IN THE SUPREME COURT OF INDIA
CRIMINAL ORIGINAL JURISDICTION
CRIMINAL CONTEMPT PETITION NO. 10 OF 2009
IN
I.A. NO. 1374, 1474, 2134 OF 2007
IN
WRIT PETITION (c) NO. 202 OF 1995
IN THE MATTER OF:
AMICUS CURIAE …PETITIONER
VERSUS
PRASHANT BHUSHAN & ANOTHER …RESPONDENTS

AFFIDAVIT IN REPLY ON BEHALF OF RESPONDENT NO.1

I, Prashant Bhushan s/o Shri Shanti Bhushan, r/o B-16, Sector 14, Noida, do hereby solemnly state and affirm as under:

1. That I am the first Respondent in this Contempt Petition and am fully acquainted with the facts of this case. I have read and understood the contents of the Contempt Petition filed by Shri Harish Salve in his capacity as Amicus Curiae and my reply to it is as under:

2. From the report in Tehelka, which is relied upon as the basis of the alleged contempt, reliance has been placed on the following sentences: Firstly,

"In my view, out of the last 16 to 17 Chief Justices, half have been corrupt. I can't prove this, though we had evidence against Punchhi, Anand, and Sabharwal on the basis of which we sought their impeachment".

This could have been better phrased, but, by the word corrupt, I meant, "of doubtful integrity".

The second part of the interview relied upon is my answer to the question as to whether there were other ways in which judicial corruption manifests itself. In response to which I had said: "There are so many---". Here again, when I said, "There are so many", it was only with reference to non financial behaviour, or other kinds of conflict of interest or misconduct by judges. It is in this context that my answer to the question should be understood.

3. I have been involved in the Campaign for Judicial Accountability since 1991 when the impeachment proceedings began against Justice V. Ramaswami. Since then, I have been an active member of the Committee on Judicial Accountability and subsequently the Convenor of the Campaign for Judicial Accountability and Reforms which was set up in early 2007. It has been my understanding at least since 1991, and even prior to that, that there has been considerable corruption in the higher judiciary, the main reason for which has been the lack of credible mechanisms for securing accountability of the higher judiciary. The focus of our Campaign for Judicial Accountability, therefore, has been to generate public opinion for putting in place credible legal institutions and mechanisms for investigating complaints against judges and for holding judges committing misconduct to account. I, along with my colleagues in the

Campaign, have always held the view that an independent full time National Judicial Commission should be created for a transparent method for selecting and appointing judges of the higher judiciary, as well as for investigating complaints against them. Copies of some of the resolutions passed in the National Conventions on Judicial Accountability organised by our Committee on Judicial Accountability between 1991 and 2003 to this effect, are collectively annexed hereto as Annexure-A which would attest to these publicly stated perceptions.

4. Our campaign has also repeatedly highlighted the fact that the lack of accountability in the higher judiciary is not only on account of the lack of a credible mechanism for investigating complaints against judges, but also by the virtual prevention of criminal investigation of judges by the Veeraswami judgement. This lack of accountability is further accentuated by the takeover of the power of appointing judges by the judiciary through the SCAORA judgement (Supreme Court Advocate-on-Record Association vs. UOI, (1993) 4 SCC 441). Appointments by the judiciary after this judgement have often been made arbitrarily and with complete lack of transparency. Even after the passage of the Right to Information Act, the Supreme Court has refused to share any information with the public about the manner in which judges have been selected for appointment and transfers. It has gone to the extent of filing Special Leave Petition directly to the Supreme Court against orders of the Central Information Commission asking the Court to disclose information about the manner of selection and appointment of judges. On top of all this, contempt powers have also often been sought to be used to silence outspoken criticism and public exposure of corruption in the judiciary. The Campaign for Judicial Accountability and Reforms has taken up all these issues of judicial accountability and has made constructive suggestions for the legal and constitutional changes required to redress these problems.

In order to build public opinion to bring the required constitutional and other legal changes for securing judicial accountability, it is necessary to freely and frankly discuss the existing state of affairs including the existing state of corruption in the judiciary, including the higher judiciary. In fact, the problem of judicial accountability or rather the lack of it, is mainly with the higher judiciary since the lower judiciary is accountable to the High courts. It has been our perception that corruption in the higher judiciary is not and would not be substantially lower than that in the lower judiciary, since in that case, the High courts would take serious steps to curb corruption in the lower judiciary which can be curbed if the High courts have the will to do it. The recent Ghaziabad Provident Fund scam is a stark illustration of some of the reasons why the higher judiciary is benignly tolerant of corruption in the lower judiciary.

