

IN THE SUPREME COURT OF INDIA

REVIEW JURISDICTION

REVIEW PETITION [CRL] 46/2019

IN

WRIT PETITION [CRL] NO 298/2018

IN THE MATTER OF:

YASHWANT SINHA & ORS

...Petitioners

Versus

CENTRAL BUREAU OF INVESTIGATION & ANR

...Respondents

WRITTEN SUBMISSIONS ON BEHALF

OF UNION OF INDIA

1. It is submitted that on the directions of this Hon'ble Court, the Government had submitted the information in sealed envelopes on the decision making process vide letter No. 1(7)/US (DK)/D(Air-I)/2015 on 26.10. 2018 and on pricing vide letter No.8(7)/US D(Air-I)/2018 on 10.11.2018. On further directions of this Hon'ble Court, the information regarding the decision making process and offsets was shared with the petitioners vide letter No. 8(7)/US D(Air-I)/2018 dated 9.11.2018. The information contained in these papers was the same as submitted to this Hon'ble Court in sealed covers, except the classified information.

2. After hearing the detailed oral arguments on 14.11.2018 and going through the documents provided by the Petitioners and the Government, this Hon'ble Court dismissed the Writ Petitions vide its judgment dated 14.12.2018. Thereafter, a Review Petition, a Perjury Application, an Interlocutory Application for production of documents from secret files of the Ministry of Defence have been filed by the Petitioners.
3. The Petitioners have not disclosed any new evidence in the Review Petition except that they have now based their case on some unauthorisedly accessed documents copied from the secret files of the Ministry of Defence. The issues which find mention in these documents had already been raised earlier by the Petitioners in their Writ Petition and the oral arguments. The Review Petition and other Applications filed by the Petitioners continue to rely on media reports while completely ignoring the findings of the report of the CAG, an expert body having constitutional mandate, which was submitted to the Parliament on 13.02.2019. Even the Application alleging Perjury which was filed on 15.02.2019 fails to make a reference to the findings of the CAG.
4. It is submitted that a detailed reply has been filed to the Review Petition on 4.05.2019. Further, a reply to the Interlocutory Application has also been filed on 4.05.2019, and a response to Application for alleged perjury has also been

filed on 9.05.2019. It is submitted that the following submissions on behalf of the Union of India may be read with above Reply Affidavits filed on behalf of the Union of India.

NO GROUNDS FOR REVIEW MADE OUT

5. At the outset, it is submitted that no ground whatsoever has been made out by the petitioners which would justify a review of the well reasoned judgment and final order passed in this case on 14.12.2018. The said judgment addresses the contentions advanced by the petitioners in this case, on the basis of compelling and incontrovertible jurisprudential principles with regard to the scope of judicial enquiry in cases involving the very security and defense of the nation. The judgment *ibid*, it is respectfully submitted, lays down the correct law and sets a forceful precedent to be followed if such cases arise in future. **[Paras 5,11 of the judgement @ Pg 6 & 10 of R.P Paper book refers]**.
6. This Hon'ble Court also correctly concludes that the "*perception of individuals cannot be the basis of a fishing and roving enquiry by this Court*". This conclusion, as well as the flimsy and unfounded nature of the allegations raised by the petitioners in the Review Petition, are established by the application filed by the petitioners themselves, wherein the production of number of documents has been prayed for. This clearly establishes that the petitioners are trying to get a fishing enquiry directed without even laying foundation of a

prima facie case. Especially, when this Hon'ble Court dismissed the Writ Petition inter alia holding @ **Pg 28-29 of the R.P paper book** that :

*"...34. In view of our findings on all the three aspects, and having heard the matter in detail, we find no reason for any intervention by this Court on the sensitive issue of purchase of 36 defence aircrafts by the Indian Government. **Perception of individuals cannot be the basis of a fishing and roving enquiry by this Court, especially in such matters.** We, thus dismiss all the writ petitions, leaving it to the parties to bear their own costs. We, however, make it clear that our views as above are primarily from the standpoint of the exercise of the jurisdiction under Article 32 of the Constitution of India which has been invoked in the present group of cases."*[emphasis added].

7. That it is submitted that the Hon'ble Court, had reached the above conclusion after carefully studying the material placed before the Court as recorded earlier in **paragraph 22 of the judgement @ Pg 18-20 of the R.P paper book** as under:

'...We have studied the material carefully. We have also had the benefit of interacting with senior Air Force Officers who answered Court queries in respect of different aspects, including that of the acquisition

*process and pricing. **We are satisfied that there is no occasion to really doubt the process, and even if minor deviations have occurred, that would not result in either setting aside the contract or requiring a detailed scrutiny by the Court.** We have been informed that joint exercises have taken place, and there is financial advantage to our nation. It cannot be lost sight of, that these are contracts of defence procurement which should be subject to different degree and depth of judicial review. Broadly the processes have been followed,.....**It will not be correct for the Court to sit as an appellate authority to scrutinize each aspect of the process of acquisition.**" [emphasis added].*

NO GRAVE ERROR APPARENT ON RECORD

8. That in view of such categorical and emphatic findings recorded by this Hon'ble Court on all the three issues raised by the Petitioners on the basis of official records, it is submitted that there **is no error apparent on the face of the record** warranting review of the judgement and order dated 14.12.2018 passed by this Hon'ble Court.
9. The pleadings do not satisfy Art 137 of the Constitution of India read with Order XLVII Rule 1 of the Supreme Court Rules, 2013 framed under Article 145 of the Constitution of

India. It is submitted that as held by this Hon'ble Court repeatedly that an application to review a judgment is not to be lightly entertained unless there is a grave error and that a mere repetition of over ruled arguments and or a second trip over ineffectually covered points cannot be a ground for review. The petitioners have repeated the very same arguments in the garb of having procured new documents/facts, whereas the fact of the matter is that the R.P is nothing but repetition of the same arguments all over again.

