REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL ORIGINAL JURISDICTION

WRIT PETITION (CIVIL) NO.374 OF 2012

Arun Kumar Agrawal
...Petitioner

Versus

Union of India & Ors. …
Respondents

J U D G M E N T

SURINDER SINGH NIJJAR, J.

1. This writ petition has been filed by one Mr. Arun Kumar Agrawal under Article 32 of the Constitution of India; seeks the issuance of a writ of *quo warranto* or any other direction against Mr. U.K. Sinha, Chairman of the Securities and Exchange Board of India (hereinafter referred to as 'SEBI') and his consequential removal from the post of Chairman.

2. Stated concisely, the petitioner challenges the appointment of respondent No.4 on the following grounds :-

(a) Mr. Sinha failed to fulfill one of the eligibility condition as laid down in sub-section (5) of Section 4 of the Securities and Exchange Board of India Act, 1992 (hereinafter referred to as 'SEBI Act'), as well as the qualification contained in Government communication, which required that the Chairman shall be a person of high integrity.

(b) The appointment of respondent No.4 is the result of manipulation, misrepresentation and suppression of vital material before the Search-cum-Selection Committee and the Appointment Committee of the Cabinet (hereinafter referred to as 'ACC').

(c) The appointment of respondent No.4, a Chairman of SEBI, is *mala fide*.

3. Mr. Prashant Bhushan, learned counsel appearing for the petitioner, has made detailed submissions with regard to the manipulations and the maneuvers indulged in by the

petitioner with the active connivance of some other persons to successfully mislead the Search Committee as well as the ACC. He has highlighted that the petitioner does not fulfill the requirements of Section 4(5) of SEBI Act which provides as under:-

> "(5) The Chairman and the other members referred to in clauses (a) and (d) of sub-section (1) shall be persons of ability, integrity and standing who have shown capacity in dealing with problems relating to securities marker or have special knowledge or experience of law, finance, economics, accountancy, administration or in any other discipline which, in the opinion of the Central Government, shall be useful to the Board."

4. Giving the factual background, he referred to the communication dated 10th September, 2010 of the Department of Economic Affairs inviting the application for the post of Chairman SEBI. In paragraph 3 of the aforesaid communication which provided that "keeping in view the role and importance of SEBI as a regulator, it is desirable that *person with high integrity, eminence and reputation* preferably with more than 25 years of professional experience and in the age group of 50 to 60 years may apply". Learned counsel submits that Mr. Sinha lacks integrity which is well illustrated by a reference to events leading to his appointment.

5. He points out that Mr. Sinha was Joint Secretary, Banking till May, 2002. He became Joint Secretary, Ministry of Finance in June, 2002. Thereafter, he held the post of Joint Secretary, Capital Market, Ministry of Finance from 1st July, 2003. Whilst working as such he was appointed as Additional Director on the Board of Unit Trust of India Asset Management Company Ltd. (hereinafter referred to as 'UTI AMC'). Thereafter, on 3rd November, 2005 Mr. Sinha was appointed as CEO and MD of UTI AMC on deputation for two years. According to Mr. Bhushan, Mr. Sinha was wrongly sent on deputation under Rule 6(2)(ii) of the IAS (Cadre) Rules, 1954, which is applicable in case of deputation in an international organization, NGO or body not owned by the Government. Since the equity share capital in UTI AMC is held by the State Bank of India, Life Insurance Corporation, Bank of Baroda and Punjab National Bank, each holding 25% of the shares, it could not be said that UTI AMC was not controlled by the Government. According to Mr. Bhushan, Mr. Sinha ought to have been sent on deputation under Rule 6(2)(i) of the IAS (Cadre) Rules, 1954 which is applicable for deputation of an IAS officer "under a company, association or body of

individuals, whether incorporated or not, which is wholly or substantially owned or controlled by the State Government, Municipal Corporation or a local body by the State Government on whose cadre she/he is borne." According to Mr. Bhushan, Mr. Sinha was deliberately sent on deputation under Rule 6(2)(ii) for ulterior motive. He points out that the deputation of Mr. Sinha was against the accepted assurance given to the J.P.C. on the appointment of CMD of UTI AMC. Mr. Sinha as Joint Secretary, Capital Market and member of the Board of UTI AMC was aware of the recommendation of JPC. He deliberately violated the recommendations. According to Mr. Bhushan, the deputation was also in violation of policy of not allowing deputation to an officer who had overseen the organization to which he was being deputed. Deputation of Mr. Sinha was also in conflict of interest as he was Joint Secretary, Banking till May 2002 and the ownership of UTI AMC was with the SBI, Bank of Baroda, PNB and LIC. According to Mr. Bhushan, Mr. Sinha was privy to sensitive information. Under the rules, Mr. Sinha was required to file affidavit/undertaking that person sent on deputation was not privy to any sensitive information.

6. Continuing further, Mr. Bhushan pointed out that on appointment as CMD, UTI AMC on 13th January, 2006, Mr. Sinha continued to get pay scale of Joint Secretary, even though he had an option under Rule 6(2)(ii) of drawing the pay of the UTI AMC or the scale of pay of the Government which is beneficial. There was no separate pay scale for CMD of UTI AMC and the same needed to be created in view of the option under Rule 6(2)(ii). On 29th January, 2007, Mr. Sinha made representation to the Government claiming that his batch cadre IAS Officer has been empanelled as Additional Secretary, therefore, his salary be fixed accordingly in the pay scale of Additional Secretary to the Government of India i.e. 22400-525-24500. On 1st March, 2007, the salary of Mr. Sinha was fixed in the aforesaid scale, with effect from 10th February, 2007. A communication was also sent on 16th April, 2007 enclosing the terms and conditions of the deputation of Mr. Sinha. It was pointed out that the member of service may opt for his grade pay or the pay of the post, whichever is more beneficial to him. It was also pointed out that the terms and conditions will be applicable with effect from 27th December, 2007. Mr. Bhushan thereafter laid considerable emphasis on the fact that on 27th September, 2007 the Board UTI AMC

approved the remuneration package of Mr. Sinha keeping in view the remuneration package of CEO in the industry, roles and responsibilities of the CMD, UTI AMC and the current surge of the salary structure in the market, as follows :-

- Fixed Pay Rs. 10 million per annum
- Variable Pay upto 100% of Fixed pay subject to performance and as may be approved by the Board on yearly basis.

7. According to Mr. Bhushan, this decision was taken on the basis of the recommendation made by the Aapte Committee in July, 2007. This Committee had been set up to recommend the compensation to be paid to CMD, UTI AMC. This Committee had recommended the compensation to be paid to CMD, UTI AMC on the basis that the *compensation should be market competitive to attract appropriate talent from the market*.

8. According to Mr. Bhushan, the actual fact situation would show that the recommendation to appoint CMD, UTI AMC from the market was given a complete go by at the time of the appointment of Mr. Sinha in 2008, when his extension to deputation was denied. Therefore, in order to continue as CMD, UTI, AMC Mr. Sinha took voluntary retirement. Mr.

Bhushan states that on 6th November, 2007 though a proposal for extension of deputation of Mr. Sinha for a period of two years was made, he was only granted an interim extension of three months till 2nd February, 2008. This was because some general issue regarding deputation under Rule 6(2)(ii) was being re-examined. On 28th November, 2007, the Consolidated Deputation Guidelines for All India Services was circulated by the Ministry of Personnel and under the Guidelines the deputation of Mr. Sinha was determined to be under Rule 6(1). He points out that under Rule 6(1) there is no option of getting remuneration as per the scheme of the organization to which an officer is sent on deputation. On 12th December, 2007, the Finance Ministry, Department of Economic Affairs requested the Department of Personnel and Training (DOPT) to extend the deputation of Mr. Sinha for the remaining one year and nine months under Rule 6(1). On 10th March, 2008, the ACC advised the Finance Ministry (Department of Economic Affairs) that extension of tenure as CMD of UTI AMC has been granted to Mr. Sinha till 31st May, 2008 under Rule 6(1). It was indicated that upon completion of the aforesaid term he would return to his parent cadre (Bihar). A direction was issued to the Department of Economic Affairs to identify a suitable

replacement of Mr. Sinha by that date. Mr. Bhushan points out that in the meantime on 25th March, 2008, the shareholders approved the emoluments of Mr. Sinha as recommended with effect from 27th December, 2006. This, according to Mr. Bhushan, was not permissible since 28th November, 2007 or at best since February, 2008 the deputation of Mr. Sinha was no longer under Rule 6(2)(ii). Mr. Bhushan points out that inspite of the recommendation of the ACC on 10th March, 2008, a recommendation was made by the Chairman of SBI on behalf of other shareholders proposing that Mr. Sinha should continue as CMD of UTI AMC even beyond 31st May, 2008. In the recommendation letter, it was proposed to offer four years tenure to Mr. Sinha as CMD of UTI AMC with effect from 1st June, 2008 or earlier without break of continuity. The letter also notices that under the existing Government Rules Mr. Sinha will be able to take this offer only if he takes voluntary retirement from the Government Service. A formal letter for extension of tenure was issued to Mr. Sinha on 11th April, 2008 by the UTI AMC. On 12th April, 2008 the Board of UTI AMC approved that the CMD can draw revised compensation with effect from 27th December, 2006.

9. Mr. Bhushan had laid considerable amount of emphasis on these facts to support the submission that although the words in the aforesaid letters give the impression that the approval of the shareholders of the pay package and the bonus was for the future but in reality the resolution enhanced the emoluments with effect from 27th December, 2006. Mr. Sinha in fact drew emoluments on that basis with effect from 27th December, 2006. This fact, according to Mr. Bhushan, is evident from the annual return of UTI AMC for the year 2007-2008. The annual return shows his salary for the year ended 31st March, 2008 as Rs.20.12 million. The return also shows that Mr. Sinha has also been paid Rs. 4.40 million as an arrear of his salary from 27th December, 2006 to 31st March, 2007 consequent to his salary restructured with effect from 27th December, 2006. Being fully aware of all the facts and having received compensation in crores of rupees, Mr. Sinha did not disclose the same while making an application for VRS on 15th April, 2008. Whilst giving the answer to column No.5 in the form of application to accept the commercial appointment, Mr. Sinha stated Rs.22,400–Rs.525-Rs.24,500/- as his pay scale and Rs. 23,450/- as his present basic pay.

10. Mr. Bhushan pointed out that this information was necessary for getting the no-objection from the Cadre Controlling Authority and from the office from where the officer retired. Mr. Bhushan further pointed out that not only Mr. Sinha gave false information in the application for seeking voluntary retirement; he repeated the same in the counter affidavit, in response to the writ petition in this Court. According to Mr. Bhushan, the averments made in paragraph 18 of the counter affidavit are contrary to the Balance Sheet of the UTI AMC for the year 2007-2008. Mr. Bhushan emphasized that it is apparent from the annual report of UTI AMC for the year 2008-2009, 2009-2010 and 2010-2011 (10½ months), Mr. Sinha got remuneration of Rs.2.15 crores, Rs. 2.36 crores and Rs.3.62 crores, respectively. According to Mr. Bhushan again in paragraph 21 of the affidavit Mr. Sinha has tried to mislead this Court. Mr. Sinha had stated that the excessive payment of Rs. 4 crores for the year 2010-2011 was on account of severance payment. He submits that the severance payment is payable only when the concerned organization asks the CEO to leave. In the case of Mr. Sinha, UTI AMC did not ask him to leave. In fact, Mr. Sinha did not

even give the mandatory three months notice, and relinquished the charge without giving any opportunity to the organization to appoint another CEO. Mr. Bhushan submits that Mr. Sinha wrongly received benefits of retirement when in fact he had only resigned. He reiterated that Mr. Sinha has given false information repeatedly. He gives a false declaration under Rule 26(3)(ii) of All India Services Death-cum-Retirement Benefit Rules to the effect that in the last three years of his official career he has not been privy to sensitive or strategic information of UTI AMC. Mr. Bhushan pointed out that this statement is patently false as Mr. Sinha was already on deputation in the same organization at the time of taking VRS.

