IN THE SUPREME COURT OF INDIA
(CIVIL ORIGINAL JURISDICTION)

WRIT PETITION (CIVIL) NO. ..... OF 2017
PUBLIC INTEREST LITIGATION

IN THE MATTER OF:

COMMON CAUSE
(A REGISTERED SOCIETY)
THROUGH ITS PRESIDENT
MR. KAMAL KANT JASWAL
5, INSTITUTIONAL AREA
NELSON MANDELA ROAD
VASANT KUNJ, NEW DELHI-110070
EMAIL: COMMONCAUSEINDIA@GMAIL.COM
PH: 9818399055 ...THE PETITIONER

VERSUS

1. UNION OF INDIA
THROUGH ITS CABINET SECRETARY
GOVERNMENT OF INDIA
CABINET SECRETARIAT
NEW DELHI-110001 ... RESPONDENT NO. 1

2. MR. RAKESH ASTHANA
SPECIAL DIRECTOR
CENTRAL BUREAU OF INVESTIGATION
PLOT 5B, 6TH FLOOR, CGO COMPLEX
LODHI ROAD, NEW DELHI-110003 ... RESPONDENT NO. 2

3. MR. ALOK VERMA
DIRECTOR,
CENTRAL BUREAU OF INVESTIGATION
PLOT NO. 5-B, 6TH FLOOR,
CGO COMPLEX, LODHI ROAD,
NEW DELHI, DELHI 110003 ... RESPONDENT NO. 3

4. CENTRAL VIGILANCE COMMISSION
CENTRAL VIGILANCE COMMISSION
SATARKATA BHAVAN, A-BLOCK
GPO COMPLEX, INA

NEW DELHI - 110 023 … RESPONDENT NO. 4

A WRIT PETITION IN PUBLIC INTEREST UNDER ARTICLE 32 OF THE CONSTITUTION OF INDIA FOR QUASHING THE APPOINTMENT OF RESPONDENT NO. 2 TO THE POST OF SPECIAL DIRECTOR, CENTRAL BUREAU OF INVESTIGATION (CBI) AND FOR HIS TRANSFER OUT OF THE CBI AND FOR THE ENFORCEMENT OF THE RIGHTS OF THE CITIZENS UNDER ARTICLES 14 AND 21 OF THE CONSTITUTION OF INDIA

To,

THE HON'BLE CHIEF JUSTICE OF INDIA AND HIS COMPANION JUDGES OF THE HON'BLE SUPREME COURT OF INDIA

The Humble Petition of the
Petitioners above-named

MOST RESPECTFULLY SHOWETH: -

1) That the petitioner is filing the instant writ petition in public interest seeking an appropriate writ challenging the appointment of Respondent No. 2 to the post of Special Director, Central Bureau of Investigation (CBI) as being illegal, arbitrary, *mala fide* and in violation of the principle of impeccable integrity and institutional integrity as laid down by this Hon'ble Court. These attributes have been held to be *sine qua non* for appointment to such a key position in an integrity institution such as the CBI. Strict adherence to the letter and spirit of the statutory law in such appointments is necessary for upholding the rule of law and for enforcement of the rights of the citizens under Articles 14 and 21 of the Constitution of India.

1A) The Petitioner, Common Cause, is a registered society (No. S/11017) that was founded in 1980 by late Shri H. D. Shourie for the express purpose of ventilating the common problems of the people and securing their resolution. It has brought before this Hon'ble Court various Constitutional and other important issues and has established its reputation as a *bona fide* public interest organization fighting for an accountable, transparent and corruption-free system. Mr. Kamal Kant Jaswal, President of Common Cause, is authorized to file this PIL. The requisite Certificate & Authority Letter are filed along with the vakalatnama. The average annual income of the Petitioner Society for the last three financial years is approximately Rs. 1.03 crore. (PAN number: AAXPM0305P). The Society does not have a UID number.

The petitioner has not made any representations to the respondent in this regard because of the extreme urgency of the matter in issue.

The petitioner has no personal interest, or any private or oblique motive, in filing the instant petition. There is no civil, criminal, revenue or any other litigation involving the petitioner, which has or could have a legal nexus with the issues involved in this PIL.

THE CASE IN BRIEF

2) The Central Bureau of Investigation (CBI) established under the Delhi Special Police Establishment Act (DSPE), 1946 is the premier investigation agency in the country. It investigates corruption related

offences connected with the Central Government, and under certain circumstances, also cases connected with State Government entities. This Hon'ble Court has time and again entrusted important cases of corruption and violation of human rights to the CBI for investigation. The CBI has, sometimes under the monitoring of this Hon'ble Court, investigated important cases involving powerful and influential individuals.

4) This Hon'ble Court in its landmark judgment in *Vineet Narain* (1998 1 SCC 226) had directed that the Director CBI would have full freedom for allocation of work in the organization, including the constitution of investigation teams. This Hon'ble Court had directed that the selection of posts up to the post of Joint Director shall be decided by a Board comprising CVC, Home Secretary, Secretary (Personnel) based on the inputs from the Director, CBI. Only cases of appointment, etc. of officers of the level of Joint Director and above are to be referred by the Board to the Appointments Committee of the Cabinet (ACC) for its approval. This was done with a view to circumscribing the unfettered discretion hitherto enjoyed by the government in matters of appointment to the CBI and ensuring the independence of the agency.

The Vineet Narain Judgment directed as under.

"Selection/ extension of tenure of officers up to the level of Joint Director (JD) shall be decided by a Board comprising the central Vigilance Commissioner, Home Secretary and Secretary (Personnel) with the Director, CBI providing the necessary inputs. The extension of tenure or premature repatriation of officers up to the level of Joint Director shall be

with final approval of the Board. Only cases pertaining to the appointment or extension of tenure of officers of the rank of Joint Director or above shall be referred to the Appointments Committee of the Cabinet (ACC) for decision."

