REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL ORIGINAL JURISDICTION
WRIT PETITION (C) No. 348 OF 2010

Centre for PIL & Anr. …
Petitioner(s)

versus

Union of India & Anr. …
Respondent(s)

with
Writ Petition (C) No. 355 of 2010

J U D G M E N T

S. H. KAPADIA, CJI

Introduction

1. The two writ petitions filed in this Court under Article 32 of the Constitution of India give rise to a substantial question of law and of public importance as to the legality of the appointment of Shri P.J. Thomas (respondent No. 2 in W.P.(C) No. 348 of 2010) as Central Vigilance Commissioner under Section 4(1) of the Central Vigilance Commission Act, 2003 ("2003 Act" for short).

2. 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. On 3rd September, 2010, the High Powered Committee ("HPC" for short), duly constituted under the proviso to Section 4(1) of the 2003 Act, had recommended the name of Shri P.J. Thomas for appointment to the post of Central Vigilance Commissioner. The validity of this recommendation falls for judicial scrutiny in this case. 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 law.

Clarification

3. At the very outset we wish to clarify that in this case our judgment is strictly confined to the legality of the recommendation dated 3rd September, 2010 and the appointment based thereon. As of date, Shri P.J. Thomas is

Accused No. 8 in criminal case CC 6 of 2003 pending in the Court of Special Judge, Thiruvananthapuram with respect to the offences under Section 13(2) read with Section 13(1)(d) of the Prevention of Corruption Act, 1988 and under Section 120B of the Indian Penal Code ("IPC" for short) [hereinafter referred to as the "Palmolein case"]. According to the petitioners herein, Shri P.J. Thomas allegedly has played a big part in the cover-up of the 2G spectrum allocation which matter is subjudice. Therefore, we make it clear that we do not wish to comment in this case on the pending cases and our judgment herein should be strictly understood to be under judicial review on the legality of the appointment of respondent No. 2 and any reference in our judgment to the Palmolein case should not be understood as our observations on merits of that case._

Facts

4. Shri P.J. Thomas was appointed to the Indian Administrative Service (Kerala Cadre) 1973 batch where he served in different capacities with the State Government including as Secretary, Department of Food and Civil Supplies,

State of Kerala in the year 1991. During that period itself, the State of Kerala decided to import 30,000 MT of palmolein. The Chief Minister of Kerala, on 5th October, 1991, wrote a letter to the Prime Minister stating that the State was intending to import Palmolein oil and that necessary permission should be given by the concerned Ministries. On 6th November, 1991, the Government of India issued a scheme for direct import of edible oil for Public Distribution System (PDS) on the condition that an ESCROW account be opened and import clearance be granted as per the rules. Respondent No. 2 wrote letters to the Secretary, Government of India stating that against its earlier demand for import of 30,000 MT of Palmolein oil, the present minimum need was 15,000 MT and the same was to meet the heavy ensuing demand during the festivals of Christmas and *Sankranti*, in the middle of January, 1992, therefore, the State was proposing to immediately import the said quantity of Palmolein on obtaining requisite permission. The price for the same was fixed on 24th January, 1992, i.e., 56 days after the execution of the agreement. The Kerala State Civil Supplies Corporation Ltd. was to act as an agent of

the State Government for import of Palmolein. The value of the Palmolein was to be paid to the suppliers only in Indian rupees. Further, the terms governing the ESCROW account were to be as approved by the Ministry of Finance. This letter contained various other stipulations as well. This was responded to by the Joint Secretary, Government of India, Ministry of Civil Supplies and Public Distribution, New Delhi vide letter dated 26th November, 1991 wherein it was stated that it had been decided to permit the State to import 15,000 MT of Palmolein on the terms and conditions stipulated in the Ministry's circular of even number dated 6th November, 1991. It was specifically stated that the service charges up to a maximum of 15% in Indian rupees may be paid. After some further correspondence, the order of the State of Kerala is stated to have been approved by the Cabinet on 27th November, 1991, and the State of Kerala actually imported Palmolein by opening an ESCROW account and getting the import clearance at the rate of US $ 405 per MT in January, 1992.

5. The Comptroller and Auditor General ('CAG'), in its

report dated 2nd February, 1994 for the year ended 31st March, 1993 took exception to the procedure adopted for import of Palmolein by the State Government. While mentioning some alleged irregularities, the CAG observed, "therefore, the agreement entered into did not contain adequate safeguards to ensure that imported product would satisfy all the standards laid down in Prevention of Food Adulteration Rules, 1956". This report of the CAG was placed before the Public Undertaking Committee of the Kerala Assembly. The 38th Report of the Kerala Legislative Assembly - Committee on Public Undertakings dated 19th March, 1996, *inter alia,* referred to the alleged following irregularities:-

a. That the service fee of 15% to meet the fluctuation in exchange rate was not negotiated and hence was excessive. Even the price of the import product ought not to have been settled in US Dollars.

b. That the concerned department of the State of Kerala had not invited tenders and had appointed M/s. Mala Export Corporation, an associate company of M/s. Power and Energy Pvt. Ltd., the company upon which the import

order was placed as handling agent for the import.

c. That the delay in opening of ESCROW accounts and in fixation of price, which were not in conformity with the circular issued by the Central Government had incurred a loss of more than Rupees 4 crores to the Exchequer.

6. The Committee also alleged that under the pretext of plea of urgency, the deal was conducted without inviting global tenders and if the material was procured by providing ample time by inviting global tenders, other competitors would have emerged with lesser rates for the import of the item, which in turn, would have been more beneficial.

7. The Chief Editor of the Gulf India Times even filed a writ petition being O.P. No. 3813 of 1994 in the Kerala High Court praying that directions be issued to the State to register an FIR on the ground that import of Palmolein was made in violation of the Government of India Guidelines. However, it came to be dismissed by the learned Single Judge of the Kerala High Court on 4th April, 1994. Still another writ petition came to be filed by one Shri M. Vijay Kumar, who was

MLA of the Opposition in the Kerala Assembly praying for somewhat similar relief. This writ petition was dismissed by a learned Single Judge of the Kerala High Court and even appeal against that order was also dismissed by the Division Bench of that Court vide order dated 27th September, 1994.

8. Elections were held in the State of Kerala on 20th May, 1996 and the Left Democratic Front formed the government. An FIR was registered against Shri Karunakaran, former Chief Minister and six others in relation to an offence under Section 13(2) read with Section 13(1) (d) of the Prevention of Corruption Act, 1988 and Section 120B of the IPC. The State of Kerala accorded its sanction to prosecute the then Chief Minister Shri Karunakaran and various officers in the State hierarchy, who were involved in the import of Palmolein, including respondent No. 2 on 30th November, 1999.

9. Shri Karunakaran, the then Chief Minister filed a petition before the High Court being Criminal Miscellaneous No.1353/1997 praying for quashing of the said FIR registered against him and the other officers. Shri P.J. Thomas herein was not a party in that petition. However, the High Court

dismissed the said writ petition declining to quash the FIR registered against the said persons. In the meanwhile, a challan (report under Section 173 of the Code of Criminal Procedure) had also been filed before the Court of Special Judge, Thiruvananthapuram and in this background the State of Kerala, vide its letter dated 31st December, 1999 wrote to the Department of Personnel and Training (DoPT) seeking sanction to prosecute the said person before the Court of competent jurisdiction. Keeping in view the investigation of the case conducted by the agency, two other persons including Shri P.J. Thomas were added as accused Nos. 7 and 8.

10. Shri Karunakaran challenged the order before this Court by filing a Petition for Special Leave to Appeal, being Criminal Appeal No. 86 of 1998, which also came to be dismissed by this Court on 29th March, 2000. This Court held that "after going through the pleadings of the parties and keeping in view the rival submissions made before us, we are of the opinion that the registration of the FIR against the appellants and others cannot be held to be the result of mala fides or actuated by extraneous considerations. The menace

of corruption cannot be permitted to be hidden under the carpet of the legal technicalities…". The Government Order granting sanction (Annexure R-I in that petition) was also upheld by this Court and it was further held that "our observations with respect to the legality of the Government Order are not conclusive regarding its constitutionality but are restricted so far as its applicability to the registration of the FIR against the appellant is concerned. We are, therefore, of the opinion that the aforesaid Government Order has not been shown to be in any way illegal or unconstitutional so far as the rights of the appellants are concerned…". Granting liberty to the parties to raise all pleas before the Trial Court, the appeal was dismissed. In the charge-sheet filed before the Trial Court, in paragraph 7, definite role was attributed to Accused No. 8 (respondent No. 2 herein) and allegations were made against him.