5. Due to my personal observations during more than 26 years that I have been practicing in the Supreme Court and in the Delhi High Court, and also because of my close involvement in the Campaign for Judicial Accountability for the last 20 years or so, I have become aware of a good deal of corruption that has prevailed in the courts in which I have practiced as well as in other parts of the country. In order to develop a perception of corruption in the judiciary in general and particularly in the court where one practices, one does not need to have actual documentary evidence of corruption. This perception is formed on the basis of various kinds of circumstantial evidence surrounding judicial and administrative acts of judges which one learns from ones own experience as well as from the experience of other responsible and reliable lawyers and observers, apart from occasional documentary evidence. Documentary evidence about corruption in the higher judiciary is rarely and only fortuitously obtained, since all investigation into such

corruption is prohibited except by the written permission of the Chief Justice of India. However, as one of the active members of the Campaign for Judicial Accountability, I have also had the occasion to examine, sift through, and deal with a large volume of documentary evidence which discloses what in my view must be called acts of judicial corruption. I would like to clarify, however, that financial corruption is by no means the only kind of corruption prevalent in the judiciary, and whenever I use the word "corruption" in relation to the judiciary, it is not used in the narrow sense of financial corruption by way of taking direct bribes, but in a more general sense of anything which corrupts or influences by extraneous considerations, the judicial process. Thus, I regard the act of a judge who decides the cases of a political party or sits in a Commission of Enquiry involving that political party and thereafter, after retirement, gets elected to the Parliament, on the ticket of a political party, as an act of corruption. Similarly, if a judge hears and decides the case of a person, who is so friendly with the judge that his grand daughter's wedding is held in the judge's official residence, it ought to be regarded as a case of corruption of the judicial process. So also the judicial acts of a Judge who takes up cases (even part heard cases) of a particular company during vacations to decide in their favour by convoluted reasoning would be clear indicators of corruption of the judicial process. Thus, when asked as to what made me get involved in this Campaign for Judicial Accountability, I referred to my experience with the Judiciary, and in this spirit I said that it was my perception that roughly half of the last 16/17 chief justices have been corrupt. That is my honest and bonafide perception. It is a belief formed on the basis of direct and circumstantial evidence about judicial acts and other acts, as well as on the basis of information gathered from other responsible lawyers and judges including former Chief Justices of India.

6. Such an expression of honest and bonafide opinion about my perception of corruption at the very top of the judiciary cannot be regarded as Contempt of Court. If it were to be so regarded, it would stifle free speech and would constitute an unreasonable restriction on Article 19 (1) (a) of the Constitution. It is the essence of a democracy that all institutions, including the judiciary, function for the citizens and the people of this country, and they have every right to freely and fairly discuss the state of affairs within any institution, and build public opinion in order to reform the institutions. This is what I have always believed, and have, therefore, always freely and frankly expressed my honest views about the state of affairs within the judiciary and what needs to be done to remedy them.

7. It may not be out of place to point out that several responsible observers of the court including former chief justices have publicly and privately voiced their views about the extent of corruption prevailing in the higher judiciary. Newspaper reports of the views expressed by some of the judges including former Chief Justices such as Justice Bharucha are annexed hereto as Annexure-B. The fact that there will be difference in the perception among different persons about the extent and level of corruption prevalent in the judiciary would not make any difference to the question of whether expression of such views amounts to Contempt. In fact, Transparency International, a respected global anti-corruption institution, has also done global as well as national surveys of corruption perception within various institutions in the country including the judiciary, which also showed the judiciary to be perceived by the people as among the most corrupt institutions in the country. Copy of the relevant pages of the report of the Transparency International is annexed hereto as Annexure-C.