5) In order to give statutory effect to the directions given in *Vineet Narain*, the Delhi Special Police Establishment (DSPE) Act, 1946 was amended in 2003 *vide* the Central Vigilance Commission (CVC) Act, 2003 to provide that the Director CBI and officers above the post of SP shall be appointed by the Central Government on the recommendations of the Central Vigilance Commissioner, the Vigilance Commissioners and two Secretaries to the Government of India. The following are the relevant Sections added to the DSPE Act in 2003.

> *4A. Committee for appointment of Director—*
>
> *(1) The Central Government shall appoint the Director on the recommendation of the Committee consisting of:—*
>
> *(a) the Central Vigilance Commissioner - Chairperson;*
> *(b) Vigilance Commissioners - Members;*
> *(c) Secretary to the Government of India in-charge of the Ministry of Home Affairs in the Central Government Member;*
> *(d) the Secretary to the Government of India in-charge of the Ministry or Department of the Central Government having administrative control of the Delhi Special Police Establishment] Member.*
>
> *(2) While making any recommendation under sub-section (1), the Committee shall take into consideration the views of the outgoing Director.*
>
> *(3) The Committee shall recommend a panel of officers—*
> *(a) on the basis of seniority, integrity and experience in the investigation of anti-corruption cases; and*
> *(b) chosen from amongst officers belonging to the Indian Police Service constituted under the All-India Services Act, 1951 (61 of 1951), for being considered for appointment as the Director.*
>
> *4B. Terms and conditions of service of Director—*

(1) The Director shall, notwithstanding anything to the contrary contained in the rules relating to his conditions of service, continue to hold office for a period of not less than two years from the date on which he assumes office.

(2) The Director shall not be transferred except with the previous consent of the Committee referred to in sub-section (1) of section 4A.

4C. Appointment for posts of Superintendent of Police and above, extension and curtailment of their tenure, etc.—

(1) The Committee referred to in section 4A shall, after consulting the Director, recommend officers for appointment to the posts of the level of Superintendent of Police and above and also recommend the extension or curtailment of the tenure of such officers in the Delhi Special Police Establishment.

(2) On receipt of the recommendation under sub-section (1), the Central Government shall pass such orders as it thinks fit to give effect to the said recommendation.

6) As the above mechanism was not found sufficient to insulate the CBI from undue government influence, the DSPE Act, 1946 was amended *vide* the Lokpal and Lokayuktas Act, 2013 (the Lokpal Act) to provide for a mechanism for the appointment of CBI Director as well as for the appointment of officers to the post above the Superintendent of Police. The CBI Director is now appointed on the recommendation of a committee comprising the Chief Justice of India, the Prime Minister and the Leader of Opposition, thus further insulating his appointment from the government of the day.

7) Section 4C was inserted in the DSPE Act to provide that appointments to the posts of Superintendent of Police and above shall be made by a committee comprising the CVC, VCs and Home Secretary and Secretary (Personnel), in consultation with the Director, CBI and thereafter the central government shall give effect to the said

recommendation. Section 4C of DSPE Act, 1946, as it currently stands, reads as follows:

> *4C. Appointment for posts of Superintendent of Police and above, extension and curtailment of their tenure, etc.—*
>
> *[(1) The Central Government shall appoint officers to the posts of the levels of Superintendent of Police and above except Director, and also recommend the extension or curtailment of the tenure of such officers in the Delhi Special Police Establishment, on the recommendation of a Committee consisting of –*
>
> *a) The Central Vigilance Commissioner – Chairperson;*
>
> *b) Vigilance Commissioners – Members;*
>
> *c) Secretary to the Government of India in charge of the Ministry of Home – Member, and*
>
> *d) Secretary to the Government of India in charge of the Department of Personnel – Member.*
>
> *Provided that the Committee shall consult the Director before submitting its recommendation to the Central Government.]*
>
> *(2) On receipt of the recommendation under sub-section (1), the Central Government shall pass such orders as it thinks fit to give effect to the said recommendation.]*

8) Thus, the appointment of the posts above the post of SP, including the post of Special Director, CBI, which is next only to the Director, CBI, has to be made on the recommendation of the CVC, VCs, Home Secretary, Secretary DoPT, in consultation with the CBI Director. Thereafter, the Central Government has to give effect to the said recommendation of the above committee and appoint such officers.

9) As per various news reports, a meeting of the selection committee was called on 21.10.2017 (Saturday). The said meeting was chaired by

Mr. KV Chowdary, CVC, and attended by the two Vigilance Commissioners, the Secretaries of Home Ministry and DoPT, and the Director, CBI. The meeting had only two agenda items: the promotion of Respondent No. 2 and the posting of five Joint Directors in the CBI. The second agenda item was not taken up for consideration on that day. The CBI Director objected in writing to the promotion of Respondent No. 2 and gave information in a sealed cover on the status of the ongoing investigation that involved and named Respondent No. 2.

10) *India Today,* a leading English media house, reported on 22.10.2017 that the proposal of appointment of Respondent No. 2 had been rejected by the committee headed by the CVC in its meeting held on 21.10.2017 since his name had appeared in “Diary 2011”, which was the subject matter of the investigation of the CBI. A copy of the said news report dated 22.10.2017 taken from *India Today* website is annexed as **Annexure P1** (Page ____ to _____).

11) However, on the very next day of the committee meeting, i.e. 22.10.2017 (Sunday), the Appointments Committee of the Cabinet (ACC), comprising the Prime Minister and the Home Minister issued an order appointing Respondent No. 2 to the post of Special Director CBI. This order was issued late at night on a Sunday. Significantly, the said order states that the reference from DoPT recommending the name of Respondent No. 2 was received on the same day, i.e. 22.10.2017. A copy of the Order dated 22.10.2017 issued by the ACC is annexed herewith as **Annexure P2** (page_____ to _____).

