IN THE SUPREME COURT OF INDIA

REVIEW JURISDICITON

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

REPLY AFFIDAVIT ON BEHALF OF

RESPONDENT NO 2

1. I, Sanjai Singh, S/O Late Shri Vidya Prasad Singh, aged about 53 years, working as Joint Secretary & Acquisition Manager (Air) in the Ministry of Defence at New Delhi, do hereby solemnly affirm and state as under.

2. That am working as Joint Secretary & Acquisition Manager (Air) in the Ministry of Defence and in such capacity am conversant with the facts of the case as derived from official records and am competent and duly authorized to file the

present reply affidavit on behalf of the answering Respondent.

3. That I have gone through the contents of the Review Petition filed by the Petitioners, and I deny the contents thereof and grounds raised therein individually and specifically, except those which are matter of official record, and facts which have been specifically admitted in this affidavit. It is submitted that any fact and or issue raised in the Review Petition not specifically traversed in the reply affidavit may not be taken as admission on behalf of the answering respondent, but the same shall be deemed to have been traversed and denied unless specifically admitted.

PRELIMINARY SUBMISSIONS

4. That before giving paragraph wise reply, the answering respondent would like to make the following preliminary submissions.

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, it is respectfully submitted, lays down the correct law and sets a forceful precedent to be followed if such cases arise in future. This Hon"ble Court has fittingly observed, in paragraph 5 of the judgment, that

> *"Adequate Military strength and capability to discourage and withstand external aggression and to protect the sovereignty and integrity of India, undoubtedly is a matter of utmost concern for the Nation. The empowerment of defence forces with adequate technology and material*

support is, therefore, a matter of vital importance."

6. That a similar note is struck in paragraph 11 of the judgment, where this Hon"ble Court observes:

"The scrutiny of the challenges before us, therefore, will have to be made keeping in mind the confines of national security, the subject of the procurement being crucial to the nation"s sovereignty."

7. That the judgment also rightly relies on the earlier decision of this Hon"ble Court in *Reliance Airport Developers (P) Ltd v Airports Authority of India & Ors.* – (2006) 10 SCC 1, which had laid down the principle that:

"*there are certain areas of governmental activity, national security being the paradigm, which the courts regard themselves as incompetent to investigate, beyond an initial decision as to whether the Government"s claim is bonafide. In this kind of non-justiciable areas judicial review is not entirely excluded, but very limited"*.

8. That it had also been observed in that case that

> "*many prerogative powers are in fact concerned with sensitive, non-justiciable areas, for example foreign affairs, but some are reviewable in principle, including where national security is not involved.*"

9. That the following further passages from the judgment dated 14.12.2018 highlight its unassailable reasoning and foundation, as well as the factual basis on which this Hon"ble Court rejected the misconceived writ petition filed by the petitioners herein:

> *"19. …….. The stalemate resulted in the process of RFP withdrawal being initiated in March, 2015. In this interregnum period, adversaries of the country, qua defence issues, inducted modern aircrafts and upgraded their older versions. This included induction of even 5th Generation Stealth Fighter Aircrafts of almost 20 squadrons, effectively reducing the combat*

potential of our defence forces."
(emphasis supplied)

"22. …… ……. ……. We cannot sit in judgment over the wisdom of deciding to go in for purchase of 36 aircrafts in place of 126. We cannot possibly compel the Government to go in for purchase of 126 aircraft…… …… …….
Our country cannot afford to be unprepared/ underprepared in a situation where our adversaries are stated to have acquired not only 4th Generation, but even 5th Generation Aircrafts, of which, we have none. It will not be correct for the Court to sit as an appellate authority to scrutinize each aspect of the process of acquisition."

10. The 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, are established by the application now filed by the petitioners themselves, wherein

the production of the following documents has been prayed for:

(i) Work Share agreement between HAL & Dassault referred to by Mr. T. Suvarna Raju, the former Chairman of HAL;

(ii) Final INT report dated 21.07.2016;

(iii) Record of Minutes of Meeting of the Defence Acquisition Council dated 13.05.2015, 11.01.2016 and 14.07.2016.