11. Mr. Bhushan also pointed out that the third deliberate mis-statement made by Mr. Sinha in the application to accept the post of CEO of UTI AMC, was to the effect that such higher level post are generally not advertised. This statement was in answer to the question whether the post on which the appointment is sought was advertised and, if not, how was the offer made. Mr. Sinha had stated that keeping in mind the contribution made by him and the needs of the

company, the shareholders have made the offer to him. Mr. Bhushan submits that the statement about such higher level post not generally being advertised was against the Aapte Committee's direction. In fact, after Mr. Sinha relinquished the post, an advertisement was issued to fill the post of CMD, UTI AMC on 4th June, 2012. On the basis of the aforesaid facts, Mr. Bhushan submits that manipulation of deputation under Rule 6(2)(ii), extension of deputation, concealment of emoluments, misrepresentation and distortion of facts in the application for voluntary retirement and re-employment clearly reflect that respondent No.4 is not a man of integrity.

12. Mr. Bhushan has also made a reference to a very lengthy letter, written by one Dr. K.M. Abraham, a former Whole Time Member of SEBI, dated 1st June, 2011, to the Prime Minister of India. In this letter, the Whole Time Member has complained that the Chairman, SEBI, Mr. U.K. Sinha is being directly influenced by the Union Minister of Finance or Smt. Omita Paul, Adviser to Finance Minister. Mr. Bhushan reiterated that the letter by Dr. Abraham contains unbiased information. The former Whole Time Member was only expressing his concern that under the leadership of Mr.

U.K. Sinha the institutional integrity of SEBI is being compromised.

13. Another ground of attack on the appointment of the respondent No.4 pertains to the suppression of material facts relating to the remuneration of Mr. Sinha as CMD, UTI AMC before the Search-cum-Selection Committee and the ACC. Mr. Bhushan points out that the application form for the post of SEBI Chairman required the applicant to disclose scale of pay and basic pay of the post presently held along with service of the petitioner. The first meeting of the Search-cum-Selection Committee was held on 2nd November, 2010. The SSC short listed five candidates out of nineteen. Mr. Bhushan then points out that the second meeting of the Committee was held on 13th December, 2010, wherein the names of Mr. U.K. Sinha and Mr. Himadri Bhattacharya were recommended for the post of Chairman, SEBI *in the order of merit*. Mr. Bhushan further submitted that the selection of Chairman of SEBI required the approval of the ACC. The appointments recommended to the ACC have to be sent along with a standard Performa and annexures which are to be filled in by the Ministry recommending the appointment. The proposal for

the appointment of Mr. Sinha was put up to the ACC by the Finance Ministry vide its confidential letter No.D.O.No.2/23/2007-RE dated 13th December, 2010. Blatantly false information is given against the column requiring details about the pay scale presently enjoyed by the applicant. In reply to this column, it is stated "not available". Against Column 6(ii), scale of pay of the post it is stated that "the chairman shall have an option to receive pay (a) as admissible to a Secretary to the Government of India; or (b) a consolidated salary of Rs.3,00,000 per month. It was also submitted that in between the first and the second meeting of the Search-cum-Selection Committee, there were 40 days for the officials to ensure that the particulars of Mr. Sinha are verified before filling up the application form. The officials could have ascertained the particulars of his emoluments as CMD, UTI AMC. Mr. Bhushan submits that in order to mislead this Court, Mr. Sinha in paragraph 10 of the counter affidavit has given a totally false explanation that the Finance Secretary was aware of his market-bench-marked salary as CMD, UTI AMC. This, according to Mr. Bhushan, is a bald assertion without any material to substantiate the same. Mr. Bhushan submits that the other explanation given by Mr.

Sinha that information relating to emoluments of CMD, UTI AMC was in public domain as full disclosure is made in the Balance Sheet of UTI AMC. It is submitted by Mr. Bhushan that such an explanation cannot possibly be accepted. The question before this Court, according to Mr. Bhushan, is not whether the person who filled up the form knew or could have known the correct emoluments drawn by Mr. Sinha. The issue is that the applicant had failed to disclose the correct particulars about his emoluments and the pay scale before the Search Committee. This misinformation was also placed before the ACC. According to Mr. Bhushan, such a manipulative person cannot be said to be a man of integrity. Mr. Bhushan, as noticed earlier, submitted that the Committee in its second meeting had recommended two names. However, the Finance Minister forwarded only the name of Mr. Sinha to the ACC for approval. Even the document which was placed before the ACC seeking approval for the appointment of Mr. Sinha mentions “not available” against the present scale of pay. Mr. Bhushan further pointed out that Mr. Sinha’s total emoluments for the year 2010-2011 were over 4 crores per annum. This amount was probably more than what the bureaucrats senior to him and involved in the selection

process were paid by the Government in their entire career. Mr. Bhushan, therefore, submits that it was for this reason that Mr. Sinha manipulated that there should be no advertisement and the selection should be made through the Search route. In the case of advertisement, he would have to reveal the emoluments received by him. Relying on the aforesaid facts, Mr. Bhushan submits that since vital pieces of information was withheld from the Search Committee as well as ACC, Mr. Sinha clearly cannot be said to be a man of high integrity. The post of the Chairman, SEBI is a very important position having a bearing on the flow of investment, Indian and Foreign, economic growth and the safety of funds invested by large and small investors. Therefore, according to Mr. Bhushan, it was important that the complete facts particularly those having direct bearing on deciding the question of integrity should have been placed before the Search-cum-Selection Committee and the ACC. In support of the submission learned counsel has relied on the judgment of this Court in **Centre for PIL & Anr.** Vs. **Union of India & Anr.**[1]

14. The next ground of challenge of the petitioner to the appointment of Mr. Sinha as the Chairman of SEBI is that it

[1] (2011) 4 SCC 1

is vitiated by *mala fide*. Mr. Bhushan pointed out that to accommodate Mr. Sinha the earlier Chairman of SEBI was denied extension in tenure. The SEBI (Term and Condition of Service of Chairman and Members) Rules were amended on 23rd July, 2009 not to extend the term of the Chairman and the WTM from three to five years. The Director of Capital Market Division put up a proposal on 2nd September, 2009 for aligning the terms of the Chairman and WTM by giving two years extension and the same was endorsed by the Finance Secretary. After following the due procedure, consent for the extension of the concerned persons was taken and the proposal for extension of tenure was recommended to the DOPT by the Director, Capital Market Division by letter dated 16th November, 2009. According to Mr. Bhushan, from that stage manipulation started with the active cooperation of Ms. Omita Paul, the then Advisor in the Finance Ministry. On 25th November, 2009, she called for the file relating to the recommendation for extension, in the term of the Chairman and the Whole Time Member. The file was sent to her by the Finance Secretary on 27th November, 2009 and was seen by her on 30th November, 2009. It was again sent to the Advisor for her perusal on 16th December, 2009 and noting was made

by her on 21st December, 2009 drawing the attention of the Finance Minister to Page 22 regarding the composition of the SEBI Board and the present tenure of the Board. Mr. Bhushan submits that the note was written in such a way by Ms. Omita Paul, the then Finance Minister reversed his earlier decision to accord extension to the then Chairman. Subsequently, the orders were issued to start the selection process for the Chairman on 10th August, 2010. Suggestion of giving further extension to the existing officers was overruled. Mr. Bhushan submits that the justification given by the respondents in the counter affidavit for non grant of the extension is wholly fallacious. He submits that the justification that earlier Chairman was not granted extension as his name was reported in newspapers of being involved in NSDL Scam. According to Mr. Bhushan, there is no such noting in the official files. Mr. Bhushan also emphasized that the real reason for denial of extension to the former chairman is that it was at his insistence that investigations were being held against the Sahara and RIL. There was a complaint pending with regard to insider trading relating to RIL and Reliance Petroleum in which over Rs.500 crores were made in four days of trading in September, 2007. Mr. Bhushan then submits that in order to

facilitate the selection of Mr. Sinha there was illegal and arbitrary change in composition of Search-cum-Selection Committee. Ms. Omita Paul ordered two new names of her own to be appointed as experts of eminence on the Selection Committee. She also suggested Secretary (Financial Services) over and above the two experts. Thus, according to Mr. Bhushan, three of the five members of the Search-cum-Selection Committee were hand picked by Ms. Paul. In order to include Secretary (Financial Services) in the Search Committee, Rule 5 of the Rules, 2010 was amended to include clause (e) under which two nominees of the Finance Minister were included. In such a way, primacy was given to the Finance Minister. Mr. Bhushan submits that the record clearly shows that the object of the entire exercise of changing the Rules was to ensure that the Committee desired by the Advisor Ms. Omita Paul remains unchanged. It was also done probably to ensure that the ex-officio Chairman, the Cabinet Secretary, remains the only member unconnected with the Finance Minister. Mr. Bhushan submits that Ms. Omita Paul in the reply affidavit has admitted that her role was merely advisory. Mr. Bhushan submits that in spite of the admitted position that her role was merely advising without having any

authority to process the matter or take a decision, the files relating to further extension or composition of Search-cum-Selection Committee were regularly sent to her. The composition of the Search Committee was changed at her behest. Mr. Bhushan then submitted that the respondents have sought to justify the selection of Mr. Sinha on the basis that he was earlier unanimously selected by the Search-cum-Selection Committee in 2008, on the same post. If that was so, it is surprising that the Government, in fact, appointed Mr. C.B. Bhave as the Chairman, SEBI, who had neither applied for the post nor appeared in the interview. He had in fact informed the Committee that he did not want to be considered for the post of Chairman, SEBI. According to Mr. Bhushan, this can hardly be a fact relevant to judge the integrity of Mr. Sinha.

15. To further establish the ground of a *mala fide*, Mr. Bhushan submits that the post of CMD of UTI AMC was kept vacant for 17 months to accommodate the brother of respondent No.6 Ms. Omita Paul. He points out that shortly after the appointment of Mr. Sinha in mid-February reports started appearing in the press from April, 2011, that the brother of Ms. Omita Paul, Jitesh Khosla, was the front runner

for the post of UTI AMC because he had the backing of the Finance Minister. These reports also stated this was being resisted by a foreign investor and whose consent was necessary. Thus, the post of CMD UTI AMC continued to remain vacant for 17 months because the brother of Omita Paul could not be appointed to the post. According to Mr. Bhushan, the whole episode of appointment of Mr. Sinha as CMD, UTI AMC and the proposed appointment of Mr. Jitesh Khosla was adversely commented upon by the Joint Parliamentary Committee, because the recommendations of the Committee were ignored. The Joint Parliamentary Committee had gone into the entire UTI Scam as a result of which massive losses were incurred by the Government investors and tax payers. The report in paragraph 5 made the following recommendations :-

> "(V) Government has stated that a professional Chairman and Board of Trustees will manage UTI-II and that advertisements for appointment of professional managers will be issued. The committee recommended that it should be ensured that the selection of the Chairman and professional managers of UTI-II should be done in a transparent manner, whether they are picked up from the public or private sector. If an official from the public sector is selected, in no case should deputation from the parent organization be allowed and the person chosen should be asked to sever all connections with the previous employer. This is imperative because under no

> circumstance should there be a public perception that the mutual fund schemes of UTI-II are subject to guarantee by the Government and will be bailed out in case of losses."

