SYNOPSIS

The petitioners are filing the instant writ petition in public interest seeking a writ of quo warranto or any other appropriate writ to declare the appointment of Shri Shashi Kant Sharma (hereinafter 'Respondent No. 2') as India's new Comptroller & Auditor General of India (hereinafter 'CAG') as void. The appointment of Respondent No. 2 as CAG is liable to be declared *non est* or void as it is made arbitrarily by a procedure that does not withstand the test of constitutionality, also on the ground of conflict of interest, and *'Nemo judex in causa sua'*, i.e. no person shall be a judge in his own cause. Petitioners had filed a similar writ petition before the Hon'ble Supreme Court of India under Article 32 of the Constitution (WPC 426/2013 titled as 'N. Gopalaswami & Ors vs Union of India & Anr') which vide order dated 15.07.2013 directed the petitioners to approach the High Court for the said reliefs. Pursuant to the said order, petitioners are filing the instant writ petition.

CAG is constitutional auditor who acts as a watchdog over the expenditure & accounts of the Central Government, its instrumentalities and the State Governments. He has been given a stature and oath akin to the Judge of the Supreme Court of India and has been described as the "most important officer under the Constitution" by Dr. B R Ambedkar and others as recorded in the Constituent Assembly Debates.

The Constitution of India states that CAG shall be appointed by the President of India under his warrant and seal. The method of selection of the CAG has not been prescribed by the Constitution, but it is obvious that the process of selection has to be constitutional, non-

arbitrary and in a manner that enables the selection of best person for the office. The Supreme Court has repeatedly held in a large number of judgments that every selection must be after following a process consistent with the rule of law. The process must be non-arbitrary, transparent and designed to select the best candidate. Since the office of the CAG acts as watchdog over the Government, the process of appointment cannot be at the sole discretion of the executive and has to be non-partisan. As far as the office of the CAG is concerned, the Government has followed no system for selection. There is no selection committee, no criteria, no transparency and no call for applications or nominations. The process is entirely arbitrary and opaque, and thus completely violative of rule of law and several judgments of the Supreme Court.

There is no basis in law for the argument that since the Constitution does not prescribe any procedure for the appointment of the CAG means that the selection can be at the untrammeled discretion of the Government. If a man on the street is picked up and appointed without any audit credentials, then such an appointment would be illegal. If the Government exercises its discretion without application of mind, or by draw of lots or by throw of dice, or by an act of patronage, then such a selection would obviously be illegal. The fact the selection has to be made to such a high Constitutional post, *ipso facto*, would mean that there has to be a proper criteria, broad-based selection committee, call for applications and nominations, and set procedure for *inter se* evaluation of merit. These imperatives are particularly relevant for the selection of the CAG, a functionary who is supposed to be completely

independent of the Government and unbiased in his auditing of Governmental actions and spending.

In a recent judgment, the Supreme Court reaffirmed the legal principle that appointment to constitutional posts where the constitution has not prescribed any procedure cannot be arbitrary and has to be made after proper selection of the best candidate. The Supreme Court while holding the above upheld the judgment of the High Court quashing the appointment of Chairperson of State Public Service Commission and also directed the Government to lay down guidelines for selection in the future. (*State of Punjab vs Salil Sabhlok*, 2013 (2) Scale 573, dated 15.02.2013)

Before being appointed as the CAG, Respondent No. 2 had served in key positions in the Ministry of Defence that involved decision-making powers over purchases running into tens of lakhs of crores of rupees. During the period 2003-2007 he was the Joint Secretary in the Ministry of Defence. In 2007, after serving a brief stint as Additional Secretary, the Government posted him as the Director General of Acquisitions in charge of all defence purchases, where he served till September 2010. Thereafter, he served briefly as Officer on Special Duty, and was appointed as Defence Secretary in July 2011. He remained as Defence Secretary until recently when he was appointed as the CAG by the Government.

During the last 6 years, when Respondent no. 2 was involved in clearing all major defence purchases either as DG (Acquisitions) or as the Defence Secretary, serious defence scandals of mammoth proportions have come out in the public domain as are detailed in the petition.

It is to be noted that the defence budget has grown hugely in the last decade, particularly in the last 5 years and in 2013-14 it is Rs. 2,03,672 crore. Thus, a major share of the annual budget is accounted for by the defence procurements and acquisitions. One of the biggest tasks of the CAG is to audit these expenditures cleared by the Defence Ministry. Under the circumstance, the Government ignored this crucial fact when it appointed Respondent No. 2 as the CAG, creating a clear situation of conflict of interest and virtually making him a judge in his own cause, as he would be auditing the defence purchases he himself sanctioned.

Therefore, Government could not have appointed a person with greater conflict of interest than Respondent No. 2 for the position of India's national auditor of public finances. If the conflict of interest was unforeseeable and minor, then that could be excused. But a glaring conflict of interest which one can foresee would vitiate the appointment as per the clear law laid down in the CVC judgment ((2011) 4 SCC 1). There is no provision in the Constitution or in the CAG Act for a CAG to recuse himself in situations where clear conflict of interest is present. The very fact that the CAG would need to recuse himself marks a negation of the concept of a constitutional auditor and hence cannot be permitted. This is more so because the office of the CAG is a single-member body unlike the Supreme Court, the Election Commission or the Central Vigilance Commission. Major defence procurement decisions cannot be exempted from audit. Any such exemption would surely be unconstitutional. If the CAG recuses himself then that would mean that audit cannot be conducted and no

report can be submitted to Parliament since none other than the CAG can sign an Audit Report.

If right at the start of an appointment, a question of 'recusing' comes up prominently, then the appointment is *ipso facto* illegal. If, in the present case, this difficulty was not foreseen and considered, then that is clearly a case of non-application of mind and a failure to take into account the material and relevant facts. That would also render the appointment *non est* in the eyes of law.

In the CVC judgment, Supreme Court said that CVC is an “integrity institution” akin to the institution of the CAG. In the said case, the Court declared the recommendation of the selection committee to the President for appointment of the then CVC as *non est* in law. This was so held since the Court found that the appointment would dilute the integrity of the statutory institution of the Central Vigilance Commission. The Court held that the test is whether the individual would be able to perform his duties ((2011) 4 SCC 1, CPIL vs UoI):

The Supreme Court clearly found that a person who is himself the subject of scrutiny, irrespective of his own personal integrity, would not be able to perform his duties impartially and this would affect his functioning. The above judgment squarely applies with much greater force in the present case. Objectivity and fairness are the core principle that governs auditing. The impugned appointment of a person with such direct conflict of interest is also against the code of ethics of auditors. An auditor, who for whatsoever reason cannot be, or is expected not to be, unbiased, cannot be allowed to function as an auditor, more so as India’s constitutional auditor of the public finances.

IN THE HIGH COURT OF DELHI, AT NEW DELHI
(CIVIL ORIGINAL JURISDICTION)

Writ Petition (Civil) No. ..... Of 2013

MEMO OF PARTIES

IN THE MATTER OF PUBLIC INTEREST LITIGATION:

1) SHRI N GOPALASWAMI
(FORMER CHIEF ELECTION COMMISSIONER)
5, LEO MADHURAM
39, GIRI ROAD, T NAGAR
CHENNAI-600017 …PETITIONER NO. 1

2) ADMIRAL (RETD.) R H TAHILIANI
(FORMER CHIEF OF NAVAL STAFF)
R/O 290, DEFENCE COLONY
SECTOR-17, GURGAON-122001 …PETITIONER NO. 2

3) ADMIRAL (RETD.) L RAMDAS
(FORMER CHIEF OF NAVAL STAFF)
BHAIMALA VILLAGE, P.O. KAMARLE
ALIBAG-402201 (MAHARASHTRA) …PETITIONER NO. 3

4) DR. B P MATHUR
(FORMER DEPUTY CAG)
1621, BHRAMAPUTRA APARTMENTS
SECTOR-29, NOIDA-201303 …PETITIONER NO. 4

5) SHRI KAMAL KANT JASWAL
(FORMER SECRETARY, GOVT OF INDIA)
R/O B-34, GEETANJALI ENCLAVE
NEW DELHI-110017 …PETITIONER NO. 5

