

(1997) 09 AHC CK 0046

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 19100 of 1997

Monika Plastic Pipes (P) Ltd.

APPELLANT

Vs

Director of Industries and Another

RESPONDENT

Date of Decision : 25-09-1997

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 141
Constitution of India, 1950 — Article 14, 226

Citation : AIR 1998 All 111

Hon'ble Judges : Palok Basu, J;O.P. Garg, J

Bench : Division Bench

Advocate : V.B. Singh, for the Appellant; Standing Counsel, for the Respondent

Final Decision : Dismissed

Judgement

O.P. Garg, J.—By means of this writ petition under Article 226 of the Constitution of India, the petitioner M/s. Monika Plastic Pipes (P) Limited has prayed that the three impugned orders all dated 10-2-1997 (Annexures-17, 18 and 19 to the writ petition) be quashed and the respondents be restrained from effecting any recovery from the petitioner on the basis of the order (Annexure-17) and from taking any action of causing any interference in the business of the petitioner directly or indirectly.

2. The petitioner company is engaged in the business of manufacture and sale of PVC pipes of which the Government departments, particularly, the Minor Irrigation Department and U.P. Jal Nigam are the main consumers. The Director of Industries, U.P., respondent No. 1 (for short "Director") determines and prescribes the "Rate Contract" for the supply of the various articles to Government departments by the manufactures/ contractors. A tender notice No. 181 (G) dated 22-11-1994 (Annexure-1) was floated by the Director for "Rate Contract" arrangement for supply of unplasticised PVC two different size pipes which are used for potable water supplies to meet the requirement of the various department of Government. The petitioner along with other manufacturers

participated and after offer and counter-offers, the Director finalised the rate contract by issuing notification No. 241-R.C./G. dated 23rd March, 1995 (Annexure-2). The rate contract 110 mm/6 Kg was fixed at 99.69 per metre. This rate was to remain operative (for) the period 23-3-1995 to 30-9-1995. In Sept. 1995 another tender notice No. 167 (G) (Annexure 10) for the supply of PVC pipes on fate contract was floated by the Dittor of Industries in which again the petitioned participated and on 29-1-1996 the rate for 110 mm/6/Kgf PVC pipe was notified as Rs. 84,96 per metre under Notification No. 196-G dated 30-1-1996. The said fate was to remain in force for a period of 4 months i.e. with effect from 30-1-1996 to 30-5-1996.

3. The final rate contract preceded with the acceptance of tender which is hedged with certain terms and conditions annexed with it. In those conditions there is a clause known as "Fall Clause", in which it is specifically stipulated that if the tendering firm heaters into a contract with any person for the Supply of sortie material at the lower rate than that of the "Rate Contract", then the firm shall be liable to pay difference money to be calculated on the basis of such lower rate. The "Fall Clause", the existence and the applicability of which is in dispute in the present petition runs as follows :--

"FALL CLAUSE"

1. The price charged for tHe stores supplied under the contract shall in no event exceed the lowest price at which the contractor sells the stores if identical description to the other person during the period of the contract.

2. If at any time during the said period the contracted reduces the sale price of such stores, sells such stores to any other person at a price lower than the price chargeable under contract he shall forthwith notify such reduction or sale to the Director of Industries, SPS, Kanpur, U.P. and price payable under the contract for the stores supplied after the date of coming into force of such reduction of sale shall stand correspondingly reduced.

The above stipulation will not however apply to :

(a) Exports by the contractor.

(b) Sales of goods as original equipment at a price lower than the prices charged for normal replacement.

3A. The contractor shall furnish certificates to the Director of Industries, SPS, Kanpur at intervals mentioned below :--

(a) Within a month of commencement of the contract a certificate to the rate prevailing at the commencement of rate contract.

(b) Within a month of expiry of every six months certificate as rate prevailing during the proceeding months.

(c) And at the end of the rate contract within a month of the expiry of the rate

contract a certificate in the following forms :--

"I/We certify that the stores supplied to the identical to the stores supplied to the Government under the contract herein have the rate Contract from -- to at a price lower than the price except for the quantity of under Sub-clauses (a) and (b) sub-para (2) above."

