A MANOHAR LAL SHARMA

v.

NARENDRA DAMODARDAS MODI & ORS.

(Writ Petition (Crl.) No. 225 of 2018)

B DECEMBER 14, 2018

[RANJAN GOGOI, CJI, SANJAY KISHAN KAUL AND K. M. JOSEPH, JJ.]

Constitution of India: Art 32 – Public interest litigation – Issue
C *relating to procurement of 36 Rafale Fighter Jets for the India Airforce by Defence Ministry from France – Petitions seeking registration of FIR, court monitored investigation into corruption allegations in Rafale deal and quashing of Inter Governmental Agreement of 2016 for purchase of Rafale Jets – Held: Interference on the sensitive issue of purchase of defence aircrafts by the Indian*
D *Government as regards the decision making process, difference in pricing, and the choice of Indian Offset Partner-IOP not called for – In such matters, perception of individuals cannot be the basis of a fishing and roving enquiry by this Court – Court cannot sit as an appellate authority to scrutinize each aspect of the process of*
E *acquisition – Decision making process cannot be doubted – Minor deviations even if have occurred, would not result in either setting aside the contract or requiring a detailed scrutiny – Court would not carry out a comparison of the pricing details – Said material has to be kept in a confidential domain – In Defence Procurement Procedure 2013, the role of the Government is not envisaged, thus,*
F *mere press interviews or suggestions cannot form the basis for judicial review, especially when there is a categorical denial by both the sides – Also, no material to show that this is a case of commercial favouritism to any party by the Government.*

Judicial review: Governmental decisions relating to defence
G *procurement of aircrafts – Permissibility of judicial review – Held: Extent of permissible judicial review in matters of contracts, procurement, etc. varies with the subject matter of the contract and there cannot be any uniform standard – Contracts of defence procurement should be subject to a different degree and depth of judicial review – Scrutiny of the challenges will have to be made*
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keeping in mind the confines of national security, the subject of the procurement being crucial to the nation's sovereignty.

Dismissing the writ petitions, the Court

HELD: 1.1 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. It would be appropriate, at the outset, to set out the parameters of judicial scrutiny of governmental decisions relating to defence procurement and to indicate whether such parameters are more constricted than what the jurisprudence of judicial scrutiny of award of tenders and contracts, that has emerged till date, would legitimately permit. The tender in issue is not for construction of roads, bridges, etc. It is a defence tender for procurement of aircrafts. The parameter of scrutiny would give far more leeway to the Government, keeping in mind the nature of the procurement itself. [Para 5, 6, 9][847-G-H; 848-A-B, F-G]

1.2 The extent of permissible judicial review in matters of contracts, procurement, etc. would vary with the subject matter of the contract and there cannot be any uniform standard or depth of judicial review which could be understood as an across the board principle to apply to all cases of award of work or procurement of goods/material. The scrutiny of the challenges, thus, 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. [Para 11][849-G-H; 850-A]

Jagdish Mandal v. State of Orissa and Ors. **(2007) 14 SCC 517** *; Maa Binda Express Carrier & Anr. v. North-East Frontier Railway & Ors.* **(2014) 3 SCC 760 : [2013] 12 SCR 529 ;** *Tata Cellular v. Union of India* **(1994) 6 SCC 651 : [1994] 2 Suppl. SCR 122 ;** *Siemens Public Communication Networks Pvt. Ltd. & Anr. v. Union of India & Ors.* **(2008) 16 SCC 215 : [2008] 15 SCR 585 ;** *Reliance Airport Developers (P) Ltd. v. Airports Authority of India & Ors.* **(2006) 10 SCC 1 : [2006] 8 Suppl. SCR 398 – referred to.**

A **2. 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. Joint exercises have taken place, and that there is a financial advantage to the nation. 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. The need for the aircrafts is not in doubt. The quality of the aircraft is not in question. 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 Court cannot sit in judgment over the wisdom of deciding to go in for purchase of 36 aircrafts in place of 126. The Government cannot be compelled to go in for purchase of 126 aircraft. This is despite the fact that even before the withdrawal of RFP, an announcement came to be made in April 2015 about the decision to go in only for 36 aircrafts. The country cannot afford to be unprepared/underprepared in a situation where the adversaries are stated to have acquired not only 4th Generation, but even 5th Generation Aircrafts, of which, there are none. It will not be correct for the Court to sit as an appellate authority to scrutinize each aspect of the process of acquisition. [Para 22][854-B-F]**

