THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 13.08.2014

\+ **WP(C) 4653/2013**

N GOPALASWAMI & ORS ... Petitioners

versus

THE UNION OF INDIA & ANR ... Respondents

Advocates who appeared in this case:

For the Petitioner : Mr Shanti Bhushan, Senior Advocate with Mr Prashant Bhushan and Mr Pranav Sachdeva

For the Respondent No.1 : Mr G. E. Vahanvati, AG with Mr Paras Kuhad and Mr Rajeeve Mehra, ASG with Mr Jatan Singh, Mr Sumeet Pushkarna, Gaurav Sharma, Mr Soayib Qureshi, Mr Kartikey Mahajan, Mr Devdutt Kamat, Mr Anoopam Prasad, Ms Tara Narula, Mr Nizam Pasha and Ms Sania Husaini

For the Respondent No.2 : Mr Amit Sibal with Mr Amrinder Singh

AND

\+ **WP(C) 4619/2013**

MANOHAR LAL SHARMA ADVOCATE ... Petitioner

versus

THE PRINCIPAL SECRETARY,
PRIME MINISTER OFFICE AND OTHERS ... Respondents

Advocates who appeared in this case:

For the Petitioner : Petitioner-in-person with Ms Suman

For the Respondent Nos.1 & 2 : Mr Paras Kuhad and Mr Rajeeve Mehra, ASGs with Mr Jatan Singh, Mr Sumeet Pushkarna, Gaurav Sharma, Mr Soayib Qureshi,

For the Respondent No.3 : Mr Amit Sibal with Mr Amrinder Singh

CORAM:-
HON'BLE MR JUSTICE BADAR DURREZ AHMED
HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

BADAR DURREZ AHMED, J

1. These writ petitions challenge the appointment of respondent No. 2 as the Comptroller and Auditor-General (CAG). They also seek a writ, direction or order commanding the Union of India to frame a transparent selection procedure based on definite criteria and to constitute a broad based non-partisan selection committee, which, after calling for applications and nominations, would recommend to the President of India, the most suitable person for appointment as the CAG. Both these petitions raise common issues and questions and are, therefore, being disposed of together.

I. The challenge and the petitioners' submissions

2. The appointment of the respondent No. 2 as the CAG has been challenged on two grounds. First of all, his appointment is said to have violated the principles of institutional integrity as contemplated in the Supreme Court decisions – (i) ***Centre for PIL v. Union of India : (2011) 4 SCC 1*** (known as the 'CVC case'); and (ii) ***State of Punjab v. Salil Sabhlok: (2013) 5 SCC 1*** (known as 'the Punjab PSC case'). It is contended on behalf of the petitioners and, in particular, the petitioner in WP(C) 4653/2013 that the respondent No. 2 was involved in defence procurements in his capacity as the Director General of Defence Acquisitions and as the audits conducted

by the CAG involve a large part of defence purchases, the respondent No. 2 would have an apparent bias in respect of purchases in which the respondent No. 2 had participated in some capacity or the other. This, according to the petitioners, would violate the principle of institutional integrity. The second ground for challenging the appointment of the respondent No. 2 as the CAG is that the appointment was done in an arbitrary manner which lacked transparency. There was no specific criteria for selecting a person suitable to be appointed as the CAG and there was no short-listing committee. Reliance was, once again, placed on the ***CVC case*** *(supra)* and the ***Punjab PSC case*** *(supra)*. Reliance was also placed on the Supreme Court decision in ***E.P. Royappa v. State of Tamil Nadu and Another.***: (1974) 4 SCC 3 for the proposition that the government cannot be arbitrary in any of its actions.

3. Chapter V of the Constitution of India deals with the Comptroller and Auditor-General of India. It comprises of four Articles (148-151). Article 148 stipulates that there shall be a Comptroller and Auditor-General of India, who shall be appointed by the President by warrant under his hand and seal and shall only be removed from office in like manner and on the like grounds as a Judge of the Supreme Court. Article 149 spells out the duties and powers of the CAG. Article 150 specifies the forms of accounts of the Union and of the States. Article 151, *inter alia*, provides that the

reports of the CAG, relating to the accounts of the Union, shall be submitted to the President, who shall cause them to be laid before each House of Parliament. The said Articles 148-151 are set out herein below:-

> "**148. Comptroller and Auditor-General of India**.—(1) There shall be a Comptroller and Auditor-General of India who shall be appointed by the President by warrant under his hand and seal and shall only be removed from office in like manner and on the like grounds as a Judge of the Supreme Court.
>
> (2) Every person appointed to be the Comptroller and Auditor-General of India shall, before he enters upon his office, make and subscribe before the President, or some person appointed in that behalf by him, an oath or affirmation according to the form set out for the purpose in the Third Schedule.
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> (3) The salary and other conditions of service of the Comptroller and Auditor-General shall be such as may be determined by Parliament by law and, until they are so determined, shall be as specified in the Second Schedule:
>
> Provided that neither the salary of a Comptroller and Auditor-General nor his rights in respect of leave of absence, pension or age of retirement shall be varied to his disadvantage after his appointment.
>
> (4) The Comptroller and Auditor-General shall not be eligible for further office either under the Government of India or under the Government of any State after he has ceased to hold his office.
>
> (5) Subject to the provisions of this Constitution and of any law made by Parliament, the conditions of service of persons serving in the Indian Audit and Accounts Department and the

administrative powers of the Comptroller and Auditor-General shall be such as may be prescribed by rules made by the President after consultation with the Comptroller and Auditor-General.

(6) The administrative expenses of the office of the Comptroller and Auditor-General, including all salaries, allowances and pensions payable to or in respect of persons serving in that office, shall be charged upon the Consolidated Fund of India.

149. Duties and powers of the Comptroller and Auditor-General.— The Comptroller and Auditor-General shall perform such duties and exercise such powers in relation to the accounts of the Union and of the States and of any other authority or body as may be prescribed by or under any law made by Parliament and, until provision in that behalf is so made, shall perform such duties and exercise such powers in relation to the accounts of the Union and of the States as were conferred on or exercisable by the Auditor-General of India immediately before the commencement of this Constitution in relation to the accounts of the Dominion of India and of the Provinces respectively.

150. Form of accounts of the Union and of the States.—The accounts of the Union and of the States shall be kept in such form as the President may, on the advice of the Comptroller and Auditor-General of India, prescribe.

151. Audit reports.—(1) The reports of the Comptroller and Auditor-General of India relating to the accounts of the Union shall be submitted to the President, who shall cause them to be laid before each House of Parliament.

(2) The reports of the Comptroller and Auditor-General of India relating to the accounts of a State shall be submitted to the Governor of the State, who shall cause them to be laid before the Legislature of the State."

4. It will be seen from the above provisions of the Constitution that the salary and other conditions of service of the CAG shall be such as may be determined by Parliament by law and, until so determined, shall be as specified in the Second Schedule to the Constitution [see Article 148(3)]. The CAG is also required to perform such duties and exercise such powers in relation to the accounts of the Union and of the States as were conferred on or exercisable by the Auditor-General of India immediately before the commencement of the Constitution in relation to the accounts of the Dominion of India and of the Provinces, respectively (see Article 149). Subsequently, Parliament has enacted the Comptroller and Auditor-General's (Duties, Powers and Conditions of Service) Act, 1971 (hereinafter referred to as 'the CAG Act') in order to determine the conditions of service of the Comptroller and Auditor-General and to prescribe his duties and powers and for other matters connected therewith or incidental thereto. It may be pertinent to note at this juncture that the CAG Act does not prescribe any method or manner of appointment of the CAG.

5. The learned counsel for the petitioners referred to a request for information under the Right to Information Act, 2005 made by virtue of an application dated 21.02.2013, wherein information was, *inter alia*, sought as

to whether there was any approved system or procedure for selection/appointment of the Comptroller and Auditor-General. The answer to this question was in the affirmative. Information was sought as to whether the system or procedure is formally laid down and well documented system? Further supplementary questions were also raised in this connection. The answers were provided by the First Appellate Authority under the RTI Act, 2005 by virtue of an order dated 16.05.2013. It was stated thereunder that by virtue of the powers vested in the President of India under Article 148(1) of the Constitution of India, the President, through warrant under his hand and seal, appoints the Comptroller and Auditor-General of India. After the issuance of the Presidential warrant, the Budget Division of the Department of Economic Affairs issues the Gazette Notification for the appointment of the CAG. It was further stated that the system of appointment is established in terms of past conventions and practices. This entails that, on a note moved by the Ministry of Finance, the Government makes recommendations to the President of India for the appointment of the CAG. The authorities in the Government, which are involved in the system of selection of the CAG, are stated to be the Ministry of Finance, Cabinet Secretariat, the Prime Minister and the President of India. It was also stated that there is no specified eligibility criteria/zone of

consideration etc. inasmuch as the position of the CAG is open to both, 'service' as well as others.

6. The learned counsel for the petitioners referred to paragraph 7 of the counter-affidavit filed on behalf of the respondent No.1, wherein it is provided that the CAG is selected from amongst civil servants who have rich and varied experience in public administration by a broad-based time-tested and established procedure. It is further stated in the said counter-affidavit that the CAGs have been appointed following the established procedures and processes which have evolved over the last several decades. Under the said procedure, the Cabinet Secretariat, which is headed by the Cabinet Secretary, who is the senior most civil servant, having knowledge about the competence and integrity of the civil servants in the Government, sends the list of shortlisted names which have been approved by the Finance Minister to the Prime Minister for his consideration. The Prime Minister thereafter considers the said shortlisted names and recommends one name to the President of India for his approval. After the name is approved by the President, the CAG is appointed under the warrant and seal of the President of India.

