

**IN THE SUPREME COURT OF INDIA**  
[EXTRAORDINARY ORIGINAL JURISDICTION]  
M.A. No. \_\_\_\_\_ OF 2019  
IN  
**WRIT PETITION (CRIMINAL) No. 298 OF 2018**

**IN THE MATTER OF:-**

YASHWANT SINHA & ORS

...PETITIONERS

VERSUS

UNION OF INDIA & ANR

...RESPONDENTS

**APPLICATION U/S 340 CR.PC FOR INITIATION OF PROCEEDINGS U/S  
195 OF CR.PC FOR OFFENCES U/S 193 OF IPC**

To,  
**The Hon'ble Chief Justice of India  
And His Companion Judges of  
the Supreme Court of India**

The Humble Application of  
the Applicants above named

**MOST RESPECTFULLY SHOWETH:**

1. That present application is being filed u/s 340 of Cr.PC to the Hon'ble Court for initiating proceedings u/s 195 of Cr.PC against official/s who made false statements and suppressed evidence while submitting information on 'decision making process', 'offsets', & 'pricing' pursuant to Orders of this Hon'ble Court in W.P. (Cr.) 298/2018 and thereby committed offences u/s 193 of IPC.

2. That relevant extracts of sections attracted are as below.

Section 193 of IPC states,

*193. Punishment for false evidence.—Whoever intentionally gives false evidence in any stage of a judicial proceeding, or fabricates false evidence for the purpose of being used in any stage of a judicial proceeding, shall be punished with imprisonment of either description*

*for a term which may extend to seven years, and shall also be liable to fine, and whoever intentionally gives or fabricates false evidence in any other case, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.*

Section 195 of CrPC states,

*195. Prosecution for contempt of lawful authority of public servants, for offences against public justice and for offences relating to documents given in evidence.*

*(1) No Court shall take cognizance-*

*(a) ommitted*

*(b) (i) of any offence punishable under any of the following sections of the Indian Penal Code (45 of 1860), (namely, sections 193 to 196 (both inclusive), 199, 200, 205 to 211 (both inclusive) and 228, when such offence is alleged to have been committed in, or in relation to, any proceeding in any Court,*

*(ii) ommitted*

*(iii) ommitted,*

*except on the complaint in writing of that Court, or of some other Court to which that Court is subordinate.*

Section 340 of CrPC states,

*Procedure in cases mentioned in section 195.*

*(1) When, upon an application made to it in this behalf or otherwise, any Court is of opinion that it is expedient in the interests of justice that an inquiry should be made into any offence referred to in clause (b) of sub- section (1) of section 195, which appears to have been committed in or in relation to a proceeding in that Court or, as the case may be, in respect of a document produced or given in evidence in a proceeding in that Court, such Court may, after such preliminary inquiry, if any, as it thinks necessary,-*

*(a) record a finding to that effect;*

*(b) make a complaint thereof in writing;*

*(c) send it to a Magistrate of the first class having jurisdiction;*

*(d) take sufficient security for the appearance of the accused before such Magistrate, or if the alleged offence is non- bailable and the*

*Court thinks it necessary so to do, send the accused in custody to such Magistrate; and*

*(e) bind over any person to appear and give evidence before such Magistrate.*

3. That applicants above named had filed W.P.(Cr) 298/2018 on 24.10.2018 praying for direction to CBI to: register FIR on their complaint dated 04.10.2018; investigate procedural violation and corruption in procurement of 36 Rafale fighter aircrafts; & to submit periodic status reports to the Hon'ble Court.

2. That by judgement dated 14.12.2018, the Hon'ble Court —without the benefit of any independent investigation/report— was pleased to dismiss the applicants' petition by basing the judgement on 'notes' given in a sealed cover to the Hon'ble Court by Union of India whose very conduct was in question. Applicants had in their Response dated 14.11.2018 drawn Hon'ble Court's attention to the fact that said 'notes' (at least those made available to the applicants) were misleading, unsigned, and not supported by an Affidavit which is a fundamental requirement for receiving evidence based on sound principles of holding person signing affidavit responsible for contents thereof.