(iv) Record of consultation with the Ministry of Finance & Ministry of Law & Justice subsequent to the finalization of the INT report;

(v) The minutes of meetings of the Cabinet Committee on Security dated 24.08.2016 where the decision was taken to increase the price by almost 2.5 billion euros from the Benchmark Price, Sovereign Guarantee and Bank Guarantees were dispensed with, the seat of arbitration was changed;

(vi) The minutes of meetings before signing of contract on 23.09.2016 where

„escrow account“ too was dropped and „Letter of Comfort“ from France accepted, standard provisions relating to „use of undue influence“, „Agents/Agency Commissions“ & access to „Book of Accounts“ were inter alia dropped disregarding objections of domain experts in INT, Ministry of Defence, & Ministry of Law & Justice;

(vii) The record on the basis of which the CCS took the aforementioned decisions.

The very demand for these documents is telling, in as much as it is evident that not even a prima facie case exists in favour of the petitioners. On the other hand, the petitioners now seek to obtain a large number of documents from the Government in order to attempt to somehow create a prima facie case on the basis of which the intervention of this Hon“ble Court could be sought. The review petition is, therefore, wholly without merit and is liable to be rejected outright by this Hon“ble Court.

11 The judgment of the Court dtd 10th April 2019 would imply that any document marked Secret obtained by whatever means and placed in public domain can be used without attracting any penal action. This has happened in the case of Combat Aircraft which the Court has upheld by its judgment dated 10th April, 2019. This could lead to the revelation of all closely guarded State Secrets relating to space, nuclear installations, strategic defence capabilities, operational deployment of forces, intelligence resources in the country and outside, counter-terrorism and counter insurgency measures etc. This could have implications in the financial sector also if say budget proposals are published before they are presented in Parliament. Such disclosures of Secret Government information will have grave repercussions on the very existence of the Indian State.

The petitioners have on the basis of the judgment of the Court sought certain papers and files from

the Ministry of Defence. The judgment of the Court opens the window for any person making the request not only to seek papers from Ministry of Defence but from other Ministries and Departments dealing with subjects mentioned above if they are stolen and placed in public domain by the Press or a Website. All papers and files have been made available to the CAG who has given his Report concluding that the price of 36 Rafale is 2.86% lower than the audit aligned price, apart from additional benefits which would accrue because of change from firm and fixed pricing to non-firm price. This could be possible under the IGA route. The Government remains committed to provide to the Court any document or file which it desires to peruse.

12. That it is most humbly submitted that this Hon"ble Court while dismissing the Writ Petition by judgement and order dated 14.12.2018, has interalia held:

> *"…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].*

13. That it is submitted that this 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 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,…..**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].*

14. That similarly, on the issue of pricing, it has been concluded by this Hon"ble Court in paragraph 26 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].

15. 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 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].*

16. 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.

17. 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 notings procured 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. A non existent distinction is sought to be created between an inquiry by the CBI and by the Court by playing on words. Once the Court has held that perceptions of individuals can not be the basis of a fishing and roving inquiry by this Court, there is no basis for a fishing and roving inquiry by the CBI.

18. That it is submitted that media reports cannot form the basis for seeking review of the judgement since it is well settled that Courts do not take decisions on the basis of media reports. This legal position apart, it is submitted that the media reports attached as Annexures P/1 and P/2 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 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 published much prior to the judgment. 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.

19. That it is submitted that Annexure P/4 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 notings 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 notings 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.

20. That according to petitioners own admission the review has been sought interalia 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 notings deliberately projected in a selective manner, which for reasons set out above cannot form the basis for a review.

It is submitted that the papers/documents from the Government side which are alleged by the petitioners as unsigned, misleading and not supported by an affidavit, were provided to the petitioners as per this Hon"ble Court Orders dated 31.10.2018 through a forwarding letter No. 8(7)/US D(Air-I)/2018 dated 09.11.2018 addressed to Government Advocate/ Advocate-on-Record duly signed by the concerned Under Secretary, Ministry of Defence. These

papers/documents are based on available official records and finalized with approval of the competent authority. The Hon“ble Court had not directed to provide these papers/documents by way of an affidavit. The information contained in these papers was same as provided to the Hon“ble Court in sealed covers, except the classified information.

PARAWISE REPLY

1-2. That the contents are matter of record. But is denied that there is error apparent on the face of record so as to warrant review of the judgement. The reply given in the preliminary submissions made herein above are reiterated.

3. That the contention of the petitioners that the prayer for registration of FIR and investigation by the CBI has not been dealt with is preposterous to say the least. 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. A non existent distinction is sought to be created between an inquiry by the CBI and by the Court by playing on words. Once the Court has held that perceptions of individuals can not be the basis of a fishing and roving inquiry by this Court, there is no basis for a fishing and roving inquiry by the CBI.