11. For a period of 5 years, the matter remained pending with the Central Government and vide letter dated 20th December, 2004, the Central Government asked the State Government to send a copy of the report which had been filed

before the Court of competent jurisdiction. After receiving the request of the State Government, it appears that the file was processed by various authorities and as early as on 18th January, 2001, a note was put up by the concerned Under Secretary that a regular departmental enquiry should be held against Shri P.J. Thomas and Shri Jiji Thomson for imposing a major penalty. According to this note, it was felt that because of lack of evidence, the prosecution may not succeed against Shri P.J. Thomas but sanction should be accorded for prosecution of Shri Jiji Thomson. On 18th February, 2003, the DoPT had made a reference to the Central Vigilance Commission ("CVC" for short) on the cited subject, which was responded to by the CVC vide their letter dated 3rd June, 2003 and it conveyed its opinion as follows: -

> "Department of Personnel & Training may refer to their DO letter No.107/1 /2000-AVD.I dated 18.02.2003 on the subject cited above.
>
> 2. Keeping in view the facts and circumstances of the case, the Commission would advise the Department of Personnel & Training to initiate major penalty proceedings against Shri P.J. Thomas, IAS (KL:73)

> and Shri Jiji Thomson, IAS (KL:80) and completion of proceedings thereof by appointing departmental IO.
>
> 3. Receipt of the Commission's advice may be acknowledged."

12. Despite receipt of the above opinion of CVC, the matter was still kept pending, though a note was again put up on 24th February, 2004 on similar lines as that of 18th January, 2001. In the meanwhile, the State of Kerala, vide its letter dated 24th January, 2005 wrote to the DoPT that for reasons recorded in the letter, they wish to withdraw their request for according the sanction for prosecution of the officers, including respondent No. 2, as made vide their letter dated 31st December, 1999. The matter which was pending for all this period attained a quietus in view of the letter of the State of Kerala and the PMO had been informed accordingly.

13. In its letter dated 4th November, 2005, the State took the position that the allegations made by the Investigating Agency were invalid and the cases and request for sanction against Shri P.J. Thomas should be withdrawn.

14. On 18th May, 2006 again, the Left Democratic Front formed the Government in the State of Kerala with Mr. Achuthanandan as the Chief Minister. This time the Government of Kerala filed an affidavit in this Court disassociating itself from the contents of the earlier affidavit.

15. Vide letter dated 10th October, 2006, the Chief Secretary to the Government of Kerala again wrote a letter to the Government of India informing them that the State Government had decided to continue the prosecution launched by it and as such it sought to withdraw its above letter dated 24th January, 2005. In other words, it reiterated its request for grant of sanction by the Central Government. Vide letter dated 25th November, 2006, the Additional Secretary to the DoPT wrote to the State of Kerala asking them for the reasons for change in stand, in response to the letter of the State of Kerala dated 10th October, 2006. This action of the State Government reviving its sanction and continuing prosecution against Shri Karunakaran and others, including Respondent No. 2, was challenged by Shri Karunakaran by filing Criminal Revision Petition No. 430 of 2001 in the High

Court of Kerala on the ground that the Government Order was liable to be set aside on the ground of mala fide and arbitrariness. This petition was dismissed by the High Court. In its judgment, the High Court referred to the alleged role of Shri P.J. Thomas in the Palmolein case. The action of the State Government or pendency of proceedings before the Special Judge at Thiruvananthapuram was never challenged by Shri P.J. Thomas before any court of competent jurisdiction. The request of the State Government for sanction by the Central Government was considered by different persons in the Ministry and vide its noting dated 10th May, 2007, a query was raised upon the CVC as to whether pendency of a reply to Ministry's letter, from State Government in power, on a matter already settled by the previous State Government should come in the way of empanelment of these officers for appointment to higher post in the Government. Rather than rendering the advice asked for, the CVC vide its letter dated 25th June, 2007 informed the Ministry as follows :

"Department of Personnel & Training may

refer to their note dated 17.05.2007, in file No.107/1/2000-AVD-I, on the above subject.

2. The case has been re-examined and Commission has observed that no case is made out against S/Shri P.J. Thomas and Jiji Thomson in connection with alleged conspiracy with other public servants and private persons in the matter of import of Palmolein through a private firm. The abovesaid officers acted in accordance with a legitimately taken Cabinet decision and no loss has been caused to the State Government and most important, no case is made out that they had derived any benefit from the transaction. (emphasis supplied)

3. In view of the above, Commission advises that the case against S/Shri P.J. Thomas and Jiji Thomson may be dropped and matter be referred once again thereafter to the Commission so that Vigilance Clearance as sought for now can be recorded.

4. DOPT's file No.107/1/2000-AVD-I along with the records of the case, is returned herewith. Its receipt may be acknowledged. Action taken in pursuance of Commission's advice may be intimated to the Commission early."

16. It may be noticed that neither in the above reply nor on the file any reasons are available as to why CVC had changed its earlier opinion/stand as conveyed to the Ministry

vide its letter dated 3rd June, 2003. After receiving the above advice of CVC, the Ministry on 6th July, 2007 had recorded a note in the file that as far as CVC's advice regarding dropping all proceedings is concerned, the Ministry should await the action to be taken by the Government of Kerala and the relevant courts.

17. The legality and correctness of the order of the Kerala High Court dated 19th February, 2003 was questioned by Shri Karunakaran by filing a petition before this Court on which leave was granted and it came to be registered as Criminal Appeal No. 801 of 2003. This appeal was also dismissed by this Court vide its order dated 6th December, 2006. However, the parties were given liberty to raise the plea of mala fides before the High Court. Even on reconsideration, the High Court dismissed the petition filed by Shri Karunakaran raising the plea of mala fides vide its order dated 6th July, 2007. The High Court had, thus, declined to accept that action of the State Government in prosecuting the persons stated therein was actuated by mala fides. The order of the High Court was again challenged by Shri Karunakaran by preferring a Petition

for Special Leave to Appeal before this Court. This Court had stayed further proceedings before the Trial Court. This appeal remained pending till 23rd December, 2010 when it abated because of unfortunate demise of Shri Karunakaran.

18. Vide order dated 18th September, 2007, the Government of Kerala appointed Shri P.J. Thomas as the Chief Secretary. Thereafter, on 6th October, 2008 CVC accorded vigilance clearance to all officers except Smt. Parminder M. Singh. We have perused the files submitted by the learned Attorney General for India. From the said files we find that there are at least six notings of DoPT between 26th June, 2000 and 2nd November, 2004 which has recommended initiation of penalty proceedings against Shri P.J. Thomas and yet in the clearance given by CVC on 6th October, 2008 and in the Brief prepared by DoPT dated 1st September, 2010 and placed before HPC there is no reference to the earlier notings of the then DoPT and nor any reason has been given as to why CVC had changed its views while granting vigilance clearance on 6th October, 2008. On 23rd January, 2009, Shri P.J. Thomas was appointed as Secretary, Parliamentary Affairs to

the Government of India.

19. The DoPT empanelled three officers vide its note dated 1st September, 2010. Vide the same note along with the Brief the matter was put up to the HPC for selecting one candidate out of the empanelled officers for the post of Central Vigilance Commissioner. The meeting of the HPC consisting of the Prime Minister, the Home Minister and the Leader of the Opposition was held on 3rd September, 2010. In the meeting, disagreement was recorded by the Leader of the Opposition, despite which, name of Shri P.J. Thomas was recommended for appointment to the post of Central Vigilance Commissioner by majority. A note was thereafter put up with the recommendation of the HPC and placed before the Prime Minister which was approved on the same day. On 4th September, 2010, the same note was submitted to the President who also approved it on the same day. Consequently, Shri P.J. Thomas was appointed as Central Vigilance Commissioner and he took oath of his office.