12) On 23.10.2017, J. Gopikrishnan, the renowned investigative journalist, reported in *The Pioneer* that as per the minutes of the meeting dated 21.10.2017, the reason for opposition to the proposal to appoint Respondent No. 2 was an issue pertaining to the "integrity clause". This was because the name of Respondent No. 2 figured in "Diary 2011" on which an FIR has been filed by the CBI on 30.08.2017. As per the said news report, some members of the committee had expressed displeasure over the hasty manner in which Saturday's meeting was convened and the fact that the agenda of the meeting was not available until Friday evening. A copy of the news report dated 23.10.2017 published in *The Pioneer* is annexed herewith as **Annexure P3** (page_____to_____).

13) On the same day, *The Hindu* reported that Respondent No. 2 had been promoted as special director by the ACC headed by the Prime Minister despite the fact that there was disagreement over his promotion in the selection committee. The Hindu reported that an officer who was present at the meeting had said, *"…the meeting did take place on Saturday but no decision was taken. Members of the committee were divided on Mr. Asthana's promotion and we decided to meet again on Monday."* A copy of the news report dated 23.10.2017 published in the *Hindu* is annexed herewith as **Annexure P4** (page_____to_____).

14) J. Gopikrishnan of the Pioneer reported on 24.10.2017 that the CBI Director had moved a two-page note putting forth his objections regarding the appointment of Respondent No. 2 on record. The note referred to the fact that the name of Respondent No. 2 figured in an

ongoing corruption investigation being carried out by the CBI. The Director, CBI had also provided in a sealed cover the status of the ongoing investigation involving Respondent No.2.

The report stated*:*

> *"The Pioneer has learnt that CBI Director Alok Verma objected to the move to promote Asthana in the Saturday's CVC Selection Committee meeting. In a two-page note, Verma referred to the fact that Asthana's name has figured in an ongoing corruption probe by the agency.*
>
> *The CVC Selection Committee meeting was chaired by CVC KV Chowdary and attended by two Vigilance Commissioners as well as Secretaries of Home and DoPT, besides the CBI Director. The meeting had only two agendas. Apart from Asthana's promotion, the other item was the posting of five Joint Directors in the CBI. After the CBI Director put on record his objection and provided a sealed cover on the status of the ongoing probe involving Asthana, the panel did not take up the second agenda for consideration.*
>
> *According to highly placed sources, some members of the meeting too objected to the fact that the meeting was called on a few hours notice on such sensitive appointments.*
>
> *Though the CVC officials had told the media that the meeting would resume on Monday, it was shelved as the CBI Director is reported to have expressed his displeasure that the names of these five Joint Directors did not originate from the organisation."*

A copy of the said news report dated 24.10.2017 published in *The Pioneer* is annexed herewith as **Annexure P5** (page_____to_____).

15) In the wake of the aforesaid news reports, Mr. K.V. Chowdary, CVC, addressed a press conference on 26.10.2017 and said that the decision

to appoint Respondent No. 2 to the post of Special Director was taken unanimously by the selection committee. He further said that CBI Director is not a member of the selection committee and only had to be consulted. A copy of the news report published in *The Hindu* dated 27.10.2017 reporting the statements made by the CVC is annexed herewith as **Annexure P6** (page_____to_____). Another news report published in *The Hindustan Times* dated 27.10.2017 is annexed herewith as **Annexure P7** (page_____to_____).

16) While there is no clarity over what actually transpired in the selection committee and whether its recommendation in terms of Section 4C was in fact obtained on 21.10.2017, it is clear that the Government and the selection committee overruled the opinion of the Director, CBI in violation of the law on the purport statutory consultation as laid down in various judgments referred to hereunder.

17) Such was the haste in appointing Respondent No.2 to the post of Special Director, CBI, that a late night order was issued on Sunday by the ACC headed by the Prime Minister, even as the Prime Minister was reportedly in Gujarat during that day.

18) As per Section 4C of the DSPE Act, 1946, the Director CBI has to be mandatorily “consulted” by the selection committee before the recommendation for any appointment above the level of SP is made. This Hon’ble Court has held in a catena of decisions that the term “consultation” means ‘meaningful consultation’ and that it loses to be

meaningful if the opinion of the consultee is rejected out of hand (***State of Assam v Ranga Mohd***. - 5 judge bench (1967 1 SCR 454)).

19) It is submitted that the views of CBI, Director, who must be consulted as per Section 4C, DSPE Act, cannot be ignored and overruled without the committee giving cogent reasons. If no specific explanation is provided for non-consideration of the material put forth before the committee, it cannot be said the appointment has been made after consultation.

20) In ***N. Kannadasan v. Ajoy Khose*** *[(2009) 7 SCC 1),* it was held that where the consultee places for consideration certain material against a person whose name is proposed for appointment, the competent authority must give some explanation for the non-consideration of such material, failing which the appointment made cannot be said to have been made after due consultation.

The Court held as under: (SCC p. 21, para 13f-g)

> *"13. … But, where a decision itself is thickly clouded by non-consideration of the most relevant and vital aspect, the ultimate appointment is vitiated not because the appointee is not desirable or otherwise, but because mandatory statutory requirement of consultation has not been rendered effectively and meaningfully."*

21) In ***State of Gujarat and Anr. Vs. Hon'ble Mr. Justice R.A. Mehta (Retd.) and Ors****.* (2013 3 SCC 1) this Hon'ble Court in Para 9 held as under:

> ***"Consultation — Meaning***
>
> ***25.*** *In State of Gujarat v. Gujarat Revenue Tribunal Bar Assn. [(2012) 10 SCC 353 (SCC p. 372 para 34)], this Court held*

that the object of consultation is to render its process meaningful so that it may serve its intended purpose. Consultation requires the meeting of minds between the parties that are involved in the consultative process on the basis of material facts and points in order to arrive at a correct or at least a satisfactory solution. If a certain power can be exercised only after consultation such consultation must be conscious, effective, meaningful and purposeful. To ensure this, each party must disclose to the other all relevant facts for due deliberation. The consultee must express his opinion only after complete consideration of the matter on the basis of all the relevant facts and quintessence. Consultation may have different meanings in different situations depending upon the nature and purpose of the statute.

