the terms of reference to the IRC and further the summary of recommendations by it, extracted at paras 25 and 26 as above on the one side and the final directions by the Supreme Court in the case extracted as at para 27 vis-a-vis what came to be observed on the directions of the Supreme Court in para 61 referred to in para 28, supra, I do not think the Supreme Court had saved in any way, the CBI Recruitment Rules, 1996, or for that matter, the notification dated 19-2-1993 in the matter of constitution of Selection committee for considering the senior level appointments of IPS Officers at the Centre, copy at Annexure-E to writ petition referred to above.

30. That being the position, the argument of the learned Attorney General that the issuance of the direction in Vineet Narain's case, supra, was an additional insulation is difficult to be accepted and according to me, the direction of the Supreme Court was "the insulation" and "the insulation only" on permanent basis to insulate totally the interference from whatever quarters be and in my further considered view, the Supreme Court by taking all the facts and prevailing circumstances into consideration had come to the just conclusion to direct at serial No. 6 (serial No. 6 of the Directions) that, "recommendations for appointment of the CBI Director shall be made by the Selection committee of the CBI, headed by the Central Vigilance Commissioner with Home Secretary and the Secretary (Personnel) as members by taking the views of the incumbent CBI Director by the committee for making the best choice and that the committee alone shall draw a panel of IPS Officers on the basis of their seniority, experience in investigation and anti-corruption work independently and that the final selection in the matter of appointment of CBI Director shall be made by the Appointments committee of the Cabinet (in brief, the "ACC"), from the panel recommended by the Selection committee of the CBI, there being no dilution of that authority from whatever quarters.

31. While I was in the process of preparing the draft judgment, I had come across a write-up by way of report by Special Correspondent of Indian Express, Mr. K.R. Balasubramanyam under the caption "Express Focus - IPS Transfers" in Indian Express published from Bangalore, dated 8th August, 2001. I feel it appropriate to quote here relevant parts in bits. They are as hereunder:

"Often, IPS Officers South of the Vindhyas bemoan that the Centre hardly looks at them while picking officers for a Government of India (GoI) posting".

"In India, the politics of postings has always been strange, both in the State and at the Centre. Even the Supreme Court intervened at times. But it offered nothing beyond a temporary respite largely because rulers would never want to stick to a norm".

"The vilification is not without grounds. Take for instance, the 20 DGP rank officers currently on deputation to the Government of India. Not even one of them is from the South. Four are from the Uttar Pradesh, three from AGMUT, two each from Madhya Pradesh, Jammu and Kashmir, Bihar, Orissa and one each from Punjab, Rajasthan, Himachal Pradesh, Haryana and Assam. Interestingly, these 20 DGPS belong to just eight cadres of the IPS. Not a single DGP is from the southern States of Andhra Pradesh, Tamil Nadu, Karnataka and Kerala".

"One might wonder how come such things happen? One version is that the coveted posts in the Ministry of Home Affairs (MHA), right from the Secretary, routinely go to IAS Officers from these States. So the IPS Officers hailing from these cadres get patronised. While this has been happening blatantly in the North Block, the Centre often manoeuvres out of blame by showing occasional concessions here and there. To name a few, the immediate past CBI Director was R.K. Raghavan from Tamil Nadu cadre, and before that Joginder Singh from Karnataka cadre; Karnataka's A.P. Durai too once headed the Railway Protection Force (RPF)".

32. I have extracted the above, not that I had taken judicial note of the same for the purpose of the case in hand, but only say that all is not well in the matter of selection of DGPS at the Centre; reason being that the write-up smacks of even a North-South divide in the selection of DGPS at the Centre which situation one cannot comprehend in our federal set-up as that of ours and the scheme of things under the Constitution. With regard to the write-up, I only say that there cannot be "smoke" without "fire", quite possible, that the revelation therein may be only a tip of the iceberg. What a fall!

33. Whatever its worth that be, I add here a small note on the height of corruption and disheartening and sorry state of affairs prevailing in our country now, all in the name of Democracy of which "Rule of Law" is the bedrock, to borrow the expression of the Supreme Court in the very Vineet Narain's case, supra. It may be painful for one to visualise.

34. The note goes this way.

35. India is described as one of the most corrupt nations in the world as per the survey conducted by Transparency International (in brief "T.I.") - a non-governmental organisation dedicated to fight corruption and increasing governmental accountability across the globe. As per the survey by T.I., our country had been distinctly and dubiously ranked at 72nd place among 91 countries surveyed by the T.I. In the survey, it is said that in the year last, India was placed at 69th place and its position in the list of most corrupt nations has gone down further with a score of a meagre 2.7 compared to 2.9 and 2.8 in the

years 1999 and 2000 respectively. The Corruption Perception Index (C.P.I.) all over the world is drawn on a scale of ten - one, ten being the least corrupt end score and one indicating highest level of corruption. It ranks countries in terms of degrees to which corruption is perceived to exist among public, officials and politicians. It is said that the 2001 corruption perception index is a composite index drawn by 14 surveys from 7 independent institutions and the survey factors in the perceptions of business people, academicians, the general public and the country analysis.

(Reference: Cite at:

<http://www.indianexpress.com/news/national/20010628-0.html> visited on 7/31/01.)

36. According to me, the Supreme Court had taken note of the above sorry state of affairs and the alarming situation in the country in the matter of prevalence of rampant corruption, widespread and all pervading, in Vineet Narain's case, supra, and to meet the extraordinary situation, issued extraordinary directions. To me it appears, probably, in its wisdom, the Supreme Court found out the panacea in the directions to the "killer disease" as if it said: "enough is enough, no looking backward, here and now are the directions to shock-treat the cancerous and killer disease, engulfing from all the sides, the vital organs of our nationhood, to revamp the whole system of policing by prime investigating agencies of the country to uphold the rule of law".

37. Now, I come back again to the subject-matter in the case in hand.

It is an admitted fact that in the instant case in hand, the respondent 7 came to be appointed by the Selection committee of the CBI, presided over by the CVC on the basis of the panel of names empanelling the respondent 7 among two others who have been empanelled as DGP, Central as per notification dated 19-2-1993 by the Selection committee for considering Senior level IPS Officers at the Centre. Therefore, it is obvious that the forwardal of the panel of names for consideration of the appointment of the CBI Director by the Selection Board of the CBI presided over by the CVC to the ACC of the Cabinet was the result of the first and the primary exercise made by the Selection committee for consideration of senior level appointments of IPS Officers at the Centre consisting of the Cabinet Secretary, Home Secretary, Secretary (Personnel), Director, Intelligence Bureau, E.O. (Estate Officer) being the Secretary of the committee constituted by the Prime Minister and it is only upon that, the Selection committee of the CBI presided over by the CVC had made further empanelling of three names of senior IPS Officers on the basis of seniority, for the purpose of selection of the CBI Director by the ACC of the Cabinet,

38. I do not think that, that whole process, firstly, by the Selection committee per notification dated 19-2-1993, copy at Annexure-E to writ petition and secondly, the drawal of the further panel thereafter, to recommend to ACC of the Cabinet by the Selection committee for the CBI presided over by the CVC as

above was in the true understanding and direction of the Supreme Court in Vineet Narain's case, supra, for, according to me, no other committee as that of the Selection committee for the consideration of DGP, Centre as per notification dated 19-2-1993, copy at Annexure-E to writ petition has got any role to play since it is only the Selection Board of the CBI consisting of CVC and other two committee members i.e., Home Secretary and Secretary (Personnel) have got the exclusive jurisdiction to finalise and empanel officers among the IPS Officers on the basis of their seniority, integrity, experience in investigation, anti-corruption work and the domain on that was only in that i.e., Selection Board of the CBI and no other; let apart, one cannot say with certainty whether the Selection committee for considering that senior level appointments of IPS Officers as DGP at the Centre in the normal course was also on the basis of their seniority, integrity, experience in investigation and anti-corruption work as emphasised and fixed by the Apex Court in the matter of appointment of CBI Director in Vineet Narain's case, supra.

