

IN THE SUPREME COURT OF INDIA

(CIVIL ORIGINAL JURISDICTION)

Writ Petition (Civil) No. _____ of 2018

PUBLIC INTEREST LITIGATION

In the Matter of:

Tehseen S Poonawalla

...Petitioner

Versus

1. Union of India

Through Its Cabinet Secretary

Cabinet Secretariat

New Delhi – 110001

.... Respondent No.1

2. Ministry of Defence

Through its Secretary,

South Block,

New Delhi – 110011

... Respondent No. 2

**A WRIT PETITION IN PUBLIC INTEREST UNDER ARTICLE
32 OF THE CONSTITUTION OF INDIA SEEKING AN
INDEPENDENT INVESTIGATION INTO THE
PROCUREMENT OF 36 RAFALE FIGHTER AIRCRAFT'S
BY GOVERNMENT OF INDIA UNDER AGREEMENT DATED
23RD SEPTEMBER, 2016.**

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

The Humble Petition Of
The Petitioner Above-Named

Most respectfully Showed: -

1. The Petitioner is filing the instant Writ Petition in public interest seeking an appropriate writ against the Respondents to disclose the cost / price consideration involved in purchase of fighter aircrafts, which dealt with procurement of 36 Rafale fighter aircrafts from Dassault a French company. Rafale deal is a Defence agreement signed between the Government of India and Government of France to purchase of 36 Rafale fighter aircrafts in fly-away condition as a part of upgrading process of Indian Air Force equipment's. It is the responsibility of Ministry of Defence (MoD) to disclose the cost / price of entire deal to the Parliament and to the citizens of the nation.

2. That the Petitioner is a known social activist who has previously moved to this Hon'ble Court on matters of substantial public interest. The Petitioner is acting bona fide for the welfare and benefit of the society as a whole. The Petitioner has been involved in various public movements and campaigns. That the Petitioner has no vested personal interest in the subject matter of this petition. That this petition has been filed with no ulterior or malafide motive other than public interest. That no similar petition has been filed by the said Petitioner before this Hon'ble Court or any other Court in the country.

BACKGROUND

3. The Petitioner would herein state that Rafale fighter aircraft is a twin-engine Medium Multi Role Combat Aircraft (MMRCA) which is manufactured by Dassault Aviation. Dassault is a French aerospace company with proven dual expertise as a manufacturer of both military aircraft and business aircrafts. Rafale fighter aircraft is positioned as “omnirole” aircraft which is capable to perform a wide range of combat roles such as air supremacy, interdiction, aerial reconnaissance, ground support, in-depth strike, anti-ship strike and

nuclear deterrence. That in 2001 the Indian Air Force expressed its requirement of additional fighter aircrafts. The Indian Air force fleet largely consist of heavy and light-weight combat aircraft, hence the Defence Ministry considered bringing in intermediate multi-weight fighter aircrafts.

4. The Petitioner would like to bring to the attention of this Hon'ble court that the actual process of procurement began in 2007. The Defence Acquisition Council, headed by the then Defence Minister A. K. Antony, approved the request of India Air Force and advancing the said purpose a proposal to buy 126 fighter aircraft in August 2007 was brought to force. This coined the floating of tender and an invitation was sent to various aviation companies to participate for the bidding process. The bidding process further lead to applications from the six contenders for MMECA tender - Boeing's Super Hornet, Lockheed Martin's F-16IN Super Viper, RAC MiG's MiG-35, Saab's Gripen C, the Eurofighter Typhoon and the Rafale. Thereafter these six fighter aircrafts were examined by the Indian Air Force. In 2011, the Indian Air Force narrowed the focus on the Eurofighter Typhoon and Dassault Rafale in the fray while rejecting all the other contenders. In January, 2012, the Indian Air Force identified Dassault Aviation's

RAFALE FIGHTER AIRCRAFT and officially acknowledged it as having passed all the tests and emerged as the lowest bidder, following which negotiations over the cost began.