3.1-3.2. That the contents of paragraphs are self serving statements of petitioners except reference made to contents of writ petition, certain rules and decision rendered by this Hon“ble Court. It is submitted that the decision rendered by this Hon“ble Court in Lalitha Kumari“s case is not attracted in the facts and circumstances of the present case.

3.3-3.4. It is submitted that this Hon“ble Court has already concluded emphatically that the perceptions of the individuals cannot be the basis of fishing and roving enquiry on this sensitive defence issue. In any case there is benefit of availability of CAG Report already placed on record by the answering respondent vide its affidavit dated 13.03.2019, which does not give any basis for undertaking any enquiry. It is submitted that an attempt to bring this procurement under cloud will have serious impact on national security with the current security environment in the country and in neigbouring countries being well known.

It is submitted that paras (a) to (e) of sub para 3.4 are reference to various paragraphs of the judgement which is matter of record. The rest of the contents of the sub-paras are denied being petitioners own perception.

3.5. Regarding the contention for CBI enquiry, the reply given in preceding paras is reiterated.

4.1. In reply it is submitted that this Hon"ble Court has been provided with the pricing details in sealed cover. Keeping in view the sensitivity involved, it did not direct the Government to share the pricing details with the petitioners. Even the CAG has presented the redacted report to the Parliament. The pricing details have been thoroughly scrutinized by the CAG and the report has concluded that the entire package price of the 36 Rafale procurement is 2.86% lower than the audit aligned price compared to MMRCA process apart from additional benefits which would accrue because of change from firm and fixed pricing to non-firm price which was possible under the IGA route.. Therefore, the main argument of the petitioners regarding exorbitant price is not supported by the report of constitutional body i.e. CAG which has the technical expertise to scrutinize this procurement. It is submitted that reference to SP Gupta"s case is neither relevant nor attracted in the facts of the present case.

4.2. a) That it is denied that any false averments were made in the note submitted by the government to this Hon“ble Court. The reliance placed on letter dated 12.11.2018 of retired bureaucrats is apparently perception of individuals on the basis of which no fishing or roving enquiry can be ordered as concluded by this Hon“ble Court.

b) In reply it is submitted that this Hon“ble Court delivered its judgement on 14.12.2018. On perusal of the detailed order a mis-match 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 mis-match vis-a vis the factual position submitted to this Hon“ble Court for

necessary correction, an Application for correction 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 mis-match does not in any manner either directly or indirectly affect the main judgement and it is not a substantial error as contended as is clear from the observations of CAG on pricing etc. brought out in succeeding paras of this reply. Therefore, the assertions made by petitioners regarding falsity etc in sub paras (b), (c) (d) (e) are denied.

4.3. That in reply it is submitted that a copy of the Press release issued by Ministry of Defence on 22.09.2018 was provided to the petitioners and the same was also placed before this Hon"ble Court. The Press release 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. The petitioners are again trying to create unnecessary controversy in this regard. The allegation is denied being utterly preposterously untrue and far-fetched.

4.4 In reply it is submitted that during the presence of the senior Air Force Officers in the Hon"ble Supreme Court on 14.11.2018, apart from technical questions, which were orally answered by Air Force Officers, certain other questions were also asked by the Hon"ble Supreme Court where responses were formulated based upon the inputs of Air Force Officers/ information provided by Air HQs. Therefore, attempt of the petitioners to distinguish between Ministry of Defence and Air Force Officers may not be correct as Indian

Air Force is an integral part of the Ministry of Defence.

5.1. In reply it is submitted that the petitioners are relying on the media reports and statement of individual functionaries. The CAG audit report clearly states that in case of 126 MMRCA 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 calculation of manpower costs of production of aircraft in India and non-guarantee of aircraft by M/s Dassault Aviation, the OEM for aircraft to be licence manufactured by M/s HAL in India. In fact, this Hon"ble Court has also observed the facts in paragraphs 2, 3 and 22 of the judgement.

Even the CAG report mentions that "*the committee recommended in March, 2015 that the RFP for the procurement of MMRCA may be withdrawn"*. The Government note submitted to this Hon"ble Court rightly

mentions that process for withdrawal of RFP was initiated in March, 2015.

Regarding the contents of sub para (a) it is submitted that it goes without saying that business entities will always present most optimistic scenario in public domain related with their activities which have been boastfully quoted by petitioners relying on media reports in order to prove the Government wrong. Even their misplaced arguments are contradictory to what a constitutional body i.e. CAG has mentioned in its report as quoted above. Further such decision making in the Government is carried out in a confidential manner and there is no reason for a private entity to have prior knowledge if such a decision is being contemplated by the Government. (b) it is submitted that even according to the press release sought to be relied upon, it was merely an "understanding" as the release itself mentions and hence there is no room for any investigation on this score.