During the subsistence of the "Rate Contract" the prices of the products were to remain fixed and there could be no variation either on lower or higher side and if any manufacturer/contractor, who is on the approved list of the Director, makes supplies at a rate lower than the rate contract, he is required to inform the Director of such contract at the lower rate.

4. What happened that the U.P. Jal Nigam floated a tender for supply of PVC pipes. The petitioner participated in the said tender and quoted Rs. 94.10 per metre for 110 mm/6 Kgf PVC pipe and entered into a contract with Jal Nigam and executed a bond on 21-8-1995 for the supply Of aforesaid PVC pipe 110 mm/6 Kgf at the rate of Rs. 87,41 per metre. The bond was to remain valid up to 10-7-1996. An information is alleged to have been sent by the petitioner to the Director on 29-4-1995 (Annexure 3) about the contract with the Jal Nigam. On 10-5-1995 a letter Was sent by the Director seeking information about the participation of the petitioner in the tender of U.P. Jal Nigam, and taking exception to the petitioner tendering at the lower rate in violation of the "Fall Clause". The petitioner gave its reply dated 16-5-1995 giving therein the regions which impelled the Company to enter into a contract with Jal Nigam and the circumstances in which the prices lower than the rate contract were quoted. The petitioner also approached the director to reduce the "rate Contract" price of Rs. 99.69 per metre of PVC pipe to Rs. 91.09. This request of the petitioner was turned down, and a show cause notice dated 4-8-1995 was issued to the petitioner taking objection for quoting the lower rate for supply of PVC pipe to Jal Nigam. The petitioner submitted its reply on 4-8-1995.

5. On 25-1-1997, the Director sent a notice to the petitioner on the ground that the petitioner has violated the "Fall Clause" by quoting lower rate for supply of PVC pipes to Jal Nigam and to show cause as to why the petitioner be not blacklisted and recovery of the difference amount be not made. The petitioner submitted the reply on 30-1-1997 denying the allegations contained in the show cause notice and asserted that there was no "fall clause" in both the rate contracts and that no supply or sale of PVC pipe was made to the U.P. Jal Nigam up to 31-5-1996 by which date the rate contract subsisted. The petitioner also met the Director of Industries and explained that since neither sale nor supply has been effected to the U.P. Jal Nigam, the question of recovery of any difference amount or black-listing of the petitioner does not arise.

6. Respondent No. 2, Minor Irrigation Department of the State of U.P. sent a letter to the petitioner on 1-11-1996 for recover of Rs. 8,29,920/- on the basis of difference of price in between the rate quoted by the petitioner to U.P. Jal Nigam

and the "rate contract" on which the supplies were made to the Minor Irrigation Department. The petitioner sent the reply stating therein that no sale or supply of the PVC pipe has ever been made to U.P. Jal Nigam within the period during which the rate contract remained in force.

7. According to the petitioner, the Director was influenced by the motivated complaints made by certain disgruntled persons and consequently, three impugned orders dated 10-2-1997 were issued. By the first impugned order (Annexure 17) the petitioner was held liable to pay a sum of Rs. 20,76,097/- as being the difference of prices in between the rate quoted to the Jal Nigam and the rate contract. By the second order (Annexure 18) the petitioner was debarred and black-listed from carrying on business with any Government department for a period of five years, and by the third order (Annexure 19) the various departments of the government were informed not to place any order with the petitioner for the supply of PVC pipes, as it has been black-listed for mal practices. The petitioner has challenged the validity of the aforesaid three impugned orders as being illegal, arbitrary, mala fide and violative of the principles of natural justice.

8. Prior to the filing of the writ petition, Sri Amit Saxena appeared on behalf of one Sri Sarwar Ali Khan a sitting MLA, and filed a caveat. On the direction of this Court an application for impleadment was moved along with a counter affidavit. On behalf of respondent No. 1, Director of Industries, a counter-affidavit has been filed by Sri R.K. Srivastava General Manager of the District Industries Centre, Allahabad. The petitioner has also filed a rejoinder affidavit.