3. That Review Petition No. 46/2019 preferred by the applicants in this matter is pending along with an application (M.A. 58/2019) by government for "correction" of the judgement.

4. That information that has come into the public domain after the judgement of Hon'ble Court was delivered *prima facie* shows that government 'misled' the Hon'ble Court on various counts and the basis of the judgement of the Hon'ble Court is more than one untruth submitted by the government and suppression of pertinent information. The untruths and suppression of information in the 'notes' constitute perjury and also contempt as the 'notes' were submitted pursuant to the orders of the Hon'ble Court.

5. That said untruths and suppressions in the 'notes' have been widely reported in the Fourth Pillar of Democracy —the Media— and there is

robust scrutiny and public criticism of the government for the manner in which it has misled the Hon'ble Supreme Court of India showing contemptuous disregard for orders of the Hon'ble Court in judicial proceedings. Untruths and suppressions in the note intentionally gave false evidence in judicial proceedings before the Hon'ble Court causing Hon'ble Court to base it's judgement on untruths. Due to suppression of information by government official/s, Hon'ble Court was deprived from having the full set of facts before it on which to decide *bonafides* of the procurement.

6. That it is of paramount importance that person/s who misled the Hon'ble Court be identified and suitably dealt with so as to also uphold the sanctity of the judicial proceedings of the Hon'ble Court. Submitting untruths and suppressing information despite clear orders of Hon'ble Court is brazen and wilful. Where fundamental rights of citizens are affected and they have no adequate opportunity to rebut averments submitted in sealed covers, onus is that much greater on government to apprise true facts and disclose all relevant information to the Hon'ble Court so that the Hon'ble Court can discharge it's obligation of protecting the rights of citizens effectively with all relevant, true, & complete information at it's disposal.

## **ORDERS OF THE COURT**

7. That the applicants' petition was heard on 31.10.2018 along with other connected matters and this Hon'ble Court was pleased to order,

*After we had passed the order dated in W.P.(Crl.) No. 225/2018 and W.P.(C) No. 1205/2018, two more public interest litigations have been filed on the same issue i.e. W.P.(Crl.) Nos. 297/2018 and 298/2018. Having perused the same, we would like to observe that in none of the public interest litigations before us, the suitability of the equipment (fighter jets) and its utility to the Indian Air Force has been questioned. What has been questioned is the bona fides of the decision making process and the price/cost of the equipment at which the same is to be procured. On 10.10.2018, we had passed the following order:-*

*“Permission to argue in person is granted in Writ Petition (Crl.) No. 225/2018. We have heard the petitioner-in-person and the learned counsels for the parties. We are of the view that the following order would be appropriate at this stage.*

*We make it clear that we are not issuing any notice at this stage on either of the writ petitions filed under Article 32 of the Constitution. However, **we would like to be apprised by the Government of India of the details of the steps in the decision making process leading to the award of the order for the defence equipment in question i.e. Rafale Jet-Fighters (36 in number).***

*We also make it clear that while requiring the Government of India to act in the above terms we have not taken into account any of the averments made in the writ petitions which appear to be inadequate and deficient. **Our above order is only for the purpose of satisfying ourselves in the matter.***

*We also make it clear that the steps in the decision making process that we would like to be apprised of would not cover the issue of pricing or the question of technical suitability of the equipment for purposes of the requirement of the Indian Air Force.*

*The requisite information sought for will be placed before the Court in three separate sealed covers on or before 29th October, 2018 which shall be filed with the learned Secretary General of this Court and not in the Registry. List the matters on 31st October, 2018.”*

***Pursuant to the said order, a note giving the “details of the steps in the decision making process leading to the award of 36 Rafale Jet-Fighters/Fighter Aircrafts”, has been submitted to the Court in a sealed cover.***

*We have perused the same.*

*At this stage, we would not like to record any finding or views with regard to the contents of the said report. Rather, we are of the opinion that such of the core information conveyed to the Court in the aforesaid confidential report which can legitimately be brought into the public domain be made available to the learned counsels for the petitioners in all the cases, as well as, the petitioners-in-person. Along with the said facts, further details that could legitimately come in the public domain with regard to the induction of the Indian offset partner (if any) be also furnished to the learned counsels for the parties, as well as, the petitioners in person. Such of the details in this regard which may be considered to be strategic and confidential may, at this stage, be placed before the Court and may not be furnished to the learned counsels for the parties or the petitioners-in-person. **The Court would also like to be apprised of the details with regard to the pricing/cost, particularly, the advantage thereof, if any, which again will be submitted to the Court in a sealed cover.***