16. Mr. Bhushan submits that the aforesaid recommendations were blatantly ignored in the selection of Mr. Sinha. He further pointed out that neither Mr. Sinha nor Mr. Jitesh Khosla were professionals. Neither of them met any of the four criteria in the advertisement inserted for the post of UTI CMD in newspaper dated 4th June, 2012. In fact, the entire manipulation and *mala fide* exercise, according to Mr. Bhushan, is exposed by the advertisement that was released after the brother of Ms. Omita Paul, Advisor opted out of the race because the tenure of Ms. Omita Paul, Advisor was coming to an end on account of it being co-terminus with that of Finance Minister. He emphasized that it was only then the advertisement was released fulfilling the commitment given to the JPC by the Government in 2002.

17. In reply to the preliminary objection raised by the respondents in the counter affidavit/replies, he submits that they deserve to be ignored. According to Mr. Bhushan, the respondents including the Government have made concerted

attack on the public spirited attitude of the petitioner. He is wrongly labeled as a person who has been set up by persons or entities having vested interests. It is also wrongly alleged that the petitioner had similarly challenged the appointment of another past Chairman of SEBI which was decided against him with imposition of costs. The respondents have also wrongly stated that this is the 4th similar petition on a similar issue. Re-enforcing high credentials of the petitioner, Mr. Bhushan submits that he has filed several notable public interest litigations that have unearthed corruption and financial irregularities. The appointment of the petitioner as Advisor to Prasar Bharti benefited the organization by about Rs. 20 Crores. He was the original complainant in the 2G spectrum scam which eventually led to the registration of the FIR by the CBI. This fact has been noted by this Court in the 2G case. On the basis of the above, Mr. Bhushan submits that the petitioner has given his time and forgone earnings selflessly in the true spirit of Article 51A of the Constitution and continues to unravel financial scams because of the paucity of people who both understand and are willing to take risks and make sacrifices. Mr. Bhushan then points out that the petitioner had previously challenged the appointment of a

previous SEBI Chairman, but it was not related to the integrity of the then Chairman. In fact, the then Chairman was a person with high integrity and compassion. However, his leniency in trusting the sharp players in the market resulted in lot of scams in the first three years of his tenure. Therefore, the petitioner has challenged the extension that had been given to the then Chairman SEBI on the ground that the Government should reassess his performance after three years. The writ petition was dismissed. The Chairman was given yet another extension in 2000 to make him the longest serving Chairman. What followed was the largest stock market scam in which the investors and the government lost tens of thousands of crores and the entire JPC report is the testimony to the scam. The Government and tax payer lost over Rs.10,000 crores in the UNIT 64 scam. Similarly Mr. Bhushan submits that the respondents have wrongly taken the preliminary objection that earlier two writ petitions having been filed by the petitioner challenging the appointment of respondent No.1 having been dismissed as withdrawn. He further submits that the respondents have wrongly leveled allegations that this petition is at the behest of some other person who is interested to continue as the Chairman of SEBI. The petitioner

has not prayed for the reinstatement of any of the previous incumbents. The petitioner only prays for appointment of a person as the Regulator who should be a person of high integrity functioning in a transparent manner. Mr. Bhushan submits that although the respondents claim that the petitioner has suppressed material facts, the suppression of facts by respondent No.4 is not treated with the same amount of concern.

Respondents' Submissions:

18. In response to the submission made, learned Attorney General Mr. G.E. Vahanvati, appearing for the Union of India, has submitted that public interest litigation jurisdiction is based on the principle of *Uberrimae fide* which means 'utmost good faith'. Therefore, before the petitioner can attack the integrity of respondent No.4, he would have to establish his own *good faith* in filing the present writ petition. He further submits that this is a very unfair petition. Documents have been presented before the Court in a very selective manner. The petitioner has admitted the suppression of earlier petition but he has tried to explain it by giving some excuses**.** The submission of the petitioner that the petition

was dismissed on the pleadings has been contended by Mr. Vahanvati to be totally without any basis. This is evident from his letter to the Registrar sent in August, 2000. He stated that Writ Petition (C) No.69 of 2012 deals with Cairn-Vedanta deal and it has nothing to do with the present writ petition. Then it is stated that there is one similar matter filed by some other person which is pending before this Court which is W.P. (C) No.246 of 2012. The petitioner never mentioned the earlier petitions filed by him which were dismissed. The objection taken is that the petition deserves to be dismissed for suppression of earlier petition. The letter given to the Registrar gives the totally distorted version. Similarly, the petitioner has distorted the entire sequence of events with regard to the deputation of Mr. Sinha.

19. Mr. Vahanvati points out to paragraph 34 of the petition and the emphasis placed by the petitioner that "within a period of a day the emoluments too increased from around six lacs per annum to one crore per annum". It is submitted that the deputation of respondent No.4 commences on 3rd November, 2005 he became CEO, UTI AMC on 27th December, 2006. The letter dated 16th April, 2006 which is very relevant to the issue has been withheld by the petitioner. Referring to

the affidavit of Mr. Sinha, he submits that all other information has been given according to law. The terms and conditions for deputation clearly show that Mr. Sinha was permitted to opt for his grade of pay or pay scale whichever is more beneficial for him. The recommendations made by the Aapte Committee were taken into notice when extension of tenure of Mr. Sinha was approved by the Board of Directors UTI AMC on 17th September, 2007. Actual sanction came on 11th April, 2008, as the approval of the Bank of Baroda did not come till 29th March, 2008. Therefore, there was no approval prior to 11th April, 2008 of the compensation of Rs.1 crore per annum alongwith the related payment of bonus of Rs. 1 crore. Similarly, it is stated by Mr. Vahanvati that submission of the application for voluntary retirement was done four days after the approval on 15th April, 2008. Until then, the petitioner had been in receipt of pay scale which was duly sanctioned on the post held by him in the Government. Therefore, the petitioner has unnecessarily tried to create an impression that there has been any deliberate misrepresentation or concealment of fact by respondent No.4. In the form of application to accept commercial appointment, respondent No.4 had clearly stated that he has been working as the Director/CEO UTI AMC since

3rd November, 2005 till date. Respondent No.4 had to state the pay scale of the post and the pay drawn by the officer at the time of the retirement which in his case was of Rs.22,400-535-24,500. Respondent No.4 had clearly mentioned his present basis pay as Rs.23,450/-.

20. Learned Attorney General submitted that the petitioner has wrongly alleged that respondent No.4 had given a false declaration that he was not privy to any sensitive information. This would clearly only indicate that the respondent No.4 has to disclose that he was not privy to any sensitive information received in his official capacity. Learned Attorney General submits that the petitioner in fact has an absurdity of facts with regard to compensation which were placed before the Ministry of Finance on 1st May, 2008. The Finance Minister approved the proposal. It was specifically observed that there is no conflict of interest between the Government of India and UTI AMC. On 17th April, 2008, Department of Personnel and Training sent a comprehensive note with regard to the application of respondent No.4 in the prescribed format to seek permission under Rule 26 of the All India Services (DCRB) Rules, 1958 to join the Company i.e. UTI

Asset Management Company Ltd. on regular basis, post voluntary retirement. The proposal was thoroughly examined and duly approved by all the authorities. Learned Attorney General drew our attention to paragraph 30 of the petition and submitted a list of documents. The petition has given a twist in the tale. This has been done, according to learned Attorney General, to give the same controversy a new flavour. He submits that the allegations about the pattern of JPC directions are false. The same petitioner had challenged Mr. Mehta's appointment earlier. It is the submission of learned Attorney General that public interest litigation cannot be filed irresponsibly. It has to be handled very carefully. It cannot be used as an AK-47 with the hope that some bullets will hit the target. The allegations of the petitioner that the rules were deliberately amended to hand pick Mr. Sinha are without any basis. In fact, there was no illegality committed in changing the composition of Search-cum-Selection Committee. Prior to 23rd July, 2009 there was no rule on the procedure to be followed for the selection of Chairman/WTM of SEBI. Therefore, before July, 2009 selections were made as decided by the Finance Minister from time to time. However, for the selection of the SEBI Chairman in 2008 the then Finance Minister had

approved on 2nd November, 2007 that the High Powered Search Committee (later notified as the Search Committee) which had four members and one Chairman. The Finance Minister noted that there should be one more outside expert. Accordingly, Dr. S.A. Dave, Chairman CMIE, was nominated as the Member. Therefore, to say that the amendment of the rules has been made just to ensure that balance was tilted in favour of the Finance Minister is without any basis.

21. Learned Attorney General also pointed out that the Search-cum-Selection Committee in its meeting held on 29th January, 2008 had unanimously short listed two names in the following order: (1) Mr. U.K. Sinha and (2) Mr. J. Bhagwati. However, notwithstanding the recommendation of Mr. Sinha by the Selection Committee, Shri Bhave was appointed as Chairman, SEBI on 15th February, 2008. In 2009, a statutory system was established for selection of Chairman/Whole Time Member of the SEBI. The proposal was also placed to amend Rule 3 of the Securities & Exchange Board of India (Terms and Conditions of Service of Chairman and Members) Rules, 1992 to include the provision relating to procedure to be followed for the selection of Chairman/WTM of SEBI. This was done by

incorporating sub-rule (5) which required the recommendation of the Search-cum-Selection Committee consisting of Cabinet Secretary, Department of Economic Affairs, Chairman, SEBI for selection of WTM and two experts of eminence from the relevant field. When it was decided in 2010 to initiate action for the fresh selection for the post of Chairman, SEBI two experts of eminence from the relevant field were Shri Suman Bery, Director General, National Council of Applied Economic Research (NCAER) and Prof. Shekhar Choudhary, former Director, IIM Calcutta. The composition of the Search-cum-Selection Committee was sent to the Department of Personnel & Training for approval. However on 23rd September, 2010, Department of Personnel and Training pointed out that inclusion of the Secretary Financial Services was not within the Rules as amended on 23rd July, 2009. Therefore, the matter was again referred to the Ministry of Law & Justice. During the discussion that was held with the Ministry of Law, it was suggested that there could be an amendment to the rule based on the Income Tax Appellate Tribunal Members (Recruitment and Conditions of Service) Rules, 1963. Under these rules, the Selection Board *inter alia* consists of a nominee of the Ministry of Law as well as such other persons if

any, not exceeding two, as the Law Minister may appoint. It was in these circumstances that the proposal to amend the 1992 Rules was approved.

22. The Search-cum-Selection Committee after scrutinizing the qualification and experience of the short listed candidates unanimously placed respondent No.4 first in the order of merit. The impression sought to be given wrongly by the petitioner is that respondent No.4 was placed at No.2 and Mr. Bhattacharya was at No.1. This is a deliberate distortion by the petitioner.

23. With regard to the role played by Ms. Omita Paul, learned Attorney General submitted that in fact the present petition is a *mala fide* attempt to resurrect the challenge earlier rejected by this Court. The petition is a sheer abuse of the process of law. The petitioner is guilty of making reckless allegations against two highly respected dignitaries who were appointed expert members of the Selection Committee. Learned Attorney General also submitted that the submissions with regard to the non extension of tenure of Mr. Bhave are totally baseless and need to be ignored. He makes a reference

to a detailed explanation given in the affidavit filed by the UOI. The term of Mr. Bhave was not extended to avoid the Government being unnecessarily involved in a scandal. In the earlier petition (W.P. No. 340 of 2012), the petitioner has sought an extension to continue the tenure of Mr. Bhave for 5 years which was withdrawn. Prayer No.2 in the W.P.(C) No.340 of 2011 was as follows :

> "Issue a writ of mandamus or any other appropriate writ, order or, direction to quash and declare void constitution of sub-committee of the Search-cum-Selection Committee under Shri U.K.Sinha, Chairman SEBI for conducting interview to the post of whole time members and proceedings/recommendation thereof."