32. *Thus, in view of the above, the meaning of "consultation" varies from case to case, depending upon its fact situation and the context of the statute as well as the object it seeks to achieve. Thus, no straitjacket formula can be laid down in this regard. Ordinarily, consultation means a free and fair discussion on a particular subject, revealing all material that the parties possess in relation to each other and then arriving at a decision. However, in a situation where one of the consultees has primacy of opinion under the statute, either specifically contained in a statutory provision, or by way of implication, consultation may mean concurrence. The court must examine the fact situation in a given case to determine whether the process of consultation as required under the particular situation did in fact stand complete.*

22) This Hon'ble Court in ***Chandramouleshwar Prasad v. Patna High Court*** *[(1969) 3 SCC 56: AIR 1970 SC 370] (SCC p. 63, para 7),* held that consultation or deliberation can neither be complete nor effective before the parties thereto make their respective points of view

known to the other or others and discuss and examine the relative merits of their views. If one party makes a proposal to the other, who has a counter-proposal in mind which is not communicated to the proposer, a direction issued to give effect to the counter-proposal without any further discussion with respect to such counter-proposal with the proposer cannot be said to have been issued after consultation.

23) This Hon'ble Court in ***Supreme Court Advocates-on-Record-Association and Ors. Vs. Union of India*** ((2016) 5 SCC 1**)** in Para 693 held as under: *"The greater significance of Sankalchand Sheth lies in the conclusion, relying upon R. Pushpam, that for a meaningful consultation, both parties must have for consideration full and identical facts. It was said: "The word 'consult' implies a conference of two or more persons or an impact of two or more minds in respect of a topic in order to enable them to evolve a correct, or at least, a satisfactory solution". In order that the two minds may be able to confer and produce a mutual impact, it is essential that each must have for its consideration full and identical facts, which can at once constitute both the source and foundation of the final decision."*

24) The decision of the Committee to appoint the Respondent No. 2 as Special Director and rejecting the opinion of the CBI, Director apparently without any effective reasoning is therefore, invalid. The Committee ought not to reject the opinion of the CBI Director on such a crucial question of integrity at such a high post without giving convincing and strong counter-reasoning for doing do. This is specially so because the Additional Director (as Respondent No. 2 was before his promotion)

works under the CBI Director and the latter is in the best position to judge the merits and suitability of the proposed appointee. The opinion of the CBI Director, therefore, ought to have been given the highest regard and should not have been overruled without sufficient reason.

Respondent No.2

25) Respondent No. 2 Mr. Rakesh Asthana, IPS (GJ 1984 cadre) was posted as Additional Director in the CBI in April 2016. In December 2016 he was briefly appointed as the Acting/Interim Director, CBI and in June 2017 he was empanelled as DG level officer in the CBI by the government. Significantly, he has earlier held several important positions in Gujarat Police, e.g. Commissioner of Police, Surat City; Commissioner of Police, Vadodara City; Joint Commissioner of Police, Ahmedabad City; and IGP, Vadodara Range. He was part of the SIT set up by the Gujarat Government to probe the Godhra train burning case. As per news reports, he is also associated with several high-profile and politically sensitive cases registered by the CBI, including the recent case against the RJD chief, Mr. Lalu Prasad, over alleged irregularities in awarding certain tenders as the Union Railway Minister. At the time of the raid on Sterling Biotech and Sandesara Group of Companies in Vadodara in June 2011, Respondent No. 2 was posted as Police Commissioner of Surat, Gujarat.

Non-filing of property returns

26) Rule 18 of the Central Civil Services (Conduct) Rules, 1964 provides that every officer has to mandatorily submit an annual return giving full details regarding:

> *(4) The Government or the prescribed authority may, at any time, by general or special order, require a Government servant to furnish, within a period specified in the order, a full and complete statement of such movable or immovable property held or acquired by him or on his behalf or by any member of his family as may be specified in the order. Such statement shall, if so required by the Government or by the prescribed authority, include the details of the means by which, or the source from which, such property was acquired.*

27) The DoPT *vide* its O.M. No. 11012/11/2007-Estt.A dated 14.12.2007 issued certain guidelines regarding grant of vigilance clearance to members of the Central Civil Services /Central Civil Posts. These guidelines are applicable with respect to any empanelment, deputation, and appointment to sensitive posts. The O.M. states that "*the vigilance status must be placed before and considered by the Competent Authority before a decision is taken."* A copy of DoPT O.M. dated 14.12.2007 is annexed herewith as **Annexure P8** (page_____to_____).

28) The DoPT issued another O.M. dated 27.09.2011 by which a new paragraph "(f)" was inserted in the 2007 O.M stating that all officers have to file their Immovable Property Return (IPR) each year and all those officers who do not file their (IPR) by the prescribed time would be

denied vigilance clearance and would not be considered for empanelment for senior level posts in the government of India. Para (f) states the following:

> *(f) Vigilance clearance shall be denied to an officer if he fails to submit his annual immovable property return of the previous year by 31st January of the following year, as required under Government of India decisions under Rule 18 of the Central Civil Services (Conduct) Rule 1964.*

A copy of the notification dated 27.09.2011 is annexed herewith as **Annexure P9** (page_____to_____).