7. Along with the said counter-affidavit, the respondent No.1 has annexed a list of the CAGs, their tenures and the post last held before taking over as CAG. The said list is re-produced herein below:-

"LIST OF CAGs, TENURE, ETC

Sr.No.		Service	Post last held before taking over as CAG
1.	V. Narahari Rao (15.08.1948 -14.08.1954)	IAAS	Not Available
2.	A. K. Chanda (15.08.1954 -14.08.1960)	IAAS	Not Available
3.	A. K. Roy (15.08.1960 -14.08.1966)	IAAS	Not Available
4.	S. Ranganathan (15.08.1966 -26.03.1972)	ICS	Not Available
5.	A. Bakshi (27.03.1972 -26.03.1978)	IAAS	Not Available
6.	Gian Prakash (2.03.1978 -26.03.1984)	IAS	Defence Secretary
7.	T.N. Chaturvedi (27.03.1984 -26.03.1990)	IAS	Home Secretary
8.	C.G. Somiah (27.03.1990 -11.03.1996)	IAS	Home Secretary, CVC
9.	V.K. Shunglu (15.03.1996 -14.03.2002)	IAS	Secretary, Industries & Industrial Promotion
10.	V.N. Kaul (15.03.2002 -06.01.2008)	IAS	Secretary, Petroleum
11.	Vinod Rai (07.01.2008 -22.05.2013)	IAS	Secretary, Financial Services
12.	S.K. Sharma (23.05.2013 - till date)	IAS	Defence Secretary

8. Referring to the above list, the learned counsel for the petitioners submitted that all the previous CAGs upto 1978 (except one) were from the

Indian Audit and Accounts Service (IAAS) and after 1978, all the CAGs have been from the IAS (Indian Administrative Service). It was submitted on behalf of the petitioners that the appointment of the CAG must satisfy certain minimum criteria. The minimum criteria, according to the petitioners, was that the person, who is to be appointed as the CAG, must have knowledge of audits and he must not have any conflict of interest. According to the petitioners, the respondent No. 2 is disqualified on both counts. According to them, the respondent No. 2 does not have any knowledge of audits and accounts and there is a clear conflict of interest inasmuch as he has been involved in many of the defence procurements in respect of which he would be conducting audits. It is not even possible for the CAG to recuse inasmuch as the CAG is not part of a multiple-member body and, therefore, in those matters, in which he may have earlier been involved, the CAG would have to sign the audit reports as he has no other option.

9. It was contended on behalf of the petitioners that prior to his appointment as the CAG, the respondent No. 2 had served in key positions in the Ministry of Defence and was involved in the decision making process in respect of purchases running into "tens of lacs of crores" of rupees. It is

stated that the respondent No. 2 was the Joint Secretary in the Ministry of Defence from 2003-2007. Thereafter, in 2007, after serving a brief stint as an Additional Secretary, the respondent No. 2 was posted as the Director General of Acquisitions in charge of all defence purchases, where he served till September, 2010. Thereafter, the respondent No. 2 briefly served as an Officer on Special Duty and was subsequently, appointed as the Defence Secretary in July, 2011, in which position he remained till he was appointed as the CAG. During this entire period, there were several major defence purchases, including the deal with an Anglo-Italian firm Agusta Westland for helicopters for the Indian Air Force. Several of these deals have come under the scanner and the earlier CAG had made serious observations with regard to the Defence Ministry's procurement policy in the compliance Audit–Defence Services (Air Force and Navy) report in November, 2012. It is in the backdrop of these allegations that it has been contended on behalf of the petitioners that the respondent No. 2 would have a conflict of interest while preparing the audit reports in respect of the defence purchases made during the period in which he was in some way or the other involved with the same.

10. A reference was made to a representation submitted to the President of India on 20.03.2013 by the Forum of Retired Officers of the Indian Audit and Accounts Service (IAAS) on the subject of appointment of the CAG. In that representation the said Forum submitted that there was a need for an open, transparent, institutionalized selection mechanism for the post of CAG similar to the arrangements that exist for the National Human Rights Commission and the Central Vigilance Commission. The representation also suggested that, other things being equal, the choice should be of an officer from the Indian Audit and Accounts Service (IAAS) and, in the absence of a suitable officer from such service, an officer from the IAS or other source could be selected.

11. The learned counsel for the petitioners, as pointed out above, placed reliance on the Supreme Court decision in the ***CVC case*** *(supra)* stressing the importance of the concept of "institutional integrity". The decision of the Supreme Court in the case of the ***Punjab PSC case*** *(supra)* was also relied upon for the very same concept of "institutional integrity" as also the issue of conflict of interest. Parallels were sought to be drawn between the appointment of the CAG on the one hand and the appointment of the Central Vigilance Commissioner and the Chairman of the Punjab Public Service Commissioner on the other, which were in issue in the ***CVC case*** *(supra)*

and the ***Punjab PSC case*** *(supra)*, respectively. The next decision referred to was that of ***Namit Sharma v. Union of India: (2013) 1 SCC 745***, which is known as the "CIC case" which stressed on the requirement of transparency in the appointments to the Central Information Commission under the Right to Information Act, 2005. As pointed out above, the decision in ***Royappa's case*** *(supra)* was also referred to, to stress the importance of there being no room for arbitrariness in any action of the Government. On the aspect of bias, the decisions of the Supreme Court in ***Manak Lal v. Dr. Prem Chand*: *AIR 1957 SC 425*** and ***Ranjit Thakur v. Union of India and Others*: *AIR 1987 SC 2386*** were referred. It was contended that although these two cases related to judicial/quasi-judicial proceedings, the same principles would apply in the present case also. Lastly, the decision in the case of ***Bhakra Beas Management Board v. Krishan Kumar Vij and Another*: *(2010) 8 SCC 701*** was relied upon by the learned counsel for the petitioners in support of their contention that mere dismissal of a Special Leave Petition at a preliminary stage did not constitute a binding precedent. This case was referred to in the backdrop of the fact that earlier Special Leave Petitions filed on the very same subject matter as is sought to be raised in the present writ petitions had been dismissed by the Supreme Court at the preliminary stage.

II. The Attorney General's reply on behalf of Union of India

12. The learned Attorney General appearing on behalf of the respondent No.1 in WP(C) 4653/2013 submitted that the writ petitions filed by the petitioners were not even maintainable and were liable to be dismissed on this ground alone. A reference was made to a writ petition [**WP(C) 115/1996 – Common Cause v. Union of India**] filed in the Supreme Court. The prayer made in that writ petition, *inter alia*, was to the following effect:-

> "to direct the Government to evolve policy, including guidelines prescribing the requisite qualification/ experience in the matter of appointment to the office of the Comptroller and Auditor-General of India with the approval of this Hon'ble Court and direct the Government to follow the same."

That writ petition was rejected by the Supreme Court by an order dated 26.02.1996. The learned Attorney General further pointed out that another writ petition being **WP(C) No. 618/2007** was filed before the Supreme Court by the **Public Cause Research Foundation**. In that writ petition, prayers similar to the writ petition filed by Common Cause were made. It was, *inter alia*, prayed that a writ of mandamus or any other appropriate writ, order or direction be issued calling upon the respondents to evolve a policy including guidelines as to the requisite qualifications/experience in the matter of

appointment to the office of the Comptroller and Auditor-General of India. It was also prayed that a writ, order or direction be issued setting out a mode of selection through a wide based independent manner as in the case of several other high offices. That petition [WP(C) 618/2007] was dismissed as withdrawn by the Supreme Court by virtue of its order dated 14.07.2008. It was pointed out that the only difference between the prayers in the two petitions was that in the earlier petition the prayer sought was that the policy had to have the approval of the Supreme Court, whereas in the second petition [WP(C) 618/2007] this aspect was missing. Prayer (b) of WP(C) 4653/2013, which is now under consideration by this Court, seeks the issuance of a writ of mandamus or any other appropriate writ or direction to the Union of India for framing "a transparent selection procedure based on definite criteria and for the constitution of broad based non-partisan selection committee".

13. In this backdrop, it was contended by the learned Attorney General that the prayers in the present petitions are nothing but an attempt to resurrect the prayers in the petitions which were dismissed by the Supreme Court by virtue of the orders referred to above. It was submitted that in the wake of such dismissals, the present petitions needed to be summarily rejected. It was further contended on behalf of the respondent No.1 that

WP(C) 115/1996, which had been filed under Article 32 of the Constitution of India, sought the direction of the Supreme Court with regard to prescribing criteria and guidelines as to the qualifications and experience of the incumbent to the important constitutional position of the CAG. The second petition filed by the Public Cause Research Foundation made similar averments for prescribing appropriate criteria and guidelines in regard to the qualifications and experience of the incumbent of the important constitutional position of the CAG. The learned Attorney General pointed out that the averments and submissions made in the present petitions and particularly in WP(C) 4653/2013, were virtual reproductions of the averments and submissions made in WP(C) 618/2007. The learned Attorney General also submitted a chart, which we need not refer to in detail for the sake of brevity, which indicated congruence of the averments made in WP(C) 618/2007 and the present WP(C) 4653/2013. The learned Attorney General submitted that the earlier petitions, which were dismissed by the Supreme Court, as well as the present petitions, have a common thread apart from having near identical averments and that in this backdrop, the ratio of the decision in ***Bar Council of India v. Union of India: (2012) 8 SCC 243*** would be applicable. In that decision, the Supreme Court held that it is against public policy and well defined principles of judicial discretion to

entertain or to hear petitions relating to the same subject matter where the matter was heard and dismissed on an earlier occasion. He submitted that, since the Supreme Court had dismissed similar petitions, the present petitions were also liable to be dismissed by this Court.