9. The respondents as well as Sri Sarwar Ali Khan who has sought himself to be impleaded have resisted the various allegations made by the petitioner. It is alleged that the petitioner has violated the terms and conditions governing the rate contract by making an offer and entering into a contract with the U.P. Jal Nigam to supply the PVC pipes at a rate lower than the notified rate contract. It is further pleaded that for the application of the "fall clause", it is not necessary that actual supply/delivery should be made; that the petitioner has agreed and undertaken to pay the difference amount by filing an affidavit as well as the undertaking and, therefore, he cannot challenge the order for recovery of the difference amount. According to the respondents black listing and debarring of the petitioner to make supplies to the various Government departments have been passed keeping in view the established mal-practice on the part of the petitioner.

10. The learned counsel for the petitioner raised the preliminary objection about the intervention of Sri Sarwar Ali Khan, M.L.A. in the instant case. It was pointed out that he has no locus standi or interest in the matter and, therefore, he cannot be impleaded as a party to the present petition and his counsel cannot be heard. Sri Amit Saxena, appearing on behalf of Sri Sarwar Ali Khan maintained that Sri Khan who is a sitting M.L.A. has a positive public interest in exposing the mal-practices of the petitioner as well as other manufacturers who are engaged

in the supply of PVC pipes to various Government departments. It was pointed out that it came to the notice of Sri Sarwar Ali Khan that certain firms engaged in the business of manufacturing of PVC pipes have defrauded the State exchequer by quoting different rates for identical items to different Government departments and in collusion with the officials of the State, they have been successful in their designs. He made a number of the complaints to the departmental authorities including the Director and had also moved the Governor of U.P. to initiate action against the manufacturers and the officials of various Government departments who were colluding to perpetuate their nefarious business of defrauding the State exchequer.

11. There is no doubt that Sri Sarwar Ali Khan, who is a sitting M.L.A. has no personal interest in the matter since he has been instrumental in initiating and setting up the enquiry against the petitioner and other firms/ manufacturers engaged in resorting to malpractices, he has to keep watch and remain alert to ensure that no order may be obtained by the petitioner from the courts by misrepresenting or cancelling the facts. The learned counsel for Sri Sarwar Ali Khan pointed out that in the instant case the petitioner has tried to hoodwink this Court by filing incomplete copies of tender notices and keeping off the record the terms and conditions which were integral part of the tender notice and contained the "fall clause". From the orders passed by this Court at the initial stage, it is clear that the petitioner filed incomplete Annexures. The terms and conditions which were the inseparable part of the tender notice were not annexed. It was at the instance of Sri Amit Saxena, who appeared on behalf of the Sri Sarwar Ali Khan that terms and conditions which contain the "fall clause" were brought on record.

12. The rate contract notified for a particular period is fixed and cannot be varied but in spite of such a stipulation, the petitioner and other manufacturers who were bound by the terms of the rate contract made supplies at the varying rates with a view to defraud the Government departments. This matter is of sufficient public importance to render it susceptible to judicial review. If it had been the case of the enforcement of only a private right of an individual, this Court would not have allowed Sri Sarwar Ali Khan to intervene but the controversy involved in the writ petition is virtually of public law rights. Objective review of the impugned orders is possible only if the person, who had initiated the enquiry by making complaint, is also heard.

