

IN THE SUPREME COURT OF INDIA
REVIEW JURISDICTION
REVIEW PETITION (CRL) NO. 46/2019
IN
WRIT PETITION (CRL) NO. 298/2018

IN THE MATTER OF:

YASHWANT SINHA & ORS.

...PETITIONERS

VERSUS

CENTRAL BUREAU OF INVESTIGATION &

RESPONDENTS

REJOINDER AFFIDAVIT ON BEHALF OF PETITIONERS TO
REPLY AFFIDAVITS DATED 04.05.2019

PAPERBOOK

(FOR INDEX KINDLY SEE INSIDE)

PRASHANT BHUSHAN PETITIONERS IN PERSON

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1. I, Prashant Bhushan, S/o Sh. Shanti Bhushan, aged about 63 years, R/o House No. B-16, Sector 14, Noida, Uttar Pradesh - 201301, presently at New Delhi, India, do hereby solemnly affirm and state as under.
2. That I am Petitioner No. 3 in the above mentioned Petition and as such conversant with the facts of this case and am competent and duly authorised to file the present rejoinder affidavit on behalf of the petitioners.
3. That the present affidavit is being filed pursuant to the orders of the Hon'ble Court on 06.05.2019, wherein it was stated, "*The present matters and Contempt Petition (Criminal) No. 3/2019 be listed together on 10.5.2019 at 2.00 p.m. We make it clear that the hearing scheduled for 10.5.2019 would be taken up and parties shall make an endeavour to complete the same on the said date. Rejoinder to the replies of Union of India may be filed, in the meantime.*"
4. That the contents of the present affidavit may be read along with the Review Petition 46/2019, IA 71047/2019, & MA 403/2019.

5. That the Union of India's three broad contentions are that the Review is not justified; (i) because the matter pertains to National Security therefore scope of Judicial Review is constrained (ii) because the petitioners cannot ask for a "roving & fishing inquiry" on the basis of subsequent media reports, and (iii) because the C&AG has given its final report after considering all records and not found any wrongdoing with this contract. These contentions are untenable.
6. The petitioners prayer in W.P. 298 of 2018 for directions to the CBI to take action on the complaint that was made to it on 04.10.2018 is required to be assessed in terms of the law laid down by a Constitutional Bench of this Hon'ble Court in *Lalitha Kumari v Union of India* (2014) 2 SCC 1 that states that if the complaint prima facie discloses the commission of a cognizable offence then an FIR has to mandatorily be registered and investigated. CBI can do a Preliminary Enquiry (PE) in complaints regarding Prevention of Corruption Act and if it finds no merit, it is open to CBI to submit a status report to that effect. Whether CBI does a PE or investigation, in each case it is required to maintain a record of the actions that it has taken. That in the instant case the CBI has taken no action on the complaint of the Petitioners.
7. The petitioners prayer was not considered and the petition was dismissed as if the petitioners were seeking a cancellation of the contract or review of the contract.
8. That the petitioners have brought material on record that shows that the procurement suffered from various problems. These include:
- a. The ex post facto AON that was granted on 13.05.2015 after the announcement of the deal on 10.04.2015.
 - b. Parallel negotiations being conducted by officials in the PMO which were objected to by the Ministry of Defence.
 - c. The objections of Ministry of Law & Justice & Ministry of Defence to removal of various Standard Clauses of the contract such as Sovereign Guarantee & Seat of Arbitration considered necessary for the deal as it was an Inter-Governmental Agreement.

- d. Strong objections of the Domain Experts in the Indian Negotiating Team *inter alia* to the increase in the Benchmark price, Delivery Schedule, Sovereign Guarantee, Seat of Arbitration and provisions in Offset Contract.
 - e. The surreptitious amendment that was introduced in August, 2015, in the Technical Offset Proposal against Public Interest and which is in contradiction to the requirements for disclosure of the Indian Offset Partner in the Commercial Offset Proposal which is required to be 'approved' by the Raksha Mantri before the signing of the main offset contract.
9. That it is clear that the government misled the Hon'ble Court on various counts in the notes that were submitted in a sealed cover. The government has also suppressed material and relevant information from the Hon'ble Court and obtained the impugned judgement on the basis of the fraud played upon the Hon'ble Court by the government.
10. That even now the government is not disclosing that contrary to what was submitted in the sealed covers, the Cabinet Committee on Security met once again in the month of September, 2016, to *inter alia* drop Standard Clauses which are meant to ensure probity, transparency, and check corruption. The clauses pertain to the Use of Undue Influence, Agents/Agency Commission, & Access to Book of Accounts of the Industrial Suppliers. No basis has been given as to why these basic measures of prudence were dropped. A copy of note from Ministry of Defence recording the eight last minute changes that were approved by the DAC on directions from the CCS is annexed as **Annexure 1 at Pages**
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11. That the continued suppression of relevant and material information by the government is the reason for the petitioners to seek production of relevant and material documents before the Hon'ble Court which cannot be considered as seeking a 'fishing and roving' inquiry.

12. That the C&AG's report on which heavy reliance is sought to be placed by the government should be assessed in light of the following;

- a. The government predicted that C&AG would redact the final report and it has.
- b. This is despite the C&AG's admission that there is no precedence for reacting commercial details from an audit.
- c. The C&AG's report is silent on the ex post facto AON that was granted.
- d. The C&AG's report is silent on the parallel negotiations.
- e. The C&AG's report is silent on the dropping of the Standard Clauses meant to ensure probity and transparency in every procurement.
- f. The C&AG's report does not address the issue of Offsets and proposes to do a separate audit for the same.
- g. The C&AG's report concedes that waiver of Bank Guarantees was a saving for Dassault & yet fails to account for impact of the same when stating that the 36 aircraft procurement was 2.86% cheaper than the 126 aircraft procurement. The INT domain experts had calculated the impact of Bank Guarantees at 574 million Euros.

13. Given that the impugned judgment has been obtained through multiple falsehoods and suppression of material and relevant information it needs to be recalled and reviewed for the reasons and grounds stated above and in the Review Petition and Perjury Application.

14. 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 8th day of May, 2019

DEPONENT

Decisions

The DAC ratified and approved the following:-

- a) Revised Article 5 of the IGA.
- b) Revised Clause 21 (Arbitration) of the Supply Protocols.
- c) Non-inclusion of the Standard DPP Clauses related to 'Penalty for undue Influence', 'Agents/Agency Commission' and 'Access to accounts' in the Supply Protocols.
- d) Minor Variations from DPP 2013 guidelines for Clauses 1.1, 10.3.1, 27 and 29 of Aircraft and Weapons Package Supply Protocols and of Weapons Package Supply Protocol.
- e) Inclusion of additional Articles 9 to 17 of Offset Contracts of those specified in model Offset Contract of DPP 2013.

Revised Article 9 of the Offset Contracts aligned with the Annexure of the Supply Protocols.

f) Revised Article 12 of the Offset Contracts aligned with the model contract.

g) Revised Offset Schedules of DA and MBDA.

(Ajit Kumar P)
Vice Adm
DCIDS (PP&FD)