6) SHRI RAMASWAMY R IYER
(FORMER SECRETARY, GOVT OF INDIA)
R/O A-10, SARITA VIHAR
NEW DELHI-110076 …PETITIONER NO. 6

7) DR. E A S SARMA
(FORMER SECRETARY, GOVT OF INDIA)
R/O 14-40-4/1, GOKHALE ROAD
MAHARANIPETA
VISHAKHAPATNAM-530002 …PETITIONER NO. 7

8) SHRI S KRISHNAN
(FORMER IAAS OFFICER)
R/O E-212, ANANDLOK CGHS
MAYUR VIHAR PHASE-I
NEW DELHI-110091 …PETITIONER NO. 8

9) SHRI M G DEVASAHAYAM
(FORMER IAS & ARMY OFFICER)
R/O 103, CEEBROS BAYVIEW, VALMIKINAGAR
THIRUVANMIYUR, CHENNAI …PETITIONER NO. 9

VERSUS

1) UNION OF INDIA
THROUGH ITS CABINET SECRETARY
CABINET SECRETARIAT, RASHTRAPATI BHAVAN
NEW DELHI-110001 … RESPONDENT NO. 1

2) SHRI SHASHI KANT SHARMA
COMPTROLLER & AUDITOR GENERAL OF INDIA
DEEN DAYAL UPADHYAYA MARG
NEW DELHI-110124 …RESPONDENT NO. 2

NEW DELHI
DATED:

(PRASHANT BHUSHAN)
ADVOCATE FOR THE PETITIONER
301, NEW LAWYERS CHAMBERS
SUPREME COURT OF INDIA
NEW DELHI-110001

IN THE HIGH COURT OF DELHI, AT NEW DELHI
(CIVIL ORIGINAL JURISDICTION)

Writ Petition (Civil) No. ..... Of 2013

IN THE MATTER OF PUBLIC INTEREST LITIGATION:

SHRI N GOPALASWAMI & ORS …THE PETITIONERS

VERSUS

THE UNION OF INDIA & ANR. …THE RESPONDENTS

A WRIT PETITION IN PUBLIC INTEREST UNDER ARTICLE 226 OF THE CONSTITUTION OF INDIA SEEKING A WRIT OF QUO WARRANTO OR ANY OTHER APPROPRIATE WRIT AGAINST THE ILLEGAL AND ARBITRARY APPOINTMENT OF THE NEW COMPTROLLER & AUDITOR GENERAL OF INDIA AND ALSO FOR SEEKING CERTAIN DIRECTIONS FOR FUTURE APPOINTMENTS

To,

THE HON'BLE CHIEF JUSTICE OF DELHI AND HIS COMPANION JUDGES OF THE HON'BLE HIGH COURT OF DELHI

The Humble Petition of the
Petitioners above-named

MOST RESPECTFULLY SHOWETH: -

1) That the petitioners are filing the instant writ petition in public interest under Article 226 of the Constitution of India. The petitioners have no personal interest in the litigation and the petition is not guided by self-gain or for gain of any other person / institution / body and that there is no motive other than of public interest in filing the writ petition.

2) That the petitioners have based the instant writ petition from authentic information and documents made available through newspaper reports, articles published by eminent thinkers, CAG

reports, reports of the Government-appointed committees, letters written by petitioners to the authorities concerned, response received under the RTI Act, information from reliable inside sources and other publicly available documents.

3) That the petition, if allowed, would benefit the citizens of this country who are suffering from corruption and mis-governance. Since these persons are too numerous and have no personal interest in the matter, they are unlikely to approach this Hon’ble Court on this issue. Hence the petitioners herein are preferring this PIL.

4) The only affected parties by the orders sought in the writ petition would be the Union of India and Mr. Shashi Kant Sharma, who have been made as a Respondent. To the best of the knowledge of the petitioners, no other persons / bodies / institutions are likely to be affected by the orders sought in the writ petition.

5) All the petitioners have means to pay the costs if imposed by this Hon'ble Court. The brief description of petitioners is as given below:

a) Petitioner No. 1 is Shri N Gopalaswami. He is former Chief Election Commissioner of India. Before he was appointed as an election commissioner, he served as Home Secretary, Govt. of India, and also as Secretary General of the National Human Rights Commission.

b) Petitioner No. 2 is Admiral (Retd.) R H Tahiliani. He is the former Chief of Naval Staff. He has served for many years as Chairperson of Transparency International India.

c) Petitioner No. 3 is Admiral (Retd.) L Ramdas. He is the former Chief of Naval Staff and a recipient of the Ramon Magsaysay award.

d) Petitioner No. 4 is Dr. B P Mathur. He is a former Deputy Comptroller & Auditor General of India. He is also former Director of National Institute of Financial Management. Dr. Mathur has done extensive research on the office and the appointment process of the CAG in India and other countries. He has also written to the authorities seeking a transparent and objective criteria based selection.

e) Petitioner No. 5 is Shri Kamal Kant Jaswal. He has been Secretary to the Government of India in the Ministries of Statistics & Programme Implementation and Communication & Information Technology, and Member-Secretary, National Commission for Enterprises in the Unorganised Sector. For the last six years, he has been the Director of ‘Common Cause’, a civil society organisation dedicated to pursuit of governance reforms and redressal of the common problems of the people.

f) Petitioner No. 6 is Shri Ramaswamy R Iyer. He is a former Secretary to the Government of India. He has done extensive

research on the institution of the CAG and written many articles in newspapers seeking transparent selection of the CAG.

g) Petitioner No. 7 is Dr. E A S Sarma. He is a former Power Secretary to the Government of India, former Secretary in the Ministry of Finance, and former Principal Advisor (Energy) to the Planning Commission. He studied at Harvard University and holds a Doctoral degree from Indian Institute of Technology (Delhi). He has written several letters to the Prime Minister seeking a transparent and rule based selection process for the CAG.

h) Petitioner No. 8 is Shri S Krishnan. A former officer of Indian Audit and Account Service (IAAS), today he serves as the President, Forum of Retired Officers of the IAAS. He is formerly Member (Finance), Department of Posts, and Additional Secretary in the Ministry of Finance.

i) Petitioner No. 9 is Shri M G Devasahayam. He was a senior IAS officer who worked in several departments and key positions. He is also a former commissioned officer in the Indian Army who fought the 1965 war and participated in anti-insurgency operations in Nagaland. He has written several articles on governance and has published books. He is presently Convener of the Forum for Electoral Integrity.

6) That several representations have made to the authorities concerned seeking transparent and meritocratic system of selection of

the CAG by some of the petitioners, however no response has been received. A few such representations are annexed as **Annexure P1 (Colly)**. The first was letter dated 04.03.2011 sent by Petitioner No. 7 to the Prime Minister. Then was letter dated 23.11.2012 sent by Petitioner No. 5 to Chairman, Public Accounts Committee. And lastly is the letter dated 20.03.2013 sent by Petitioner Nos. 4, 6 and 8 to the President of India. Ignoring all such representations and several articles published in newspapers, the Government has proceeded to select Respondent No. 2 as the CAG in a completely arbitrarily and opaque manner.

7) That the Petitioners Nos. 1, 2, 3 and 7 have filed several notable PILs in the past in the Hon'ble Supreme Court and this Hon'ble Court. A brief of them is given below:

PILs filed by Petitioner No. 1:

S. No.	Case	Status	Outcome
1	WPC 464/2011 filed in Supreme Court (PIL challenging the validity of the Nuclear Liability Act)	Pending	SC has admitted the petition and issued Rule
2	WPC 463/2012 filed in Supreme Court (PIL seeking cancellation of coal	Pending	SC has issued notices to the respondents and is monitoring the CBI investigation.

	blocks and court-monitored investigation)		

PILs filed by Petitioner No. 2

S. No.	Case	Status	Outcome
1	WPC 463/2012 filed in Supreme Court (PIL seeking cancellation of coal blocks and court-monitored investigation)	Pending	SC has issued notices to the respondents and is monitoring the CBI investigation.

PILs filed by Petitioner No. 3

S. No.	Case	Status	Outcome
1	WPC 464/2011 filed in Supreme Court (PIL challenging the validity of the Nuclear Liability Act)	Pending	SC has admitted the petition and issued Rule
2	WPC 463/2012 filed in Supreme Court (PIL seeking	Pending	SC has issued notices to the respondents and is monitoring the CBI

	cancellation of coal blocks and court-monitored investigation)		investigation.