14. The learned Attorney General further submitted that the prayer seeking the setting out of a definite criteria and constitution of a broad-based non-partisan selection committee is contrary to the constitutional scheme itself. According to the learned Attorney General, Article 148 of the Constitution implies that it is the President who has to appoint the CAG with the aid of the Council of Ministers. It was submitted by the learned Attorney General that the constituent assembly rejected the proposal for fixing qualifications of the CAG. It was submitted that in the course of the constituent assembly debates, a notice for introduction of a new Article was moved by one of the members to the following effect:-

> "124-A The Auditor-General shall be appointed from among persons qualified as Registered Accountants or holding any other equivalent qualifications recognized as such, and having not less than ten years practice as such Auditors."

This proposal was rejected by the constituent assembly and Shri T. T. Krishnamachari, while opposing the proposed amendment, expressed the

view that the CAG is not an accountant *per se* and he had a number of duties to perform and, therefore, he would necessarily have to have a comprehensive knowledge of the entire administration. The relevant excerpts of Shri Krishnamachari's address are as under:-

> "Mr. President, Sir, I must say that Professor Shah's amendment is an original one and quite in conformity with ideas prevalent in the commercial world but I am afraid it is out of tune completely with existing practice in the matter of the appointment of the Auditor-General in this country and elsewhere. Actually the man who is an Auditor-General is not an accountant per se. He has a number of other duties to perform and in so functioning he has got to have knowledge of the entire administration and I think the present method of appointment of Auditors-General in India is perhaps the best. We had some very good Auditors-General who were administrators and who had been in the Finance Department and who have functioned as Accountants-General in various places and who had held other important responsible positions, so that it is not merely a question of arithmetic or accounting knowledge that is necessary but a comprehensive knowledge of the entire administration. From that point of view I think the House will readily concede that the view taken by Professor Shah, however, plausible, is extremely narrow. A person who has got the qualification of only Registered Accountant and nothing else, which will probably be the case if you rule out administrative experience, will not suit as an Auditor-General."

15. The learned Attorney General further submitted that while WP(C) 618/2007, which was filed before the Supreme Court, referred to the above debate, the present petitions and in particular WP(C) 4653/2013, did

not allude to this aspect and yet an argument was raised that the CAG must have audit experience. The learned Attorney General also submitted that the President appoints Governors of States by virtue of the power vested in him under Article 155 of the Constitution. The said Article provides that the Governor of a State shall be appointed by the President by warrant under his hand and seal. This is virtually identical to Article 148(1) which empowers the President to appoint the CAG by warrant under his seal. While the Governor of a State holds office during the pleasure of the President in terms of Article 156(1) of the Constitution, the CAG can only be removed from office in like manner and on the like grounds as a Judge of the Supreme Court. Article 124(4) stipulates that a Judge of the Supreme Court shall not be removed from his office except by an order of the President passed after an address by each House of Parliament supported by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting which has been presented to the President in the same session for such removal on the ground of proved misbehaviour or incapacity. It was submitted that while the manner of removal of the CAG is different from that of Governors of States and akin to that of the judges of the Supreme Court, the manner of appointment of the CAG is similar to that of Governors. And, there cannot be any fixed

qualification or criteria for an incumbent of the high office of CAG. It was submitted that the constituent assembly debates were relevant material in order to understand the intent of the framers of the Constitution. In this connection, it was submitted that the Supreme Court in several decisions had relied upon the constituent assembly debates for the purposes of interpreting the provisions of the Constitution. Some of the cases where this was done were:-

(i) ***A. K. Roy v. Union of India: (1982) 1 SCC 271***;

(ii) ***Special Reference No. 1/2002: (2002) 8 SCC 237***;

(iii) ***State of Punjab v. Devans Modern Breweries Limited: (2004) 11 SCC 26;***

(iv) ***S. R. Chaudhuri v. State of Punjab: (2001) 7 SCC 126;*** and

(v) ***Raja Ram Pal v. Hon'ble Speaker, Lok Sabha and Others: (2007) 3 SCC 184***

It was contended that when the framers of the Constitution had deliberately and consciously omitted to circumscribe the eligibility requirement, such a requirement could not be read into the Constitution and if such an exercise was to be undertaken, it would amount to altering the basic feature of the Constitution. As such, the Court could not prescribe or direct the prescription of an eligibility requirement for the office of the CAG.

16. The learned Attorney General further contended that the prayer seeking the constitution of a broad-based non-partisan selection committee, if granted, would imply the alteration of Article 148 of the Constitution itself. This would be so because the President would only be nominally vested with the authority to make an appointment and the entire selection process would be effectively taken away from the executive and vested in a so-called "non-partisan selection committee". It was submitted that as held by a Bench of seven Judges of the Supreme Court in ***Shamsher Singh v. State of Punjab: (1974) 2 SCC 831***, the President has to act on the aid and advice of the Council of Ministers as prescribed in Article 74 of the Constitution. The Supreme Court held that the President acts on the aid and advice of the Council of Ministers with the Prime Minister as the head in all matters which vests in the executive whether those functions are executive or legislative in character. It was further observed in the said decision that the President does not exercise the executive functions personally. As pointed out by Justice Krishna Iyer, speaking for himself and Bhagwati, J., in a concurring opinion in Shamsher's case, the justification for vesting of such powers in the Council of Ministers is that the Council of Ministers is responsible to Parliament.

17. It was further submitted by the learned Attorney General that the prayer made for replacement of the executive by a broad based non-partisan selection committee was not only contrary to Article 148 but also ran against the doctrine of separation of powers which is a basic feature of the Constitution. It was submitted that the powers of appointment were specifically given to the executive, which, in turn, would be responsible to Parliament. A reference was made to the Supreme Court decision in ***Minerva Mills Limited v. Union of India: (1980) 3 SCC 625***, wherein the Supreme Court observed that it was a fundamental principle of the constitutional scheme that every organ of the State, every authority under the Constitution, derived its power from the Constitution and had to act within the limits of such powers. Again, in ***Bhim Singh v. Union of India: (2010) 5 SCC 538***, the Supreme Court observed that the concept of separation of powers, even though not found in any particular constitutional provision, was inherent in the polity which the Constitution had adopted. It was also observed that the aim of separation of powers was to achieve the maximum extent of accountability of each branch of the Government. It was contended that neither the executive nor Parliament is empowered to displace the provisions of Article 148 particularly because Parliament under Article 148(3) has not been empowered to legislate or set out an eligibility

criteria or a particular process of selection. Parliament has only been empowered to legislate on the salary and other conditions of service of the CAG. In exercise of this power, the said CAG Act of 1971 had been enacted. That Act, does not and could not contain any provision relating to the appointment of the CAG. It was further submitted that Article 148 does not envisage calling of applications or advertisements. It was submitted that in high level and constitutional appointments, advertisements and calling of applications was not at all required. Support was taken from the Supreme Court decision in ***B. S. Minhas v. Indian Statistical Institute: (1983) 4 SCC 582***, wherein the Supreme Court observed as under:-

> "25. ……Of course, we do not wish to suggest for a moment that appointment to every post must be made only after advertising or publicising the vacancy. That would not be right, for there are quite a few posts at the top level which cannot be and should not be advertised or publicised, because they are posts for which there should be no lobbying nor should any applications be allowed to be entertained. Examples of such posts may be found in the post of Commander of Armed Forces or the Chief Justice or the Judges of the Supreme Court or the High Courts."

18. The learned Attorney General submitted that the reliance placed by the petitioners on the ***CVC case*** *(supra)* was misplaced. It was submitted that insofar as the appellant in the ***CVC case*** *(supra)* was concerned,

Parliament had, by virtue of Section 4 of the CVC Act, prescribed the constitution of a selection committee comprising of the Prime Minister, the Minister of Home Affairs and the Leader of Opposition in the House of the People. There is no such prescription in the case of appointment of the CAG. Therefore, the decision in the ***CVC case*** *(supra)* would not apply to the present petitions. Insofar as the ***Punjab PSC case*** *(supra)* is concerned, it was submitted that a Full Bench of the High Court had prescribed a procedure to be followed for appointment of the Chairman and other Members of the State Public Service Commission. The Supreme Court found fault with this aspect of the judgment of the High Court and held that the High Court could not, under Article 226 of the Constitution, usurp the constitutional power of the Government and lay down a procedure for appointment of the Chairman and other Members of the Public Service Commission. The Supreme Court in the ***Punjab PSC case*** *(supra)* in paragraph 39 had observed as under:-

> 39. .....A reading of Article 316 of the Constitution would show that it confers power on the Governor of the State to appoint the Chairman and other Members of a Public Service Commission. It has been held by this Court in ***Mohinder Singh Gill and Anr. v. The Chief Election Commissioner, New Delhi and Ors.*****: 1978 (1) SCC 405** that an authority has implied powers to make available and carry into effect powers expressly conferred on it. Thus, under Article 316 of the

> Constitution, the Governor of a State has not only the express power of appointing the Chairman and other Members of Public Service Commission but also the implied powers to lay down the procedure for appointment of Chairman and Members of the Public Service Commission and the High Court cannot under Article 226 of the Constitution usurp this constitutional power of the Government and lay down the procedure for appointment of the Chairman and other Members of the Public Service Commission. The Full Bench of the High Court, therefore, could not have laid down the procedure for appointment of the Chairman and Members of the Punjab Public Service Commission and the Haryana Public Service Commission by the impugned judgment dated 17.08.2011"
>
> (underlining added)

The Supreme Court further held as under:-

> "Having held that the Full Bench of the High Court has in its judgment dated 17.08.2011 acted beyond its jurisdiction and has usurped the constitutional power of the Governor in laying down the procedure for appointment of the Chairman and Members of the Public Service Commission, I have to set aside the judgment dated 17.08.2011 of the Full Bench of the High Court."