5.2 In reply it is submitted that the CAG audit has extensively dealt in its report the case of 126 MMRCA 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 calculation of manpower costs of production of aircraft in India and non-guarantee of aircraft to be manufactured by M/s HAL. Therefore, para 18 correctly records the factual position and there is no error. Therefore, the contents of sub paras (b) to (d) are misconceived and have no bearing on the issue in view of categorical findings recorded by the CAG.

6-7 In reply it is submitted that the Petitioners have stated that procedures as mandated by the DPP were not followed when it was announced on 10 April 2015 and ex-post-facto AON was granted in the procurement of 36 Rafale. Petitioners have stated that this Hon“ble Court had not considered material facts. It is

submitted that the Government has already submitted to this Hon"ble Court that "*through the Indo-French Joint Statement 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*". 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 ……, an urgent need was felt to arrest the decline in the number of fighter squadrons in IAF and enhance their combat capabilities."

In so far as the concerns raised by few INT members, as mandated by the DAC, the INT undertook a collegiate process involving due deliberations and diligence at various levels during the negotiations. The concerns raised by members of the INT were deliberated, recorded and addressed, while ensuring utmost integrity and transparency in the process, allowing opinions to be freely expressed, recorded, discussed and, if necessary, modified. All the concerns raised

were addressed in a collegiate manner. Aspects pertaining to the responsibility and obligations of French Government, pricing, delivery schedule, maintenance terms, offsets, IGA terms, etc. were discussed and negotiated with the French side during the INT meetings.

After the concerns were raised on 01 June 2016, two more INT meetings were held between the members of the INT on 09-10 June 2016 and 18 July 2016, respectively, wherein the concerns raised by the Members were duly deliberated and appropriate steps were taken to address these concerns. Certain concerns raised by the three members were also referred to the DAC. The INT report indicated better terms and conditions arrived at as a result of negotiation as compared to 126 MMRCA case and achievements of Negotiating Team. Incidentally, the then JS & AM (Air), was one of the three signatories to the note bringing out some concerns. The

same Officer subsequently processed the case in MoD and signed the note for CCS approval. 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.

The points raised by the petitioners were already heard in detail by this Hon“ble Court

on 14.11.2018 which are being repeated again by petitioners and these issues were covered during the hearing in the Court. Now, CAG report has covered the pricing and procedural aspects in detail. The CAG report brings out interalia the following :

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.*

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.*

iii) *CAG in its Audit Report under Chapter 5 at Para 5.3 on Page 22 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.

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.

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.

Even if we take into account the Bank Guarantee charges calculated by CAG and reduce it from the difference of 2.86% between the contract price and the audit aligned price, the contract signed is still much cheaper than the audit aligned price. It may also be noted that the estimate of the Bank Guarantee charges by three members of the INT is multiple times higher than the Bank Guarantee charges estimated by the CAG and is a reflection of the danger in relying on incomplete information.

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 matters of individual perceptions. All relevant provisions of DPP

have been followed. Allegations regarding the Reliance Group are based on unsubstantiated media reports. 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 holding 48 internal and 26 external meetings with the French side and approval of CCS being CFA was taken before signing the IGA.

A comparison has been made to revelation of pricing in public domain of Mirage 2000 Upgrade contract where package price had been revealed. The basic price of flyaway aircraft has already been revealed to the Parliament. A submission was already made to this Hon"ble Court regarding

secrecy of pricing details. Even CAG in its report placed in Parliament on 13.02.2019 has presented a redacted report. This Hon"ble Court and CAG have considered the sensitivities and national security implications in this regard. The main reason for insistence on revelation of pricing details by petitioners has been to prove that Government is hiding pricing details in 36 Rafale case as it has paid exorbitant price. The CAG report clearly says otherwise. It clearly mentions that the entire package price of the 36 Rafale procurement is 2.86% lower than the audit aligned price compared to MMRCA process apart from additional benefits which would accrue because of change from firm and fixed pricing to non-firm price which was possible under the IGA route.

8.1. In reply it is submitted that the Petitioners have brought out that they have access to

subsequent information relating to certain notings of the Ministry. The petitioners are referring to the classified file notings of SECRET nature on the concerns raised by three members of the INT on 01 June 2016. The bringing out of the concerns of INT Members by petitioners are selective and do not bring out the subsequent actions taken and how the concerns were addressed and decisions taken by the competent authority.