24. This would clearly ensure that as soon as Mr. Sinha's appointment was declared void, Mr. Bhave would continue as a Chairman. This is evident from Prayer 5 which is as under :

> "Issue a writ of mandamus or any other appropriate Writ, order or direction to direct Respondent Nos.1 & 2 to act in accordance with the Government of India Notification No.2/106/2006-RE, dated 23rd July, 2009 which stipulates enhancement of the tenure of existing Chairman and Whole Time directors of SEBI from three (3) to five (5) years."

25. Similarly, Writ Petition (C) No.392 of 2011 again

repeats the prayer which was made in the earlier writ petition. It was submitted by the learned Attorney General that the present writ petition is a camouflage for the earlier writ petitions which were dismissed. Learned Attorney General submitted that the submission of Mr. Bhushan that why a person, who was earning crores, would expect a position on which he was only to be paid lacs, is too absurd to be even taking cognizance of. Respondent No.4 accepted the Chairmanship of SEBI as a matter of national duty and as a matter of honour. Finally, learned Attorney General submitted that in the interest of justice the tendency among the petitioners to make wild allegations in public interest litigation needs to be curbed.

26. Mr. Harish Salve, learned senior counsel and Mr. Rajesh Dwivedi appearing for respondent No. 4 have also raised a preliminary objection on the ground of maintainability. According to Mr. Salve, the writ petition is not maintainable because it is not filed in public interest. In fact, the writ petition has been filed as surrogate litigation on behalf of an individual who was very anxious to continue as

Chairman, SEBI, namely Mr. C.B. Bhave. Secondly, Mr. Salve submits that the writ petition is liable to be dismissed as it does not make a candid disclosure of all the facts which are relevant for the adjudication of the issues raised. Learned senior counsel submits that a litigant is duty bound to make full and true disclosure of the facts without any reservation, even if they seem to be against them. In support of this proposition, he relies on **State of Madhya Pradesh** Vs. **Narmada Bachao Andolan & Anr.**[2] and **K.D. Sharma** Vs. **Steel Authority of India Limited & Ors.**[3]. The factual basis for the aforesaid submission is that the petitioner had filed a writ petition in the Delhi High Court against the then Chairman, SEBI, Mr. D.R. Mehta, which was dismissed with cost. A Special Leave Petition against the same was dismissed. However, this Court reduced the cost. This fact is deliberately suppressed. Writ Petition No. 340 of 2011 on the same issue was dismissed by this Court. Dismissal of these petitions has also been suppressed by the petitioner. Mr. Salve reiterates the submissions of the Attorney General that public interest litigation is founded on the principle of *uberrima fide*, i.e., the utmost good faith of the petitioner. To

[2] (2011) 7 SCC 639
[3] (2008) 12 SCC 481

buttress his submission, learned senior counsel relied on **S.P. Gupta's** case. This petition is motivated by ill will, and the moving spirit behind the petition is Mr. C.B. Bhave. He reiterated the submissions of the Attorney General that Mr. C.B. Bhave and the Whole Time Member Dr. K.M. Abraham were aggrieved by the non-grant of extension to them, on the posts occupied by them, in the light of change in the rules. In fact, the petitioner, in his submission, has made detailed reference to the motivated complaint made by the Whole Time Member Dr. K.M. Abraham about the functioning of the new Chairman, i.e., Mr. U.K. Sinha. This was only because Mr. Bhave and Mr. Abraham were upset about the non-extension of tenure of Mr. Bhave. Apart from the change of rules, the extension was not granted to Mr. Bhave for his lapses in dealing with the IPO Scam of 2005 when he was the Chairman of NSDL**.**

Conclusions:

27. We have considered the submissions made by the learned counsel for the parties. Although all the respondents have raised the preliminary issue about the maintainability of the writ petition, we shall consider this submission after we

have considered the issue on merits. The foremost issue raised by the petitioner and emphasized vehemently by Mr. Parshant Bhushan is that respondent No.4 lacks the integrity and does not meet the eligibility conditions laid down in sub-section (5) of Section 4 of the SEBI Act. Additionally, respondent No.4 does not fulfil the conditions contained in communication of the government dated 10th September, 2010 which emphasizes, keeping in view the role and importance of SEBI as a regulator, that it is desirable that only a person with *high integrity* and reputation should be appointed as Chairman of SEBI.

28. We have narrated the sequence of events relied upon by the petitioner to establish that respondent No.4 is not a man of high integrity. We have also narrated how the respondents have, with equal vehemence, countered the submissions made on behalf of the petitioner. All the respondents have submitted that the writ petition filed by the petitioner ought to be dismissed on the ground of maintainability alone. As noticed earlier, we shall consider the preliminary objections later.

29. We agree with Mr. Bhushan that SEBI is an institution of high integrity. A bare perusal of the SEBI Act makes it apparent that SEBI was established to protect the interests of investors in securities and to promote the development of, and to regulate the securities market. In fact, the SEBI Act gives wide ranging powers to the Board to take such measures as it thinks fit to perform its duty to protect the interests of investors in securities and to promote the development of, and to regulate the securities market. These measures may provide for regulating the business in stock exchanges and any other securities markets. Further measures are set out in Sections 11(1), (2)(a to m) to enable SEBI to perform its duties and functions efficiently. Section 11(2)(a) provides that the Board may take measures to undertake inspection of any book, register, or other document or record of any listed public company or a public company which intends to get its securities listed on any recognised stock exchange. The Board can exercise its power where it has reasonable grounds to believe that such company has been indulging in insider trading or fraudulent and unfair trade practices relating to securities market. To enforce its directions, the Board has powers under Section 11(4) to issue any suspension/restraint

orders against the persons including office bearers of any stock exchange or self regulatory organisation. It can impound and retain the proceeds or securities in respect of any transaction which is under investigation. The wide sweep of the powers of SEBI leaves no manner of doubt that it is the supreme authority for the control and regulations and orderly development of the securities market in India. It would not be mere rhetoric to state that in this era of globalisation, the importance of the functions performed by SEBI are of paramount importance to the well being of the economic health of the nation. Therefore, Mr. Bhushan is absolutely correct in emphasising that the Chairman of SEBI has to be a person of high integrity. This is imperative and there are no two ways about it. The importance of the functions performed by SEBI has been elaborately examined by this Court in the case of **Sahara India Real Estate Corporation Ltd. & Ors.** Vs. **Securities and Exchange Board of India & Anr.**[4] Justice Radhakrishnan, upon examination of the various provisions of the SEBI Act, has observed that it is a special law, a complete code in itself containing elaborate provisions to protect interest of the investors. The paramount duty of the Board under the SEBI Act is to protect the interest of the

[4] 2013 (1) SCC 1.

investors and to prevent unscrupulous operators to enter and remain in the securities market. It is reiterated in paragraph 67 that SEBI is also duty bound to prohibit fraudulent and unfair trade practice relating to securities markets. Similarly, Justice Khehar in the concurrent judgment has emphasised the importance of the functions performed by SEBI in exercise of its powers under Section 11. In paragraph 303.1, it is observed as follows :-

> "303.1. Sub-section (1) of Section 11 of the SEBI Act casts an obligation on SEBI to protect the interest of investors in securities, to promote the development of the securities market, and to regulate the securities market, "by such measures as it thinks fit". It is therefore apparent that the measures to be adopted by SEBI in carrying out its obligations are couched in open-ended terms having no prearranged limits. In other words, the extent of the nature and the manner of measures which can be adopted by SEBI for giving effect to the functions assigned to SEBI have been left to the discretion and wisdom of SEBI. It is necessary to record here that the aforesaid power to adopt "such measures as it thinks fit" to promote investors' interest, to promote the development of the securities market and to regulate the securities market, has not been curtailed or whittled down in any manner by any other provisions under the SEBI Act, as no provision has been given overriding effect over sub-section (1) of Section 11 of the SEBI Act."

In sub-paras 303.2, 303.3 and 303.4, the powers of SEBI under Section 11(2), 11(3) and 11(4) have been analysed and

elaborately explained.

30. It becomes clear from the above that the functions performed by SEBI are such that any malfunctioning in the performance of such functions can disturb the economy of our country. Keeping in view the aforesaid scope and ambit of the discretionary powers conferred on the Members of the SEBI Board, there is little doubt in our mind that only persons of high integrity would be eligible to be appointed as Chairman/Member of the SEBI. Section 4(5) *inter alia* stipulates that the Chairman and other Members of the SEBI shall be persons of "ability, integrity and standing who have shown capacity in dealing with problems relating to securities market." Statutorily, therefore, a person cannot be appointed as Chairman/Member of the SEBI unless he or she is a person of high integrity. We, therefore, have no hesitation in accepting the submission of Mr. Bhushan that the selection and appointment of respondent No.4 could be challenged before this Court in a writ petition under Article 32 of the Constitution of India on the ground that he does not satisfy the statutory requirements of a person of high integrity.

31. Since Mr. Bhushan has relied on the judgment of this

Court in **Centre for PIL & Anr. (supra)**, it would be appropriate to notice the observations made in that judgment by S.H. Kapadia, C.J. in paragraph 2 of the judgment, it has been observed as follows :-

> "2. The Government is not accountable to the courts in respect of policy decisions. However, they are accountable for the legality of such decisions. While deciding this case, we must keep in mind the difference between legality and merit as also between judicial review and merit review. .... If a *duty* is cast under the proviso to Section 4(1) on the HPC to recommend to the President the name of the selected candidate, the integrity of that decision-making process is got to ensure that the powers are exercised for the purposes and in the manner envisaged by the said Act, otherwise such recommendation will have no existence in the eye of the law."

In our opinion, these observations are relevant as the procedure prescribed for the appointment of Chairman, SEBI is similar to the procedure which was prescribed for the selection on the post of Central Vigilance Commissioner. This apart, it has been emphasised that CVC is an integrity institution. The reasons for the aforesaid view are stated in paragraph 39, it has been observed as follows :-

> "39. These provisions indicate that the office of the Central Vigilance Commissioner is not only given independence and insulation from external influences, it also indicates that such protections are given in order to enable the institution of the CVC to work in a free and fair environment. The

prescribed form of oath under Section 5(3) requires the Central Vigilance Commissioner to uphold the sovereignty and *integrity* of the country and to perform his duties without *fear or favour*. All these provisions indicate that the CVC is an *integrity institution*. The HPC has, therefore, to take into consideration the values, independence and impartiality of the institution. The said Committee has to consider institutional competence. It has to take an informed decision keeping in mind the abovementioned vital aspects indicated by the purpose and policy of the 2003 Act."

32. Elaborating further, Kapadia, C.J., has further observed :

"43. Appointment to the post of the Central Vigilance Commissioner must satisfy not only the eligibility criteria of the candidate but also the decision-making process of the recommendation..."

33. In paragraph 44, it was clarified that "*we should not be understood to mean that personal integrity is not relevant. It certainly has a co-relationship with institutional integrity.*"

34. Keeping in view the aforesaid observations and the ratio of the law laid down, let us now examine the issue with regard to the validity of the recommendation made for the appointment of Mr. Sinha together with the issue as to whether Mr. Sinha does not fulfil the statutory requirement to be appointed as the Chairman of SEBI.

DEPUTATION : Was it irregular, illegal or vitiated by

colourable exercise of power?

