IN THE SUPREME COURT OF INDIA

[REVIEW JURISDICTION]

REVIEW PETITION (Cr) No. OF 2018

(Under Article 137 of the Constitution of India)

IN

WRIT PETITION (CRIMINAL) No. 298 OF 2018

IN THE MATTER OF:-

1. Yashwant Sinha
   S/o BipinBihari Saran
   R/o House No. 228, Sector 15-A
   Noida, Uttar Pradesh - 201301
   Ph:
   Email: …Petitioner No. 1

2. Arun Shourie
   S/o HariDev Shourie
   R/o House No. A-31, West End Colony
   New Delhi -110021
   Ph:
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3. Prashant Bhushan
   S/o Shanti Bhushan
   R/o House No. B-16,Sector 14
   Noida, Uttar Pradesh -201301
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Versus

1. Central Bureau of Investigation
   Through it's Director,
   Plot No. 5-B, 6th Floor, CGO Complex
   Lodhi Road, New Delhi -110003 …Respondent No. 1

2. Union of India
   Through it's Cabinet Secretary
   Cabinet Secretariat
   New Delhi -110001 …Respondent No. 2

PETITION UNDER ARTICLE 137 OF THE CONSTITUTION OF INDIA READ WITH ORDER XLVII OF SUPREME COURT RULES, 2013, SEEKING REVIEW OF JUDGEMENT DATED 14.12.2018 IN WRIT PETITION (CRIMINAL) NO. 298 OF 2018

To, ——

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

The Humble Petition of the

Petitioners above-named

MOST RESPECTFULLY SHEWETH:-

1. That the instant petition seeks review of judgement dated 14.12.2018 of the Hon'ble Court in W.P.(Cr) 298 of 2018 as the impugned judgement is based on errors apparent on the face of the record and subsequent information has come to light non consideration of which will cause grave miscarriage of justice.

2. That for the sake of brevity not all the averments in the petition in W.P. (Cr.) 298 of 2018 are reiterated herein but they may be taken as part and parcel of the present petition.

(I) Errors apparent on the face of the record

3.*Prayer of petitioners for registration of FIR and investigation by CBI not dealt with and instead the contract has been reviewed prematurely without the benefit of any investigation or inquiry into disputed questions of facts.*

3.1. That the impugned judgment conflates the prayer of petitioners in W.P. (Cr) 298 of 2018 with those in connected matters. The judgement is rendered *qua* the prayers in connected petitions that the Hon'ble Court described as "*inadequate and deficient*". In it's order dated 10.10.2018 passed in W.P. (Cr) 225 of 2018 & W.P. (C) 1205 of 2018, the Hon'ble Court observed as regards the two petitions, "*We also make it clear that while requiring the Government of India to act in the above terms we have not taken into account any of the averments made in the writ petitions which appear to be inadequate and deficient. Our above order is only for the purpose of satisfying ourselves in the matter."*

Order XXXVIII, Rule 8, of Supreme Court Rules deals with petitions under Article 32 seeking Writ of Mandamus. It states, "*The petition shall be posted before the Court for preliminary hearing and orders as to the issue of notice to the respondent. Upon the hearing, the Court, if satisfied that no*

fundamental right guaranteed by the constitution has been infringed or that

the petition is otherwise untenable, shall dismiss the petition…" The Hon'ble Court of its own volition departed from the stipulated rule in not dismissing the petitions described as "*inadequate and deficient*" and yet rendered the entire judgement in terms of the prayers contained therein. The impugned judgement merely records the prayer of petitioners but does not adjudicate upon it vis a vis the material placed on record and the law for registration of FIR and investigation as laid down by a Constitutional Bench in *Lalitha Kumari v. Government of Uttar Pradesh, (*2014) 2 SCC 1.

3.2. That the prayer of the petitioners is recorded in Para 4. It states, *"The fourth and the last writ petition bearing Writ Petition (Criminal) No.298 of 2018 has been filed by Shri Yashwant Sinha, Shri Arun Shourie and Shri Prashant Bhushan claiming to be public spirited Indians. They are aggrieved by nonregistration of FIR by the CBI pursuant to a complaint made by them on 4th October, 2018 which complaint, according to the petitioners, disclose a prima facie evidence of commission of a cognizable offence under the provisions of the Prevention of Corruption Act, 1988. The prayer, inter alia, made is for direction for registration of an FIR and investigation of the same and submitting periodic status reports to the Court*".

Prayers in other connected petitions are noted as having sought "*cancellation of Inter Governmental Agreement"* and "*scrutiny of the Court into the alteration of pricing and, above all, how a 'novice' company i.e. Reliance Defence came to replace the HAL as the* Offset *partner*".

3.3. That seeking directions to CBI to register an FIR on a complaint made and investigate the same in any contract (defence related or otherwise) is distinct from seeking judicial review by the Hon'ble Court of the contract itself. Where under Article 32, disputed questions of facts arise, the Hon'ble Court may also rely upon commissions to ascertain facts, reports of which are open to challenge by both sides. In the instant case without any investigation by statutory authorities (as sought by the petitioner) or even by way of a commission, the Hon'ble Court has erred in prematurely reviewing the contract itself, without even affording an opportunity to the CBI to apprise the Hon'ble Court of the status of the complaint that was made by the petitioners and findings thereof.

3.4. That the impugned judgement deals with the prayer of petitioners in other connected matters and not of the petitioners herein is apparent:

(a) Para 1 states, "*The procurement in question which has been sought to be challenged…"* . Para 5 states, *"It would be appropriate, at the outset, to set out the parameters of judicial scrutiny of governmental decisions relating to defence procurement…".*

(b) Paras 7, 8, 9, 10, & 11 discuss the scope of Judicial Review *qua* the prayers in connected petitions in matters of defence procurements. Para 15, notes, "*It is in the backdrop of the above facts and the somewhat constricted power of judicial review that, we have held, would be available in the present matter that we now proceed to scrutinise the controversy raised in the writ petitions which raise three broad areas of concern, namely, (i) the decisionmaking process; (ii) difference in pricing; and (iii) the choice of IOP.*"

(c) Paras 16 to 23 judicially review the decision making process *qua* the prayers in other connected matters. In Para 22, the impugned judgement states, "*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 Cour*t". It is further observed that, "*It cannot be lost sight of, that these are contracts of defence procurement which should be subject to a different degree and depth of judicial review. Broadly, the processes have been followed.*" It is apparent that the entire impugned judgement is *qua* the prayers of petitions in connected matters which the Hon'ble Court had itself described as "*inadequate and deficient".* The impugned judgement does not deal with the prayer of the petitioners at all. Para 22 further notes, "*We cannot possibly compel the Government to go in for purchase of 126 aircraft*". It is further stated, "*It will not be correct for the Court to sit as an appellate authority to scrutinize each aspect of the process of acquisition*". Neither of these are the prayers of the petitioners herein.