As mandated by the DAC, the INT undertook a collegiate process involving due deliberations and diligence at various levels during the negotiations. The concerns raised by members of the INT were deliberated, recorded and addressed, while ensuring utmost integrity and transparency in the process, allowing opinions to be freely expressed, recorded, discussed and if necessary modified. All the concerns raised were addressed in a

collegiate manner. Aspects pertaining to the responsibility and obligations of French Government, pricing, delivery schedule, maintenance terms, offsets, IGA terms, etc. were discussed internally and negotiated with the French side during the INT meetings.

After the concerns were raised on 01 June 2016, two more INT meetings were held between the members of the INT on 09-10 June 2016 and 18 July 2016, respectively. Certain concerns raised by the three members were also referred to the DAC. The INT report also indicated better terms and conditions arrived at as a result of negotiations as compared to 126 MMRCA case and achievements of Negotiating Team. 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. Therefore, the contentions

advanced by the petitioners are inconclusive and based on incomplete file notings.

The CAG has already brought out in its report the unrealistic benchmark price fixed by INT and better price arrived at in 36 Rafale procurement case as compared to MMRCA process. It may also be noted that one unfounded conjecture of the three members of the INT was that M/s Dassault has an order book of 83 planes due to which they can not deliver the 36 planes being ordered by India before 10 years. The project is currently as per schedule with the first plane to be delivered in September 2019 as per the contracted schedule of delivery.

8.2. In reply it is submitted that waiver of Sovereign / Bank Guarantee in Government to Government Agreements/ Contracts is not unusual. It is submitted

that in Contracts concerning Russian Federation contracts signed with Rosoboronexport of Russia, the requirement of Bank Guarantees is waived off in view of the assurance provided through a *„Letter of Comfort"* from the Government of the Russian Federation. Similarly, 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.

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

It has also been brought out to the CCS 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"*.

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.

8.3. In reply it is submitted that the Petitioners, referring to media articles, have brought out that there was political decision to increase the benchmark price.

It is submitted that even the CAG in its report has adversely commented on the unrealistically low benchmark in both the MMRCA and the 36 Rafale case.

The DAC on 28 August – 01 September 2015 had directed that better terms should be in terms of price, delivery schedule and maintenance. The better price in case of 36 Rafale as compared to 126 MMRCA has been acknowledged by the CAG audit. The price discovery of 126 MMRCA was determined out of a global competitive tender. The reasonability of the price for 36 Rafale through the IGA has been established by CAG audit.

It is pertinent to note that the CAG conducted performance audit of the procurement of Medium Multi Role Combat Aircraft (MMRCA) including the procurement of 36 Rafale aircraft. Access to all files, notings, letters, etc related to

the said procurement, including the full pricing details, have been shared with the CAG audit team which scrutinized the records and took about two years and prepared their report. The initial observations and findings of the audit were clarified through additional information and discussions. Face to face discussions were also conducted to bring clarity in the procurement process and related aspects. The CAG in its report tabled in the Parliament on 13 Feb 19, has brought out that "usually, in the IGAs for defence capital assets, there are no comparable costs".

The observations of the CAG as mentioned in the above paragraphs clearly negates the submissions put forward by the petitioners.

The issue of Rafale procurement was also thoroughly debated in the Lok Sabha and

Hon"ble Raksha Mantri gave a detailed reply on 04.01.2019 suitably addressing all the issues. It is submitted that the Government has moved in a very decisive manner for 36 Rafale procurement in view of critical operational necessity. While the past process of 126 MMRCA could not come to a conclusion in 15 years (Also commented by CAG audit report), government could conclude 36 Rafale procurement process in about one and half years. The implementation of 36 Rafale procurement is on schedule with the deliveries of the aircraft commencing September, 2019. Training for the IAF team has already commenced in France.

9. That the contents are matter of record.

10 That in view of submissions made herein above the contents of Grounds A to E are denied. The reply given herein above may be read as part and parcel of reply to Grounds as well.

11. The petitioners are not entitled to any relief as prayed for and the Review Petition is liable to be dismissed. Prayed accordingly.

DEPONENT

VERIFICATION:

I, the above named Deponent do hereby verify that the contents of my foregoing affidavit are true and correct. No part of it is false and nothing material has been concealed there from.

Verified at New Delhi on this _____ day of May, 2019.

DEPONENT