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

% **Judgment reserved on: 04 August 2022**
Judgment pronounced on: 08 August 2022

\+ W.P.(C) 8047/2022

M/S JBM ELECTRIC VEHICLES PRIVATE LIMITED
..... Petitioner

Through: Mr. Mukul Rohatgi and Mr. Sandeep Sethi, Sr. Advs. with Mr. Sanjay Gupta, Mr. Abhinav Agnihotri, Mr. Sidharth Mehra, Mr. Amrit Bhatia, Mr. Atul Sharma, Mr. Dipan Seth, Advs.

versus

UNION OF INDIA & ANR. ..... Respondents

Through: Mr. Chetan Sharma, ASG with Mr. Apoorv Kurup, CGSC with Mr. Ojaswa Pathak, Mr. Amit Gupta, Mr. Rishav Dubey, Mr. Sourabh Tripathi and Mr. Sahag Garg, Advs. for UOI.
Mr. Kush Chaturvedi, Ms. Priyashree Sharma, Mr. Syed Faraz Alam, Advs. for R-2.

CORAM:
HON'BLE MR. JUSTICE YASHWANT VARMA

J U D G M E N T

1. The petitioner, **JBM Electric Vehicles Private Limited** has petitioned this Court impugning the letter dated 25 April and 29 April 2022

issued by the **Ministry of Heavy Industries**[1] and IFCI Limited. The communication essentially debars the petitioner and its group companies from all future tenders and for the period of the **Production Linked Incentive Scheme**[2] upto 31 March 2027. The aforesaid action is stated to have been taken upon it being found that the petitioner had furnished incorrect information for the purposes of claiming benefits under the PLI Scheme. The second letter impugned in the writ petition is a communication from IFCI holding that the petitioner had submitted an application for extension of benefits under the PLI Scheme basing its Global Group Revenue to be Rs. 10,590.74 crores. IFCI contends that on scrutiny it has been found that the aforesaid declaration is incorrect since it also includes revenue of Rs. 910.50 crores from intra-group sales. IFCI goes on to hold that the inclusion of that revenue enabled the petitioner to project that it met the eligibility criteria. This action according to the respondents clearly amounted to a violation of the Integrity Pact Undertaking submitted by the petitioner and consequently warranted its debarment from all tenders of MHI that may be issued during the pendency of the PLI Scheme and up to 31 March 2027. This communication also refers to the letter of the MHI dated 25 April 2022 referred to above. In order to appreciate the challenge which is raised in the writ petition it would be apposite to notice the following essential facts.

---

[1] MHI

2 PLI Scheme

2. On 23 September 2021 the Union Government announced the PLI Scheme for the automobile and auto component industry. The PLI Scheme proposed financial incentives to boost domestic manufacturing of advanced automotive technology products and to attract investment in the automotive manufacturing value chain. The Basic Eligibility Criteria was specified as being companies or group companies with an existing presence in India or globally in the automotive vehicle and components manufacturing business having a Global Group Revenue of a minimum of Rs.10,000 crores. Clause 3.2 which set out the eligibility criteria for applicants is reproduced hereinbelow:-

> "**3.2 Eligibility:** The applicant company or its Group company(ies) will need to meet the following common criteria to qualify and receive benefits under the Scheme:
>
> **Basic Eligibility Criteria:**
>
> **(a)** For company or its Group company(ies) with existing presence in India or globally in the Automotive vehicle and components manufacturing business:

Eligibility Criteria	Auto OEM	Auto-Component
Global group* Revenue (from automotive and/or auto component manufacturing)	Minimum ₹ 10,000 crore.	Minimum ₹ 500 crore.
Investment	Global Investment of Company or its Group* Company(ies) in fixed assets (gross block) of ₹ 3,000 crore.	Global Investment of Company or its Group* Company(ies) in fixed assets (gross block) of ₹ 150 crore."

