

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Judgment delivered on 1st July, 2010

+ W.P.(C) 8130/2009

M/S ROSHAN LAL VOHRA & ANR. Petitioners
Through: Mr. Shyam Moorjani, Advocate

versus

MCD & ORS. Respondents
Through: Mr. H.S. Phoolka, Sr. Advocate with
Mr. Sanjeev Sabharwal, Advocate

CORAM:
HON'BLE MR. JUSTICE G.S.SISTANI

1. Whether reporters of local papers may be allowed to see the Judgment ?
2. To be referred to the Reporter or not?
3. Whether the Judgment should be reported in the Digest?

G.S. SISTANI, J.

1. Rule. With the consent of counsel for the parties, writ petition is set down for final hearing and disposal.
2. The facts of the case, which have led to filing of the present petition, as stated in the writ petition, are that the petitioners, who are contractors, participated in a tender floated by the respondents. The tender was opened on 23.6.2007. After negotiations a work order was issued to the petitioners on 19.2.2008 and thereafter a formal agreement was also executed between the parties on 14.11.2008. As per the petitioners, they started the work on 28.2.2008 within the stipulated period. The completion period was 18 months i.e. by 27.8.2009. Petitioners after carrying out certain work of earth excavation, found that the work cannot be completed as hindrances existed at the site such as clusters of jhuggies, electric poles and further the designs provided by the respondents were faulty. The petitioners approached the respondents for revising the designs / drawings relating to the work as in case the designs were not revised the structure would collapse. The petitioners also submitted modified

drawings and designs with the respondents, however, the respondents sat over the same.

3. It is submitted that the petitioners wrote a letter dated 6.5.2008 to respondent no.3 wherein petitioners clarified that the work had been started in the reach of about 100 meters; the remaining portion is thickly effected with encroachments on route, clusters of jhuggies are existing; and electric poles are also existing on the alignment. The respondents were also informed that further work is likely to get hindered till the encroachments are removed and clear site is made available to the petitioners.
4. The case of the petitioners is that despite the petitioners having pointed out to the respondents with regard to the difficulties being faced by them, the respondents did not bother to take any action for removal of obstructions nor handed over revised drawings. It is the case of the petitioners that in fact, the revised drawings were not received by the petitioners till the date of filing of the writ petition.
5. As per the petition, the petitioners received a communication dated 5.5.2008 from respondent no.3, by which respondent no.3, without addressing any of the issues raised by the petitioners, directed the petitioners to restart the work which had been held up for ten days, failing which action would be initiated. Petitioners are stated to have issued another communication to the respondents on 22.5.2008 wherein while reiterating the difficulties faced by the petitioners it was brought to the notice of the respondents that in case matters are not resolved within one week the petitioners would be constrained to dispense with the work without prejudice to their rights and contentions.
6. It is the case of the petitioners that respondent no.3 had realised its fault with regard to faulty drawings which were handed over to the petitioner initially and had referred the matter back to Water & Power Constancy Services (India) Ltd. (herein after referred to "WAPCOS"), who admitted that the drawings were faulty and had revised the drawings. However, as per the petitioners, neither the

revised drawings were supplied to the petitioners nor the petitioners were informed about the same.

7. Respondent no.3 issued a show cause notice dated 27.5.2008 to the petitioners under Clause 2 of the contract wherein the petitioners were asked to reply as to why the compensation should not be levied upon them for not restarting the work. Respondent no.3 also issued a communication to the petitioners on 29.5.2008, by which, respondents had issued various clarifications in response to the petitioners' communication dated 6.5.2008. The petitioners were asked to complete the work and thus counsel for the petitioners submits that this communication superseded the show cause notice dated 27.5.2008.
8. Mr. Shyam Moorjani, learned counsel for the petitioners, submits that the respondents, without adverting to the issues raised by the petitioners, issued another show cause notice to the petitioners on 15.10.2008 pointing out that the progress of the work was slow. By a communication dated 20.10.2008, the petitioners informed respondent no.3 that the work cannot be resumed due to non-supply of revised drawings and designs. In response to this communication of the petitioners, respondent no.3 addressed a letter to the petitioners dated 24.10.2008 informing the petitioners that designs have been revised by WAPCOS, however, the petitioners' contention that despite the designs / drawings having been revised, a copy of the drawings were not handed over to them, was denied. In the same communication, it was also brought to the notice of the petitioners that the work was being carried out by the petitioner as per the revised drawings/designs of which the petitioners as well as the petitioners' site engineer are well aware and the work was held up on account of fault of the petitioners by not removing the malba/silt from the site.
9. It is contended by counsel for the petitioners that despite various verbal and written requests the respondents did not supply to the petitioners a copy of the revised drawings / designs, although the malba/silt was removed, excavation of earth work was completed

and lean concrete laid at the site during the period from 23.10.2008 to 18.11.2008. The petitioners were, however, left with no option but to stop the work as the petitioners did not want to risk the lives of labourers to execute the structural work on their earlier faulty designs as the revised drawings and designs were not supplied to the petitioners. It is further contended by counsel for the petitioners that the petitioners were again informed by the respondents vide communication dated 1.12.2008 that they have carried out only 7% of the work and the work was held up since 18.11.2008. Petitioners were requested to expedite the progress so that the work can be completed within the stipulated period of time.

10. According to the petitioners, they had reliable information that in the revised drawings the consultant had altogether altered the designs and scope of the work and in view thereof the respondents were concealing the revised designs. The petitioners, by a communication dated 24.12.2008 addressed to respondent no.3, stated that the petitioners had learnt that designs and scope of the work were completely altered by the consultant agency. Petitioners clarified that they had completed the work to the tune of 20% and not 7% as alleged by the respondents. Petitioners further in its letter clarified to the respondents that the work had been held up for the approval of the designs and rates in the order of merit and conditions of the award letter.
11. It is contended by counsel for the petitioners that as per the work order dated 19.2.2008 when orders are given for execution of any extra/substitute item the petitioners had to obtain an order from the competent authority before executing the same to avoid any further complications. Therefore, the allegation with regard to supply of revised designs/drawings was *per se* false as even in case the designs had been supplied to the petitioners the work could not have been started as no order was given to the petitioners from the competent authority for executing the substituted items of work included due to revision of drawings/designs, which was one of the main reasons for the

respondents in not providing a copy of the revised drawings to the petitioners and, thus, in fact, the respondents have played a fraud on the petitions and did not supply any copy of the drawings to the petitioners. It is further contended that the respondents were aware that the drawings have been completely changed and in case a copy of the same was handed to the petitioners, the petitioners would raise hue and cry and the erring respondents and officials would be in serious trouble as the earlier drawings were completely faulty. It is also contended that the respondents have made the petitioners a scapegoat.