13. In support of his submission that Sarwar Ali Khan cannot be impleaded by invoking the provisions of Order 1, Rule 10, C.P.C. the learned counsel for the petitioner made a reference to the two decisions of the Supreme Court reported in Razia Begum Vs. Sahebzadi Anwar Begum and Others, and Ramesh Hirachand Kundanmal Vs. Municipal Corporation of Greater Bombay and Others, under what provision an application is captioned is immaterial as the substance of the prayer is to be taken into consideration. Shri Amit Saxena, learned counsel for Sarwar Ali Khan pointed out that the provisions of Order 1, Rule, 10, C.P.C. are not

applicable to the writ proceedings as is clear from the provisions of Section 141, of the Code of Civil Procedure. It provides that the procedure provided in the Code in regard to suit shall be followed as far as it can be made applicable in all proceedings in any Court of Civil Jurisdiction. The Explanation appended to the section makes it clear that the expression "Proceedings" includes the proceedings under Order IX but it does not include any proceedings under Art. 226 of the Constitution. Therefore, the question of impleadment or otherwise of a third person has to be considered independent of the provisions of the Code of Civil Procedure. In the matter of public interest the traditional limitations of locus standi are vanishing and the sphere of judicial scrutiny is expanding. The State activities too are becoming fast pervasive as the State has descended into commercial field on the giant field of public utilities are growing up. The stake of public exchequer is also large justifying social audit, judicial control and review by opening of the public Gaze. In such circumstances a petitioner should not feel shy about the person who is impleaded or heard.

14. In para 45 of the writ petition, the petitioner himself has alleged that the Director was influenced to initiate action against the petitioner on the complaint of certain disgruntled persons and the rival manufacturers including a sitting M.L.A. (This obviously has reference to Sri Sarwar Ali Khan). This averment also supports the plea of Sri Sarwar AH Khan that it was at his behest that the scam in the supply of PVC pipes at different rates lower than the rate contract came to be unfolded. Sri Khan undoubtedly, a public spirited citizen who has taken up the cause of ventilating the Kgitimate public grievance. Obviously, he as stated above, is not personally interested in the matter but has a general cause to project and consequently he has sufficient locus standi to resist/oppose the averments and claimed by the petitioner. The submission of Sri V. B . Singh, learned counsel for the petitioner that Sarwar All Khan a sitting M.L.A. has nothing to do with the present writ petition and therefore should not be heard does not commend itself to our acceptance. We have, therefore, heard Sri Amit Saxena learned counsel for Sarwar AH Khan also. Even otherwise the controversy on the point of locus standi raised by Sri V. B. Singh, learned counsel for the petitioner is nothing but an academic exercise for one simple reason that even if we had not heard Amit Saxena, learned counsel for Sarwar Ali Khan or had not taken into consideration the counter affidavit filed on his behalf it would not have made any difference. The Director, respondent No. 1, has placed before the Court all the facts in his counter affidavit and the learned Standing Counsel appearing on behalf of the Director addressed this Court on all the aspects of the controversy.

15. Having cleared the decks about the right of Sri Sarwar AH Khan to intervene in the matter, now we proceed to consider and determine the merits of the case. As would appear from the above facts as unfolded and disclosed in the light of the respective submissions on behalf of the parties the entire controversy centres round the existence, applicability or otherwise of the "fall clause" which is the integral part of the terms of and conditions appended with the tender notice for

settling the rate contract. For better and clear understanding of the controversy it would be proper to mention the rationale and the background of the "rate contract." The State is engaged in various developmental activities. It has also to maintain and carry on various works of public utilities. To accomplish the task of maintaining public utilities different departments of the State have to effect purchases of various products and articles produced and manufactured by the private entrepreneurs. The State like other individuals is entitled to look for the best deal in making purchases. It looks for offers for specific stores item on reasonable rates. In order to tide over the problems of fluctuations in prices and to ensure uniform rates and standardized supplies by the approved and authorised contractors and manufacturers of repute, an elaborate exercise is undertaken. The Director of Industries, U.P. has been charged with the duty of determining and notifying the prices/rates of different items/store to be operative during the specified period. Their capacity to manufacture and supply at any time the products on the rate contracts is thoroughly enquired into after screening and verifying whether the manufacturers have the capacity to produce and supply the required goods and what are their commitments with others. Inspection and testing of various products and articles by the expert agencies such as L.G.S. & D., C.I.P.E.T./H.B.T.I. & R.I.T.F. are also made to control and supervise the quality of all the articles to be supplied on the rate contract. The conditions of payment are also laid down and the penalty for delayed supply has also been prescribed. After all this thorough rigours exercise, the rate contract as well as the manufacturers who are to make supplies are notified. After taking into consideration the competitive rates submitted by the tendering firms and by making offers and counter offers as well as negotiations prices of a particular item of certain specifications are determined, notified and circulated amongst all the Government departments for placing indents for supply of store/articles according to their requirements by the approved dealers/manufacturers at the approved rate contract. The prices so notified are firm. They cannot be varied either on the lower or upper side. The manufacturers, thus, enter into a contract with the Director to effect the supplies of their specific material/articles at the notified rates which is popularly known as "rate contract; which is binding on all the manufacturers as well as the Government departments in respect of the items of particular specifications which are on the rate of contract list. The Government departments are not required to undertake the exercise of inviting fresh tenders to obtain competitive rates as this exercise has already been completed by the Director. The Government departments have simply to place orders with the approved suppliers at the "rate contract".