3. The petitioner submitted an application under the Champion OEM category on 09 January 2022. In support of the application the petitioner

set out its Global Group Revenue as being Rs.10,590.75 crores for the Financial Year 2020-2021. The details of the revenue earned by its 16 group companies from the automotive or auto component manufacturing activities was duly disclosed in the application that was submitted. On 20 January 2022 IFCI Limited which was the implementing agency and the designated **Project Management Agency**[3] under the PLI Scheme, called upon the petitioner to submit its latest shareholding certificate as well as financial statements of its group companies. It also called upon the petitioner to furnish the link between each group company displaying the relationship between the companies inter se as well as the independent shareholdings of each corporate entity forming part of the conglomerate. In response to the aforesaid email of IFCI, the petitioner provided the necessary clarifications and documents in terms of two emails dated 21 and 22 January 2022. The petitioner then alludes to a news report which was aired on 10 February 2022 by CNBC TV 18 which had reported that the petitioner was one of the successful applicants under the PLI Scheme.

4. On 11 February 2022 a Press Release came to be issued which set forth the details of the 20 applicants who had been approved under the PLI Scheme. The name of the petitioner did not stand included in that list which was published. The petitioner is stated to have then met with the officers of IFCI on 14 February 2022. It is alleged that in the course of that interaction with the representatives of IFCI the petitioner was apprised of a complaint having been received alleging that the Global Group Revenue, as

[3] PMA

disclosed by the petitioner had been inflated and that it did not meet the benchmark of Rs.10,000 crores as stipulated under the PLI Scheme. After the aforesaid meeting, the petitioner addressed two emails dated 15 and 17 February 2022 explaining that the complaint which essentially alleged that intra-group sales and revenues were liable to be excluded while calculating the global group turnover, was incorrect and that the turnover of each group company was liable to be taken into account for the purposes of evaluating eligibility of an applicant under the PLI Scheme. The petitioner also provided details with respect to the manufacturing processes and transactions between the intra group companies and asserted that all of them were engaged in independent manufacturing activities of automotive components and consequently it would be incorrect for the respondents to hold that it did not meet the qualifying criteria. It specifically asserted that the determination of group revenue is in accordance with the PLI Scheme and the **Guidelines for the Production Linked Incentive Scheme for Automobile and Auto Component Industry**[4] framed and therefore the complaint was wholly unfounded. In these two emails the petitioner further asserted that although related party transactions are not liable to be excluded for the purposes calculating the Global Group Revenue, even if one were to assume that the said principle applied to its determination, a sum of Rs.81.39 crores between a holding company and its subsidiaries could at best be considered for elimination. It would be pertinent to note here that even if the aforesaid sum were to be excluded from the global

[4] PLI Guidelines

group turnover as declared by the petitioner, it would have still met the qualifying criteria prescribed under the PLI Scheme.

5. The petitioner by a subsequent communication of 18 February 2022 submitted further material and data for the consideration of the respondents. On 28 February 2022 the petitioner offered the turnover of two other companies to be added to the total group turnover and contended that if the same were taken into consideration, it would still meet the benchmarks placed under the PLI Scheme. The petitioner asserted that in fact if the turnover of these two companies were to be taken into account, it would raise the group turnover to Rs.12,026 crores. The dispute essentially appears to have arisen with the respondents taking the position that revenues generated on account of intra group transactions was liable to be excluded while computing global group turnover. The respondents assert that if intra group sales were to be excluded, the group turnover of JEVPL would stand reduced by Rs.910 crores and thus take it below the threshold of Rs.10,000 crores.