35. It is a matter of record that respondent No.4 was on deputation with UTI AMC since the year 2005. His deputation was duly approved by the Ministry of Finance, DOPT and the Government of Bihar, wherever applicable. Respondent No.4 was first appointed as CEO, UTI AMC by order dated 30th October, 2005. He was initially on deputation under Rule 6(2)(ii) and subsequently under Rule 6(2)(i) of the IAS Cadre Rules. The terms and conditions of service of respondent No.4 at UTI AMC were settled on 16th April, 2007. This was in conformity with the letter dated 31st October, 2005 written by the DOPT accepting the request made by the Government of Bihar in its letter dated 28th October, 2005 for approval of deputation of respondent No.4 with UTI AMC for a period of two years under Rule 6(2)(ii) of IAS Cadre Rules. The letter further indicated that terms and conditions applicable in the aforesaid deputation were under examination and would be communicated shortly. The deputation was converted from Rule 6(2)(ii) to Rule 6(2)(i), upon clarification of the applicability of the appropriate rule. This fact is noticed by the petitioner himself whilst stating that although on 6th November, 2007, the proposal for extension of deputation of

Mr. Sinha was for two years, but the extension was granted only for a period of three months until 2nd February, 2008, as an *interim measure*. This, according to the petitioner himself, was because some general issue regarding deputation under Rule 6(2)(ii) of IAS (Cadre) Rules, 1954 was being examined. Therefore, we are unable to accept the submission of Mr. Bhushan that respondent No.4 was in any manner responsible for being sent on deputation initially under Rule 6(2)(ii) and subsequently under Rule 6(2)(i). The "Final Consolidated Deputation Guidelines for All India Service" issued on 28th November, 2007 would also indicate that respondent No.4 cannot be said to be, in any manner, responsible for being sent on deputation under Rule 6(2)(ii). Nor can it be said that any individual officer aided Mr. U.K. Sinha to gain any unfair advantage. Therefore, it cannot be said that his deputation under Rule 6(2)(ii) was approved in colourable exercise of power.

"False Declaration in Form L"

36. A perusal of Office Memorandum dated 1st May, 2008 sent by the Department of Economic Affairs in reference to the letter sent by DoP&T seeking comments of DEA under Rule

26(3) of All India Services (Death-cum-Retirement Benefits) Rules, 1958 would show that necessary facts relating to the service of respondent No.4 in the six years prior to the response dated 1st May, 2008 had been faithfully set out. The Memorandum records the following facts:-

> "Shri U.K. Sinha had been working as Joint Secretary (Capital Markets) in DEA from 2nd June, 2002 to 29th October, 2005. Before joining DEA (Main) he had been Joint Secretary in the erstwhile Banking Division (presently Department of Financial Services) from 30th October, 2000 to 1st June, 2002.
>
> - With the approval of the competent authority, he has been on deputation to Unit Trust of India Asset Management Company (UTI AMC) as its CMD since 3rd November, 2005, and his term there expires on 31st May, 2008. Going by his experience and qualifications, the name of Shri Sinha had been unanimously shortlisted by the Chairmen of the sponsors of UTI AMC [State Bank of India (SBI), Life Insurance Corporation of India (LIC), Bank of Baroda (BoB) and Punjab National Bank (PNB)]. The Government has approved his deputation to UTI AMC, in public interest.
> - UTI AMC is a company formed by SBI, PNB, BoB and LIC, each having equal shareholding. It is registered with Securities and Exchange Board

of India (SEBI) and is engaged in activities pertaining to mutual fund, portfolio management, venture fund management, pension fund and offshore fund management. The UTIAMC is managing the 'financial assets of over Rs. 50,000/- crores.

- Considering the challenges that UTI AMC faces in the prevailing market conditions and the need for continuity necessitated by the structural changes undertaken in the Company, the Chairman of SBI, in consultation with other stakeholders of UTI AMC (viz. LIC, BoB and PNB) has offered to Shri Sinha a four year tenure as CMD of UTIAMC w.e.f. 1st June, 2008, or earlier without break of continuity on the understanding that Shri Sinha will take voluntary retirement from Government service and that Shri Sinha will be entitled for salary and perquisites decided by the Compensation Committee of the Board of the Company from time to time. Hon'ble Finance Minister has approved this proposal.

2. The Department of Economic Affairs supports the request of Shri U.K. Sinha for post retirement commercial employment with UTI AMC as its CMD and certify the following:

- The proposed employment of Shri U.K. Sinha with UTIAMC as its CMD is in public interest and has the approval of Hon'ble Finance Minister.

- There is no conflict of interest between the Government of India and the UTIAMC.
- UTIAMC, formed by SBI, PNB, BoB and LIC, is neither involved in activities prejudicial to India's foreign relations, national security and domestic harmony nor is undertaking any form of intelligence gathering prejudicial to India.
- In the prevailing financial markets condition, the fixed pay of Rs. 1 crore per annum, along with performance related payouts and other usual perks, offered by UTIAMC to Shri Sinha is considered reasonable.
- As per the information available in DEA, the service record of Shri U.K. Sinha is clear, particularly with respect in integrity and dealings with NG0s.

3. Department of personnel &, Training is accordingly requested kindly to grant requisite permission to Shri U.K. Sinha, under intimation to this Department.

4. This issues with the approval of Hon'ble Finance Minister.

(S.K. Verma)

Director to the Government of India…"

37. Keeping in view the aforesaid, we are not satisfied that the petitioner has made any false declaration in 'Form L', Clause 9 read with Rule 26(3) of All India Services (Death-cum-

Retirement Benefits) Rules, 1958, while working in his previous job as Chairman, UTI AMC. Mr. Bhushan has pointed out the following mis-statements and opinions :-

i. In Serial-5, pay scale for the post of Addl. Secretary was mentioned although respondent No.4 was drawing the higher pay scale approved by UTI AMC.

ii. In Serial 9, the 2nd declaration was false as respondent No.4 was working as CEO cum CMD of UTI AMC during the last 3 years on deputation and therefore he was privy to sensitive or strategic information relating to areas of interest or work of UTI AMC.

iii. A mis-statement had been made that generally such posts are not advertised and that was against the JPC Recommendation.

38. In our opinion, the respondents have rightly pointed out that respondent No.4 was on deputation in UTI AMC when he filled up Form `L'. At that time, he held *lien* on the post of Additional Secretary, Government of India. His application for voluntary retirement had been processed. He was, however, required to obtain approval under Rule 26 for commercial employment-post retirement. Sr.No.5 of Form `L' requires the person seeking approval to state the pay scale of the post and pay drawn by the Officer at the time of retirement.

Undoubtedly, respondent No.4 was drawing the pay scale of Rs.22400-525-24500. He also stated his present pay to be Rs.23,450/-. There is no legal infirmity in the aforesaid statement by respondent No.4. It is a settled proposition of law that deputationist would hold the lien in the parent department till he is absorbed on any post. The position of law is quite clearly stated by this Court in **State of Rajasthan & Anr.** Vs. **S.N.Tiwari & Ors.**[5]

> **"18.** This Court in *Ramlal Khurana* v. *State of Punjab* observed that: (SCC p. 102, para 8)
>
> > "*8*. ... Lien is not a word of art. It just connotes the right of a civil servant to hold the post substantively to which he is appointed."
>
> **19.** The term "lien" comes from the Latin term "ligament" meaning "binding". The meaning of lien in service law is different from other meanings in the context of contract, common law, equity, etc. The lien of a government employee in service law is the right of the government employee to hold a permanent post substantively to which he has been permanently appointed."

39. Similarly, in the case of **Triveni Shankar Saxena** Vs. **State of U.P. & Ors.**[6], it has been held as under:-

[5] (2009) 4 SCC 700
[6] 1992 Supp. (1) SCC 524

> **"24.** A learned Single Judge of the Allahabad High Court in *M.P. Tewari* v. *Union of India* following the dictum laid down in the above *Paresh Chandra case* and distinguishing the decision of this Court in *P.L. Dhingra* v. *Union of India* has observed that "a person can be said to acquire a lien on a post only when he has been confirmed and made permanent on that post and not earlier", with which view we are in agreement."

40. In response to Column No.7 of the same Form, respondent No.4 has quite clearly mentioned that he has been offered a fixed pay of Rs. 1.00 crore per annum alongwith performance related payment and other usual perks. The letter containing the offer was enclosed with the Form. The letter clearly states that the Board of Directors, UTI AMC, after going through the prevailing practice in the Industry, has fixed a compensation of Rs.1.00 crore per annum alongwith performance related perks and other usual prerequisites. The shareholders of the UTI AMC have also indicated their concurrence to the above compensation. It must be noticed that respondent No.4 had sought retirement from the IAS w.e.f. 15th May, 2008 to enable him to join UTI AMC on a regular basis as its CMD. Therefore, it cannot be said that at the time when he filled the Form for seeking VRS, respondent No.4 was not drawing the pay scale stated by him. We do not find much substance in the allegation that respondent No.4

had deliberately suppressed the information regarding his salary. The fact that emoluments paid to respondent No.4 w.e.f. 27th December, 2006 would not affect the statement made by respondent No.4 in Form `L' filled on 15th April, 2008. The Board of UTI AMC by resolution dated 12th April, 2008 approved that the CMD can draw revised compensation w.e.f. 27th December, 2006. Till that date, he was still placed in the scale of Additional Secretary, Government of India.

41. The next submission of Mr. Bhushan is that Mr. Sinha had wrongly stated in reply to Sr. No. 9(ii) in Form `L' that he was not privy to any sensitive or strategic information in the last three years of service. This submission of the petitioner is based only on assumption and cannot be accepted without any supporting material. Respondent No.4 in his capacity as a Joint Secretary/Additional Secretary to Government of India was required to state whether he was privy to any sensitive information in his official capacity. The information would be required if the Officer was in receipt of information whilst working as Officer in the Government and is aware of the sensitive proposals or other decisions which are not otherwise known to others and which can be used for giving undue

advantage to the Organization in which he is seeking a future position. In the case of respondent No.4, he was already working as CMD-cum-CEO in the UTI AMC. Therefore, there was no question of respondent No.4 having been privy to any sensitive information with regard to UTI AMC at the time when he was posted as Joint Secretary/Additional Secretary in the Government of India. In fact, respondent No.4 in the same Form No. L at Sr.No.7-C had stated that he was earlier working as Director in UTI AMC and was appointed as CEO cum MD from 3rd November, 2005 and CMD from 13th January, 2006. The declaration is in fact in conformity with the 3rd proviso to Rule 26 of All India Service (DCRB) Rules which envisages that an Officer in deputation of an Organization under Cadre rules can be absorbed in the same Organization post VRS. The word "Service" in Sr. No. 9(ii) in Form L is in contrast to the work of proposed Organization.

42. We are also not much impressed by the submission on behalf of the petitioner that the deputation was in violation of policy of not allowing deputation to an Officer who has over-seen the Organization to which he was being deputed. As noticed earlier, respondent No.4 had no role to play in the

grant of approval of deputation, once he fully disclosed that he had been working as Joint Secretary Banking. He had no further role to play. It is a too farfetched submission that whilst respondent No.4 worked as Joint Secretary Banking that he can be said to have over-seen the Organization of UTI AMC. The petitioner had unnecessarily and without any basis tried to confuse that respondent No.4 would be disqualified for deputation in UTI AMC as he would have been privy to receiving some sensitive information with regard to its functioning. As noticed earlier, Rule 36 of All India Service (DCRB) Rules envisages that an Officer on deputation to an Organization can be absorbed in the same Organization after seeking voluntary retirement.