16. The scheme of determining the rate contract which is in vogue has a "fall clause", as quoted above, which in short means that no manufacturer shall supply the goods at a rate higher or lower than the rate contract and, if at anytime, during the subsistence of the rate contract, a manufacturer reduces the sale price of a particular item or sells the same to any other person at a price lower than the price chargeable under the rate contract, the manufacturer has to

notify such reduction or sale to the Director and the price payable under the contract for stores supplied after the date of coming into force of such reduction of sale, shall stand correspondingly reduced. The Director has the power to recover the difference amount from the manufacturers who have offended or violated the "fall clause". The "fall clause" as stated above, is an inseparable and integral part of the tender notice and every approved manufacturer binds himself to abide by the "fall clause".

17. With a view to wriggle out of the consequence of the "fall clause", the stand taken by the petitioner is that the tender notices Nos. 181-G and 167-G Annexures-1 and 10 to the writ petition did not contain any "fall clause" and, in any case, the petitioner was not aware of it. This assertion of the petitioner is not correct obviously for one simple reason that in all the tender notices, it is specifically mentioned that "other terms and conditions governing the notice are separately enclosed. "The petitioner deliberately avoided to annex the terms and conditions with copies of the tender notices Annexures-1 and 10, with an avowed object to suppress the "fall clause". It was with the counter affidavit filed by respondent No. 1, that the terms and conditions annexed with the tender notices Nos. 181-G, 167, containing a "fall clause" were brought on record. The contention on behalf of the petitioner that the "fall clause" was not in existence or that it was not within the knowledge of the petitioner stands negatived by the petitioner's own letter dated 29-4-1996, Annexure 3 by which the petitioner informed the Director that he had entered into a contract with Jal Nigam to supply the P.V.C. pipes at a lower rate under certain favourable circumstances and that the contract with the Jal Nigam "does not come under fall clause." This assertion of the petitioner in the letter Annexure-3 itself confirms the existence of the "fall clause". The "fall clause" contemplates that if a manufacturer effects supplies at reduced rates, he will immediately inform the Director. It was in response to this stipulation in the "fall clause" that the petitioner wrote the letter Annexure-2 to the Director. Otherwise, there was no occasion for the petitioner to address the said letter to the Director. The correspondence which has been brought before this Court undoubtedly reveals that the petitioner has accepted and acknowledged "the existence of "fall clause". The petitioner is bound with all the terms and conditions annexed with the tender notices. He had entered into the rate contract with eyes wide open to and knowing full well that the terms and conditions contain a "fall clause".