12. Counsel for the petitioners submits that another show cause notice was issued to the petitioners under Clause (2) of the contract agreement on 5.1.2009. While referring to their earlier letter dated 24.12.2008, petitioner replied to the respondents vide letter dated 14.1.2009 rendering clarifications, reasons and the circumstances for not resuming the work for want of approval of designs and rates. The respondents instead of considering the reply, on 20.1.2009 issued another show cause notice to the petitioners as to why the action under clause, sub-clause 3(a), and / or 3 (b) and / or 3(c) of the agreement be not taken against the petitioners. Reply to the show cause notice dated 20.1.2009 was submitted by the petitioners on 28.1.2009 denying the allegations made by the respondents in their show cause notice. The respondents did not accept the stand of the petitioners and informed the petitioners vide letter dated 07.02.2009 that the respondents proposed to proceed against them in accordance with Clause 2 and 3 of the Contract Agreement and Clause 22 of the Contractor Enlistment Rules. However, with a view to adhere to the principle of natural justice a final opportunity of personal hearing was granted to the petitioners and the petitioners were directed to appear before the Chief Engineer VII on 16.2.2009 at 3.00 p.m. Thereafter by a communication dated 16.2.2009 personal hearing was fixed for 20.9.2009 at 3.00 p.m., on which date, petitioners are stated to have appeared and also gave written submissions on 21.2.2009. By a communication dated

25.2.2009 respondent no.3 supplied a copy of the speaking order passed by respondent no.2 on 24.2.2009 to the petitioners.

13. In consequence to the speaking order dated 24.2.2009 respondent no.3 vide order dated 16.3.2009 rescinded / determined the contract and fortified the earnest money and the security deposited. The respondents also took out such part of the work from the hands of the petitioners, which remained unexecuted, for giving it to another contractor for completion of the work. Further the right to claim compensation with regard to purchasing and procurement of any material and entering into any engagement by the petitioners had been curtailed and a notice for measurement of the work was given for 20.3.2009. On 16.3.2009 respondent no.3 had given a notice whereby the petitioners were called upon as to why the amount of Rs.36,84,846/- i.e. 10% of the contractual cost should not be recovered by the Department from the security deposit lying with the respondents within a period of seven day.
14. It is the case of the petitioners that these letters were received only on 21.2.2009 and 23.3.2009 by which date the stipulated time had already elapsed. The respondents thereafter passed an order dated 12.3.2009 debarring the petitioners from tendering in MCD for three years.
15. It is contended by counsel for the petitioners that the order dated 12.3.2009, debarring the petitioners, was passed without issuing any show cause notice and in total violation of the principles of natural justice. It is further contended that the order dated 24.3.2009, by virtue of which, the petitioners have been black listed as well as the order dated 12.3.2009 and also two orders dated 16.3.2009 are totally arbitrary, illegal, unreasonable and against the prescribed principles established by law. It is next contended that the orders passed by the respondents are unconstitutional, ex facie, colourable exercise of power and in violation of Articles 14(1)(g) and 21 of the Constitution of India and are, thus, liable to be quashed. It is also contended that the order of black listing has been passed without issuing any show

cause notice as to why the petitioners should not be black listed, without giving any opportunity of hearing to the petitioners and thus the respondents have failed to comply with the principles of natural justice and in view of this the order of black listing is liable to be quashed.

16. Learned counsel for the petitioners submits that the orders passed by the respondents are with a view to tarnish the unblemished record of the petitioner of 50 years. Counsel further submits that the speaking order which has been passed is without any jurisdiction in view of the fact that the same has been passed by the Chief Engineer, who is not competent to pass the order. Counsel also submits that the contract has been rescinded with a view to save the skin of the officials of the MCD. Counsel next submits that the work had to be stopped by the contractor on account of two measure factors (i) that the site was not clear of obstructions, there were jhuggies and electric polls in the alignment of the work to be carried out; and (ii) revised drawings were not supplied to the petitioners.
17. Counsel for the petitioners has placed strong reliance on the communications issued by the petitioners dated 6.5.2008 wherein various issues were raised by the petitioners which were not addressed by the respondents, which led to the work coming to a standstill.
18. It is contended by learned counsel for the petitioners that petitioners made all efforts to carry on with the work and the work commenced from both the sides but had to stop on account of the fact that the obstructions were to be cleared by the MCD. The second issue, which has been raised by the petitioners for non-completion of work is that the revised drawings were not supplied to the petitioners. It is further contended that various letters were written by the petitioners to the MCD to supply the revised drawings but no satisfactory response has been received. The respondents were only trying to show by implication that revised drawings were handed over to the petitioners and there is nothing

on record, which would show that, in fact, the revised drawings were handed over to the petitioners.

19. Learned counsel for the petitioners submits that, even otherwise, as per CPWD manual another copy of the revised drawings could have been handed over to the contractor on payment of Rs.1500/- which amount could either have been recovered by the MCD from the bills of contractor or demanded in cash. Counsel further submits that, in fact, the MCD wanted to shift the burden on the petitioners and with mala fide intentions the revised drawings were not handed over to the petitioners in view of the fact that as the concrete mixture had to be changed from M-20 to M-35 and on account of this revision, the expenditure of the project would have increased manifolds and in case of revised drawing only half the work could have been completed within the estimated cost. Even otherwise the MCD failed to grant prior permission in relation to the work which was to be carried out as per the revised drawing, as this was a condition precedent for carrying out additional and substitute work. Counsel further submits that the Orders dated 16.03.2009, by virtue of which, the contract of the petitioners has been rescinded is without any jurisdiction. Counsel also submits that the two orders dated 16.03.2009 (Annexure P-3) passed by the Executive Engineer are without any jurisdiction and that he was neither competent nor authorized to issue the orders as per the terms of the contract. Counsel next submits that to the best of the knowledge of the petitioners the structural designs have not been made in respect of the revised drawings and the same could not have been made without the participation of the petitioners as the MCD was to supply the sample of the necessary material. The second order dated 16.03.2009 has been assailed by the petitioners as the petitioners could not have imposed 10% penalty on the value of the contract as only the Superintending Engineer has the power of jurisdiction to impose the penalty and that too after giving a show cause notice and after granting hearing to the petitioners and only after the petitioners had admitted the breach could the damages have

been imposed. The respondents cannot be a judge of his own cause and cannot pass the order against the petitioners.