10. Very recently, this Hon'ble Court in paras 6 to 10 of its judgement in the case of Mukesh Vs State (NCT of Delhi) reported in (2018) 8 SCC 149 reiterated the law regarding scope of review in criminal proceedings. It has been held that it is not permissible at all during review to reargue the case as if it is an appeal and it was further held that even if another view is possible on the basis of the material produced, a review petition would not lie.

FISHING INQUIRY IMPERMISSIBLE

11. That it is submitted that in the garb of seeking review of the judgement, and placing reliance on some press reports and some incomplete internal file noting(s), copies of which were obtained unauthorisedly and illegally, the petitioners cannot seek to re-open the whole matter **since the scope of review petition is extremely limited. The Review Petition, it is therefore, submitted is an attempt to get a fishing and**

roving enquiry ordered, which this Hon'ble Court has specifically declined to go into based on perceptions of individuals.

RE PRICING

12. The CAG report has comprehensively dealt with all technical and commercial matters including the pricing of the basic aircraft, the pricing of the entire package including the aircraft package and weapons package, benchmarking of price, price advantage due to shift from firm and fixed price to non-firm and fixed price, the cost of Bank Guarantees, lower prices negotiated for India Specific Enhancements and the delivery timelines amongst other issues.
13. The CAG report also gives a timeline of the process for the acquisition of Medium Multi Role Combat Aircraft and the failure to progress the procurement even after lapse of 15 years. It also examined the MMRCA bidding process of 2007 and states that **the negotiations could not be concluded due to a stalemate on the issues of calculation of manpower costs and non-guarantee of aircraft by M/s Dassault Aviation to be manufactured by M/s HAL.**
14. The Review Petitioners have ignored the Audit Report of CAG, an expert body with constitutional mandate to scrutinize such procurements. The files and documents have been made available to the CAG who took about two years to complete its

study and finalize its Report. Instead of relying on the findings of the CAG, the petitioners have continued to rely on selective media reports of unauthorisedly accessed photocopies of internal documents, presenting only an incomplete picture. The Government has reaffirmed what was submitted to the Hon'ble Court in sealed cover earlier before Hon'ble Supreme Court judgment dated 14.12.2018 by filing three affidavits dealing with the contents of the Review Petition, Interlocutory Application for production of documents and the Application for perjury. It is a well accepted principle which has also been accepted by the Hon'ble Court that it is the final decision in a case which matters and not the internal deliberations on file where various opinions are expressed which constitute intermediate stages of the decision making process.

15. In the original Writ Petition, the petitioners had alleged on the basis of various report in the media that the price of an aircraft bought under the 36 Rafale aircraft package is about Rs.1000 crore higher per aircraft as compared to price under MMRCA process. The report of the CAG does not support the main argument of petitioners which has been perpetually repeated before this Hon'ble Court that the cost of each aircraft under 36 Rafale contract is Rs.1000 crore higher than what it would have been under the MMRCA bid.
16. The basic price of the aircraft has been informed to the Parliament as approximately Rs.670 crore at prevailing

exchange rate of November, 2016; without associated equipments, weapons, India Specific Enhancements, maintenance support and services. The price built up and a comparison with the price of the flyaway aircraft in the MMRCA bid was submitted to the Hon'ble Supreme Court in a sealed cover. All pricing details, files, documents and records were made available to the team of the CAG which worked out its own aligned cost.

17. The CAG report has held that as far as the basic aircraft price is concerned, the cost in the bid of 2007 after price escalations is not lower than the negotiated cost under 36 Rafale Aircraft. For the overall aircraft package, the CAG has held that the contract was concluded at a price which is 2.86% lower than the audit aligned price. The table of alignment and item-wise cost analysis is given in Table 5, @ internal Page 137 of the CAG Report. The CAG report has also brought out an additional benefit accruing to the country in view of the change from 'firm and fixed price' in the 2007 bid to 'non-firm and fixed offer' in 2016. The relevant portion of the CAG report (Para 5.3 of Page 22) is quoted below:

"Audit also noted that only in case of MMRCA, Indian Negotiation Team (INT) advised M/s DA to provide a Non-Firm & Fixed offer in 2016, although the RFP of 2007 had invited firm and fixed prices. This change proved to be more beneficial. Initially (15 January

2016) Firm & Fixed price bid was invited by the Ministry and M/s DA had quoted 'AX13' Million Euros. This was found to be too high and Ministry called (21 January 2016) for Non-Firm & Fixed price bid. The firm had quoted 'T' Million Euros. Audit noted that at this price the total outgo of cash payments to the vendor till the completion of the contract would have been 'EU' Million Euros (applying the vendor's price variation formula). Therefore, when compared to the Firm & Fixed offer of 'AX13' Million Euros the cash outgo was 'BX' billion Euro lesser in case of Non-Firm & Fixed offer."