2.2 The process was concluded for 36 Rafale fighter jet aircrafts on 23rd September, 2016. Nothing was called into question, then. It is only taking advantage of the statement by the ex-President of France, that these set of petitions have been filed, not only qua the aspect which formed the statement, that is, the issue of IOPs but also with respect to the entire decision-making process and pricing. [Para 23][854-G-H]

3.1 The material placed before this Court shows that the Government did not disclose pricing details, other than the basic price of the aircraft, even to the Parliament, on the ground that sensitivity of pricing details could affect national security, apart

from breaching the agreement between the two countries. The pricing details have, however, been shared with the Comptroller and Auditor General and the report of the CAG has been examined by the Public Accounts Committee only a redacted portion of the report was placed before the Parliament, and is in public domain. The Chief of the Air Staff is stated to have communicated his reservation regarding the disclosure of the pricing details, including regarding the weaponry which could adversely affect national security. 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. Despite this reluctance, the material has still been placed before the Court to satisfy its conscience. [Para 25][855-C-F]

3.2 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 and the explanatory note on the costing, item wise have been examined. 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. It is certainly not the job of this Court to carry out a comparison of the pricing details in matters like the present. Nothing more is said as the material has to be kept in a confidential domain. [Para 26] [855-G-H; 856-A]

4.1 The company, Reliance, has come into being in the recent past, but the press release suggests that there was possibly an arrangement between the parent company and Dassault starting from the year 2012. As to what transpired between the two corporates would be a matter best left to them, being matters of their commercial interests, as perceived by them. 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

Government in the matter. On the basis of materials available this appears contrary to the clause in DPP 2013 dealing with IOPs. Thus, the commercial arrangement, 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. As far as the role of HAL, insofar as the procurement of 36 aircrafts is concerned, there is no specific role envisaged. In fact, the suggestion of the Government seems to be that there were some contractual problems and Dassault was circumspect about HAL carrying out the contractual obligation, which is also stated to be responsible for the non-conclusion of the earlier contract. [Para 32][858-A-E]

4.2 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. There is no substantial material on record to show that this is 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. [Para 33][858-F-G]

5. There is 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. It is made clear that the views are primarily from the standpoint of the exercise of the jurisdiction under Article 32 of the Constitution which has been invoked in the instant group of cases. [Para 34][858-H; 859-A-B]

Case Law Reference

(2007) 14 SCC 517	**referred to**	**Para 7**
[2013] 12 SCR 529	**referred to**	**Para 7**
[1994] 2 Suppl. SCR 122	**referred to**	**Para 8**
[2008] 15 SCR 585	**referred to**	**Para 9**
[2006] 8 Suppl. SCR 398	**referred to**	**Para 10**

CIVIL/CRIMINAL ORIGINAL JURISDICTION : Writ Petition (Criminal) No. 225 of 2018.

Under Article 32 of the Constitution of India

With

W.P. (C) No. 1205 of 2018, W.P. (Crl.) Nos. 297, 298 of 2018

K. K. Venugopal, AG, Tushar Mehta, SG, Sanjay R. Hegde, Sr. Adv., Ms. Suman, Ms. Raj Rani Dhanda, Vineet Dhanda, N. A. Usmani, Gopi Chand for Dr. J. P. Dhanda, Dheeraj Kumar Singh, Mrinal Kumar, Nihal Ahmad, Alok Shukla, R. Balasubramanian, Ms. Shraddha Deshmukh, A.K. Sharma, Advs. for the appearing parties.

Manohar Lal Sharma, Petitioner-in-person.

Prashant Bhushan, Petitioner-in-person.

Arun Shourie, Petitioner-in-person.