39. Therefore, I am left with no doubt whatsoever that the statutory rules and the executive instructions issued by the Government of India from time to time earlier to Vineet Narain's case, supra, deemed to have been set aside by the Supreme Court by implication as held by the CAT, and furthermore, even where executive instructions were issued by the Government of India subsequent to Vineet Narain's case, supra, as that of Notification No. 202/8/98-AVD.II-A, dated 20-5-1998, copy at Annexure-R3 to objection statement of petitioners and others before the CAT can be held good only to the extent and insofar as the same is in aid to the directions of the Supreme Court in Vineet Narain's case, supra, lest, it is as good as that the Selection committee of CBI presided over by the CVC is doing its exercise only in the second round after the first round of exercise by Selection committee for considering the IPS Officers for empanelling DGP, Centre. I do not think that can be at all, for, as I observed as above, that Selection committee for considering the IPS Officers for empanelling DGP, Centre has got no role to play in whatsoever manner, in the scheme of things, per direction of the Supreme Court in Vineet Narain's case, supra, when the exclusive jurisdiction was vested in the matter of empanelling the names from among the IPS Officers based on their seniority, integrity and experience in anti-corruption work to ACC of the Cabinet for appointment of CBI Director, in the Selection Board of CBI presided over by the CVC. In my considered view, if it is not so done, as in the instant case of appointment of the respondent 7, it is in total negation and violation of the directions of the Supreme Court in Vineet Narain's case, supra, which one cannot imagine or comprehend, when the direction by the Supreme Court in the said case is the law laid down by it to bind all, of course till legislature takes necessary steps to legislate the law to hold the field as made abundantly clear by the Supreme Court in the very case.

40. With the above conclusions I have reached, the first question stands answered in favour of the respondent 1 and as against the petitioners and further as against the respondent 7.

41. Point No. (ii).--It is an admitted fact that the respondent 7 came to be appointed by the ACC on the basis of the panel of names, firstly prepared by the Selection committee for consideration of senior level appointments of IPS Officers at the Centre constituted by the Prime Minister in following the CBI Recruitment Rules, 1996 and secondly, by the Selection committee for the CBI, presided over by the CVC in the second round. If that Selection committee constituted by the Prime Minister consisting of the Cabinet Secretary and other responsible officers of the petitioner 1-Union of India, which according to me is totally foreign to the scheme of the Apex Court in the directions issued in Vineet Narain's case, supra, it appears to me that it is as good as that the authority of the Selection committee for CBI presided over by the CVC is in total dilution of that authority in it by the intervention of the said Selection committee constituted by the Prime Minister and as such, it cannot be said that it is by the Selection Board of the CBI as it alone has got the exclusive authority and jurisdiction to decide on its own by applying its mind to draw the panel of IPS Officers on the basis of their seniority, integrity, experience in investigation and anti-corruption work as directed by the Supreme Court in Vineet Narain's case, supra.

42. In this context, it is relevant to take note that in the official memorandum dated 20-5-1998, copy at Annexure-R3 to the objection statement before the CAT, copy as at Annexure-C to writ petition at para 8 thereof, the Administration Vigilance Division of the Department of Personnel and Training was directed to provide the necessary administrative support by initiating action at least two months in advance and that it shall submit necessary proposals to the Secretary of the Selection Board of the CBI for consideration of the names to empanel the names to be recommended to the ACC of the Cabinet for appointment of the CBI Director. By reading that part in the official memorandum, vide Annexure-E to writ petition, it also appears to me that it again had doubly assured that it is the Selection Board of the CBI presided over by the CVC, which has to do the whole and entire exercise in the matter of recommendation of drawing the panel of names to forward the same to the ACC of the Cabinet in the matter of appointment of CBI Director.

43. Since this procedure admittedly was not at all followed either by the petitioners - Union of India and Another or for that matter by the respondent 3-the CVC, I am also of the considered view that the appointment of respondent 7 as the CBI Director had totally vitiated the direction of the Supreme Court in Vineet Narain's case, supra and as such, his appointment had rightly been quashed by the CAT. If that be so, it was natural that the CAT had directed to initiate the process of selection of IPS Officers for the post of Director, CBI in accordance with the law laid down by the Supreme Court in Vineet Narain's case, supra, even by considering the case of the respondent 1, the appellant before the CAT, for at that point of time, he was very much in service as a Senior IPS Officer, being the DGP in the State of Karnataka to be in the zone of consideration.

44. In this context, it is relevant to observe that the earlier Division Bench presided over by the Hon"ble Chief Justice while passing an interim order on 19-2-2001 in the instant writ petition had observed in para 4 thereof that in the event the writ petition were to be dismissed and the first respondent being found to be the fittest officer for being appointed to the post of Director, CBI, the Court is not helpless to redress the injury caused to him, i.e., respondent 1 and that this Court may direct the benefit of proforma appointment and the payment of differential monetary benefits by moulding the relief appropriately. It is to be taken note that the said interim order had reached its finality as the same had not been challenged ever before the Apex Court.

45. Much had been argued about the defects or insufficiency in the pleadings by the respondent 1 in his original application before the CAT. According to me, that defect or insufficiency could not matter much, for all that what was complained before the CAT by the respondent 1 is with regard to the illegality committed by the petitioners, the respondent 3 and other authorities in the matter of appointment of the respondent 7 as the CBI Director inasmuch as his appointment was totally opposed to the direction of the Supreme Court in Vineet Narain's case, supra. That in fact was the sum and substance of the case put forth by the respondent 1 before the CAT, of course, by certain other pleadings he did plead that he was better suited and as such, was lying in the zone of consideration for the post of CBI Director bearing in mind the broad guidelines the Supreme Court indicated in Vineet Narain's case, supra.

46. The CAT had approached the "lis" before it in that broad perspective and no other and that approach according to me, was just and proper approach. I say so, for, consequent to the law laid down by the Apex Court in Vineet Narain's case, supra, which is the law of the land, binding all, including the CAT and this Court. One cannot forget here that the majesty of law has to be upheld in *stricto sensu*. That appears to have been zealously guarded by the CAT with concern and sincerity of purpose, leaving apart shortcomings or deficiencies in the pleading in the original application by the respondent 1 and that according to me was only an aberration, not touching the core of the case put forth before it. Let apart, u/s 22 of the Administrative Tribunals Act, 1985, it is provided therein in the matter of procedure and powers of the Tribunals that the CAT shall not be bound by the procedure in CPC, but shall be guided by the principles of natural justice and the provisions of the Act and the Rules made thereunder by the Central Government.

47. Section 22 of the Central Administrative Tribunal Act, 1985 reads as hereunder:

"22. Procedure and powers of Tribunals.--(1) A Tribunal shall not be bound by the procedure laid down in the Code of Civil Procedure, 1908 (5 of 1908), but shall be guided by the principles of natural justice and subject to the other provisions of this Act and of any Rules made by the Central Government, the Tribunal shall have power to regulate its own procedure including the fixing of places and times

of its inquiry and deciding whether to sit in public or in private.

(2) A Tribunal shall decide every application made to it as expeditiously as possible and ordinarily every application shall be decided on a perusal of documents and written representations and (after hearing such oral arguments as may be advanced).

(3) A Tribunal shall have, for the purposes of (discharging its functions under this Act), the same powers as are vested in a Civil Court under the Code of Civil Procedure, 1908 (5 of 1908), while trying a suit, in respect of the following matters, namely,-

- (a) summoning and enforcing the attendance of any person and examining him on oath;
- (b) requiring the discovery and production of documents;
- (c) receiving evidence on affidavits;
- (d) subject to the provisions of Sections 123 and 124 of the Indian Evidence Act, 1872 (1 of 1872), requisitioning any public record or document or copy of such record or document from any office;
- (e) issuing commissions for the examination of witnesses or, documents;
- (f) reviewing its decisions;
- (g) dismissing a representation for default or deciding it ex parte;
- (h) setting aside any order of dismissal of any representation for default or any order passed by it ex parte; and
- (i) any other matter which may be prescribed by the Central Government".

48. There is another angle to that aspect of the case. As per Section 19 of the Administrative Tribunals Act, 1985 read with Rule 4(a) of the Central Administrative Tribunal Rules of Practice, 1993, framed thereunder, the original application before the CAT has to be made, not by way of application in following the strict rules of practice in the CPC, but has to be made in three sets in the format prescribed. Thus it is clear therefrom that strict rules of practice are not applicable to the applications before the CAT.