18. Thus, the CAG's observations do not support the main claim of the petitioners that each aircraft was bought at a price which is Rs.1000 crore more than in the MMRCA bid. In fact, the CAG has held that the 36 Rafale aircraft deal is 2.86% lower than the audit aligned price and in addition, there would be benefits on account of non-firm and fixed price. This itself negates the case of the petitioners of a prima facie criminal offence having been committed due to the payment of higher prices.
19. The writ petitioners have raised doubts on the process followed in the procurement of 36 Rafale, the pricing of 36 Rafale aircraft and the offset contract between M/s Dassault Aviation and M/s Reliance Aerostructure Ltd. On the directions of the Supreme Court, the Government vide letter No. F.NO.

1(7)/US (DK)D Air-I/2015 dated 26.10.18 submitted a Note on the process followed in the procurement of 36 Rafale aircraft. On further directions of the Hon'ble Court, the Note with suitable modifications was shared with the petitioners and a Note on pricing was submitted to the Hon'ble Court in sealed cover. The Government stands by what was submitted in the Note on process, pricing & offsets and the facts submitted to the Court have been reaffirmed on oath by affidavit filed on 09.05.2019.

20. That on the issue of pricing, it has been concluded by this Hon'ble Court in paragraph 26 @ pg 22 of the R.P paper book as follows:-

" 26. **We have examined closely the price details and comparison of the prices** of the basic aircraft along with escalation costs as under the original RFP as well as under the IGA. **We have also gone through the explanatory note on the costing item wise.** Suffice it to say that as per the price details, the official respondents claim that there is commercial advantage in the purchase of 36 Rafale aircrafts. The official respondents have claimed that there are certain better terms in IGA qua the maintenance and weapon package. **It is certainly not the job of this Court to carry out**

a comparison of the pricing details in matters like the present. We say no more as the material has to be kept in a confidential domain." [emphasis added].

21. It is further submitted that the conclusion reached by this Hon'ble Court even without the benefit of the CAG Report is now fortified by the report of the CAG, which has thoroughly scrutinized the pricing details. The CAG report has concluded that the entire package price of the concluded contract price for 36 Rafale Combat Air Crafts is 2.86% lower than the Audit Aligned price. At @ **Pg 150 of affidavit dt 13.03.2019 filed by UOI, the conclusions of CAG are** as follows:-

" Conclusion

Overall, it may be seen that as against the Aligned Price as estimated by Audit of "CV" million € the contract was concluded for "U" million € i.e. 2.86 per cent lower than the Audit Aligned Price. The same is summed up in the table in the below....."

22. Therefore, the main argument of the petitioners regarding exorbitant price is belied by the report of constitutional body i.e. CAG which has the technical expertise to scrutinize this procurement.
23. The primary ground raised in the R.P to seek review on the issue of pricing is the extensive reliance placed by the

petitioners to the note dt 01.06.2016 put up by the three members of the INT [referred in para 6.3 @ pg 42 of the R.P] that the 'bench mark price' was raised from 5.2 billion to 8.2 billion euros. .

24. It is submitted that after the objections raised on 01.06.2016, two more INT meetings were held between the members of the INT on 09-10.06.2016 and 18.07.2016 respectively. The concerns raised by the three members were discussed in these meetings in a collegiate process and it was also referred to the DAC. The INT report also indicated better terms and conditions arrived at as a result of negotiation as compared to 126 MMRCA case and achievements of the INT. The then JS & AM (Air), was one of the three signatories to the note bringing out some concerns. The same Officer subsequently has signed the note for CCS approval.
25. The fact that the INT could have fixed the bench mark price more realistically have been specially taken note by the CAG in its report in **para 1 (c) and 2.2. (@ pg 140 and 142 respectively of the additional affidavit dt 13.03.2019)** filed by the Union of India. Further, the CAG also found that the price worked out by it was 1.23 per cent lower than the INT aligned costs and ultimately the contracted price signed in 2016 was 2.86 per cent lower than the Audi aligned price. **[Para 2.2.c @ pg 143-144 refers]**. The CAG has done exhaustive analysis of price comparison of different packages

of the contract, and found overall the contract was concluded for 2.86 per cent lower than the Audit Aligned Price. **[Detailed comparative table is @ pg 151 of the affidavit dt 13.03.2019].**

26. The CAG report has gone into the benchmarking in the MMRCA bid as well as the 36 Rafale contract. To quote from the CAG report (Page 121) regarding the MMRCA bid, *'Thus, the benchmark price worked out by Ministry for the actual deliverables was 47 per cent below the actual prices offered by the L1 vendor, which shows that the benchmark price, once again, in this acquisition too, was fixed unrealistically.'*
27. Regarding the 36 Rafale contract (Para 2.2 of Page 128-129 of CAG Report), it was observed by the CAG:-

'Before commencing negotiations, the Indian Negotiating Team estimated the bench mark price on a Firm & Fixed cost basis keeping in view of the expected discounts, market study, Rafale sale price from annual reports of M/s DA etc., as "R" million €. This was about 57 per cent lower than the initial offer of the French Team and 46 per cent lower than the non-firm & fixed offer of "T" million €. Audit noted that as the INT was already aware of both the previous unrealistic benchmark pricing as well the commercial offer, they could have estimated the benchmark price more realistically. Audit also noted that in the process of

procuring the MMRCA, this was the second time (first time in November 2011) that an unrealistically low benchmark prices were fixed.'