43. We may also notice here that even the petitioner has not pleaded that UTI AMC is a Government owned Company under Section 617 of the Companies Act. Mr. Bhushan tried to establish that it is a Government controlled company as the shares are all held by instrumentalities of the State. In our view, UTI AMC can not be said to be a Government company. It was for this very reason that respondent No.4 had to make a request for VRS to seek re-employment in a Commercial Organization. We are also not much impressed by the

objection of the petitioner that the deputation of respondent No.4 was contrary to the recommendation of JPC. Subsequent to the recommendation of JPC, the Parliament had passed UTI (Transfer of Undertaking and Repeal) Act, 2002 which was gazetted on 17th December, 2002 and came into force w.e.f. 29th October, 2002. Under the Act, UTI was bifurcated into SUUTI and UTI Mutual Fund, managed by UTI AMC. The Central Government transferred its entire share holding in UTI AMC to Life Insurance Corporation, Punjab National Bank, Bank of Baroda and SBI. The entire consideration for the aforesaid transfer was received by the Central Government. Therefore, it becomes quite evident that UTI AMC is not a "Government Company" under Section 617 of the Companies Act. In the affidavit filed, this has been the consistent stand taken by the Central Government and the CAG in various writ petitions filed by the petitioner. In a company like the UTI AMC, it is for the shareholder on the Board to decide what process to follow and whom to appoint. When the selected candidate is not a government employee having a lien on a government job, then the government would have nothing to do with the selection process. In this case, the shareholders made a request to the Government for the deputation of respondent

No.4. They again made a request for extending his deputation beyond two years. In April 2008, respondent No.4 was offered commercial employment provided he took VRS. At each stage, permission was duly granted by the competent authority after duly following the prescribed procedure as per the rules of executive business. Therefore, we do not find any justifiable reason to doubt the legality of the manner in which respondent No.4 continued to work in UTI AMC since he initially came on deputation in October, 2005.

44. Mr. Bhushan has vehemently argued that respondent No.4 had deliberately concealed or distorted the information in his application for voluntary retirement. We have already noticed that in filling up the Form `L', respondent No.4 had correctly stated the pay scale of the post at the time of seeking voluntary retirement. We have also earlier held that respondent No.4 cannot be said to have been privy to any sensitive information relating to areas of interest of work of UTI AMC whilst he was holding the post of Joint Secretary. In fact in reply to Column No. C of Form `L' i.e. “Whether the Officer had during the last three years of his official career, any dealing with the Firm/Company/Cooperative Society etc?” Respondent No.4 had clearly stated that in his capacity as

Joint Secretary in the Department of Economic Affairs, Capital Market of his Division, he was also inducted as a Director on the Board of UTI AMC. In the meanwhile, he was appointed as MDMCU and CMD w.e.f. 3rd November, 2005 and 13th January, 2006, respectively by the Board of Directors of UTI AMC.

45. The next grievance of the petitioner is that respondent No.4 had made a mis-statement in Column No.7F of Form `L' whilst giving information as to whether the post which has been offered to him was advertised, if not, how was offer made? In reply to the aforesaid question against, respondent No.4 categorically stated that such higher-level posts are generally not advertised. Keeping in mind the contribution made by him and the needs of the Company, the shareholders had made the offer to him. Alongwith this reply, respondent No.4 had attached copy of the letter dated 3rd April, 2008. We have already noticed that UTI AMC is a company incorporated under the Companies Act. As such all the decisions are made by the Board of Directors. The shareholders are Life Insurance Corporation, PNB, BOP and SBI. We have earlier noticed that respondent No.4 was initially on deputation with UTI AMC since 2005. In 2008, he was offered the post of CMD on

contractual basis. Consequently, according to the service rules, he sought his voluntary retirement from the parent cadre, Bihar. This was duly processed by the State of Bihar and approved by the Central Government. UTI AMC is managed on a commercial basis. Therefore, in a commercial company as a part of good governance, it is the responsibility of the Board to ensure succession planning at the top. As a normal practice, nominations are made by the Board and share-holders, either directly or through a search firm and the post is rarely advertised. In any event, it would be the decision to be taken by the Board of Directors. Respondent No.4 would clearly have no say in the matter.

46. We are also of the opinion that there is nothing so outlandish or farfetched in the statement made by respondent No.4 that *"such higher-level posts are generally not advertised"*. It is a matter of record that previously Shri M. Damodaran, an IAS Officer of the rank of Additional Secretary, the post was not advertised. Subsequently also, the appointment of Mr. S.B. Mathur and Administrator Mr. K.N. Tripathi Raj was made without any advertisement. In fact, both the appointments were made without even resorting to

the Search-cum-Selection Process. The erstwhile Chairman of SEBI was also appointed without any advertisement. It is also a matter of common knowledge that the posts such as the Government of Reserve Bank of India are hardly ever advertised. Similarly, the post of Chairman, SEBI was advertised for the first time in 2008. Prior to that, it was not advertised. The statement made by respondent No.4 that such higher posts are generally not advertised, cannot be said to be a misleading or a false statement. It is a statement setting out general practice of appointments in the commercial world on such posts.

47. We also do not find much substance in the submission of Mr. Bhushan that in order to facilitate the appointment of respondent No.4, the recommendations of the JPC that the post should be advertised, was deliberately concealed. A perusal of paragraph 21.9 of the recommendations dated 12th December, 2002 would show that the Government had stated that a professional Chairman and Board of Trustees would manage UTI II. It was also stated that advertisement for the appointment of professional Manager will be issued. The Committee also recommended that it should be ensured that

the selection of the Chairman and Professional Managers of UTI should be done in a transparent manner whether they are picked up from the public or private Sectors. It was further pointed out that if an official from the public sector is selected, in no case the deputation from the parent organization be allowed and the person chosen should be asked to severe all connections with the previous employer. This, according to the Government, was imperative because under no circumstances should there be any public perception that the mutual fund scheme of UTI-II are subject to guarantee by the Government and would be bailed out in case of losses. In the affidavit filed by UOI, the entire service history of respondent No.4 has been set out from the time he joined erstwhile banking division of the Department of Economic Affairs (DEA) as Joint Secretary w.e.f. 30th October, 2000. Thereafter, he was posted as DEA (Main) on 2nd June, 2002; he was assigned the charge of CM Division and was relieved by DEA on 28th October, 2005 on completion of his Central Deputation. At that time a proposal was received in DEA from Chairman, SBI on behalf of the shareholders of UTI AMC regarding initial appointment of respondent No.4 as CEO, UTI AMC for a period of two years. This was forwarded by the DEA to the

Department of Personnel and Training (DOPT) with the approval of the then Finance Minister. The deputation of respondent No.4 was considered under Rule 6(2)(ii) which provides for deputation of a cadre Officer under an international organization, an autonomous body not controlled by the Government or a private body. The aforesaid deputation can be made only in consultation with the State Government on whose cadre the Officer is borne. We had earlier noticed that due procedure was followed when respondent No.4 was sent on deputation. However, at the risk of repetition, since the petitioner has made such a grievance about the same, it will be apt to notice that DOPT had agreed with the proposal of DEA with the consent of Government of Bihar for deputation of respondent No.4 for a period of two years under Rule 6(2)(ii) and conveyed to the Government of Bihar, Department of Economic Affairs through Letter No.14017/26/2005-AIS-(II) dated 31st October, 2005. As noticed earlier, the deputation of respondent No.4 as CEO, UTI was conveyed to UTI vide DOPT letter dated 16th April, 2007. The terms and conditions clearly provided that the Officer could draw the pay of the organization or the government pay scale which was beneficial to respondent No.4. Respondent

No.4 had made a representation to DOPT vide his application dated 29th January, 2007 requesting to allow him to draw the pay in the scale of Additional Secretary to the Government of India as he had already been empanelled to the said post or the pay of CMD of UTI AMC whichever is beneficial to him. The competent authority approved the release of pay of Additional Secretary to respondent No.4 w.e.f. 10th February, 2007, the information was duly communicated to UTI. Furthermore, DEA by its letter dated 19th July, 2007 had requested DOPT for extension of deputation of respondent No.4 as CMD of UTI AMC for a further period of two years beyond 2nd November, 2007 under Rule 6(2)(ii) of the IAS Cadre Rule 1954 on the same terms and conditions. However, the deputation was extended only for a period of three months beyond 2nd November, 2007, as an interim measure till the issue of deputation of IAS Officer under Rule 6(2)(ii) of IAS Cadre Rules 1954 was finalized. Therefore, the deputation was extended upto 2nd February, 2008. Thereafter the matter was again taken up by the DEA, DOPT for consideration of the case of respondent No.4 under Rule 6(1) of the IAS Cadre Rules under which an Officer may be deputed to service under the Central Government or under State Government or under a Company,

Organization, Body of Individuals whether incorporated or not, which is wholly substantially owned or controlled by the Central Government or by any other State Government. Therefore, ultimately, according to the consolidated guidelines, the deputation of respondent No.4 was covered under Rule 6(1)(i) of the IAS Cadre Rules.

48. There is not much substance in the submission that just for the sake of accommodating respondent No.4, the recommendations of the JPC were concealed from the Government. This submission is fallacious on the face of it as the recommendations of the JPC were placed before the Parliament and Government of India directly. Respondent No.4 had no role to play in that procedure. In fact, the Government of India submitted action taken report in context of the recommendations from time to time and was fully aware of it. The Government of India never adopted the policy of not sending IAS Officer on deputation to UTI AMC and informed the Parliament in its 3rd action taken report submitted in December, 2004. The decision to grant approval of commercial employment post retirement under Rule 26 was taken by the Government of India. The post was filled up by

Board of Directors and shareholders of UTI AMC. It was entirely for them to adopt such policy of appointment as they deem fit. We fail to understand that even upon respondent No.4 complying with all the conditions of deputation, it would render him a person of not high integrity. We may notice here that the Appointment Committee of the Cabinet (ACC) had approved the extension of tenure of respondent no.4 as CMD UTI AMC till 31st may, 2008.

49. This takes us past the alleged irregularities regarding deputation of respondent No.4, the alleged misstatement/non-disclosure about his pay scale/sanctioned emoluments as disclosed in the letter dated 16th April, 2007; the alleged appointment of respondent No.4 is contrary to recommendations made by the AAPTE Committee on July, 2007; the alleged false declaration under Rule 26(3)(ii) of AIS Death-cum-Retirement Rules that in the last three years of his career he had not been privy to sensitive and strategic information of UTI AMC; the alleged false statement about higher-level posts are generally not advertised.

Was the recommendation and appointment of Mr. U.K. Sinha vitiated by MALA FIDE exercise of powers?