PILs filed by Petitioner No. 7

S. No.	Case	Status	Outcome
1	WPC 250/2007 filed in Supreme Court (PIL on the issue of 'Salwa Judum' in Chhatisgarh)	Disposed off	SC allowed the writ petition holding the deployment of 'Salwa Judum' forces as unconstitutional
2	WPC 464/2011 filed in Supreme Court (PIL challenging the validity of the Nuclear Liability Act)	Pending	SC has admitted the petition and issued Rule
3	WPC 407/2012 filed in Supreme Court (PIL on the issue of liability of Kudankulam nuclear power plant)	Pending	SC has issued notice on the petition
4	WPC 131/2013 filed in Delhi High Court	Pending	This Hon'ble Court has issued notice in the petition.

	(PIL seeking action against Congress, BJP for violation of FCR Act)		

THE CASE IN BRIEF

8) That the petitioners are filing the instant writ petition in public interest seeking a writ of quo warranto or any other appropriate writ against Mr. Shashi Kant Sharma (Respondent No. 2) to declare his appointment as India's new Comptroller & Auditor General of India (hereinafter 'CAG') as illegal and void.

9) CAG is constitutional auditor who acts as a watchdog over the expenditure & accounts of the Central Government, its instrumentalities and the State Governments. He has been given a stature and oath akin to the Judge of the Supreme Court of India and has been described as the "most important officer under the Constitution" by Dr. B R Ambedkar and others as recorded in the Constituent Assembly Debates.

10) Article 148 to 151 of the Constitution deal with the office of the CAG:

> **Article 148**: COMPTROLLER & AUDITOR GENERAL OF INDIA
>
> *(1) There shall be a Comptroller & Auditor General of India who shall be appointed by the President by warrant*

under his hand and seal and shall only be removed from office in like manner and on the like grounds as a Judge of the Supreme Court.

(2) Every person appointed to be the Comptroller & Auditor General of India shall, before he enters upon his office, make and subscribe before the President, or some person appointed in that behalf by him, an oath or affirmation according to the form set out for the purpose in the Third Schedule.

(3) The salary and other conditions of service of the Comptroller & Auditor General shall be such as may be determined by Parliament by law and, until they are so determined, shall be as specified in the Second Schedule:

Provided that neither the salary of a Comptroller & Auditor General nor his rights in respect of leave of absence, pension or age of retirement shall be varied to his disadvantage after his appointment.

(4) The Comptroller & Auditor General shall not be eligible for further office either under the Government of India or under the Government of any State after he has ceased to hold his office.

(5) Subject to the provisions of this Constitution and of any law made by Parliament, the conditions of service of

persons serving in the Indian Audit and Accounts Department and the administrative powers of the Comptroller & Auditor General shall be such as may be prescribed by rules made by the President after consultation with the Comptroller & Auditor General.

(6) The administrative expenses of the office of the Comptroller & Auditor General, including all salaries, allowances and pensions payable to or in respect of persons serving in that office, shall be charged upon the Consolidated Fund of India.

Article 149: DUTIES AND POWERS OF THE COMPTROLLER & AUDITOR GENERAL OF INDIA

The Comptroller & Auditor General shall perform such duties and exercise such powers in relation to the accounts of the Union and of the States and of any other authority or body as may be prescribed by or under any law made by Parliament and, until provision in that behalf is so made, shall perform such duties and exercise such powers in relation to the accounts of the Union and of the States as were conferred on or exercisable by the Auditor General of India immediately before the commencement of this Constitution in relation to the accounts of the Dominion of India and of the Provinces respectively.

Article 151: Audit Reports-

(1) The reports of the Comptroller and Auditor General of India relating to the accounts of the Union shall be submitted to the President, who shall cause them to be laid before each House of Parliament.

(2) The reports of the Comptroller and Auditor General of India relating to the accounts of a State shall be submitted to the Governor of the State, who shall cause them to be laid before the Legislature of the State.

11) The importance of the office of the CAG is reflected in its historical background, which goes back to 1858, when the East India Company administration was taken over by the British government. In 1860, the independent accounting offices of the three Presidencies of Bengal, Madras and Bombay were amalgamated and an Auditor General of India was appointed to look after both the audit and accounting functions. In 1914, through an executive order, the status and independence of the Comptroller and Auditor General were enhanced. With the introduction of constitutional reforms and the passing of the Government of India Act of 1919, a statutory recognition was given to the Auditor General of India and his independence and status were further enhanced. The Government of India Act, 1935 further enhanced the status and independence of the Auditor General. Under Section 166(1), he was to be appointed by the Governor General and could only be removed from office in like

manner and on like grounds as a judge of the Federal Court. Under Section 166(3) of the Act, the Auditor General had to perform such duties and exercise such powers in relation to the accounts of the Dominion and the Provinces as may be prescribed by rules. In pursuance of the said section, the duties and powers of the Auditor General were governed by the Government of India (Audit and Accounts) order 1936, which in view of Art 149 of the Constitution, remained in force until the CAG Act, 1971 came in force.

12) During the Constituent Assembly Debates, Dr B R Ambedkar observed on 30th May 1949 as follows:

> "*I cannot say that I am very happy about the position which the Draft Constitution, including the amendments which have been moved to the articles relating to the Auditor General in this House, assigns to him. Personally, speaking for myself, I am of opinion that this dignitary or officer is probably the most important officer in the Constitution of India. He is the one man who is going to see that the expenses voted by Parliament are not exceeded or varied from what has been laid down by Parliament in what is called the Appropriation Act. If this functionary is to carry out the duties -and his duties, I submit, are far more important than the duties even of the judiciary he should have been certainly as independent as the Judiciary. But, comparing the articles about the Supreme Court and the articles relating to the Auditor General, I cannot help saying that we have not given him the same independence which we have*

given to Judiciary, although I personally feel that he ought to have far greater independence than the Judiciary itself."

13) That the role of Audit in the preservation of Indian democracy is of vital importance. The following extract from a speech of Dr. S. Radhakrishnan, Vice-President of India, delivered on 2nd June 1954, describes the role of the Indian Audit and Accounts department in the Governmental set up of this country:

"Recent reports have revealed to us various irregularities in the working of the administration themselves. They have referred to the great losses sustained by the Government by errors of judgment, negligence, incompetence, and inefficiency. It was all right during the war period when we wanted to speed up business and therefore we relaxed standards. Ours is a poor country, its resources are limited and we cannot afford to risk any kind of waste and the Audit and Accounts Department will have to look upon their functions as functions of the greatest public utility by pointing out errors and by showing where and how we can remove abuses, effect economies, increase efficiency and reduce waste of expenditure. These things are very essential. There is a popular feeling of something wrong about them and if they are not well thought of, they are doing their duty properly. That may be so or may not be so. I do not believe that the different departments of the State are working at cross-purposes. All that I mean is that the Accounts Department must not be afraid of courting unpopularity. They must not go

about always saying things, which will please their superiors. There is an increasing tendency in our country today to say things, which our superiors wish to hear and it is that tendency that has to be resisted. I do hope that these people who are the watch-dogs, so to say, of public funds or the tax-payers' money will exercise great vigilance and control and see to it that we get a proper return for every rupee we spend and there is a proper utilization of public funds."

"Building up a welfare State is not to be regarded as merely as motive for promoting one's own welfare. It is the welfare of the country, which we have to set before ourselves, and there the work which the Audit and Accounts department can do is very great. By exposing failing, by revealing defects, you set before the country a great standard, and see to it that our Schemes are carried out with economy and efficiency."

"The Audit Department is obliged to say things which are embarrassing to the Government but it is the duty of the officers, on account of their great loyalty to the country, to act as a check even on the Government of the country".

Speaking on the importance of audit, Dr. Rajendra Prasad, the first President of India, observed on 21st July 1954,

"Our Constitution has guaranteed the independence of the judiciary, with the Supreme Court at the head, for preserving and protecting the right not only of individuals against individuals

but also of individuals against the State. The Judiciary has the power even to declare a law invalid when the Legislature has exceeded its powers. Similarly the office of the Comptroller and Auditor General with his wide spread organization all over the country has the power to see that the moneys granted by the Legislature to the Executive Authorities are spent for the purposes meant and that the accounts are maintained in a proper and efficient manner. He has the power to call to account any officers, however highly paced, so far as the State moneys are concerned."