28. The CAG has conclusively held that the benchmark by the Indian Negotiating Team was unrealistic. Thus the allegations of the petitioners quoting main objection of the three INT members who had given a different opinion is not supported by the CAG report.
29. Therefore, the contentions advanced by the petitioners that the bench mark price was exorbitantly high is completely misleading and based on incomplete file noting and faulty assertions.
30. Thus, CAG's observations do not support the main claim of the petitioners that each aircraft was bought at a price which is about Rs.1000 crore more than in the MMRCA bid. In fact, the CAG has held that the 36 Rafale aircraft deal 2.86% lower than the audit aligned price and in addition, there would be benefits on account of non-firm and fixed price. This itself negates the case of the petitioners of a prima facie criminal offence having been committed due to the payment of higher prices.

RE REDACTION OF PRICING IN THE CAG REPORT

31. The petitioners have argued that there is no precedence of redaction of pricing details in the final Report and CAG in case of 36 Rafale has redacted the pricing details. Considering the implications of availability of sensitive information in public domain, audit reports are vetted from security point of view and only redacted versions are available in public domain. While CAG Audit team is provided all the requisite details and access to files and records, the input on sensitivities involved from National Security point of view are usually sought by Audit and provided by Service Headquarters. There are past instances of such redaction of CAG Audit Reports about weapons, assets, location, numbers, deficiencies. Some of the past instances of redaction are given below :-
- i) Audit Para No. 2.1 of CAG Report no. 24 of 2017 (Air Force) regarding "Induction of Strategic Missile System in S-sector" was redacted. The report redacted the name, performance of missiles, numbers and location of units.
 - ii) Union Government (Defense Services) Navy and Coast Guard Report no. 9 of 2018 was redacted. Para 2.1 redacted the details of name, location, quantity,

infrastructure, weapons, NSQRs, of Maritime Reconnaissance Anti-Submarine Warfare aircraft.

iii) Union Government (Defense Services) Air Force Report no. 14 of 2018 was redacted. Para 3 on Operational readiness of IAF airfields redacted the details of number of airfields, airfield locations, quantity, infrastructure & deficiencies.

iv) Para 2.3 of C&AG Report No. 34 of 2014 relating to "Procurement of Air Combat Maneuvering Instrumentation System". The report redacted the location of delivery points.

32. In the Report on 126 MMRCA Acquisition Process and 36 Rafale case also the Audit sought the input from Ministry of Defence on redaction. Based on the inputs provided by the Air Headquarters, Ministry of Defence mentioned the nature of information considered sensitive by Ministry of Defence which needed redaction from the final report to be published. The Chief of Air Staff had also made out a strong case against the disclosure of pricing details in 36 Rafale case, which would prove inimical to our National interests. This Hon'ble Court has also taken note of above fact in Para 25 of its judgment dated 14.12.2018. Further the pricing details are covered by Article 10 of the Security Agreement between India and France in 2008. The IAF had requested for redaction of pricing details in all 11 cases, apart from other sensitive details, covered in the

performance audit of CAG on Capital Acquisition in Indian Air Force. However, CAG chose to redact the pricing details only in the case of 126 MMRCA acquisition process and 36 Rafale aircraft. The Government has taken up the issue of redaction in other cases also with the CAG.

33. It is submitted that though the CAG has redacted the exact pricing details in case of 36 Rafale procurement, **the clarity of conclusions of CAG on commercial aspects as brought out in its Final Report are quite evident.**

RE INDIAN OFFSET PARTNER

34. That on the issue of Indian Offset Partners, after going through the stand of the Union Government and the materials placed in this regard, it was concluded by this Hon'ble Court in paragraph 33 @ pg 27-28 of the R.P paper book as follows:-

" 33. Once again, it is neither appropriate nor within the experience of this Court to step into this arena of what is technically feasible or not. The point remains that DPP 2013 envisages that the vendor/OEM will choose its own IOPs. In this process, the role of the Government is not envisaged and thus, mere press interviews or suggestions cannot form the basis for judicial

*review by this Court, especially, when there is categorical denial of the statements made in the Press, by both the sides. **We do not find any substantial material on record to show that this a case of commercial favouritism to any party by the Indian Government, as the option to choose the IOP does not rest with the Indian Government.***" [emphasis added].

35. The petitioners in their Review Petition allege that clause 4.1& 4.2 of the Off Set Guidelines were violated by inducting M/S RAL Ltd as Indian Off Set Partner, which is otherwise ineligible as it is not engaged in eligible products or services and that it is not correct to state that the Indian Govt has no role to play in selection of Indian Off Set Partner. Petitioners have relied on Para 7.2, 8.4 and 8.6 of Off Set Guidelines. Certain Media Reports appearing in French Media have also been relied upon.
36. It is submitted that in so far as the selection of Indian Offset Partners (IOPs) is concerned, there is no mention of any private Indian Business House(s) in IGA or Offset Contract. The Offset Contract does not envisage manufacture of 36 Rafale Aircraft in India by any public or private sector firm. As per the Offset Contract, the vendor/OEM is required to confirm the details of IOPs / products either at the time of seeking offset credits or one year prior to discharge of offset obligation. The annual offset implementation schedule, as per

offset contract, will commence from October 2019. The vendor/OEM is yet to submit a formal proposal in the prescribed manner indicating details of IOPs and products for offset discharge. There is no violation of the provisions of DPP in this regard. Therefore, there is no error in the judgement.