Thus, in respect of prayer (b) of WP(C) 4653/2013, the learned Attorney General submitted that the first part of that prayer was nothing but a rehash of the prayers made in the two earlier petitions which had been filed before the Supreme Court and which had been dismissed by the Supreme Court. The second part of prayer (b) could not be granted inasmuch as that would

be contrary to the constitutional scheme as contemplated under Article 148 read with Article 74 of the Constitution.

II.1 Re: The prayer of a writ of quo warranto

19. With regard to prayer (a) of WP(C) 4653/2013, it was submitted that the petitioners are seeking a writ of quo warranto to set aside the appointment of the respondent No. 2 as the CAG. It was submitted that quo warranto, as a principle, applies to "eligibility" and not "suitability". It applies to a situation where a person could not be appointed and not to a situation where a person ought not to have been appointed. The learned Attorney General referred to paragraph 10 of the counter-affidavit submitted by the respondent No.1, wherein it has been stated that insofar as the respondent No. 2 is concerned, his service record has been unimpeachable and he has had 37 years of unblemished service and has a distinguished record in the Indian Administrative Service both at the centre and his parent cadre, Bihar. It is further stated therein that the respondent No.2 has had a wide experience in many areas including Defence, Financial Services, Information Technology, Public Administration, Labour Relations, Urban Development and Industrial Development. It is further stated therein that it was in this background that the respondent No. 2, who was the then Defence Secretary, was recommended for appointment as the CAG. Furthermore, his

earlier elevation as a Secretary to the Government of India was possible only after clearances from CBI, CVC and DoPT which clearly implies that he possessed integrity and competence necessary for the high constitutional position of CAG.

II.2 Re: The argument as regards conflict of interest

20. It was submitted that the argument of the petitioners that the respondent No. 2's appointment would result in a conflict of interest because the respondent No. 2 has worked in defence procurements for the last 10 years was factually incorrect. It was submitted that respondent No. 2 had, during the last 10 years, held the post of an Additional Secretary in the Department of Administrative Reforms and Public Grievances under the Ministry of Personnel for the period April, 2007 to August, 2007. Subsequently, the respondent No. 2 held the post of Secretary, Department of Information Technology for the period September, 2010 to February, 2011 and he was the Secretary, Department of Financial Services for the period February, 2011 to July, 2011. In this backdrop, it was contended that the submissions of the petitioners that the respondent No. 2 had been concerned only with defence procurements for the last 10 years prior to his appointment as the CAG was misleading.

21. Furthermore, it was submitted that just because the respondent No. 2 had worked in the Ministry of Defence, he cannot be disqualified for being considered for appointment as the CAG. This is so because any defence procurement is the result of a collective decision. It cannot also be assumed that all defence acquisitions are questionable. Furthermore, the respondent No. 2 was not a member of the Technical Evaluation Committee, the Technical Oversight Committee or the Contract Negotiation Committee nor was the respondent No. 2 the competent financial authority and as such, it cannot be said the respondent No. 2 suffered from any conflict of interest. Moreover, the Defence Budget formed only a small portion of the total Union Budget. It was stated that the total expenditure of the Union and the State Governments which the CAG audits was about Rupees 26 lac crores in 2011-2012. Apart from the Union and State Government accounts, the CAG is also entrusted with the audit of financial transactions of 1760 public sector undertakings, 683 Central Autonomous Bodies, besides hundreds of State Autonomous Bodies. It was contended that the audit of the defence sector, therefore, formed only a small percentage of the total audit undertaken by the CAG. It was further submitted that for the year 2012-13, out of 141 audit reports, only 3 pertained to the defence sector. Similarly, for the year 2011-2012, out of a total 137 audit reports, only 4 pertained to defence. As regards

the audit report on the acquisition of helicopters for VVIPs, it was submitted that the said report was signed and had already been submitted by the former CAG on 25.04.2013 to the President for laying before the Houses of Parliament. That report has already been laid before Parliament on 13.08.2013 and, in any event, there are no allegations against or indictment of the respondent No. 2 in that report. In any event, it was submitted that the audit reports, which are submitted by the CAG, are subject to scrutiny by Parliament or the legislatures of the States, as the case may be. A reference was made to the Supreme Court decision in the case of ***Arun Kumar Aggarwal v. Union of India: (2013) 7 SCALE 333***, where the Court held that a CAG report, by itself, cannot be accepted by the Court as the basis for initiating any action. The Supreme Court had observed as under:-

> "54. We have referred to the report of the CAG, the role of the PAC and the procedure followed in the House, only to indicate that the CAG report is always subject to scrutiny by the Parliament and the Government can always offer its views on the report of the CAG.
>
> 55. The question that is germane for consideration in this case is whether this Court can grant reliefs merely placing reliance on the CAG's report. The CAG's report is always subject to parliamentary debates and it is possible that PAC can accept the ministry's objection to the CAG report or reject the report of the CAG. The CAG, indisputably is an independent constitutional functionary, however, it is for the

> Parliament to decide whether after receiving the report i.e. PAC to make its comments on the CAG's report.
>
> 56. We may, however, point out that since the report is from a constitutional functionary, it commands respect and cannot be brushed aside as such, but it is equally important to examine the comments what respective ministries have to offer on the CAG's report. The ministry can always point out, if there is any mistake in the CAG's report or the CAG has inappropriately appreciated the various issues. For instance, we cannot as such accept the CAG report in the instance case."
>
> (underlining added)

II.3 Re: The argument that the procedure was illegal or arbitrary

22. It was also submitted that the challenge to the appointment of the respondent No. 2 on the ground that the procedure was illegal or arbitrary is without any substance. A reference was made to the Supreme Court decision in the case of ***Sanchit Bansal v. Joint Admission Board: (2012) 1 SCC 157***, wherein the Supreme Court held that an action is said to be arbitrary or capricious when it is based on individual discretion, is illogical and whimsical and without any reasonable explanation. It was submitted that the present appointment of the respondent No. 2 as the CAG could not be described as arbitrary as it was based on a practice which had been followed and become a convention over several decades and had stood the test of time as there is nothing whatsoever on record to show that the procedure, which had been followed till date for the appointment of the

earlier CAGs, had resulted in the failure of any one of the CAGs in the discharge of his duties as prescribed under the Constitution. With regard to the importance of well-established conventions, reliance was placed by the learned Attorney General on the Supreme Court decision in the case of ***Supreme Court Advocates-on-Record Association v. Union of India: (1993) 4 SCC 441***, wherein the Supreme Court observed as under:-

> " 344. K.C. Wheare in his book "*Modern Constitutions*" gives at least two sources of conventions. A course of conduct may be persisted in over a long period of time and gradually attain first persuasive and then obligatory force. According to him a convention may arise much more quickly than this. There may be an agreement among the people concerned to work in a particular way and to adopt a particular rule of conduct. This rule is immediately binding and it is a convention. Sir Ivor Jennings puts it as under:
>
> > The laws provide only a framework; those who put the laws into operation give the framework a meaning and fill in the interstices. Those who take decisions create precedents which others tend to follow and when they have been followed long enough they acquire the sanctity and the respectability of age. They not only are followed but they have to be followed."

23. Finally, it was submitted by the learned Attorney General that the ***CVC case*** *(supra)*, on which the petitioners heavily relied, had no

application to the present case. In that case, there was a pending criminal case against the incumbent and sanction for prosecution had even been accorded by the State Government. Moreover, disciplinary proceedings had also been recommended by the DoPT against the person under consideration for appointment to the post of the Central Vigilance Commissioner. The notings to this effect were not considered by the High Powered Committee and this impinged upon 'institutional integrity'. It was the recommendation of the High Powered Committee which was in question in that case because the notings, as regards the pending criminal case and the recommendations for initiating disciplinary proceedings, had not been considered by the High Powered Committee while making its recommendation. In the present case, the facts are entirely different. No such proceedings are pending against the respondent No. 2, who has had an impeccable service record. In his entire service carrier, no disciplinary proceedings have been contemplated nor has any case been initiated against him. Therefore, the petitions, according to the learned Attorney General, are liable to be dismissed.

III. Reply on behalf of the Respondent No. 2

24. Mr Amit Sibal, the learned counsel appearing on behalf of the respondent No. 2 in WP(C) 4653/2013, submitted that the respondent No. 2 has 37 years of unblemished record. There are no adverse notings insofar as

he is concerned and his appointment has been cleared by CVC etc. There is no allegation with regard to the competence and integrity of the respondent No. 2. Therefore, the ***CVC case*** *(supra)* would have no application to the present case.