49. This position is equally so when claims are made u/s 166 of the Motor Vehicles Act, 1988 (formerly Section 110-A of the Motor Vehicles Act, 1939), by the applicants or claimants before the Motor Accidents Claims Tribunal, for, the claim has to be made in formats prescribed. That being so, I think that an analogy can be drawn safely that claim made u/s 19 of the Administrative Tribunals Act before the CAT and the claim made u/s 166 of the Motor Vehicles Act, 1988 (formerly Section 110-A of 1939 Act), before the Motor Accidents Claims Tribunal are similarly placed in the matter of application of rules of pleadings.

50. By drawing that analogy, now let me examine few authorities under Motor Vehicles Act in that regard, i.e., application of rules of pleadings. According to me, ratios of the decided cases under the Motor Vehicles Act in the matter of application of rules of pleadings are equally applicable to the case under Administrative Tribunals Act with which we are concerned with.

51. The Division Bench of this Court in the case of Basappa and Another Vs. K.H. Sreenivasa Reddy and Others, , held as follows:

"15. Therefore, it is obvious that the strict rules of pleading contained in the CPC cannot be invoked while considering a claim petition. The petition is not a plaint. It does not provide for "Prayer" in a separate column. Hence, there is no rational basis to apply the doctrine of variance between pleadings and proof.

In a subsequent judgment, the High Court of Judicature at Bombay, Nagpur Bench, also held similar view. It held that an application or claim made u/s 110-A of the Motor Vehicles Act, 1939, is not a plaint governed by CPC and the form prescribed for making application for compensation does not require averments to be made in so many words, (paras 8 and 11 thereof)

52. It is pertinent to note here that the Bombay High Court held as above, based on the observation of the Supreme Court in the case of Bhagwati Prasad Vs. Shri Chandramaul, , in the context of Order 6, Rule 2 of the CPC. In that case, the Supreme Court observed as follows:

"If a plea is not specifically made and yet it is covered by an issue by implication and the parties knew that the said plea was involved in the trial, then mere fact that the plea was not expressly taken in the pleadings would not necessarily disentitle a party from relying upon it, if it is satisfactorily proved by evidence".

53. It was vehemently argued by the Attorney General in the case in hand that, certain findings by the CAT were without there being pleadings in the original application by the respondent 1 and as such, the impugned order passed by it was hit by the principle of "sub-silentio". He had also pointed out that there was variance between pleadings and the relief granted by the CAT. In this regard, I only say that the said rules of pleadings are not applicable to an application u/s 19 of the Central Administrative Tribunals Act, in view of the statutory provisions made in Section 22 of the said Act and further in the light of the authority referred to in para 50 above, and as such, the principle of "sitb-silentio" has got no application in view of what is discussed at paras 43 to 49, supra.

54. Now, I come to what was concluded by the CAT in the impugned order on the original application filed by the respondent 1.

55. In paras 17 and 18 of the order of CAT it is held as hereunder:

"17. It should be utterly pointless in our considered view, to reiterate the totally unexceptionable and well-established position that when the law governing a matter is laid down by the Hon"ble Supreme Court by invoking specifically the

constitutional provisions of Articles 141 and 142 thereof, the said law is required to be given effect to implicitly by all authorities in the country which doubtless include all the official respondents in the present O.A. Unless the Hon''ble Supreme Court make an exception in particular, all other executive instructions and rules must, by definition, be deemed to have been set aside as far as the latter seek to regulate or govern the same or similar matter/matters.

18. In paragraph 57 of their judgment in Vineet Narain's case, mentioned above, their Lordships have directed as follows.-

"57. On this basis, we now proceed to give the directions enumerated hereafter for rigid compliance till such time as the legislature steps in to substitute them by proper legislation. These directions made under Article 32 read with Article 142 to implement the rule of law wherein the concept of equality enshrined in Article 14 is embedded, have the force of law under Article 141 and by virtue of Article 144, it is the duty of all authorities, civil and judicial, in the territory of India to act in aid of this Court. In the issuance of these directions, we have accepted and are reiterating as far as possible the recommendations made by the IRC".

(emphasis supplied)

In the subsequent paragraph 63 specifically in sub-paragraph (6) thereof, the directions of the Hon''ble Supreme Court laying down the constitution of the Selection Board and the procedure to be followed by them for preparing a panel of IPS Officers for final selection by the ACC, which we have reproduced earlier, have been incorporated. The said paragraph 63 starts with the following statement.-- "As a result of the aforesaid discussion, we hereby, direct as under, "Thus, it is obvious that when the law laid down by the Hon''ble Supreme Court in the aforesaid case of Vineet Narain, supra, is read in its entirety, the said law regulating the constitution of a Selection Committee, the criteria and procedure to be adopted by that committee and finally the preparation of a panel of IPS Officers by that Committee, headed by the Central Vigilance Commissioner with the Home Secretary and the Secretary (Personnel) as members, has to be taken as the complete law for that particular purpose. It is evident that the said purpose is the appointment of an IPS Officer as the Director, CBI. The directions of the Hon''ble Supreme Court contained in sub-paragraph (6) of paragraph 63 of the said judgment cited above, contemplate, explicitly and unequivocally".

56. In paragraphs 22 and 24, it is further held as hereunder:

"22. Limiting the consideration of the Selection Board (Committee), directed to be constituted by the Hon''ble Supreme Court, to only those IPS Officers who are first empanelled as DGPS at the Centre by a different committee as indicated above, has, on the other hand, been sought to be justified on behalf of the respondents as perfectly valid. We must confess that this position taken on behalf of the respondents does appear to us as totally unwarranted and in the circumstances we hold it as utterly without any legal foundation".

"24. The result of the discussion made by us above is that the procedure followed by the CBI Selection Board which resulted in inclusion of the name of the 7th respondent in the panel comprising 3 names, based only on the consideration of the list of IPS Officers who have already been empanelled for the post of DGPS at the Centre, and communicated to the Board as such by the Home Ministry and not extending their consideration to all IPS Officers of a certain seniority, including the applicant, is directly violative of the rule laid down by the Hon''ble Supreme Court in this behalf.

57. According to me, the impugned order passed by the CAT is well-considered and purposeful order, besides well-dealt with the issues before it in the right perspective, bearing in the top of its mind primarily the judgment of the Apex Court, vis-a-vis the directions issued therein in Vineet Narain's case, supra, be that be, the law of the land laid down by the Supreme Court under Article 141 of the Constitution.

58. In view of the above, I hold the appointment of the respondent 7 as the CBI Director bad, inasmuch as, opposed to and in contravention of Vineet Narain's case, supra, and therefore, it is natural that the case of the respondent 1 has to be now considered in the matter of appointment as CBI Director, notionally, to accord monetary benefit to the respondent 1. This answers the second point.

59. With regard to the judgment of the CAT, I quote what Francis Bacon (1561-1626), the English philosopher and politician, who deserted his patron, the Earl of Essex, during the latter's trial for treason and worked with the prosecution to ensure his conviction (1601), in "The Advancement of Learning" (1605). He said:

"If a man will begin with certainties, he shall end in doubts, but if he will be content to begin with doubts, he shall end in certainties".

(Ref: "The Giant Book of 1000 Great Lives", Edited by Jonathan Law, published by Robinson Publishing Limited, London, 1997.)

60. That is how I view the "lis" by the respondent 1 before the CAT and the resultant order passed by the CAT in his favour. I only say that, I entirely agree with it for the detailed reasons aforementioned. According to me, the CAT had rose to the occasion and taken pains to come to a just conclusion on the original application filed by the respondent 1 to uphold the law of the land as laid down by the highest Court of the land.

61. Now, I come to the awarding of cost in the writ petition. I hold that the respondent 1, the contesting respondent, has to be compensated with compensatory cost, for, as I see, he fought valiantly the litigation all through, single handedly, with sense of purpose and commitment, his back to the wall, of course there was also an element of personal interest involved in it, but one cannot help it, because, it is but natural. I assess that compensatory cost at Rs. 5,000/-, for no doubt he had argued his case himself, nevertheless, he might

have definitely spent certain amounts for secretarial work such as typing, binding, xeroxing the voluminous papers in good measure.