6. On 25 April 2022 the MHI addressed a letter to **Convergence Energy Services Limited**[5] a wholly owned subsidiary of Energy Efficiency Services Limited. Energy Efficiency Services Limited came to be incorporated as a joint venture of various public sector undertakings working under the Ministry of Power. CESL, its wholly owned subsidiary, was the tendering authority for the Grand Challenge tender which had come

[5] CESL

to be published inviting offers for procurement of e-buses to be utilized for public transportation in the cities of Mumbai, Delhi, Bangalore, Hyderabad, Ahmedabad, Chennai, Kolkata, Surat and Pune. **JBM Ecolife Mobility Private Limited**[6], an allied concern of the petitioner was one of the tenderers in that exercise. The communication of 25 April 2022 in its subject heading refers to this tender in which JBM Ecolife was an applicant. The aforesaid communication refers to the application filed by the petitioner here under the PLI Scheme and records that on the basis of a complaint which was received the application of the petitioner made under that Scheme had been re-examined and it was subsequently found that it had furnished incorrect information and thus violated the spirit of the Integrity Pact Undertaking. The letter further apprised CESL of a decision having been taken to debar the petitioner and its group companies from all future schemes and tenders floated by MHI for the entire period of the PLI Scheme with immediate effect and that debarment being effective upto 31 March 2027. That communication appears to have been addressed to CESL since it was in the process of examining and evaluating tenders received in connection with the Grand Challenge for procurement of e-buses and in which JBM Ecolife was an applicant.

7. IFCI, which was the PMA for the purposes of the PLI Scheme, thereafter and on 29 April 2022 passed an order holding that the competent authority on 25 April 2022 had decided to reject the application of the petitioner under the Scheme and to debar it as well as its group companies

[6] JBM Ecolife

from all future schemes and tenders of the MHI for the entire period of the PLI Scheme and upto 31 March 2027. That order records that the petitioner had disclosed its Global Group Revenue to be Rs.10,590.74 crores while submitting financials in respect of its 16 group companies. It asserts that out of the aforesaid Global Group Revenue as disclosed, an amount of Rs.910.54 crores constituted revenues from intra group sales of goods. IFCI accordingly held that these intra group sales had been taken into consideration for the purposes of inflating the group revenue in order to enable the petitioner to meet the Basic Eligibility Criteria under the PLI Scheme. This impugned communication further noted that if the aforesaid amount were to be deducted from the declarations made, the Global Group Revenue would stand reduced to Rs.9680.20 crores and thus clearly fall below the minimum threshold stipulated in terms of the PLI Guidelines. IFCI concluded that the aforesaid action of the petitioner constituted a violation of the Integrity Pact Undertaking and therefore justified the debarment of the petitioner. It is these communications which are impugned by the petitioner in the instant writ petition.

8. Before proceeding to deal with and notice the rival contentions which were addressed, it would be pertinent to briefly note the relevant provisions as contained in the PLI Guidelines which were published by the respondents in connection with the PLI Scheme. The PLI Guidelines which were notified on 23 September 2021 define an applicant in Clause 2.1 to be a company or its group companies engaged in the automotive and/or auto component manufacturing sector who meets the eligibility criteria specified

under the Scheme. The expression "Global Group Revenue" is defined in Clause 2.16 as follows: -

> "**2.16 Global Group Revenue**: Total revenue of the group companies from global operations (from automotive and auto component manufacturing in a given year)."

9. "Group Companies" was defined in Clause 2.17 in the following terms:

> **"2.17 Group Companies** : Group Company(ies) shall mean two or more enterprises which, directly or indirectly, are in a position to:
>
> Exercise twenty-six percent or more of Voting rights in the other enterprise;
>
> Or
>
> Appoint more than fifty percent of members of Board of Directors in the other enterprise (As defined in the FDI Policy Circular of 2020)."

10. The expression "Global Network" was defined in Clause 2.18 as under:

> **"2.18 Global Net Worth**: It refers to the Gross Net worth of a company or its Group company(ies) from all operations i.e. Domestic as well as Foreign, of all assets (Domestic plus Foreign) less all liabilities (Domestic plus Foreign)."

11. Clause 4.1 set out the Basic Eligibility Criteria and reads as follows:

> "**4.1. Eligibility**: The applicant company or its Group company(ies) will need to meet the following common criteria to qualify and receive benefits under the Scheme:
>
> **Basic Eligibility Criteria:**
>
> (a) For company or its Group company(ies) with existing presence in India or globally in the Automotive vehicle and components manufacturing business:

Eligibility Criteria	Auto OEM	Auto-Component
Global group* Revenue	Minimum ₹ 10,000	Minimum ₹ 500

(from automotive and/or auto component manufacturing)	crore.	crore.
Investment	Global Investment of Company or its Group* Company(ies) in fixed assets (gross block) of ₹ 3,000 crore.	Global Investment of Company or its Group* Company(ies) in fixed assets (gross block) of ₹ 150 crore."