"I consider it, therefore, not only appropriate but necessary that the office of the Comptroller and Auditor General should be provided with all the necessary facilities to enable it to function in a way calculated to ensure the discharge of the duties allocated to it in the best possible manner. In a country like ours where huge amounts are allocated to different Ministries and the various offices attached to them. It is of the highest importance that a proper check is maintained on expenditure and that the funds drawn by various government departments are not in excess of the appropriations".

"In a democratic set up involving allocation of hundreds of crores of rupees, the importance of this kind of scrutiny and check can never be over emphasized, particularly at present moment when Government is incurring large expenditure on so many welfare projects. Apart from these, the Government has of late been

taking up industrial undertakings in its hands, which have to be worked on purely business lines. It is essential that every rupee that we spend on all these be properly accounted for. This important task – I am afraid, a task not always very pleasant, devolves upon the Comptroller and Auditor General and his Office. In accordance with the powers vested in him, he has to carry out these functions without fear or favour in the larger interests of the nation".

14) Former President, Dr APJ Abdul Kalam, has expressed similar views about the importance of CAG. While addressing a conference of Accountant Generals on 20th September 2005, he observed:

"*(CAG)… brings out evaluation of the efficiency and effectiveness of the government programmes. Also during the last few years I understand that CAG has touched the major development initiative of Government in areas of health, education, urban employment generation, food security, basic infrastructure, and accelerated irrigation benefit programmes. Thus I can see that CAG is becoming a partner in national development programme."* While addressing a meeting of Audit Advisory Board on 2nd April 2007, Dr Kalam said, "*The CAG of India is, de facto, our nation's 'chief accountability officer'. The CAG's mission is not only to oversee conformance to rules and regulations, but on the basis of unique experience and database acquired over the years, to help improve performance,*

transparency and assure accountability of government for the benefit of the people."

15) Public audit is a vital instrument of ensuring supremacy of the Parliament over the Executive and ensuring public accountability. The CAG works on behalf of the Parliament and State Legislatures with a view to seeing that funds voted have been spent with due regard to wisdom, faithfulness and economy. In view of the tremendous growth of public expenditure due to development planning, the CAG over the years has extended the scope of his work from regularity and financial audit to performance audit. Performance audit implies that an evaluation is made whether public funds have been spent with due regard to economy, efficiency and effectiveness and whether the programme objectives have been achieved.

16) Today, the size of public expenditure of the Central and State government together runs into tens of lakhs of crores annually. The CAG has to audit this voluminous expenditure and report to the Parliament and the Government the cases where money has not been put to good use. The CAG also conducts the audit of tax revenue and other receipts of both Central and State governments which too run into tens of lakhs of crores annually. The audit of receipts helps not only in bringing additional revenue for the government, but also in better functioning of the machinery of tax administration by pointing out deficiencies, lacunae and loopholes in the act and rules, so that

they could be plugged. Recent audit reports have unearthed massive scams, particularly in the transfer of natural resources to the private sector leading to registration of several corruption cases and embarrassment to the Government of the day.

17) Therefore, keeping in mind the importance of the constitutional office of the CAG the appointment of Respondent No. 2 is being challenged. The said appointment of Respondent No. 2 as the CAG is bad in law and illegal on two grounds that can be broadly classified as: a) illegal manner of appointment, and b) conflict of interest.

ILLEGAL MANNER OF APPOINTMENT

18) The Constitution of India states that CAG shall be appointed by the President of India under his warrant and seal. The method of selection of the CAG has not been prescribed by the Constitution, but it is obvious that the process of selection has to be constitutional, non-arbitrary and in a manner that enables the selection of best person for the office. The Hon'ble Supreme Court has repeatedly held in a large number of judgments that every selection must be after following a process consistent with the rule of law. The process must be non-arbitrary, transparent and designed to select the best candidate.

19) As far as the office of the CAG is concerned, the Government has followed no system for selection. There is no selection committee,

no criteria, no transparency and no call for applications or nominations. The process is entirely arbitrary and opaque, and thus completely violative of rule of law and several judgments of this Hon'ble Court. Also, the zone of consideration has been restricted to civil servants, a limitation not found in the Constitution. An RTI application was filed with the Government on 21.02.2013 seeking information as to what is the system of appointment, whether there is any selection committee, what is the zone of consideration, what are the criteria etc. The response given by Director in the Ministry of Finance dated May 2013 under RTI along with its true typed copy is annexed as **Annexure P2**. The said reply clearly shows that there is no search committee, no criterion, no system, no call for applications or nominations, and is therefore arbitrary 'pick and choose'.

20) There is no basis in law for the argument that since the Constitution does not prescribe any procedure for the appointment of the CAG means that the selection can be at the untrammeled discretion of the Government. If a man on the street is picked up and appointed without any audit credentials, then such an appointment would be illegal. If the Government exercises its discretion without application of mind, or by draw of lots or by throw of dice, or by an act of patronage, then such a selection would obviously be illegal. The fact the selection has to be made to such a high Constitutional post, *ipso facto*, would mean that there has to be a proper criteria, broad-based selection committee, call for applications and nominations, and set procedure for *inter se* evaluation of merit. These imperatives are

particularly relevant for the selection of the CAG, a functionary who is supposed to be completely independent of the Government and unbiased in his auditing of Governmental actions and spending.

21) It is to be noted that in regard to another constitutional post of Chairperson of Public Service Commissions, a similar provision regarding appointment by the President is made in the Constitution, without prescribing any method for selection. In a recent judgment, the Supreme Court reaffirmed the legal principle that appointment to constitutional posts where the constitution has not prescribed any procedure cannot be arbitrary and has to be made after proper selection of the best candidate. The Supreme Court while holding the above, upheld the judgment of the High Court quashing the appointment of Chairperson of State Public Service Commission and also directed the Government to frame guidelines for future appointments. (*State of Punjab vs Salil Sabhlok* dated 15.02.2013).

22) In the case of Chief Information Commissioner and Information Commissioners appointed under the Right to Information Act 2005, there is no procedure prescribed for shortlisting the candidates. The RTI Act only states that the appointment would be made by the President on the recommendation of the Selection Committee consisting of Prime Minister, one Cabinet Minister and Leader of Opposition. The Supreme Court has directed that a short list would have to be prepared in a fair and transparent manner after calling for

applications by an advertisement, and on the basis of rational criteria. The said judgment in *Namit Sharma vs Union of India* is reported as (2013) 1 SCC 745.

23) In the present case, Respondent No. 2 has been arbitrarily selected without any transparency and without any criteria. Moreover, he suffers from a grave conflict of interest as is shown below, making the appointment illegal and unconstitutional.

CONFLICT OF INTEREST

24) Before being appointed as the CAG, Respondent No. 2 had served in key position in the Ministry of Defence that involved decision-making powers over purchases running into tens of lakhs of crores of rupees. During the period 2003-2007 he was the Joint Secretary in the Ministry of Defence. In 2007, after serving a brief stint as Additional Secretary, the Government posted him as the Director General of Acquisitions in charge of all defence purchases, where he served till September 2010. Thereafter, he served briefly as Officer on Special Duty, and was appointed as Defence Secretary in July 2011. He remained as Defence Secretary until recently when he was appointed as the CAG by the Government.