Setting-up of CVC

20. Vigilance is an integral part of all government institutions. Anti-corruption measures are the responsibility of the Central Government. Towards this end the Government set up the following departments :

(i) CBI

(ii) Administrative Vigilance Division in DoPT

(iii) Domestic Vigilance Units in the Ministries/ Departments, Government companies, Government Corporations, nationalized banks and PSUs

(iv) CVC

21. Thus, CVC as an *integrity institution* was set up by the Government of India in 1964 vide Government Resolution pursuant to the recommendations of Santhanam Committee. However, it was not a statutory body at that time. According to the recommendations of the Santhanam Committee, CVC, in its functions, was supposed to be independent of the executive. The sole purpose behind setting up of the CVC was to improve the *vigilance administration* of the country.

22. In September, 1997, the Government of India established the Independent Review Committee to monitor the

functioning of CVC and to examine the working of CBI and the Enforcement Directorate. Independent Review Committee vide its report of December, 1997 suggested that CVC be given a *statutory status*. It also recommended that the selection of Central Vigilance Commissioner shall be made by a High Powered Committee comprising of the Prime Minister, the Home Minister and the Leader of Opposition in Lok Sabha. It also recommended that the appointment shall be made by the President of India on the specific recommendations made by the HPC. That, the CVC shall be responsible for the efficient functioning of CBI; CBI shall report to CVC about cases taken up for investigations; the appointment of CBI Director shall be by a Committee headed by the Central Vigilance Commissioner; the Central Vigilance Commissioner shall have a minimum fixed tenure and that a Committee headed by the Central Vigilance Commissioner shall prepare a panel for appointment of Director of Enforcement.

23. On 18th December, 1997 the judgment in the case of **Vineet Narain v. Union of India [(1998) 1 SCC 226]** came to be delivered. Exercising authority under Article 32 read with

Article 142, this Court in order to implement an important constitutional principle of the rule of law ordered that CVC shall be given a statutory status as recommended by Independent Review Committee. All the above recommendations of Independent Review Committee were ordered to be given a statutory status.

24. The judgment in **Vineet Narain's** case (supra) was followed by the 1999 Ordinance under which CVC became a multi-member Commission headed by Central Vigilance Commissioner. The 1999 Ordinance conferred statutory status on CVC. The said Ordinance incorporated the directions given by this Court in **Vineet Narain's** case. Suffice it to state, that, the 1999 Ordinance stood promulgated to improve the *vigilance administration* and to create a culture of *integrity* as far as government administration is concerned.

25. The said 1999 Ordinance was ultimately replaced by the enactment of the 2003 Act which came into force with effect from 11th September, 2003.

Analysis of the 2003 Act

26. The 2003 Act has been enacted to provide for the

constitution of a Central Vigilance Commission as an institution to inquire or cause inquiries to be conducted into offences alleged to have been committed under the Prevention of Corruption Act, 1988 by certain categories of public servants of the Central Government, corporations established by or under any Central Act, Government companies, societies and local authorities owned or controlled by the Central Government and for matters connected therewith or incidental thereto (see Preamble). By way of an aside, we may point out that in Australia, US, UK and Canada there exists a concept of *integrity institutions*. In Hongkong we have an Independent Commission against corruption. In Western Australia there exists a statutory Corruption Commission. In Queensland, we have Misconduct Commission. In New South Wales there is Police Integrity Commission. All these come within the category of *integrity institutions*. In our opinion, CVC is an *integrity institution*. This is clear from the scope and ambit (including the functions of the Central Vigilance Commissioner) of the 2003 Act. It is an **Institution** which is statutorily created under the Act. It is to supervise *vigilance*

administration. The 2003 Act provides for a mechanism by which the CVC retains control over CBI. That is the reason why it is given autonomy and insulation from external influences under the 2003 Act.

27. For the purposes of deciding this case, we need to quote the relevant provisions of the 2003 Act.

> **3. Constitution of Central Vigilance Commission.-**
>
> (2) The Commission shall consist of—
>
> (a) a Central Vigilance Commissioner — Chairperson;
> (b) not more than two Vigilance Commissioners -Members.
>
> (3) The Central Vigilance Commissioner and the Vigilance Commissioners shall be appointed from amongst persons—
>
> (a) who have been or are in an All-India Service or in any civil service of the Union or in a civil post under the Union having knowledge and experience in the matters relating to vigilance, policy making and administration including police administration;
>
> **4. Appointment of Central Vigilance Commissioner and Vigilance Commissioners.-**
>
> (1) The Central Vigilance Commissioner and the Vigilance Commissioners shall be appointed by the President by warrant under his hand and seal:
>
> Provided that every appointment under this sub-

section shall be made after obtaining the recommendation of a Committee consisting of—

(a) the Prime Minister — Chairperson;
(b) the Minister of Home Affairs — Member;
(c) the Leader of the Opposition in the House of the People —Member.

Explanation.—For the purposes of this sub-section, "the Leader of the Opposition in the House of the People" shall, when no such Leader has been so recognized, include the Leader of the single largest group in opposition of the Government in the House of the People.

(2) No appointment of a Central Vigilance Commissioner or a Vigilance Commissioner shall be invalid merely by reason of any vacancy in the Committee.

5. Terms and other conditions of service of Central Vigilance Commissioner. -

(1) Subject to the provisions of sub-sections (3) and (4), the Central Vigilance Commissioner shall hold office for a term of four years from the date on which he enters upon his office or till he attains the age of sixty-five years, whichever is earlier. The Central Vigilance Commissioner, on ceasing to hold the office, shall be ineligible for reappointment in the Commission.

(3) The Central Vigilance Commissioner or a Vigilance Commissioner shall, before he enters upon his office, make and subscribe before the President, or some other person appointed in that behalf by him, an oath or affirmation according to the form set out for the purpose in Schedule to this Act.

(6) On ceasing to hold office, the Central

Vigilance Commissioner and every other Vigilance Commissioner shall be ineligible for—

(a) any diplomatic assignment, appointment as administrator of a Union territory and such other assignment or appointment which is required by law to be made by the President by warrant under his hand and seal.

(b) further employment to any office of profit under the Government of India or the Government of a State.

6. Removal of Central Vigilance Commissioner and Vigilance Commissioner.- (1) Subject to the provisions of sub-section (3), the Central Vigilance Commissioner or any Vigilance Commissioner shall be removed from his office only by order of the President on the ground of proved misbehaviour or incapacity after the Supreme Court, on a reference made to it by the President, has, on inquiry, reported that the Central Vigilance Commissioner or any Vigilance Commissioner, as the case may be, ought on such ground be removed.

(3) Notwithstanding anything contained in sub-section (1), the President may by order remove from office the Central Vigilance Commissioner or any Vigilance Commissioner if the Central Vigilance Commissioner or such Vigilance Commissioner, as the case may be,—

(a) is adjudged an insolvent; or
(b) has been convicted of an offence which, in the opinion of the Central Government, involves moral turpitude; or
(c) engages during his term of office in any paid employment outside the duties of his office; or
(d) is, in the opinion of the President, unfit to continue in office by reason of infirmity of mind or

body; or

(e) has acquired such financial or other interest as is likely to affect prejudicially his functions as a Central Vigilance Commissioner or a Vigilance Commissioner.

8. **Functions and powers of Central Vigilance Commission-**

(1) The functions and powers of the Commission shall be to—

(a) exercise superintendence over the functioning of the Delhi Special Police Establishment in so far as it relates to the investigation of offences alleged to have been committed under the Prevention of Corruption Act, 1988 or an offence with which a public servant specified in sub-section (2) may, under the Code of Criminal Procedure, 1973, be charged at the same trial;

(b) give directions to the Delhi Special Police Establishment for the purpose of discharging the responsibility entrusted to it under sub-section (1) of section 4 of the Delhi Special Police Establishment Act, 1946:

(d) inquire or cause an inquiry or investigation to be made into any complaint against any official belonging to such category of officials specified in sub-section (2) wherein it is alleged that he has committed an offence under the Prevention of Corruption Act, 1988 and an offence with which a public servant specified in subsection (2) may, under the Code of Criminal Procedure, 1973, be charged at the same trial;

(e) review the progress of investigations conducted by the Delhi Special Police Establishment into offences alleged to have been committed under the Prevention of Corruption Act, 1988 or the public servant may, under the Code of

Criminal Procedure, 1973, be charged at the same trial;

(f) review the progress of applications pending with the competent authorities for sanction of prosecution under the Prevention of Corruption Act, 1988;

(h) exercise superintendence over the vigilance administration of the various Ministries of the Central Government or corporations established by or under any Central Act, Government companies, societies and local authorities owned or controlled by that Government:

(2) The persons referred to in clause (d) of sub-section (1) are as follows:—
(a) members of All-India Services serving in connection with the affairs of the Union and Group 'A' officers of the Central Government;

(b) such level of officers of the corporations established by or under any Central Act, Government companies, societies and other local authorities, owned or controlled by the Central Government, as that Government may, by notification in the Official Gazette, specify in this behalf:

Provided that till such time a notification is issued under this clause, all officers of the said corporations, companies, societies and local authorities shall be deemed to be the persons referred to in clause (d) of sub-section (1).