20. Respondents have filed an affidavit in opposition to the writ petition as also the synopsis have been handed over in Court with supporting documents.
21. Mr. H.S. Phoolka, learned senior counsel for the respondents, submits that the present petition involves disputed questions of fact, which cannot be adjudicated upon in the present writ petition. Senior counsel further submits that the existence / removal of clusters of jhuggis, electrical poles, which as per the petitioners are a hindrance in execution of the work are strongly disputed as according to the MCD the work could have been executed and some work has, in fact, been executed without removal of the clusters of jhuggis and electrical poles. Senior counsel also submits that the second issue raised by the petitioners with regard to non-submission of revised designs / drawings is also vehemently denied and disputed as the petitioners were well aware of the revised drawings, which is evident from the fact that the petitioners had executed the allotted work as per the revised drawings. Senior counsel next submits that it is also a disputed question as to the extent of work executed by the petitioners, who have contended that they have executed 20% of the work, whereas as per the MCD only 7% of the awarded work has been executed, which has led to the cancellation of the contract.
22. It is contended by senior counsel for the respondents that the reasons for delay in execution of the work also cannot be adjudicated in the present proceedings which question would require detailed evidence and in view thereof petition under Article 226 of Constitution of India, is not the appropriate remedy and, thus, liable to be dismissed. It is further contended that the subject matter of the writ petition involves contractual disputes arising out of contract dated 14.11.2008 and the disputes have arisen during the execution of the contract and thus a writ court cannot adjudicate upon the disputes arising out of contractual

matters. It is also contended by counsel for the respondent that the petitioners have failed to make out a strong *prima facie* case for judicial review of the action taken by the respondents as the respondents have issued repeated show cause notices to the petitioners granting opportunity of filing replies; personal hearing was also granted to the petitioners and thereafter a speaking order dated 24.2.2009 has been passed. The respondents have thus followed the due process of law and also complied with the principles of natural justice. The show cause notice dated 5.1.2009 was issued to the petitioner proposing action under Clause 2 of the Contract Agreement; show cause notice dated 20.1.2009 was issued to the petitioners proposing action under clause, sub-clause 3(a) and / or 3(b) and /or 3(c) of the Contract Agreement; and show cause notice dated 7.2.2009 was issued clearly stating that the MCD was contemplating to proceed against the petitioners under Clauses 2 and 3 of the Contract Agreement and Clause 22 of the Contract Enlistment Rules. Receipt of all the show cause notices issued to the petitioners have been admitted in the writ petition filed by the petitioners. Petitioners have also admitted that opportunity of personal hearing was also granted to them on 20.1.2009, 16.2.2009 and 20.2.2009 before the Chief Engineer VII of the MCD. The petitioner did not appear on two dates of hearing. The third opportunity of personal hearing was availed of by the petitioners.

23. It is submitted by learned senior counsel for the respondents that while passing the speaking order dated 24.2.2009 the submissions made by the petitioners have been duly considered by the respondents. It is further submitted that as far as the revised set of drawings are concerned the same was handed over to the Site Engineer of the Contractor as soon as the same was received from the consultant. It is also submitted that a copy of the revised designs / drawings was also handed over to the third party agency i.e. Sh. V.V. Arora, Scientist, NCCBM, and the Site Engineer. This fact was also intimated to the petitioners by EE(Pr)/Central-I vide communication dated 24.10.2008 and the petitioners by their

letter dated 24.12.2008 has admitted that the designs and scope have been altered by the consultant agency and that the petitioners were in the knowledge of the requirement of M/35 grade of concrete in place of M/20 grade of concrete and as such the petitioners had alleged that approval of extra / substitute items were required as per the designs and drawings. It is further submitted that it is only after the drawings were supplied to the petitioners and a copy of the same was handed over to the third party in the presence of the Contractor, Sh. Anil Vohra, and his Site Engineer on 10.9.2008, could the petitioners have learnt that designs and scope had been altered and the grade of concrete was changed from M-20 to M-35 and a demand for extra/ substitute items could have been made. It is further submitted that in case the petitioners were interested in completing the work, the petitioners would have deposited Rs.1500/- and obtained another copy of the drawings. The work was resumed by the petitioners on 23.10.2008 and executed till 18.11.2008. The receipt of revised drawings / designs is also evident from the fact that it has been stated in para 13 of the writ petition that "*malba / silt was removed, excavation of earth work completed and lean concrete laid at the site during the period 23.10.2008 to 18.11.2008*". It is also submitted that this averment would make it clear that for laying the lean concrete, revised drawings / designs were required. As far as demand of extra items is concerned, the changes / deviations in the quantities of item of the contract would be dealt with as per Clause 12 of the Contract Agreement.

24. It is submitted by learned senior counsel for the respondents that the petitioners have completed only 7% of the work is also evident from the fact that the running bill for the work carried out by the petitioners was paid in the month of November, 2008 and the petitioners have accepted the running bill to the tune of 7%. Thus, the submission that the 20% of the work has been completed is false. It is further submitted by counsel for the respondents that since even after lapse of 11 months only 7% of the work had been

completed the show cause notice dated 5.1.2009 under Clause 2 of the Contract Agreement for poor progress of work was issued to the petitioners. It is also submitted As per the respondents the petitioners have been delaying the completion of the work without any justifiable reasons; MCD has not withheld the drawings / designs and, thus, the petitioners have rendered themselves liable for action for breach of the contract.

25. Learned senior counsel for the respondents submits that since the petitioners have committed breach of contract, they have not completed the work as per the schedule and have executed only 7% of the work after a lapse of 2/3 of stipulated period the petitioners are liable for action under Clause 2 of the Agreement and thus the MCD was well within its right to take the action against the petitioners on the basis of notice and the material on record and the order dated 16.3.2009 under Clause 2 of the Contract agreement was passed against the petitioners demanding the levy of Rs.36,84,846/- against the petitioners calculated @ 10% of the contractual cost of the work shown in the agreement.
26. In response to the submission made by counsel for the petitioners that the order dated 16.3.2009 regarding levy of compensation in accordance with Clauses 2 & 3 of the Contract is without jurisdiction as the Executive Engineer is not competent to pass the order, counsel for the respondents submits that the submission is without any merit. Mr. Phoolka, learned senior counsel for the respondents, relies upon Clause 3 of the Contract which reads as under:

(3) When contract can be determined

Subject to other provisions contained in this Clause, the Engineer-in-charge may, without prejudice to his any other rights or remedy against the contractor in respect of any delay, inferior workmanship, any claims for damages and / or any other provisions of this contract or otherwise, and whether the date of completion has or has not elapsed, by notice in writing

absolutely determine the contract in any of the following cases....”