The Judgment of the Court was delivered by

RANJAN GOGOI, CJI

1. The issues arising in this group of writ petitions, filed as Public Interest Litigations, relate to procurement of 36 Rafale Fighter Jets for the Indian Airforce. The procurement in question, which has been sought to be challenged, has its origins in the post-Kargil experience that saw a renewed attempt to advance the strategic needs of the armed forces of the country.

2. As far back as in the month of June of the year 2001, an in-principle approval was granted for procurement of 126 fighter-jets to augment the strength of the Indian Airforce. Simultaneously, a more transparent Defence Procurement Procedure ("DPP") was formulated for the first time in the year 2002. A robust 'offset clause' was included

A in the DPP in the year 2005 so as to promote Indigenisation and to that effect Services Qualitative Requirements ("SQRs") were prepared in June 2006. On 29th June 2007 the Defence Acquisition Council ("DAC") granted the "Acceptance of Necessity" for the procurement of 126 Medium Multi Role Combat Aircrafts (for short "MMRCA") including 18 direct fly-away aircrafts (equivalent to a single squadron) to be
B procured from the Original Equipment Manufacturer ("OEM") with the remaining 108 aircrafts to be manufactured by Hindustan Aeronautics Limited (for short "HAL") under licence, to be delivered over a period of 11 years from the date of signing. The bidding process commenced in August 2007. Six (06) vendors submitted proposals in April, 2008.
C The proposals were followed by technical and field evaluations; a Staff Evaluation Report and a Technical Oversight Committee Report. All these were completed in the year 2011. The commercial bids were opened in November, 2011 and M/s Dassault Aviation (hereinafter referred to as "Dassault") was placed as the L-I sometime in January 2012. Negotiations commenced thereafter and continued but without
D any final result. In the meantime, there was a change of political dispensation at the centre sometime in the middle of the year 2014.

3. According to the official respondents negotiation continued**.** A process of withdrawal of the Request for Proposal in relation to the 126 MMRCA was initiated in March 2015. On 10th April, 2015 an Indo-
E French joint statement, for acquisition of 36 Rafale Jets in fly-away condition through an Inter-Governmental Agreement (hereinafter referred to as "IGA"), was issued and the same was duly approved by the DAC. The Request for Proposal for the 126 MMRCA was finally withdrawn in June 2015. Negotiations were carried out and the process
F was completed after Inter-Ministerial Consultations with the approval of the Cabinet Committee on Security (for short "CCS"). The contract along with Aircraft Package Supply Protocol; Weapons Package Supply Protocol; Technical Arrangements and Offset contracts was signed in respect of 36 Rafale Jets on 23rd September, 2016. The aircrafts were
G scheduled to be delivered in phased manner commencing from October 2019.

4. Things remained quiet until sometime in the month of September, 2018 when certain newspapers reported a statement claimed to have been made by the former President of France, Francois Hollande, to the effect that the French Government were left with no choice in the matter
H of selection of Indian Offset Partners and the Reliance Group was the

name suggested by the Government of India. This seems to have triggered of the writ petitions under consideration.

The first writ petition i.e. Writ Petition (Criminal) No.225 of 2018 has been filed by one Shri Manohar Lal Sharma, a practicing lawyer of this Court. What is sought for in the said writ petition is registration of an FIR under relevant provisions of the Indian Penal Code, 1860 and a Court Monitored Investigation. The further relief of quashing the Inter-Governmental Agreement of 2016 for purchase of 36 Rafale Jets has also been prayed for.

Writ Petition (Civil) No.1205 of 2018 has been filed by one Shri Vineet Dhanda claiming to be a public spirited Indian. The petitioner states that he was inspired to file the writ petition being agitated over the matter on the basis of the newspaper articles/reports.

The third writ petition bearing Writ Petition (Criminal) No.297 of 2018 has been filed by one Shri Sanjay Singh, a Member of Parliament alleging illegality and non-transparency in the procurement process. The said writ petition seeks investigation into the reasons for "cancellation of earlier deal" and seeks a 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. Cancellation of Inter-Governmental Agreement and registration of an FIR has also been prayed for.