11. Power relating to inquiries. - The Commission shall, while conducting any inquiry referred to in clauses (c) and (d) of sub-section (1) of section 8, have all the powers of a civil court trying a suit under the Code of Civil Procedure, 1908 and in particular, in respect of the following

matters, namely:—

(a) summoning and enforcing the attendance of any person from any part of India and examining him on oath;

(b) requiring the discovery and production of any document;

(c) receiving evidence on affidavits;

(d) requisitioning any public record or copy thereof from any court or office;

(e) issuing commissions for the examination of witnesses or other documents; And

(f) any other matter which may be prescribed.

THE SCHEDULE

[See section 5(3)]

Form of oath or affirmation to be made by the Central Vigilance Commissioner or Vigilance Commissioner:--

"I, A. B., having been appointed Central Vigilance Commissioner (or Vigilance Commissioner) of the Central Vigilance Commission do swear in the name of god/ solemnly affirm that I will bear true faith and allegiance to the Constitution of India as by law established, that I will uphold the sovereignty and integrity of India, that I will duly and faithfully and to the best of my ability, knowledge and judgment perform the duties of my office without fear or favour,

affection or ill-will and that I will uphold the constitution and the laws.".

28. On analysis of the 2003 Act, the following are the salient features. CVC is given a statutory status. It stands established as an Institution. CVC stands established to inquire into offences alleged to have been committed under the Prevention of Corruption Act, 1988 by certain categories of public servants enumerated above. Under Section 3(3)(a) the Central Vigilance Commissioner and the Vigilance Commissioners are to be appointed from amongst persons who have been or are in All India Service or in any civil service of the Union or who are in a civil post under the Union having knowledge and experience in the matters relating to vigilance, policy making and administration including police administration. The underlined words "who have been or who are" in Section 3(3)(a) refer to the person holding office of a civil servant or who has held such office. These underlined words came up for consideration by this Court in the case of **N. Kannadasan v. Ajoy Khose and Others** [(2009) 7 SCC 1] in which it has been held that the said words indicate the

eligibility criteria and further they indicate that such past or present eligible persons should be without any *blemish* whatsoever and that they should not be appointed merely because they are eligible to be considered for the post. One more aspect needs to be highlighted. The constitution of CVC as a statutory body under Section 3 shows that CVC is an Institution. The key word is Institution. We are emphasizing the key word for the simple reason that in the present case the recommending authority (High Powered Committee) has gone by personal integrity of the officers empanelled and not by institutional integrity.

29. Section 4 refers to appointment of Central Vigilance Commissioner and Vigilance Commissioners. Under Section 4(1) they are to be appointed by the President by warrant under her hand and seal. Section 4(1) indicates the importance of the post. Section 4(1) has a proviso. Every appointment under Section 4(1) is to be made after obtaining the *recommendation* of a committee consisting of-

(a) The Prime Minister - Chairperson;

(b) The Minister of Home Affairs - Member;

(c) The Leader of the Opposition in the House of the People - Member.

30. For the sake of brevity, we may refer to the Selection Committee as High Powered Committee. The key word in the proviso is the word "*recommendation*". While making the recommendation, the HPC performs a statutory duty. The impugned recommendation dated 3rd September, 2010 is in exercise of the statutory power vested in the HPC under the proviso to Section 4(1). The post of Central Vigilance Commissioner is a statutory post. The Commissioner performs statutory functions as enumerated in Section 8. The word 'recommendation' in the proviso stands for an informed decision to be taken by the HPC on the basis of a consideration of relevant material keeping in mind the purpose, object and policy of the 2003 Act. As stated, the object and purpose of the 2003 Act is to have an integrity Institution like CVC which is in charge of *vigilance administration* and which constitutes an anti-corruption mechanism. In its functions, the CVC is similar to Election

Commission, Comptroller and Auditor General, Parliamentary Committees etc. Thus, while making the recommendations, the service conditions of the candidate being a public servant or civil servant in the past is not the sole criteria. The HPC must also take into consideration the question of institutional competency into account. If the selection adversely affects institutional competency and functioning then it shall be the duty of the HPC not to recommend such a candidate. Thus, the institutional integrity is the primary consideration which the HPC is required to consider while making recommendation under Section 4 for appointment of Central Vigilance Commissioner. In the present case, this vital aspect has not been taken into account by the HPC while recommending the name of Shri P.J. Thomas for appointment as Central Vigilance Commissioner. We do not wish to discount personal integrity of the candidate. What we are emphasizing is that institutional integrity of an institution like CVC has got to be kept in mind while recommending the name of the candidate. Whether the incumbent would or would not be able to function? Whether the working of the Institution would

suffer? If so, would it not be the duty of the HPC not to recommend the person. In this connection the HPC has also to keep in mind the object and the policy behind enactment of the 2003 Act. Under Section 5(1) the Central Vigilance Commissioner shall hold the office for a term of 4 years. Under Section 5(3) the Central Vigilance Commissioner shall, before he enters upon his office, makes and subscribes before the President an oath or affirmation according to the form set out in the Schedule to the Act. Under Section 6(1) the Central Vigilance Commissioner shall be removed from his office only by order of the President and that too on the ground of proved misbehaviour or incapacity after the Supreme Court, on a reference made to it by the President, has on inquiry reported that the Central Vigilance Commissioner be removed. 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 CVC to work in a free and fair environment. The prescribed form of oath under Section 5(3) requires 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 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 the 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.

31. Chapter III refers to functions and powers of the Central Vigilance Commission. CVC exercises superintendence over the functioning of the Delhi Special Police Establishment insofar as it relates to investigation of offences alleged to have been committed under the Prevention of Corruption Act, 1988, or an offence with which a public servant specified in sub-section (2) may, under the Code of Criminal Procedure, 1973 be charged with at the trial. Thus, CVC is empowered to exercise superintendence over the functioning of CBI. It is also empowered to give directions to CBI. It is also empowered to review the progress of investigations conducted by CBI into

offences alleged to have been committed under the Prevention of Corruption Act, 1988 or under the Code of Criminal Procedure by a public servant. CVC is also empowered to exercise superintendence over the vigilance administration of various ministries of the Central Government, PSUs, Government companies etc. The powers and functions discharged by CVC is the sole reason for giving the institution the administrative autonomy, independence and insulation from external influences.

Validity of the recommendation dated 3rd September, 2010

32. One of the main contentions advanced on behalf of Union of India and Shri P.J. Thomas before us was that once the CVC clearance had been granted on 6th October, 2008 and once the candidate stood empanelled for appointment at the Centre and in fact stood appointed as Secretary, Parliamentary Affairs and, thereafter, Secretary Telecom, it was legitimate for the HPC to proceed on the basis that there was no impediment in the way of appointment of respondent No. 2 on the basis of the pending case which had been found to be without any substance.