29) In 2014-15, various officers were denied empanelment for reasons of not filing of their IPRs. DoPT issued another O.M dated 27.01.2015 stating: "*A large number of CSS officers have not yet furnished the Immovable Property Return for the year ended 31.12.2014. They are once again advised to file the same latest by 31.01.2015. It is also brought to the notice of the officers that if IPR is not filed by the stipulated date, vigilance clearance will be denied for deputation, non-mandatory training and empanelment in terms of this Department's O.M. No. 11012/11/2007-Estt A dated 14.01.2007 read with O.M. of even number dated 27.09.2011*". Thus, filing of IPR is compulsory for empanelment in the Central Bureau of Investigation (CBI). A copy of the DoPT O.M. dated 27.01.2015 is annexed herewith as **Annexure P10** (page_____to_____).

30) As per the information available on the website of DoPT *(http://mha1.nic.in/ipr/notipr_report.aspx)*, Respondent No. 2 has not filed his IPR information for the year 2016. Even then he was

empanelled as DG level officer in June 2017 and has now been promoted to the post of Special Director, CBI. His name appears under the head: *"List of those officers who are yet to Submit their IPR for the year 2012 onwards"* on the MHA website. A copy of the screenshot dated NIL from government's website *http://mha1.nic.in/ipr/notipr_report.aspx* is annexed herewith as **Annexure P11** (page_____to_____).

31) On 14.06.2017, even though Respondent No. 2 had not filed his IPR for 2016, the ACC approved his empanelment to hold the post of Director General (DG) on 14.06.2017. A copy of the ACC Order dated 14.06.2017 empanelling Respondent No. 2 is annexed herewith as **Annexure P12** (page_____ to _____).

32) Thus, the empanelment of Respondent No. 2 on 14.06.2017 and his promotion as Special Director, CBI violate the government's own orders. Respondent No. 2 should not have been empaneled until he had furnished his IPR statement as per DoPT O.M dated 27.09.2011 r/w O.M dated 14.02.2007 (as revised by O.M. dated 27.09.2011) and O.M. dated 27.01.2015.

33) The government and the committee formed under Section 4C of the DSPE Act, 1946, overlooked the non-filing of IPR by Respondent No. 2. The empanelment and subsequent promotion of Respondent No. 2 have been effected in the absence of proper vigilance clearance, while hundreds of other officers have been denied empanelment for the same reason as per government rules. The ACC's order dated 14.06.2017 as

well as its latest order dated 22.10.2017 both ought to be set aside due to this deficiency.

Diary 2011 and the FIRs registered by the CBI

34) On 28.06.2011, the Income Tax Department had conducted a search and seizure under Section 132 of the Income Tax Act covering 25 premises of Gujarat-based Sterling Biotech and Sandesara Group of Companies at Mumbai, Vadodara and Ooty. During the raid, certain incriminating documentary evidences were found and seized from the premises of the group at Mumbai and Vadodara. A Diary of 2011 was also recovered and seized by the Income Tax Department from the premises of the Sandesara Group at Vadodara containing a hand-written record of certain transactions of the group for the period of 01.01.2011 to 28.06.2011. The said Diary contained the details of daily financial dealings and cash transactions carried out by the group in favour of certain named individuals and public servants, including several senior officers of the Income Tax department. The name of Respondent No. 2 appears at several places in the said “Diary 2011”. An entry also indicates an alleged payment of about 3.88 Crore. A copy of a few pages from “Diary 2011” dated NIL received from a reliable whistleblower by the counsel of the petitioner along with its typed copy is annexed herewith as **Annexure P13** (page_____to_____).

35) In September 2016, the Income Tax Department prepared an Appraisal Report on the raid conducted on Sterling Biotech and Sandesara Group of Companies. A copy of the summary of the said

Appraisal Report dated 29.09.2016 is annexed herewith as **Annexure P14** (page_____to_____).

36) On 30.08.2017, the CBI's Delhi unit registered an FIR under the Prevention of Corruption Act, 1988 against three senior Income-Tax officials for allegedly accepting bribes from the Gujarat-based Sterling Biotech and Sandesara Group of Companies. At that time Respondent No.2 was working as Police Commissioner of Surat. As per the FIR, a "Diary 2011" was found from the company premises during a raid, which detailed the monthly payouts to the accused income tax officials and several police officials and politicians in Gujarat. The FIR states that, *"The Documents seized revealed that the Sandesara group has been acting as a depository for receiving funds on behalf of persons including public servants and for further delivery to them at the place of convenience. The evidence collected by the Income Tax Department showed corruption of various public servants including three senior IRS officers".* Apart from naming officers of Income Tax Department and other individuals, the said FIR also mentions the name of one Mr. Irfan Bhai allegedly gave a bribe of Rs. 100,00,000 in cash. It has been reported that this Irfan Siddiqui also known as Irfan Bhai is married to Smt. Mumtaz Patel, daughter of Mr. Ahmed Patel. A copy of the FIR dated 30.08.2017 is annexed herewith as **Annexure P15** (page_____to_____).

37) That on 25.10.2017, the CBI has registered an FIR against the Sandesara Group company Sterling Biotech Limited, its directors, Chartered Accountant and the then director of Andhra Bank for allegedly

cheating public sector banks of Rupees 5,383 crore. The case has been registered under provisions of cheating, forgery of valuable security, forgery for the purpose of cheating, using forged documents as genuine, criminal conspiracy and criminal misconduct. Among those named are Sterling Biotech Limited, located in Gujarat's Vadodara, its directors Chetan Jayantilal Sandesara, Dipti Chetan Sandesara, Rajbhushan Omprakash Dixit, Nitin Jayantilal Sandesara and Vilas Dattatray Joshi, besides chartered accountant Hemant Hathi, the then Andhra Bank Director Anup Garg and unknown private and public servants. The FIR alleges that the Sterling Biotech group companies availed of more than Rupees 5,000 crore in loans from Andhra Bank and other public sector banks, which turned non-performing assets. The CBI has alleged that the group was laundering money through a circuitous route and even indulged in insider trading. As part of the conspiracy, CBI has alleged, the Sandesaras were regularly supplying money to Andhra Bank director Anup Garg in Delhi through angarias (cash couriers). A copy of the FIR dated 25.10.2017 is annexed herewith as **Annexure P16** (page_____to_____).

