

**IN THE SUPREME COURT OF INDIA  
CIVIL APPELLATE JURISDICTION**

**SPECIAL LEAVE PETITION  
{Order XVI Rules 4(1) (a)}**

(Under Article 136 of the Constitution of India)

**SPECIAL LEAVE PETITION (CIVIL) NO. 24328 OF 2014**

[Arising out of the Impugned Final Judgment and Order dated 13.08.2014  
passed by the Delhi High Court in WP (C) No. 4653/2013]

**In the matter of:**

SHRI N. GOPALASWAMI & OTHERS

Petitioners

versus

UNION OF INDIA AND ANOTHER

Respondents

**PAPER BOOK**

(FOR INDEX PLEASE SEE INSIDE)

**ADVOCATE FOR THE PETITIONERS: PRASHANT BHUSHAN**

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Respondents

**OFFICE REPORT ON LIMITATION**

1. The above mentioned Special Leave Petition is filed within time.
2. The Petition is barred by time and there is delay of \_\_\_\_\_ days in filling the same against order dated 13/08/2014.
3. There is delay of \_\_\_\_\_ days in refilling the petition and petition for condonation of \_\_\_\_\_ days delay in refilling has been filed.

**BRANCH OFFICER**

PLACE: NEW DELHI

DATED:

## SYNOPSIS AND LIST OF DATES

The instant SLP is being filed against the judgment/order dated 13.08.2014 delivered by the Hon'ble High Court of Delhi wherein the public interest litigation challenging the appointment of the Comptroller and Auditor General of India (CAG) and a transparent system of appointment of the CAG was dismissed. The Hon'ble High Court upheld the appointment of the CAG on the basis that it has been made as per past convention and also refused to direct the Government to frame a transparent procedure for selection.

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 petitioners had challenged the appointment of Respondent No. 2 as the CAG and had submitted that his appointment 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. The appointment also violated the principle of 'institutional integrity' as laid down by this Hon'ble Court in its judgment in the CVC appointment case (CPIL Vs. UoI (2011) 4 SCC 1). The Hon'ble High Court has rejected the above contentions based on an incorrect appreciation of law and the facts of the case.

For the detailed reasons and legal grounds stated in the petition, petitioners had also sought a direction for the future to the Union of India to frame a transparent selection procedure based on definite criteria, and by calling for applications & nominations, and by constituting a broad-based non-partisan selection committee, to recommend the most suitable person for appointment as the CAG to the President of India. The Hon'ble High Court has not made any such direction and has found the existing procedure of complete executive discretion to be proper.

**Similar matters pending:**

This Hon'ble Court is presently hearing a petition (WPC 683 of 2014) seeking transparent system of appointment of the CVC & VCs and has issued notice to the Union of India vide order dated 04.08.2014. The petitioners in this petition are also seeking a transparent system of appointment of the CAG so that it is not based on the arbitrary whim of the political executive of the day. This Hon'ble Court is also hearing a petition seeking transparent system of appointment for Lokpal (WPC 245/2014).

**About the petitioners:**

Petitioner No. 1 is a former Chief Election Commissioner. Petitioner No. 2 and 3 are former Chiefs of Naval Staff. Petitioner No. 4 is a former Deputy CAG. Petitioner No.s 5, 6 and 7 are distinguished former Secretaries to the Government of India. Petitioner No. 8 is a former IAAS officer (Audit service) and Petitioner No. 9 is a former IAS and Army officer.

**Arbitrary selection process:**

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. This Hon'ble 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 this Hon'ble Court. Also, the zone of consideration has been restricted to civil servants (a fact confirmed by Government's counter-affidavit), 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 of the Government 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'.

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 untrammelled 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 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. This Hon'ble Court last year 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. This Hon'ble Court while holding the above upheld the judgment of the High Court quashing the appointment of Chairperson of State Public Service Commission (*State of Punjab vs Salil Sabhlok* (2013) 5 SCC 1).