33. We find no merit in the above submissions. Judicial review seeks to ensure that the statutory duty of the HPC to recommend under the proviso to Section 4(1) is performed keeping in mind the policy and the purpose of the 2003 Act. We are not sitting in appeal over the opinion of the HPC. What we have to see is whether relevant material and vital aspects having nexus to the object of the 2003 Act were taken into account when the decision to recommend took place on 3rd September, 2010. 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 [see para 88 of **N. Kannadasan** (supra)]. The decision to recommend has got to be an informed decision keeping in mind the fact that CVC as an institution has to perform an important function of vigilance administration. If a statutory body like HPC, for any reason whatsoever, fails to look into the relevant material having nexus to the object and purpose of the 2003 Act or takes into account irrelevant circumstances then its decision would stand vitiated on the ground of official arbitrariness [see **State**

of Andhra Pradesh v. Nalla Raja Reddy (1967) 3 SCR 28]. Under the proviso to Section 4(1), the HPC had to take into consideration what is good for the institution and not what is good for the candidate [see para 93 of **N. Kannadasan** (supra)]. When institutional integrity is in question, the touchstone should be "public interest" which has got to be taken into consideration by the HPC and in such cases the HPC may not insist upon proof [see para 103 of **N. Kannadasan** (supra)]. ***We should not be understood to mean that the personal integrity is not relevant. It certainly has a co-relationship with institutional integrity.*** The point to be noted is that in the present case the entire emphasis has been placed by the CVC, the DoPT and the HPC only on the bio-data of the empanelled candidates. None of these authorities have looked at the matter from the larger perspective of institutional integrity including institutional competence and functioning of CVC. Moreover, we are surprised to find that between 2000 and 2004 the notings of DoPT dated 26th June, 2000, 18th January, 2001, 20th June, 2003, 24th February, 2004, 18th October, 2004 and 2nd November, 2004 have all observed that

penalty proceedings may be initiated against Shri P.J. Thomas. Whether State should initiate such proceedings or the Centre should initiate such proceedings was not relevant. What is relevant is that such notings were not considered in juxtaposition with the clearance of CVC granted on 6th October, 2008. Even in the Brief submitted to the HPC by DoPT, there is no reference to the said notings between the years 2000 and 2004. Even in the C.V. of Shri P.J. Thomas, there is no reference to the earlier notings of DoPT recommending initiation of penalty proceedings against Shri P.J. Thomas. Therefore, even on personal integrity, the HPC has not considered the relevant material. The learned Attorney General, in his usual fairness, stated at the Bar that only the Curriculum Vitae of each of the empanelled candidates stood annexed to the agenda for the meeting of the HPC. The fact remains that the HPC, for whatsoever reason, has failed to consider the relevant material keeping in mind the purpose and policy of the 2003 Act. The system governance established by the Constitution is based on distribution of powers and functions amongst the three organs

of the State, one of them being the Executive whose duty is to enforce the laws made by the Parliament and administer the country through various statutory bodies like CVC which is empowered to perform the function of vigilance administration. Thus, we are concerned with the institution and its integrity including institutional competence and functioning and not the desirability of the candidate alone who is going to be the Central Vigilance Commissioner, though personal integrity is an important quality. It is the independence and impartiality of the institution like CVC which has to be maintained and preserved in larger interest of the rule of law [see **Vineet Narain** (supra)]. While making recommendations, the HPC performs a statutory duty. Its duty is to recommend. While making recommendations, the criteria of the candidate being a public servant or a civil servant in the past is not the sole consideration. The HPC has to look at the record and take into consideration whether the candidate would or would not be able to function as a Central Vigilance Commissioner. Whether the institutional competency would be adversely affected by pending proceedings and if by that touchstone the

candidate stands disqualified then it shall be the duty of the HPC not to recommend such a candidate. In the present case apart from the pending criminal proceedings, as stated above, between the period 2000 and 2004 various notings of DoPT recommended disciplinary proceedings against Shri P.J. Thomas in respect of Palmolein case. Those notings have not been considered by the HPC. As stated above, the 2003 Act confers autonomy and independence to the institution of CVC. Autonomy has been conferred so that the Central Vigilance Commissioner could act without fear or favour. We may reiterate that ***institution is more important than an individual***. This is the test laid down in para 93 of **N. Kannadasan's case** (supra). In the present case, the HPC has failed to take this test into consideration. The recommendation dated 3rd September, 2010 of HPC is entirely premised on the blanket clearance given by CVC on 6th October, 2008 and on the fact of respondent No. 2 being appointed as Chief Secretary of Kerala on 18th September, 2007; his appointment as Secretary of Parliamentary Affairs and his subsequent appointment as Secretary, Telecom. In

the process, the HPC, for whatever reasons, has failed to take into consideration the pendency of Palmolein case before the Special Judge, Thiruvananthapuram being case CC 6 of 2003; the sanction accorded by the Government of Kerala on 30th November, 1999 under Section 197 Cr.P.C. for prosecuting inter alia Shri P.J. Thomas for having committed alleged offence under Section 120-B IPC read with Section 13(1)(d) of the Prevention of Corruption Act; the judgment of the Supreme Court dated 29th March, 2000 in the case of **K. Karunakaran v. State of Kerala and Another** in which this Court observed that, "the registration of the FIR against Shri Karunakaran and others cannot be held to be the result of malafides or actuated by extraneous considerations. The menace of corruption cannot be permitted to be hidden under the carpet of legal technicalities and in such cases probes conducted are required to be determined on facts and in accordance with law". Further, even the judgment of the Kerala High Court in Criminal Revision Petition No. 430 of 2001 has not been considered. It may be noted that the clearance of CVC dated 6th October, 2008 was not binding on the HPC. However, the

aforestated judgment of the Supreme Court dated 29th March, 2000 in the case of **K. Karunakaran vs. State of Kerala and Another** in Criminal Appeal No. 86 of 1998 was certainly binding on the HPC and, in any event, required due weightage to be given while making recommendation, particularly when the said judgment had emphasized the importance of probity in high offices. This is what we have repeatedly emphasized in our judgment – ***institution is more important than individual(s)***. For the above reasons, it is declared that the recommendation made by the HPC on 3rd September, 2010 is non-est in law.

Is Writ of Quo Warranto invocable?

34. Shri K.K. Venugopal, learned senior counsel appearing on behalf of respondent No. 2, submitted that the present case is neither a case of infringement of the statutory provisions of the 2003 Act nor of the appointment being contrary to any procedure or rules. According to the learned counsel, it is well settled that a writ of quo warranto applies in a case when a person usurps an office and the allegation is that he has no title to it or a legal authority to hold it. According to the

learned counsel for a writ of quo warranto to be issued there must be a clear infringement of the law. That, in the instant case there has been no infringement of any law in the matter of appointment of respondent No. 2.

35. The procedure of quo warranto confers jurisdiction and authority on the judiciary to control executive action in the matter of making appointments to public offices against the relevant statutory provisions. Before a citizen can claim a writ of quo warranto he must satisfy the court inter-alia that the office in question is a public office and it is held by a person without legal authority and that leads to the inquiry as to whether the appointment of the said person has been in accordance with law or not. A writ of quo warranto is issued to prevent a continued exercise of unlawful authority.

36. One more aspect needs to be mentioned. In the present petition, as rightly pointed by Shri Prashant Bhushan, learned counsel appearing on behalf of the petitioner, a declaratory relief is also sought besides seeking a writ of quo warranto.

37. At the outset it may be stated that in the main writ

petition the petitioner has prayed for issuance of any other writ, direction or order which this Court may deem fit and proper in the facts and circumstances of this Case. Thus, nothing prevents this Court, if so satisfied, from issuing a writ of declaration. Further, as held hereinabove, recommendation of the HPC and, consequently, the appointment of Shri P.J. Thomas was in contravention of the provisions of the 2003 Act, hence, we find no merit in the submissions advanced on behalf of respondent No. 2 on non-maintainability of the writ petition. If public duties are to be enforced and rights and interests are to be protected, then the court may, in furtherance of public interest, consider it necessary to inquire into the state of affairs of the subject matter of litigation in the interest of justice [see **Ashok Lanka v. Rishi Dixit** (2005) 5 SCC 598].

38. Keeping in mind the above parameters, we may now consider some of the judgments on which reliance has been placed by the learned counsel for respondent No. 2.

39. In **Ashok Kumar Yadav v. State of Haryana** [(1985) 4 SCC 417], the Division Bench of the Punjab and Haryana High

Court had quashed and set aside selections made by the Haryana Public Service Commission to the Haryana Civil Service and other Allied Services.

40. In that case some candidates who had obtained very high marks at the written examination failed to qualify as they had obtained poor marks in the viva voce test. Consequently, they were not selected. They were aggrieved by the selections made by Haryana Public Service Commission. Accordingly, Civil Writ Petition 2495 of 1983 was filed in the High Court challenging the validity of the selections and seeking a writ for quashing and setting aside the same. There were several grounds on which the validity of the selection made by the Commission was assailed. A declaration was also sought that they were entitled to be selected. A collateral attack was launched. It was alleged that the Chairperson and members of Public Service Commission were not men of high integrity, calibre and qualification and they were appointed solely as a matter of political patronage and hence the selections made by them were invalid. This ground of challenge was sought to be repelled on behalf of the State of Haryana who contended that

not only was it not competent to the Court on the existing set of pleadings to examine whether the Chairman and members of the Commission were men of high integrity, calibre and qualification but also there was no material at all on the basis of which the Court could come to the conclusion that they were men lacking in integrity, calibre or qualification.