*The necessary information/particulars be communicated to the learned counsels for the parties and the petitioners-in-person, and the rest of the details in terms of the present order be submitted to the Court in a sealed cover in the next ten days. The parties may file their response to the information that would be conveyed. Let the matter be listed on 14.11.2018. (emphasis supplied)*

8. That note on pricing was not shared with the applicants. From the notes on the 'decision making process' & 'offsets', & Judgement of the Hon'ble Court based on 'notes' submitted by the government, more than one untruth and suppressions are apparent. They are presented in a tabular format for comparing what was submitted to the government in sealed covers (to the best knowledge of applicants), how the Hon'ble Court was misled into relying on these untruths and suppressions, and 'Observations'.

‘NOTES’ IN SEALED COVERS	RELIANCE IN JUDGEMENT	OBSERVATION
<b>CAG REPORT</b>		
<p><i>"The Government has already shared the pricing details with the CAG. The report of the CAG is examined by the PAC. Only a redacted version of the report is placed before the Parliament and in public domain"</i></p> <p><b>Source:</b> Note on ‘pricing’ not shared with Petitioners.</p>	<p><i>"The pricing details have, however, been shared with the Comptroller and Auditor General (hereinafter referred to as "CAG"), and the report of the CAG has been examined by the Public Accounts committee</i></p>	<p>There was no CAG report at the time. Government misled Hon’ble Court into relying on non-existent fact/report as basis of it’s observation on pricing in the judgement.</p> <p>Instead of admitting that it misled the Hon’ble Court, by way of an application for “correction”, government imputes that Hon’ble Justices including the Hon’ble Chief Justice of the Hon’ble Supreme Court of India have misinterpreted tenses in english grammar in like manner individually and severally.</p> <p>The government’s act of stating untruth to Hon’ble Court in a sealed cover on ‘pricing’ and thereafter it’s scandalous application have lowered sanctity of judicial proceedings.</p>

<p>Above extract is from government's application for "correction" pending before the Hon'ble Court. (M.A. 56/2019)</p>	<p><i>(hereafter referred to as "PAC). Only a redacted portion of the report was placed before the Parliament, and is in public domain"</i></p>	
<p><b>2012 arrangement between Dassault &amp; Parent Company of Offset Beneficiary</b></p>		
<p><i>"Incidentally, media reports of 2012 suggest that Dassault Aviation, within two weeks of being declared the lowest bidder for procurement of 126 aircraft by the previous government</i></p>	<p><i>"It is no doubt true that the company, Reliance Aerostructure Ltd., has come into being in the recent past, but the press release suggests that there was possibly an</i></p>	<p>Mr. Anil Ambani's Reliance Infrastructure (not Reliance Industries of Mr. Mukesh Ambani) is the parent company of Reliance Aerostructure Ltd. (beneficiary of the offset contract). There is no possibility of any arrangement between Reliance Infrastructure with Dassault Aviation in 2012. As pointed out in applicants' petition in para 56, "Mr. Ambani's first foray into the defence sector was on, 22nd of December, 2014", when Reliance Infrastructure incorporated Reliance Defence Technologies Pvt Ltd. and Reliance Defence and Aerospace Pvt. Ltd as apparent from the balance sheet of Reliance Infrastructure that was annexed as Annexure P38 to the petition. 'Note' on offsets mischievously, "suggests that there was possibly an arrangement between the parent Reliance company and Dassault starting from the year 2012."</p>