37. It is further submitted that the Press release issued by Ministry of Defence on 22.09.2018 sought to address the unnecessary controversies created on the basis of certain media reports regarding offset partners. The main point emphasized in the Press release was that the Government of India has no role in the selection of Indian Offset Partner which is a commercial decision of the OEM.
38. The petitioners during arguments in November, 2018 raised the issue of offset guidelines being amended intentionally to benefit the industrial group. The Government during arguments on 14.11.2018 clarified that "**based on the experience gained during the implementation of the signed offset contracts, handling of various issues emerging in on-going cases and representations received from various OEMs, a need was felt to review the Defence offset guidelines. Accordingly, Hon'ble Raksha Mantri approved constitution of a committee under the Chairmanship of Additional Secretary (DP) on 26th August, 2013. The report was finalized on 10 Jan**

14. The then Raksha Mantri gave in principal approval to the report on 22 Jan 2014 for obtaining DPB/DAC approval. The case was put up to DPB on 24 Mar 2014 for the first time. Subsequently the matter was placed before DPB on 20th March, 2015.”

39. The case was finally put up on 13.05.2015 to DAC. After the approval of DAC on 13.05.2015 Government incorporated the revised guidelines in the DPP in August 2015. The amendment permitted the vendors to submit details of IOPs and products, either at the time of seeking offset credits or one year prior to discharge of offset obligations through that IOP, if the vendor is not able to provide these details at the pre-contract stage itself.
40. It is submitted that there are many avenues for discharge of offset obligations which can be done through many Indian Offset Partners.
41. The petitioner(s) have sought a review of the judgment again based on the media reports appearing in the French Media as well as in Indian media. The petitioner(s) have relied on the media reports indicating that a group company of ADA Group having received some tax settlements in France in the year 2015. The Government has also countered this claim in its Affidavit filed on 04.05.2019 stating that the issue reported in

the Media relates to the decision of a sovereign Government giving certain concessions to the subsidiary of an Indian private entity in a sector unrelated to Defence. It is not only far-fetched but a figment of imagination of the petitioners to link the decision of the French Government in this case to the procurement of 36 Rafale Aircraft. It is reiterated that the Government of India has no role in selection of Indian Offset partner which is a commercial decision of Original Equipment Manufacturer (OEM).

42. On offsets, there has been no fundamental change since the judgment of Court delivered on 14.12. 2018 except some media reports suggesting a settlement of tax case of ADAG Group in France. This is a sovereign decision by a foreign country in a sector unrelated to defence which cannot be linked to purchase of 36 Rafale aircraft in any way.

ISSUES REGARDING DROPPING OF ESCROWACCOUNT
GUARANTEES AND DELIVERIES

43. The dropping of the escrow account, bank guarantee, sovereign and performance guarantee clauses from the IGA have also been assailed by the petitioners.
44. It is submitted that waiver of Sovereign / Bank Guarantee in Government to Government Agreements / Contracts is not unusual. It is submitted that in Foreign Military Sales (FMS) Cases with US Govt, no Bank Guarantee / Sovereign

Guarantee is provided for Foreign Military Sales (FMS) Contracts signed between the Government of India and US Government where the execution of projects are done by OEMs/vendors. In contracts concerning Russian Federation signed with Rosoboron export of Russia, the requirement of Bank Guarantees is waived off in view of the assurance provided through a '*Letter of Comfort*' signed by the Finance Minister of the Russian Federation. In the 36 Rafale procurement, the French Government has proposed that they are providing '*outstanding Guarantees*' through Article 4.4 of the IGA along with the '*Letter of Comfort*' signed by the French Prime Minister. The Letter of comfort states that:-

(a) Government of the French Republic is fully committed in doing whatever is necessary to make sure that industrialists Dassault Aviation and MBDA France, each in their own respect, do their utmost to fully respect all their obligations in accordance with aforesaid intergovernmental agreement and annexed supply protocols.

(b) Furthermore, assuming that Dassault Aviation or MBDA France meet difficulties in the execution of their respective supply protocols and would have to reimburse all or part of the intermediary payments to the Government of the Republic of India, the Government of French Republic will take appropriate

measures so as to make sure that said payments or reimbursements will be made at the earliest.

45. Based on the above, the CCS was apprised that the French side has indicated that "the proposed Letter of Comfort along with the guarantees proposed through the IGA, *constitute a unique and unprecedented level of involvement of the French Government in coherence with the strategic partnership between both countries*".
46. While providing Legal Vetting, MoL&J made the following remarks:- "*...the revised draft of Inter Governmental Agreement (IGA) and revised draft Supply Protocol which has been finalised by the parties appear to be formally in order as it is an agreement between sovereign nations.*" Therefore, legal vetting of MoL&J and the approval of CCS, the highest decision making authority has been taken.
47. The CAG has also in its report has examined all these issues in **para 2.3 & 2.4 of its report (@ pg 151 -153 of the affidavit dt 13.03.2019)** filed by the UOI. The CAG also took note of Article 5 of the IGA as well as the fact that responsibility of the French Govt and M/S DA was made 'Joint and Several' thus making the French Govt equally responsible to fulfill its obligations.