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 non-registration 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.

5. 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.

A 6. Keeping in view the above, it would be appropriate, at the outset, to set out the parameters of judicial scrutiny of governmental decisions relating to defence procurement and to indicate whether such parameters are more constricted than what the jurisprudence of judicial scrutiny of award of tenders and contracts, that has emerged till date, would legitimately permit.

B 7. Parameters of judicial review of administrative decisions with regard to award of tenders and contracts has really developed from the increased participation of the State in commercial and economic activity. In ***Jagdish Mandal*** vs. ***State of Orissa and Ors.***[1] this Court, conscious of the limitations in commercial transactions, confined its scrutiny to the C decision making process and on the parameters of unreasonableness and mala fides. In fact, the Court held that it was not to exercise the power of judicial review even if a procedural error is committed to the prejudice of the tenderer since private interests cannot be protected while exercising such judicial review. The award of contract, being D essentially a commercial transaction, has to be determined on the basis of considerations that are relevant to such commercial decisions, and this implies that terms subject to which tenders are invited are not open to judicial scrutiny unless it is found that the same have been tailor-made to benefit any particular tenderer or a class of tenderers. [See ***Maa Binda Express Carrier & Anr.*** Vs. ***North-East Frontier Railway & Ors.***[2]] E

8. Various Judicial pronouncements commencing from ***Tata Cellular*** vs. ***Union of India***[3], all emphasise the aspect that scrutiny should be limited to the Wednesbury Principle of Reasonableness and absence of mala fides or favouritism.

F 9. We also cannot lose sight of the tender in issue. The tender is not for construction of roads, bridges, etc. It is a defence tender for procurement of aircrafts. The parameter of scrutiny would give far more leeway to the Government, keeping in mind the nature of the procurement itself. This aspect was even emphasized in ***Siemens Public*** G ***Communication Networks Pvt. Ltd. & Anr.*** Vs. ***Union of India & Ors.***[4]. The triple ground on which such judicial scrutiny is permissible has been consistently held to be "illegality", "irrationality" and "procedural impropriety".

[1](2007) 14 SCC 517
[2](2014) 3 SCC 760
H [3](1994) 6 SCC 651
[4](2008) 16 SCC 215

10. In ***Reliance Airport Developers (P) Ltd.*** vs. ***Airports Authority of India & Ors.***[5] the policy of privatization of strategic national assets qua two airports came under scrutiny. A reference was made in the said case to the commentary by Grahame Aldous and John Alder in their book 'Applications for Judicial Review, Law and Practice':

> "There is a general presumption against ousting the jurisdiction of the courts, so that statutory provisions which purport to exclude judicial review are construed restrictively. There are, however, 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 bona fide. In this kind of non-justiciable area judicial review is not entirely excluded, but very limited. It has also been said that powers conferred by the royal prerogative are inherently unreviewable but since the speeches of the House of Lords in Council of Civil Service Unions Vs. Minister for the Civil Service [1985 AC 374: (1984) 3 WLR 1174 (HL): (1984) 3 All ER 935] this is doubtful. Lords Diplock, Scaman and Roskili (sic.)[6] appeared to agree that there is no general distinction between powers, based upon whether their source is statutory or prerogative but that judicial review can be limited by the subject-matter of a particular power, in that case national security. 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. Another non-justiciable power is the Attorney General's prerogative to decide whether to institute legal proceedings on behalf of the public interest."
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> [emphasis supplied]

11. It is our considered opinion/view that the extent of permissible judicial review in matters of contracts, procurement, etc. would vary with the subject matter of the contract and there cannot be any uniform standard or depth of judicial review which could be understood as an across the board principle to apply to all cases of award of work or procurement of goods/material. The scrutiny of the challenges before us, therefore, will have to be made keeping in mind the confines of national

[5](2006) 10 SCC 1

[6]To be read as 'Roskill'

A security, the subject of the procurement being crucial to the nation's sovereignty.