18. The learned counsel for the petitioner urged that even if it be assumed that there is a "fall clause" by which the petitioner is bound, it has not been violated in any manner. It was emphasised that the contract with the Jal Nigam was entered into by the petitioner as it provided better terms and conditions and was flexible it contained variation as well as fluctuation clauses in the rate corresponding to the prices of the raw material i.e. resin. According to the learned counsel, the rates settled with the Jal Nigam were subject to variation according to the prices of basic raw material. It was also urged that the basic difference in the rate contract as well as the contract with the Jal Nigam was that

the contract with the latter was for a period of one year while the rate contract was to remain in force for only 5-6 months. It was also alleged that the petitioner made a request by addressing a letter dated 4-7-1995 (Annexure sic) to the Director to reduce the rate contract of P.V.C. pipes from Rs. 99.69 to Rs. 91.09 per meter as was initially settled with the Jal Nigam, but the request was turned down by the Director without any lawful justification vide his letter dated 29-8-1995 (Annexure 9). The respondents have challenged these assertions of the petitioner on the ground that whatever be the terms and conditions the petitioner could not enter into a contract with the Jal Nigam to supply P.V.C. pipes at the lower rates. It was also demonstrated that prices of Resin, which is the basic material for manufacturing P.V.C. pipes, had gone up at the time when the petitioner entered into contract with the Jal Nigam and therefore it cannot be said that the rates were quoted to the Jal Nigam on the basis of the fluctuation of the price of Resin. The various justifications given by the petitioner to enter into contract with the Jal Nigam are nothing but a subterfuge.

19. There was a plausible and valid reason why the Director did not agree with the proposal of the petitioner to reduce the amount of rate contract to the level of the prices quoted to the Jal Nigam. According to the terms and conditions of the rate contract the rates are to remain fixed and they cannot be varied either on higher or lower side during the period of rate contract. Besides the petitioner there were 17 more firms/ manufacturers who had bound themselves with the rate contract. If the petitioner was allowed to violate the "fall clause" and the rate contract, which otherwise was fixed, the rights of the other manufacturers were likely to be seriously jeopardized. The result of the acceptance of the proposal of the petitioner to reduce the prices would have been that he would have virtually monopolised the orders from the Government departments to the exclusion of the other manufacturers who honestly and sincerely adhered to the rate contract which was obviously higher than the rate which the petitioner offered to the Jal Nigam. The "fall clause" is essentially incorporated to preserve the sanctity and validity of the rates determined for a specified period during which supplies were to be effected. The rate contract is the product of the well thought and long exercise, as has been indicated above. If the suppliers who were parties to the tender notice and who had agreed to supply their material at the notified rates are allowed to vary the prices during the continuance of the rate contract, its very purpose and object would be frustrated and the whole exercise culminating up to the stage of notifying the rate contract would be rendered futile and otiose. There is also an apprehension that the suppliers with a view to defraud the Government departments may combine together and get their rate contract determined at higher rates and then resort to reduce the prices giving rise to mal-practices. Since the other manufacturers were going to be affected by the move of the petitioner, the Director was justified and within his right in refusing to reduce the prices of P.V.C. pipes at the rate lower than the rate contract. The Director could not be a party to the dishonest move of the petitioner.