38) The opposition of the CBI Director to the proposal to promote Respondent No.2 to the post of Special Director, CBI on the issue of "integrity clause" pertained to the aforesaid FIR dated 30.08.2017 registered by the CBI. As per the initial news reports, the selection Committee had observed that when the CBI was investigating a case a person whose name was mentioned in the Diary should not be in the

CBI. The CBI Director had also reportedly handed over to the committee a sealed envelope containing a 2-page note on the involvement of Respondent No.2 in the said case and the status of the relevant investigation.

39) As per the news report dated 23.10.2017 published in *The Pioneer* (annexed above), *"The FIR said a "Diary 2011" was found from company which details the monthly pay-out details to these accused Income Tax Commissioners and several police and politicians in Gujarat and Delhi. Sources indicated that the diary noting contained Asthana's name, who was then serving in Gujarat cadre. The Selection Committee observed that when the agency is probing the case, the persons mentioned in the dairy should not be in the CBI. The decision was unanimous as per the file notings of the meeting. A sealed cover was placed before the Selection Committee Meeting regarding the details of the probe findings on the bribes accepted by many officers from Sterling Biotech and Sandesara Group, said sources."*

40) The appointment of Respondent No. 2 is in violation of the principles of "impeccable integrity" and "institutional integrity". This Hon'ble Court in the judgment concerning appointment to an integrity institution like the CVC had enunciated these principles. This Hon'ble Court in ***Centre for Public Interest Litigation & Anr. Vs Union of India & Anr*** (2011) 4 SCC 1 held:

> "*If a duty is cast under the proviso to Section 4(1) on the HPC to recommend to the President the name of the selected candidate, the integrity of that decision making process is got to ensure that*

the powers are exercised for the purposes and in the manner envisaged by the said Act, otherwise such recommendation will have no existence in the eye of law.

The HPC must also take into consideration the question of institutional competency into account. If the selection adversely affects institutional competency and functioning then it shall be the duty of the HPC not to recommend such a candidate. Thus, the institutional integrity is the primary consideration which the HPC is required to consider while making recommendation under Section 4 for appointment of Central Vigilance Commissioner. In the present case, this vital aspect has not been taken into account by the HPC while recommending the name of Shri P.J. Thomas for appointment as Central Vigilance Commissioner.

We do not wish to discount personal integrity of the candidate. What we are emphasizing is that institutional integrity of an institution like CVC has got to be kept in mind while recommending the name of the candidate. Whether the incumbent would or would not be able to function? Whether the working of the Institution would suffer? If so, would it not be the duty of the HPC not to recommend the person."

41) Given that the CBI is investigating the role of Respondent No.2 in the said "Diary 2011", his appointment to such a high post as the Special Director of CBI itself is bound to create situations where officers junior to Respondent No. 2 would not be able to conduct a free, fair and fearless

probe into his role. Thus, his appointment as the Special Director of CBI would violate the principle of institutional integrity.

Previous attempt by the government to appoint Respondent No. 2 as acting/interim CBI Director and Writ Petition No. 984 of 2016

42) In December 2016, the government, in order to clear the way for giving the interim charge of CBI Director to Respondent No. 2, had transferred his senior Mr. R.K. Dutta out of the CBI and appointed him as the acting/interim CBI Director.

43) The Central Government had omitted to convene a meeting of the selection committee comprising the Prime Minister, the Leader of the largest Opposition party and the Chief Justice of India, even though it was fully aware that the incumbent CBI Director Mr. Anil Sinha was going to demit his office on 02.12.2016. This deliberate dereliction was in complete violation of Section 4A of the DSPE Act, 1946.

44) In order to accommodate Respondent No. 2, the Government at that time had prematurely curtailed the tenure of Mr. R K Dutta, Special Director, CBI, and transferred him to the Ministry of Home Affairs. Mr. R.K. Datta was senior to Respondent No 2 in the CBI and Respondent No. 2 could not have been promoted to the post of Acting/Interim Director, CBI as long as Mr. R.K. Dutta was serving in the CBI. Mr. Dutta was second in command to the CBI Director and would have been a natural choice in case an interim or acting CBI Director was to be appointed. Therefore, on 30.11.2016, i.e. just two days before the incumbent CBI Director was slated to demit office, a post of Special

Secretary was specially created in the Ministry to accommodate Mr. Dutta by upgrading the post of a Joint Secretary, which is two levels below the Special Secretary. A copy of the appointment order of Mr. Dutta dated 30.11.2016 is annexed as **Annexure P17** (page _____to _____).

45) After Mr. Dutta was moved out, the Government gave Respondent No. 2 an additional charge as the Interim/Acting Director of the CBI. Hence, for the first time in a decade, the CBI did not have a full time Director appointed as per the prescribed statutory procedure. A copy of the press release dated 02.12.2016 regarding the appointment of Respondent No. 2 as the Interim/Acting CBI Director is annexed as **Annexure P18** (page_____to_____).

46) It is clear from the foregoing that even on an earlier occasion the Government wanted to appoint Respondent No. 2 as Interim CBI Director, even if it meant bypassing the statutory law, the norms of propriety, and the directions contained in this Hon'ble Court's judgment in *Vineet Narain*.