41. The writ petition came to be heard by a Division Bench of the High Court of Punjab and Haryana. The Division Bench held that the Chairperson and members of the Commission had been appointed purely on the basis of political considerations and that they did not satisfy the test of high integrity, calibre and qualification. The Division Bench went to the length of alleging corruption against the Chairperson and members of the Commission and observed that they were not competent to validly wield the golden scale of viva voce test for entrance into the public service. This Court vide para 9 observed that it was difficult to see how the Division Bench of the High Court could have possibly undertaken an inquiry into the question whether Chairman and members of the Commission were men of integrity, calibre and qualification;

that such an inquiry was totally irrelevant inquiry because even if they were men lacking in integrity, calibre and qualification, it would not make their appointments invalid so long as the constitutional and legal requirement in regard to appointment are fulfilled. It was held that none of the constitutional provisions, namely, Article 316 and 319 stood violated in making appointments of the Chairperson and members of the Commission nor was any legal provision breached. Therefore, the appointments of the Chairperson and members of the Commission were made in conformity with the constitutional and legal requirements, and if that be so, it was beyond the jurisdiction of the High Court to hold that such appointments were invalid on the ground that the Chairman and the members of the Commission lacked integrity, calibre and qualification. The Supreme Court observed that it passes their comprehension as to how the appointments of the Chairman and members of the Commission could be regarded as suffering from infirmity merely on the ground that in the opinion of the Division Bench of the High Court the Chairperson and the members of the

Commission were not men of integrity or calibre. In the present case, as stated hereinabove, there is a breach/ violation of the proviso to Section 4(1) of the 2003 Act, hence, writ was maintainable.

42. In **R.K. Jain v. Union of India** [(1993) 4 SCC 119] Shri Harish Chandra was a Senior Vice-President when the question of filling up the vacancy of the President came up for consideration. He was qualified for the post under the Rules. No challenge was made on that account. Under Rule 10(1) the Central Government was conferred the power to appoint one of the members to be the President. The validity of the Rule was not questioned. Thus, the Central Government was entitled to appoint Shri Harish Chandra as the President. It was stated that the track record of Shri Harish Chandra was poor. He was hardly fit to hold the post of the President. It was averred that Shri Harish Chandra has been in the past proposed for appointment as a Judge of the Delhi High Court. His appointment, however, did not materialize due to certain adverse reports. It was held by this Court that judicial review is concerned with whether the incumbent possessed requisite

qualification for appointment and the manner in which the appointment came to be made or the procedure adopted was fair, just and reasonable. When a candidate was found qualified and eligible and is accordingly appointed by the executive to hold an office as a Member or Vice President or President of a Tribunal, in judicial review the Court cannot sit over the choice of the selection. It is for the executive to select the personnel as per law or procedure. Shri Harish Chandra was the Senior Vice President at the relevant time. The question of comparative merit which was the key contention of the petitioner could not be gone into in a PIL; that the writ petition was not a writ of quo warranto and in the circumstances the writ petition came to be dismissed. It was held that even assuming for the sake of arguments that the allegations made by the petitioner were factually accurate, still, this Court cannot sit in judgment over the choice of the person made by the Central Government for appointment as a President of CEGAT so long as the person chosen possesses the prescribed qualification and is otherwise eligible for appointment. It was held that this Court cannot interfere with

the appointment of Shri Harish Chandra as the President of CEGAT on the ground that his track record was poor or because of adverse reports on which account his appointment as a High Court Judge had not materialized.

43. In the case of **Hari Bansh Lal v. Sahodar Prasad Mahto** [(2010) 9 SCC 655], the appointment of Shri Hari Bansh Lal as Chairman, Jharkhand State Electricity Board stood challenged on the ground that the board had been constituted in an arbitrary manner; that Shri Hari Bansh Lal was a person of doubtful integrity; that he was appointed as a Chairman without following the rules and procedure and in the circumstances the appointment stood challenged. On the question of maintainability, the Division Bench of this Court held that a writ of quo warranto lies only when the appointment is contrary to a statutory provision. It was further held that "suitability" of a candidate for appointment to a post is to be judged by the appointing authority and not by the court unless the appointment is contrary to the statutory rules/provisions. It is important to note that this Court went into the merits of the case and came to the conclusion that

there was no adequate material to doubt the integrity of Shri Hari Bansh Lal who was appointed as the Chairperson of Jharkhand State Electricity Board. This Court further observed that in the writ petition there was no averment saying that the appointment was contrary to statutory provisions.

44. As stated above, we need to keep in mind the difference between judicial review and merit review. As stated above, in this case the judicial determination is confined to the integrity of the decision making process undertaken by the HPC in terms of the proviso to Section 4(1) of the 2003 Act. If one carefully examines the judgment of this Court in **Ashok Kumar Yadav's** case (supra) the facts indicate that the High Court had sat in appeal over the personal integrity of the Chairman and Members of the Haryana Public Service Commission in support of the collateral attack on the selections made by the State Public Service Commission. In that case, the High Court had failed to keep in mind the difference between judicial and merit review. Further, this Court found that the appointments of the Chairperson and

Members of Haryana Public Service Commission was in accordance with the provisions of the Constitution. In that case, there was no issue as to the legality of the decision-making process. On the contrary the last sentence of para 9 supports our above reasoning when it says that it is always open to the Court to set aside the decision (selection) of the Haryana Public Service Commission if such decision is vitiated by the influence of extraneous considerations or if such selection is made in breach of the statute or the rules.

45. Even in **R.K. Jain's** case (supra), this Court observed vide para 73 that judicial review is concerned with whether the incumbent possessed qualifications for the appointment and the manner in which the appointment came to be made or whether procedure adopted was fair, just and reasonable. We reiterate that Government is not accountable to the courts for the choice made but Government is accountable to the courts in respect of the lawfulness/legality of its decisions when impugned under the judicial review jurisdiction. We do not wish to multiply the authorities on this point.

Appointment of Central Vigilance Commissioner at the

President's discretion

46. On behalf of respondent No. 2 it was submitted that though under Section 4(1) of the 2003 Act, the appointment of Central Vigilance Commissioner is made on the basis of the *recommendation* of a High Powered Committee, the President of India is not to act on the *advice* of the Council of Ministers as is provided in Article 74 of the Constitution. In this connection, it was submitted that the exercise of powers by the President in appointing respondent No. 2 has not been put in issue in the PIL, nor is there any pleading in regard to the exercise of powers by the President and in the circumstances it is not open to the petitioner to urge that the appointment is invalid.

47. Shri G.E. Vahanvati, learned Attorney General appearing on behalf of Union of India, however, submitted that the proposal sent after obtaining and accepting the recommendations of the High Powered Committee under Section 4(1) was binding on the President. Learned counsel submitted that under Article 74 of the Constitution the

President acts in exercise of her function on the aid and advice of the Council of Ministers headed by the Prime Minister which advice is binding on the President subject to the proviso to Article 74. According to the learned counsel Article 77 of the Constitution inter alia provides for conduct of Government Business. Under Article 77(3), the President makes rules for transaction of Government Business and for allocation of business among the Ministers. On facts, learned Attorney General submitted that under Government of India (Transaction of Business) Rules, 1961 the Prime Minister had taken a decision on 3rd September, 2010 to propose the name of respondent No. 2 for appointment as Central Vigilance Commissioner after the recommendation of the High Powered Committee. It was accordingly submitted on behalf of Union of India that this advice of the Prime Minister under Article 77(3), read with Article 74 of the Constitution is binding on the President. That, although the recommendation of the High Powered Committee under Section 4(1) of the 2003 Act may not be binding on the President *proprio vigore*, however, if such recommendation has been accepted by the Prime Minister,

who is the concerned authority under Article 77(3), and if such recommendation is then forwarded to the President under Article 74, then the President is bound to act in accordance with the advice tendered. That, the intention behind Article 77(3) is that it is physically impossible that every decision is taken by the Council of Ministers. The Constitution does not use the term "Cabinet". Rules have been framed for convenient transaction and allocation of such business. Under the Rules of Business, the concerned authority is the Prime Minister. The advice tendered to the President by the Prime Minister regarding the appointment of the Central Vigilance Commissioner would be thus binding on the President. Lastly, it was submitted that unless the Constitution expressly permits the exercise of discretion by the President, every decision of the President has to be on the aid and advice of Council of Ministers.