27. Learned senior counsel for the respondents submits that accordingly the Engineer-in-Charge is competent to pass the order under Clause 3 of the Contract Agreement as the Engineer-in-Charge means the Engineer Officer, who shall supervise and being incharge of the work and who shall sign the contract on behalf of the MCD. Senior counsel further submits that the contract has been signed by the Executive Engineer. Senior counsel also submits that the Executive Engineer has only communicated the order imposing the penalty on the petitioners and the same has been approved by the Chief Engineer and finally approved by the Commissioner, MCD.
28. I have heard counsel for the parties and also perused the pleadings as well as the annexures filed along with the writ petition as also submitted along with the synopsis. In this case the petitioners participated in a tender floated by the MCD, which was opened on 23.06.2007 and after negotiations the work order was issued in favour of the petitioners on 19.02.2008 and thereafter a formal agreement was also executed in favour of the petitioners on 14.11.2008. The petitioners were to start the work within ten days of issuance of the work order. The work was started on 28.02.2008 and the same was to be completed within 18 months i.e. by 27.08.2009.
29. It is the case of the petitioners that although the work commenced on time, it was held up on account of the fact that the site was not clear of obstructions (i) there were jhuggis besides electricity poles and (ii) revised drawings were not supplied to the petitioners. By a communication dated 06.05.2008, the petitioners had brought it to the notice of the MCD that according to the conditions of NIT the third party payment is to be made separately, however, since due weightage has not been considered at the time of preparation of justification and award of work has not been considered as such the amount is to be paid by the Department to the third party separately. A request was made

that the third party payment may be made by the Department directly so that they may conduct their routine supervision for quality assurance. In the same communication, the petitioner brought to the notice of the MCD that the work is likely to get hindered till the encroachment is removed and clear site is made available. The MCD vide communication dated 05.05.2008 called upon the petitioners to restart the work which according to them had been held up for ten days, failing which action would be taken by the Department. The issues raised by the petitioners were also replied to by the respondents by a communication dated 28.05.2008. It would be useful to reproduce reply dated 29.05.2008:

**MUNICIPAL CORPORATION OF DELHI
OFF. OF THE EX-ENGINEER (M)-II
JAL VIHAR, LAJPAT NAGAR, CENTRAL ZONE
NEW DELHI.**

No.EE(M)-II/2008/238

Dated 29/5/08

Subject:- Remodeling and covering of existing nalla along Taimoor Nagar & Khizarbad Village in W.No.7, Central Zone.

W.P.No.:- 169/WW(M)-II/TC/CNZ/07-08 Dated:19.2.08.

Agency:- M/s Roshan Lal Vohra & Sons, 38, Mahila Colony, Gandhi Nagar, Delhi.

May please refer your letter No.nil dated 06.05.08.
The point-wise reply of the same is as under:

1. It is alleged that due weightage for third party payment had not been considered at the time of preparation of justification. At the time of negotiation, contractor is supposed to raise any objection in writing. In the instant case, contractor has not raised any objection in writing at the time of negotiation. Hence, it is understood that you have considered all such factors/aspects while negotiating the rates which are now final and binding on both the parties. As per NIT condition the payment of third party shall be born by the contractor as per Circular No.SE(QC)/06-07/D-2816 Dated 20.02.07.
2. It is alleged that cluster of jhuggies and electric poles exists in the alignment of drain. As per instruction of WAPCOS (Water & Power Constancy Services (India) Ltd.

A Govt. of India undertaking), Consultancy Agency, the work of remodeling and covering of existing nalla is to be started from down stream side. There is no hindrance in the shape of jhuggies and electric poles where the work is to be executed on the downstream side. A huge quantity of silt and malba had been gathered by you at the construction site and the same has not been removed by your agency. Due to which there is water logging on the upstream side in Maharani Bagh & Friends Colony. It is also added that the case of temporary encroachment removal in the shape of jhuggies and electric poles is also being perused and will be cleared before taking up the work in this reach. As such, there is no hindrance in portion on downstream side where construction is to be carried out.

3. It is alleged that there are deviations in the schedule of quantities. In this regard, it is stated that the design and estimate have been prepared by WAPCOS and the same is being followed. Hence, there is no deviation in quantities at present.
4. It is alleged that excavated earth is not being received by Okhla SLF. Excavated earth is not to be dumped in Okhla SLF, as the same is required for filing of creet way. Department has never asked to dispose excavated earth to Okhla SLF. You are required to dispose off the silt gathered by you and lying on downstream side to Okhla SLF, which is not being removed inspite of repeated request.
5. It is alleged that the work is in full swing and there is hindrance on account of revision of structural drawing for RCC work. The work was held up by you without any reason since 25.4.08 and the progress of work was also very slow in terms of work reference to be completed as per time schedule. The same has been intimated to you vide letter No.EE(M)-II/2008/D-148 dated 5.5.08 and EE(M)-II/TC/CZ/07-08/189 dated 13.5.08 respectively. As such, there is no dispute in the structural drawing for RCC work since; the same is designed by WAPCOS, a Govt. of India undertaking, which is being followed by department.

In view of above, you are again hereby directed to take up the work so as to complete the work within stipulated time.

EX-ENGINEER (M)-II

M/s. Roshan Lal Vohra & Sons,
38, Mahila Colony,
Gandhi Nagar,
Delhi.

30. The respondents called upon the petitioners to restart the work by letter dated 05.05.2008 and thereafter first show cause notice dated 27.05.2008 was issued to the petitioners calling upon them to show cause within ten days as to why the compensation should not be levied upon them under Clause 2 of the contract agreement. Another show cause notice was issued to the petitioners on 15.10.2008 calling upon the petitioners to resume the work which had not been resumed despite verbal request. In response to this show case notice, the petitioners vide letter dated 20.10.2008 had pointed out to the respondents that due to revision of drawings/designs by the consultant M/s WAPCOS the work has been held up. The petitioners called upon the respondents to arrange for revised drawings and supply the same to them to enable them to resume the work. In response to this communication, the respondents informed the petitioners by a communication dated 24.10.2008 that the work was being done by the contractor as per the revised drawings / designs and one set of the drawings was handed over to Sh. V.V. Arora from NCCCBM and the real reason for the work being held up was due to non removing of malba/silt from the site. The letter dated 24.10.2008 reads as under:

MUNICIPAL CORPORATION OF DELHI
OFFICE OF THE EX. ENGINEER (Pr.) CENTRAL-I
SHIV MANDIR MARG, JAL VIHAR, LAJPAT NAGAR-I,
NEW DELHI – 24.

No: - D/EE(Pr)C-I/08-09/811 Dated 24-10-08

To.

M/s Roshan Lal Vohra & Sons,
38, Mahila Colony, Gandhi Nagar,
Delhi – 110031.

**Name of Work :- Remodeling and Covering of existing
nallah along Taimoor Nagar and
Khizrabad village in W.No.:-7,
Central Zone.**

W.O.No.: -169/EE(M)-II/TC/CNZ/07-08 dated 19.02.08.

May kindly refer to your letter No. 'NIL' dated 20.10.08 wherein you have mentioned that the held up work is not resuming by you due to revised drawings/design by the consultant M/s WAPCOS. It is well known fact that the work was being done as per revised drawings/design regarding which you as well as your site engineer are well aware. During Illrd party visit by Sh. V.V. Arora from NCCBM on 10.09.08, it was also cleared that the work is being taken up as per revised drawings/design. One set of this was also handed over to Sh. V.V. Arora. Apart from it, drawings/design has not been changed completely and most of the things are same and is in your knowledge to be executed at site. Basically the work was held up due to not removing malba/silt from site for which department was making verbal requests to you. There was no any hindrance to continue the work of the side wall. Hence facts as mentioned in your letter are false and delay is being made by you. Higher officers are also aware of it. It is good that you have resumed the work on 23.10.08 after pursuance of department.