48. As regards Bank Guarantee, the three INT members had opined that the cost of Bank Guarantee under the MMRCA bid would have been 574 Million Euro and this benefit should have accrued to the Government as no Bank Guarantees were obtained under the IGA. The CAG has independently calculated the Bank Guarantee charges. The CAG calculated charges are around 7 times lower than the estimate of the three members of the Indian Negotiating Team. Even after taking into account that this is a saving by the vendor, the price in 36 Rafale aircraft procurement is lower than the audit aligned price from MMRCA bid.
49. The finally approved Article 5 of IGA by the DAC, provides that the payments are to be made to the dedicated bank accounts opened at the French Government controlled Bank, over which the French Party are to exercise control and monitoring for effective implementation of the IGA and the supply protocols.
50. The three members of the Indian Negotiating Team have on their own independent assessment of the capabilities of M/s Dassault Aviation, noted that M/s Dassault Aviation had an order book of 83 aircraft and with an annual production of eight aircraft, would take ten years to complete the pending orders and only thereafter the Indian order can be delivered. Thus in view of these three members, there was bound to be a delay in the delivery of Indian aircraft for which a Bank

Guarantee would have been essential to protect the interests of the country as almost 60% of the amount is to be paid before the delivery commences. This shows the danger of relying on incomplete information which is not even borne out by facts as they have emerged. The contract for the purchase of 36 Rafale aircraft was signed in September 2016 and the first aircraft is scheduled to be delivered to the country in September of 2019. The production and delivery schedule is monitored by High level committee with representatives of Government of France and India and the project is on schedule. Indian Air Force pilots and crew are already undergoing training in France to fly the aircraft. The CAG has held that there is an improvement in the delivery period under the 36 Rafale contract compared to the MMRCA bid. To quote the CAG (Page 140, Para 2.5 of the Report),

'However, Audit noted that as against the delivery period of 72 months in the earlier offer the contracted delivery schedule for 36 Rafale aircraft was actually 71 months. The ISE on the first aircraft would be completed by T_o+63 months and integration on the next 35 aircraft would be completed in 8 months. Thus, there was an improvement of one month in the delivery schedule of the 2016 contract.'

51. The Petitioners have stated that Defence minister was not consulted, Privilege had not been claimed as regard pricing on earlier occasions, Reliance Group paid 1.48 million Euros to Mr Hollande's partner's venture and RAL was not a legitimate offset partner. All these allegations are based on unsubstantiated media reports only. It is reiterated that the procurement process as laid down in the Defence Procurement Procedure (DPP)-2013 was followed in the procurement of 36 Rafale aircraft. The approval of DAC for procurement of 36 Rafale aircraft was taken, Indian Negotiating Team (INT) was constituted which conducted negotiations with the French side for about a year and approval of CCS being CFA was taken before signing the IGA.

RE-OBJECTIONS TO THE CAG REPORT

52. The petitioners have raised objections regarding the findings of the CAG on frivolous grounds viz. that it did not go into the issue of ex-post facto sanction accorded for Acceptance of Necessity on 13.05.2015, whereas, the declaration had already been made in Indo French Summit on 10.04.2015, and thus violating the DPP procedures, that the Off Set Contracts have not been examined by it, that it did not go into the issue of interference from PMO when the negotiations by the INT with the French Govt/M/s DA were in progress. It has also been assailed that the CAG also did not address the issue of dropping of anti-corruption clauses.

53. It is submitted that the Government has already submitted before this Hon'ble Court that *"through the Indo-French Joint Statement was issued on 10th April 2015, an intent was brought out for acquisition of 36 Rafale jets (two squadrons) in fly-away condition, on terms which would be better than conveyed by M/s Dassault Aviation in the process which was already underway"*. The DPP does not mandate approvals prior to conveying an intent or making an announcement. *The Government had also brought out the fact that "During this long period of inconclusive 126 MMRCA process, our adversaries inducted modern aircraft and upgraded their older versions. They acquired better capability air-to-air missiles and inducted their indigenous fighters in large numbers. Further, they modernized and inducted aircraft with advanced weapon and radar capabilities. As per available information, our adversaries inducted more than 400 fighters (equivalent to more than 20 Squadrons) during the period from 2010 to 2015. They not only inducted 4th Generation Aircraft but also inducted 5th Generation Stealth Fighter Aircraft. The combined effect of our own reducing combat potential and our adversaries enhancing their combat potential made the situation asymmetrical and extremely critical. As there was shortfall in number of fighter Squadrons, an urgent need was felt to arrest the decline in the number of fighter squadrons in IAF and enhance their combat capabilities."*

54. This court has also concluded interalia in para 22 @ pg 18 of the R.P as follows:

*"..... We are satisfied that there is no occasion to really doubt the process, and even if minor deviations have occurred, that would not result in either setting aside the contract or requiring a detailed scrutiny by the Court We have been informed that joint exercises have taken place and there is a financial advantage to our nation. It cannot be lost sight of, that these are contracts of defence procurement which should be subject to a different degree of and depth of judicial review. **Broadly, the processes have been followed.....**" [emphasis added].*

55. Regarding the offset contracts, the Govt has no role to play in award of offset contracts as per the IGA and it is entirely the decision of the OEM to award the Offset contracts, which would be intimated by the OEM to the Govt as per the stipulated time schedule which is yet to arrive, question of CAG examining the same at this stage does not arise. Further, Audit is in the process of finalization of separate Performance Audit Report on Management of Defence Offsets of these eleven Contracts.
56. Regarding the alleged interference by office of PMO, it is submitted that monitoring of the progress by the PMO of the Government to Government process cannot be construed as

interference or parallel negotiations. The then Hon'ble Raksha Mantri had recorded on file that ..."it appears that PMO and French President's office are monitoring the progress of the issues which was an outcome of the summit meeting."