62. I am aware that, that cost may be symbolic or gestural; nonetheless, I award that cost to him in the writ petition. Even otherwise, according to me, he is entitled to for certain cost in this writ petition, for, as I see, the whole scenario of litigation, it is he who brought the law laid down by the Apex Court to the force to take the same to the logical end, firstly, in filing the original application before the CAT in whatever form that be, even to be found fault with by the other side, and secondly, before this Court to oppose the writ petition now before us, himself.

63. To conclude, I record words of appreciation for the courage and conviction the respondent 1 had shown; no doubt, till recent, he was in Indian Police Service for long and since 1963 with distinction and merit, no less outstanding.

64. The writ petition therefore fails and accordingly stands dismissed, but with the above cost of Rs. 5,000/- to him, to be made good by the petitioners; in the process, the order of the CAT stands confirmed.

As there is a difference between us the matter has to be placed before the third Judge. Place it before the Hon"ble Chief Justice for nominating the third Judge. Keeping in view the appointment of Director, CBI, is in question, there is an urgency in the matter. We would request the Hon"ble Chief Justice to fix the case before the third Judge to be nominated by him on some actual date for immediate hearing.

ORDER

The Court

1. The controversy involved herein centers around the process of selection to be adopted for the coveted post of Director of Central Bureau of Investigation (in short "CBD particularly in view of the directions given by the Supreme Court in para 58[I(6)] of its judgment in the case of Vineet Narain and Ors. v Union of India and Anr.

2. The present writ petition has been filed by the Union of India against the order dated 8-2-2001 (Annexure-A) passed by the Central Administrative Tribunal, Bangalore, in O.A. No. 1020 of 1999, which was filed by the 1st respondent herein. The Tribunal has held that non-consideration of respondent 1 in the selection process adopted for appointment of the 7th respondent-Sri R.K. Raghavan to the post of Director (CBI) was contrary to the directions issued by the Supreme Court in Vineet Narain's case, supra. Accordingly, it quashed the order of appointment of Sri R.K. Raghavan (respondent 7) to the post of Director (CBI) dated 31-12-1998 (Annexure-R5) issued by the Central Government. This writ petition was heard earlier by a Division Bench comprised of Ashok Bhan and Chidananda Ullal, JJ. But, because of difference of opinion among them, on the question of law involved herein, the matter has been placed before me for third Judge opinion.

3. I have heard Sri Soli Sorabji, learned Attorney General of India, appearing for the Union and Sri C. Dinakar, the contesting respondent 1, who has appeared in person.

Admitted and concluded facts:

4. The contesting respondent-Sri Dinakar is a member of the Indian Police Service (in short "IPS"). He is of 1963 batch. As on 31-12-1998, when the 7th respondent was appointed as the Director (CBI) under notification dated 31-12-1998 (Annexure-R5), the inter se seniority of the four senior most officers in the All India IPS seniority list was as under:-

SI. No.

Name

Batch

1.

Sri H.K. Sharma

1962

2.

Sri H.P. Kumar

1963

3.

Sri R.K. Raghavan

1963 (7th respondent)

4.

Sri C. Dinakar

1963 (Contesting 1st respondent)

5. The procedure adopted for the impugned appointment is a matter of record. The Committee, which was constituted as per the directions of the Supreme Court for appointment of the Director (CBI), met on 11-11-1998. According to the directions of the Supreme Court this committee was required to draw up panel of IPS Officers on the basis of their seniority, integrity and experience in investigation and anti-corruption work. Further, final selection was to be made by the Appointments committee of the Cabinet (in short the "ACC") from the panel recommended by the above Committee. But, for the purpose of selection to the post in question, the said committee took into consideration the inter se seniority and merit of only 33 IPS Officers who had been earlier short listed by the process of empanelment for holding the DG level post at the Center another Selection

committee constituted by the Central Government under its order dated 19-2-1993 (Annexure-E). Since the name of the contesting respondent-Sri Dinakar was not included in the panel so prepared, therefore the committee had no occasion to consider his suitability to the post though he was one of the first four senior most IPS Officers in the All India IPS seniority list,

6. Out of the 33 names of IPS Officers which were empanelled by the ACC and were placed before the committee for its consideration, it was found that 17 of such officers did not had the requisite background or experience in anti-corruption activities. The ACRs and service records of other 16 IPS Officers were assessed on the basis of seniority, integrity and experience in investigation of anti-corruption work. Accordingly, out of them a panel of three names was prepared.

7. The aforesaid panel of names as finalised by the committee was forwarded on 11-11-1998 to the Cabinet Secretariat for being placed before the ACC for its consideration and orders. The ACC found it proper to appoint 7th respondent as the Director (CBI) though he was at third place in the panel prepared by the Committee. On the basis of the decision of ACC, the impugned appointment order dated 31-12-1998 (Annexure-R5) was issued by the Ministry of Personnel.

Rival contentions:

8. The stand taken on behalf of the Central Government before the Tribunal as well as before this Court is that the above directions of the Supreme Court were merely supplemental to the procedure which was already in existence for appointment to the post in question as on the date of the judgment i.e., 18-12-1997. The further stand taken is that it was never intended to supplant the existing rules in the sense that as a consequence of the said directions of the Supreme Court, all the rules made by the Central Government in this regard stood completely obliterated, making it impermissible to press them into service even partially.

9. The learned Attorney General has also strenuously argued that in view of the doctrine of sub-silentio as enunciated by the Supreme Court in the case of State of U.P. and Another Vs. Synthetics and Chemicals Ltd. and Another, , the Supreme Court cannot be deemed to have set aside the rules and policies which were in force on the date of judgment in Vineet Narain's case, supra, since there was not even a whisper therein on this aspect. He also took an objection that since the 1st respondent had questioned the validity of appointment of 7th respondent only on certain factual premise, which were found to be incorrect by the Tribunal, it should not have proceeded to annul the order of impugned appointment on legal issues which according to him did not form part of the pleadings.

10. On the other hand, the stand of the contesting respondent is that since the Supreme Court had in unmistakable terms declared and directed that the directions given by it were meant for rigid compliance till such time the

legislature steps in to substitute the said directions by a proper legislation, is a clear indication of the intendment of the Apex Court that no deviation, supplementation or dilution of the procedure laid down by them was permissible by way of adopting any pre-existing rule made by the executive for the purpose. Sri Dinakar, 1st respondent herein, has strongly refuted the allegations raised on behalf of the Union that he had not laid foundation in his pleadings before the Tribunal for decision on the question of law involved herein.

Re: Preliminary objection:

11. Regarding preliminary objection as to whether sufficient foundation was laid before the Tribunal for entering into the legal issue pertaining to the procedure to be adopted for appointment to the post in question, I may refer to the application filed by the 1st respondent before the Tribunal (Annexure-B) and the counter-affidavit filed in answer thereto on behalf of the Union (Annexure-C).

12. In paras 4.3 and 4.4 of the application and paragraph 1 of the counter-affidavit, there are clear averments regarding application of various rules, policy decisions, Acts and the Ordinances on which the contesting parties had sought to place reliance for ascertaining the correct procedure which was needed to be followed for appointment to the post in question.

13. Respondent 1 placed reliance on Rule 3(2-A) of the IPS (Pay) Rules, 1954 read with Schedule III-C thereof and directions of the Supreme Court in Vineet Narain's case, supra. On the other hand, the petitioner herein in order to justify the procedure adopted by them referred to Article 312 of the Constitution, Central Staffing Scheme, IPS (Pay) Rules, CBI Senior Police Posts (Recruitment) Rules, 1996, official memorandum dated 20-5-1998 issued by the Central Government and Section 4-A of the Central Vigilance Commission Ordinance, 1998.

14. Based on the materials and arguments, both oral and written, advanced by the contesting parties on the issues of law involved herein, the Tribunal had pronounced its order. Therefore, in my opinion, the objection taken on behalf of the Union that once the Tribunal had answered the factual issues against the 1st respondent herein, it should have closed the proceedings cannot be accepted. In my opinion, the Tribunal was duty-bound to enter into the legal issues as well, as it has done in the impugned order.

Legal issues involved:

15. Having heard the learned Attorney General and the 1st respondent appearing in person and the pleadings of the parties, in my opinion, the resolution of the controversy raised herein rests on appropriate answers to the following two issues:

(i) Whether the procedure for appointment to the post of Director (CBI) as laid down by the Supreme Court in para 58(c) of its judgment in Vineet Narain's case, supra, is exhaustive and was the only procedure permissible for the

purpose till duly replaced, by a proper legislation?