(d) Paras 24 to 26 judicially review the pricing *qua* the prayers in other connected petitions. In Para 26 the impugned judgement states, "*It is certainly not the job of this Court to carry out a comparison of the pricing details in matters like the present*." This was also not the prayer of the petitioners herein. In Paras 27 to 33 the impugned judgement reviews the selection of Indian Offset Partner and states in Para 33 that, "*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*".

(e) Finally, in Para 34 the impugned judgement holds that, "*Perception of individuals cannot be the basis of a fishing and roving enquiry by this Court, especially in such matters*". The petitioners' prayer was not for an inquiry by the Hon'ble Court. It was for an investigation by the CBI based on the material on record that *prima facie* showed the commission of a cognizable offence requiring investigation. The impugned judgement concludes by stating, "*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.*"It is humbly submitted that the law as regards the power of the Hon'ble Court to direct the CBI to investigate a complaint made to it is well settled and raises no question of the Hon'ble Court's jurisdiction under Article 32 as regards the prayer of the petitioners herein.

3.5. It is apparent that the entire impugned judgement is *qua* the prayers of petitioners in connected matters to judicially review the deal itself. This is a fundamental error apparent on the face of the record in the judgement as regards the prayer of the petitioners herein. The Hon'ble Court was called upon to examine whether or not the CBI ought to have registered an FIR. Nowhere in the judgement, CBI's dereliction of its duty to register an FIR on petitioner's complaint is even discussed. The judgement of the Hon'ble three judge bench disregards the judgement of the Constitutional Bench in *Lalitha Kumari's* case which mandates the registration of FIR when the complaint prima facie discloses a cognizable offence within the time specified. In *Lalitha Kumari* the Hon'ble Court held that the veracity of the facts in the complaint can only be determined once the FIR is filed and investigation carried out. It is always open for the CBI to after investigation conclude that the allegations in the FIR are not made out and for the petitioner's &/or respondents to challenge the findings of the investigation. Despite the petitioners' prayer in the petition as well as orally during the hearing requesting for a status report from the CBI the Hon'ble Court did not direct so. In terms of the CBI Manual, 2005, it was open for the CBI to send the complaint for verification and do a preliminary enquiry prior to registration of FIR in a time bound manner. The Hon'ble Court's judgement without giving an opportunity to investigative agencies to establish the truth of contested questions of facts and further investigation has dismissed W.P. (Cr) No. 298 of 2018 without considering the status of the petitioners' complaint and action that the CBI may have taken thereupon.

4.*Reliance on facts that are patently false*:

4.1. Respondent No. 2 i.e. the Union of India had submitted a note on pricing to the Hon'ble Court. Said note was not shared with the petitioners and the petitioner's had no opportunity to rebut averments therein. It appears that based on the note the Hon'ble Court has accepted the government's contention that details as regards pricing are 'privileged'. The judgement notes, "*The pricing details are stated to be covered by Article 10 of the IGA between the Government of India and the Government of France, on purchase of Rafale Aircrafts, which provides that protection of classified information and material exchanged under the IGA would be governed by the provisions of the Security Agreement signed between both the Governments on 25th January, 2008*."

In *S.P. Gupta v Union of India*, 1981 (Supp) SCC 87, it was held that where the question of privilege arises the court has the discretion to examine the primary documents in respect of which privilege is claimed to determine whether privilege was justified. In the absence of any investigation by CBI and findings thereof, the Hon'ble Court erred in relying on the averments in the note (a secondary document) without even examining the primary documents leading to reliance on gross factual errors.

4.2. *Non-existent CAG report:*

(a) In their affidavit dated 14.11.2018, the petitioner's had pointed out in Para 4.5 that, "*a group of retired bureaucrats have written to the CAG highlighting its abdication of responsibility in not having conducted the audit even three years after the deal and continuously missing deadlines to submit its reports. It is imperative that the CAG conclude the audit at the earliest.*" The letter dated 12.11.2018 was attached as Annexure 3. Apparently, the Hon'ble Court erred in not considering the said letter and submission and was instead misled by false averments in the government's note.

(b) The judgement records in para 25 that, "*The pricing details have, however, been shared with the Comptroller and Auditor General (hereinafter referred to as "CAG"), and the report of the CAG has been examined by the Public Accounts Committee (hereafter referred to as "PAC"). Only a redacted portion of the report was placed before the*

Parliament, and is in public domain." This is patently false. The CAG is yet to conclude its audit of the contract. The report has not been finalised so there is no question of it having been examined by the PAC or a redacted report having been placed before the parliament and being in the public domain.

(c) The government has subsequently filed an application for modification of the judgement claiming that the Hon'ble Court has misinterpreted the averments as regards the CAG report on account of grammatical misinterpretation. Said application imputes that three Hon'ble Justices misinterpreted that one paragraph in the same manner which is highly improbable. Moreover, Rule 3, of Order XII, states, "*Subject to the provisions contained in Order XLVII of these Rules, a judgement pronounced by the court or by a majority of the Court or by a dissenting judge in open Court shall not afterwards be altered or added to, save for the purpose of correcting a clerical or arithmetical mistake or an error arising from an accidental slip or omission."*

(d) Hon'ble Court's reliance on CAG report is not "*a clerical or arithmetical mistake or an error arising from an accidental slip or omission."* The Hon'ble Court has applied its mind and erred in relying on a non-existent fact to render its judgement which is not a "*accidental slip*" but rather a substantial error. This error apparent can only be corrected under *Order XLVII* dealing with Review or it is open for the Hon'ble Court to recall its judgement, however application under Rule 3, Order XII is not maintainable.

(e) The government states in Para 5 of its application that the sentences in their note were that, "*The Government has already shared the pricing details with the CAG. The report of the CAG is examined by the PAC.Only a redacted version of the report is placed before the Parliament and in public domain*". Government's contention in Para 7 of application that "*the very fact that the present tense "is" is used would mean that the reference is to the procedure which will be followed as and when the CAG report is ready*" is self contradictory and totally false. If reference was to the procedure that would have been followed, the correct tense would have been 'will' or 'would' or any variation thereof. The government quite clearly misled the court. It is unknown as to what other false averments in the note the Hon'ble Court has relied upon.

(f) Further, CAG is an independent constitutional body accountable only to the parliament and not under the control of the government. Even to say as a matter of fact that the CAG would in every case "redact" a report is untrue. The CAG shares its draft report with the department concerned to seek their views which may or may not be incorporated in the final report. The department concerned cannot dictate to CAG what should or should not be redacted. Historically, CAG has always placed its final report as is before the PAC. Pricing which is the *sine qua non* of the audit has never been redacted by the CAG. Therefore, the government has no authority to claim as a matter of fact that the CAG's final report would be redacted.

(g) The final CAG report is placed as is for the consideration of PAC which may or may not choose to examine it. Again, if PAC chooses to examine the report whether or not to redact the report is at the discretion of PAC and not something that the government can claim as a matter of fact.

(h) The government has blatantly misled the Hon'ble Court and the Hon'ble Court has grossly erred in placing reliance on false averments in the note not even supported by an affidavit. The entire judgement is based on disputed questions of facts in respect of which an investigation needs to be done. As the judgement is based on evidently false averments in the note not shared with the petitioners, on that ground alone the entire judgement ought to be not just reviewed but recalled.