25. He further submitted that Article 148 of the Constitution does not prescribe any narrow criteria for eligibility. He referred to the constituent assembly debates and emphasised that a person to be appointed as the CAG should have a comprehensive knowledge of the entire administration. He submitted that the scope of duties of the CAG are very wide and by its very nature, the CAG will have to consider various departments of the Government including those departments in which he has served. In the present case, it would include the departments pertaining to Financial Service, Information Technology, Ministry of Personnel and Defence. But, this, by itself, does not mean that there is any conflict of interest. Earlier, CAGs have also served in departments which have fallen within the purview of the CAG audits. There is, therefore, no question of any conflict of interest. It was further submitted that defence procurements, which have been the hub of allegations in these petitions, are not one-man decisions but collective decisions. They were, in any event, not decided by the respondent

No. 2. As per the defence procurement procedure (DPP), there are three key committees – Technical Oversight Committee (TOC), Technical Evaluation Committee and the Contract Negotiation Committee. The respondent No. 2 was not a member of any of these three committees as would be evident from paragraph 15 of the counter-affidavit submitted by the respondent No. 1. Furthermore, the respondent No. 2 was also not the competent financial authority for the sanctioning of procurement in respect of any of the defence procurement cases mentioned in the petitions. As regards the 12 VVIP helicopters, Mr Sibal reiterated the submissions of the learned Attorney General that the previous CAG had already placed his report before the President on 20.04.2013 and the same had been laid before Parliament on 13.08.2013. He submitted that in that report there is no indictment of the respondent No. 2 nor is there any investigation contemplated with regard to the respondent No. 2. Even the FIR lodged does not name the respondent No.2 and there is no case of any kind against the respondent No. 2. There are only two references to the respondent No. 2 in the said CAG report with regard to the said helicopters. The first reference being at page 9 of the said report No. 10/2013 to the following effect:-

> "Discussion of revision in the ORs was held in a meeting chaired by Deputy Chief of Air Staff (DCAS) in Air HQ

> and attended by Joint Secretary & Acquisition Manager (Air), Director SPG and other officers from Air HQ (07 March 2005), wherein height altitude capability was reduced to 4500 metre."

The reference to the Joint Secretary is a reference to the respondent No.2. It merely indicates that the meeting was attended by him amongst others. The second and only other reference to the respondent No. 2 is to be found at page 13 of the said report No. 10/2013, which is to the following effect:-

> "Air HQ shortlisted the remaining two vendors. The TEC evaluated the technical proposals of vendors *i.e.* Sikorsky (S-92) and Agusta Westland (AW-101) and recommended the two for field evaluation. The report of the TEC was accepted by the Director General (Acquisitions) in December 2007. As per the DPP-2006, the time frame for technical evaluation and acceptance by DG (Acquisitions) was four months, against which it took 10 months. The delay of six months was on account of the fact that certain features such as sound proofing (non-VVIP helicopters), product support after expiration of warranty of the technical proposals in respect of Sikorsky, and provision of active Missile Approach Warning System (MAWS) proposals submitted by both the vendors did not conform to the RFP requirements and deviations for the same Were submitted to the RM for approval in December 2007 by the DPB. Thereafter, it was sent to DG (Acquisitions) for acceptance of the TEC report, as required under Paragraph 36 of DPP-2006."

It was submitted by Mr Sibal that the reference to DG (Acquisitions) is to the respondent No. 2. But, there were no adverse comments with regard to the respondent No. 2. Moreover, the deviations were submitted to "RM" which means '*Raksha Mantri'* or the Defence Minister and not to DG (Acquisitions). It was, therefore, submitted by Mr Sibal that there is no adverse comment made with regard to the respondent No. 2 in the CAG report. In any event, the report has already been placed before Parliament and, therefore, there is no question of conflict of interest on this aspect of the matter.

26. With regard to the reliance placed by the petitioners on the ***CVC case*** *(supra)*, Mr Sibal outlined the fact that in that case the person concerned had a case under Section 13 of the Prevention of Corruption Act, 1988 pending against him. Furthermore, there was a statutory procedure prescribed for appointment to the position of CVC. In that case, the High Powered Committee did not consider the notings which indicated the pendency of a criminal case as well as the recommendation for initiation of disciplinary proceedings. He submitted that in the present case, there is no criminal case against the respondent No. 2 and there are no adverse notings against the respondent No. 2. The facts of the present case and that of the ***CVC case***

(supra) are, therefore, according to Mr Sibal, entirely different and the said judgment would have no application to the present case.

27. With regard to the prayer for issuance of a writ of quo warranto, Mr Sibal submitted that such a writ, before it could be issued, required that the office concerned must be a public office and, secondly, the appointment to such office must not have been in conflict with the statutory rules. He submitted that it is nobody's case that the appointment of the respondent No. 2 was contrary to a statute. In this case, the applicable statute, if it can be so called, was Article 148 of the Constitution. The said Article requires that the CAG should be appointed by the President. The respondent No. 2 has been so appointed by the President. The only requirement is that the appointment by the President must be on the basis of aid and advice of the Council of Ministers. It is nobody's case that this was not done. There is no other procedural requisite. Therefore, the writ of quo warranto does not at all lie.

28. He further submitted that 'suitability', as contrasted with 'eligibility', cannot be the subject matter of judicial review. He placed reliance on the Supreme Court decision in the case of ***Hari Bansh Lal v. Sahodar Prasad Mahto and Others: (2010) 9 SCC 655.*** According to Mr Sibal, the Supreme

Court in that case held that a writ petition raising the question of suitability was not maintainable. Finally, Mr Sibal submitted that the CAG takes oath of office under the Third Schedule to the Constitution. There can be no presumption that the respondent No. 2, in his capacity as the CAG, would not perform his duties and functions in terms of the oath that he has taken. There is no dispute that the respondent No. 2 has been appointed in the manner which has been prevalent for decades and which has fructified into a convention. That procedure or convention had been challenged in two earlier writ petitions before the Supreme Court, which have been dismissed. Therefore, that procedure cannot now form the subject matter of another set of writ petitions such as the present.

IV. Rejoinder arguments on behalf of the petitioners

29. In rejoinder, it was submitted on behalf of the petitioners that the respondent No. 2 played the most important role in defence acquisitions. The learned counsel for the petitioners made references to the CAG audit report to submit that the Ministry's view was not acceptable. According to them, the Ministry's reply was prepared by the respondent No. 2, who was the then Defence Secretary. It was reiterated that the respondent No. 2, who had been a part of the defence purchases, could not have been appointed as the CAG and that he was the most inappropriate person selected and

appointed. It was, therefore, reiterated on behalf of the petitioners that the writ petitions ought to be allowed by setting aside the appointment of the respondent No. 2 as the CAG and by issuance of a writ of mandamus directing the Union of India to frame a transparent selection procedure based on definite criteria and to constitute a broad based non-partisan selection committee, which, after calling for applications and nominations, would recommend the most suitable person for appointment as the CAG to the President of India.

V. Discussion

V.1 The CVC case

30. The petitioners placed heavy reliance on the ***CVC case*** *(supra)*. The question that was examined by the Supreme Court in the ***CVC case*** *(supra)* was concerning the legality of the appointment of the respondent No. 2 therein as the Central Vigilance Commissioner under Section 4(1) of the Central Vigilance Commission Act, 2003 (hereinafter referred to as 'the CVC Act'). The Supreme Court observed that while the Government is not accountable to the courts in respect of policy decisions, they are accountable for the legality of such decisions. The Supreme Court also cautioned that while deciding such cases, the difference between 'legality' and 'merit', as also between 'judicial review' and 'merit review', should not be lost sight

of. In the ***CVC case*** *(supra)*, the High Powered Committee (HPC), which had been duly constituted under the proviso to Section 4(1) of the CVC Act, had recommended the name of the respondent No. 2 therein for appointment to the post of Central Vigilance Commissioner. The validity of that recommendation fell for judicial scrutiny. The Supreme Court observed that the Central Vigilance Commission is an 'integrity institution'. This would be clear from the following extract of the said decision:-

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

We may also note that by virtue of Section 3(3) of the CVC Act, the Central Vigilance Commissioner is to be appointed from amongst persons who have been or are in 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. It would become immediately clear that this provision of eligibility is entirely different from the wide area of selection which the

President, under Article 148(1), can traverse before a CAG is appointed. Section 4 of the CVC Act reads as under:-

> "**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."

From the above, it would be clear that while the Central Vigilance Commissioner is appointed by the President by warrant under his hand and seal and the CAG by virtue of Article 148(1) of the Constitution is also appointed by the President by warrant under his hand and seal, the

appointment of the Central Vigilance Commissioner is to be made only after obtaining the recommendation of a committee consisting of the Prime Minister (Chairperson), the Minister of Home Affairs (Member) and the Leader of the Opposition in the House of the People (Member). In the case of the CAG, there is no such stipulation. This distinction has to be kept in mind while we consider the present writ petitions.

31. The Supreme Court observed that the words "who have been or are" in Section 3(3)(a) of the CVC Act refer to the person holding office of a civil servant or who has held such office. These words were regarded as indicating an eligibility criteria and they further indicate that such post or 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. The Supreme Court further observed as under:-

> "36. 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.

37. 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.

38. 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.
>
> 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 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."

From the above extract, it is evident that the post of the Central Vigilance Commissioner is a statutory post and the Commissioner performs statutory functions as enumerated in Section 8 of the CVC Act. The Central Vigilance Commission is an integrity institution and in its functions, it is similar to the Election Commission, the Comptroller and Auditor-General, the Parliamentary Committees etc. It was, therefore, observed that while making recommendations, the service conditions of the candidate, being a public servant or civil servant in the past, was not the sole criteria and the HPC must also take into consideration the question of "institutional competency". The Supreme Court further observed that if the selection

adversely affects institutional competency and functioning, then it is the duty of the HPC not to recommend such a candidate. It was noted in the above decision that in the case before it, the vital aspect of institutional integrity had not been taken into account by the HPC while recommending the name of the respondent No. 2 therein for appointment as the Central Vigilance Commissioner. The Supreme Court further noted that the HPC has to take into consideration the values, independence and impartiality of the Institution and it has to consider the institutional competence. It has to take an informed decision keeping in mind these vital aspects.

32. The Supreme Court further observed as under:-

> "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 (see SCC para 88 of ***N. Kannadasan v. Ajoy Khose: (2009) 7 SCC 1)*** . 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**: ***AIR 1967 SC 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)*].

44. *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 26-6-2000, 18-1-2001, 20-6-2003, 24-2-2004, 18-10-2004 and 2-11-2004 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 6-10-2008. 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."