25) During the last 6 years, when Respondent no. 2 was involved in clearing all major defence purchases either as DG (Acquisitions) or the Defence Secretary, serious defence scandals of mammoth

proportions have come out in the public domain. One of the defence deal that is a major source of embarrassment to the Government involves the procurement of 12 VVIP choppers for the Indian Air Force from Italy. This deal was cleared by Respondent No. 2 in 2010 when he was the DG (Acquisition). This Rs 3,500-crore deal with an Anglo-Italian firm Agusta Westland has been investigated by Italy and Italian prosecutors have in their chargesheet stated that a kickback of at least Rs 350 crore was paid to middlemen to swing the deal in the company's favour. Pursuant to this, the CBI has registered an FIR and is investigating into the allegations of possible kickbacks in which 11 persons have been named as accused, including the former chief of Indian Air Force. News reports on this are annexed as **Annexure P3 (Colly).**

26) The CAG had made serious observations in the recent past on the defence ministry's procurement policy, and in its latest Compliance Audit--Defence Services (Air Force and Navy) report, in November 2012, CAG had pointed at major deficiencies in the defence procurement. It noted that between 2007 and 2011, India concluded five offset contracts in the defence sector worth Rs 3410 crores that were not in consonance with the provisions laid down in the defence procurement procedure. News report on the above issue is annexed as **Annexure P4**. The last few years have also seen the coming out of the major scams, including the purchase of Scorpene submarines and the aircraft carrier 'Admiral Gorshkov' / 'Vikramaditya', many of which have been exposed by the CAG itself.

27) The Admiral Gorshkov deal coincides with the tenure of Rspondent No. 2 in the Defence Ministry. It involved the conversion of Russia's discarded warship Admiral Gorshkov into a full modern aircraft carrier, renamed INS Vikramaditya, originally scheduled to be delivered by August 2008 at a total cost of $ 947 million. This amount was to refurbish and convert the scrapped ship which was a gift from Russia. Even now the ship has not been delivered and no one knows when it will be delivered, because the aircraft carrier has failed the 'sea trials' that have been carried out so far. The cost has gone up to the dizzy height of $ 2.9 billion for this second-hand ship, which is 60 per cent higher than the cost of a new aircraft carrier of similar specifications. Soon after a huge cost escalation was given to the Russians when Respondent No. 2 was DG Acquisition, a 2009 report of the CAG, which was placed in Parliament, stated: "*The objective of inducting an aircraft carrier in time to fill the gap in the Indian Navy has not been achieved. The cost of acquisition has more than doubled in four years. At best, the Indian Navy would be acquiring, belatedly, a second-hand ship with a limited life span, by paying significantly more than what it would have paid for a new ship.*" News reports on the above issue are annexed as **Annexure P5 (Colly)**.

28) The tenure of Respondent No. 2 also saw the eruption of the scam relating to Tatra trucks. Respondent No. 2 as DG acquisition had cleared all purchases in 2008 and 2009. In 2011, when the former Army Chief, General VK Singh, tried to break the chain by refusing to accept a bribe of Rs. 14 crore to extend the yearly contract for Tatra trucks at a highly inflated price and complaining to the Defence

Minister, there was a huge uproar in the country and a CBI investigation was ordered. By then, seven thousand vehicles had been purchased with an approximate mark up of Rs 75 lakh, adding up to Rs. 5,250 crore of the taxpayer's money. Soon after General VK Singh demitted office, the purchases commenced again under Respondent No. 2, now as the Defence Secretary. News report on this is annexed as **Annexure P6**.

29) It is to be noted that the defence budget has grown hugely in the last decade, particularly in the last 5 years. In 2010-11, it was Rs. 1,47,334 crore, in 2011-12 it rose to Rs.1,64,415 crore, in 2012-13 it became Rs.1,93,407 crore and now in 2013-14 it is Rs. 2,03,672 crore. Thus, a major share of the annual budget is accounted for by the defence procurements and acquisitions. One of the biggest tasks of the CAG is to audit these expenditures cleared by the Defence Ministry. Under the circumstance, the Government ignored this crucial fact when it appointed Respondent No. 2 as the CAG, creating a clear situation of conflict of interest and virtually making him a judge in his own cause, as he would be auditing the defence purchases he himself sanctioned. A few news reports, an article in The Hindu, an editorial and an article published in The Statesman on this issue are annexed as **Annexure P7 (Colly)**.

30) Presently, Indian Army is in the process of upgrading approximately 1100 vehicles of BMP-2 (which is a second generation infantry fighting vehicle from Russia). Total value of the project is estimated at Rs 8000 crores. There are several unresolved issues that

raise serious question marks on the integrity of decision making process. For instance, the entire project is proceeding on single vendor basis to a foreign company, that would raise the cost manifold. Better options like going for multiple vendors or upgradation by Indian companies are not being used. The other issue relates to Future Infantry Combat Vehicle (FICV) which has been developed by Defence Research and Development Organisation (DRDO) in India, where upgradation costs have, by some estimates, been inflated by 50%. These issues would need to be thoroughly audited and examined by the CAG.

31) Another major issue concerns the Multi-Barrel Rocket Launchers (MBRL). They have been successfully deployed for the last 40 years and have performed well. For their upgradation, only the engine has to be replaced which causes Rs 30 lacs per vehicle. At a cost of Rs 10 crores all MBRLs can easily be upgraded. But under Respondent No. 2, a tender has been floated for 300 vehicles, which would cost about Rs 600 crores. Such unnecessary purchases would have to be audited by the CAG, as has been done in the past. The above are just 3 examples of purchases for the Army that occurred under the watch of Respondent No. 2. Of course there would be many more such deals for weapons and equipments for the Army, and also for the Navy and Air Force. All of them would need to be audited by the CAG.

32) There is no provision in the Constitution or in the CAG Act for a CAG to recuse himself in situations where conflict of interest is

present. The very fact that the CAG should need to recuse himself marks a negation of the concept of a constitutional auditor and hence cannot be permitted. This is more so because the office of the CAG is a single-member body unlike the Supreme Court, the Election Commission or the Central Vigilance Commission. It may be recalled here that in the CVC case, the then CVC, Mr. P J Thomas, who had been the Telecom Secretary before his appointment, had stated that he would recuse himself whenever the Central Vigilance Commission was called upon to deal with the 2G spectrum scam investigations. This assurance of his was recorded in the 2G judgment of 16.12.2010 of the Supreme Court ((2011) 1 SCC 560, CPIL vs UoI). However, the Supreme Court still struck down his appointment as CVC *vide* judgment dated 03.03.2011 on the ground of his appointment having compromised the institutional integrity ((2011) 4 SCC 1, CPIL vs UoI). Recusing himself is a solution that is simply not available to the CAG. Major defence procurement decisions cannot be exempted from audit. Any such exemption would surely be unconstitutional. If the CAG recuses himself then that would mean that audit cannot be conducted and no report can be submitted to Parliament since none other than the CAG can sign an Audit Report.

33) If right at the start of an appointment, a question of 'recusing' comes up prominently, then the appointment is *ipso facto* illegal. One can understand if an unforeseen difficulty arises after the appointment is made and a way out has to be found, but if that difficulty is foreseen before the appointment is made, then the only recourse is clearly to refrain from making such an appointment. If, in the present case, this

difficulty was not foreseen and considered, then that is clearly a case of non-application of mind and a failure to take into account the material and relevant facts. That would also render the appointment *non est* in the eyes of law.

34) In the CVC judgment referred to above, the Supreme Court declared the recommendation of the selection committee to the President for appointment of the then CVC as *non est* in law. This was so held since the Court found that the appointment would dilute the integrity of the statutory institution of the Central Vigilance Commission. The Court held that the test is whether the individual would be able to perform his duties ((2011) 4 SCC 1, CPIL vs UoI):

> "*On 3rd September, 2010, the High Powered Committee ("HPC" for short), duly constituted under the proviso to Section 4(1) of the 2003 Act, had recommended the name of Shri P.J. Thomas for appointment to the post of Central Vigilance Commissioner. The validity of this recommendation falls for judicial scrutiny in this case. If a duty is cast under the proviso to Section 4(1) on the HPC to recommend to the President the name of the selected candidate, the integrity of that decision making process is got to ensure that the powers are exercised for the purposes and in the manner envisaged by the said Act, otherwise such recommendation will have no existence in the eye of law.*
>
> *The HPC must also take into consideration the question of institutional competency into account. If the selection adversely affects institutional competency and functioning then it shall be*

the duty of the HPC not to recommend such a candidate. Thus, the institutional integrity is the primary consideration which the HPC is required to consider while making recommendation under Section 4 for appointment of Central Vigilance Commissioner. In the present case, this vital aspect has not been taken into account by the HPC while recommending the name of Shri P.J. Thomas for appointment as Central Vigilance Commissioner. We do not wish to discount personal integrity of the candidate. What we are emphasizing is that institutional integrity of an institution like CVC has got to be kept in mind while recommending the name of the candidate. Whether the incumbent would or would not be able to function? Whether the working of the Institution would suffer? If so, would it not be the duty of the HPC not to recommend the person.