4.3. *Reliance Industries of Mr. Mukesh Ambani confused with Reliance Infrastructure of Mr. Anil Ambani:*

(a) The impugned judgement relying on the government's notes grossly errs in confusing Reliance Industries of which Mr. Mukesh Ambani is the chairman with that of Reliance Infrastructure of which Mr. Anil Ambani is the chairman. While reviewing the selection of Indian offset Partner, Para 32, states, "*It is no doubt true that the company, Reliance Aerostructure Ltd., has come into being in the recent past, but the press release suggests that there was possibly an arrangement between the parent Reliance company and Dassault starting from the year 2012.*"

(b) Mr. Anil Ambani's Reliance Infrastructure is the parent company of Reliance Aerostructure Ltd. (beneficiary of the offset contract). There is no possibility of any arrangement between Reliance Infrastructure with Dassault Aviation in 2012. As specifically pointed out in the petition in para 56, "*Mr. Ambani's first foray into the defence sector was on, 22nd of*

December, 2014", when Reliance Infrastructure incorporated *Reliance Defence Technologies Pvt Ltd.* and *Reliance Defence and Aerospace Pvt. Ltd.* This is apparent from the balance sheet of Reliance Infrastructure that was annexed as Annexure P38 to the petition and is on record.

4.4. *Erroneous recording that Air Force Officers answered questions as regards decision making process and pricing:*

(a) That the judgement in Para 22, records that, "*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*".

(b) That during the hearing in the open court, the Air Force Officers were questioned by the Hon'ble Court as regards the last induction of fighter aircrafts into the Air Force, to which it was answered that Sukhoi & Tejas (both manufactured in India by HAL) were being inducted continuously. Subsequently, the Hon'ble Court inquired as to which generation would the concerned Air Force Officer place those aircrafts and also Rafales. It is humbly submitted that this was not pertinent as none of the petitioners had sought to challenge the need for Rafale aircrafts/advanced fighter aircrafts or the quality of the aircrafts.

(c) It is most humbly submitted that no question was asked to or answered by the Air Force Officers as regards the decision making process or pricing as regards 36 Rafale aircrafts in the open court.

5. *Reliance on facts in government's notes that are contradicted by material on record that hasn't been considered.*

5.1. *Erroneous reliance on averment that process for withdrawal of RFP was initiated in March of 2015*:

The judgment records in Para 3 that, "*A process of withdrawal of the Request for Proposal in relation to the 126 MMRCA was initiated in March 2015.*" Further, para 22 notes, "*It is also a fact that the long negotiations for procurement of 126 MMRCAs have not produced any result, and merely conjecturing that the initial RFP could have resulted in a contract is of no use.The hard fact is that not only was the contract not coming forth but the negotiations had come practically to an end, resulting in a recall of the*

RFP." The Hon'ble Court has accepted the said averment in government's note without considering or dealing with the following facts on record that directly dispute this averment:

(a) That even on 25th of March, 2015, CEO of Dassault, Mr. Eric Trappier stated in the presence of the IAF Chief & HAL Chairman, "*you can imagine my great satisfaction to hear...from HAL Chairman that we are in agreement for the responsibilities sharing... I strongly believe that contract finalisation and signature would come very soon.*" It is apparent that the said statement questions the claim that process for withdrawal of RFP as regards 126 aircrafts had been initiated in March of 2015 or that the negotiations had practically come to an end. Said statement was on record in Annexure P6 of the petition.

(b) Even the assumption that the process of withdrawal had begun between 25th of March & 31st of March of 2015 is belied by the official statement of India's Foreign Secretary on 8th of April, 2015, which stated, "*In terms of Rafale, my understanding is that there are discussions under way between the French company, our Ministry of Defence, the HAL which is involved in this. These are ongoing discussions. These are very technical, detailed discussions. We do not mix up leadership level visits with deep details of ongoing defence contracts. That is on a different track. A leadership visit usually looks at big picture issues even in the security field*." Said statement was on record in Annexure P7 of the petition.

Both these facts require to be investigated and mere reliance on governments averment in a note not even supported by an affidavit is erroneous.

5.2. *Erroneous reliance on averment that the deal had run into rough weather on account of issues between HAL & Dassault:*

(a) Para 18 relies on governments averments in the note and states that, "*As far as the endeavour to procure 126 fighter aircrafts is concerned, it has been stated that the contract negotiations could not be concluded, inter alia, on account of unresolved issues between the OEM and HAL. These have been set out as under: (i) ManHours that would be required to produce the aircraft in India: HAL required 2.7 times higher ManHours compared to the French side for the manufacture of Rafale aircraft in India. (ii) Dassault Aviation as the seller was required to undertake necessary contractual obligation for 126 aircraft (18 direct flyaway and 108 aircraft*

manufactured in India) as per RFP requirements. Issues related to contractual obligation and responsibility for 108 aircraft manufactured in India could not be resolved."

(b) Said averment has been relied upon without critically examining the aforementioned statements of the CEO of Dassault on 25th of March, 2015, and Foreign Secretary on 8th of April, 2015. Moreover, the court has erred in not considering or dealing with the following facts on record:

(c) That on 3rd of March, 2014, a Work Share agreement hadbeen signed between HAL & Dassault Aviation under which they were to be responsible for 70% & 30% of the work respectively for the 108 aircrafts to be made in India. Said fact was brought on record in Annexure P5 of the petition.

(d)That this was further confirmed by the former chairman of HAL, T. SuvaranaRaju who was the lead negotiator for the original deal. He had even asked the government to put the files in the public domain disputing that the reason for cancellation of the deal was HAL. He had stated, *"I was the leader of the technical team for five years and everything had been sorted out…Dassault and HAL had signed the mutual work-share contract and given it to the government. Why don't you ask the government to put the files out in public? The files will tell you everything.*"

Mr. Raju's statement was placed on record by the petitioners in ANNEXURE P37 of the petition. These facts highlight the need for an investigation by the CBI and the Hon'ble Court erred in judicially reviewing the contract without the benefit of an investigation/report on these disputed questions of facts.

6. *Error in not considering material facts that raise pertinent issues:*

6.1. *Ex Post facto AON:* The primary contention of the petitioners was that due procedures as mandated by Defence Procurement Procedures were not followed when it was announced on 10th of April, 2015, that as part of a new procurement 36 aircrafts would be purchased. On the basis of a Statement of Case that is prepared by the IAF Services Head Quarters, the Defence Acquisition Council (DAC) grants the Acceptance of Necessity (AON) that determines the quantity of aircrafts to be procured and whether the mode of procurement should be to purchase all requisite quantities specified from a foreign vendor or whether some should be procured in a 'fly away' condition and rest be manufactured in India. The government has itself admitted that the AON granted in June of 2006 specified the quantities to be procured as 126 with 18 to be procured in a 'fly away'

condition from France & the rest to be manufactured by HAL in India with Transfer of Technology. The government has also admitted that on 10th of April, 2015, when the announcement was made to procure 36 aircrafts instead of 126 and Make in India by HAL under Transfer of Technology was jettisoned there was no Acceptance of Necessity authorising the Prime Minister's delegation to commit to such terms. The petitioners had pointed out and the governments own note admits that an *ex post facto* AON was granted only on 13th of May, 2015. A fact that is recorded in the judgement also. The Hon'ble Court has erred in not dealing with the fundamental issue as to who decided on 10th of April, 2015, to change the parameters set out in the AON granted in June of 2007 and on what basis. No material has been brought on record by the government to show that the IAF sought for reduction of the quantities. Without going into this fundamental issue the impugned judgement errs in holding that the 'decision making process' was "broadly" in accordance with the Defence Procurement Procedures.