<p><i>had entered into a pact for partnership with Reliance Industries in Defence Sector”</i></p> <p>Source:Press Release of Ministry of Defence dated 22.09.2018 Annexed to note on Offsets.</p>	<p><i>arrangement between the parent Reliance company and Dassault starting from the year 2012.”</i></p>	
<p><b>Parallel Negotiations</b></p>		
<p><i>“An Indian Negotiating Team (INT) was constituted to negotiate the terms and conditions of the procurement of 36 Rafale aircraft with</i></p>	<p><i>“An INT (Indian Negotiating Team) was constituted to negotiate the terms and conditions, which commenced in May 2015 and</i></p>	<p>Note suppressed unauthorised Parallel Negotiations against the Conduct of Business Rules and against the mandate of Defence Procurement Procedures (DPP) conducted by PMO bypassing Ministry of Defence &amp; INT. Paras 47 to 59 of DPP, 2013, state that negotiations on all aspects are to be done by INT.</p> <p>Government’s note suppresses that Ministry of Defence <i>vide</i> note dated 24.11.2015 objected to “<i>parallel negotiations</i>” being conducted by officers in the PMO and stated that such negotiations “<i>weakened the negotiating position of MoD and Indian</i></p>

<p><i>the French Government team.”</i>  <i>“Negotiations between the INT and the French side started in May 2015 and continued upto April 2016. A total of 74 meetings, which included 48 internal INT meetings and 26 external INT meetings with the French side were held during the negotiations.”</i>          SOURCE: ‘Note’ on Decision Making Process</p>	<p><i>continued till April 2016. In this period of time, a total of 74 meetings were held, including 48 internal INT meetings and 26 external INT meetings with the French side.”</i></p>	<p><i>Negotiating Team”</i> The note added, <i>“we may advise PMO that any Officers who are not part of Indian Negotiating Team may refrain from having parallel parleys [parleys] with the officers of French Government.”</i></p> <p>Citing <i>“a glaring example”</i>, the Defence Ministry note pointed out that INT learnt of parallel negotiations when a French official wrote a letter stating, <i>“taking into consideration the outcome of discussions between Diplomatic Adviser to the French Defence Minister and Joint Secretary to PM, no Bank Guarantee is provisioned in the supply protocol and the letter of comfort provides sufficient assurances of the proper implementation of the supply protocol by the industrial suppliers.”</i></p> <p>This, per note, was <i>“contrary to the position taken by the MoD and conveyed by Indian Negotiating Team that the commercial offer should be preferably backed by Sovereign/Government Guarantee or otherwise by Bank Guarantee.”</i> Another instance of a contrary stand taken in the parallel negotiations was on the arbitration arrangement.</p> <p>The seriousness of PMO’s unauthorized negotiations can be gauged from Secretary, Defence’s observation that, <i>“in case the PMO is not confident about the outcome of</i></p>
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*negotiations being carried out by the MoD, a revised modality of negotiations to be led by PMO at appropriate level may be adopted in the case.”* Defence Ministry protested that the position taken by the PMO was “*contradictory to the stand taken by MoD and the negotiating team.*” The then Defence Secretary, noted, “*RM may pl. see. It is desirable that such discussions be avoided by the PMO as it undermines our negotiating position seriously.*”

The Defence Minister, Mr. Manohar Parrikar, confirmed the interference by the PMO on 11.01.2016, and noted, “*It appears that the PMO and the French President’s office are monitoring the progress of the issue which was an outcome of the Summit meeting....Def Sec may resolve issue/matter in consultation with Pr. Sec to PMO*”

A copy of Ministry of Defence Note dated 24.11.2015 is marked and annexed as **Annexure A1 at Pages \_\_\_\_\_**

A copy of article by Mr. N. Ram in *The Hindu*, titled “*Defence Ministry protested against PMO undermining Rafale negotiations*”, dated 08.02.2019, is marked and annexed as **Annexure A2 at Pages \_\_\_\_\_**

Notwithstanding MOD objections, National Security Advisor (NSA), Mr. Ajith Doval, again interfered without mandate and conducted negotiations with the French in