57. That on the contrary, the CAG after an exhaustive analysis has concluded interalia as follows:-

i. The CAG report clearly brings out that the entire package price of the 36 Rafale procurement is 2.86% lower than the Audit Aligned price compared to MMRCA process.[Pg 150 of the affidavit dt 13.03.2019]

ii. That CAG report has also brought out that the delivery is better and also brought out the fact that Non Firm& Fixed (F&F) bids as done in the 36 Rafale IGA may be more advantageous than F&F as done in other contracts.[para 2.5 @ pg 154 of the affidavit dt 13.03.2019]

iii. CAG in its Audit Report under Chapter 5 at Para 5.3 [@ pg 36 of the affidavit dt 13.03.2019] has mentioned as under:

"Audit also noted that only in case of MMRCA, Indian Negotiation Team (INT) advised M/s Dassault Aviation to provide a Non-Firm & Fixed offer in 2016, although the RFP of 2007 had invited firm and fixed prices. This

change proved to be more beneficial. Initially (15 January 2016) Firm & Fixed price bid was invited by the Ministry and M/s DA had quoted `AX13' Million Euros. This was found to be too high and Ministry called (21 January 2016) for Non-Firm & Fixed price bid. The firm had quoted `T' Million Euros. Audit noted that at this price the total outgo of cash payments to the vendor till the completion of the contract would have been `EU' Million Euros (applying the vendor's price variation formula). Therefore, when compared to the Firm & Fixed offer of `AX13' Million Euros the cash outgo was `BX' billion Euro lesser in case of Non Firm & Fixed Offer."

iv. The audit has also commented upon the unrealistic benchmark price worked out by INT in this case.[@ pg 142-143 of the affidavit ibid]

v. The CAG Report has also mentioned in case of 126 MMRCA that the procurement which started in 2000 had made no progress even after lapse of 15 years and, in fact, failed on the twin issue of manpower costs and non-guarantee of aircraft to be manufactured by M/s HAL.[@pg 138-139 of the affidavit dt 03.03.2019].

vi. The CAG in its report has also noted that as against the delivery period of 72 months in the earlier offer the

contracted delivery schedule for 36 Rafale aircraft was actually 71 months. The ISE on the first aircraft would be completed by T_0+63 months and integration on the next 35 aircraft would be completed in 8 months. Thus, there was an improvement of one month in the delivery schedule of the 2016 contract.[@pg 154 of the affidavit].

58. On the petitioners allegation that a certain meeting details has not been provided to this Hon'ble Court, it is reiterated that the decisions by the Cabinet Committee on Security (CCS), the highest decision making body on security in defence matters and also by Defence Acquisition Council (DAC), the highest decision making body in M/o Defence have been made keeping in view all the facts of the case and the critical operational necessity of the Indian Air Force. The approval of CCS for procurement of 36 Rafale aircraft through IGA was granted on 24.08.2016. The CCS while granting necessary approvals directed MoD to work out payments through an escrow account or any other safeguards which the MoD shall work out in consultation with the French Government in Article 5 of the IGA. In view of the directions given by the CCS and some issues mentioned on file while seeking Hon'ble RM's approval for CCS note, some issues were placed before the DAC on 28.09.2016 for ratification and approval. The DAC ratified and approved the same on 28.09.2016.

59. The approval granted by the DAC was to ratify the approvals already granted in various DAC meetings and approval granted on file by the RM and also in compliance to directions of CCS. The Hon'ble Court in its judgment dated 14.12.2018 has already mentioned that **"It will not be correct for the Court to sit as an appellate authority to scrutinize each aspect of the process of acquisition"**.
60. As brought out earlier, files, records and documents were already made available to CAG. The Ministry has never denied providing files to the Hon'ble Supreme Court. The concern of the ministry is primarily on the availability of the information in the Public domain. The files shared with the CAG are not made available in the Public domain. Petitioners continue to provide selective and incomplete picture even in their rejoinder affidavit conveniently ignoring the conclusions of CAG.

LALITHA KUMARI CASE/JUDGEMENT NOT ATTRACTED

61. That the submission of the petitioners that it is mandatory to direct registration of an FIR and investigation by the CBI because of the decision of this Hon'ble Court in Lalitha Kumari's case (2014) 2 SCC 1 is completely misplaced. It is submitted that disclosing prima facie that a cognizable offence

is committed is mandatory, which is lacking in the present case. (1982) 1 SCC 561 & (2018) 3 SCC 104 relied upon. Especially, once this Hon'ble Court had come to the conclusion that on all the three aspects ie., the decision making process, pricing and Indian Offset Partner, there is no reason for intervention by this Hon'ble Court on the sensitive issue of purchase of 36 Rafale fighter aircrafts by the Indian Government, there is no question of either registration of FIR much less any investigation by the CBI.

62. The above claims and contentions of petitioners itself is misleading as the Court in its order on 14.12.2018 has clearly dismissed all the Writ Petitions. Once this Hon'ble Court has held that perception of individuals cannot be the basis of a fishing and roving enquiry, no cognizable offence(s) is even made out prima facie so as to order registration of an FIR. .