50. Mr. Bhushan submitted that the appointment of Mr. Sinha, as Chairman, SEBI was made *mala fide*. Undoubtedly, if the allegations of *mala fide* are established, it would vitiate the selection procedure, recommendation and the appointment of Mr. U.K.Sinha as the Chairman, SEBI. But the burden of proving the allegations of *mala fide* would lie very heavily on the petitioner. The law in relation to the standard of proof required in establishing a plea of *mala fide* has been repeatedly stated and restated by this Court. Mr. Salve had relied on the three judgments of this Court viz., **Purushottam Kumar Jha** Vs. **State of Jharkhand & Ors.,**[7] **Indian Railway Construction Co. Ltd.** Vs. **Ajay Kumar,**[8] *and* **Saradamani Kandappan** Vs. **S. Rajalakshmi & Ors.**[9] The law concerning the aforesaid issue is so well settled that it was hardly necessary to make any reference to previous precedent. We may, however, notice the observations made by this Court in the aforesaid three cases. In **Purushottam Kumar Jha's case** (**supra**), this court held that :

> **"23.** It is well settled that whenever allegations as to mala fides have been levelled, sufficient particulars and cogent materials making out *prima facie* case must be set out in the pleadings. Vague

[7] (2006) 9 SCC 458
[8] (2003) 4 SCC 579
[9] (2011) 12 SCC 18

allegation or bald assertion that the action taken was mala fide and malicious is not enough. In the absence of material particulars, the court is not expected to make "fishing" inquiry into the matter. It is equally well established and needs no authority that the burden of proving mala fides is on the person making the allegations and such burden is "very heavy". Malice cannot be inferred or assumed. It has to be remembered that such a charge can easily be "made than made out" and hence it is necessary for the courts to examine it with extreme care, caution and circumspection. It has been rightly described as "the last refuge of a losing litigant". (Vide *Gulam Mustafa* v. *State of Maharashtra*; *Ajit Kumar Nag* v. *GM (PJ), Indian Oil Corpn. Ltd.*)"

51. In **Indian Railway Construction Co. Ltd.** Vs. **Ajay Kumar (supra)**, this court reiterated the law laid down in **S. Partap Singh** Vs. **State of Punjab** and **E.P. Royappa** Vs. **State of T.N.** on the standard of proof required to establish the plea of *mala fide* in the following words:-

"It cannot be overlooked that the burden of establishing mala fides is very heavy on the person who alleges it. The allegations of mala fides are often more easily made than proved, and the very seriousness of such allegations demands proof of a high order of credibility. As noted by this Court in *E.P. Royappa* v. *State of T.N.* courts would be slow to draw dubious inferences from incomplete facts placed before it by a party, particularly when the imputations are grave and they are made against the holder of an office which has a high responsibility in the administration."

52. Further, in **Saradamani Kandappan's case (supra)**,

this court again emphasized that the contention of fraud has to be specifically pleaded and proved.

53. Keeping in mind the aforesaid observations, we shall now examine the material placed before us by the petitioner to establish the allegations of *mala fide* exercise of power.

54. The first instance of *mala fide* relied upon by Mr. Bhushan that number of steps were taken deliberately to deny extension to the earlier Chairman. According to Mr. Bhushan, the moving spirit in the strategic plan to deny the extension to Mr. C.B. Bhave was respondent No.6. The allegations made by the petitioner have been emphatically denied by UOI, Mr. Sinha, respondent No.4 and Ms. Omita Paul, respondent No.6. As far as the grievance of the petitioner that Mr. C.B. Bhave was denied extension just to accommodate respondent No. 4 is concerned, we are inclined to accept the submission of Mr. Mohan Parasaran, learned Solicitor General, that there was no mala fides involved in taking that decision. Learned Solicitor General pointed out that in 2009 when the name of Mr. Bhave was being considered for an extension, serious controversies came to be unearthed with regard to the entire

NSDL issue relating to the IPO scam during which Mr. Bhave was the CMD of NSDL. A two member "Special Committee" consisting of Dr. G. Mohan Gopal and Mr. V. Leeladhar that was appointed by SEBI to look into the matter passed three orders. In one of these orders, there was a serious indictment of NSDL. The media reports published in connection with this controversy adversely commented upon the role of Mr. Bhave as CMD of NSDL. Even Mr. J.S. Verma, former CJI, had voiced his concern about possible shielding of Mr. Bhave by SEBI. Dr. G. Mohan Gopal wrote a letter dated 8th April, 2009, wherein he criticized the action of SEBI on the role played by Mr Bhave. According to Mr. Parasaran, the then Finance Minister perused some of the relevant documents cited above before making the note on 22nd December, 2009, that led to denial of extension to Mr. Bhave. In these circumstances, the noting made by the Finance Minister that led to denial of extension to Mr. Bhave cannot ever be considered unreasonable, let alone *mala fide*. Thus, we are inclined to accept the submission of Mr. Parasaran that there is no mala fides involved in denying an extension of Mr. Bhave.

55. The learned Attorney General, in our opinion, rightly

pointed out that no illegality was committed in making the amendment in the rules pertaining to the selection of Chairman/WTM of SEBI. It is borne out from the record that prior to 23rd July, 2009, there was no rule on the procedure to be followed in the selection of Chairman/whole time Member of SEBI. The selection procedure for the Chairman of SEBI in 2008 was approved by the Finance Minister on 2nd November, 2007. This procedure envisaged that the selection has to be made on the recommendation of the high powered Search Committee. The composition of the Search Committee was changed on the orders of the Finance Minister. The learned Attorney General also pointed out that the amendment of the rules had no relevance to the consideration of recommendation of Mr. Sinha to be appointed as Chairman of the SEBI. The Attorney General had also pointed out that in spite of the change in the Selection Committee and in spite of Mr. Sinha having been short-listed at No.1 by the Search-cum-Section Committee in its meeting held on 29th November, 2008, it was Shri C.B. Bhave who was appointed Chairman, SEBI on 15th February, 2008. We also find substance in the submission of learned Attorney General that the amendment in Rule 3 of the Security Exchange Board of India (Terms and

Conditions of Service and Members) Rules, 1992 was to provide for more participation by the expert members. Therefore, sub-rule (5) of the aforesaid rules was incorporated which requires that recommendation of Search-cum-Selection Committee will consist of Cabinet Secretary, Department of Economic Affairs, Chairman, SEBI for selection of WTM and two expert eminent from relevant field. We have also been taken through the necessary correspondence for the inclusion of Shri Suman Berry and Shekhar Chaudhary, two experts of eminence from the relevant filed for the selection of Chairman, SEBI in 2010. But it was noticed that inclusion of Secretary Finance Services was not within the rules as amended on 23rd July, 2009. Upon discussion with the Ministry of Law, it was decided that the amendment in the rules could be made in line with the rule prevalent for the selection made to the Income Tax Appellate Tribunal. In view of the record produced in this court, we are of the opinion that the submission made on behalf of the petitioner is not correct. Learned Attorney General submitted that the Search-cum-Selection Committee, after scrutinizing the qualification and experience of the short-listed candidates unanimously placed respondent No.4 first in the merit list. We have also perused

the record and it appears that respondent No.4 was unanimously placed at Sr.No.1 by the Search-cum-Selection Committee. It has wrongly been submitted on behalf of the petitioner that respondent No.4 was placed at No.2 and yet he was appointed ignoring the person who was placed at No.1.

56. Mr. Salve has made very detailed submissions on behalf of respondent No.4. Giving us the entire sequence of how the rules were amended. Mr. Salve has rightly pointed out that the petitioner has falsely contended that rules concerning the constitution of Search-cum-Selection Committee amended through notification dated 7th October, 2010 were to ensure the selection of Mr. Sinha. The applications for filling up the post of SEBI Chairman were invited on 10th September, 2010. It is noteworthy that Mr. Sinha did not apply in response to the invitation. Further more, the rules were amended in exercise of the powers conferred on the Finance Minister under Section 29 of the SEBI Act. The aforesaid notification issued by the Finance Ministry has not been challenged by the petitioner. We also notice here that prior to the amendment, the procedure for selection of Chairman, SEBI was determined by the Finance Minister. Having perused the entire record, we are not satisfied that the petitioner has made out a case of *mala*

fide to vitiate the proceedings of the Search-cum-Selection Committee. The first meeting of the Search-cum-Selection Committee was held on 2nd November, 2010. Upon deliberations, the Committee decided to invite Mr. Sinha alongwith five others. We may notice here that Shri Suman Bery did not attend the meeting. The suitability of respondent No.4 had to be determined by the Search-cum-Selection Committee. We are unable to discern any illegality in the procedure adopted by the Search-cum-Selection Committee. We also find substance in the submission of Mr. Salve that the petitioner has made much a do about the non-mention of the pay scale of the petitioner in the Performa sent to the ACC which was enclosed with the Confidential Letter No. DO No.2/23/2007-RE dated 13th December, 2010. The letter clearly mentions that Search-cum-Selection Committee was constituted under Rule 3 of the SEBI Rules, 1992. The Search-cum-Selection Committee consisted of :-

1. Shri K.M.Chandrasekhar, Cabinet Secretary - Chairman
2. Shri Ashok Chawla, Finance Secretary - Member
3. Shri R.Gopalan, Secretary (DFS) - Member
4. Shri Devi Dayal, Former Secretary (Banking) - Member
5. Prof. Shekhar Chaudhuri, Director, IIM Kolkata - Member

6**.** Dr. Suman K.Bery, Director General, NCAER - Member

57. Applications were invited by circulating the vacancy position to all cadre controlling authorities in the Government of India and States on 10th September, 2010. The vacancy was simultaneously put on the Website of the Ministry of Finance, Department of Personnel and Training. It was also advertised in three largest circulating English Newspapers of the country on 18th September, 2010. It is clearly mentioned that out of the 19 applicants, who were respondents to the advertisement in the first meeting of the Committee held on 2nd November, 2010, five were short listed. In addition, the Search-cum-Selection Committee also decided to invite Mr. Sinha CMD, UTI AMC for interaction. The Search-cum-Selection Committee based on the qualification, experience and personal interaction with the short listed candidates, recommended the names of Mr. U.K. Sinha and Mr. Himadri Bhattacharya *in that order of merit*, for being considered for appointment as Chairman SEBI. The letter further mentions that the Finance Minister proposed the appointment of Mr. U.K. Sinha as Chairman, SEBI, for an initial period of three years from the date he resumes the charge or till he attain the age of 65 years, whichever is earlier. It is noted that willingness of Mr.

Sinha has been obtained and was enclosed with the letter. On this basis, it was requested that approval of the ACC be obtained for the appointment of Mr. Sinha as Chairman, SEBI. The letter also notes that the prescribed Performa, duly filled in, is also enclosed. We fail to see what role Mr. Sinha had to play in the whole procedure except for accepting the invitation of the Search-cum-Selection Committee for interaction. Even if the pay scale has not been mentioned, it cannot cast a shadow on the integrity of the proceedings held by the Search-cum-Selection Committee. It is also to be noticed that the proposal was sent to the ACC on the express approval of the then Finance Minister. It is noteworthy that the then Finance Minister was Mr. Pranab Mukherjee. He is renowned for his transparency in the performance of his official functions. He is at present the President of India.

58. Mr. Salve, in our opinion, has also rightly submitted that there is nothing surprising in respondent No.4 accepting the post of Chairman, SEBI which carried much lesser emoluments than he enjoyed as Chairman, UTI AMC. It is not abnormal for people of *high integrity* to make a sacrifice financially to take up the *position of honour and service to the nation*. In any

event, we are of the opinion, the acceptance by Mr. Sinha of lesser salary as Chairman of SEBI cannot *ipso facto* lead to the conclusion that he accepted the position for the purpose of abusing the authority of Chairman, SEBI. Adverting to the allegation of non-disclosure of ESOP, in our opinion, Mr. Salve has rightly submitted that it was not done to avoid any investigation by the ACC into the question as to why respondent No.4 would wish to join Chairman, SEBI when he was drawing much higher emoluments as Chairman, UTI AMC. This non-mention cannot lead to the conclusion that if the same had been mentioned, respondent No.4 would not have been selected as Chairman, SEBI on the ground that it would have been illogical for a person drawing higher emoluments on one post to join another post having lesser emoluments. Mr. Salve has rightly reiterated that there was nothing abnormal; in the course adopted by respondent No.4. No material has been placed on record to show that respondent No.4 was in receipt of ESOP illegally. It has been pointed out that under ESOP, an employee is given an option by the company to buy its shares upto the given quantity allotted to him which can be exercised after a specified time. In the case of UTI AMC, the stock option was to vest after a period of three

years. Secondly, an employee could not exercise 100% of the option in one go. It was spread over four years, 10% in the 4th year, 20% in the 5th year, 30% in the 6th year and last 40% in the 7th year. After vesting of each trench, the employee had one year to make up his mind whether to exercise his option or to let it go by. In UTI AMC, ESOP was approved by the shareholders. The HR Committee of the Board and the Board, the decision by the Board was taken on 27th December, 2007. The minutes of the meeting of the Board dated 12th April, 2008 clearly shows that the stock option was exercised by respondent No.4 in accordance with due procedure. However, even though the decision had been taken by the Board of Directors on 17th September, 2007 to grant respondent No.4 market based compensation, the matter was pending with the share holders. It was only on 12th April, 2008 that the Board took a decision to release the market based compensation to respondent No.4. The actual allocation of ESOP was made to respondent No.4 on 17th May, 2008 through the letter of head of HR Committee of the Board. In fact in 2011 after respondent No.4 got appointment in SEBI and had to leave UTI AMC on 31st January, 2011, he surrendered his entire ESOP and rescinded all his rights to

exercise his option in future. We, therefore, find no substance in the submission of the petitioner that there was any ulterior motive involved in non-disclosure of the information with regard to ESOP to the ACC.