In the CVC appointment judgment (*CPIL vs UoI*, (2011) 4 SCC 1), this Hon'ble Court held that shortlisting of candidates must be done on the basis of rational criteria with reasons, and all persons empanelled would be of unimpeachable integrity. This Hon'ble Court also directed that selection process must be fair and transparent. Though the CVC Act of 2003 was

silent on the process of short-listing of candidates, detailed directions were given by this Hon'ble Court so that meritocratic selection can be made that could sub serve the purpose of the statute.

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 unconstitutional and liable to be declared *non est* and void.

### **Conflict of Interest**

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.

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.

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. 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 this Hon'ble Court ((2011) 1 SCC 560, CPIL vs UoI). However, this Hon'ble 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.



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.

During the 6 years preceding his appointment as the CAG, 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. 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.

The CAG had also made serious observations in the recent past on the defence ministry's procurement policy, and in its 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.

The Admiral Gorshkov deal coincides with the tenure of Respondent 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 that 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 a whopping \$ 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 when Respondent No. 2 was DG Acquisition, a 2009 report of the CAG, 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."*

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 complained to the then 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.

In the CVC judgment referred to above, this Hon'ble 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 this Hon'ble Court found that the appointment would dilute the integrity of the statutory institution of the Central Vigilance Commission. This Court held that the test is whether the individual would be able to perform his duties ((2011) 4 SCC 1, CPIL vs UoI):

*“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... 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.*

*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 3<sup>rd</sup> September, 2010 is non-est in law.”*

Therefore this Hon'ble 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, this Hon'ble 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 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.

26.01.1950        Constitution of India comes into force. It, vide Article 148, creates the institution of the Comptroller and Auditor General of India (CAG) to oversee the accounts and expenditure of the Central Government, State Governments, and their instrumentalities. The CAG 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.

26.02.1996        This Hon'ble Court dismissed a petition seeking guidelines for the appointment of the CAG. A copy of the order is annexed as **Annexure P1** (Pg \_\_\_\_\_).

2003                Respondent No. 2 appointed as the Joint Secretary in the Ministry of Defence, the position he was in till 2007.

2007                Respondent No. 2 is appointed as the Director General (Acquisitions) under the the Ministry of Defence, a

position which makes him the overall in-charge of the military related procurement process of the Central Government. He served as DG (Acquisitions) till September 2010.

14.07.2008 This Hon'ble Court dismisses a petition seeking guidelines for the appointment of the CAG. A copy of the order is annexed as **Annexure P2** (Pg \_\_\_\_\_).

04.03.2011 Petitioner No. 7 writes to the Prime Minister seeking transparent and meritocratic system of selection of the CAG. A copy of the same is annexed as **Annexure P3** (Pg \_\_\_\_\_).

July 2011 Respondent No. 2 is appointed as the Defence Secretary by the Central Government, a position he serves till he is appointed as the CAG.

23.11.2012 The organization Common Cause writes to Chairperson, Public Accounts Committee (PAC) on the need for a transparent system of appointment of the CAG. A copy of the same is annexed as **Annexure P4** (Pg \_\_\_\_\_).

20.03.2013 Petitioner No.s 4, 6 and 8 make a detailed representation to the President of India seeking a transparent and meritocratic system of appointment of the CAG. A copy of the same is annexed as **Annexure P5** (Pg \_\_\_\_\_).

- 16.05.2013 In response to an RTI application dated 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 Director in the Ministry of Finance gave its response in May 2013. 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'. A copy of the same is annexed as **Annexure P6** (Pg \_\_\_\_\_).
- May 2013 Respondent No. 2 is appointed as the CAG by the Central Government
- 18.05.2013 The DNA newspaper reports that the new CAG will audit the defence deals he himself cleared. A copy of the said report is annexed as **Annexure P7** (Pg \_\_\_\_\_).
- 21.05.2013 The Statesman newspaper in an editorial called Respondent No. 2's appointment as CAG "a travesty". A copy of the said editorial is annexed as **Annexure P8** (Pg \_\_\_\_\_).
- 22.05.2013 The Hindu newspaper in its lead article criticized the appointment of Respondent No. 2 as being against the principle of not being a judge in one's own cause. A copy of the said article is annexed as **Annexure P9** (Pg \_\_\_\_\_).
- 23.05.2013 Respondent No. 2 takes over as the CAG.
- 27.05.2013 The New Indian Express in its article criticized the appointment as an instance of favouritism and a clear

case of conflict of interest. A copy of the said article is annexed as **Annexure P10** (Pg \_\_\_\_\_).