12. Adopting such an approach, on 10th October, 2018 when the first two writ petitions were initially listed before the Court, the Court had specifically observed in its order that it is proceeding in the matter B by requiring the Government of India to apprise the Court of the details of the steps taken in the decision-making process notwithstanding the fact that the averments in the writ petitions were inadequate and deficient. The Court had also indicated that it was so proceeding in the matter in order to satisfy itself of the correctness of the decision-making process. It was also made clear that the issue of pricing or matters relating to C technical suitability of the equipment would not be gone into by the Court. The requisite information was required to be placed before the Court by the Government of India in sealed cover. Before the next date of hearing fixed i.e. 31st October, 2018, the other two writ petitions came to be filed.

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13. On 31st October, 2018, the Court in its order had recorded that in none of the writ petitions the suitability of the fighter jets and its utility to the Indian Airforce had been called into question. Rather what was doubted by the petitioners is the bona fides of the decision-making process and the price/cost of the equipment at which it was proposed to be E acquired.

14. Pursuant to the order dated 10th October 2018, a note in sealed cover delineating the steps in the decision-making process was submitted to the Court and by order dated 31st October 2018 this Court had directed that such of the information which has been laid before the Court, which F can legitimately be brought into the public domain, be also made available to the petitioners or their counsels. Details with regard to the induction of the Indian Offset Partner (IOP), if any, was also required to be disclosed. The Court also directed that the details with regard to pricing; the advantages thereof, if any, should also be submitted to the Court in a sealed cover.

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15. 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 decision-making process; (ii) difference in pricing; and H (iii) the choice of IOP.

Decision Making Process

16. The details of the steps in the decision-making process leading to the award of the 36 Rafale fighter aircrafts' order have been set out in response to the order dated 10th October, 2018. The Government states that the DPP 2002 has been succeeded by periodical reviews in 2005, 2006, 2008, 2011, 2013 and 2016. The preamble to DPP has been referred to capture its essence, which emphasises that –

> "Defence acquisition is not a standard open market commercial form of procurement and has certain unique features such as supplier constraints, technological complexity, foreign suppliers, high cost, foreign exchange implications and geo-political ramifications. As a result, decision making pertaining to defence procurement remains unique and complex."

It also states that –

> "Defence procurement involves long gestation periods and delay in procurement will impact the preparedness of our forces. The needs of the armed forces being a non-negotiable and an uncompromising aspect, flexibility in the procurement process is required, which has also been provisioned for."

It is DPP 2013 which is stated to have been followed in the procurement in question.

It is no doubt true that paragraph 77 of the DPP 2013 reads as follows:

> "77. This procedure would be in supersession of Defence Procurement Procedure 2011 and will come into effect from 01 June 2013. There are, however, cases which would be under various stages of processing in accordance with provision of earlier versions of DPP at the time of commencement of DPP-2013. The processing of these cases done so far under the earlier procedure will be deemed to be valid. Only those cases in which RFP is issued after 01 June, 2013, will be processed as per DPP-2013."

In other words when it is stated that only those cases in which RFP is issued after 1st June 2013 will be processed as per DPP 2013, in this case where the RFP was issued much prior to 1st April 2013 and it was withdrawn, as already noted, in June 2015, a question may arise as

A to how it could be claimed that DPP 2013 was followed. We, however, also notice clause 75 of DPP 2013 which reads as follows:

> "75. Any deviation from the prescribed procedure will be put up to DAC through DPB for approval."

B 17. Also, we notice that the official respondents have sought support from paragraph 71 of the DPP 2013.Para 71 of DPP 2013, in respect of the IGA has been referred to, which postulates possibilities of procurement from friendly foreign countries, necessitated due to geo-strategic advantages that are likely to accrue to the country. Such procurement would not classically follow the Standard Procurement C Procedure or the Standard Contract Document, but would be based on mutually agreed provisions by the Governments of both the countries based on an IGA, after clearance from the Competent Financial Authority (hereinafter referred to as "CFA"). Of the total procurement of about Rs.7.45 lakh crores since 2002 under DPP, different kinds of IGAs, including Foreign Military Sales and Standard Clauses of Contract account D for nearly 40%. With the object of promoting indigenization, a robust offset clause is said to have been included since 2005. As per the Defence Offset Guidelines of 2013, the vendor/Original Equipment Manufacturer (hereinafter referred to as "OEM") is free to select its IOPs for implementing the offset obligation.