47) The petitioner herein filed a writ petition in this Hon'ble Court viz. Writ Petition (Civil) No. 984 of 2016 challenging the appointment of Respondent No. 2 as the Acting/Interim Director, CBI and for direction to the government to appoint a full-term director of CBI consonant with the procedure established in the DSPE Act, 1946 and the judgment in *Vineet Narain* case. A copy of the Writ Petition No. 984 of 2016 filed

before this Hon'ble Court is annexed herewith as **Annexure P19** (page_____to_____).

48) On the said petition, the Government stated in court that they would be appointing a full time director of the CBI. This Hon'ble Court *vide* orders dated 16.12.2016 recorded the submission of the Attorney General of India that "*the process of appointment of regular Director to the CBI has been commenced and hopefully, the first meeting of the Committee will take place in the last week of December, 2016*". A copy of the order dated 16.12.2016 passed by this Hon'ble Court in Writ Petition 984 of 2016 is annexed herewith as **Annexure P20** (page_____to_____).

49) The petition was taken up on 20.01.2017 wherein this Hon'ble Court observed that since a regular director of CBI had been appointed on 19.01.2017, therefore nothing survived in the writ petition and the same was accordingly closed. A copy of the order 20.01.2017 passed by this Hon'ble Court in Writ Petition 984 of 2016 is annexed herewith as **Annexure P21** (page_____to_____).

50) In a somewhat similar case, the Government had appointed Smt. Archana Ramasundaram as Additional Director, CBI, in 2014, without following the statutory procedure. This Hon'ble Court had therefore stayed the said appointment *vide* order dated 09.05.2014 passed in Writ Petition (Civil) 309 of 2014. This Hon'ble Court directed:

> *"We are informed by the learned Solicitor General that the selectee- Smt. Archana Ramasundaram - has already joined as Additional*

Director, Central Bureau of Investigation (CBI) pursuant to office order dated May 7, 2014.

Having regard to the statutory provisions of the Delhi Special Police Establishment Act, 1946 with regard to appointment of officers to the posts of the level of Superintendent of Police and above except Director, and the facts emerging from the available material, we are satisfied that a strong case has been made out for grant of interim relief.

Accordingly, the respondents are restrained from henceforth allowing Smt. Archana Ramasundaram to discharge the functions of Additional Director, CBI until next date."

A copy of the order dated 09.05.2014 passed by this Hon'ble Court in WPC 309 of 2014 is annexed herewith as **Annexure P22** (page____to_____).

51) Subsequently, the petition was disposed of as having become infructuous. A copy of the order dated 15.10.2015 passed by this Hon'ble Court in WPC 309 of 2014 is annexed herewith as **Annexure P23** (page____to_____).

52) In light of the above, the petitioner submits that the illegal, *mala fide* and arbitrary appointment of Respondent No. 2 is in violation of statutory provisions and subversive of the rule of law, and therefore deserves to be quashed and declared void. Moreover, since the role of Respondent No. 2 is being investigated by the CBI and his name figures in a diary of alleged payments, his continuation in the CBI itself is

untenable and therefore he ought to be transferred out of the CBI. The respondents should be directed to transfer Respondent No. 2 out of the CBI during the pendency of the CBI investigation into his alleged involvement in the aforesaid corruption case.

53) The petitioner has not filed any other petition, suit or application in any manner regarding the matter of dispute in this Hon'ble Court, or any High Court or any other Court throughout the territory of India. The petitioner has no other better remedy available.

Grounds

A. That the appointment of Respondent No. 2 to the post of Special Director, Central Bureau of Investigation (CBI) is arbitrary, *mala fide* and in violation of the principle of impeccable integrity and institutional integrity as laid down by this Hon'ble Court. The aforesaid attributes are *sine qua non* for an appointment to a key position in an integrity institution such as the CBI. A proper appointment as per the statutory law is necessary for upholding the rule of law and for enforcement of the rights of the citizens under Articles 14 and 21 of the Constitution of India.

B. That the Central Bureau of Investigation (CBI) established under the Delhi Special Police Establishment Act (DSPE), 1946 is the premier investigation agency in the country. It investigates the corruption related offences connected with the Central Government, and under certain circumstances, also cases connected with State Government

entities. This Hon'ble Court has on many occasions entrusted important cases of corruption and violation of human rights to the CBI for investigation. The CBI has investigated many sensitive cases involving powerful and influential individuals.

C. That the Special Director of the CBI is the second highest authority in the organization after the Director. He supervises almost all the important cases being handled by the CBI and is also responsible for constitution of investigating teams for probing corruption cases. Hence, this Hon'ble Court and later on Parliament have made determined efforts to enhance the functional autonomy of such senior level officers of the CBI and to limit/eliminate the executive discretion in the matter of appointment of such key functionaries.

D. That the CBI is investigating "Diary 2011" in which the name of Respondent No. 2 appears. The CBI has registered two FIRs dated 30.08.2017 and 25.10.2017 with regard to the said Diary against Income Tax Officers as well as other public servants who appear to have been paid huge sums of money by the Sandesara and Sterling Groups of Companies. The appointment to a high post such as that of the Special Director of CBI itself is bound to create situations where officers junior to Respondent No. 2 would not be able to conduct a free, fair and fearless probe into his role. Thus his appointment would violate the principle of institutional integrity.