8. In this context, it is pertinent to remember the words of Lord Denning in R Vs. Metropolitan Police Commissioner, Ex parte Blackburn (1968) 2 All England Reporter, Page 319, where while dealing with a particularly harsh criticism of the Court of Appeal by Mr. Quintin Hogg, he observed as follows:

> *"This is the first case, so far as I know, where this court has been called on to consider an allegation of contempt against itself. It is a jurisdiction which undoubtedly belongs to us, but which we will most sparingly exercise: more particularly as we ourselves have an interest in the matter. Let me say at once that we will never use this jurisdiction as a means to uphold our own dignity. That must rest on surer foundations. Nor will we use it to suppress those who speak against us. We do not fear criticism, nor do we resent it. For, there is something far more important at stake. It is no less than freedom of speech itself. It is the right of every man, in Parliament or out of it, in the Press or over the broadcast to make fair comment, even outspoken comment, on matters of public interest."*

It is the application of this doctrine enunciated by Lord Denning that the Contempt of Court jurisdiction of "scandalizing the court or lowering the authority of the court" gradually fell into disuse in UK.

9. It is a mistaken notion to think that the authority or dignity of the courts can be maintained by using the contempt of court jurisdiction to punish and thus stifle public criticism, however harsh, of the judiciary, or even public discussion of the perception of the extent or levels of corruption prevailing in the judiciary, be they at the apex of the judiciary. The dignity, authority and public confidence in the courts or judges cannot be maintained by seeking to silence outspoken criticism or even outspoken expression of perception of corruption in the judiciary. That confidence is maintained by the public perception of the actions of the judiciary and the conduct of its judges, and whether they are perceived to be generally just, fair and in public interest. The public perception of the conduct of the judiciary and its judges is built on the basis of observation over a long period of time and by the shared perception of a large number of people. Any wild accusation or allegations by irresponsible persons or disgruntled litigants are dismissed by the people with the contempt that they deserve. It is only when persons, who are generally perceived to be responsible, are voicing opinion and criticism which is perceived by the public to be responsible and based on facts and circumstances which are relevant, that such opinion or criticism is taken seriously by the people and is going to affect their perception about the judiciary. This is exactly how it should be in a democracy. Any attempt to use contempt of court jurisdiction to silence such voices of criticism or dissent or such airing of corruption perception by such people, would cause far greater damage to the image, the public perception of, and public confidence in the judiciary. It would in fact lead people to suspect that things are more seriously amiss in the judiciary than even they had suspected, and it will engender great resentment and even contempt for the judiciary. Such actions would have exactly the opposite effect of what law of Contempt seeks to prevent.

This is also obvious from the backlash that has followed two of the most celebrated cases of contempt recently. The sentencing of Arundhati Roy for contempt, for merely saying in her reply

affidavit (in response to another contempt petition, in which the notice was finally discharged) that for the court to have issued contempt notice on an ex-facie absurd petition showed a disquieting inclination on the part of the court to stifle criticism and muzzle dissent, led to such a backlash that it only succeeded in lowering the image of the Supreme Court in the eyes of the people. Similarly, the sentencing of the journalists of Midday for having written well-documented investigative stories about Justice Sabharwal, a former Chief Justice of India who heard and passed orders for sealing of commercial properties, which had the effect of benefiting his own sons who were in partnership with shopping mall and commercial complex developers, also outraged civil society and the media. The result of the use of the contempt power against these journalists was again to heighten suspicion about corruption in the judiciary. These actions have contributed in no small measure to a drastic increase of the perception of corruption in the judiciary in the eyes of civil society. This has also been accentuated by the eruption of corruption scandals about the judiciary in quick succession recently. The recent judicial scandals involving Justice Soumitra Sen of Calcutta, the Ghaziabad Provident fund scam, the cash at judges door scam at Chandigarh, and the case of Justice Dinakaran, among others have been given a lot of publicity by the media recently. The resentment caused by the use of or threatened use of the contempt power to stifle outspoken comment (as in the Arundhati Roy case) or to silence the exposure of corruption (as in the Midday case), have contributed in no small measure to the increasingly widespread and outspoken coverage of judicial scandals in the media.

In conclusion on this issue, I wish to state that what I have stated about corruption at the apex of the judiciary is what I honestly believe to be true and have said so with a full sense of responsibility. I have not said anything which is at variance with my bonafide belief. Even Mr. Salve has not accused me of making false statements in this regard.