12. The role of the PMA is explained in Clause 7.1 to be the entity which would be responsible for providing secretarial, managerial and implementation support and carrying out such other responsibilities which may be assigned to it by the MHI from time to time. The responsibilities of the PMA are spelt out in Clause 7.2, which reads thus: -

> "**7.2**. The PMA shall be responsible, inter alia, for:
>
> **7.2.1**. Receipt of applications, examination and processing of applications and issuing acknowledgements.
>
> **7.2.2**. Submission of a fortnightly statement to MHI about the status of applications received and processed under the Scheme.
>
> **7.2.3**. Making appropriate recommendations through appropriate channel for approval of applications under the Scheme.
>
> **7.2.4**. Verification of thresholds for determining eligibility for disbursement incentive.
>
> **7.2.5**. Examination of claims for disbursement of incentive and making appropriate recommendations through appropriate channel.
>
> **7.2.6.** Verification of the reconciliation of disbursement claims with prescribed documents.
>
> **7.2.7**. Compilation of data regarding progress and performance of the Scheme through Quarterly Review Reports and other information /documents, as required and approved by the competent authority.
>
> **7.2.8**. Providing secretarial and other support to MHI for carrying out its responsibilities.

7.2.9 Keep a check on any diversion arising out of any change in accounting policy or duplication of benefits on account of same activity under different schemes.

7.3. The PMA may request for additional information, details and documents from the applicant as deemed necessary."

13. In terms of the procedure set out in Clause 8, the PMA was to process all applications received and make appropriate recommendations for approvals under the Scheme. The final authority with respect to eligibility of an applicant and approval of its enlistment for the purposes of benefits under the Scheme was reposed in MHI in terms of Clause 8.2. The procedure for approval under the Scheme as set out in Clause 8 is reproduced hereinbelow:-

"**8. Approval under the Scheme**

8.1. The PMA will process the applications and make appropriate recommendations for approvals under the Scheme.

8.2. MHI will consider applications, as recommended by PMA through appropriate channel, for approval under the Scheme.

8.3 To avoid any duplication and formation of multiple committees, the Administrative Mechanism created under FAME-II scheme in MHI will be used for granting approvals under Production Linked Incentive (PLI) Scheme for Automobile and Auto components.

8.4. All the applications will be finalized within 60 days from the date of submission of applications or receipt of clarification sought, if any.

8.5. After receiving approval, the PMA will arrange to issue a letter to the selected applicant within 5 working days, communicating approval under the Scheme.

8.6. If a selected applicant is found to be ineligible at any stage, or if it has not complied with notifications, orders, guidelines etc. of the Scheme, the envisaged incentive claim of such selected applicant shall be forfeited or recovered with interest, if already paid."

14. Clause 13.4 dealt with the measures adopted to ensure that corrupt practices are not resorted to and for promotion of transparency and equity. It also put in place the structure of an Integrity Pact being liable to be executed and for all applicants being obliged to furnish undertakings with respect to Integrity Compliance. Clauses 13.4 and 13.5 are reproduced hereinbelow: -

> "**13.4.** To obviate any malpractices in the financial matters where disbursements are made to industry by the Government, it has been decided to provide deterrence against corrupt practices for promotion of transparency and equity. Therefore, keeping in view the sensitivities involved in the process and taking cue from the instructions of the Central Vigilance Commission regarding addition of an Integrity Pact in the matter of procurement, it has been decided that Applicants shall furnish undertaking w.r.t. Integrity Compliance duly signed by its authorised signatory, as will be notified along with the Application Form.
>
> **13.5**. The undertaking shall be provided by all applicants whose applications or claims are under consideration for approval or disbursement of incentives. The applications or claims of those applicants who do not submit the undertaking shall not be processed and considered. The undertaking for confirming the compliance of integrity will be provided by applicants after the submission of claims for disbursement of incentive and in any case before release of funds. The release of incentives shall be withheld until the above-mentioned undertaking is provided."