6.2. *Sovereign Guarantee:* Petitioners had brought on record that the Ministry of Law & Justice had objected to the fact that though the Defence Procurement Procedures required it, there was no Sovereign Guarantee by France in the Inter Governmental Agreement. The said objection had been overruled by the Cabinet Committee on Security itself. The impugned judgment records this averment of the petitioners herein in Para 20, but does not address the same. The impugned judgement records in Para 22 that, "*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.*"It is clear that the Hon'ble Court felt constrained by its judicial powers to review the contract under Article 32 *qua* the prayers of other petitioners. However, it was erroneous for the Hon'ble Court to describe the absence of Sovereign Guarantee as a "minor deviation". Whether it was minor or major and for what reason was such a deviation made would more appropriately have been a subject matter for the CBI to investigate into as was the prayer of the petitioners. Similarly, on what grounds the Law Ministry's objection to seat of arbitration being outside India was overruled was also a subject matter that could have been dealt with by an investigation by CBI.

6.3. *Objections in INT to increase in 'benchmark price' from 5.2 billion to 8.2 billion euros:* The judgment errs in not considering that 3 expert members of the Indian Negotiating Team (INT) had specifically objected to increasing the benchmark price from 5.2 billion Euros to 8.2 billion Euros. As pointed out in the petition (Paras 65 & 66 of the petition relying on Annexes 46 & 47), the 5.2 billion Euro benchmark price was discovered by an expert member of INT, Mr. M.P. Singh, who was Principal Advisor (Cost) after taking into account all factors. The decision to arbitrarily increase the benchmark price was objected to by Mr. M.P. Singh, Sh. Rajeev Verma, then Joint Secretary (Air) and Sh. AR Sule, then FinanceManager (Air). Whether the said arbitrary increase in benchmark price that has allegedly resulted in a loss to government against public interest was justified and whether or not it would be a fit case for prosecution under Section 13(1)(d) of Prevention of Corruption Act was for the CBI to determine after investigating into the circumstances in which the benchmark price was increased. The Hon'ble Court erred in not considering this fact and ordering the CBI to register an FIR and investigate whether or not said increase in benchmark price was *mala fide* as alleged by the petitioners.

6.4. *Selection of Indian Offset Partner:*

(a)The impugned judgement errs in not at all considering that Reliance Aerostructure Ltd (RAL). (beneficiary of the offset contract) was ineligible to be chosen as an offset partner. As pointed out in Para 52 of the petition, Clause 4.1. of Offset Guidelines states that, *"Indian enterprises and institutions and establishments engaged in the manufacture of eligible products and/or provision of eligible services, including DRDO, are referred to as the Indian Offset partner (IOP)."* Petitioners placed material on record in the form of Annual Statements of RAL's parent company, Reliance Infrastructure Ltd., which shows that it was not engaged in the manufacture of eligible products or services. The impugned judgement errs in not considering and dealing with this averment. How can a company that is ineligible under Clause 4.1. be chosen as an offset partner is something for the CBI to investigate.

(b) The impugned judgement does not deal with Clause 4.2. of the Offset Guidelines that states,"*The IOP shall, besides any other regulations in force, also comply with the guidelines/licensing requirements stipulated by*

the DIPP as applicable." Petitioners had placed material on record (paras 53 & 54 of petition) to show that RAL was in violation of the license that was granted to it in June of 2016, which was specifically for "*Manufacture and Upgrade of Airplanes and Helicopters Specially Designed for Military Application*", and whereas it entered into a Joint Venture with Dassault Aviation to manufacture parts for a civilian aircraft under that same licence. This fact on record has also not been dealt with in the impugned judgement & merits investigation.

(c) As regards selection of Indian Offset Partner, impugned judgement errs in holding in para 32 that, "*the commercial arrangement, in our view, itself does not assign any role to the Indian Government, at this stage, with respect to the engagement of the IOP. Such matter is seemingly left to the commercial decision of Dassault. That is the reason why it has been stated that the role of the Indian Government would start only when the vendor/OEM submits a formal proposal, in the prescribed manner, indicating details of IOPs and products for offset discharge*." Said observation is erroneous given that as required under Clause 2.4. of Offset Guidelines and as admitted by the government and recorded in the judgement, the offset contract was signed simultaneously with the main procurement contract on 23rd of September, 2016. Per Clause 7.2 of Offset Guidelines, the Offset Contract is only signed after the Technical Offset Proposal and Commercial Offset Proposal that are required to be submitted prior to signing of the Offset Contract are approved by the Raskha Mantri. It states,"*The technical and commercial offset proposals should be submitted in two separate sealed covers to the Technical Manager of Acquisition Wing*."Per Clause 8.4,"*The Commercial Offset Offer will contain the detailed offer specifying the value of the offset components, with a breakdown of the details, phasing, Indian Offset Partners.*" Both the proposals were required to be submitted prior to signing of the contract on 23rd of September, 2016, and were required to be approved by the Raskha Mantri.The requirements for submitting the Commercial Offset Offer were detailed in Annexure III to Appendix D of DPP which stated,

> "*Note: Vendor to provide following along with commercial offset offer:*
> *-(a) Undertaking that IOP is an eligible offset partner as per applicable guidelines.*
> *(b)Company profile of IOP/agency.*
> *(c) Details with values of the proposed offset, including details of*

Tier-1 sub-contractors, if any.

(d) Letter of IOP/agency confirming acceptance of the offset project in case of direct purchase or investment."

Clause 8.6 required that all offset proposals had to be approved by the RakshaMantri. It stated,"*All Offset proposals will be processed by the Acquisition Manager and approved by RakshaMantri, regardless of their value.*"

(d) It is apparent that notwithstanding theretrospective amendment to the clause dealing with Technical Offset Proposal, the Commercial Offset Proposal, required the disclosure of the Indian Offset Partner and was required to be approved by the Raksha Mantri prior to signing of Offset Contract. While Dassault may have had the option of choosing the offset partner, the offset partner was required to be approved by the Raskha Mantri. The judgement relies on the governments averment that details of Indian Offset Partner were not made available to it by Dassault. This averment in a note that has misled the Hon'ble Court on various other counts, even if true, would require an investigation by CBI as to how when Dassault failed to disclose the Indian Offset Partner as required in its Commercial Offset Proposal, did the Raksha Mantri approve the Commercial Offset Proposal and whether such approval was *malafide*.