10. Regarding the Vedanta-Sterlite matter, it may be stated at the outset that this question and my answer was in the context of "other kinds of corruption of the judicial process different from bribe taking or financial corruption". This is why in my response, I have clarified what exactly I meant by "corruption" in this case. If some people have understood my response to the question to mean that I have accused Justice Kapadia of financial corruption, that would be wrong and most unfortunate, for that was certainly not what I meant or intended to say. Justice Kapadia is widely perceived to be a judge of financial integrity and I have no reason to doubt that perception. However, I do believe that Justice Kapadia acted improperly by hearing a matter involving very large financial stakes of a company and proceeding to pass orders on it, while he had shares in the company in whose favour he passed those orders. However, I may not have been impelled to say what I did, if I did not feel that quite apart from the impropriety of Justice Kapadia having heard and passed orders in the case of a company in which he held shares, the orders that he passed were quite extraordinary and totally unwarranted.

11. Consider the orders which were passed, and the facts and circumstances in which they were passed. Sterlite Industries had transferred an Alumina Refinery Project to be built at Lanjigarh, Orissa to its subsidiary company M/s Vedanta Alumina Limited (VAL). Environmental clearance for this Refinery had been granted by the Ministry of Environment and Forest. On 12th May 2005, at the instance of Shri Harish Salve, Amicus Curiae in the case, the Court asked the Centrally Empowered Committee (CEC) of the Court, which is the court's own expert body to examine this clearance and give its report within eight weeks. The Committee gave a detailed

report in September 2005. The CEC in its report, observed that the environmental clearance for the Refinery had been fraudulently obtained by Vedanta without disclosing that the Refinery Project was linked to the mining project. In this Project, the Alumina Refinery required the diversion of 58.93 hectares of forest land for the Refinery and 672.018 hectares of forest land for the mining. After examining the matter in great depth, the CEC concluded that the refinery and the mining projects in this place would destroy the forests, the wildlife, the water sources, and the lives and livelihoods of thousands of a rare and vanishing species of tribals living in this area. The CEC finally recommended:

> *"32. The CEC is of the considered view that the use of the forest land in an ecologically sensitive area like the Niyamgiri Hills should not be permitted. The casual approach, the lackadaisical manner and the haste with which the entire issue of forests and environmental clearance for the alumina refinery project has been dealt with smacks of undue favour/leniency and does not inspire confidence with regard to the willingness and resolve of both the State Government and the MoEF to deal with such matters keeping in view the ultimate goal of national and public interest. In the instant case had a proper study been conducted before embarking on a project of this nature and magnitude involving massive investment, the objections to the project from environmental/ecological/ forest angle would have become known in the beginning itself and in all probability the project would have been abandoned at this site.*
>
> *33. Keeping in view all the facts and circumstances brought out in the preceding paragraphs it is recommended that this Hon'ble Court may consider revoking the environmental clearance dated 22.9.2004 granted by the MoEF for setting up of the Alumina Refinery Plant by M/s and directing them to stop further work on the project. This project may only be reconsidered after an alternative bauxite mine site is identified."*

The CEC also noted that Vedanta started construction on the Alumina Refinery in violation of the guidelines of the MoEF even prior to obtaining forest clearance for the forest land to be diverted for the Refinery. A copy of the CEC's report is annexed as Annexure D.

12. When the matter was taken up for hearing on 26th October 2007, before the Forest Bench, the Bench, virtually without discussing the CEC report, and without even allowing Mr. Sanjay Parikh, who was appearing for the tribals in a connected Writ Petition challenging the environmental clearance to the Project, to make submissions on the various objections to the project, straightaway proceeded to discuss the terms on which the mining should be allowed to be carried on!

Eventually, after hearing the Counsel for Vedanta, the Orissa Mining Corporation (which was to be a partner of Vedanta in the mining), the State of Orissa (which had granted the mining lease and permission to set up the Refinery Project to Vedanta) and the Counsel for the Ministry of Environment and Forest (which had granted environmental clearance for the Alumina Refinery) and briefly the Junior Amicus, Shri Uday Lalit, the court reserved the judgment. It proceeded to pronounce its order on 23th November 2007, which is authored by Justice Kapadia. In this

judgment, it is stated that since Vedanta Resources, UK, the holding company of Vedanta Alumina Ltd., had been blacklisted by Norway for non-compliance of labour laws and human rights, it would not be proper to give this Project to Vedanta Alumina Ltd. However, the judgment proceeds to grant liberty to Sterlite Industries Limited, which is noted in the judgment to be the holding company of VAL, to make an application for this Project! It is astounding as to how the court could even consider granting liberty to apply for this Project to a related company owned and controlled by the same holding company i.e. Vedanta Resources Ltd. UK, which is blacklisted and thus not considered fit to receive any concession by the court. If one subsidiary (VAL) was disqualified on this basis, surely the other subsidiary, Sterlite would also be disqualified on the same logic. Moreover, the court almost totally glosses over the very detailed report of the CEC about the seriously adverse environmental and social impacts of the Project and after merely noting the CEC's conclusions, goes on to talk about the poverty of the local people living in Lanjigarh including the tribal people. In the words of the court,