29.05.2013 The Statesman in a detailed article termed the appointment of Respondent No. 2 as mala fide and a betrayal of the nation. A copy of the said article is annexed as **Annexure P11** (Pg \_\_\_\_\_).

June 2013 The petitioners move this Hon'ble Court challenging the appointment of Respondent No. 2 as the CAG as well as seeking a direction to the Centre to set-up a selection committee that would work in a transparent manner based on set criteria. The petition is numbered as WPC 426 of 2013. An analysis of international practice regarding the appointment of the head of the Supreme Audit Institution (SAI) is also filed along with that petition. A copy of the said analysis dated Nil is annexed as **Annexure P12** (Pg \_\_\_\_\_).

15.07.2013 This Hon'ble Court in the said writ petition WPC 426/2013 titled 'N Gopaldaswami & Ors vs Union of India & Ors' directed the petitioners to first approach the High Court under Article 226 of Constitution for said reliefs. A copy of the order passed by this Hon'ble Court is annexed as **Annexure P13** (Pg \_\_\_\_\_).

July 2013 The petitioners move the Hon'ble High Court of Delhi challenging the appointment of Respondent No. 2 as the CAG as well as seeking a direction to the Centre to set-up a selection committee that would work in a transparent



manner based on set criteria. The petition is numbered as WPC 4653 of 2013. A copy of the said petition is annexed as Annexure **P14** (Pg \_\_\_\_\_).

05.08.2013 Union of India files its counter affidavit opposing the writ petition. The counter affidavit in paragraph 7 admits that only civil servants were considered for appointment as the CAG. A copy of the said counter affidavit is annexed as **Annexure P15** (Pg \_\_\_\_\_).

13.08.2013 Government tables the report of the last CAG in Parliament that deals with scam involving acquisition of helicopters for the VVIPs when Respondent No. 2 was in-charge of the acquisitions. This kind of a scathing report could not have been given by the CAG if Respondent No. 2 was the CAG because of his obvious conflict of interest. A copy of the said report the CAG dated Nil is annexed as **Annexure P16** (Pg \_\_\_\_\_).

13.08.2014 The Hon'ble High Court of Delhi vide the impugned judgment has dismissed the above writ petition, upholding the appointment of Respondent No. 2 as the CAG, and has also refused to pass a direction to the Central Government to set-up a selection committee that would work in a transparent manner based on set criteria for the future appointments for the position of the CAG.

.08.2014 Hence the instant Special Leave Petition.

**IN THE SUPREME COURT OF INDIA**

**CIVIL APPELLATE JURISDICTION**

{Order XVI Rules 4(1) (a)}

(Under Article 136 of the Constitution of India)

**SPECIAL LEAVE PETITION (CIVIL) NO. OF 2014**

[Arising out of the Impugned Final Judgment and Order dated 13.08.2014 passed by the High Court of Judicature at Delhi in WP (C) No. 4653/2013]

**IN THE MATTER OF:**

**POSITION OF PARTIES**

**High Court                      Supreme Court**

- |   |                  |                  |
|---|------------------|------------------|
| 1. SHRI N GOPALASWAMI<br>(FORMER CHIEF ELECTION COMMISSIONER)<br>5, LEO MADHURAM<br>39, GIRI ROAD, T NAGAR<br>CHENNAI-600017      | Petitioner No. 1 | Petitioner No. 1 |
| 2. ADMIRAL (RETD.) R H<br>TAHILIANI<br>(FORMER CHIEF OF NAVAL STAFF)<br>R/o 290, DEFENCE COLONY<br>SECTOR-17, GURGAON-122001      | Petitioner No. 2 | Petitioner No. 2 |
| 3. ADMIRAL (RETD.) L RAMDAS<br>(FORMER CHIEF OF NAVAL STAFF)<br>BHAIMALA VILLAGE, P.O.<br>KAMARLE, ALIBAG-402201<br>(MAHARASHTRA) | Petitioner No. 3 | Petitioner No. 3 |
| 4. DR. B P MATHUR   | Petitioner No. 4 | Petitioner No. 4 |