(e) The judgement errs in relying on the government's averment in the note to hold in Para 32 that, "*There has been a categorical denial, from every side, of the interview given by the former French President seeking to suggest that it is the Indian Government which had given no option to the French."*The French President himself has not denied the interview. He had stated to MediaPart on 21.09.2018 that, "*We didn't have any say in this matter…It is the Indian government which had proposed this service group, and Dassault who negotiated with Ambani. We didn't have the choice, we took the interlocutor who was given to us*." He had reiterated on 23.09.2018 that, Mr. Anil Ambani was suggested to the French as, "*part of the new formula of the Indian Government.*" Both statements were on record in Annexes P19 & P20 of the petition. That the government of India, Dassault, & Mr. Ambani would deny the statement as it directly proves their own complicity is not surprising.

(f) In discounting the French President's statement, the impugned judgement does not consider further corroborative evidence of Dassault's official press release which states that, DRAL —the joint venture between

Reliance and Dassault— was created in April of 2015 itself. Said press release was placed on record by petitioners in Annexure P24.

(g) Further corroborative evidence in the form of internal papers of Dassault's trade unions which showed that they were told that agreeing to set up a Joint Venture with Mr. Ambani's company was "*imperative and mandatory*" for Dassault and a "*trade off*" to secure the contract for 36 fighter aircrafts was also not considered or dealt with.A report on the same was annexed as Annexure P22 of the petition.

(h) Further, a contemporaneous news report of 17.04.2015 in the French *TTU Online: Strategic & Defence Newsletter*had stated, (The new deal),

> "*At the political level, is for Narendra Modi, to demonstrate that India is a reliable partner and reaffirm his authority ...and at the same time, he (is) devoted to the rise to power of the private consortium Reliance Ambani family, one of his main financial support(ers), (whom) he would like to see play a greater role in the defence industry*." The said report was on record in Annexure P23 of the petition.

All these facts together *prima facie* cast a doubt on the selection of Mr. Ambani's RAL as an offset partner and are required to be investigated by the CBI.

7. *Other facts on record that require consideration:*

7.1. *Defence Minister was not consulted:* That the then Defence Minister, Mr. Parrikar, was not officially consulted as regards the procurement for 36 aircrafts. Three days after the deal, Manohar Parrikar made it clear to Doordarshan on 13th of April, 2015, that, "*Modi-ji took the decision; I back it up*." Elaborating to NDTV, he described the decision as,"*the outcome of discussions between the Prime Minister [of India] and the President of France.*" Said statements are on record in Annexure P21 of the petition.

7.2. *Privilege had not been claimed as regard pricing on earlier occasions:* That on earlier occasions, notwithstanding the secrecy agreement of 2008, the cost of defence and aerospace equipment have been disclosed to Parliament and privilege was never claimed even when the procurement was from the same French companies as in this case. For instance, in the Press Release that it issued on 26th of March, 2012, regarding the "*Upgradation of Mirage Aircraft,*" the Ministry of Defence had stated,

"*Contracts have been signed with M/s Thales, France and M/s Dassault Aviation, France, along with M/s Hindustan Aeronautics Limited (HAL) for upgrade of the Mirage 2000 aircraft of the Indian Air Force (IAF). A contract has also been signed with M/s MBDA, France, for procurement of air-to-air missiles for the Mirage 2000 aircraft. The cost of the contract for upgrade of the Mirage 2000 with M/s Thales and M/s Dassault Aviation is Euro 1470 Million, while the cost of the contract with M/s HAL is Rs. 2020 crore. The cost of the contract for procurement of the missiles from M/s MBDA, France, is Euro 958,980,822.44*."

Said fact was on record in ANNEXURE P43 of the petition.

7.3. *Reliance group paid 1.48 million Euros to Mr Hollande's partner's venture:* That on 24th of January, 2016, Mr. Ambani's Reliance Entertainment announced an investment in President Hollande's partner, Julie Gayet's, French film through her company Rouge International. Payments to the tune of 1.48 million Euros were eventually made. Just two days thereafter, on 26th of January, 2016, Prime Minister and Mr. Hollande signed a Memorandum of Understanding for the 36 Rafale aircrafts. The judgement errs in not considering whether this investment was *prima facie* a *quid pro quo* requiring an investigation by the CBI. Said fact was on record in Annexes P26 and P27 of the petition.

7.4. *RAL was not a legitimate offset partner:* That the petitioner had placed on record that RAL was not a legitimate offset partner capable of credibly rendering any services to Dassault Aviation in exchange for receiving undue benefits worth thousands of crores of Rupees through its selection as offset partner. It had been shown that within a few weeks of the announcement committing India to purchase 36 aircrafts in 'fly away' condition from France, more than half a dozen defence related companies were incorporated by Reliance Infrastructure group. Many of these companies were merely on paper and were granted *en masse* licenses for varied defence related products simultaneously on 22nd of June, 2016. Further, it was shown that even three years after incorporation, none of these companies had begun any production and Mr. Ambani's Reliance Infrastructure Ltd. (RIL) made negligible investments in these companies. The only asset that Mr. Ambani's company had was the land that was granted to RAL within ten weeks of its application being made on 16th of June, 2015. As was evident from the balance sheet of RIL for years ending

2016, 2017, & 2018, no investment was made by RIL into RAL for the purpose of commencing production. The only asset of RAL in all these years was the value of the land that it had gotten at a throw away value of Rs 63 Crores for 289 acres from government of Maharashtra. It was evident that RAL was sitting on the land as its sole purpose of creation was to enter into a Joint Venture with Dassault Aviation. Annual Statements of Dassault showed that after the creation of the Joint Venture, it was Dassault Aviation that began investing into the joint venture i.e. DRAL whereas Mr. Ambani's made no investment whatsoever into DRAL even though he was the majority partner. Paras 47 to 58 of the petition dealt with the illegitimacy of RAL as a credible offset partner. All this was quit apart from the fact that Mr. Ambani's Reliance group was and is knee deep in debt and that the only defence related company that they had acquired that is Reliance Defence & Naval Engineering was taken to insolvency proceedings within three years of Mr. Ambani's acquisition and it had failed to deliver the orders for Naval Offshore Patrol Vessels to the Indian Navy on time and said order was long overdue.