E. That this Hon'ble Court had directed that the selection of posts up to the post of Joint Director shall be decided by a committee involving CVC based on the inputs from the Director, CBI in order to ensure that the unfettered discretion of the government to appoint officers in the CBI is circumscribed. This Hon'ble Court was keen to exclude the possibility of the government appointing its handpicked officers to the CBI on extraneous considerations as it would be destructive of the independence of the CBI and the rule of law. The following excerpt from Vineet Narain Judgment states:

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

F. As per Section 4C of the DSPE Act, 1946, the Director CBI has to be mandatorily "consulted" by the selection committee before the recommendation for any appointment above the level of SP is made. This Hon'ble Court has held in a catena of decisions that the term "consultation" means 'meaningful consultation' and that it loses to be meaningful if the opinion of the consultee is rejected out of hand

(***State of Assam v Range Mohr***. - 5 judge bench (1967 1 SCR 454)). Thus, the views of CBI, Director who must be consulted as per Section 4C, DSPE Act, cannot be ignored and overruled without the committee giving cogent reasons. If no specific explanation is provided for non-consideration of the material put forth before the committee, it cannot be said the appointment has been made after consultation.

G. That as per initial news reports and as is also apparent from the news conference addressed by the CVC Mr. K.V. Chowdary, there was a difference of opinion between the selection committee and the CBI, Director on the issue of integrity of the proposal of the name of Respondent No. 2. The CBI director had reportedly put his views in a two page note before the selection committee that ought to have been given the highest regard by the committee and should not have been overruled without there being cogent counter-reasoning for doing the same.

H. In ***N. Kannadasan v. Ajoy Khose*** *[(2009) 7 SCC 1),* it was held that where the consultee places for consideration certain material against a person whose name is proposed for appointment, the competent authority must give some explanation for the non-consideration of such material, failing which the appointment made cannot be said to have been made after due consultation.

I. The decision of the Committee to appoint the Respondent No. 2 as Special Director ignoring the opinion of the CBI, Director apparently without sufficient reason is therefore, invalid. The Committee ought not to have rejected the considered opinion of the CBI Director on such a crucial question of integrity at such a high post without giving convincing and strong counter-reasoning for doing do. This is specially so because the Additional Director (as Respondent No. 2 was before his promotion) works under the CBI, Director and the latter is in the best position to judge the merits and suitability of the proposed appointee. The opinion of the CBI, Director, therefore, ought to have been given the highest regard and should not have been overruled without effective reasoning.

J. That as per government's own website, Respondent No. 2 has not filed his IPR information for the year 2016, which is a mandatory requirement under DoPT O.M dated 27.09.2011 for any empanelment. The government and the committee formed under Section 4C of the DSPE Act, 1946, overlooked the non-filing of IPR by Respondent No. 2 and thereby promoted him without effective vigilance clearance, while hundreds of other officers have been denied empanelment for the same reason as per government rules. ACC's order dated 14.06.2017 as well as latest order dated 22.10.2017 both ought to be set aside.

K. That the appointment of Respondent No. 2 is in violation of the principles of “impeccable integrity” and “institutional integrity”. This Hon’ble Court in the judgment concerning appointment to an integrity institution like the CVC had enunciated these principles. This Hon’ble Court in ***Centre for Public Interest Litigation & Anr. Vs Union of India & Anr*** (2011) 4 SCC 1 held:

“*If a duty is cast under the proviso to Section 4(1) on the HPC to recommend to the President the name of the selected candidate, the integrity of that decision making process is got to ensure that the powers are exercised for the purposes and in the manner envisaged by the said Act, otherwise such recommendation will have no existence in the eye of law.*

The HPC must also take into consideration the question of institutional competency into account. If the selection adversely affects institutional competency and functioning then it shall be the duty of the HPC not to recommend such a candidate. Thus, the institutional integrity is the primary consideration which the HPC is required to consider while making recommendation under Section 4 for appointment of Central Vigilance Commissioner. In the present case, this vital aspect has not been taken into account by the HPC while recommending the name of Shri P.J. Thomas for appointment as Central Vigilance Commissioner.

We do not wish to discount personal integrity of the candidate. What we are emphasizing is that institutional integrity of an institution like CVC has got to be kept in mind while recommending the name of the

candidate. Whether the incumbent would or would not be able to function? Whether the working of the Institution would suffer? If so, would it not be the duty of the HPC not to recommend the person."

L. That on an earlier occasion in December 2016, the government had in a highly questionable manner given the interim charge of CBI Director to Respondent No. 2 herein after transferring his senior, Mr. R.K. Dutta, out of the CBI.

M. That the role of Respondent No. 2 is being investigated by the CBI and his name figures in Diary of alleged payments, and hence his continuation in the CBI itself even as Additional Director is untenable and therefore he ought to be transferred out of the CBI. The respondents are liable to be directed to transfer Respondent No. 2 out of the CBI during the pendency of the CBI investigation into his alleged involvement in corruption.

PRAYERS

In view of the facts & circumstances stated above, it is most respectfully prayed that this Hon'ble Court may in public interest be pleased to: -

a. Issue an appropriate writ or order quashing or setting aside the appointment of Respondent No. 2 as the Special Director, CBI, vide order dated 22.10.2017.

b. Issue an appropriate writ or direction to the Union of India to transfer Respondent No. 2 out of the CBI during the pendency of the CBI investigation pursuant to R.C. (FIR) No. ACIII / 2017/ 8A dated 30.08.2017 registered by the CBI concerning the payouts to various public servants by Sterling Biotech Group and Sandesara Group.

c. Issue an appropriate writ or direction to the Respondents to produce the entire record relating to the selection and appointment of Respondent No. 2 as the Special Director, CBI including *inter alia* (i) the agenda and the minutes of the selection committee meeting under Section 4C of the DSPE Act, 1946, and (ii) the note and material put up by the CBI Director regarding the proposed appointment of Respondent No. 2.

d. Issue or pass any writ, direction or order, which this Hon'ble court may deem fit and proper under the facts and circumstances of the case.

PETITIONER THROUGH:

PRASHANT BHUSHAN
COUNSEL FOR THE PETITIONER

DRAWN BY: NEHA RATHI & PRANAV SACHDEVA
DRAWN & FILED ON: OCTOBER 2017
NEW DELHI