(FORMER DEPUTY CAG)  
1621, BHRAMAPUTRA  
APARTMENTS  
SECTOR-29, NOIDA-201303

- |    |  |                  |                  |
|----|--|------------------|------------------|
| 5. | SHRI KAMAL KANT JASWAL<br>(FORMER SECRETARY, GOVT<br>OF INDIA)<br>R/O B-34, GEETANJALI<br>ENCLAVE<br>NEW DELHI-110017              | Petitioner No. 5 | Petitioner No. 5 |
| 6. | SHRI RAMASWAMY R IYER<br>(FORMER SECRETARY, GOVT<br>OF INDIA)<br>R/O A-10, SARITA VIHAR<br>NEW DELHI-110076                        | Petitioner No. 6 | Petitioner No. 6 |
| 7. | DR. E A S SARMA<br>(FORMER SECRETARY, GOVT<br>OF INDIA)<br>R/O 14-40-4/1, GOKHALE<br>ROAD<br>MAHARANIPETA<br>VISHAKHAPATNAM-530002 | Petitioner No. 7 | Petitioner No. 7 |
| 8. | SHRI S KRISHNAN<br>(FORMER IAAS OFFICER)<br>R/O E-212, ANANDLOK<br>CGHS<br>MAYUR VIHAR PHASE-I<br>NEW DELHI-110091                 | Petitioner No. 8 | Petitioner No. 8 |
| 9. | SHRI M G DEVASAHAYAM   |                  |                  |

(FORMER IAS & ARMY  
OFFICER)

Petitioner No. 9

Petitioner No. 9

R/o 103, CEEBROS BAYVIEW,  
VALMIKINAGAR

THIRUVANMIYUR, CHENNAI

**VERSUS**

1. UNION OF INDIA

THROUGH ITS CABINET  
SECRETARY

Respondent No. 1

Respondent No. 1

CABINET SECRETARIAT,  
RASHTRAPATI BHAVAN

NEW DELHI-110001

2. SHRI SHASHI KANT SHARMA

COMPTROLLER & AUDITOR

Respondent No. 2

Respondent No. 2

GENERAL OF INDIA

DEEN DAYAL UPADHYAYA

MARG

NEW DELHI-110124

To

**The Hon'ble Chief Justice of India And His Hon'ble Companion  
Justices of The Hon'ble Supreme Court Of India**

The humble Special Leave Petition of the Petitioner above named:

**MOST RESPECTFULLY SHOWETH:**

1. The Petitioner is filing the present Special Leave Petition against the impugned Final Order dated 13.08.2014 passed by the High

Court of Judicature at Delhi in Writ Petition (Civil) No. 4653 of 2013 whereby the High Court had dismissed the Writ Petition. It is submitted that no intra-court appeal or LPA is maintainable against the impugned order/judgment since it is passed by division bench and under Delhi HC Rules, no appeal lies against division bench order.

## **2. QUESTIONS OF LAW**

The following questions of law arise for consideration by this Hon'ble Court:

- I. Did the High Court err in upholding the appointment of Respondent No. 2 as the CAG?
- II. Did the High Court err in holding that the appointment of Respondent No. 2 does not violate the norm of 'institutional integrity'?
- III. Did the High Court err in holding that the appointment of Respondent No. 2 does not suffer from any arbitrariness?
- IV. Did the High Court err in holding that Respondent No. 2 does not suffer from any conflict of interest as the CAG?
- V. Did the High Court err in upholding the appointment of Respondent No. 2 as the CAG on the ground the appointment of the CAG has been made as per past practice?
- VI. Did the High Court err in not directing the Union of India to devise a transparent merit-based selection procedure based on definite criteria for the selection of the CAG?