> *"CEC has objected to the grant of clearance as sought by M/s VAL on the ground inter alia that the refinery is totally dependent on the mining of bauxite from Niyamgiri Hills, Lanjigarh, which is the only vital wildlife habitat, part of which constitutes elephant corridor and also on the ground that the said project, including the mining area, would obstruct the proposed wildlife sanctuary and the residence of tribes like Dongria Kandha. According to CEC, Niyamgiri Hills would be vitally affected if mining is allowed in the above area as Niyamgiri Hills is an important water source for two rivers. According to CEC, the project would also destroy flora and fauna of the entire region and it would result in soil erosion. According to CEC, use of forestland in an ecologically sensitive area like Niyamgiri Hills should not be permitted."*
>
> *"On the other side, we have a picture of abject poverty in which the local people are living in Lanjigarh Tehsil including the tribal people. There is no proper housing. There are ho hospitals. There are no schools and people are living in extremely poor conditions which is not in dispute.*
>
> *"Indian economy for last couple of years has been growing at the rate of 8 to 9% of GDP. It is a remarkable achievement. However, accelerated growth rate of GDP does not provide inclusive growth. Keeping in mind the two extremes, this court thought of balancing development vis-à-vis protection of wildlife ecology and environment in view of the principle of Sustainable Development."*

Thus, without discussing and overruling the serious objections of the court's own expert body of the Project on the forests, the environment, on water, on the lives of tribals and the wild life, in fact, rather cruelly using the poverty of the tribals as an argument to further impoverish them, the court just brushed them aside with the now clichéd rhetoric of providing "inclusive growth." This when the local tribals who ought to be credited with the intelligence to be the best judges of their own welfare, had been and continue to be totally opposed to the refinery as well as the mining and had filed a detailed Writ Petition against it. The court refused to even consider the writ petition. Worse still, though the issue before the court was only regarding the clearance for diversion of the 58.943 Hectares of forest land for the Alumina Refinery, the court in the next

order of 8th August 2008 proceeded to grant clearance for the diversion of 606.749 hectares of forest land for the bauxite mining of the Niyamgiri Hills! This is even before the government had granted environmental clearance or forest clearance for the diversion of the forest in the matter of the bauxite mines. Copies of the courts orders dated 23/11/07 and 8/8/08 are collectively annexed as Annexure E.

13. It was under these circumstances, coupled with the fact that Justice Kapadia had shares in Sterlite, that I made my comments. It may be noted that there were many observers present in the court in the hearing on 26th October 2007 and many e-mails were contemporaneously sent detailing the proceedings. A copy of the detailed note sent the very next day by Mr. Felix Padel, a highly respected social anthropologist working in Orissa for the last several decades and another detailed contemporaneous report by another responsible observer present in court that day about the hearing that they witnessed on 26th October 2007 are collectively annexed hereto as Annexure-F. These are only two of the several detailed reports of the hearing that I had seen and heard when I made my comments on this case.

14. Regarding the issue of Code of Conduct of Judges and the fact that Justice Kapadia had disclosed his shareholding in Sterlite, and since nobody objected, his continuing to hear the case was in accordance with the Code of Conduct and, therefore, not objectionable, I beg to differ. Firstly, Justice Kapadia's disclosure about his shareholding in Sterlite came only on 26th October 2007, though he had been hearing this case at least from 2005 onwards. Secondly, the disclosure of his shareholding was casually made in the context of Sterlite being a listed company as opposed to Vedanta which is a non-listed company. According to several observers who were present at the hearing, no one expressly was asked and no one expressly said that they had no objections to his continuing to hear the matter. In fact, at the stage at which Justice Kapadia had disclosed his shareholding in Sterlite, the effective party before the court was Vendanta. Sterlite came back into the matter only after the order of 23rd November 2007 where the order itself permitted Sterlite to make an application.