5. Then in 2012 the deal for 126 Rafale fighter aircrafts was proposed, of the total of 126 number, 18 Rafale fighter aircrafts were to be delivered by Dassault Aviation company in fly-away condition, the rest 108 Rafale fighter aircrafts were to be manufactured in India at the Hindustan Aeronautics Limited which is an Indian public sector aerospace and defence unit, under a transfer of technology agreement. Moreover, the company also had to invest half i.e. 50% of the entire transaction money into India. The agreement to that effect was signed between the French company Dassault Aviation and Hindustan Aeronautics Limited.
6. That the Petitioner is duty bound to bring to the knowledge of this Hon'ble Court that in 2013 the negotiations were back on track with Dassault Aviation, procedures to procure the first 18 Rafale fighter aircrafts which were to be delivered in 2017 had been initiated a Defence Procurement Policy (DPP) was drafted under the then government and this Defence

Procurement Policy was to be brought in force for the said acquisition.

7. That the deal was nearly finalized by 2014 by the then government (United Progressive Alliance).

8. The Petitioner would further state that in April 2015, Shri. Narendra Modi our Hon'ble Prime Minister's made a state visit to France and during a state event the Hon'ble Prime Minister in Paris made an announcement to purchase 36 Rafale fighter aircrafts in fly-away condition and immediately within few days after the big announcement of procuring of 36 Rafale aircrafts. On 13th April 2015, the then defence minister made an announcement that the Rafale deal is "effectively dead" and that India officially withdrew the 126- aircraft MMECA tender on 30 July 2015.

9. That it is imperative to mention here that the during the state visit an absolutely *new* defence deal to purchase 36 Rafale fighter aircrafts in fly-away condition was announced and subsequently in May 2015 the then defence minister made a statement that the Rafale deal was economically unviable and further

on 30th July 2015, the MMECA tender for 126 Rafale aircrafts was withdrawn.

10. The Petitioner would humbly submit that the procurement of 36 Rafale fighter aircrafts was for the public purpose aimed at national security with instrumentality of Ministry of Defence and from the contribution from the public exchequer. The central government is therefore duty bound to ensure transparency in public procurements. It is also obliged to make available the consolidated figure as to the cost on the exchequer for the said purpose. The Petitioner further states that, if the said deal is transparent, fair, bona-fide and is in public interest then the government must disclose the bi-lateral agreement signed between the two states to the Parliament and the block price of the entire transaction.

11. It is further of utmost importance to mention herein that on frequent occasions in Parliament it has been requested that the government to make a formal disclosure of the entire transaction along with the agreement dated 23rd September, 2016, but on every occasion the Ministry of Defence and government has failed to disclose the details. The Petitioner has now

come to this Hon'ble Court and via this petition seeking a disclose and the composite price schedule in respect to the 36 Rafale fighter aircrafts deal. A huge amount of public money / tax payer's money has been used for the side procurement and that the Respondents are duty bound to disclose the final agreement price to the public. The negotiation in respect to of the side procurement has been completed a year back.

12. It is submitted that no Writ Petition, Application including Review Application etc. or any other proceedings arising from or related to relief sought in the instant matter has been filed by the Petitioner, or is pending before this Hon'ble Court or any other Court.

13. That the present Writ Petition is being filed by way of Public Interest Litigation and the Petitioner doesn't have any personal interest in the matter. Present Petition has been filed with a view to enforce the Fundamental Rights of our citizens to know the amount of funds utilised from public exchequer by the Government of India for defence sector.

14. That this Hon'ble Court has jurisdiction to entertain the present petition under Article 32 of Constitution of India.

15. That since the Respondents have failed to discharge their statutory and constitutional obligations the Petitioner did not have any other alternative and equally efficacious remedy and is constrained to file the instant Writ Petition in the nature of a PIL.