In this connection the HPC has also to keep in mind the object and the policy behind enactment of the 2003 Act. Under Section 5(1) the Central Vigilance Commissioner shall hold the office for a term of 4 years. Under Section 5(3) the Central Vigilance Commissioner shall, before he enters upon his office, makes and subscribes before the President an oath or affirmation according to the form set out in the Schedule to the Act. Under Section 6(1) the Central Vigilance Commissioner shall be removed from his office only by order of the President and that too on the ground of proved misbehaviour or incapacity after the Supreme Court, on a reference made to it by the President, has on inquiry reported that the Central Vigilance Commissioner be

removed. These provisions indicate that the office of the Central Vigilance Commissioner is not only given independence and insulation from external influences, it also indicates that such protections are given in order to enable the Institution of CVC to work in a free and fair environment. The prescribed form of oath under Section 5(3) requires Central Vigilance Commissioner to uphold the sovereignty and integrity of the country and to perform his duties without fear or favour. All these provisions indicate that CVC is an integrity institution. The HPC has, therefore, to take into consideration the values independence and impartiality of the Institution. The said Committee has to consider the institutional competence. It has to take an informed decision keeping in mind the abovementioned vital aspects indicated by the purpose and policy of the 2003 Act.

This is what we have repeatedly emphasized in our judgment – institution is more important than individual(s). For the above reasons, it is declared that the recommendation made by the HPC on 3rd September, 2010 is non-est in law."

35) Therefore the Supreme Court clearly found that a person who is himself the subject of scrutiny, irrespective of his own personal integrity, would not be able to perform his duties impartially and this would affect his functioning. Hence on the test of institutional integrity, the Court held such an appointment to be illegal. The above judgment squarely applies with much greater force in the present case. Objectivity and fairness are the core principles that governs auditing.

The impugned appointment of a person with such direct conflict of interest is also against the code of ethics of auditors. An auditor, who for whatsoever reason cannot be, or is expected not to be, unbiased, cannot be allowed to function as an auditor, more so as India's constitutional auditor of the public finances.

NEED FOR A TRANSPARENT & NON-PARTISAN SELECTION

36) It is a well established fact that in a democratic polity, the accountability of the Executive to the Parliament is exercised through the control of the public purse. The Parliament sanctions moneys for various activities of the Government through annual budgetary appropriations and the reports of the CAG assist in ensuring that monies voted are spent by the Executive with due regard to wisdom, faithfulness and economy. The constitutional importance of the position becomes even clearer from the fact that the oath of office prescribed for the CAG is similar to that laid down for Supreme Court judges: it requires the CAG to "uphold the Constitution and the laws" whereas Cabinet Ministers swear an oath to "act in accordance with the Constitution".

37) The reports of the CAG are submitted to Parliament and thereafter remitted to the Public Accounts Committee for detailed examination. Every year, the CAG submits to Parliament 15 to 20 audit reports relating to Central Government transactions, which at present comprise an expenditure of the order of Rs 14 lakh crore and a revenue of Rs 9 lakh crore, supplemented by a public debt of Rs 5 lakh crore. In addition, the CAG submits audit reports for each of the

28 State Governments to their respective legislatures, covering in aggregate an expenditure of Rs 13 lakh crore and revenue receipts of Rs 11 lakh and borrowing of Rs 2 lakh crore. The reports cover diverse subjects such as implementation of socio-economic development schemes, defence deals, privatization of PSUs, public private partnership, transfer of natural resources and effectiveness of the tax collection machinery.

38) The CAG has been given an independent status under the Constitution so that he may perform his job without fear or favour. Under Article 148, he is appointed by the President under his hand and seal and cannot be removed, save by a motion in Parliament. He enjoys the same conditions of service as a judge of the Supreme Court. Dr. B R Ambedkar, Chairman of the Drafting Committee of the Constituent Assembly, had described the CAG as the 'most important officer under the Constitution' and Dr. Rajendra Prasad, Chairman of the Constituent Assembly and the first President of India, had observed that the CAG had the power to call to account any officer, however highly placed, so far as the State monies were concerned.

39) It follows from the above that if the CAG is to discharge the onerous responsibility of his office, only a person of the highest professional competence and unimpeachable integrity should be appointed to that post. Unfortunately, during the last three decades, the Government has been following an opaque and arbitrary method in making appointments to the office of the CAG. The criteria on the basis of which the selections are made are shrouded in secrecy. It is

understood that the Government follows an unwritten convention that only an officer holding the post of Secretary to the Government of India should be appointed to the post. Notwithstanding the fact that many of the individuals appointed to this Constitutional office have acquitted themselves with credit, such a policy is conceptually flawed and may give rise to a serious situation of conflict of interest. If the objective is to select the most suitable candidate and subserve the purpose for which the institution of CAG has been established, the appointing authority ought to choose from a much wider field of persons of eminence, who not only have the requisite understanding of financial management, audit and accounting procedure, but also have a deep knowledge of the complexities of governance and a vision of the future of our democratic polity.

40) In most democracies today, the Supreme Audit Institutions (SAI) is the recognized authority that helps ensure the accountability of the Executive to Parliament. Its role has evolved to conduct value-for-money audit aimed at assessing whether governments operations have been carried out with due regard to economy, efficiency and effectiveness. In view of this, most democracies have enacted laws requiring parliamentary approval for appointment of the head of the SAI, so that he is not under the influence of the executive, whose performance he is required to evaluate and pass judgment on.

41) In Britain, whose parliamentary traditions we follow, the hundred year old Exchequer & Audit Act was amended in 1983 to provide that the CAG will be appointed only after an address is presented in the

House of Commons by the Prime Minister acting in agreement with the Chairman of the Committee of Public Accounts. In Australia, the Governor General appoints the CAG with the approval of the Joint Committee on Public Accounts. In the USA, a committee comprising, among others, the President of the Senate and leaders of the majority and minority parties in the House, makes its recommendation to the President. In Canada, consultations are held with the leaders of every recognized party in the Senate and the House of Commons. In Germany, Japan, New Zealand, and in emerging economies such as South Korea and Thailand, approval of the House of Representatives is taken for appointment of the head of supreme audit authority. A note on international practice regarding appointment of SAIs prepared by the petitioners is annexed as **Annexure P8**. The examples of selection procedures in other countries clearly show that the selection of the CAG or equivalent institution is generally not left to the exclusive decision of the Executive. In contrast, the Indian procedure seems to be a unique instance of a completely arbitrary one.

42) In India the status of the CAG under our Constitution is superior to the status of the SAIs in other countries since the CAG is not just a statutory institution as in many countries but a Constitutional one, and is the auditor for both the Union and the States, unlike in other federal systems. It is, therefore, obvious that great care must go into the selection of such a functionary not only because of the crucial role of the CAG in our Constitutional scheme, but also because once appointed, the incumbent will have a long tenure of six years. Good selection would require appropriate selection criteria and procedures

and their implementation. The fact that the Constitution and the CAG Act of 1971 do not lay down the criteria and procedures for the selection does not mean that criteria and procedures are unnecessary. The Constitution mandates the post and an appointment has to be made to that post. An appointment necessarily implies a selection out of several names and selection necessarily implies criteria and procedures. A procedure for selection would have to be consistent with Article 14 of the Constitution that mandates non-arbitrariness, non-discrimination and a transparent selection procedure. Several eminent citizens have written articles in newspapers calling for a transparent process of selection of the CAG. A few such articles are annexed as **Annexure P9 (Colly).**

43) Given the importance of the office, it is obvious that the selection process should be transparent and credible. Parliament, the Public Accounts Committee, and the people in general, are entitled to know how the CAG is appointed. If the selection of the enforcer of accountability is left to the discretion of those whose accountability he has to enforce, and if the processes are non-transparent, Parliament and the people can have no confidence that a fair, rigorous and objective selection has been made. This Hon'ble Court in 2011 was constrained to quash the appointment to the post of CVC on the ground of failure to take material facts into consideration. If such a failure is possible even with a selection committee procedure in force, it is far more likely in the absence of any such procedure, and with a non-transparent selection system.