In view of facts as explained above, you are requested not to hold up the work in future so that the residents of area may not feel inconvenience due to the same.

Ex. Engineer (Pr)C-I

31. Another communication was addressed to the petitioners by the respondents on 01.12.2008 that the work was to be completed by 27.08.2009 and even after a lapse of nine months the progress achieved is only 7% approximately. The petitioners were also informed that the work is lying held up since 18.11.2008 without any reason and despite verbal requests, the work has not been resumed. In response to this communication, the petitioners vide letter dated 24.12.2008 refuted the allegation that the work had been held up without any reason. In the letter dated 24.10.2008 the petitioners informed the respondents that the designs and scope have been altogether altered by the consultant agency and they have been made to understand that the design mix of RCC has been changed from M-20 to M-35 which would thus invite change in specification and rates as well. It was also brought to the notice of MCD that the work is held up for the approval of designs and rates in the order of merit and condition of award letter as according to the award letter when the order was given

for execution of any extra/substitute item prior orders from competent authority are to be obtained before execution of the same to avoid any further complication. Citing this condition the petitioners informed the MCD that till the decisions are conveyed the work cannot commence and further the item related to excavation are likely to devoid manifold and under such circumstances the approval of rates for further quantity would be required. The respondents in response to the aforesaid letter clarified to the petitioners that any extra/substitute item shall be payable under Clause 12 of the contract agreement. In the communication dated 20.01.2009 the following aspects were brought to the notice of the contractor:

- “2.As per the design/section structure handed over to you, the RCC structure consists of M-30 & M-35 grade of concrete. You have been directed to execute the same a number of times and it is understood that any extra/substituted item on this account shall be payable to you under clause 12 of the contract agreement.
3. Further, any change/deviation in the quantity(s) of any item/items of the contract shall be dealt as per the clause 12 of the contract agreement. The contract agreement does not contain any clause for fixation of revised rates in case of deviation in quantities.

It is to further add that inspite of this office show cause notice dated 05.01.2009 under clause 2 of the contract agreement and subsequent opportunity of the personal hearing before SE(Pr.)-VII afforded to you for 20.1.2009, you have chosen not to present yourself before SE(Pr.)-VII.

From the above, it appears that you are no more interested in taking up the subject work.

Whereas, it appears to the undersigned that by reason of your wrongful delay or suspension of work or the work entrusted to you under the agreement referred to above, will not be completed within stipulated period.”

32. A careful reading of the communications exchanged between the parties would show that while the petitioners have raised three basic issues i.e. (i) obstruction at the site; (ii) absence of revised

drawings/designs; and (iii) revised rates not being fixed, on account of the changes in the revised drawings as reasons for non-completion of the work, the respondents have refuted all the three allegations in their communications, more particularly, letters dated 20.1.2009, 24.10.2008 and 29.5.2008. As per the communications addressed by the respondents to the petitioners there is no hindrance in the shape of jhuggies and electric poles and the work is to be executed on the downstream side. It is also the stand of the respondents that a huge quantity of silt and malba had been gathered by the petitioners at the construction site, which has not been removed due to which there is water logging in the upstream side in Maharani Bagh & Friends Colony. It is also the stand of the respondents that despite some jhuggis and electric polls, part of the work has been carried out by the petitioners and the remaining work can also be carried out. While the petitioners have taken a consistent stand that no revised drawings were supplied to them, the stand of the respondents including the stand taken in the communication dated 24.10.2008 is that, that not only that the revised drawings were handed over to the petitioners but the petitioners were well aware of the same, which is evident from the fact that part of the work has been carried out as per the revised drawings and petitioners had used the concrete of Grade M-35 as per the revised drawings and further some lean concrete work has also been carried out. The respondents have also placed strong reliance on the fact that another set of the drawings was handed over to Sh. V.V. Arora from NCCBM on 10.9.2008 in the presence of the petitioner. The stand taken by the petitioners, that the revised rates were not fixed, has also been refuted by the respondents while placing reliance on Clause 12 of the Contract Agreement, which deals with deviations/variations, extent and pricing. Accordingly, the present petition raises serious disputed questions of fact, which would require detailed examination of evidence and cannot be decided by this Court, in the present proceedings under Article 226 of the Constitution of India.

33. Learned counsel for the petitioners has placed reliance on ***ABL International Limited and Another Vs. Export Credit Guarantee Corporation of India Limited and Others***, reported at (2004) 3 SCC 553, in support of his argument that in appropriate cases the writ court has jurisdiction to entertain a writ petition involving disputed questions of fact and there is no absolute bar in regard thereto.
34. While there is no quarrel that the aforesaid proposition urged by counsel for the petitioners, the Supreme Court has held in para 16 of the same judgment that a writ petition involving serious disputed questions of fact, which require consideration of evidence, which is not on record, will not normally be entertained by a Court in exercise of its jurisdiction under Article 226 of the Constitution of India. Having regard to the nature of disputes between the parties and the material placed on record, it is not possible for this Court to arrive at a finding as to the extent of work carried out by the petitioners (7% or 20%) which goes to the root of the matter, or whether there are hindrances in the form of jhuggies and electric poles in the entire area where the work is to be carried out only on the basis of some photographs placed on record to show jhuggies. While counsel for the petitioners has strongly argued that no revised drawings were supplied to the petitioners, it is the case of the respondents that not only were the revised drawings supplied to the petitioners, the petitioners have also carried out part of the work as per the revised drawings and, in fact, concrete of grade M-35 has been used instead of M-20, as per the revised drawings. This is another issue, which cannot be decided by this Court as to whether, in fact, the petitioners have used grade M-35 concrete or have used grade M-20 concrete. This Court has also carefully perused the impugned orders, which have been passed by the MCD on the touchstone of 3 basic principles of judicial review: (i) whether the same are illegal, (ii) irrational or (iii) while passing the same there has been some procedural impropriety. A perusal of the letters exchanged between the parties and various show cause notices issued to the

petitioners would show that the respondents have fully complied with the principles of natural justice and have also granted the petitioners an opportunity of personal hearing in the matter and all issues raised stand decided and thereafter a speaking order has been passed. The speaking order has also considered the objections raised by the petitioners and in view of this I find no infirmity in the orders having been passed.