(ii) Whether during the material period, the said directions given by the Supreme Court had been replaced by a proper legislation providing for the only procedure for making appointment to the post in question?

Incidental issues:

16. In my opinion, before proceeding to search answers to the above legal issues, it is necessary to ascertain as to whether the status of CBI and its Director is statutory or executive in nature because it will have material bearing on the main issues as it would appear from the discussions made hereinafter.

(a) Status of CBI:

17. The CBI was set up by the Central Government under its resolution dated 1-4-1963. The learned Attorney General has placed on record a copy of the said resolution along with his brief note filed on 14-9-2001. The said resolution reads as under:-

"No. 4/31/61-T Government of India New Delhi, dated the 1st April, 1963

Resolution

The Government of India have had under consideration the Establishment of a Central Bureau of Investigation for the investigation of crimes at present handled by the Delhi Special Police Establishment including specially important cases under the Defence of India Act and Rules particularly of hoarding, black marketing and profiteering in essential commodities, which may have repercussions and ramifications in several States; the collection of intelligence relating to certain types of crimes; participation in the work of the National Central Bureau connected with the International Criminal Police Organisation; the maintenance of crime statistics and dissemination of information relating to crime and criminals; the study of specialised crime of particular interest to the Government of India or crimes having all India or inter-State ramifications or of particular importance from the social point of view; the conduct of police research; and the co-ordination of laws relating to crime. As a first step in that direction, the Government of India have decided to set up with effect from 1st April, 1963 a Central Bureau of Investigation at Delhi with the following six divisions, namely:-

(i) Investigation and Anti-Corruption Division (Delhi Special Police Establishment);

(ii) Technical Division;

(iii) Crime Records and Statistics Division;

(iv) Research Division;

(v) Legal and General Division;

(vi) Administration Division.

The charter of functions of the above said divisions will be as given in the annexure. The assistance of the Central Bureau of Investigation will also be available to the State Police Forces on request for investigating and assisting in the investigation of inter-State crime and other difficult criminal cases.

(Sd) V. Viswanathan Secretary to the Government of India".

18. The above resolution makes it clear that the CBI was established under an executive order and the Delhi Special Police Establishment (in short "DSPE") was placed under it as one of its divisions. On the other hand, the DSPE has been constituted u/s 2 of the Delhi Special Police Establishment Act, 1946 (in short the "DSPE Act") and is thus a statutory body. But, according to the learned Attorney General, since the CBI had virtually taken over the powers of investigation statutorily vested in DSPE, the Supreme Court in the case of State of Maharashtra and Others Vs. Uttamrao Rayala Nikam, , declared the CBI to be a common parlance name of DSPE. In para 2 of the judgment it has been held that.-

"The Act was enacted to make provision for the constitution of a special police force in Delhi for the investigation of certain offences in the Union Territories, for the superintendence and administration of the said force and for the extension to other areas of the powers and jurisdiction of members of the said force in regard to the investigation of the said offences. DSPE constituted under the said Act is now known as the Central Bureau of Investigation (CBI)".

19. In Vineet Narain's case, supra, while tracing out the history of CBI, the Supreme Court has held that,--

"The Central Bureau of Investigation was established on 1-4-1963 vide Government of India's Resolution No. 4/31/61-T/MHA. This was done to meet the felt need of having a Central police agency at the disposal of the Central Government to investigate into cases not only of bribery and corruption but also those relating to the breach of Central fiscal laws, frauds in Government Departments and PSUs and other serious crimes. On the existing divisions of the CBI an Economic Offences Wing was added to the existing Divisions of the CBI. In 1987 two divisions were created in the CBI known as Anti-Corruption Division and Special Crimes Division, the latter dealing with cases of conventional crimes besides economic offences. In 1994 due to increased workload relating to bank frauds and economic offences a separate Economic Offences Wing was established in CBI with the result that since then the CBI has three Investigation Divisions, namely, Anti-corruption Division, Special Crimes Division and Economic Offences Division".

20. In paras 39, 40 and 42 of the Vineet Narain's judgment, supra Supreme Court has considered the CBI as a statutory investigation agency deriving its powers under the DSPE Act. These paragraphs breach as under.-

"39. There can be no doubt that the overall administration of the said force i.e., CBI vests in the Central Government, which also includes, by virtue of Section 3, the power to specify the offences or class of offences which are to be investigated by it. The general superintendence over the functioning of the Department and specification of the offences which are to be investigated by the agency is not the same as and would not include within it the control of the initiation and the actual process of investigation, i.e., direction. Once the CBI is empowered to investigate an offence generally by its specification u/s 3, the process of investigation, including its initiation, is to be governed by the statutory provisions which provide for the initiation and manner of investigation of the offence. This is not an area which can be included within the meaning of "superintendence" in Section 4(1).

40. It is, therefore, the notification made by the Central Government u/s 3 which confers and determines the jurisdiction of the CBI to investigate an offence; and once that jurisdiction is attracted by virtue of the notification u/s 3, the actual investigation is to be governed by the statutory provisions under the general law applicable to such investigations. This appears to us the proper construction of Section 4(1) in the context, and it is in harmony with the scheme of the Act, and Section 3 in particular. The word "superintendence" in Section 4(1) cannot be construed in a wider sense to permit supervision of the actual investigation of an offence by the CBI contrary to the manner provided by the statutory provisions. The broad proposition urged on behalf of the Union of India that it can issue any directive to the CBI to curtail or inhibit its jurisdiction to investigate an offence specified in the notification issued u/s 3 by a directive u/s 4(1) of the Act cannot be accepted. The jurisdiction of the CBI to investigate an offence is to be determined with reference to the notification issued u/s 3 and not by any separate order not having that character.

42. Once the jurisdiction is conferred on the CBI to investigate an offence by virtue of notification u/s 3 of the Act, the powers of investigation are governed by the statutory provisions and they cannot be estopped or curtailed by any executive instruction issued u/s 4(1) thereof. This result follows from the fact that conferment of jurisdiction is u/s 3 of the Act and exercise of powers of investigation is by virtue of the statutory provisions governing investigation of offences. It is settled that statutory jurisdiction cannot be subject to executive control".

21. In view of the above declarations of the Supreme Court, it has to be inferred that though it has not been specifically so provided u/s 2 of the DSPE Act, the CBI as an investigating agency, has to be treated as one of the Special Police Establishment under the said Act empowered to investigate offences notified u/s 3 thereof subject to the limitations prescribed thereunder. For these reasons, it has to be concluded that the CBI has statutory status under the DSPE Act.

Re: Status of Director:

22. Chapter I, Section 2 of the CBI Manual (Administration) (Part 1) gives details about creation of posts in the CBI and the mode of recruitment of such posts. Annexure-28 to this Manual shows that there are five categories of posts in CBI, namely (i) Executive post, (ii) Legal posts, (iii) Technical posts, (iv) Ministerial and (v) Miscellaneous posts.

23. The post of Director falls under Executive posts, which is to be filled by deputation of EPS Officers. The Central Government from time to time had been making rules for recruitment to such executive posts by exercising its powers conferred under proviso to Article 309 of the Constitution of India.

24. Sri Dinakar, 1st respondent herein, in the course of his arguments suggested that the post of Director (CBI), is a cadre post in IPS. In my opinion, he is not correct. IPS is an All India Service constituted u/s 2 of the All India Services Act, 1951. Cadres in IPS have been created under the Indian Police Service (Cadre) Rules, 1954 read with the Indian Police Service (Fixation of Cadre Strength) Regulations, 1955.

25. Rule 2 of the Indian Police Service (Cadre) Rules, 1954 defines "Cadre Officer" and "Cadre post" to mean.-

(a) "Cadre Officer" means a member of the Indian Police Service;

(b) "Cadre post" means any of the posts specified under Item 1 of each cadre in the Schedule to the Indian Police Service (Fixation of Cadre Strength) Regulations, 1955.

26. Admittedly, the Director (CBI), is not a cadre post within the meaning of the above rules and regulations. Anyhow, to show that the post of Director (CBI), is a cadre post in IPS, Sri Dinakar has referred to Schedule in to the Indian Police Service (Pay) Rules, 1994, which contains the list of posts under the Central Government including that of Director (CBI).