		<p>Paris on 12.01.2016 and 13.01.2016 on issues of Bank Guarantee, Sovereign Guarantee, Seat of Arbitration, etc.</p> <p>Note suppresses, that based on Mr. Doval's meeting, Mr. Parrikar's directed that French insistence on providing only a 'Letter of Comfort' in lieu of Sovereign Guarantees should be considered by the Cabinet Committee on Security. This direction was against para 75 of DPP, 2013, that states, "<i>Any deviation from the prescribed procedure will be put up to DAC through DPB for approval.</i>"</p> <p>A copy of Ministry of Defence 'Note 18' is marked and annexed as <b>Annexure A3 at Pages _____</b></p>
<b>INT REPORT</b>		
<p><i>"As mandated by the DAC, the INT undertook a collegiate process involving due deliberations and diligence at various levels during the</i></p>	<p><i>"It is the case of the official respondents that the INT completed its negotiations and arrived at better terms relating to</i></p>	<p>'Collegial': Relating to or involving shared responsibility, as among a group of colleagues. (Oxford English Dictionary)</p> <p>Para 56 of DPP, 2013, states, "<i>The CNC should document the selection of vendor using a formal written recommendation report addressed to the relevant approval authority. The report must be complete in all respects and should be checked by the members of the CNC. It should comprehensively elaborate the method of evaluation</i></p>