20. Sequel to the above, it is asserted that the petitioner had not made any supplies to the Jal Nigam during the period of subsistence of the. rate contract and therefore there was no violation of the "fall clause". The learned counsel for the petitioner urged that the "fall clause" could be attracted only when actual supplies are made at the lower rates and since the petitioner admittedly made supplies to the Jal Nigam for the first time on 7th June, 1996 i.e. after the expiry of the period of the rate contract, the petitioner incurs no liability under the "fall clause". It is true that the petitioner had not made any supplies to the Jal Nigam period to 7-6-1996. Nevertheless, the fact remains that the petitioner had entered into a contract with the Jal Nigam during the period of subsistence of the first rate contract as notified on 23-3-1995. The respondents have a point in saying that it was not necessary to effect the actual supplies or deliveries in order to attract the "fall clause", as the petitioner had done all whatever was within his power and means. A firm, concluded an enforceable contract between the petitioner and the Jal Nigam had come into existence at a time when the rate contract was operative. The petitioner having once executed the bond to supply the materials to the Jal Nigam at the reduced rate, he could not have refused to make the supplies, lest his security, deposit was forfeited and he was held liable for breach of the contract. The fact that the petitioner made supplies to the Jal Nigam after the expiry of the period of rate contract indicates the guilty mind. In spite of the insistence of the Jal Nigam to effect early supplies and the supply orders dated 12-3-1996, 27-4-1996 and 18-5-1996 the petitioner deliberately deferred the supplies till 7th June, 1996 so that the period of rate contract may expire and the petitioner may not be caught by "fall clause". The petitioner cannot be allowed to circumvent the provisions of the "fall clause" by hair-splitting the matter. The petitioner has bound himself by a legal obligation to supply the goods at a reduced rate to the Jal Nigam during the period the "fall clause" was operative. Not only this, the petitioner finding himself in the deep waters, ultimately agreed to abide by the directions of the Director in the matter by agreeing to make payment of the difference money under the "fall clause", as would be evident from his affidavit dated 18-11-1996 and the undertaking dated 27-12-1996 furnished before the Director, Learned counsel for the petitioner, however, urged that the affidavit as well as the undertaking were filed by the petitioner in connection with finalisation of the subsequent and new rate contract Nos. 22-G and 224-G and since they did not relate the rate contract in dispute Nos. 281-G and 167-G, reference to them is of no consequence. This submission of the learned counsel merits rejection outright. At the time when the finalisation of the new contract was to be made, there was no dispute about the "fall clause". In order to avail the benefit of the new rate contract, the petitioner had furnished the affidavit and undertaking with regard to the recovery of the difference amount under the "fall clause" contained in the rate contract Nos. 281-G and 167-G in respect of which he committed breach. From the above discussion, it is well established that the petitioner has committed the breach of the "fall clause" by which he was bound and consequently, the Director was justified in taking appropriate steps against the petitioner for recovery of the

difference amount.

21. A dispute was raised about the actual amount payable by the petitioner under the "fall clause". Through the impugned order, Annexure-17, a sum of Rs. 20,76,096/- was sought to be recovered from the petitioner. This amount may still go up. The question as to what amount is recoverable need not detain us as it is a matter of calculation. In view of our categorical finding that the petitioner has violated the "fall clause" the Director was fully competent and justified to order for recovery of the difference amount calculated on the basis of difference in the price quoted by the petitioner to the Director under the rate contract and the price offered by the petitioner to the Jal Nigam and multiplying the difference of prices with the quantity supplied by the petitioner to respondent No. 2.

22. Annexure-18 to the writ petition, is the order by which the petitioner has been blacklisted for a period of five years on account of malpractices adopted by the petitioner by defrauding various government departments. Learned counsel for the petitioner urged that the order of black-listing has virtually given a death blow to the entire manufacturing unit of the petitioner and since the order of black-listing is visited with evil consequences and has the effect of creating a barrier between the petitioner and the various government departments, fundamental principle of fair play requires that the petitioner should have been given an opportunity to represent his case before being black-listed. Certain allegations of mala fides were made against Smt. Sunanda Prasad, the then Director. She has not been made a party to the petition in her personal capacity.

Half hearted and faint suggestion of mala fide which were neither here nor there against Smt. Sunanda Prasad cannot be taken into consideration for one simple reason that Smt. Sunanda Prasad has not been made a party to the petition, in her personal capacity. The learned counsel cannot be heard about the allegations of alleged mala fides which are being attributed to her at her back. Even otherwise except for the application that the Director was influenced by the motivated complaints made by a sitting M.L.A. and other disgruntled rival manufacturers (paragraph-45 of the petition), no other allegation of mala fide has been made. Therefore, in the absence of allegation of mala fide, it has to be presumed that the respondent No. 1 acted bona fide in invoking the "fall clause" and black listing the petitioner.