27. In my opinion, Schedule III to the IPS (Pay) Rules is only relevant for determining the pay admissible to an IPS Officer when he is appointed on any of the posts in Schedule III and not for any other purpose. Mere inclusion of the post of Director in Schedule III to the IPS (Pay) Rules does not make it a "cadre post" for IPS Officers.

28. Now, the question is as to whether the post of Director (CBI), which, though as noticed above was created under an executive order, can now be treated as statutory being one referable to Section 4(2) of the DSPE Act. This sub-section reads as under.-

"4. Superintendence and administration of special police establishment.-

(1) XXX XXX XXX XXX (2) The administration of the said police Establishment shall vest in an officer appointed in this behalf by the Central Government who shall exercise in respect of that police Establishment such of the powers exercisable by an Inspector-General of Police in respect of the police force in a

State, as the Central Government may specify in this behalf.

29. As already noticed above, since the Supreme Court in the cases of Kazi Lhendup Dorji, *supra* and Vineet Narain, *supra*, has treated the CBI to be a synonym of DSPE, the post of Director (CBI) has to be held as statutory post justifying its creation and powers attached to it u/s 4(2) of the DSPE Act. It is further to be clarified that once an officer is appointed to the post of Director (CBI) by operation of legislative mandate u/s 4(2) of the said Act, he ipso facto gets vested with the powers exercisable by Inspector General in respect of police force in a State as the Central Government may specify in this behalf.

30. The above position was also accepted in two successive ordinances promulgated under Article 123(1) of the Constitution, namely Central Vigilance Commission Ordinance, being Ordinance Nos. 15 of 1998 and 4 of 1999. These ordinances were obviously promulgated to give effect to the directions of the Supreme Court in Vineet Narain's case, *supra*. By Section 26 of these Ordinances, Section 4 of the DSPE Act was substituted. Sub-section (3) of substituted Section 4 recognises the head of the police Establishment i.e., CBI as Director. This sub-section reads as under:-

"4, Superintendence and administration of special police establishment.-

(1) XXX XXX XXX XXX (2) XXX XXX XXX XXX (3) The administration of the said police Establishment shall vest in an officer appointed in this behalf by the Central Government (hereinafter referred to as the "Director") who shall exercise in respect of that police Establishment such of the powers exercisable by an Inspector-General of Police in respect of the police force in a State as the Central Government may specify in this behalf.

Thus, the post of Director (CBI) i.e., DSPE was also given statutory status also legislatively.

Selection Process--pre-Vineet Narain's case, *supra*:

31. The process of appointment for the post of Director (CBI) followed by the Central Government till the judgment in Vineet Narain's case, *supra*, had been spelt out in the counter-affidavit filed on behalf of the Union before the Tribunal (Annexure-C). It has been stated therein that this post and other equivalent posts, which are not included in the cadre of any service, are made under a scheme named "Central Staffing Scheme". For making selection for appointment to these posts, the officers are short listed by the process of empanelment.

32. Paragraph 14 under the heading "Empanelment for Senior Management Posts" of the Central Staffing Scheme provides that.-

"Selection for inclusion on the panel of officers adjudged suitable for appointment to the posts of Additional Secretary or Special Secretary/Secretary to the Government of India and posts equivalent thereto, will be approved by the ACC on the basis of proposals submitted by the Cabinet Secretary. In this task, the

Cabinet Secretary may be assisted by a Special committee of Secretaries for drawing up proposals for the consideration of ACC. As far as possible, panels of suitable officers will be drawn up on an annual basis considering all officers of a particular year of allotment from one service together as a group".

33. It has further been stated on behalf of the Union in the counter-affidavit that:-

"The eligibility of officers for holding posts at the level of Director General in the Government of India is that the officers should have completed 30 years of service and should be on the panel approved by the Appointments committee of the Cabinet (ACC) in the scale of Rs. 24050-26000/Rs. 26000 (fixed) in that service. The inclusion of officers in the panel for holding posts of Director General or equivalent is approved by the Appointments committee of the Cabinet (ACC) on the basis of the recommendations of the prescribed Selection Committee, headed by the Cabinet Secretary and including 4 Secretary level officers working with Government of India".

34. It has been stated before the Tribunal, as well as before me, that the names of IPS officers used to be short listed by the process of empanelment for DG level post under the Central Government, by a Selection committee approved by the Prime Minister. The order dated 19-2-1993 providing for such constitution has been placed at Annexure-E to the writ petition, which reads as under:-

"No.36(15)-EO/93(SM-I) Government of India Ministry of Personnel, Public Grievances and Pensions Department of Personnel and Training New Delhi-110001, dated the 19th February, 1993

Subject: Constitution of the Selection Committees for considering senior level appointments of IPS Officers at the Centre -- Regarding.

The Prime Minister has approved the constitution of the following Selection Committees for considering senior level appointments of IPS Officers at the Centre.-

(1) For the posts in the scale of Rs. 7300-7600

(instead of Central Police Establishment Board)

Cabinet Secretary, Home Secretary, Secretary (Personnel), Director, Intelligence Bureau, E.G. to be Secretary of the Committee. E.O. to be Secretary of the committee

(2) For the posts in the scale of Rs. 8,000/- (fixed)

Cabinet Secretary, Principal Secretary to P.M., Home Secretary, Secretary (Personnel).

(Mata Prasad) Establishment Officer and Additional Secretary to the Government of India".

In para 5 of the writ petition it has been stated on behalf of the Union that

subsequently by an order dated 21-10-1993, the Director, Intelligence Bureau, was also included in the 2nd committee which had to short list the IPS Officers for empanelment in question.

35. During the pendency of the proceedings before the Supreme Court in Vineet Narain's case, supra, the Central Government by exercising its powers under the proviso to Article 309 of the Constitution made fresh rules for recruitment to the senior police posts in CBI, namely "Central Bureau of Investigation (Senior Police Posts) Recruitment Rules, 1996". These rules were published in the Gazette of India, dated 31-1-1997,

36. So far as recruitment to the post of Director (CBI) is concerned, column 12 of the Schedule to the above Recruitment Rules provided the manner and source of recruitment as under:-

"Transfer on deputation. Officers of Indian Police Service who have been approved for appointment as Director General of Police under the Government of India.

Note.--Deputation shall be regulated in terms of EPS Tenure Rules".

37. Therefore, till the directions were issued in Vineet Narain's case, supra, by the Supreme Court in its judgment which was pronounced on 18-12-1997, appointment to the post of Director (CBI) could have been made by transfer on deputation of only such IPS officers who were short listed and empanelled for appointment as Director General of Police under the Central Government by the Selection committee constituted with the approval of the Prime Minister as per Annexure-E and approved by the ACC.

Selection process--Vineet Narain's case, supra:

38. This case was filed before the Supreme Court under Article 32 of the Constitution of India as a public interest litigation in the year 1993 and was concluded with the judgment dated 18-12-1997. In this case, various directions pertaining to constitution and working of the investigating agencies including the CBI were given for rigid compliance till such time as the legislature steps in with appropriate legislation.

39. During the above proceedings, the Supreme Court had passed several orders having close bearing on the working of CBI and other governmental agencies, which according to the Apex Court, had not carried out their public duty to investigate the offences disclosed and it used the innovative tool of "continuing mandamus" to break their inertia and make them work in right direction. By order dated 5-12-1994 passed in the case, the Supreme Court inter alia opined that.-

"The facts and circumstances of the present case do indicate that it is of utmost public importance that this matter is examined thoroughly by this Court to ensure that all Government agencies, entrusted with the duty to discharge their

functions and obligations in accordance with law, do so, bearing in mind constantly the concept of equality enshrined in the Constitution and the basic tenet of rule of law: "Be you ever so high, the law is above you". This is imperative to retain public confidence in the impartial working of the Government agencies".

40. In para 16 of the judgment, the Supreme Court observed that:-

"The constitution and working of the investigating agencies revealed the lacuna of its inability to perform whenever powerful persons were involved. For this reason, a close examination of the constitution of these agencies and their control assumes significance. No doubt, the overall control of the agencies and responsibility of their functioning has to be in the executive, but then a scheme giving the needed insulation from extraneous influences even of the controlling executive is imperative".