35. The nature of dispute in this case also arises out of a contract entered into between the parties and it is settled law that disputes relating to contracts cannot be agitated in proceedings instituted under Article 226 of the Constitution of India. In the case of the ***Life India Corporation of India & Others Vs. Asha Goel (Smt.) & Another***, reported at (2001) 2 SCC 160, the Apex Court has disapproved entertaining of petition under Article 226 of the Constitution of India by the High Court, in the matters of enforcement of contractual rights and obligations, particularly, when the claim of one party is contested. Para 10 of ***Life India Corporation of India & Others*** (supra) reads as under:

10. Article 226 of the Constitution confers extraordinary jurisdiction on the High Court to issue high prerogative writs for enforcement of the Fundamental Rights or for any other purpose. It is wide and expansive. The Constitution does not place any fetter on exercise of the extraordinary jurisdiction. It is left to the discretion of the High Court. Therefore, it cannot be laid down as a general proposition of law that in no case the High Court can entertain a writ petition under Article 226 of the Constitution to enforce a claim under a life insurance policy. It is neither possible nor proper to enumerate exhaustively the circumstances in which such a claim can or cannot be enforced by filing a writ petition. The determination of the question depends on consideration of several factors, like, whether a writ petitioner is merely attempting to enforce his/her contractual rights or the case raises important questions of law and constitutional issues; the nature of the dispute raised; the nature of inquiry necessary for determination of the dispute etc. The matter is to be considered in the facts and circumstances of each case. While the jurisdiction of the High Court to entertain a writ petition under Article 226 of the Constitution cannot be denied altogether, Courts must bear in mind the self-imposed restriction consistently followed by High Courts all these years after the constitutional power came into

existence in not entertaining writ petitions filed for enforcement of purely contractual rights and obligations which involve disputed questions of facts. The Courts have consistently taken the view that in a case where for determination of the dispute raised, it is necessary to inquire into facts for determination of which it may become necessary to record oral evidence a proceeding under Article 226 of the Constitution is not the appropriate forum. The position is also well settled that if the contract entered between the parties provide an alternate forum for resolution of disputes arising from the contract, then the parties should approach the forum agreed by them and the High Court in writ jurisdiction should not permit them to bypass the agreed forum of dispute resolution. At the cost of repetition it may be stated that in the above discussions we have only indicated some of the circumstances in which the High Courts have declined to entertain petitions filed under Article 226 of the Constitution for enforcement of contractual rights and obligation; the discussions are not intended to be exhaustive. This Court from time to time disapproved of a High Court entertaining a petition under Article 226 of the Constitution in matters of enforcement of contractual rights and obligation particularly where the claim by one party is contested by the other and adjudication of the dispute requires inquiry into facts. We may notice a few such cases; **Mohammed Hanif v. State of Assam**, (1969) 2 SCC 782; **Banchhanidhi Rath v. State of Orissa**, (1972) 4 SCC 781; **Rukmanibai Gupta v. Collector, Jabalpur**, (1980) 4 SCC 556; **Food Corporation of India and Ors. v. Jagannath Dutta**, 1993 Supp (3) SCC 635; and **State of H.P. v. Raja Mahendra Pal and Ors.**, (1999) 4 SCC 43.

36. Reference can also be made to **National Highways Authority of India v. Ganga Enterprises**, (2003) 7 SCC 410, at page 415, wherein it has been held that:

“It is settled law that disputes relating to contracts cannot be agitated under Article 226 of the Constitution of India. It has been so held in the cases of *Kerala SEB v. Kurien E. Kalathil*¹, *State of U.P. v. Bridge & Roof Co. (India) Ltd.*² and *Bareilly Development Authority v. Ajai Pal Singh*³. This is settled law. The dispute in this case was regarding the terms of offer. They were thus contractual disputes in respect of which a writ court was not the proper forum. Mr Dave, however, relied upon the cases of *Verigamto Naveen*

¹ (2000) 6 SCC 293

² (1996) 6 SCC 22

³ (1989) 2 SCC 116

*v. Govt. of A.P.*⁴ and *Harminster Singh Arora v. Union of India*⁵. These, however, are cases where the writ court was enforcing a statutory right or duty. These cases do not lay down that a writ court can interfere in a matter of contract only. Thus on the ground of maintainability the petition should have been dismissed.”

37. In the case of ***Pimpri Chinchwad Municipal Corpn. v. Gayatri Construction Co.,(2008) 8 SCC 172***, at page 177, while considering various judgments, similar view has been expressed, holding:

“**11.** In matters relating to maintainability of writ petitions in contractual matters there are a catena of decisions dealing with the issue.

12. In *National Highways Authority of India v. Ganga Enterprises*⁶ it was inter alia held as follows: (SCC p. 415, para 6)

“6. The respondent then filed a writ petition in the High Court for refund of the amount. On the pleadings before it, the High Court raised two questions viz.: (a) whether the forfeiture of security deposit is without authority of law and without any binding contract between the parties and also contrary to Section 5 of the Contract Act; and (b) whether the writ petition is maintainable in a claim arising out of a breach of contract. Question (b) should have been first answered as it would go to the root of the matter. The High Court instead considered Question (a) and then chose not to answer Question (b). In our view, the answer to Question (b) is clear. It is settled law that disputes relating to contracts cannot be agitated under Article 226 of the Constitution of India. It has been so held in *Kerala SEB v. Kurien E. Kalathil*⁷, *State of U.P. v. Bridge & Roof Co. (India) Ltd.*⁸ and *Bareilly Development Authority v. Ajai Pal Singh*⁹. This is settled law. The dispute in this case was regarding the terms of offer. They were thus contractual disputes in respect of which a writ court was not the proper forum. Mr Dave, however, relied upon *Verigamto Naveen v. Govt. of A.P.*¹⁰ and

⁴ (2001) 8 SCC 344

⁵ (1986) 3 SCC 247

⁶ (2003) 7 SCC 410

⁷ (2000) 6 SCC 293

⁸ (1996) 6 SCC 22

⁹ (1989) 2 SCC 116

¹⁰ (2001) 8 SCC 344

*Harinder Singh Arora v. Union of India*¹¹. These, however, are cases where the writ court was enforcing a statutory right or duty. These cases do not lay down that a writ court can interfere in a matter of contract only. Thus on the ground of maintainability the petition should have been dismissed.”

13. In *Kerala SEB v. Kurien E. Kalathil*² this Court dealt with the question of maintainability of petition under Article 226 of the Constitution and the desirability of exhaustion of remedies and availability of alternative remedies, as also difference between statutory contracts and non-statutory contracts. In paras 10 and 11 of the judgment it was noted as follows: (SCC pp. 298-99)

“10. We find that there is a merit in the first contention of Mr Raval. Learned counsel has rightly questioned the maintainability of the writ petition. The interpretation and implementation of a clause in a contract cannot be the subject-matter of a writ petition. Whether the contract envisages actual payment or not is a question of construction of contract. If a term of a contract is violated, ordinarily the remedy is not the writ petition under Article 226. We are also unable to agree with the observations of the High Court that the contractor was seeking enforcement of a statutory contract. A contract would not become statutory simply because it is for construction of a public utility and it has been awarded by a statutory body. We are also unable to agree with the observation of the High Court that since the obligations imposed by the contract on the contracting parties come within the purview of the Contract Act, that would not make the contract statutory. Clearly, the High Court fell into an error in coming to the conclusion that the contract in question was statutory in nature.