(II) Subsequent Information

8. That the following information has come to light subsequent to the judgement being reserved on 14.11.2018 and was not within the knowledge of the petitioners despite all due diligence at the time of filing of the petition up until the date of final hearing and reservation of judgement:

8.1. *Subsequent information regarding strong objections within the Indian Negotiating Team (INT):*

(a) The judgement relies and reproduces contents of the note on the decision making process that was submitted to the Hon'ble Court. In para 19 of the judgement, it is stated, "*An INT was constituted to negotiate the terms andconditions, which commenced in May 2015 and continued till April 2016. In this period of time, a total of 74 meetings were held, including 48 internal INT meetings and 26 external INT meetings with the French side. It is the case of the official respondents that the INT completed its negotiations and arrived at better terms relating to price, delivery and maintenance, as compared to the MMRCA offer of Dassault. This was further processed for inter-ministerial consultations and the approval of the CCS was also obtained, finally, resulting in signing of the agreement.This was in conformity with the process, as per para 72 of DPP 2013.*"

(b) Para 72 of DPP, 2013, states, "*In cases of large value acquisition, especially that requiring product support over a long period of time, it may be advisable to enter into a separate Inter Government Agreement (if not already covered under an umbrella agreement covering all cases) with the Govt of the country from which the equipment is proposed to be procured after the requisite inter ministerial consultation. Such an Inter Governmental Agreement is expected to safeguard the interests of the Govt of India and should also provide for assistance of the foreign Govt in case the contract(s) runs into an unforeseen problem*."Whereas, the judgement has relied on the governments averments in the note to hold that that it was the Indian Negotiating Team that **completed** negotiations, further facts have come to light showing that this was not the case as there was major objections by expert members within the INT over several issues. It was the Cabinet Committee on Security which in a highly unusual manner over-rode the objections of experts within the INT on several major issues and failed to safeguard the interests of the Government of India and did not provide for assistance of the foreign government in case the contract runs into unforeseen problems.

(c) *Caravan* has reported that the government has failed to disclose to the Hon'ble Court these objections of experts within the INT. These objections are important because in Para 26 of the judgement, the Hon'ble Court has stated that, "*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 there is a 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*."The report of Caravan shows that the Hon'ble Court has relied on and been misled by the comparison on pricing, maintenance, & weapons package rendering the judgement liable to be set aside. The report in *Caravan* dated 25.10.2018 states,

> *"1. "The benchmarked price of €5.2 billion was too low as compared to the final negotiated price of 7.89 bn euros and so, the reasonability of the price was in question."*

The dissenting officers raised concerns that the new price, at over €2.5 billion higher than the one first suggested by Singh, was unreasonably high.

2. "No Advance & Performance Bank Guarantee has been obtained from Dassault Aviation and the advance payments made prior to delivery are not secured."

The Indian government agreed to pay massive sums to Dassault Aviation, the manufacturer of the Rafale, in advance of deliveries, but did not obtain any financial security from either the French government or Dassault that it could encash in case of a breach of contract. Such securities are a standard part of defence-procurement deals. In purchases directly from a manufacturer, the manufacturer puts up the security. In government-to-government deals where a sovereign government stands in as the guarantor, the security is put up by the foreign government. India makes exceptions in deals with Russia and the United States, whose laws channel all foreign defence sales through official channels, and whose governments make themselves liable for failure to deliver as promised. As reported earlier by The Caravan, France does not have such provisions. The lack of a guarantee from the French government means that the Rafale deal does not satisfy the conditions of a government-to-government deal, even though the Modi government has described it as such.

3. "The delivery schedule of 36 Rafale IGA was not better than that of 126 MMRCA bid."

4. "The Maintenance Terms and Conditions including PBG (Performance Based Guarantee) of 36 Rafale IGA was not better than that of 126 MMRCA bid."

Under the Congress-led administration that preceded the Modi government, Dassault Aviation won a competitive tender to supply India with 126 "medium multi-role combat aircraft," or MMRCAs. The Modi government inherited and scrapped the negotiations to purchase 126 Rafales under the tender, to make way for an "inter-governmental agreement," or IGA, to purchase just 36 Rafales instead. Numerous officials, including the chief of the Indian Air Force, have since claimed that the 36-jet deal offers faster delivery and better conditions than the scrapped 126-jet purchase could. The

dissenting officers of the negotiating team did not find this to be so. With both these objections, the DAC set them aside and the CCS ratified its decision.

5. "The IGA Clauses and Articles of the Aircraft and Weapon Supply Protocols be aligned/ modified with the recommendations of Ministry of Law & Justice (MOLJ)."

As reported earlier by The Caravan, the law ministry objected to many features of the 36-Rafale purchase when the deal was forwarded to it for requisite legal vetting. These concerns were ignored in the final deal, which the CCS sanctioned with the knowledge that the law ministry's objections were still outstanding. Ajit Doval, the national security advisor, was part of the Indian contingent that agreed to a "joint document" with the French side that overlooked the legal red flags, and that effectively blocked any future attempts to address them. The national security advisor has no legal standing to participate in acquisition negotiations. In its submissions to the Supreme Court, the government omitted the fact of Doval's involvement.

6. "The 20% discount offer of EADS in 126 MMRCA tender was ignored. The INT should take EADS quote for 36 Rafale delivery equivalent and then compare prices."

The Eurofighter Typhoon, manufactured by the European Aeronautic Defence and Space Company, or EADS, was the only jet other than the Rafale to pass technical trials for the MMRCA tender. Dassault was subsequently awarded the tender over EADS when it bid a lower price for supplying 126 jets. Afterwards, EADS offered a 20-percent discount on its quoted price in the hope of undercutting Dassault, but the Indian government stood by its decision. The dissenting members of the negotiation team now wanted to use the price of 36 discounted Eurofighters as a point of comparison to the price being considered for 36 Rafales. The other four members argued that EADS's discounted price was invalid as it was unsolicited and made after the bidding process was closed, thus violating procurement procedure. The price of each aircraft under the final Rafale deal was far in excess of the per-aircraft rate offered by Dassault under the MMRCA process.

7. "The cost of India Specific Enhancement (ISE) was too high."

The Indian government has repeatedly claimed that the Rafales purchased under the 36-jet deal will include "India-specific enhancements." The three dissenting officers raised concerns that the cost for these was too high. The other four members held that the cost was "non-recurring," and that it was "not affected by the number of aircraft purchased." They also said that the MMRCA deal included India-specific enhancements as well. The DAC and CCS backed the four members' position. The average cost of India-specific enhancements for each jet in the final Rafale deal was much higher than that under the MMRCA tender.

8. "Dassault will not be able to [unclear word] the deliveries as per IGA due to its ongoing contracts with French forces, Egypt and [Qatar]."

The dissenting officers raised concerns that Dassault would not be able to deliver 36 Rafales to India under the agreed schedule as it already had contracts to provide the jets to the French armed forces as well as Egypt and Qatar. The DAC agreed with the four other officers, and the CCS ratified its decision.

9. "Dassault's financial position is not sound as per its published financial results. So, it may not be able to deliver the 36 Rafale aircraft."

The three officers believed that Dassault's financial health did not inspire trust. As reported earlier by The Caravan, the French government transferred its obligations under the "inter-governmental agreement" to private manufacturers including Dassault, and India failed to secure any legally enforceable guarantee of delivery from the manufactures. The Indian government has no legal of financial protection if Dassault fails to deliver the 36 jets for any reason.

10. "As per the prices reflected in Dassault's financial results, it has sold Rafale at a cheaper rate to Qatar and Egypt as compared to India."