44) Selection by a high-level broad-based committee has been considered necessary in the case of the Vigilance Commissioners, the members of National Human Rights Commission (NHRC) or the Director of the CBI. It is rather anomalous that while there has been much concern with criteria and procedures of selection in the case of the CVC, the NHRC or even the CBI, no such thing has been followed in the manner in which such a crucial functionary as the CAG of India is chosen. As the CAG performs quasi- judicial functions and reports his findings to the Parliament, which are at times adverse to the Government of the day, the Executive should not be given the sole authority for his appointment. It is therefore submitted that selection of the CAG has to be made by a broad-based selection committee that could ensure an impartial, non-partisan selection of the most suitable person for the onerous duties of the CAG. A High Powered Committee of The National Commission to Review the Working of the Constitution recommended that the power of appointment be kept "outside the exclusive power of the Executive".

45) Keeping in mind the kind and range of responsibilities involved, the CAG should clearly have:

a) Knowledge and understanding of accounts and audit principles;

b) A willingness to point the finger at irregularity, impropriety, imprudence, inefficiency, waste, and loss of public funds, at whatever level this occurs, but tempered by a scrupulous judiciousness in criticism and comment;

c) The ability to weigh the legal and constitutional aspects of some of the issues that come before him;

d) A capacity for understanding complex technical, contractual commercial, managerial, or economic matters and forming careful judgments, particularly while dealing with large government schemes or appraisals of public enterprises;

e) Management abilities for running the vast department under him; and

f) Underlying all these, a passionate concern for rectitude and propriety, and impeccable personal integrity, accompanied by tact and wisdom.

46) Therefore appropriate criteria keeping in view the above requirements and method for evaluation on that criteria should be clearly laid down so that an objective and non-arbitrary selection can be made. The selection committee can then only be able to choose the best possible talent to do justice to this important constitutional position.

47) The petitioners are aware that in the past the Hon'ble Supreme Court dismissed *in limine* two petitions, one by Common Cause (in 1996) and another by Public Cause Research Foundation (in 2007), seeking formulation of guidelines by the court for the appointment to this position. At that time, no specific appointment was challenged and the petitions were therefore merely academic in nature. However, now keeping in view that changed circumstances and the development of law that has taken place, also the present case of glaringly illegal

appointment, the petitioners request this Hon'ble Court to examine this aspect of the matter also.

48) The petitioners had filed a writ petition with similar prayers before the Hon'ble Supreme Court of India, which asked the petitioners to approach the High Court for the said reliefs. A copy of the order passed in WPC 426 of 2013 dated 15.07.2013 is annexed as **Annexure P10**.

49) The Petitioners seek liberty from this Hon'ble Court to produce other documents and records as and when required in the course of the proceedings.

50) The petitioners had filed a writ petition (WPC 426/2013) with similar prayers before the Hon'ble Supreme Court of India, which vide order dated 15.07.2013 asked the petitioners to approach the High Court for the said reliefs. The Petitioners have not filed any other writ, complaint, suit or claim in any manner regarding the matter of dispute. The Petitioners have no other better remedy available.

GROUNDS

A. That the CAG is the Constitutional auditor who acts as a watchdog over the expenditure & accounts of the Central Government, its instrumentalities and the State Governments. He has been given a stature and oath akin to the Judge of the Supreme Court of India and has been described as the "most important officer under the Constitution" by Dr. B R Ambedkar

and others as recorded in the Constituent Assembly Debates. The constitutional importance of the position becomes even clearer from the fact that the oath of office prescribed for the CAG is similar to that laid down for Supreme Court judges: it requires the CAG to “uphold the Constitution and the laws” whereas Cabinet Ministers swear an oath to “act in accordance with the Constitution”.

B. That the selection of Respondent No. 2 as the CAG is arbitrary and against the mandate of Article 14 of the Constitution of India as the same has been made without any system for selection, without any selection committee, any criteria, any evaluation and has been made without any transparency. That in the CVC appointment judgment (CPIL vs UoI, (2011) 4 SCC 1), the Supreme Court held that shortlisting of candidates would be done on the basis of rational criteria with reasons, and all persons empanelled would be of unimpeachable integrity. The Supreme Court also directed that selection process must be fair and transparent.

C. That the Supreme Court in a recent judgment with regard to another constitutional post of Chairperson of Public Service Commissions, where similar provision regarding appointment by President has been made in the Constitution, reaffirmed the legal principle that appointments to constitutional posts where the constitution has not prescribed any procedure cannot be arbitrary and has to be made after proper selection of the best

candidate. The Supreme Court while holding the above view, upheld the judgment of the High Court quashing the appointment of Chairperson of State Public Service Commission and directed the Government to lay down guidelines for future appointments. (*State of Punjab vs Salil Sabhlok*, 2013 (2) Scale 573, dated 15.02.2013).

D. That the Supreme Court in *Namit Sharma vs Union of India* ((2013) 1 SCC 745), regarding the appointment of Chief Information Commissioners and Information Commissioners appointed under the Right to Information Act 2005, directed that after calling for applications by an advertisement, a short-list would have to prepared in a fair and transparent manner, and the short-list would need to be prepared on the basis of rational criteria.

E. That the appointment of Respondent No. 2 goes against the settled basic legal principles of conflict of interest, and also *'Nemo judex in causa sua'*, i.e. no person shall be a judge in his own cause. There is a huge line of international and national cases on this 'rule against bias' which mandate that no person shall deal with a matter in which he has any interest. The said legal principle would mandate that Respondent No. 2 not to audit his own actions.

F. That the Defence budget has grown hugely in the last decade, particularly in the last 5 years. In 2010-11, it was Rs. 1,47,334

crore, in 2011-12 it rose to Rs.1,64,415 crore, in 2012-13 it became Rs.1,93,407 crore and now in 2013-14 it is Rs.2,03,672 crore. Thus, a major share of the annual expenditure is constituted just by the defence procurements and acquisitions. One of the biggest tasks of the CAG is to audit these expenditures cleared by the Defence Ministry. Under the circumstance, the Government ignored this crucial fact when it appointed Respondent No. 2 as the CAG creating a clear situation of conflict of interest and virtually making him a judge in his own cause, as he would be auditing the defence purchases he himself sanctioned.

G. That the last 6 years, when Respondent No. 2 was either DG (Acquisitions) or the Defence Secretary (thus clearing all major defence purchases), have seen serious scandals of mammoth proportions come out in public domain. One of the defence deal that is a major source of embarrassment to the Government involves the procurement of 12 VVIP choppers for the Indian Air Force from Italy. This deal was cleared by Respondent No. 2 in 2010 when he was the DG (Acquisition). This Rs 3,500-crore deal with an Anglo-Italian firm Agusta Westland has been investigated by Italy and Italian prosecutors have in their chargesheet stated that a kickback of at least Rs 350 crore was paid to middlemen to swing the deal in the company's favour. Pursuant to this, the CBI has registered an FIR and is investigating into the allegations of possible kickbacks in which

11 persons have been named as accused, including the former chief of Indian Air Force.

H. That Admiral Gorshkov deal coincides with the tenure of Respondent No. 2 in the Defence Ministry. It involves the conversion of Russia's discarded warship Admiral Gorshkov into a full modern aircraft carrier, renamed INS Vikramaditya, originally scheduled to be delivered by August 2008 at a total cost of $ 947 million. This amount was to refurbish and convert the scrapped ship which was a gift from Russia. Even now the ship has not been delivered and no one knows when it will be delivered because the aircraft carrier has failed the 'sea trials' that have been carried out so far. The cost has gone up to the dizzy height of $ 2.9 billion for this second-hand ship, which is 60 per cent higher than the cost of a new aircraft carrier of similar specifications. Soon after a huge cost escalation was given to the Russians when Respondent No. 2 was DG Acquisition, a 2009 report of the CAG, placed in Parliament states: "*The objective of inducting an aircraft carrier in time to fill the gap in the Indian Navy has not been achieved. The cost of acquisition has more than doubled in four years. At best, the Indian Navy would be acquiring, belatedly, a second-hand ship with a limited life span, by paying significantly more than what it would have paid for a new ship.*"

I. That the tenure of Respondent No. 2 also saw the eruption of the scam relating to Tatra trucks. Respondent No. 2 as DG

acquisition had cleared all purchases in 2008 and 2009. In 2011, when the former Army Chief, General VK Singh, tried to break the chain by refusing to accept a bribe of Rs. 14 crore to extend the yearly contract for Tatra trucks at a highly inflated price and complaining to the Defence Minister, there was a huge uproar in the country and a CBI investigation was ordered. By then, seven thousand vehicles had been purchased with an approximate mark up of Rs 75 lakh, adding up to Rs. 5,250 crore of the taxpayer's money. Soon after General VK Singh demitted office, the purchases commenced again under Respondent No. 2, now as the Defence Secretary.