11. A statute may expressly or impliedly confer power on a statutory body to enter into contracts in order to enable it to discharge its functions. Dispute arising out of the terms of such contracts or alleged breaches have to be settled by the ordinary principles of law of contract. The fact that one of the parties to the agreement is a statutory or public body will not by

¹¹ (1986) 3 SCC 247

itself affect the principles to be applied. The disputes about the meaning of a covenant in a contract or its enforceability have to be determined according to the usual principles of the Contract Act. Every act of a statutory body need not necessarily involve an exercise of statutory power. Statutory bodies, like private parties, have power to contract or deal with property. Such activities may not raise any issue of public law. In the present case, it has not been shown how the contract is statutory. The contract between the parties is in the realm of private law. It is not a statutory contract. The disputes relating to interpretation of the terms and conditions of such a contract could not have been agitated in a petition under Article 226 of the Constitution of India. That is a matter for adjudication by a civil court or in arbitration if provided for in the contract. Whether any amount is due and if so, how much and refusal of the appellant to pay it is justified or not, are not the matters which could have been agitated and decided in a writ petition. The contractor should have relegated to other remedies.”

14. Reference can also be made to *State of Gujarat v. Meghji Pethraj Shah Charitable Trust*¹². In para 22 it was observed as follows: (SCC pp. 568-69)

“22. We are unable to see any substance in the argument that the termination of arrangement without observing the principle of natural justice (audi alteram partem) is void. The termination is not a quasi-judicial act by any stretch of imagination; hence it was not necessary to observe the principles of natural justice. It is not also an executive or administrative act to attract the duty to act fairly. It was—as has been repeatedly urged by Shri Ramaswamy—a matter governed by a contract/agreement between the parties. If the matter is governed by a contract, the writ petition is not maintainable since it is a public law remedy and is not available in private law field e.g. where the matter is governed by a non-statutory contract. Be that as it may, in view of our opinion on

¹² 7 (1994) 3 SCC 552

the main question, it is not necessary to pursue this reasoning further.”

15. Again, in *State of U.P. v. Bridge & Roof Co. (India) Ltd.*³ this Court dealt with the issue in paras 15 and 16 in the following manner: (SCC p. 30)

“15. In our opinion, the very remedy adopted by the respondent is misconceived. It is not entitled to any relief in these proceedings i.e. in the writ petition filed by it. The High Court appears to be right in not pronouncing upon any of the several contentions raised in the writ petition by both the parties and in merely reiterating the effect of the order of the Deputy Commissioner made under the proviso to Section 8-D(1).

16. Firstly, the contract between the parties is a contract in the realm of private law. It is not a statutory contract. It is governed by the provisions of the Contract Act or, maybe, also by certain provisions of the Sale of Goods Act. Any dispute relating to interpretation of the terms and conditions of such a contract cannot be agitated, and could not have been agitated, in a writ petition. That is a matter either for arbitration as provided by the contract or for the civil court, as the case may be. Whether any amount is due to the respondent from the appellant Government under the contract and, if so, how much and the further question whether retention or refusal to pay any amount by the Government is justified, or not, are all matters which cannot be agitated in or adjudicated upon in a writ petition. The prayer in the writ petition viz. to restrain the Government from deducting a particular amount from the writ petitioner’s bill(s) was not a prayer which could be granted by the High Court under Article 226. Indeed, the High Court has not granted the said prayer.”

16. At para 11 of *India Thermal Power Ltd. v. State of M.P.*¹³ it was observed as follows: (SCC pp. 386-87, para 11)

“11. It was contended by Mr Cooper, learned Senior Counsel appearing for appellant GBL and also by some

¹³ (2000) 3 SCC 379

counsel appearing for other appellants that the appellant/PPs had entered into PPAs under Sections 43 and 43-A of the Electricity Supply Act and as such they are statutory contracts and, therefore, MPEB had no power or authority to alter their terms and conditions. This contention has been upheld by the High Court. In our opinion the said contention is not correct and the High Court was wrong in accepting the same. Section 43 empowers the Electricity Board to enter into an arrangement for purchase of electricity on such terms as may be agreed. Section 43-A(1) provides that a generating company may enter into a contract for the sale of electricity generated by it with the Electricity Board. As regards the determination of tariff for the sale of electricity by a generating company to the Board, Section 43-A(2) provides that the tariff shall be determined in accordance with the norms regarding operation and plant-load factor as may be laid down by the authority and in accordance with the rates of depreciation and reasonable return and such other factors as may be determined from time to time by the Central Government by a notification in the Official Gazette. These provisions clearly indicate that the agreement can be on such terms as may be agreed upon by the parties except that the tariff is to be determined in accordance with the provision contained in Section 43-A(2) and notifications issued thereunder. Merely because a contract is entered into in exercise of an enabling power conferred by a statute that by itself cannot render the contract a statutory contract. If entering into a contract containing the prescribed terms and conditions is a must under the statute then that contract becomes a statutory contract. If a contract incorporates certain terms and conditions in it which are statutory then the said contract to that extent is statutory. A contract may contain certain other terms and conditions which may not be of a statutory character and which have been incorporated therein as a result of mutual agreement between the parties. Therefore, the PPAs can be regarded as statutory only to the extent that they contain provisions regarding determination of tariff and other statutory requirements of Section 43-A(2). Opening and maintaining of an escrow account or an escrow

agreement are not the statutory requirements and, therefore, merely because PPAs contemplate maintaining escrow accounts that obligation cannot be regarded as statutory.”

17. Therefore, the High Court ought not to have entertained the writ petition. Additionally, it appears that by order dated 17-1-2007 interim stay of the impugned order was granted and was continued by order dated 12-2-2007. It is pointed out by learned counsel for the appellants that since the order of the High Court was stayed and there was urgency in the matter, fresh tenders were called for. Three persons submitted the bids and the work has already been allotted and a considerable portion of the work has already been completed. In view of the aforesaid, we set aside the impugned order of the High Court and direct dismissal of the writ petition. It is however open to the respondent-writ petitioners to seek such remedy, if so advised, as is available in law. We do not express any opinion in that regard.”