<p><i>negotiations.”</i></p>	<p><i>price, delivery and maintenance, as compared to the MMRCA offer of Dassault”</i></p>	<p><i>and the rationale for the selection made. All CNC members should sign the recommendation report, in the interest of probity and accountability, as evidence that they concur with the process adopted and the ultimate selection made...”</i></p> <p>On 01.06.2016, the three public servants with Domain Expertise in Indian Negotiating Team put their objections on record as regards various aspects of the 36 aircraft deal. These were Mr. M.P. Singh, Advisor (Cost): a JS-level officer from the Indian Cost Accounts Service (ICoAS), Mr. A.R. Sule, Finance Manager (Air): JS-level officer who is the whole time finance expert meant only for defence capital acquisition and is acquainted with the cost elements, &amp; Mr. Rajeev Verma JS &amp; AM (Air): who anchors all defence capital acquisitions and is familiar with all capital procurements/ costing of various items.</p> <p>They recorded that far from being a ‘Collegiate’ process, there were outright attempts at manipulating draft INT report of 30.05.2016 that had, <i>“a number of factual inaccuracies and omissions. It was also observed that certain issues pertaining to the benchmark price that were never deliberated in the internal meeting were also included in the draft report that was prepared by Air HQ”</i> After their protest, another draft report was brought at <i>“around 4:00 pm on 31.05.2015...it was not shown to</i></p>
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<p><i>“As mandated by DAC, INT completed its negotiations and arrived at better terms</i></p>	<p><i>“We have been informed that their is a financial advantage to the</i></p>	<p><i>Member Secretary INT, as he was busy in some other engagement...It was noticed that the revised draft report had similiar factual inaccuracies and ommissions...It was noticed that some of the directions issued by MoD from time to time with approval of Defence Secretary/Hon’ble RM to INT were not referred to in the revised Draft Report. Similarly, all communications between the INT and French side in form of letters that have taken place during the course of negotiations were also not reflected in the Draft Report.” They closed with this warning, “It may also be mentioned that Records of Discussion of number of meetings of INT have not been finalized by Air HQ inspite of repeated requests. It is imperative to finalise these RoDs”</i></p> <p>Whether manipulations objected to by these officers were finally addressed in final report is not known. Who was including <i>“issues pertaining to the benchmark price that were never deliberated in the internal meeting ...in the draft report that was prepared by Air HQ”</i> and why would have been pertinent for the Hon’ble Court to be apprised of to rule on <i>bona fides</i> of decision making process.</p> <p>The note of the three Domain Experts objected that the new deal for 36 aicrafts was not in conformity with the Joint Statement issued on 10th of April, 2015, which stated that new procurement would be on <i>“terms that would be better than conveyed by Dassault Aviation as part of a separate process under way,”</i> and that the delivery</p>
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<p>relating to price, delivery and maintenance compared to the MMRCA offer of M/s Dassault Aviation.”</p>	<p>nation”.</p> <p>“We have examined closely the price details and comparison of the prices of the basic aircraft along with escalation costs as under the original RFP as well as under the IGA. We have also gone through the explanatory note on the costing, item wise.”</p> <p>“Suffice it to say that as per the</p>	<p>would be in “a time frame that would be compatible with the operational requirement of the IAF.”</p> <p><b>Price:</b> “the final price offered by the French Government cannot be considered as ‘better terms’ compared to the MMRCA [medium multi-role combat aircraft] offer and therefore not meeting the requirement of the Joint Statement.”</p> <p>The three domain experts pointed out that the Defence Procurement Procedure (DPP) stipulated that in all cases the Contract Negotiating Committee “<i>should establish a benchmark and reasonableness of price in an Internal Meeting before opening the Commercial Offer.</i>” Said benchmark price was determined as Euro 5.2 billion.</p> <p>Final Price (36, all inclusive) was compared to Benchmark Price determined by Experts and it was recorded: “<i>The final price offered by the French Government (which is escalation based) is 55.6% above the benchmark (which is for firm and fixed price). Considering the future escalations till the time of delivery, the gap in the benchmark and the final price would further increase.</i>”</p>
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	<p><i>price details, the official respondents claim there is a commercial advantage in the purchase of 36 Rafale aircrafts. The official respondents have claimed that there are certain better terms in IGA qua the maintenance and weapon package”</i></p>	<p>Paragraph 52 of DPP 2013 is relevant and states,  <i>“Cases for which contracts have earlier been signed and benchmark prices are available, the CNC [contract negotiation committee] would arrive at the reasonable price, taking into consideration the escalation/ foreign exchange variation factor.”</i></p> <p>As no contract was signed for procurement of 126 aircrafts therefore INT domain experts were correct to come up with a benchmark price which discounted costs of License manufacturing in India and cost of Transfer of Technology that was in built in 126 MMRCA RFP.</p> <p>Nonetheless Final Price offered by Dassault was compared to MMRCA factoring in escalation also based on Aligned Cost Table and it was recorded, <i>“The commercial offers in the MMRCA process were aligned by the INT after factoring in the scope of supplies as per 36 Rafale procurement and compared with the final offer made by the French side,”</i></p> <p>While the commercial offers submitted by Dassault Aviation during the MMRCA deal were based on the submission of bank guarantees against advance payments, the final price offered for 36 aircrafts was without any sovereign or government</p>
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<p><i>“INT report was finalized and signed on 21st July, 2016. Report indicated better terms and conditions arrived at</i></p>		<p>guarantee or bank guarantees (thereby further lowering costs).</p> <p>The aligned cost, which included the bank guarantee cost, was €8.059 billion, which came down to €7.48 billion after the commercial impact of bank guarantees of 7.28% was deducted. The final price offered by the French to the Modi government was <i>“still 5.3% higher than the Aligned Cost of the commercial quotes submitted by M/s Dassault Aviation and M/s MBDA in MMRCA procurement process.”</i></p> <p><b>Delivery Schedule:</b> The three domain experts stated, <i>“in the MMRCA process, the first 18 flyaway aircrafts were being delivered between T0+36 months to T0+48 months whereas in the delivery schedule offered by the French side, first 18 aircrafts will be delivered between T0+36 months and T0+53 months.”</i></p> <p>Objections of domain experts within INT, raise the question as to how report of INT <i>“indicated better terms and conditions arrived at as a result of negotiation compared to 126 MMRCA case”</i> which may have been used to mislead the Hon’ble Court, more so given apprehensions of INT experts and Ministry of Defence that parallel negotiations were being conducted and attempts were made to manipulate INT report.</p>
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<p>as a result of negotiation compared to 126 MMRCA case”</p>		<p>A copy of note by Domain Experts within INT dated 01.06.2016 is marked and annexed as <b>Annexure A4 at Pages _____</b></p> <p>A copy of article by Mr. N. Ram in <i>The Hindu</i>, titled “<i>Rafale deal not on ‘better terms’ than UPA-era offer</i>”, dated 11.02.2019, is marked and annexed as <b>Annexure A5 at Pages _____</b></p>
<p align="center"><b>Ministry of Defence, Ministry of Law &amp; Justice, INT concerned that this agreement did not meet requirements of IGA</b></p>		
<p><i>Chairman, INT submitted the report on 04th August, 2016, and recommended the case to be progressed for CCS approval &amp; signing the IGA. The INT report and the proposal for obtaining the approval of Cabinet Committee</i></p>	<p><i>Broadly, the processes have been followed.</i></p>	<p>The note suppresses that Ministries/Officers were concerned that the way this agreement was structured, it did not meet the minimum requirements of an IGA and was IGA in nomenclature only.</p> <p><b>Sovereign Guarantee Waived by CCS:</b> Pursuant to unauthorized intervention by PMO &amp; NSA &amp; directions of Mr. Parrikar, over vehement objections of experts in INT and Ministry of Law &amp; Justice, issue of Sovereign Guarantee without which the Inter Governmental Agreement (IGA) does not remain IGA was placed for consideration of CCS.</p> <p>Ministry of Defence vide ‘Note 18’ opined, “<i>it was considered essential that the proposed IGA retains the character of Government- to- Government Agreement for</i></p>