48. Shri Venugopal, learned counsel appearing on behalf of respondent No. 2 submitted that though the President has an area of discretion in regard to exercise of certain powers under the Constitution the Constitution is silent about the

exercise of powers by the President/Governor where a Statute confers such powers. In this connection learned counsel placed reliance on the judgment of this Court in **Bhuri Nath v. State of J & K** [(1997) 2 SCC 745]. In that case, the appellants-Baridars challenged the constitutionality of Jammu and Kashmir Shri Mata Vaishno Devi Shrine Act, 1988 which was enacted to provide for better management, administration and governance of Shri Mata Vaishno Devi Shrine and its endowments including the land and buildings attached to the Shrine. By operation of that Act the administration, management and governance of the Shrine and its Funds stood vested in the Board. Consequently, all rights of Baridars stood extinguished from the date of the commencement of the Act by operation of Section 19(1) of the Act. One of the questions which came up for consideration in that case was that when the Governor discharges the functions under the Act, is it with the aid and advice of the Council of Ministers or whether he discharges those functions in his official capacity as the Governor. This question arose because by an order dated 16th January, 1995, this Court had directed the Board to

frame a scheme for rehabilitation of persons engaged in the performance of Pooja at Shri Mata Vaishno Devi Shrine. When that matter came up for hearing on 20th March, 1995, the Baridars stated that they did not want rehabilitation. Instead, they preferred to receive compensation to be determined under Section 20 of the impugned Act 1988. This Court noticed that in the absence of guidelines for determination of the compensation by the Tribunal to be appointed under Section 20 it was not possible to award compensation to the Baridars. Consequently, the Supreme Court ordered that the issue of compensation be left to the Governor to make appropriate guidelines to determine the compensation. Pursuant thereto, guidelines were framed by the Governor which were published in the State Gazette and placed on record on 8th May, 1995. It is in this context that the question arose that when the legislature entrusted the powers under the Act to the Governor whether the Governor discharges the functions under the Act with the aid and advice of the Council of Ministers or whether he acts in his official capacity as a Governor under the Act. After examining the Scheme of the 1988 Act the Division

Bench of this Court held that the legislature of Jammu & Kashmir, while making the Act was aware that similar provisions in the Endowments Act, 1966 gives power of the State Government to dissolve the Board of Trustees of Tirupati Devasthanams and the Board of Trustees of other institutions. Thus, it is clear that the legislature entrusted the powers under the Act to the Governor in his official capacity. On examination of the 1988 Act this Court found that the Governor is to preside over the meetings of the Board and in his absence his nominee, a qualified Hindu, shall preside over the functions. That, under the 1988 Act no distinction was made between the Governor and the Executive Government. That, under the scheme of the 1988 Act there was nothing to indicate that the power was given to the Council of Ministers and the Governor was to act on its advice as executive head of the State. It is in these circumstances that this Court held that while discharging the functions under the 1988 Act the Governor acts in his official capacity. In the same judgment this Court has also referred to the judgment of the Full Bench of the Punjab and Haryana High Court in **Hardwari Lal v.**

G.D. Tapase [AIR 1982 P&H 439] in which a similar question arose as to whether the Governor in his capacity as the Chancellor of Maharshi Dayanand University acts under the 1975 Act in his official capacity as Chancellor or with the aid and advice of the Council of Ministers. The Full Bench of the High Court, after elaborate consideration of the provisions of the Act, observed that under the Maharshi Dayanand University Act 1975, the State Government would not interfere in the affairs of the University. Under that Act, the State Government is an Authority different and distinct from the authority of the Chancellor. Under that Act the State Government was not authorized to advise the Chancellor to act in a particular manner. Under that Act the University was a statutory body, autonomous in character and it had been given powers exercisable by the Chancellor in his absolute discretion. In the circumstances, under the scheme of that Act it was held that while discharging the functions as a Chancellor, the Governor does everything in his discretion as a Chancellor and he does not act on the aid and advice of his Council of Ministers. This judgment has no application to the

scheme of the 2003 Act. As stated hereinabove, the CVC is constituted under Section 3(1) of the 2003 Act. The Central Vigilance Commissioner is appointed under Section 4(1) of the 2003 Act by the President by warrant under her hand and seal after obtaining the recommendation of a Committee consisting of the Prime Minister as the Chairperson and two other Members. As submitted by the learned Attorney General although under the 2003 Act the Central Vigilance Commissioner is appointed after obtaining the recommendation of the High Powered Committee, such recommendation has got to be accepted by the Prime Minister, who is the concerned authority under Article 77(3), and if such recommendation is forwarded to the President under Article 74, then the President is bound to act in accordance with the advice tendered. Further under the Rules of Business the concerned authority is the Prime Minister. Therefore, the advice tendered to the President by the Prime Minister regarding appointment of the Central Vigilance Commissioner will be binding on the President. It may be noted that the above submissions of the Attorney General find support even

in the judgment of the Division Bench of this Court in **Bhuri Nath's** case (supra) which in turn has placed reliance on the judgment of this Court in **Samsher Singh v. State of Punjab** [(1974) 2 SCC 831] in which a Bench of 7 Judges of this Court held that under the Cabinet system of Government, as embodied in our Constitution, the Governor is the formal Head of the State. He exercises all his powers and functions conferred on him by or under the Constitution with the aid and advice of his Council of Ministers. That, the real executive power is vested in the Council of Ministers of the Cabinet. The same view is reiterated in **R.K. Jain's** case (supra). However, in **Bhuri Nath's** case (supra) it has been clarified that the Governor being the constitutional head of the State, unless he is required to perform the function under the Constitution in his individual discretion, the performance of the executive power, which is coextensive with the legislative power, is with the aid and advice of the Council of Ministers headed by the Chief Minister. Thus, we conclude that the judgment in **Bhuri Nath's** case has no application as the scheme of the Jammu and Kashmir Shri Mata Vaishno Devi Shrine Act, 1988 as well

as the scheme of Maharshi Dayanand University Act, 1975 as well as the scheme of the various Endowment Acts is quite different from the scheme of the 2003 Act. Hence, there is no merit in the contention advanced on behalf of respondent No. 2 that in the matter of appointment of Central Vigilance Commissioner under Section 4(1) of the 2003 Act the President is not to act on the advice of the Council of Ministers as is provided in Article 74 of the Constitution.

Unanimity or consensus under Section 4(2) of the 2003 Act

49. One of the arguments advanced on behalf of the petitioner before us was that the recommendation of the High Powered Committee under the proviso to Section 4(1) has to be unanimous. It was submitted that CVC was set up under the Resolution dated 11th February, 1964. Under that Resolution the appointment of Central Vigilance Commissioner was to be initiated by the Cabinet Secretary and approved by the Prime Minister. However, the provision made in Section 4 of the 2003 Act was with a purpose, namely, to introduce an element of bipartisanship and political neutrality in the process of

appointment of the head of the CVC. The provision made in Section 4 for including the Leader of Opposition in the High Powered Committee made a significant change from the procedure obtaining before the enactment of the said Act. It was further submitted that if unanimity is ruled out then the very purpose of inducting the Leader of Opposition in the process of selection will stand defeated because if the recommendation of the Committee were to be arrived at by majority it would always exclude the Leader of Opposition since the Prime Minister and the Home Minister will always be ad idem. It was submitted that one must give a purposive interpretation to the scheme of the Act. It was submitted that under Section 9 it has been inter alia stated that all business of the Commission shall, as far as possible, be transacted unanimously. It was submitted that since in **Vineet Narain's** case (supra) this Court had observed that CVC would be selected by a three member Committee, including the Leader of the Opposition it was patently obvious that the said Committee would decide by unanimity or consensus. That, it was no where stated that the Committee would decide by

majority.