15. The Proforma for Integrity Compliance which formed part of the PLI Guidelines and Paragraph 4 thereof which alone is relevant for our purposes required applicants to make the following declaration: -

> "**4**. The applicant agrees that if it is found that the applicant has made any incorrect statement on this subject, the application will be closed or rejected and MHI reserve the right to initiate legal action of whatsoever nature. In case if MHI has disbursed the incentives under PLI, the amount disbursed to applicant be recoverable along with interest calculated at 3 years SBI MCLR prevailing on the date of disbursement, compounded

annually besides blacklisting of the applicant and initiation of legal action of whatsoever nature at the discretion of MHI."

16. The respondents have also referred to the Guidelines on **Debarment of firms from Bidding**[7] framed by the Ministry of Expenditure and set out in an Office Memorandum of 02 November 2021. Those Debarment Guidelines deal with the debarment of firms from bidding. As per those Debarment Guidelines various provisions have been made for debarment of bidders from tenders floated either by a single Ministry or across all Ministries and Departments of the Union Government. Those Debarment Guidelines lay emphasis on adherence to the principles of natural justice as would be evident from a reading of Clauses 11 to 16 which read as follows:-

"**Debarment across All Ministries/ Departments**

11. Where a Ministry/ Department is of the view that business dealings with a particular firm should be banned across all the Ministries/ Departments by debarring the firm from taking part in any bidding procedure floated by the Central Government Ministries/ Departments, the Ministry/ Department concerned, should after obtaining the approval of the Secretary concerned, forward to DoE a self-contained note setting out all the facts of the case and the justification for the proposed debarment along with all the relevant papers and documents. DoE will issue the necessary orders after satisfying itself that proposed debarment across all the Ministries/ Departments is in accordance with Rule 151 of GFRs, 2017. This scrutiny is intended to ensure Uniformity of treatment in all cases.

12. The firm will remain in suspension mode (Le. debarred) during the interim period till the final decision taken by DoE, only in the Ministry/ Department forwarding such proposal.

[7] Debarment Guidelines

13. Ministry/ Department before forwarding the proposal to DoE must ensure that reasonable opportunity has been given to the concerned firm to represent against such debarment (including personal hearing, if requested by firm). If DoE realizes that sufficient opportunity has not be given to the firm to represent against the debarment, such debarment requests received from Ministries/ Departments shall be rejected.

14. DoE can also give additional opportunity, at their option, to firm to represent against proposed debarment. DoE can also take suo-moto action to debar the firms in certain circumstances.

15. No contract of any kind whatsoever shall be placed on the debarred firm, including its allied firms by any Ministries/ Departments/ Attached/Subordinate offices of the Government of India including autonomous body, CPSUs etc. after the issue of a debarment order.

16. DoE will maintain list of such debarred firms, which will be displayed on Central Public Procurement Portal."

17. Other salient provisions which are made applicable to debarments that may come to be made either by a single Ministry or one which would operate across all ministries are set out in Clauses 16 to 19, which are extracted hereinbelow:-

"**Other Provisions (common to both types of debarment)**

16. No contract of any kind whatsoever shall be placed to debarred firm including its allied firms after the issue of a debarment order by the Ministry/Department. Bids from only such firms shall be considered for placement of contract, which are neither debarred on the date of opening of tender (first bid, normally called as technical bid, in case of two packet/two stage bidding) nor debarred on the date of contract. Even in the cases of risk purchase, no contract should be placed on such debarred firms.

17. If case, any debar firms has submitted the bid, the same will be ignored. In case such firm is lowest (L-1), next lowest firm shall be considered as L-1. Bid security submitted by such debarred firms shall be returned to them.