on Security (CCS) was processed in the Ministry of Defence. After inter-ministerial consultations with Finance Ministry & Ministry of Law & Justice, the proposal was placed before CCS on 24th August, 2016”

“It is reiterated that procurement process as laid down in the Defence Procurement Procedure (DPP)-2013 was followed in

this procurement. As may be seen in Encl 13A, it was stated in our reference to MoL&J the core elements of G-to-G character seem to be:

I. The responsibility for the supply of equipment and related industrial services and performance of the entire contract remains with the foreign Government;

II. Dispute Resolution mechanism at Government to Government level only.”

**Arbitration directly with French Industrial Suppliers on direction of CCS:**

Though, termed IGA in nomenclature, MoD, MoL&J, & INT acutely recorded that this was a peculiar contract where though termed IGA, the arbitration was directly with the French Industrial Suppliers, and the French government did not provide requisite support if matter went to arbitration. It was recorded, vide Note 18, that, “With reference to issues pertaining to arbitration. we had vide Note 223, sought legal opinion and advice on whether the proposed scheme of Arbitration between Government of India and French Industrial Suppliers is legally tenable in spite of the fact that there is no direct contact between the Government of India and French Industrial Suppliers. Whether the Government -to- Government character of the procurement is maintained in the draft IGA by incorporating provisions of Arbitration with the French Industrial Suppliers? Whether the scheme of direct Arbitration between Government of India and French Industrial

procurement of 36 Rafale aircrafts. The approval of DAC for procurement of 36 Rafale aircrafts was taken. Indian Negotiating Team (INT) was constituted which conducted negotiations with the French side for about a year and approval of CCS being CFA was taken before signing the agreement.”

SOURCE: Note on decision making

*Suppliers adequately protects the legal and financial interests of Government of India and whether the same should be accepted?*

*As per the advice of MoL&J, the direct arbitration with the French Industrial Suppliers is not legally tenable since Indian side is not a party to the Convention. As stated above, the French side has even not shared the language of Convention with the Indian side.”*

Notwithstanding this, on account of parallel negotiations and interference of NSA, matter was again referred to CCS which approved the same.

**Benchmark Price increased from 5.2 billion Euros set by Domain Experts to 8.2 billion Euros**

There was nothing final about the INT report. Even decision to increase the benchmark price was referred to CCS on directions of Mr. Parrikar, which increased the benchmark price.

A copy of article by Hartosh Singh Bal in *The Caravan* dated 14.12.2018 is marked and annexed as **Annexure A6 at Pages \_\_\_\_\_**

The Note suppresses that contrary to what was submitted to the Hon'ble Court, even