## **3. DECLARATION IN TERMS OF RULE 4 (2)**

The Petitioner state that no other Petition seeking leave to appeal has been filed by them against the final judgment and order of the Hon'ble Division Bench of the High Court of Judicature at Delhi, dated 13.08.2014 passed in WP (C) No. 4653/2012 titled N Gopaldaswami & Ors v. Union of India & Anr.

#### **4. DECLARATION IN TERMS OF RULE 6**

The annexures produced along with the SLP are true copies of the pleadings/documents, which formed part of the record of the case in the High Court below against whose order leave to appeal is sought for in this Petition

#### **5. 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 High Court erred in upholding the appointment of Respondent No. 2 as the CAG since the same 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), this Hon'ble 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. This Hon'ble Court also directed that selection process must be fair and transparent.

- C. That this Hon'ble Court in 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 Hon'ble Court while holding the above view upheld the judgment of the High Court quashing the appointment of Chairperson of State Public Service Commission. (*State of Punjab vs Salil Sabhlok*, (2013) 5 SCC 1).
- D. That the Hon'ble High Court ignored 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' 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.
- E. That the Hon'ble High Court ignored the fact that 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.

F. That during the 6 years prior to his appointment as the CAG, when Respondent No. 2 was either DG (Acquisitions) or the Defence Secretary (thus clearing all major defence purchases), the nation has seen serious defence purchase 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.

G. 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.*"

H. 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.

- I. 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.
- J. That the 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.

K. That 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).

- L. The said appointment therefore goes against the legal principle of “institutional integrity” as laid down by this Hon’ble Court in the CVC appointment case (CPIL vs UoI, (2011) 4 SCC 1). This Hon’ble Court declared the recommendation of the selection committee to the President for appointment of the then CVC as *non est* in law: “On 3<sup>rd</sup> 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 3<sup>rd</sup> September, 2010 is non-est in law.”*

M. That the High Court erred in not appreciating that 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*”.

- N. That the High Court erred in not appreciating that the selection by the Central Government for such a high position of the CAG *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.
- O. 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.

## 6. **GROUNDS FOR INTERIM RELIEF**

Nil

## 7. **PRAYER:**

For the reasons aforesaid and those that may be urged at the time of hearing it is most respectfully prayed that the Hon'ble Court be pleased

- A) To grant Special Leave to Appeal to the petitioner under Article 136 of the Constitution against the order dated 13.08.2014 in W.P. (C) No. 4653 of 2013 passed by the High Court of Judicature at Delhi and

B) Pass such other and further order or orders as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case.

**8. INTERIM PRAYER:**

Nil

AND FOR THIS ACT OF KINDNESS THE PETITIONERS AS IN DUTY BOUND SHALL EVER PRAY.

PETITIONERS

Through: PRASHANT BHUSHAN  
Counsel for the Petitioners

Drawn by: Pranav Sachdeva

Drawn and Filed on: August 2014

New Delhi



**IN THE SUPREME COURT OF INDIA**

**CIVIL APPELLATE JURISDICTION**

**SPECIAL LEAVE PETITION (CIVIL) NO. OF 2014**

**In the matter of:**

N. GOPALASWAMI & OTHERS

Petitioners

versus

UNION OF INDIA AND ANOTHER

Respondents

**CERTIFICATE**

Certified that the Special Leave Petition is confined only to the pleadings before the Court whose judgment/order is challenged and the other documents relied upon in those proceedings. No additional facts/documents have been taken therein or relied upon in the Special Leave Petition. It is further certified that the copies of the documents/annexures attached to the Special Leave Petition are necessary to answer the questions of law raised in the Petition or to make out grounds urged in the Special Leave Petition for consideration of this Hon'ble Court. This certificate is given on the basis of the instructions given by the Petitioners whose affidavit is filed in support of the Special Leave Petition.

PRASHANT BHUSHAN

COUNSEL FOR THE PETITIONERS

NEW DELHI

Dated: August 2014