18. Contracts concluded before the issue of the debarment order shall, not be affected by the debarment Orders.

19. The Debarment shall be automatically extended to all its allied firms. In case of joint venture/consortium is debarred all partners will also stand debarred for the period specified in Debarment Order. The names of partners should be clearly specified in the "Debarment Order"."

18. Those Debarment Guidelines also refer to the General Financial Rules 2017 framed by the Department of Expenditure and for our purposes Rules 151 and 175 may be noticed. Those Rules are reproduced below: -

"Rule 151 Debarment from bidding

(i) A bidder shall be debarred if he has been convicted of an offence-
   (a) under the Prevention of Corruption Act, 1988; or
   (b) the Indian Penal Code or any other law for the time being in force, for causing any loss of life or property or causing a threat to public health as part of execution of a public procurement contract.

(ii) A bidder debarred under sub-section (i) or any successor of the bidder shall not be eligible to participate in a procurement process of any procuring entity for a period not exceeding three years commencing from the date of debarment. Department of Commerce (DGS&D) will maintain such list which will also be displayed on the website of DGS&D as well as Central Public Procurement Portal.

(iii) A procuring entity may debar a bidder or any of its successors, from participating in any procurement process undertaken by it, for a period not exceeding two years, if it determines that the bidder has breached the code of integrity. The Ministry/Department will maintain such list which will also be displayed on their website.

(iv) The bidder shall not be debarred unless such bidder has been given a reasonable opportunity to represent against such debarment.

xxx xxx xxx

Rule 175 (1) Code of Integrity

No official of a procuring entity or a bidder shall act in contravention of the codes which includes

(i) prohibition of

(a) making offer, solicitation or acceptance of bribe, reward or gift or any material benefit, either directly or indirectly, in exchange for an unfair advantage in the procurement process or to otherwise influence the procurement process.

(b) any omission, or misrepresentation that may mislead or attempt to mislead so that financial or other benefit may be obtained or an obligation avoided.

(c) any collusion, bid rigging or anticompetitive behavior that may impair the transparency, fairness and the progress of the procurement process.

(d) improper use of information provided by the procuring entity to the bidder with an intent to gain unfair advantage in the procurement process or for personal gain.

(e) any financial or business transactions between the bidder and any official of the procuring entity related to tender or execution process of contract; which can affect the decision of the procuring entity directly or indirectly.

(f) any coercion or any threat to impair or harm, directly or indirectly, any party or its property to influence the procurement process.

(g) obstruction of any investigation or auditing of a procurement process.

(h) making false declaration or providing false information for participation in a tender process or to secure a contract;

(ii) disclosure of conflict of interest.

(iii) Disclosure by the bidder of any previous transgressions made in respect of the provisions of sub-clause (i) with any entity in any country during the last three years or of being debarred by any other procuring entity.

Rule 175 (2) The procuring entity, after giving a reasonable opportunity of being heard, comes to the conclusion that a bidder or prospective bidder, as the case may be, has contravened the code of integrity, may take appropriate measures."

19. In order to complete the narration of facts it would be pertinent to note that this writ petition had initially come up before the Court on 23 May 2022 where upon noticing the contentions addressed, the Court had called upon the respondents to file their counter affidavits. Aggrieved by the fact

that the Court had not granted any interim relief against the impugned orders of debarment, the petitioners preferred LPA 357/2022 which while noticing the grievance raised passed the following order: -