Dassault's financial disclosures suggested to the three dissenting officers that the Rafale was being sold to India at a higher price than it had been to Egypt and Qatar. The four other officers disagreed. Information available to The Caravan indicates that Dassault had claimed that its financial disclosures were being misinterpreted, and that the French government had said in writing that India was being

offered the Rafale at a lower price than the other countries. The DAC sided with the four officers to set this objection aside, and the CCS backed its decision.**"**

A copy of the report in *Caravan* dated 25.12.2018 is annexed as **Annexure** ____at **Pages** ___ **to** ___

(d) It is apparent that material information has been withheld from the Hon'ble Court on several issues and on the aspect of pricing the Hon'ble Court has been misled by disputed averments in the government's note.

8.2. *Subsequent information regardingpolitical decision to waive off sovereign guarantee:*

(a) The petitioners had highlighted that the Ministry of Law & Justice (MoL&J) had objected to the Inter-Governmental Agreement departing from mandated condition in waiving of the requirement for a Sovereign Guarantee from the French government. It has now been reported in *Caravan* that the decision to depart from the requirement of sovereign guarantee and seat of arbitration was taken after the unauthorised intervention of the present National Security Advisor (NSA), Mr. Ajith Doval. As recorded in a Ministry of Defence note, titled 'Note 18', after the objections raised by the MoL&J, Mr. Doval visited France on 12th & 13th of January, 2016, along with Member Secretary of Indian Negotiating Team (INT) and discussed the issue of sovereign guarantee and the seat of arbitration with the French. This would be an unauthorised intervention as it was the INT that was authorised by the Defence Acquisition Council to negotiate the terms of the contract as required under the Defence Procurement Procedures. Another pertinent fact that the government's note not supported by an affidavit omitted to mention. The note describes thenDefence Minister Manohar Parrikar's ruling that the French insistence on providing only a "Letter of Comfort" in lieu of sovereign guarantees should be considered by the CCS, taking into account the MEA's (Ministry of External Affairs) and NSA's views on the subject. Effectively, Mr. Parrikar's decision took the authority for approving the said deviation out of the purview of the Defence Acquisition Council. As the judgment of the Hon'ble Court notes in para 16, Clause 75 of Defence Procurement Procedure states, "*Any deviation from the prescribed procedure will be put up to DAC through DPB for approval*." It is apparent that on account of Mr. Doval's unauthorised intervention, on account of Mr. Parrikar's direction,

the sensitive issue as regards the absence of sovereign guarantee was taken out of the purview of experts and instead placed before the Cabinet Committee on Security all of whose members are part of the political executive and who decided to waive off sovereign guarantee from France. The importance of sovereign guarantee is apparent from para 3 of 'Note 18', that states,

> "*It was considered essential that the proposed IGA retains the character of Government-to-Government Agreement for this procurement. As may be seen in Encl 13A, it was stated in out reference to MoL&J the core elements of G-to-G character seem to be: (i) The responsibility for the supply of equipment and related industrial services and performance of the entire contract remains with the foreign Government; (ii) Dispute Resolution mechanism at Government-to-Government level only."*

(b) *Business Standard* has further reported, that,

> *"a key reason New Delhi sought sovereign guarantees was to prevent Paris from ever citing international instruments, such as the Arms Trade Treaty of 2013 (ATT), to interrupt, modify or cease delivery of the Rafale fighter at any stage…The ATT is a multilateral treaty that regulates international trade in conventional arms. France has signed the ATT, but India has consistently rejected it as discriminatory. The ATT allows weapons exporting countries to deny or cancel export permissions at any stage. In such an event, the treaty's provisions relieve the exporting country and its defence manufacturers from any contractual liability.On the other hand, a sovereign guarantee is a pledge that supersedes the ATT. Had Paris provided a sovereign guarantee in the Rafale contract, it would not have been able to cite the ATT to explain any lapse in its execution*"

A copy of the report dated 16.12.2018 in *Caravan* is marked and annexed as **Annexure** __ at Pages ___ to ___

A copy of the report dated 28.11.2018 in *Business Standard* is marked and annexed as **Annexure** __ at Pages ___ to ___

A copy of Ministry of Defence's note titled, 'Note 18', is marked and annexed as **Annexure** __ at Pages ___ to ___

8.3. *Subsequent information regarding political decision to increase the Benchmark Price:*

(a) The petitioners had highlighted that the benchmark price determined by the expert member, Mr. M.P. Singh, Advisor (cost) was 5.2 billion euros. The increase in benchmark price to 8.2 billion euros was also objected to by two other experts in the INT who were Mr. Rajeev Verma, then Joint Secretary (Air) and Mr. A.R. Sule, then Finance Manager (Air). It has now been reported in the *Caravan* that,

> "*the initial benchmark price for the Rafale deal was set at €5.2 billion—€2.5 billion less than the deal signed in 2016. In view of apprehensions that the deal would be unviable at this price, the Defence Acquisition Council, or DAC, headed by the defence minister—Manohar Parrikar at the time—prescribed a revised mechanism for pricing. The method used for price revision was a departure from mandatory procedure. The final pricing was ratified by the Cabinet Committee for Security, headed by Prime Minister Narendra Modi*." The report adds that, "*final pricing for the Rafale deal was directly approved and ratified by the prime minister on 24 August 2016, overruling the pricing arrived at by the official who had the requisite expertise and was first tasked to do the job by the Modi government itself. The method used to arrive at the new benchmark was not in keeping with the procedure set down in the Defence Procurement Procedure 2013*". It is further elaborated that, "*In this case, per the established norm, MP Singh, the adviser for cost on the INT, carried out the benchmarking process. He based it on an evaluation of costs from the bottom up—of the components that go into building a Rafale jet as well as all additional costs, including research and development and India-specific enhancements. Singh set the benchmark price for the 36 jets at €5.2 billion.The benchmark cost Singh arrived at was also endorsed by two other members of the INT: Rajeev Verma, the joint secretary and acquisition manager (air); and Anil Sule, the finance manager (air). Together, Singh, Verma and Sule were the three officers on the INT with the greatest amount of expertise in dealing with issues relating to pricing.*"

(b) These new facts belie the note submitted by the government where it had claimed that all issues relating to pricing were determined by the Indian Negotiating Team. It is also apparent that there were disagreements that

are on record as regards the revision in benchmark price to 8.2 billion euros by relying on a new formula that took into account the price quoted in the earlier deal which was erroneous as the earlier deal included the cost of Transfer of Technology as well as costs of developing the requisite vendor network, plants, & machineries in India for manufacturing of 108 aircrafts as was envisaged in the earlier deal. That when the experts within INT disagreed on the revision in benchmark price, the call to increase it was taken by the Cabinet Committee on Security (CCS) none of whose members have any expertise in the said matter. It is for an investigation to determine whether CCS's approval of the increase in benchmark price has caused a monetary loss to the government against public interest and whether said act would be prosecutable under section 13(d)(ii) of Prevention of Corruption Act.