16. That the petitioner has preferred the present petition on the following **grounds**: -

a) Because the defence deal of procuring 36 Rafale fighters from Dassault was announced during the Prime Minister's state visit to France. It was an attempt to put a sheen on Prime Minister's visit to Paris. This pronouncement was a premature announcement of the deal without going through the usual practice, the formal process and procedure which is otherwise involved in similar international covenants.

b) Because the Respondent No. 2 under the present Government of India had withdrawn the 2007 MMERC tender which was for procurement of 126 Rafale fighter aircrafts, the deal announced for

procurement of 36 Rafale fighter aircraft was all together a fresh procurement. It is relevant to state here that the course of Defence Procurement Policy (DPP) was to be followed for the fresh Defence procurement, but on the contrary, the procurement of 36 Rafale fighter aircrafts was a non-comparative and a non-competitive contract, it was a single arrangement with Dassault Aviation.

c) That there cannot be a comparison between the two Rafale deals. The 2007 MMERC tender was for procurement of 126 Rafale fighter aircrafts which included: -

- i. 18 fighters in fly-away condition
- ii. Transfer of technology from Dassault Aviation
- iii. Hindustan Aeronautics Limited to manufacture 108 with Dassault Aviation via workshare agreement between Hindustan Aeronautics Limited and Dassault, which was further signed on 13th March, 2014.
- iv. Dassault Aviation was also to invest half i.e. 50% of the transaction money in India.

Subsequently the deal for the acquisition of 36 fighter aircrafts was signed by the Government of India and Government France in September 2016 and according to the agreement, the Rafale fighter

aircrafts are to be delivered between September 2019 and April 2022. It must also be noted that Dassault Aviation no longer had to transfer the technology, as per the new agreement and that Hindustan Aeronautics Limited was no longer required to manufacture any fighter aircrafts.

- d) Because the deal which was pronounced in April 2015 during the Prime Ministers state visit to France, it bypassed the entire customary Defence Procurement Policy (DPP) procedure. The deal was pronounced by side stepping the practice of getting clearance from Ministry of Defence, without getting clearance from Cabinet Committee on Security and without a competitive bidding process.
- e) Because the present deal of procurement of 36 Rafale fighter aircrafts is a direct government to government deal as against the earlier 2007 MMERC open tender wherein Dassault Aviation was announced as the lowest bidder in 2012.
- f) Because the previous deal which was through 2007 MMERC tender bidding process was never finalised and no contract was signed or executed and hence no official figure as to the price was ever given. But on the contrary the subsequent deal of September 2016 for procurement of 36 Rafale fighter aircraft's is

finalised along with its contracts have been signed and executed between the two states and yet the price consideration for the same remains in question.

- g) Because the government has remained silent on the price details of procurement of 36 Rafale fighter aircrafts under the garb of “**classified information**” and that material exchanged under the Indian Government Agreement (IGA) is governed by the provision of security agreement.
- h) Because it has been a practice to share the cost of defence deals with Parliament. However, in some cases the details have been kept secret for the national security purpose, but in such situations the broad block details i.e. the entire cost consideration has been shared however keeping aside the operational details.
- i) Because the details of expenditure on state procurements must be provided in a democracy where public money is being spent. Every expenditure in respect to the procurement of 36 Rafale fighter aircrafts is under a cloak of secrecy by the Ministry of Defence.
- j) Because the announcement of the deal was from Prime Minister’s office and not from the Ministry of

Defence. It was a last minute announcement during Prime Ministers state visit.

- k) Because, first there was a pronouncement of procuring 36 Rafale fighter aircrafts in April 2015 and then later in May 2015 the then Defence Minister announced the withdrawal of contract of 126 Rafale fighter aircrafts. Hence there was an abandonment of the former deal and it was replaced by a fresh deal which was later brought on papers in September 2016.
- l) Because, as per the Direct Procurement Policy, it is the cardinal principal of public procurement to produce the material/ services/ work of the specified quality, at the most competitive price, in a fair just and transparent manner.
- m) However, the facts and figures in respect to the procurement of 36 Rafale fighter aircrafts deal have been given by the government in off-the-record press briefing to various news channels through the high-ranking officers of the Ministry of Defence and other senior leaders within the government, but on the contrary no formal briefing was conducted in the Parliament in terms of capability, price, equipment, delivery, maintenance of the fighter aircrafts, training, etc. in particular to the entire transaction.