MEDIA REPORTS & FILE NOTING

63. That it is submitted that media reports attached as Annexures P/1 and P/2 to the Review Petition @ Pg 63-71 are dated 24.12.2018 and 16.12.2018 respectively. These are thus post judgement articles apparently aimed at re-opening the issue. Annexure P/5 @ pg 78-80 is a media report dated 14.12.2018 the same day when the judgment came to be delivered, whereas, Annexures P/3; P/6 and P/7 are articles dated

28.11.2018; 02.12.2018 and 15.11.2018 @ pg 72-73; 81-83; 84 published much prior to the judgment.

64. That these three articles apart from expressing view point of some of the retired functionaries/individuals are not final decision of the Union Government nor do they in any manner convey the complete official stand of the Union. In any case these were already in public domain according to the petitioners own admission, and if any support is liable to be gathered therefrom to advance the case of the petitioners, then the same ought to have been placed before this Hon'ble Court at the time of original hearing. It is submitted that on the strength of these unsubstantiated media reports, the petitioners cannot seek review of the judgement and order.
65. That it is submitted that Annexure P/4 @pg 74-77 is an internal file noting from the Secret File of the Ministry of Defence wherein various views and legal advice rendered by different agencies at different stages of the procurement process have been reflected/recorded. It is submitted that these are incomplete file noting containing views expressed by various functionaries at different times and not the final decision of the competent authority of the Union Government. It is well settled by this Hon'ble Court that in governmental functioning files are generally examined/seen by various agencies and functionaries in the hierarchy. While doing so there is free and frank expression of views /candour of opinion

expressed by the functionaries. These internal file noting and views contained therein are mere expression of opinion/views for consideration of the competent authority for taking final decision in the matter. It cannot form the basis for a litigant to question the final decision. Therefore, there is no ground made out either for entertaining the review petition on this ground either.

66. That according to petitioners own admission the review has been sought inter alia on the basis of subsequent information that has come to light. It is submitted that the subsequent information are nothing but unsubstantiated media reports and or part internal file noting deliberately projected in a selective manner, which for reasons set out above cannot form the basis for a review.

NO CONCEALMENT / PRESENTATION OF FALSE FACTS

67. The petitioners have repeatedly argued that the Govt has suppressed and concealed material facts and that false and fabricated information were placed before the court and thus committed perjury. These are not only allegations devoid of merit but are conjectures. It is submitted that pursuant to the orders dt 10.10.2018 and 31.10.2018, the facts regarding decision making process and pricing details were submitted to this Hon'ble Court in sealed covers. Such of the information which could be legitimately shared was also supplied to the

petitioners in redacted form. It is submitted that even the CAG has presented only the redacted report to the Parliament. The submission that Parliament has been apprised about price of the contract is also not correct since the Parliament has only been apprised about the basic price of the air frame and not the complete price to include its avionics, weaponry etc.

68. It is submitted that the Government has placed the facts before the Court by first placing the information in sealed envelopes on the directions of the Court and subsequently reaffirming on oath what had been stated earlier and countering the Review Petition, the Interlocutory Application for seeking fresh documents and the Perjury Petition through affidavits. All the submissions made before the Hon'ble Court are based on the records of the final decisions taken by competent authorities i.e. Hon'ble Raksha Mantri/ Defence Acquisition Council (DAC)/ Cabinet Committee on Security (CCS).
69. The petitioners have submitted that the UOI has misled this Hon'ble Court in stating that the CAG report has already been submitted to the Parliament when the judgement dt 14.12.2018 was rendered. Such an assertion is completely false and preposterous.

70. It is submitted that this Hon'ble Court delivered its judgement on 14.12.2018. On perusal of the detailed order a mismatch was observed in some contents of Para 25 of the judgement as compared to the details submitted to this Hon'ble Court in a sealed cover along with pricing details in a separate sealed cover. However in order to correct the mismatch vis-a-vis the factual position submitted to this Hon'ble Court necessary correct application was filed on 15.12.2018 i.e. on the very next day of the judgment on behalf of the Union of India and the same is pending consideration of this Hon'ble Court. It is submitted that in any case the mismatch does not in any manner either directly or indirectly affect the main judgement and it is not a substantial or grave error as contended since the fact of the matter is that the conclusions of the CAG Report which has gone through the Decision Making Process and pricing in detail are not supporting any of the allegations made by the Petitioners. The petitioners have made a big hue and cry about this error which crept in due to a misunderstanding of the language while they have never once referred to the report of the CAG in their Perjury Petition filed on 15th February 2019, two days after the report of the CAG was placed in the Parliament.
71. It is submitted that the articles published in the media have sensationalised the issue by selectively publishing certain aspects. The petitioners heavily relied on this incomplete and

selective published information and have apparently made efforts to mislead this Hon'ble Court.

72. It is submitted that the IGA for 36 Rafale procurement is between the two sovereign nations and the implementation of the project which is on schedule is being closely monitored by both the Governments. The adequate safeguards are built into IGA for ensuring smooth implementation of the project. The training of Indian Air Force personnel is underway in France. Any attempt to bring this procurement under cloud may result into delay in implementation of the project and would affect the operational preparedness of Indian Air Force.
73. The petitioners are not entitled to any relief as prayed for and the Review Petition is liable to be dismissed. Prayed accordingly.

New Delhi

[A.K.SHARMA]

23.05.2019

ADVOCATE FOR UNION OF INDIA