15. Moreover, the only counsel who could have objected and who had an adverse interest to Vedanta in the matter was Mr. Sanjay Parekh who was appearing in a connected Writ Petition on behalf of the tribals. However, he was not permitted to even argue his case, and was told in no uncertain terms that he would not be heard, since the Amicus was good enough to represent the tribals. All the other counsel present i.e. of Vedanta, Orissa Mining Corporation (which was in partnership with Vedanta for the mining), State of Orissa (which had granted the lease) and the Ministry of Environment and Forest (which had granted environmental clearance for the Project) had a common interest. Moreover, the senior Amicus in this case, Mr. Harish Salve, already had a retainer from Vedanta and it was left to Mr. Uday Lalit, the junior Amicus to object or not to object to Justice Kapadia's continuing to hear the case. The fact that Mr Uday Lalit did not object in no way excuses Justice Kapadia's non recusal in the matter.

16. It is well settled in India as well as internationally that any Judge who has the slightest pecuniary interest in a case must automatically recuse himself from hearing the case. Shareholding in a company, particularly in a case where the order would have enormous impact on the financial status and thus share values of that company as in the case of Vedanta/Sterlite, is certainly a pecuniary interest.

In Manak Chand Vs. Dr. Premchand, (AIR 1957 SC 425), the Supreme Court held that, "It is obvious that pecuniary interest, howsoever small, it may be in the subject matter of the proceedings, would wholly disqualify a member from acting as a judge". While saying this, the Supreme Court has followed a long line of English decisions starting with Dimes Vs. Grand Junction Canal, (1852 3 HLC 759) where the judgement of the Lord Chancellor who decided the case of a company while he had shares in the company, was set aside by the House of Lords, observing, "This will be a lesson to all inferior tribunals to take care not only that in their decrees they are not influenced by their personal interest, but to avoid the appearance of labouring under such influence." It has thereafter been consistently held in a long line of English cases that "the least pecuniary interest in the subject matter of the litigation will disqualify any person from acting as a judge" (R Vs. Farrant, 1987 QB 58), (R Vs. Rand, 1866 LR 1, QB 230), (R Vs. Myer 1875 1 QBD 173).

H.M. Seervai has also authoritatively pronounced on this principle in his Constitutional Law of India, where he says:

> *"Least pecuniary interest in the subject of the litigation will disqualify any person from acting as a judge: the pecuniary interest may be so small that no one will think it likely to produce bias in a judge, e.g. if a judge held shares worth five pounds in a company with a capital of five million; where pecuniary interest exists, the law does not allow any further inquiry as to whether or not the mind was actually biased by the pecuniary interest; the rule applies to judge of the highest tribunal as it does to tribunals and bodies of persons obliged to act judicially or quasi-judicially".*

The basis for this principle is a higher principle which has been clearly stated by Justice Venkatachalaiah in Ranjit Thakur v. UOI and Ors. AIR 1987 SC2386

> *"The test of real likelihood of bias is whether a reasonable person, in possession of relevant information, would have thought that bias was likely. A judgment which is the result of bias or want of impartiality is a nullity and the trial "coram non-judice".*
>
> *"As to the tests of the likelihood of bias what is relevant is the reasonableness of the apprehension in that regard in the mind of the party. The proper approach for the judge is not to look at his own mind and ask himself, however, honestly, "Am I biased?" but to look at the mind of the party before him."*

The principle of automatic recusal if a judge holds shares in the company is the norm in the US as well. Quite recently, 4 judges of the US Supreme Court recused themselves (due to their shareholding) from a case filed by 50 companies that did business in apartheid era South Africa leading to the automatic affirmation of the lower court's judgement. A copy of the New York Times report to that effect is annexed as Annexure G.

17. In these circumstances, in my opinion, the Code of Conduct which was internally adopted by the courts, does not provide an adequate justification to Justice Kapadia to continue to hear the

case. The consent of lawyers is not a safe basis for deciding whether one should recuse oneself from a case. Most lawyers who appear before a judge every day would be reluctant to ask a judge to recuse himself from a case, even if they feel that there is a serious conflict of interest. This is because asking a judge to recuse himself seems like an expression of no confidence in the ability of the judge to rise above his personal interest. That is why, after this controversy arose, most judges have come to accept that the Code of Conduct does not provide the correct guide for recusal in such matters. Judges should automatically recuse themselves from hearing the cases of those companies in which they hold shares. Recognizing this fact, after this controversy, many judges including Justice Kapadia have recused from hearing cases where they had shares, despite the lawyers saying that they had no objection. Newspaper reports to this effect are annexed as Annexure H.