41. It has been noticed by the Supreme Court in para 17 of the judgment that as a result of the debate in these proceedings and the experience gained thereby the Union of India came to realise that an in-depth study of selection of personnel of these agencies, particularly CBI and the Enforcement Directorate of the Revenue Department, and their functioning is necessary. The Government of India, sharing this perception, by an order dated 9-7-1993 constituted a committee headed by the then Home Secretary Shri N.N. Vohra to take stock of all available information about the activities of crime syndicates/mafia organisations which had developed links with and were being protected by, Government functionaries and political personalities. The Vohra committee submitted its recommendations on 5-10-1993 which made scathing comments and painted a dismal picture of the existing scene. The committee said that the network of the mafia is virtually running a parallel Government pushing the State apparatus into irrelevance. According to the Apex Court, as observed in para 17 of the judgment:-

"The report is significant for the dismal picture of the existing scenario which discloses a powerful nexus between the bureaucracy and politicians with the mafia gangs, smugglers and the underworld. The report of the Vohra committee is the opinion of some top bureaucrats and it confirmed out worst suspicions focusing the need of improving the procedure for constitution and monitoring the functioning of intelligence agencies. There is, thus, no doubt that this exercise cannot be delayed further".

42. Immediately thereafter, the Central Government constituted another committee by its order dated 8-9-1997 called the Independent Review committee (IRC). One of the terms of reference of this committee was to examine the present structure and working of the Central Bureau of Investigation (CBI), the Enforcement Directorate and related agencies to suggest the changes, if any, needed to ensure:

(a) that offences alleged to have been committed by any person, particularly

those in positions of high authority, are registered, investigated and prosecuted fairly and expeditiously, ensuring against, inter alia, external pressure, arbitrary withdrawals or transfers of personnel etc., and ensuring adequate protection to functionaries concerned to effectively discharge their duties and responsibilities;

(b) that there are sufficient checks and balances to ensure that the powers of investigation and prosecution are not misused;

(c) that there are no arbitrary restrictions to the initiation of investigation or launching of prosecutions.

43. Summary of recommendations made by the Vohra committee has been noticed by the Supreme Court at page 251 of the report. The 6th recommendation under the heading "CBI and CVC" refers to appointment of Director (CBI). It reads thus.-

"Constitution of a Selection committee for identifying a panel of names for selection of Director, CBI; final selection to be made by ACC from such panel".

44. After having noticed the recommendations made by the Vohra committee and inaction on the part of the executive as also the legislature to make proper legislation in accordance with the said recommendations, in para 48 of the judgment the Supreme Court opined that.-

"In view of the common perception shared by everyone including the Government of India and the Independent Review committee (IRC) of the need for insulation of the CBI from extraneous influence of any kind, it is imperative that some action is urgently taken to prevent the continuance of this situation with a view to ensure proper implementation of the rule of law. This is the need of equality guaranteed in the Constitution. The right to equality in a situation like this is that of the Indian polity and not merely of a few individuals. The powers conferred on this Court by the Constitution are ample to remedy this defect and to ensure enforcement of the concept of equality".

45. In paragraph 50 of the judgment, the Supreme Court has held that-

"The need for a strong and competent prosecution machinery and not merely a fair and competent investigation by the CBI can hardly be over-emphasised. This is the occasion for us to take the view that a suitable machinery for prosecution of the cases filed in Court by the CBI is also essential to ensure discharge of its full responsibility by the CBI. Unless a competent prosecution follows a fair and competent investigation, the exercise in the ultimate analysis would be futile. Investigation and prosecution are interrelated and improvement of investigation without improving the prosecution machinery is of no practical significance. We would, therefore, consider the aspect of prosecution also in the formulation of the guidelines".

46. In the above background, the Supreme Court took upon itself to set out directions in terms of the recommendations made by IRC in order to ensure

insulation of the CBI from extraneous influence of any kind till these directions were substituted by appropriate legislation made by the legislature. In para 53 of the judgment, the Supreme Court has said that.-

"On this basis, we now proceed to give the directions enumerated hereafter for rigid compliance till such time as the legislature steps in to substitute them by proper legislation. These directions made under Article 32 read with Article 142 to implement the rule of law wherein the concept of equality enshrined in Article 14 is embedded, have the force of law under Article 141 and, by virtue of Article 144, it is the duty of all authorities, civil and judicial, in the territory of India to act in aid of this Court. In the issuance of these directions, we have accepted and are reiterating as far as possible the recommendations made by the IRC".

47. The directions of the Supreme Court in relation to CBI and CVC are contained in Part I of paragraph 58 of the judgment. Sub-para (6) of Part I sets out the directions for selection and appointment to the post of Director (CBI), when sequentially put, were as under.-

"(i) Recommendations for appointment of the Director, CBI, shall be made by a committee headed by the Central Vigilance Commissioner with the Home Secretary and Secretary (Personnel) as members.

(ii) The views of the incumbent Director shall be considered by the committee for making the best choice.

(iii) The committee shall draw up a panel of IPS Officers on the basis of their seniority, integrity, experience in investigation and anti-corruption work.

(iv) The final selection shall be made by the Appointments committee of the Cabinet (ACC) from the panel recommended by the Selection Committee.

(v) If none among the panel is found suitable, the reasons thereof shall be recorded and the committee asked to draw up a fresh panel".

Selection process--post-Vineet Narain's case, supra:

48. After the judgment of Vineet Narain's case, supra, the Central Government issued official memorandum dated 20-5-1998 (Annexure-R3) by constituting CBI Selection Board in terms of the directions of the Supreme Court and the procedure to be followed for appointment to the post of Director (CBI). But, while doing so, the Central Government added a rider, which was to the following effect.-

"The Selection Board shall make recommendations/decide matters strictly in accordance with the relevant rules, policy and guidelines having a bearing on the matter concerned. Recommendations regarding deviations from established policy, practices and guidelines require to be specifically brought to the notice of the ACC, giving reasons therefore. The decisions of the CBI Selection Board which involve relaxation of relevant rules, policy and guidelines shall be only recommendatory".

49. Subsequently, the President of India promulgated the Central Vigilance Commission Ordinance, 1998 (No. 15 of 1998), which came into force on 25-8-1998. This was obviously done to give legislative sanction to the directions of the Supreme Court in Vineet Narain's case, supra. By Section 26 of this Ordinance, several sections including new Section 4A were inserted in the DSPE Act.

50. Section 4A, as inserted by the Central Vigilance Commission Ordinance, 1998 (No. 15 of 1998), of the DSPE Act reads as under:-

"4-A. committee for appointment of Director--(1) The Central Government shall appoint the Director on the recommendations of the committee consisting of-

(a) the Central Vigilance Commissioner Chairperson

(b) Secretary to the Government of India in charge of the Ministry of Home Affairs in the Central Government Member

(c) Secretary to the Government of India in charge of the Ministry of Personnel in the Central Government Member

(2) While making any recommendation under Sub-section (1), the committee shall consider the views of the Director.

(3) The committee shall recommend a panel of officers-

(a) on the basis of seniority, integrity and experience in investigation of anti-corruption cases; and

(b) chosen from amongst officers belonging to the Indian Police Service constituted under the All India Services Act, 1951 (61 of 1951)

for being considered for appointment as the Director".

51. Since the above Ordinance could not be replaced by Act of Parliament, it was re-promulgated by the Central Vigilance Commission Ordinance, 1999 (No. 4 of 1999), which came into force from 1-1-1999.

52. The learned Attorney General has stated that the Bill introduced in the Parliament is still pending consideration. But in the meantime the above Ordinance was allowed to lapse.

Analysis, Reasoning and Conclusions:

53. In the background of the above developments which had been taken place regarding the process of selection to the post of Director (CBI), now I proceed to examine the two main issues which have been formulated in paragraph 15 of this judgment.

Re: Issue No. 1;

54. The discussions set out in Vineet Narain's case, as already noticed above,

clearly indicates that in this case, the Supreme Court keeping in view the in-camera and open Court hearings held by it and the reports of Vohra committee and IRC prima facie felt that there existed a powerful nexus between the bureaucracy and politicians with mafia gangs, smugglers and underworld. Therefore, it expressed immediate need to improve the procedure for constitution and monitoring the functioning of intelligence agencies particularly the CBI. Keeping in view this objective and the related recommendations of IRC, inter alia directed for following the procedure laid down by it for appointment to the post of Director (CBI). This was done with the express object of providing the scheme to insulate the investigating agency from extraneous influences even of the controlling the executive.