50. We find no merit in these submissions. To accept the contentions advanced on behalf of the petitioners would mean conferment of a **"veto right"** on one of the members of the HPC. To confer such a power on one of the members would amount to judicial legislation. Under the proviso to Section 4(1) Parliament has put its faith in the High Powered Committee consisting of the Prime Minister, the minister for Home Affairs and the Leader of the Opposition in the House of the People. It is presumed that such High Powered Committee entrusted with wide discretion to make a choice will exercise its powers in accordance with the 2003 Act, objectively and in a fair and reasonable manner. It is well settled that mere conferment of wide discretionary powers per se will not violate the doctrine of reasonableness or equality. The 2003 Act is enacted with the intention that such High Powered Committee will act in a bipartisan manner and shall perform its statutory duties keeping in view the larger national interest. Each of the Members is presumed by the legislature to act in public interest. On the other hand, if veto power is given to one of

the three Members, the working of the Act would become unworkable. One more aspect needs to be mentioned. Under Section 4(2) of the 2003 Act it has been stipulated that the vacancy in the Committee shall not invalidate the appointment. This provision militates against the argument of the petitioner that the recommendation under Section 4 has to be unanimous. Before concluding, we would like to quote the observations from the judgment in **Grindley and Another v. Barker**, 1 Bos. & Pul. 229, which reads as under :

> "I think it is now pretty well established, that where a number of persons are entrusted with the powers not of mere private confidence, but in some respects of a general nature and all of them are regularly assembled, **the majority will conclude the minority, and their act will be the act of the whole**."

51. The Court, while explaining the raison d'etre behind the principle, observed :

> "It is impossible that bodies of men should always be brought to think alike. There is often a degree of coercion, and the majority is governed by the minority, and vice versa, according to the strength of opinions, tempers, prejudices, and even interests. We shall not therefore think ourselves bound in this case by

the rule which holds in that. I lay no great stress on the clause of the act which appoints a majority to act in certain cases, because that appears to have been done for particular reasons which do not apply to the ultimate trial: it relates only to the assembling the searchers; now there is no doubt that all the six triers must assemble; and the only question, what they must do when assembled? We have no light to direct us in this part, except the argument from the nature of the subject. The leather being subject to seizure in every stage of the manufacture, the tribunal ought to be composed of persons skilful in every branch of the manufacture. And I cannot say there is no weight in the argument, drawn from the necessity of persons concurring in the judgments, who are possessed of different branches of knowledge, but standing alone it is not so conclusive as to oblige us to break through the general rule; besides, **it is very much obviated by this consideration when all have assembled and communicated to each other the necessary information, it is fitter that the majority should decide than that all should be pressed to a concurrence.** If this be so, then the reasons drawn from the act and which have been supposed to demand, that the whole body should unite in the judgment, have no sufficient avail, and consequently the general rule of law will take place; viz. that the judgment of four out of six being the whole body to which the authority is delegated regularly assemble and acting, **is the judgment of the all."**

52. Similarly, we would like to quote Halsbury's Laws of

England (4th Ed. Re-issue), on this aspect, which states as under:

> "Where a power of a public nature is committed to several persons, in the absence of statutory provision or implication to the contrary the act of the majority is binding upon the minority."

53. In the circumstances, we find no merit in the submission made on behalf of the petitioner on this point that the recommendation/decision dated 3rd September, 2010 stood vitiated on the ground that it was not unanimous.

Guidelines/Directions of this Court

54. The 2003 Act came into force on and from 11th September, 2003. In the present case we find non-compliance of some of the provisions of the 2003 Act. Under Section 3(3), the Central Vigilance Commissioner and the Vigilance Commissioners are to be appointed from amongst persons –

(a) who have been or who are in All-India Service or in any civil service of the Union or in a civil post under the Union having requisite knowledge and

experience as indicated in Section 3(3)(a); **or**

(b) who have held office or are holding office in a corporation established by or under any Central Act or a Central Government company and persons who have experience in finance including insurance and banking, law, vigilance and investigations.

55. No reason has been given as to why in the present case the zone of consideration stood restricted only to the civil service. We therefore direct that :

(i) In our judgment we have held that there is no prescription of unanimity or consensus under Section 4(2) of the 2003 Act. However, the question still remains as to what should be done in cases of difference of opinion amongst the Members of the High Powered Committee. As in the present case, if one Member of the Committee dissents that Member should give reasons for the dissent and if the majority disagrees with the dissent,

the majority shall give reasons for overruling the dissent. This will bring about fairness-in-action. Since we have held that legality of the choice or selection is open to judicial review we are of the view that if the above methodology is followed transparency would emerge which would also maintain the integrity of the decision-making process.

(ii) In future the zone of consideration should be in terms of Section 3(3) of the 2003 Act. It shall not be restricted to civil servants.

(iii) All the civil servants and other persons empanelled shall be outstanding civil servants or persons of impeccable integrity.

(iv) The empanelment shall be carried out on the basis of rational criteria, which is to be reflected by recording of reasons and/or noting akin to reasons by the empanelling authority.

(v) The empanelment shall be carried out by a person not below the rank of Secretary to the Government of India in the concerned Ministry.

(vi) The empanelling authority, while forwarding the names of the empanelled officers/persons, shall enclose complete information, material and data of the concerned officer/person, whether favourable or adverse. Nothing relevant or material should be withheld from the Selection Committee. It will not only be useful but would also serve larger public interest and enhance public confidence if the contemporaneous service record and acts of outstanding performance of the officer under consideration, even with adverse remarks is specifically brought to the notice of the Selection Committee.

(vii) The Selection Committee may adopt a fair and transparent process of consideration of the empanelled officers.

Conclusion

56. For the above reasons, it is declared that the recommendation dated 3rd September, 2010 of the High Powered Committee recommending the name of Shri P.J. Thomas as Central Vigilance Commissioner under the proviso to Section 4(1) of the 2003 Act is non-est in law and, consequently, the impugned appointment of Shri P.J. Thomas as Central Vigilance Commissioner is quashed.

57. The writ petitions are accordingly allowed with no order as to costs.

.....CJI
(S. H. Kapadia)

.....J.
(K.S. Panicker Radhakrishnan)

.....J.
(Swatanter Kumar)

New Delhi;
March 3, 2011

ITEM NO.1A COURT NO.1 SECTION PIL

S U P R E M E C O U R T O F I N D I A
RECORD OF PROCEEDINGS

WRIT PETITION (CIVIL) NO.348 OF 2010

CENTRE FOR PIL & ANR. Petitioner(s)

VERSUS

UNION OF INDIA & ANR. Respondent(s)

With Writ Petition (C) No.355 of 2010

Date: 03/03/2011 These Matters were called on for judgement today.

For Petitioner(s) Mr. Prashant Bhushan,Adv.
In WP 348/2010: Mr. Pranav Sachdeva,Adv.

In WP 355/2010: Mr. Siddharth Bhatnagar,Adv.
Mr. Prashant Kumar,Adv.
Mr. B.S. Iyenger,Adv.
for M/s. AP & J Chambers,Advs.

For Respondent(s) Ms. Indira Jaising,ASG
Mr. Devadatt Kamat,Adv.
Mr. T.A. Khan,Adv.
Mr. Anoopam N. Prasad,Adv.
Mr. Nishanth Patil,Adv.
Mr. Rohit Sharma,Adv.
Ms. Naila Jung,Adv.
Ms. Anil Katiyar,Adv.
Mr. S.N. Terdal,Adv.

In WP 348/2010: Mr. K.K. Venugopal,Sr.Adv.
Mr. Gopal Sankaranarayanan,Adv.
Mr. Wills Mathews,Adv.
Mr. D.K. Tiwari,Adv.
Mr. Rajdipa Behura,Adv.
Mr. Shyam Mohan,Adv.
Mr. A. Venayagam Balan,Adv.

In WP 355/2010: Mr. K.K. Venugopal,Sr.Adv.
Mr. Wills Mathews,Adv.

....2/-

For Intervenor: Mr. Braj Kishore Mishra,Adv.
Ms. Aparna Jha,Adv.
Mr. Vikas Malhotra,Adv.
Mr. M.P. Sahay,Adv.
Mr. Abhishek Yadav,Adv.
Mr. Vikram,Adv.

Hon'ble the Chief Justice pronounced the judgement of the Bench comprising His Lordship, Hon'ble Mr. Justice K.S. Panicker Radhakrishnan and Hon'ble Mr. Justice Swatanter Kumar.

The writ petitions are allowed with no order as to costs.

Application for intervention is dismissed.

[T.I. Rajput]
A.R.-cum-P.S.

[Madhu Saxena]
Assistant Registrar

[Signed reportable judgment is placed on the file.]