Copy of report in *Caravan* dated 14.12.2018 is marked and annexed as **Annexure**__ at**pages** ___ **to** ___

(c) Further, as regards the decision to increase the benchmark price, Mr. Sudhanshu Mohanty, former Controller General of Defence Accounts and also a former Financial Adviser (Defence Services) in the Ministry of Defence who retired on May 31, 2016, has published an important article pointing out that the decision to increase the benchmark price taking into account the price in the 126 aircraft deal that never materialised was erroneous. He states,

> "*Another troubling issue is of benchmarking, where Para 52 of DPP 2013 is relevant. It says: 'Cases for which contracts have earlier been signed and benchmark prices are available, the CNC [contract negotiation committee] would arrive at the reasonable price, taking into consideration the escalation/ foreign exchange variation factor.'*
>
> *Since there were no contracts on the item signed earlier and hence no benchmark price was available, going by media information one wonders how the benchmark price was revised upwardly, by use of an "aligned cost table".*
>
> *Para 47 of DPP 2013 stipulates that, "the CNC would carry out all processes from opening of commercial bids till conclusion of contract".*
>
> *If there were differences of opinion on benchmarking among members of the CNC, with three crucial members – Joint Secretary & Acquisition Manager, Finance Manager, and Advisor (Cost) – who*

had the relevant domain expertise on benchmarking, plumping for €5.2 billion while others sought enhancement to €8.2 billion based on an "aligned cost table", the details doubtless merit scrutiny"

(d) Mr. Mohanty has further highlighted that it was erroneous to take into consideration the price for the 126 aircrafts deal that never materialised as that price was inclusive of costs of Transfer of Technology and additional costs that the vendor would have had to spend to materialise manufacturing in India. These would be costs that Dassault would not incur in the 36 aircraft deal. He states,

"The manufacturing of 108 aircraft which were proposed to be made in India included the ToT and licence production cost, plus the cost of setting up the facility in India. This expenditure was to be amortised over the entire spectrum of 108 aircraft to be produced. Thereafter even the depreciated value of the facility upon closure of this production line would have a residual value.Amortisation in its classical sense is applied to intangible assets. When funds need to be invested for setting up a particular facility that is quantity-neutral, it is natural that the greater the number the better it is for the investor.With the cost of such investment deemed as inexorable because it is the irreducible minima, the higher the number, the lesser is the cost per unit, since the investment spreads across a wider spectrum, thereby whittling down the individual price.So, apportioning this expenditure over 36 units isn't the best way to arrive at the reasonable price to benchmark. It's much too simplistic a calculation – and it doesn't work that way!".

(e) Mr. Mohanty has further brought out that the decision of the Defence Acquisition Council to refer to the CCS the decision as regards the upward revision in bencmark price when it could not agree on the same was against the *Allocation and Business Rules* of the Government of India. Further, such a practice had been depreciated by the CAG in its audit report on the Augusta Westland case which is currently also a subject matter of investigation by the CBI. Mr. Mohanty stated,

"Going by media reports, the Defence Acquisition Council/ MoD did not recommend the case as authorised by the Allocation and Business Rules of the Government of India, and instead referred it to the Cabinet Committee on Security (CCS) for taking a decision that falls within its power (which it has exercised in other cases).But for

the Ministry of Finance to have agreed to refer it to the CCS for decision-making is truly a puzzle. This is because the CAG in its audit report on the AgustaWestland case – the Report of the Comptroller and Auditor General of India on Acquisition of Helicopters for VVIPs; Union Government Defence Services (Air Force) No. 10 of 2013, tabled before Parliament on August 13, 2013 – had observed that: 'the MoF should have either recommended, not recommended or recommended with conditions the proposal as MoF provides financial advice to CCS and Government'"

(f) In an interview to the Economic Times, Mr. Mohanty highlighted that the decision to refer the increase in benchmark price for approval of CCS was highly unusual and described the decision as "*strange, even queer*". He stated,

"*It has been brought out that the negotiating team came up with a benchmark price that was overruled by the ministry. It wouldn't be fair on my part to comment on the benchmark price. The more relevant question that needs to be asked is: On what grounds was this overruled? What logic and justifications were adduced on file to overrule the points made by senior ministry officials who negotiated the contract? Further, as per the information available in public domain, the Defence Acquisition Council headed by the defence minister and consisting of all top MoD honchos didn't recommend the case, instead left it to the Cabinet Committee on Security to take a call. Why? This needs to be looked into. For, not in my fallible memory of defence capital acquisition can I recall such a thing — because it is strange, even queer.*"

A copy of the article published by Mr. Mohanty on 02.12.2018 in *The Citizen* is annexed as **Annexure** __ at pages ____ to ____.

A copy of the interview of Mr. Mohanty published on 15.11.2018 in the *Economic Times* is annexed as **Annexure** __ at pages ____ to ____.

9. That the Petitioner herein has not filed any other ReviewPetition in this Hon'ble Court earlier for similar relief. Further,given the gravity of issues which are for consideration in thisPetition by the Hon'ble Court, the Petitioner herein seeks anaudience in Open Court before the present Petition isadjudicated upon. Further, as the government's application for modification is really an application for Review under disguise, it would be

appropriate to treat it as such, and a hearing in the open court should be provided to both sides.

10. It is evident from the facts and submissions hereinabovethat the impugned judgement contains patent factual andlegal errors, which sufficiently make out a case for review in the OpenCourt. *Inter Alia,* following are the grounds which establish a case for review by this Hon'bleCourt:

GROUNDS

A. Because the judgement contains several errors apparent on the face of the record which go to the root of the matter mentioned elaborately in the petition above in paras 3, 4, 5, & 6.

B. Because the judgement relies upon patently incorrect claims made by the government in an unsigned note given in a sealed cover to the Hon'ble Court without being shown to the petitioners which is a violation of principles of natural justice. The petitioners were not given an opportunity to be heard on the claims made in the governments unsigned notes resulting in gross miscarriage of justice.

C. Because the Hon'ble Court has not even considered the main prayer in the petition and proceeded to dispose it off on the basis that the petitioners were seeking cancellation of the contract rather than an inquiry or investigation into the criminal complaint that was made by the petitioners to the CBI.

D. Because the Hon'ble Court has relied upon incorrect claims made by the government in unsigned notes which were conclusively rebutted by the petitioners in their petition and the rejoinder affidavit, which refutation has not even been considered by the Hon'ble Court.

E. Because several new facts have come to light after the judgement was reserved in the matter, which go to the root of the matter and falsify the claims of the government which have been relied upon by the Hon'ble Court in it's judgement.

PRAYER

It is, therefore, most respectfully prayed that this Hon'bleCourt may be pleased to:

a) Review Judgement dated 14.11.2018 delivered by this Hon'ble Court in Writ Petition(Criminal) No. 298 of 2018;

b) Recall Judgement dated 14.11.2018; &

c) Grant an oral hearing in the open court to the petitioners' as the facts and circumstances of the case sufficiently necessitate.

c) Be pleased to pass such other order or orders as thisHon'ble Court deems just and proper in the facts andcircumstances of the case.

AND FOR THESE ACTS OF KINDNESS YOUR PETITIONERS AS IN DUTY BOUND SHALL EVERPRAY.

New Delhi

Filed on: _____ of January, 2019 Petitioners in Person

YASHWANT SINHA

PRASHANT BHUSHAN

(On behalf of himself & ARUN SHOURIE)