23. There is no doubt about the fact that it is well settled proposition of law that the order of black-listing which involves civil consequences should not be passed without adequate and reasonable opportunity of hearing to the person who has been black-listed. The learned counsel for the petitioner replaced reliance on the two decisions of the Supreme Court reported in *Erusian Equipment and Chemicals Ltd. Vs. State of West Bengal and Another*, and *M/s. Southern Painters Vs. Fertilizers and Chemicals Travancore Ltd. and another*, to fortify his submission that it was incumbent upon the Director to have given an opportunity to the petitioner before passing an order of black listing. In *M/s. Erusian Equipment's case's* (supra) the Supreme Court observed that black listing 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 black-list. The State* which has the right to trade has also the duty to observe equality. The Government cannot choose to exclude persons by discrimination. The order of black-listing has the effect of depriving a person of equality of opportunity in the matter of public contract. A person who has been dealing with the Government in the matter of sale and purchase of materials has a legitimate interest or expectation. When the State acts to the prejudice of a person it has to be supported by legality. The State can enter into contract with any person it chooses. No person has a fundamental right to insist that the Government must enter into a contract with him. A citizen has a right to claim equal treatment to enter into a contract which may be proper, necessary and essential to his lawful calling. Where the blacklisting order involves civil consequences it casts a slur. It creates a barrier between the person blacklisted and the Government in the matter of transactions. The blacklists are "instruments of coercion." Hence a person must be given an opportunity of hearing before his name is put on the black list.

24. In *M/s. Southern Painters Vs. Fertilizers and Chemicals Travancore Ltd. and another*, it was observed that the cry of natural justice is that prior notice and opportunity of being heard should be given before refusing to issue tender form to a qualified contractor and deleting his name from qualified contractor's list and blacklisting him for 10 years as personal and professional reputation of the contractor would be at stake. Again in *Raghunath Thakur Vs. State of Bihar and Others*, , the Supreme Court observed :

"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 consequences should be passed only after following the principles of natural justice. It has to be realised that blacklisting any person in respect of business ventures has civil consequences 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 representations against the order."

25. There can be no quarrel about the well established proposition of law that the person who is proposed to be black-listed for having committed malpractice in trade has to be given an opportunity of hearing. In the instant case it would appear from the following facts that the petitioner was afforded more than the

reasonable opportunity to clarify his stand. Annexure-7 to the writ petition is the letter of the Director dated 4-8-1995 addressed to the petitioner in which it was mentioned that the petitioner has committed breach of the "fall clause" and therefore, why he should not be proceeded against. The petitioner sent reply dated 14-8-1995, Annexure-8 to the writ petition. Again there is another letter Annexure-9 dated 16-5-1995 which is almost in the same terms as letter Annexure-7. A specific letter dated 25-1-1997, Annexure-14, was addressed by the Director to the petitioner to show cause why the petitioner should not be blacklisted or debarred for having committed breach or the "fall clause". A detailed reply dated 30-1-1997, Annexure-15 was furnished by the petitioner to the Director. The petitioner has also pleaded that he had met the Director personally and explained his position. From the above facts, therefore, it is clear that the petitioner was afforded adequate and reasonable opportunity before passing the impugned order dated 10-2-1997, Annexure-18, in which the Director has taken the view that the explanation submitted by the petitioner was not satisfactory and since the petitioner was guilty of malpractice and defrauded the departments, he is liable to be blacklisted for a period of five years and accordingly the impugned order, Annexure-18, was passed.

26. The impugned order, Annexure-19, of the even date is a letter addressed by the Director to the various heads of the departments intimating them that the petitioner as well as two other firms have been denotified on account of the malpractices adopted by them and consequently indenting officers were advised not to make any purchase from the denotified units including the petitioner. The impugned order, Annexure-19, has been passed as being the necessary consequence of the order Annexure-18 by which the petitioner has been blacklisted for a period of five years.

27. In the light of the above facts and circumstances we are of the view that the Director was competent and justified in passing the three impugned orders all dated 10-2-1997, Annexures-17, 18 and 19. These orders do not suffer from any illegality. In the backdrop of the facts and circumstances detailed above, the petitioner has no case which may warrant interference by involving writ jurisdiction under Article 226 of the Constitution of India. Since the petition is devoid of any merits, and substance, it is hereby dismissed.

No order as to cost is made.