E 18. 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) Man-Hours that would be required to produce the aircraft in F India: HAL required 2.7 times higher Man-Hours 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 fly-away and 108 aircraft manufactured in India) as per RFP G requirements. Issues related to contractual obligation and responsibility for 108 aircraft manufactured in India could not be resolved."

19. The aforesaid issues are stated to have been unresolved for more than three years. Such delay is said to have impacted the cost of

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acquisition, as the offer was with 'in-built escalation' and was influenced by Euro-Rupee exchange rate variations. 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. In such a situation, government-to-government negotiations resulted in conclusion of the IGA for the supply of 36 Rafale Aircrafts, as part of a separate process. The requisite steps are stated to have been followed, as per DPP 2013. An INT[7] was constituted to negotiate the terms and conditions, 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 theINT 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.

20. The petitioners, on the other hand, seek to question the very fulfilment of the prerequisites for entering into an IGA. The Government of France, giving only a 'Letter of Comfort' and not a 'Sovereign Guarantee' has been questioned.

21. It is a say of the petitioners that para 71 envisages three eventualities, where the question of entering into an IGA would arise, which have not arisen in the present case:

(a) Proven technology and capabilities belonging to a friendly foreign country is identified by our Armed Forces while participating in joint international exercises;

(b) Large value weapon system/platform in service in a friendly foreign country is available for transfer or sale normally at a much lesser cost; or

(c) Requirement of procuring a specific state-of-the-art equipment/ platform where the Government of the OEM's country might have

[7]Indian Negotiating Team

A imposed restriction on its sale and thus the equipment cannot be evaluated on 'No Cost No Commitment' basis.

22. 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
B 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 that there is a financial advantage to our nation. It cannot be
C 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. The need for the aircrafts is not in doubt. The quality of the aircraft is not in question. 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
D 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. 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
E purchase of 126 aircraft. This is despite the fact that even before the withdrawal of RFP, an announcement came to be made in April 2015 about the decision to go in only for 36 aircrafts. 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
F for the Court to sit as an appellate authority to scrutinize each aspect of the process of acquisition.

23. We may also note that the process was concluded for 36 Rafale fighter jet aircrafts on 23rd September, 2016. Nothing was called into question, then. It is only taking advantage of the statement by the
G ex-President of France, Francois Hollande that these set of petitions have been filed, not only qua the aspect which formed the statement, that is, the issue of IOPs but also with respect to the entire decision-making process and pricing. We do not consider it necessary to dwell further into this issue or to seek clause-by-clause compliances.

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Pricing

24. The challenge to the pricing of the aircrafts, by the petitioners, is sought to be made on the ground that there are huge escalations in costs, as per the material in public domain, as found in magazines and newspapers. We did initially express our disinclination to even go into the issue of pricing. However, by a subsequent order, to satisfy the conscience of the Court, it was directed that details regarding the costs of the aircrafts should also be placed in sealed covers before the Court.

25. The material placed before us shows that the Government has not disclosed pricing details, other than the basic price of the aircraft, even to the Parliament, on the ground that sensitivity of pricing details could affect national security, apart from breaching the agreement between the two countries. 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. The Chief of the Air Staff is stated to have communicated his reservation regarding the disclosure of the pricing details, including regarding the weaponry which could adversely affect national security. 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. Despite this reluctance, the material has still been placed before the Court to satisfy its conscience.

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 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.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.

Offsets

27. The issue of IOP is what has triggered this litigation. The offset contract is stated to have been governed by the Defence Offset Guidelines of DPP 2013. Two of the said contracts were signed with Dassault and M/s MBDA Missile Systems Limited on 23rd September, 2016, the same day on which the IGA was signed between the Government of India and the Government of France. These are the French industrial suppliers of the Aircraft package and Weapon Package respectively. There are stated to be no offset obligations in the first three years, but the offset obligations are to commence from October 2019 onwards.