As observed by the Supreme Court, if the HPC, for any reason whatsoever, fails to look into relevant material having a nexus with the object and purpose of the CVC Act or takes into account irrelevant circumstances, then

its decision would stand vitiated on the ground of official arbitrariness. The Supreme Court importantly observed that 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. The Supreme Court also noted in the case before it that the HPC did not even consider the relevant material in respect of personal integrity. It did not consider the notings of the DoPT, wherein there were observations that penalty proceedings be initiated against the respondent No. 2 therein. The Supreme Court concluded that the HPC had failed to consider the relevant material keeping in mind the purpose and policy of the CVC Act.

33. The Supreme Court in the ***CVC case*** *(supra)* further held as under:-

> "46. 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.
>
> 47. *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 3-9-2010 of HPC is entirely premised on the blanket clearance given by CVC on 6-10-2008 and on the fact of Respondent No. 2 being appointed as Chief Secretary of Kerala on 18-7-2007; 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 No. 6 of 2003; the sanction accorded by the Government of Kerala on 30-11-1999 under Section 197 Code of Criminal Procedure for prosecuting inter alia Shri P.J. Thomas for having committed alleged offence under Section 120B IPC read with Section 13(1)(d) of the Prevention of Corruption Act……"

It would be evident from the above that in the case before it, even the pending criminal case was not considered by the HPC. More importantly, it was noted that the HPC had failed to take into consideration the pendency of the Palmolein case before the Special Judge, Thiruvananthapuram in respect of which sanction had been accorded by the Government of Kerala under Section 197 Cr. P.C for prosecuting, *inter alia*, the respondent No. 2 therein

for allegedly having committed an offence under Section 120B IPC read with Section 13(1)(d) of the Prevention of Corruption Act. It is for these reasons and, particularly, the fact that the relevant material with regard to the DoPT notings and the pendency of the criminal case not having been considered by the HPC while making its recommendation, that the Supreme Court held the said recommendation of the HPC to be *non-est* in law.

34. We must also notice the observations of the Supreme Court in the ***CVC case*** *(supra)* with regard to a writ of quo warranto. The Supreme Court observed that 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. The Supreme Court observed that a writ of quo warranto is issued to prevent a continued exercise of unlawful authority. With reference to ***R.K. Jain v. Union of India: (1993) 4 SCC 119***, the Supreme Court, in the ***CVC case*** *(supra)*, observed that judicial review is concerned with whether the

incumbent possessed the requisite qualification for appointment and whether the manner in which the appointment came to be made or the procedure adopted was fair, just and reasonable. It was noted that when a candidate is found qualified and eligible and is accordingly appointed by the executive to hold a public office, the Court cannot, in judicial review, sit over the choice of the selection. A reference was also made to the earlier Supreme Court decision in the case of ***Hari Bansh Lal*** *(supra)*, wherein the Supreme Court held that a writ of quo warranto lies only when the appointment is contrary to the statutory provisions. It was further noted that in ***Hari Bansh Lal*** *(supra)*, the Supreme Court had observed 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 provisions or rules. In this backdrop, the Supreme Court, in ***CVC case*** *(supra)*, observed as under:-

> 63. 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 v. State of Haryana: (1985) 4 SCC 417*** 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 were 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.

35. In the light of the above discussion with regard to the ***CVC case*** *(supra)*, it immediately becomes clear that there are several differences between the ***CVC case*** *(supra)* and the present writ petitions. First of all, the Central Vigilance Commissioner is a statutory authority, whereas the CAG is a constitutional authority. Secondly, the Central Vigilance Commissioner is to be appointed upon the recommendation of a High Powered Committee by virtue of Section 4(1) of the CVC Act. There is no similar statutory provision requiring the selection by and recommendation of a committee, insofar as the appointment of a CAG is concerned. The only provision for appointment of the CAG is Article 148(1), which only stipulates that he shall be appointed by the President by warrant under his hand and seal. The President appoints the CAG on the aid and advice of the Council of Ministers headed by the Prime Minster. That is the manner in which the

appointments of CAGs till date have been made and that is the manner in which the respondent No. 2 has been appointed as the CAG. Thirdly, the manner of removal of the Central Vigilance Commissioner is provided in Section 6(1) of the CVC Act which stipulates that he can be removed from 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 ought, on such ground, be removed. Of course, by virtue of Section 6(3) of the CVC Act, notwithstanding anything contained in sub-section (1), the President may by order remove the Central Vigilance Commissioner from office in several clear-cut instances, such as, when he is adjudged an insolvent; or has been convicted of an offence which, in the opinion of the Central Government, involves moral turpitude; or engages during his term of office in any paid employment outside the duties of his office; or is, in the opinion of the President, unfit to continue in office by reason of infirmity of mind or body; or has acquired such financial or other interest as is likely to affect prejudicially his functions as a Central Vigilance Commissioner or a Vigilance Commissioner. On the other hand, the CAG can be removed from office as per Article 148(1) of the Constitution in like manner and on the like grounds as a Judge of the Supreme Court. Article 124(4) of the Constitution,

as we have pointed out above, stipulates that a Judge of the Supreme Court shall not be removed from his office except by an order of the President passed after an address by each House of Parliament supported by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting which has been presented to the President in the same session for such removal on the ground of proved misbehaviour or incapacity. Fourthly, in the ***CVC case*** *(supra)*, the respondent No. 2 therein was under a cloud in the sense that there were notings of DoPT with regard to initiation of disciplinary proceedings against him and sanction had been accorded under Section 197 Cr.P.C for prosecuting him for having allegedly committed an offence under Section 120B IPC read with Section 13(1)(d) of the Prevention of Corruption Act. These factors had been ignored by the High Powered Committee while recommending the name of the respondent No. 2 therein for the post of the Central Vigilance Commissioner. It is for these reasons that the recommendation made by the High Powered Committee was found to be non-est in law by the Supreme Court in the ***CVC case*** *(supra)*.

36. In the case before us, there is no pending disciplinary proceedings nor any pending criminal case insofar as the respondent No. 2 herein is

concerned. Thus, while the legality of the appointment of the respondent No. 2 as the Central Vigilance Commissioner was in question before the Supreme Court in the ***CVC case*** *(supra)*, this is not the case in the present writ petitions. In judicial review, as pointed out in the ***CVC case*** *(supra)*, we are concerned not about the merit but about the legality of the appointment. What the petitioners want us to do is to examine the merit of the appointment of the respondent No. 2 as the CAG. That would amount to a merit review which is entirely distinct and different from judicial review. There is no doubt that the CAG is an integrity institution, but that by itself, would not entitle us to conduct a merit review in the guise of a judicial review. In our view, there are several distinguishing features, on facts, which have been pointed out above, which would make the ***CVC case*** *(supra)* inapplicable to the position obtaining in the appointment of the respondent No. 2 as the CAG.

V.2 The Punjab PSC case

37. The next decision which was relied upon by the learned counsel for the petitioners was that of the ***Punjab PSC case*** *(supra)*. The question before the Supreme Court was whether the High Court, in exercise of its writ jurisdiction under Article 226 of the Constitution, could lay down the procedure for the selection and appointment of the Chairman of the State

Public Service Commission and quash his appointment in appropriate cases? Article 316(1) stipulates, *inter alia*, that the Chairman of a Public Service Commission shall be appointed in the case of the Union Commission or a Joint Commission, by the President, and in the case of a State Commission, by the Governor of the State. Article 317 of the Constitution prescribes the manner of removal and suspension of, *inter alia*, the Chairman of a Public Service Commission. The manner of removal is akin to that of the manner of removal of the Central Vigilance Commissioner to which we have already alluded to above. In the ***Punjab PSC case*** *(supra)*, the Supreme Court, with reference to Article 316 of the Constitution, observed as under:-

> "A reading of Article 316 of the Constitution would show that it confers power on the Governor of the State to appoint the Chairman and other Members of a Public Service Commission. It has been held by this Court in *Mohinder Singh Gill and Anr.* v. *The Chief Election Commissioner, New Delhi and Others* (supra) that an authority has implied powers to make available and carry into effect powers expressly conferred on it. Thus, under Article 316 of the Constitution, the Governor of a State has not only the express power of appointing the Chairman and other Members of Public Service Commission but also the implied powers to lay down the procedure for appointment of Chairman and Members of the Public Service Commission and the High Court cannot under Article 226 of the Constitution usurp this constitutional power of the Government and lay down the procedure for appointment of the Chairman and other Members of the Public Service Commission. The Full Bench of the High Court, therefore, could not have laid down the procedure for appointment of the Chairman and Members of the Punjab Public Service

> Commission and the Haryana Public Service Commission by the impugned judgment dated 17.08.2011."
>
> (underlining added)

It is evident from the above extract that by virtue of Article 316 of the Constitution, the Governor of a State had not only the express power of appointing the Chairman of the Public Service Commission, but also the implied powers to lay down the procedure for appointment of, *inter alia*, the Chairman of the Public Service Commission and that the High Court, under Article 226 of the Constitution, could not usurp this constitutional power of the Government and lay down the procedure for appointment of, *inter alia*, the Chairman of the Public Service Commission. The Supreme Court further observed (per Patnaik, J.) that even though Article 316 did not specify the qualities that a Chairman of a Public Service Commission is required to possess, however, the qualities of 'integrity' and 'competence' are implied relevant factors which have to be taken into consideration while selecting a person to the post of the Chairman of a Public Service Commission. It was further observed that if these relevant factors are not taken into account, the Court can hold the selection and appointment to be not in accordance with the Constitution. The Supreme Court (per Patnaik, J.) further observed that the Chairman of a Public Service Commission who has to perform his duties under Article 320 of the Constitution with

independence from the State Government cannot be equated with the Chief Secretary or the DG or IG Police, who are concerned solely with the administrative functions and had to work under the State Government. The Supreme Court (per Patnaik, J.) held as under:-

> ".....Therefore, I hold that the High Court should not normally, in exercise of its power under Article 226 of the Constitution, interfere with the discretion of the State Government in selecting and appointing the Chairman of the State Public Service Commission, but in an exceptional case if it is shown that relevant factors implied from the very nature of the duties entrusted to Public Service Commissions under Article 320 of the Constitution have not been considered by the State Government in selecting and appointing the Chairman of the State Public Service Commission, the High Court can invoke its wide and extra-ordinary powers under Article 226 of the Constitution and quash the selection and appointment to ensure that the discretion of the State Government is exercised within the bounds of the Constitution."