55. Keeping in the broad perspective, in the background of which the Supreme Court had given imperative directions, it is crystal-clear that those directions were aimed at making fundamental changes in the constitution and working of investigating agencies to remedy the defects noticed by it to prevent continuation of the prevailing situation so as to ensure proper implementation of the rule of law.

56. The learned Attorney General has submitted that despite directions given by the Supreme Court for following the procedure laid down by it for selection to the post of Director (CBI), since the Supreme Court had not specifically held that the 1996 Recruitment Rules and the Central Staffing Scheme were bad or inapplicable, the Central Government was well-within its competence to adopt those as well. To substantiate this part of his submission, he sought the support from the doctrine of sub-silentio as enunciated and accepted by the Supreme Court in the case of State of Uttar Pradesh, supra, in paragraph 41 whereof it has been held that.-

"Any declaration or conclusion arrived without application of mind or preceded without any reason cannot be deemed to be declaration of law or authority of a general nature binding as precedent".

57. In my considered opinion, the above submission cannot be accepted for a simple reason that a reading of judgment in Vineet Narain's case, supra, clearly reveals that the Supreme Court had carefully and thoroughly examined the entire structure and mode of functioning of the CBI including the process of selection to the post of Director (CBI) with the effective assistance of galaxy of members of the Bar, Attorney General of India, officers of CBI and Revenue Intelligence Department clearly keeping in view that there was a need "to improve and innovate the procedure and fructify the new ideas for betterment of the polity". It had also taken into account the two expert opinions placed on record. No doubt, the Supreme Court has not said in so many words about the applicability or otherwise of the 1996 Recruitment Rules or the Central Staffing Scheme. But it will be impermissible to presume that the Supreme Court while giving directions, was not aware of the existing rules, procedure and policies of the Central Government in this regard.

58. In the above view of the matter, I find it difficult on my part to hold that the Central Government could have resorted to the doctrine of sub-silentio to apply 1996 Recruitment Rules in the impugned selection process by restricting the zone of consideration for selection. In my opinion, the Supreme Court with all eloquence and strongly felt reasons had directed for adopting one and the only method for selection to the post of Director with a clear direction that it was "for a rigid compliance till such time as the legislature steps in to substitute those by appropriate legislation". Therefore, the entire field pertaining to the process of selection to the post in question was completely occupied by the Supreme Court directions.

59. It is to be further noticed here that the procedure envisaged under the 1996 Recruitment Rules, for appointment to the post of Director (CBI), was in obvious conflict with the selection process laid down by the Supreme Court for the purpose. This conflict is in one of the most pertinent areas. According to the Supreme Court directions, the committee constituted by it was required to make recommendations for appointment to the post in question by drawing up a panel of IPS Officers on the basis of their seniority, integrity and experience in investigation and anti-corruption work. The discretion so vested in this committee was not to be fettered by any other consideration or influence or suggestion.

60. On the other hand, the 1996 Recruitment Rules read with "Central Staffing Scheme" provided that the appointment to the post of Director (CBI) was to be made by selecting any one of the officers of IPS, who have been approved for appointment as Director General of Police under the Government of India. Admittedly, panel of this nature was prepared by short listing from amongst the members of IPS on the criteria laid down by the Government.

61. Therefore, under the process of selection laid by the Supreme Court for appointment to the post in question, the final selection was to be made out of the panel prepared by the recommending committee from amongst all eligible IPS Officers based on their seniority; whereas under 1996 Recruitment Rules, such final selection could have been made only from out of the short listed IPS Officers who had been approved for appointment as DGI under the Government of India. Because of this repugnancy as well, the 1996 Recruitment Rules, has to be held as become inapplicable. If it is not so held, then the very basic requirement of providing insulation to the CBI from extraneous interference by the executive can conveniently be frustrated because, through the Selection committee constituted by the executive Government, any IPS Officer who would have been otherwise found eligible for consideration to the post of Director, but was uncomfortable to the Government, can be conveniently kept out of the zone of consideration.

Re: Issue No. 2:

62. As I have already noticed earlier, after the pronouncement of the judgment in

Vineet Narain's case, supra, and in order to give legislative sanction to the directions issued thereunder, the President had promulgated two successive Ordinances in Nos. 15 of 1998 and 4 of 1999 on 25-8-1998 and 8-1-1999 respectively. The copy of the first ordinance was placed on record before the Tribunal by the Union. It also forms part of the present writ petition as Annexure-R4.

63. By Section 26 of the said Ordinances, Section 4 of the DSPE Act was substituted inter alia designating the head of police Establishment as "Director". Sections 4A and 4B were inserted to provide for the process of appointment to the post of Director and its service conditions. u/s 4-A(3) it has been clearly provided that the committee constituted thereunder shall recommend a panel of officers (a) on the basis of seniority, integrity and experience in investigation of anti-corruption cases; and (b) chosen from amongst officers belonging to the Indian Police Service constituted under the All India Services Act, 1951 (61 of 1951) for being considered for appointment as the Director.

64. The proviso to Article 309 of the Constitution reads as under:-

"Provided that it shall be competent for the President or such person as he may direct in the case of services and posts in connection with the affairs of the Union, and for the Governor of a State or such person as he may direct in the case of services and posts in connection with the affairs of the State, to make rules regulating the recruitment, and the conditions of service of persons appointed, to such services and posts until provision in that behalf, is made by or under an Act of the appropriate legislature under this Article, and any rules so made shall have effect subject to the provisions of any such Act".

65. In the case of Shri A.B. Krishna and Others Vs. The State of Karnataka and Others, , it has been held by the Supreme Court that:-

"As a matter of fact, under the scheme of Article 309 of the Constitution, once a legislature intervenes to enact a law regulating the conditions of service, the power of the Executive, including the President or the Governor, as the case may be, is totally displaced on the principle of "doctrine of occupied field" ".

66. The above aspect of the matter, when brought to the notice of the learned Attorney General, he has submitted that his arguments in the context of the directions of the Supreme Court will hold good even if the said two Ordinances were operative during the period of impugned selection to the post in question.

67. In my opinion, in view of the specific provisions contained in the Ordinances referred to above read with the legislative mandate contained in the proviso to Article 309 of the Constitution, from the date of coming into force of the said Ordinances, the 1996 Recruitment Rules clearly ceased to be in existence at least in relation to the process of appointment to the post of the Director (CBI).

68. Admittedly, the selection process in question was initiated and completed during the subsistence of the said Ordinances. I may specifically notice here that

though the Ordinances provide for the process of selection and appointment of Director of DSPE but as I have already noticed above as per the declarations of the Supreme Court, the DSPE and the CBI are the two different names of the same police establishment established u/s 2 of the DSPE Act. Therefore, the process of selection adopted in the present case was clearly in violation of the legislative provisions contained in the Ordinances.

69. For the aforesaid reasons, in my considered opinion, it was impermissible for the Selection committee to draw up a panel of names only from short listed officers of IPS who had been approved for appointment as Director General of Police under the Government of India and recommend for appointment as Director (CBI). In view of the directions of the Supreme Court and the subsequent specific provisions made in this regard in the Ordinances, the committee was required to recommend a panel of officers chosen from amongst officers belonging to the Indian Police Service constituted under the All India Services Act, 1951 based on its own assessment of their respective seniority, integrity and experience in investigation of anti-corruption works. The committee could not have allowed its discretion to be fettered by relying on the short listing and empanelment done by an external agency. Such an act was clearly hit by the doctrine of abdication of power and was totally impermissible in law.

70. On facts, because of adoption of the above illegal procedure, as found by the Tribunal as well, the 1st respondent was deprived of his valuable right of being considered for appointment to the post of Director (CBI). Therefore, the entire impugned process was to be taken as ab initio void and the Tribunal was right in declaring it to be so and quashing the appointment of 7th respondent.

71. In the result, I agree with the view taken by Chidananda Ullal, J., though for my own reasons as discussed above, and dismiss the writ petition being devoid of any merit with costs assessed at Rs. 5,000/- to be paid to the 1st respondent.