28. The complaint of the petitioners is that the offset guidelines contemplate that the vendor will disclose details about the Indian Offset partner however, in order to help the business group in India in question, an amendment was carried out in paragraph 8 of the Offset Guidelines that too with retrospective effect. By virtue of the said amendment it is contended that cloak of secrecy is cast about the Offset partner and the vendor is enabled to give the details at a much later point of time. It is contended, however, that other provisions of the Offset Guidelines remain unamended, and, therefore, Government cannot pretend ignorance about the Indian Offset partner as has been done in the affidavit filed. It is complained that favouring the Indian business group has resulted in offence being committed under the Prevention of Corruption Act.

29. As per clause 8 of DPP 2013, dealing with the processing of offset proposals, it has been stated in clause 8.2 as under:

> "8. **Processing of Offset Proposals**
>
> 8.2 The TOEC[8] will scrutinize the technical offset proposals (excluding proposals for Technology Acquisition by DRDO as per para 8.3) to ensure conformity with the offset guidelines. For this purpose, the vendor may be advised to undertake changes to bring his offset proposals in conformity with the offset guidelines. The TOEC will be expected to submit its report within 4-8 weeks of its constitution."

[8]Technical Offset Evaluation Committee

30. It has been categorically stated that the vendor/OEM is yet to submit a formal proposal, in the prescribed manner, indicating the details of IOPs and products for offset discharge. A press release in the form of a 'Clarification on Offset Policy', posted on 22nd September, 2018 has also been placed before us. *Inter alia,* it states that the Government reiterates that it has no role to play in the selection of the IOP. As per the Defence Offset Guidelines, the OEM is free to select any Indian company as its IOP. A joint venture is stated to have come into being between Reliance Defence and Dassault in February 2017, which is stated to be a 'purely commercial arrangement' between the two private companies. Media reports of February 2012 are stated to suggest that Dassault, within two weeks of being declared the lowest bidder for procurement of 126 aircrafts by the previous Government, had entered into a pact for partnership with Reliance Industries (Another business group) in the Defence sector. Dassault has also issued a press release stating that it has signed partnership agreements with several companies and is negotiating with over hundred other companies. As per the guidelines, the vendor is to provide details of the IOPs, either at the time of seeking offset credit or one year prior to discharge of offset obligation, which would be due from 2020 onwards. The aforesaid press release is in conformity with the clause dealing with IOPs which reads as under:

> "4. **Indian Offset Partner**
>
> 4.3 The OEM/vendor/Tier-I sub-vendor will be free to select the Indian offset partner for implementing the offset obligation provided the IOP has not been barred from doing business by the Ministry of Defence."

31. Despite the aforesaid illustration, the petitioners kept on emphasising that the French Government has no say in the matter, as per media reports. It is also stated that there was no reason for Dassault to have engaged the services of Reliance Aerostructure Ltd., through a joint venture, when the company itself had come into being only on 24th April, 2015. The allegation, thus, is that the Indian Government gave a benefit to Reliance Aerostructure Ltd., by compelling Dassault to enter into a contract with them, and that too at the cost of the public enterprise, HAL.

A 32. 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. As to what transpired between the two corporates would be a matter best left to them, being matters of their commercial interests, as perceived by them. There has
B 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 Government in the matter. On the basis of materials available before us, this appears contrary to the clause in DPP 2013 dealing with IOPs which has been extracted
C above. Thus, 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 seeminglyleft 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
D vendor/OEM submits a formal proposal, in the prescribed manner, indicating details of IOPs and products for offset discharge. As far as the role of HAL, insofar as the procurement of 36 aircrafts is concerned, there is no specific role envisaged. In fact, the suggestion of the Government seems to be that there were some contractual problems and Dassault was circumspect about HAL carrying out the contractual
E obligation, which is also stated to be responsible for the non-conclusion of the earlier contract.

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
F 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 is a case of commercial favouritism to any party by the Indian Government,
G as the option to choose the IOP does not rest with the Indian Government.

Conclusion:

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
H 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.

Nidhi Jain Petitions dismissed.