J. That the CAG had made serious observations in the recent past on the defence ministry's procurement policy, and in its latest Compliance Audit--Defence Services (Air Force and Navy) report, in November 2012, CAG had pointed at major deficiencies in the defence procurement. It noted that between 2007 and 2011, India concluded five offset contracts in the defence sector worth Rs. 3410 crore that were not in consonance with the provisions laid down in the defence procurement procedure. The above coincides with tenure of Respondent No. 2 as DG (Acquisition) and later as Defence Secretary.

K. Presently, Indian Army is in the process of upgrading approximately 1100 vehicles of BMP-2 (which is a second generation infantry fighting vehicle from Russia). Total value of

the project is estimated at Rs 8000 crores. There are several unresolved issues that raise serious question marks on the integrity of decision making process. For instance, the entire project is proceeding on single vendor basis to a foreign company, that would raise the cost manifold. Better options like going for multiple vendors or upgradation by Indian companies are not being used. The other issue relates to Future Infantry Combat Vehicle (FICV) which has been developed by Defence Research and Development Organisation (DRDO) in India, where upgradation costs have, by some estimates, been inflated by 50%. These issues would need to be thoroughly audited and examined by the CAG.

L. Another major issue concerns the Multi-Barrel Rocket Launchers (MBRL). They have been successfully deployed for the last 40 years and have performed well. For their upgradation, only the engine has to be replaced which causes Rs 30 lacs per vehicle. At a cost of Rs 10 crores all MBRLs can easily be upgraded. But under Respondent No. 2, a tender has been floated for 300 vehicles, which would cost about Rs 600 crores. Such unnecessary purchases would have to be audited by the CAG, as has been done in the past. The above are just 3 examples of purchases for the Army that occurred under the watch of Respondent No. 2. Of course there would be many more such deals for weapons and equipments for the Army, and also for the Navy and Air Force. All of them would need to be audited by the CAG. Therefore, Government could not have

appointed a person with greater conflict of interest than Respondent No. 2 for the position of India's national auditor of public finances. If the conflict of interest was unforeseeable and minor, then that could be excused. But a glaring conflict of interest which one can foresee would vitiate the appointment as per the clear law laid down in the CVC judgment ((2011) 4 SCC 1).

M. The said appointment therefore goes against the legal principle of "institutional integrity" as laid down by the Supreme Court in the CVC appointment case (CPIL vs UoI, (2011) 4 SCC 1). The Supreme Court declared the recommendation of the selection committee to the President for appointment of the then CVC as *non est* in law:

> "*On 3rd September, 2010, the High Powered Committee ("HPC" for short), duly constituted under the proviso to Section 4(1) of the 2003 Act, had recommended the name of Shri P.J. Thomas for appointment to the post of Central Vigilance Commissioner. The validity of this recommendation falls for judicial scrutiny in this case. If a duty is cast under the proviso to Section 4(1) on the HPC to recommend to the President the name of the selected candidate, the integrity of that decision making process is got to ensure that the powers are exercised for the purposes and in the manner envisaged by the said Act, otherwise such recommendation will have no existence in the eye of law.*

The HPC must also take into consideration the question of institutional competency into account. If the selection adversely affects institutional competency and functioning then it shall be the duty of the HPC not to recommend such a candidate. Thus, the institutional integrity is the primary consideration which the HPC is required to consider while making recommendation under Section 4 for appointment of Central Vigilance Commissioner. In the present case, this vital aspect has not been taken into account by the HPC while recommending the name of Shri P.J. Thomas for appointment as Central Vigilance Commissioner. We do not wish to discount personal integrity of the candidate. What we are emphasizing is that institutional integrity of an institution like CVC has got to be kept in mind while recommending the name of the candidate. Whether the incumbent would or would not be able to function? Whether the working of the Institution would suffer? If so, would it not be the duty of the HPC not to recommend the person.

In this connection the HPC has also to keep in mind the object and the policy behind enactment of the 2003 Act. Under Section 5(1) the Central Vigilance Commissioner shall hold the office for a term of 4 years. Under Section 5(3) the Central Vigilance Commissioner shall, before he enters upon his office, makes and subscribes before the

President an oath or affirmation according to the form set out in the Schedule to the Act. Under Section 6(1) the Central Vigilance Commissioner shall be removed from his office only by order of the President and that too on the ground of proved misbehaviour or incapacity after the Supreme Court, on a reference made to it by the President, has on inquiry reported that the Central Vigilance Commissioner be removed. These provisions indicate that the office of the Central Vigilance Commissioner is not only given independence and insulation from external influences, it also indicates that such protections are given in order to enable the Institution of CVC to work in a free and fair environment. The prescribed form of oath under Section 5(3) requires Central Vigilance Commissioner to uphold the sovereignty and integrity of the country and to perform his duties without fear or favour. All these provisions indicate that CVC is an integrity institution. The HPC has, therefore, to take into consideration the values independence and impartiality of the Institution. The said Committee has to consider the institutional competence. It has to take an informed decision keeping in mind the abovementioned vital aspects indicated by the purpose and policy of the 2003 Act.

This is what we have repeatedly emphasized in our judgment – institution is more important than individual(s).

For the above reasons, it is declared that the recommendation made by the HPC on 3rd September, 2010 is non-est in law."

N. That the selection by a high-level broad-based committee has been considered necessary in the case of the Vigilance Commissioners, the members of National Human Rights Commission (NHRC) or the Director of the CBI. It is anomalous that while there has been much concern with criteria and procedures of selection in the case of the CVC, the NHRC or even the CBI, such rigour has not been extended to the selection of most crucial functionary i.e. the CAG of India. As the CAG performs quasi- judicial functions and reports his findings to the Parliament, which are at times adverse to the Government of the day, the Executive should not be given the sole authority for his appointment. The selection of the CAG has to be made by a broad-based selection committee that could ensure an impartial, non-partisan selection of the most suitable person for the onerous duties of the CAG. That a High Powered Committee of The National Commission to Review the Working of the Constitution recommended that the power of appointment be kept "outside the exclusive power of the Executive".

O. That the Constitution creates an important office of the CAG for which selection has to be made. A selection for such a high position *ipso facto* postulates a selection consistent with Article 14 of the Constitution that would mean a non-arbitrary selection

process based on definite criteria, call for applications & nominations, followed by a transparent and objective selection.

P. That the prevailing corruption and misgovernance in the country at high levels and the unwillingness of the government to ensure a clean and accountable system impairs the right of the people of this country to live in a environment free from corruption and misgovernance. This is a violation of Article 21 of the Constitution. The right to life guaranteed to the people of this country also includes in its fold the right to live in a society, governed by rule of law and accountability.

PRAYERS

In view of the facts & circumstances stated above, it is most respectfully prayed that this Hon'ble Court in public interest may be pleased to: -

a. Issue a writ of quo warranto or any other appropriate writ to set aside the appointment of Respondent No. 2's as Comptroller & Auditor General of India (CAG).

b. Issue a writ of mandamus or any appropriate writ directing the Union of India to frame a transparent selection procedure based on definite criteria and constitute a broad-based non-partisan selection committee, which after calling for applications & nominations would recommend the most suitable person for appointment as the CAG to the President of India.

c. Issue or pass any writ, direction or order, which this Hon'ble court may deem fit and proper under the facts and circumstances of the case.

PRASHANT BHUSHAN
Counsel for the Petitioners

Drawn By: Pranav Sachdeva

Dated: July 2013
New Delhi