<p>process as shared with applicants’.</p> <p>“Approval of CCS...was accorded on 24th August, 2016. IGA...signed on 23rd September, 2016”</p>		<p>after 24th of August, 2016, the DAC met yet again in September, 2016, and dropped;</p> <p><b>1. Standard DPP Clauses relating to ‘Penalty for Undue Influence,’ ‘Agents/Agency Commission’ and ‘Access to Company Accounts’ in the Supply Protocols.”</b> Dropping of these clauses meant to check corruption was suppressed. Pertinently, in 2014, the Ministry of Defence had cancelled the contract for procurement of Augusta Westland Helicopters and encashed the Bank Guarantee to recover the monies already paid. In present matter, it was ensured by CCS that there are no Bank Guarantees or Sovereign Guarantees to protect India’s interests.</p> <p><b>2 Escrow Account too dropped:</b> Concerned by the manner in which after NSA’s visit to France on 12.01.2016 &amp; 13.01.2016, the issue of guarantees was sidelined, then Finance Advisor (DS), Mr. Mohanty recommended on 14.01.2016, <i>“In the absence of a sovereign/bank guarantee, in a case like this where an IGA is to be signed, it would be prudent to involve the French Govt. as far as releases are concerned. This possibly could be done through an Escrow account or a variant of the same where the money released by the buyer (Govt. of India) is paid to the Escrow account held under the charge of French Govt. to make further payments to the firm as per terms &amp; conditions agreed to by the Indian and French Govt. through IGA. This would make</i></p>
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	<p><i>It has been categorically stated that the vendor/OEM is yet to submit a formal proposal, in the prescribed manner, indicating the details of IOPs and products for offset discharge.</i></p>	<p><i>French Govt. morally and materially responsible for the procurement so proposed. Since they are one of the parties to the IGA and also jointly and severally responsible for the execution of the supply protocol, they should not be having any reservation about it.”</i> For some reason even this very basic condition was dropped in a matter where huge payouts are to be made before any deliveries actually take place. After the 24th of August, this condition was also dropped by CCS of which there is no mention in the note either.</p> <p><b>3. Offsets:</b> The note submitted and the Hon’ble Court accepted that Vendor is required to inform the MoD of it’s offset partner at the time of discharge of offset obligations. It was suppressed that in this meeting of DAC after approval from CCS various ‘Offset’ Clauses were changed including pertaining to the schedule for discharge of Offset Obligations.</p> <p>A copy of Ministry of Defence note dated 14.01.2016 by then Finance Advisor (DS) Mr. Sudhanshu Mohanty, is marked and annexed as <b>Annexure A7 at Pages _____</b></p> <p>A copy of article by Mr. N. Ram in <i>The Hindu</i>, titled “<i>Government waived anti-corruption clauses in Rafale deal</i>”, dated 13.02.2019, is marked and annexed as <b>Annexure A8 at Pages _____</b></p>
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9. That the Hon'ble Court had observed,

*“in none of the public interest litigations before us, the suitability of the equipment (fighter jets) and its utility to the Indian Air Force has been questioned. **What has been questioned is the bona fides of the decision making process and the price/cost of the equipment at which the same is to be procured.**”* (emphasis supplied)

Accordingly, the Hon'ble Court would have been better placed to rule on *bona fides* of the procurement if the government had not told untruths to it as regards the decision making process and suppressed crucial information calling into question the integrity of the entire process.

10. That the Hon'ble Court has been misled into rendering its judgement on the basis of false evidence and suppression of crucial pertinent information by the government in the course of judicial proceedings. Official/s responsible for giving false evidence and suppression of information should be identified and proceedings initiated against them for offences made out under section 193 of IPC.

11. As this false evidence has been given/suppression of information done in 'notes' submitted pursuant to the Orders of the Hon'ble Court, it is also contemptuous and has lowered the dignity and majesty of the Hon'ble Court and suo moto action should be considered by the Hon'ble Court against errant official/s

### **PRAYER**

In these circumstances, it is therefore most respectfully prayed that your Lordships may graciously be pleased to:

- a. Direct an inquiry to be made to identify the persons in the Government of India responsible for filing notes (in sealed cover or otherwise) containing false and/or misleading information intended to mislead this Hon'ble Court.
- b. Cause a complaint to be made in exercise of the power u/s 340 r/w 195 of Cr.PC before the magistrate of competent jurisdiction to initiate the perjury proceeding against the persons so identified
- c. Pass such other orders or directions as this Hon'ble Court may deem fit and proper in the facts and circumstances of the present application.

AND FOR THESE ACTS OF KINDNESS, THE APPLICANTS, AS IN DUTY BOUND, SHALL EVER PRAY.

New Delhi

Filed on: \_\_\_\_\_ of February, 2019

Applicant

(PRASHANT BHUSHAN)