The Supreme Court (per Patnaik, J.) further observed as under:-

> ".....These materials do not indicate that Mr. Harish Dhanda had any knowledge or experience whatsoever either in administration or in recruitment nor do these materials indicate that Mr. Harish Dhanda had the qualities to perform the duties as the Chairman of the State Public Service Commission under Article 320 of the Constitution which I have discussed in this judgment. No other information through affidavit has also been placed on record before us to show that Mr. Harish Dhanda has the positive qualities to perform the duties of the office of the Chairman of the State Public Service Commission under Article 320 of the Constitution. The decision of the State Government to appoint Mr. Harish Dhanda as the Chairman of

> the Punjab Public Service Commission was thus invalid for non-consideration of relevant factors implied from the very nature of the duties entrusted to the Public Service Commissions under Article 320 of the Constitution."

In a concurring opinion, Madan B. Lokur, J. observed as under:-

> "While it is difficult to summarize the indicators laid down by this Court, it is possible to say that the two most important requirements are that personally the Chairperson of the Public Service Commission should be beyond reproach and his or her appointment should inspire confidence among the people in the institution. The first 'quality' can be ascertained through a meaningful deliberative process, while the second 'quality' can be determined by taking into account the constitutional, functional and institutional requirements necessary for the appointment."

With reference to the ***CVC case*** *(supra)*, the learned Judge observed as under:-

> "101. Acknowledging this, this Court looked at the appointment of the Central Vigilance Commissioner not as a merit review of the integrity of the selected person, but as a judicial review of the recommendation making process relating to the integrity of the institution. It was made clear that while the personal integrity of the candidate cannot be discounted, institutional integrity is the primary consideration to be kept in mind while recommending a candidate. It was observed that while this Court cannot sit in appeal over the opinion of the HPC, it can certainly see whether relevant material and vital aspects having nexus with the objects of the Act are taken into account when a recommendation is made. This Court emphasized the overarching need to act for the good of the institution and in the public interest. Reference in this context was made to *N. Kannadasan*.

> 102. Keeping in mind the law laid down and the facts as they appear from the record, it does appear that the constitutional, functional and institutional requirements of the Punjab Public Service Commission were not kept in mind when Mr. Dhanda was recommended for appointment as its Chairperson."

He further distinguished the case of ***Hari Bansh Lal*** *(supra)* and other cases referred therein by observing that none of those decisions dealt with the appointment to a constitutional position such as the Chairperson of a Public Service Commission. He further observed that he was unable to accept the view that the suitability of an appointee to the post of Chairperson of a Public Service Commission should be evaluated on the same yardstick as the appointment of a senior administrative functionary. Moreover, in the case of an administrative functionary, the State Government or the Chief Minister and the appointee usually share a similar vision of the administrative goals and requirements of the State and the underlying premise is that the State Government or the Chief Minister must have confidence that the appointee would deliver administratively and also be compatible with each other. In the case of the Chairperson of a State Public Service Commission, the question of confidence does not arise nor does the issue of compatibility. The Supreme Court concluded as under:-

> "142. The appointment of the Chairperson of the Punjab Public Service Commission is an appointment to a constitutional

position and is not a "service matter". A PIL challenging such an appointment is, therefore, maintainable both for the issuance of a writ of *quo warranto* and for a writ of declaration, as the case may be.

143. In a case for the issuance of a writ of declaration, exercise of the power of judicial review is presently limited to examining the deliberative process for the appointment not meeting the constitutional, functional and institutional requirements of the institution whose integrity and commitment needs to be maintained or the appointment for these reasons not being in public interest.

144. The circumstances of this case leave no room for doubt that the notification dated 7th July 2011 appointing Mr. Harish Rai Dhanda was deservedly quashed by the High Court since there was no deliberative process worth the name in making the appointment and also since the constitutional, functional and institutional requirements of the Punjab Public Service Commission were not met.

145. In the view that I have taken, there is a need for a word of caution to the High Courts. There is a likelihood of comparable challenges being made by trigger-happy litigants to appointments made to constitutional positions where no eligibility criterion or procedure has been laid down. The High Courts will do well to be extremely circumspect in even entertaining such petitions. It is necessary to keep in mind that sufficient elbow room must be given to the Executive to make constitutional appointments as long as the constitutional, functional and institutional requirements are met and the appointments are in conformity with the indicators given by this Court from time to time.

146. Given the experience in the making of such appointments, there is no doubt that until the State Legislature enacts an appropriate law, the State of Punjab must step in and take urgent steps to frame a memorandum of procedure and administrative guidelines for the selection and appointment of the Chairperson and members of the Punjab Public Service

> Commission, so that the possibility of arbitrary appointments is eliminated.
>
> 147. The Civil Appeals are disposed of as directed by Brother Patnaik."
>
> (underlining added)

38. It is evident from the above that the appointment of the Chairman of the Punjab State Public Service Commission was held to be bad because relevant factors, such as integrity and competence, had not been taken into account. Furthermore, there was no deliberative process for the appointment so as to meet the constitutional functions and institutional requirements of the institution whose integrity and commitment needed to be maintained. It must be noted that directions were given that until the State Legislature enacts an appropriate law, the State of Punjab ought to step in and take urgent steps to frame a memorandum of procedure and administrative guidelines for selection and appointment of the Chairperson and members of the Punjab Public Service Commission so that the possibility of arbitrary appointments is eliminated.

V.3 The CIC case

39. The next decision relied upon by the petitioners was that of the Supreme Court in the ***CIC case*** *(supra)*. Particular reference was made to paragraphs 108.10 and 108.11, which read as under:-

> "108.10 The appointment of the Information Commissioners at both levels should be made from amongst the persons empanelled by the DoPT in the case of Centre and the concerned Ministry in the case of a State. The panel has to be prepared upon due advertisement and on a rational basis as afore-recorded.
>
> 108.11 The panel so prepared by the DoPT or the concerned Ministry ought to be placed before the High-powered Committee in terms of Section 12(3), for final recommendation to the President of India. Needless to repeat that the High Powered Committee at the Centre and the State levels is expected to adopt a fair and transparent method of recommending the names for appointment to the competent authority."

On the basis of the above, it was contended that as in the case of the appointment of Information Commissioners, a panel ought to be prepared after due advertisement and upon following a rational basis even in the case of selection of a person for the office of the CAG. It was contended that there must be transparency and one facet of which is to advertise the post and invite applications for the same. It must be pointed out that the Chief Information Commissioner and the Information Commissioners are appointed by the President on the recommendation of a committee

consisting of the Prime Minister (Chairperson), Leader of Opposition in the Lok Sabha and a Union Cabinet Minister to be nominated by the Prime Minister. This is provided in Section 12(3) of the Right to Information Act, 2005. Section 12(5) stipulates that the Chief Information Commissioner and Information Commissioners shall be persons of eminence in public life with wide knowledge and experience in law, science and technology, social service, management, journalism, mass media or administration and governance. Section 12(6) further stipulates that the Chief Information Commissioner or an Information Commissioner shall not be a Member of Parliament or Member of the Legislature of any State or Union territory, as the case may be, or hold any other office of profit or be connected with any political party or carry on any business or pursue any profession. The removal of the Chief Information Commissioner or Information Commissioners is provided for in Section 14 of the Right to Information Act and is akin to that of the removal of the Central Vigilance Commissioner. The question that was, *inter alia*, being considered by the Supreme Court in the said ***CIC case*** *(supra)* was the validity of sub-Sections (5) and (6) of Section 12 and sub-Sections (5) and (6) of Section 15 of the Right to Information Act, 2005, which primarily deal with the eligibility criteria for appointment to the post of Chief Information Commissioner and Information

Commissioners both at the Central and State levels. The Court ultimately held that it would serve the ends of justice if the Information Commission was manned by persons of legal expertise and with adequate experience in the field of adjudication. It was further clarified that such judicial members could work individually or in Benches of two, one being a judicial member while the other being a qualified person from the specified fields to be called an expert member. It further held that in order to satisfy the test of constitutionality, the provisions of Section 12(5) of the Right to Information Act, 2005 would have to be read in a manner that the expression 'knowledge and experience' includes basic degree in that field and experience gained thereafter and secondly that legally qualified, trained and experienced persons would better administer justice to the people, particularly when they are expected to undertake an adjudicatory process which involves critical legal questions and niceties of law.