59. This brings us to the issue whether there was a conspiracy hatched to ensure the selection of respondent No.4 as Chairman, SEBI. The petitioner stated that the conspiracy involved taking seven steps, namely:-

i. Mr.Sinha would seek voluntary retirement from IAS.

ii. SBI Chairman would move to make a fresh offer.

iii. Mr.Sinha would seek approval for post retirement commercial employment.

iv. Ministry of Finance would recommend commercial employment.

v. DOPT would approve the same and waive the waiting period.

vi. All concerned persons in the decision making process would designate the employment with UTI AMC as commercial employment.

vii. File would not be sent to the PMO/ACC for information or approval.

60. We have already considered all the points raised by the petitioner in the earlier part of the judgment. Therefore, it is not necessary to repeat the same. This, apart, the charge of conspiracy has to be taken seriously as it involves the commission of very serious criminal offence under Section 120-B of the IPC. Such a charge of criminal intent and conduct had to be clearly pleaded and established by evidence of very high degree of probative value. No notice of such allegations can be taken based only on pure conjectures, speculations and interpretation of notings in the official files.

61. The observations made by this Court in the judgments noticed earlier make it clear that it was incumbent on the petitioner not only to make specific allegations, but to produce very strong evidence to lead to a clear conclusion that the selection was actuated by *mala fide*. The 7 steps relied upon by the petitioner to establish conspiracy *per se* do not amount to conspiracy to mislead the ACC. It is unbelievable to expect such a coordinated overt and covert operation to have been even conceived, let alone successfully executed just to have Mr. U.K. Sinha appointed as Chairman, SEBI. The appointment of Mr. Sinha is strictly in conformity with the procedure

prescribed by service rules, i.e, Rules 16 and 26 of the AIS (DCRB) Rules, 1958. The files were sent to PMO as and when required by rules of business. In matter of VRS and post retirement commercial employment, there is no requirement under the rules of business of sending the file to PMO/ACC. We find substance in the submission of Mr. Salve that the petitioner has not placed on record any material to establish that any conspiracy was hatched to ensure the selection of respondent No.4.

62. The submissions made by the learned Attorney General and Mr. Salve have also been supported by learned Solicitor General appearing on behalf of respondent No.6. Mr. Prasaran submitted that baseless allegations have been made against respondent No.6. She was neither the recommending authority nor the appointing authority for the post of SEBI. She was appointed as Advisor to the Finance Minister on 26th June, 2009. Mr. Prasaran, in our opinion, has rightly made a grievance that all the actions taken by respondent No.6 in the execution of her duty have been deliberately warped and distorted to unnecessarily involve her in the trumped up controversy. Her role as Advisor was limited to advising/assisting the Finance Minister on the work assigned

to her. The nature of work was, therefore, different from the role of a functionary who performed an assigned line of functions. She could have neither recommended respondent No.4 for appointment nor negated any recommendation. By making a detailed reference to the official record, Mr. Prasaran has pointed out that the Chairman, SEBI is appointed by the Central Government by following an established process by the ACC headed by the Prime Minister. This is done on the basis of Search-cum-Selection Committee of the Government of India. The opinion of other independent and reputed experts in the field of Economics, Finance and Management is also taken through an institutional mechanism approved by the DOPT. We are inclined to accept the submission of the learned Solicitor General that the allegations made against respondent No.6 are imaginary and based on a distorted interpretation of the official notes appended with the writ petition. With regard to the non-extension of Mr. C.B. Bhave, the learned Solicitor General relied upon the averments made in the counter affidavit filed by the UOI in Writ Petition No.391 of 2011. The aforesaid affidavit has been attached as Annexure R-4 to the counter affidavit filed by respondent No.6 in the present writ petition. In the aforesaid affidavit, it has

been set out that prior to July, 2009; selections were made by the Committee as decided by the Finance Minister from time to time. As noticed earlier, the name of Dr. S.A. Dave, Chairman, CMIE was added as an expert member of the high powered Selection Committee constituted by the Finance Minister for the selection of Chairman, SEBI in 2008. Even at that time, Mr. Sinha was short-listed and placed at Sr.No.1. Out of the two names short listed as noticed by us earlier in spite of the recommendations, it was C.B. Bhave who was appointed. In 2009, a statutory system was established for the selection of Chairman/Whole time Member of SEBI. In this back-ground, Rule 3 was amended by introducing sub-rule (5) which provided that the Chairman and every whole time member shall be appointed by the Central Government on the recommendation of the Selection-cum-Search Committee consisting of the (i) Cabinet Secretary as the Chairman, (ii) Secretary, Department of Economic Affairs, (iii) Chairman, SEBI (for selection of whole time members) (iv) two experts of eminence from the relevant field to be nominated by the Central Government. In 2010, it was decided to initiate action for a fresh selection for the post of Chairman, SEBI. Therefore, a note was initiated on 18th July, 2010 for the constitution of a

Committee. Various names were suggested for inclusion as experts. While approving the constitution of the Selection Committee, the Finance Minister also observed that going by earlier precedent, the Committee should have composition that includes Secretary, Finance Services, who functionally deals with special critical aspects of the capital market. Thus, with the addition of the Secretary Finance Services, the number of nominees in the Search-cum-Selection Committee became five. Unlike in the past, the composition of the Selection Committee was sent to the DOPT for approval. However, on 23rd September, 2010, DOPT pointed out as noticed earlier that inclusion of Secretary Finance Services was not within the rules amended on 23rd July, 2009 which led to the amendment of the rules. To rectify this shortcoming, the amendment of the rules became necessary. It was within the powers of the Central Government to make the aforesaid amendment, which was carried out in accordance with the rules. It is, therefore, difficult to accept the submission of the petitioner that the amendment in the rules was made to ensure the non-extension of Mr. C.B. Bhave as Chairman, SEBI. In fact, Mr. Bhave was not granted the extension for the reasons which have been given in detail by Mr. Prasaran in his

submission, the same need not be reiterated. We are also unable to take the allegations made by Dr. Abraham seriously, as the same seem to be actuated by ulterior motive. It is a direct attack on the integrity of respondent No.4. The opinion expressed by Dr. Abraham, in his lengthy letter, cannot be given much credence unless it is supported by very convincing material. We are also not much impressed by the submission of Mr. Bhushan that the constitution of the Search-cum-Selection Committee was changed at the instance of respondent No.6. As narrated by the Solicitor General, the ultimate selection was made by a Selection Committee consisting of Members who were all serving Officers in the Government. Therefore, it is difficult to accept the submission that 3 out of 5 members were hand-picked by respondent No.6 to select Mr. Sinha. We are also unable to see any merit in the submission of the petitioner that the post of CMD, UTI AMC was kept vacant for 17 months to accommodate the brother of respondent No.6. In our opinion, the allegations are malicious and without any basis, and therefore, cannot be taken into consideration.

63. This now brings us to the preliminary objections

raised by the respondents that the writ petition deserves to be dismissed on the ground that it is not a bona fide petition. According to the respondents, the petitioner has been set up by interested parties. We entirely agree with the submissions made by the learned Attorney General that the first requirement for the maintainability of a public interest litigation is the *uberrimae fide* of the petitioner. In our opinion, the petitioner has unjustifiably attacked the integrity of the entire selection process. It is virtually impossible to accept the submission that respondent No.6 was able to influence the decision making process which involves the active participation of the ACC, a high powered Search-cum-Section Committee with the final approval of the Finance Minister and the Prime Minister. The proposition is so absurd that the allegations with regard to *mala fide* could have been thrown out at the threshold. We have, however, examined the entire issue not to satisfy the ego of the petitioner, but to demonstrate that it is not entirely inconceivable that a petition disguised as "public interest litigation" can be filed with an ulterior motive or at the instance of some other person who hides behind the cloak of anonymity even in cases where the procedure for selection has been meticulously followed. The

respondents have successfully demonstrated how the petitioner has cleverly distorted and misinterpreted the official documents on virtually each and every issue. In our opinion, the petition does not satisfy the test of *utmost good faith* which is required to maintain public interest litigation. We have been left with the very unsavoury impression that the petitioner is a *surrogate* for some powerful *phantom* lobbies. Respondent No.2-SEBI in its affidavit has stated that the petitioner is a habitual litigant. He files writ petitions against individuals to promote vested interest without any relief to the public at large. We are at a loss to understand as to how in the facts of this case, the petitioner can justify invoking the jurisdiction of this court under Article 32. This is not a petition to protect the Fundamental Rights of any class of down trodden or deprived section of the population. It is more for the protection of the vested interests of some unidentified business lobbies. The petitioner had earlier filed writ petition in which identical relief had been claimed and the same had been dismissed. The aforesaid writ petition is sought to be distinguished by the petitioner on the ground that three successive writ petitions were withdrawn as sufficient pleadings were not made for the grant of necessary relief.

Even if this preliminary objection is disregarded, we are satisfied that the present petition is filed at the behest of certain interested powerful lobbies. The allegations made in the letter written by Dr. Abraham are without any basis and clearly motivated. Further, a perusal of the record clearly reveals that several complaints were filed against Dr. Abraham, wherein some serious allegations have been made against him in relation to his tenure as the Whole Time Member (WTM), SEBI. Also, it was only after the Ministry of Finance decided not to extend his tenure as WTM, SEBI and advertisements for new appointments were issued that Dr. Abraham started complaining about interference of the Ministry of Finance in SEBI through the present Chairman. We may also notice here that the letter dated 1st June, 2011 written by Dr. Abraham to the Prime Minister, that the Petitioner seeks reliance upon, was written merely a month and a half before Dr. Abrham's tenure was to end. From the above, it is manifest that the letter written by Dr. Abraham was clearly motivated and espouses no public interest. The affidavit also narrates the action which has been taken by SEBI against very influential and powerful business Houses, including Sahara and Reliance. It is pointed out that the

petitioner is a *stool pigeon* acting on the directions of these Business Houses. We are unable to easily discard the reasoning put forward by respondent No.4. It is a well known fact that in recent times, SEBI has been active in pursuing a number of *cause celebre* against some very powerful Business Houses. Therefore, the anxiety of these Business Houses for the removal of the present Chairman of SEBI is not wholly unimaginable. We make the aforesaid observations only to put on record that the present petition could have been dismissed as not maintainable for a variety of reasons. However, we have chosen to examine the entire issue to satisfy our judicial conscience that the appointment to such a High Powered Position has actually been made fairly and in accordance with the procedure established by law.

64. We find no merit in this petition which is accordingly dismissed.

.....J.

[**Surinder Singh Nijjar]**

.....J.

[**Pinaki Chandra Ghose]**

New Delhi;
November 01, 2013.