38. As far as the order of blacklisting the petitioner is concerned, during the course of hearing, counsel for the respondents, however, has been unable to show that whether any show cause notice was issued to the petitioners as to why the petitioners should not be debarred/black listed for a period of three years neither any order has been placed on record nor any record has been produced to show that any hearing was granted to the petitioners on this issue of black-listing the petitioner. Apparently, the respondents have issued a Circular dated 24.3.2009, which reads as under:

MUNICIPAL CORPORATION OF DELHI
ENGINEERING DEPARTMENT (HQ)
TOWN HALL, DELHI – 110 006

No.G-IV/Engg./HQ/2008-09/5025 Date: 24-3-2009

CIRCULAR

The Commissioner, MCD vide order dated 12-3-2009 has debarred M/s Roshan Lal Vohra & Sons, R/o, 38, Mahila Colony, Gandhi Nagar, Delhi-31 for tendering with MCD for a Period of three years on account of non execution of work awarded against work orders No.169/EE(M)-II/TC/CNZ/07-8 dated 19-2-08.

This is notified & circulated to all concerned for information and necessary action.

**Addl. Dy. Commissioner
Engineering Deptt. (HQ)**

Distribution:

1. M/s Roshan Lal Vohra & Sons,
R/o 38, Mahila Colony,
Gandhi Nagar, Delhi-31.
2. All Chief Engineers
3. Chief Engineer (Slum & JJ, MCD)
4. All Supdtg. Engineers
5. All Ex. Engineers
6. AO/IT
7. EE(Pr)-I/Central Zone alongwith original main file
containing orders of the Commissioner, MCD Page No.1/N
to 16/N and 1/C to 56/C

Copy for kind information:-

1. Addl. Commissioner (Engg.)
2. ME-cum-E-in-C

**Addl. Dy. Commissioner
Engineering Deptt. (HQ)**

39. Counsel for the petitioners has also submitted that the order dated 24.3.2009 debarring the petitioners for a period of three years has also not been passed by the competent authority. Although counsel for the respondents submits that the powers of Enlistment Committee have been delegated by the Commissioner, MCD, himself in accordance with Section 491 of the DMC Act. This question need not be decided by this Court in view of the fact that the order of blacklisting has been passed without following the principles of natural justice and the settled position of law. The respondents have failed to follow any fair procedure and intimate the petitioners about the possible blacklisting.
40. In the case of ***M/s Erusion Equipment and Chemicals etc. Ltvs. V. State of West Bengal***, reported at AIR 1975 SC 266, which was followed by the Supreme Court in the case of ***Raghunath Thakur v. State of Bihar and Others***, reported at

AIR 1989 SC 620 as well as in the judgments of this Court including M/s **National Building Construction Corporation Limited v. New Delhi Municipal Council**, reported at 2007 (2) R.A.J. 162 (Del), it has been well settled that since the proposal of black-listing entails civil consequences, order of black-listing, should be passed after following the principles of natural justice. In para 4 of **Raghunath Thakur** (supra) it was held as under:

4. Indisputably, no notice had been given to the appellant of the proposal of blacklisting the appellant. It was contended on behalf of the State Government that there was no requirement in the rule of giving any prior notice before blacklisting any person. In so far as the contention that there is no requirement specifically of giving any notice is concerned, the respondent is right. But it is an implied principle of the rule of law that any order having civil consequence should be passed only after following the principles of natural justice. It has to be realized that blacklisting any person in respect of business ventures has civil consequence for the future business of the person concerned in any event. Even if the rules do not express so, it is an elementary principle of natural justice that parties affected by any order should have right of being heard and making representation against the order. In that view of the matter, the last portion of the order in so far as it directs blacklisting of the appellant in respect of future contracts, cannot be sustained in law. In the premises, that portion of the order directing the appellant be placed in the blacklist in respect of future contracts under the Collector is set aside. So far as the cancellation of the bid of the appellant is concerned, that is not affected. This order will, however, not prevent the State Government or the appropriate authorities from taking any future steps for blacklisting the appellant if the Government is entitled to do so in accordance with law, i.e. giving the appellant due notice and an opportunity of making representation. After hearing the appellant, the State Government will be at liberty to pass any order in accordance with law indicating the reasons therefor. We, however, make it quite clear that we are not expressing any opinion on the correctness or otherwise of the allegations made against the appellant. The appeal is thus disposed of."

41. Further in the case of **M/s Erusian Equipment and Chemicals etc. Ltd.** (supra), it has been held as under:

“Blacklisting has the effect of preventing a person from the privilege and advantage of entering into lawful relationship with the Government for purposes of gains. The fact that a disability is created by the order of blacklisting indicates that the relevant authority is to have an objective satisfaction. Fundamentals of fair play require that the person concerned should be given an opportunity to represent his case before he is put on the blacklist.”

42. Applying the aforesaid principles to the facts of this case, I find that before passing the order of blacklisting no specific notice to show cause was issued to the petitioners as to why the petitioners should not be blacklisted for a period of three years. Even otherwise, no order of blacklisting has been served upon the petitioners, neither a copy thereof has been filed in Court. Accordingly, the order dated 24.3.2009, blacklisting the petitioners for a period of three years, is quashed on the ground that the respondents have failed to follow the principles of natural justice.
43. I find no force in the submission made by counsel for the petitioners that the orders dated 24.3.2009 as also 16.3.2009 are liable to be quashed in view of the fact that the same has not been passed by the competent authority. Counsel for the petitioners has submitted that a reading of Clause 3 of the Contract Agreement would show that it is the Engineer-in-Charge, who is competent to pass the order. In response to this submission, counsel for the respondents has submitted that the order has been passed by the Superintending Engineer, who was also the Engineer-in-Charge of the work, in question.
44. A perusal of the order dated 16.3.2009 itself would show that in the order itself the Executive Engineer has stated that “*I Ajay Aggarwal, the Engineer-in-Charge of the aforesaid work under the aforesaid agreement.....*”. Since the Executive Engineer was the Engineer-in-Charge of the work, it cannot be said that the order has not been passed by an authorized person. As far as the order passed under Clause 2 of the Contract Agreement is concerned, it is stated by counsel for the petitioners that the aforesaid order has been passed by the Executive Engineer whereas the same

should have been passed by the Superintending Engineer. Learned senior counsel for the respondents has clarified that by the order dated 16.3.2009 the Executive Engineer has only issued the communication to the petitioners and not passed the order, which is evident after reading the order itself, wherein it has been stated that the competent authority has decided and determined that the petitioners are liable to pay Rs.36,84,846/-.

45. In the facts and circumstances of this case as observed earlier, it is not possible for this Court in the proceedings under Article 226 of the Constitution of India to decide disputed questions of fact and the dispute arises out of a contract entered into between the parties. Thus, no relief can be granted to the petitioners with respect to two orders passed on 16.3.2009. It will be open to the petitioners to seek such remedies, as may be available to them in accordance with law. It is clarified that any observations made by this Court shall not come in the way of the petitioners in seeking appropriate remedy.
46. Writ petition is partly allowed. No orders as to costs.

G.S. SISTANI, J.

July 1st, 2010
'msr/ssn'