
(2001) 10 KAR CK 0030
In the Karnataka High Court
Case No : Writ Petition No. 5765 of 2001 (S-CAT)

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

Date of Decision : 11-10-2001

Acts Referred:

Constitution of India, 1950 — Article 141, 142, 143, 309, 32

Citation : (2001) 6 KarLJ 268

Hon'ble Judges : G. C. Bharuka, J

Judgement

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 "CBI") 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 Others v Union of India and Another, AIR 1998 SC 889.

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:-

Sl. No. Name Batch

1. Sri R.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 Uttar Pradesh and Another v Synthetics and Chemicals Limited, (1991)4 SCC 139, 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-TGovernment of IndiaNew 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 under Section 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 *Kazi Lhendup Dorji v Central Bureau of Investigation*, 1994 Supp. (2) SCC 116, 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 investigating agency deriving its powers under the DSPE Act. These paragraphs read 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 under Section 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 under Section 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 under Section 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 under Section 3 by a directive under Section 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 under Section 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 under Section 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 under Section 4(1) thereof. This result follows from the fact that conferment of jurisdiction is under Section 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 under Section 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 under Section 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 IPS 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 under Section 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 III 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 under Section 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 under Section 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-1)Government of IndiaMinistry of Personnel, Public Grievances and PensionsDepartment of Personnel and TrainingNew 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.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
IPS 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 the 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 therefor. 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 4-A were inserted in the DSPE Act.

50. Section 4-A, 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 4-A and 4-B were inserted to provide for the process of appointment to the post of Director and its service conditions. Under Section 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 *A.B. Krishna v State of Karnataka*, AIR 1998 SC 1050, 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 under Section 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.