40. Essentially, the ***CIC Case*** *(supra)* was referred to by the learned counsel for the petitioners for the proposition that the appointment of the Information Commissioners should be from amongst empanelled persons and that panel should be prepared after due advertisement and on a rational basis. It was, therefore, contended that the CAG should also be appointed

after following such a process. As in the case of the appointment of a CVC, so too the case of appointment of Information Commissioners cannot be compared with the present case of appointment of a CAG. It may be remembered that in ***B. S. Minhas*** *(supra)*, the Supreme Court observed that there are quite a few posts at the top level which cannot be and should not be advertised or publicised because they are posts for which there should be no lobbying nor should any applications be allowed to be entertained. In the said decision, examples of such posts were given, which include posts of Commander of Armed Forces, of the Supreme Court Judges and of judges of the High Courts. We may add that the office of the CAG should also find mention in that list and, therefore, the submission that the post of the CAG ought to have been advertised is not acceptable to us. What may be appropriate in the case of appointment of Information Commissioners would not necessarily be appropriate for the high office of a CAG, as is evident from the distinction brought about between different levels of posts in ***B. S. Minhas*** *(supra)*. The reasons for the same have been indicated by us while considering the ***CVC case*** *(supra)* and the same need not be repeated at this juncture.

V. 4 The other decisions

41. The other decisions referred to by the learned counsel for the petitioners being ***Royappa's case*** *(supra)* and the decisions in ***Manak Lal*** *(supra)* and ***Ranjit Thakur*** *(supra)* are unexceptionabe. In ***Royappa's case*** *(supra)*, the Supreme Court observed that equality is a dynamic concept with many aspects and dimensions and it cannot be "cribbed, cabined and confined" within traditional and "doctrinaire" limits. It was observed that from a positivistic point of view, equality is antithetic to arbitrariness. It was further observed that in fact, equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and is, therefore, violative of Article 14. There is no denying that there should be no arbitrariness in any State action, including in the appointment of the CAG. The quarrel is not with this principle. The question is whether, in the facts of the present case, there has been any arbitrariness in the appointment of the respondent No. 2 as the CAG. In our view, there has not. The respondent No. 2 was appointed following a time tested convention. As in the appointment of all previous CAGs in the past, so, too, in the present, the CAG has been selected from amongst civil servants who have rich and varied experience in public administration. The procedure that has been

established and has worked itself into a convention over the last several decades is that the Cabinet Secretariat, which is headed by the Cabinet Secretary, who is the senior most civil servant having knowledge about the competence and integrity of the civil servants in the government, sends the list of shortlisted names (approved by the Finance Minister) to the Prime Minister for his consideration. The Prime Minister thereafter considers the said shortlisted names and recommends one name out of that list to the President of India for his approval. After the name is approved by the President, the CAG is appointed under the warrant and seal of the President of India. This is the manner in which the appointments to the position of CAG have been made in the past and this is the manner in which the respondent No. 2 was appointed as the CAG. There has been no arbitrariness in this process. It is not as if the shortlist was not prepared by the Cabinet Secretary. It is not as if the Finance Minister did not approve of the same. It is not as if the Prime Minister had not recommended the name of the respondent No. 2 to the President and it is not as if the President had not approved the name of the respondent No. 2. Therefore, the process of appointment, which was followed as a convention, has been followed and there was no deviation from the same. Therefore, it cannot be said that there

was any arbitrariness involved in the appointment of the respondent No. 2 as the CAG.

42. Although the learned counsel for the petitioners referred to the Supreme Court decisions in ***Manak Lal*** *(supra)* and ***Ranjit Thakur*** *(supra)* on the point of bias, we fail to see as to how they would apply to the facts of the present case.

V.5 The aspect of Quo Warranto

43. We now come to the aspect of whether a writ of quo warranto can be issued in this case. In ***The University of Mysore and Another v. C.D. Govinda Rao and Another: [1964] 4 SCR 575***, a Constitutional Bench of the Supreme Court held that:-

> "Broadly stated, the quo warranto proceeding affords a judicial enquiry in which any person holding an independent substantive public office, or franchise, or liberty, is called upon to show by what right he holds the said office, franchise or liberty; if the inquiry leads to the finding that the holder of the office has no valid title to it, the issue of the writ of quo warranto ousts him from that office. In other words, 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; it also protects a citizen from being deprived of public office to which he may have a right. It would thus be seen that if these proceedings are adopted subject to the

> conditions recognised in that behalf, they tend to protect the public from usurpers of public office; in some cases, persons, not entitled to public office may be allowed to occupy them and to continue to hold them as a result of the connivance of the executive or with its active help, and in such cases, if the jurisdiction of the courts to issue writ of quo warranto is properly invoked, the usurper can be ousted and the person entitled to the post allowed to occupy it. It is thus clear that 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 is held by usurper without legal authority, and that necessarily leads to the enquiry as to whether the appointment of the said alleged usurper has been made in accordance with law or not."
>
> (underlining added)

44. Quo warranto is essentially a judicial remedy available against a usurper of a public office. Quo warranto (by what authority) is a question which is put to the pretender or a person occupying a public office to show "by what warrant" is he holding such office. If the person to whom the question is put is able to satisfy the Court that he holds the office under the authority of law, then an action for quo warranto is to be dismissed. On the other hand, if the answer is unsatisfactory and the person occupying the public office is unable to demonstrate the authority under which he is so occupying the office, then the Court shall issue a writ to oust him from that office. In the present case, we find that the respondent No. 2 has been

appointed by the President by warrant under his hand and seal. He has been appointed after following the well-established procedure and convention for appointments of CAGs. Therefore, in our view, the respondent No. 2 has been able to show satisfactorily as to by what authority he holds and occupies the public office of CAG. He was appointed after following the conventional practice, as indicated above and by a warrant issued by the President under his hand and seal.

45. We may also take note of the Supreme Court decision in the case of ***M. Manohar Reddy v. Union of India: (2013) 3 SCC 99***. In that case, a petition under Article 32 of the Constitution of India had been filed purportedly in public interest seeking a writ in the nature of quo warranto for quashing the appointment of the respondent No. 3 therein as a Judge of the High Court of Andhra Pradesh. The Supreme Court in ***M. Manohar Reddy*** *(supra)* referred to its earlier decision in the case of ***Mahesh Chandra Gupta v. Union of India: (2009) 8 SCC 273***. In that case, the Supreme court had examined the class of cases relating to appointments of High Court judges that might fall under judicial scrutiny and concluded that judicial review may be called for on two grounds, namely, (i) "lack of eligibility" and (ii) "lack of effective consultation". In ***M. Manohar Reddy*** *(supra)*, the

Supreme Court held that "eligibility" is a matter of fact, whereas suitability is a matter of opinion. It was further observed that in cases involving "lack of eligibility" a writ of quo warranto would certainly lie. One reason being that "eligibility" was not a matter of subjectivity. On the other hand, the Supreme Court observed that "suitability" or "fitness" of a person to be appointed as a Judge of the High Court involving his character, his integrity, his competence and the like were matters of opinion.

46. In the present case also, we must bear this distinction in mind. We cannot sit in judgment over the suitability of the respondent No. 2 to be appointed as the CAG. Judicial review must be limited to considering as to whether the respondent No. 2 was eligible to be appointed as the CAG. Of course, as the high constitutional post of a CAG is an integrity institution, an incumbent must have the qualities of competence and integrity. There is no prescribed criteria as to what qualifications a person must possess before he is considered for the post of the CAG. In fact, there can be none as amply demonstrated by the constitutional debates referred to by us earlier in this judgment. Of course, the person being considered for the position of the CAG must have a comprehensive knowledge of the entire administration. There is nothing on record to suggest that the respondent No.2 does not have

a comprehensive knowledge of the entire administration. As pointed out by the respondents, the respondent No. 2 has had about four decades of administrative experience in different departments of the Government. He has had an unblemished record and, therefore, the integrity aspect cannot also be doubted. The only reference in the CAG report with regard to the purchase of helicopters for VVIPs was to be found in two places which we have outlined above and, none of them, in our view, could be regarded as an indictment or implying ineligibility of respondent No. 2. Thus, neither on integrity nor on competence, is there any material to substantiate the plea of the petitioners that the respondent No. 2 was not eligible for appointment as the CAG. The manner in which the President functions in appointing the CAG is also clear-cut inasmuch as he acts on the aid and advice of the Council of Ministers. As pointed out above, the practice adopted for the appointment of the CAG is that a shortlist emanates from the Cabinet Secretary. It is approved by the Finance Minister and placed before the Prime Minister who, then, recommends one name from that list to the President. If the President approves the same, the appointment of the CAG is made by warrant under the hand and seal of the President. The present case is not one where, as in ***CVC case*** *(supra)*, relevant material had not been considered. In the ***CVC case*** *(supra)*, it may be remembered, the DoPT

notings with regard to initiation of disciplinary proceedings and the pendency of a criminal case against the person being considered for appointment, were ignored and not considered. These constituted relevant materials and whenever relevant materials are not considered, the action can be said to be arbitrary. But, this is not the case in the appointment of the respondent No. 2 as the CAG. There is no disciplinary proceeding pending against him. There is no criminal case pending against him. There is only a supposition on the part of the petitioners that as he had dealt with defence procurements in his various capacities in the past, there might be a conflict of interest when he prepares audit reports in respect of the defence procurements. This is merely a surmise, conjecture and presumption on the part of the petitioners insofar as the audit report in respect of purchase of helicopters is concerned. That, as we have pointed out above, has already been tabled in Parliament. With regard to conflict of interest, it may be pertinent to note that any civil servant would have served in various departments and Ministries of the Government and any of those Ministries could be the subject matter of an audit report of the CAG. Merely because a person has served in those departments would not constitute a ground for raising the plea of conflict of interest.

VI. Conlcusion

47. For the foregoing reasons, we are of the view that a writ of quo warranto does not lie for quashing the appointment of the respondent No. 2 to the post of CAG. The appointment did not, in our view, violate the principles of institutional integrity nor was the appointment arbitrary. As such, the writ petitions are dismissed. There shall be no order as to costs.

BADAR DURREZ AHMED, J

VIBHU BAKHRU, J

August 13, 2014
SR