- n) Because an international transaction of such a nature being highly competitive and secretive in nature, the Petitioner is being extremely précised and is not asking for the break outs, the Petitioner herein is seeking only for the price figure of the entire transaction and leaving aside the break outs and other details.
- o) Because the contract has been entered ignoring the standard procedure laid down for the same, which can be said to be the basic nature, after a consideration of different options available and taking into account the interest of state and its citizens. Government cannot enter into a contract like a private individual. Government actions must be in conformity with the standards or norms which are not arbitrary, irrational or irrelevant.
- p) Because the present Writ Petition is filed against the alleged abuse of process of law. In this case, it is imperative to consider and take into account that when huge amount of money is used from the public exchequer for a public procurement be it for Ministry of Defence or for any other public sector development, the government is duty bound to give a block price for the entire transaction.

- q) Because in such a case where prima facie material is available to investigate, it is absolutely necessary to order an enquiry as to why is the government keeping the entire transaction under the clog of secrecy and not disclosing a ball-park figure of the public exchequer used for the said transaction.
- r) Because it is humbly submitted that this Hon'ble court may intervene in this situation and safeguard the right and interest of the citizens ***Boni Judicis Est Judicium Sine Dilatione Mandare Executioni.***

Prayer

In the aforesaid premise, it is most respectfully and humbly prayed that this Hon'ble Court may graciously be pleased to:

- a) Issue an appropriate writ directing the respondents to disclose a consolidate transaction cost involved in procuring 36 Rafale fighter aircraft.
- b) Issue an appropriate writ or direction against the answering Respondent as to why a Cabinets approval was not sought as part of the Defence Procurement Procedure (DPP) before signing the defence procurement deal dated 23rd September 2016

- c) Issue an appropriate writ directing the respondents to put on record the inter government agreement which was signed between Government of India and Government of France dated 23rd September 2016.
- d) 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.

PETITIONER THROUGH

VIRENDER KUMARSHARMA
COUNSEL FOR THE PETITIONER

Filed On: 13.03 2018

Place: New Delhi

SYNOPSIS LIST OF DATES

The petitioner has preferred this instant writ petition in public interest seeking an appropriate writ against the Respondent to disclose the approximate

acquisition cost of the 36 Rafale fighter aircrafts and the agreement dated September 2016 which was signed between the Government of India and the Government of France. The said transaction seems to hinge around three things 1) price 2) propriety 3) workshare. That the deal which was pronounced in April 2015 during the Prime Ministers state visit to France, the said announcement at Paris had bypassed the entire customary Defence Procurement Policy (DPP) mandate. The transaction was pronounced by side stepping the practice of getting clearance from Ministry of Defence, without getting clearance from Cabinet Committee on Security, no prior approval of the competent financial authority (CFA) and without a competitive bidding process.

That the Respondents had on various occasions on public platform disclosed various facts and figures but on the contrary's no formal Parliamentary discussion nor any formal press briefing was done in reference to the same.

A huge amount of public money / tax payer's money has been used for the procurement of 36 Rafale fighter aircraft and the Respondents are duty bound to disclose the final agreement price to the public.

List of Date

Date	Particulars
2001	That the Indian Air Force expressed its requirement of additional fighter aircrafts.
29.06.2007	the Defence Acquisition Council (DAC), headed by the Defence Minister, cleared the process for the procurement of 126 aircraft Request for proposal (RFP) was approved for release to the respective bidders.
28.08.2007	The RFP was released to the 6 bidding companies
28.04.2008	Formal proposals for bidding were submitted
08.08.2008	Technical evaluation of the bidders began
18.12.2010	Indian Air Force completed the technical evaluation of all 6 fighter aircraft's and that the reports had been submitted to the ministry of defence.

31.01.2012	The Indian Air Force identified Dassault Aviation's RAFALE FIGHTER AIRCRAFT and officially acknowledged it as having passed all the tests and emerged as the lowest bidder, following which negotiations over the cost began.
April 2015	Shri. Narendra Modi our Hon'ble Prime Minister's made a state visit to France and during a state event in Paris made an announcement to purchase 36 Rafale fighter aircrafts in fly-away condition.
13.04.2015	The then defence minister made an announcement in Rajya Sabha that the Rafales deal is "effectively dead" and that India officially withdrew the 126- aircraft MMECA tender on 30 July 2015.
23.09.2016	The contract for the purchase of 36 off-the-shelf Rafales fighter aircrafts was signed. The first set of Rafale fighter aircraft are expected to be delivered to India by 2019.