18. In these circumstances, my comment on Justice Kapadia's role in the Vedanta-Sterlite matter is a legitimate opinion which I am entitled to express.

19. There is however another important aspect of this contempt petition and the manner in which it has been initiated. This Contempt Petition has been filed by a person who has repeatedly misused his position as Amicus Curiae and has taken briefs/retainers to appear for various private parties in matters in which he has been appearing as Amicus Curiae as well. In the case of Vedanta/Sterlite which is the subject matter of this complaint against me, Shri Salve first appeared as Amicus in this matter, and then took a retainer from Vedanta/Sterlite, after which he asked Shri Udai Lalit to appear as Amicus in the case. For a person who is Amicus and who has not only appeared as Amicus in a matter involving a particular party, to subsequently accept a brief or retainer on behalf of that party, in my view amounts to professional misconduct. Once he has been appointed Amicus in a matter by the Court, he has no business to accept a brief or retainer on behalf of a private party in the same matter. In fact, in my view, in either case, whether he took retainer on behalf of a private party after appearing as Amicus in the same matter or appeared as amicus though he was holding retainer of a private party in the same matter amounts to serious professional misconduct. Even in this application, he has misled the court by consciously concealing his retainership and connection with Vedanta/Sterlite, once again misusing his position as Amicus. For this reason alone, this application filed by him should not be entertained. In fact the Court should discharge him as Amicus in the matter. Copies of the orders showing Shri Salve was appearing as Amicus and the newspaper report showing his retainership with Vedanta-Sterlite are collectively annexed hereto as Annexure-I

20. This is however not the only instance where Shri Salve has misused his position and accepted a brief of a private party in cases where he is also acting as Amicus. He was Amicus in the forest matter when the issue of the Delhi Ridge and constructions of hotels/shopping malls on the Ridge came up before the Forest Bench. He still chose to take up a brief of M/s Unison Hotels which involved construction on 92 hectares of forest land on the Ridge. Subsequently, in another Writ Petition of Mr. Santosh Bhartiya challenging the construction by Unison Hotels (now called the Grand Hyatt Hotel) on the Delhi Ridge, Shri Salve appeared again in the matter, this time for the DDA. Copies of orders in the aforementioned cases related to Vasant Kunj Ridge area and the officer report dated 06.12.06 in Ridge Bachao Case are collectively annexed hereto as Annexure-J.

21. In the case of the construction of statues in the Noida Park, Shri Salve appeared as Amicus, though he had already been appearing on behalf of the UP Government in the same or connected matters involving construction of statues at the Noida Park and at other places. (Writ Petition No. 266 of 2009, Ravi Kant & Another Vs. State of U.P.). Copies of the orders in the two cases showing Shri Salve appearing as Amicus in the Noida Park matter and on behalf of the State of UP in Ravi Kant's case involving the same park as well as the relevant pages of the petition of Ravi Kant's case, are collectively annexed hereto as Annexure-K.

22. However, these are not isolated instances of professional misconduct on the part of Shri Salve, who has chosen to style himself as Amicus Curiae in this Contempt Petition. In a large number of cases, Shri Salve has accepted briefs/retainers from one party and thereafter gone on to appear on behalf of the other party by just returning the retainer despite the protest of the opposite party. Some instances of these cases are the case of K.K. Birla Vs. Lodha and the case of Lilavati Hospital (Charu Kishore Mehta vs. Lilavati Kirtilal Mehta M. Trust & ors., SLP (C) No.4911/2007). Copies of the correspondence between Shri Birla and Shri Salve published in Shri Birla's autobiography to this effect are collectively annexed hereto as Annexure-L. Copy of the order of 26/3/07 and a copy of a newspaper report regarding Shri Fali Nariman's public expression of outrage at Shri Salve's totally unprofessional behaviour in the Lilavati Hospital matter where after being briefed by one party, he chose to appear for the opposite party is annexed hereto as Annexure-M.

23. I have been constrained to point out these instances of professional misconduct of Shri Salve in this context because he has repeatedly misused his position as Amicus and involved himself in conflict of interest situations which has influenced the course of justice.

Deponent

Verification:

I the deponent above named do hereby verify that the contents of the above affidavit are true and correct to my knowledge and nothing material has been concealed therefrom.

Verified at New Delhi on this the 7th day of December 2009.

Deponent