> "1. With the consent of counsel for the parties, the appeal is taken up for hearing and final disposal, at this stage itself.
>
> 2. The above captioned matter was listed before us on 26.05.2022. At the request of Mr Apoorv Kurup, central government standing counsel for respondent no.l/Union of India (UOI), we had directed that the matter be listed before us today i.e. 27.05.2022.
>
> 3. Mr Apoorv has returned with instructions. According to Mr Apoorv, respondent no.l/UOI [which is represented by Ministry of Heavy Industries (in short "MHI")] says debarment, which has been assailed by the appellant before the learned Single Judge, is limited to the tenders floated by the MHI.
>
> 4. To be noted, the appellant has assailed before the learned Single Judge two communications dated 25.04.2022 and 29.04.2022, whereby, in effect, the appellant has been debarred from participating in future tenders/contract.
>
> 4.1. The appellant has raised several pleas in the writ action which is pending adjudication before the learned Single Judge. Inter alia, it is the assertion of the appellant i.e., the original writ petitioner that there has been a breach of the principles of the natural justice.
>
> 4.2. The appellant has taken the stand that the debarment communication has not been served upon it up-until now.
>
> 4.3. It is also the appellant's contention that no hearing was granted. Quite obviously, respondent no.l/UOI-MHI disputes this position.
>
> 4.4. These are issues which would require adjudication by the learned Single Judge.
>
> 5. However, what ails the appellant is the order dated 23.05.2022 passed by the learned Single Judge, whereby simply notice has been issued in the writ petition without rendering a decision in the appellant's interlocutory application.
>
> 5.1. The appellant contends that because interim directions that were sought were not granted, the appellant is debarred from participating in the tenders issued by various State Governments and/or instrumentalities of the State. By way of illustration, our attention has been drawn to pages 53 and 300 of the case file.

6. Messrs Mukul Rohatgi and Sandeep Sethi, learned senior advocates, who appear for the appellant, submit that the appellant's bid will not be considered by any State Government or instrumentality of the State on account of the impugned debarment communication issued by respondent no.l/UOI-MHI. In support of this plea, once again, by way of an illustration, our attention has been drawn to the tender issued by Brihanmumbai Electric Supply and Transport (in short "BEST"), Maharashtra. In particular, Messrs Rohatgi and Sethi have laid emphasis on Clause 7 of the said tender, which finds mention on page 57 of the case file.

> *"**7) JBM ECOLIFE MOBILITY PVT. LTD.***
>
> *Based on the letter from Ministry of Heavy Industries, GOI dated 25/04/2022; the offer of the firm is not considered for evaluation. Hence, same is considered as "TECHNICALLY NON RESPONSIVE"*

6.1. It is contended on the basis of the said clause that because MHI has issued the impugned debarment communication dated 25.04.2022, the appellant's bid was declared as "Technically Non Responsive".

6.2. To be noted, insofar as this tender is concerned, the deadline for preferring a bid has passed. However, as indicated above, there are other tenders in the offing. These are tenders, the brief details of which are listed out in Annexure A-6, which is appended on page 300 of the case file.

6.3. According to Messrs Rohatgi and Sethi, the tenders which are in offing are listed at serial nos. 5 to 8 of the table set out in Annexure A-6. Besides this, Messrs Rohatgi and Sethi have placed before us the photocopies of the relevant pages of the tender documents concerning the aforementioned tenders.

6.4. From what has been shown to us, it is clear that the debarment by respondent no. 1/UOI-MHI would come in the way of the appellant's tender/bids being considered.

6.5. It is, therefore, quite apparent to us that in order to ensure that the writ petition, which is pending adjudication before the learned single judge, is not rendered inefficacious and/or mere formality, the rights of the appellant will need to be preserved, albeit, to a limited extent. Therefore, the appeal is disposed of with the following directions:

(i) The appellant would be entitled to participate in the tenders which, we are told, are in the offing. These being tenders floated by:

   (a) Jammu Smart City Limited, Jammu;

(b) Aurangabad Smart City Development Corporation Limited, Aurangabad;

(c) Navi Mumbai Municipal Transport (NMMT), Navi Mumbai; and

(d) Assam State Transport Corporation, Guwahati.

(ii) The employer and/or the authority considering the bid(s) submitted by the appellant will not reject it on the ground that the appellant has been debarred by respondent no. 1/UOI-MHI. This direction, however, will not come in the way of the employer and/or authority considering the bid, rejecting the appellant's bid on other tenable grounds.

(iii) Needless to add, the aforementioned direction will not come in the way of the learned Single Judge disposing of the writ action. The writ action will be adjudicated without being influenced by the directions issued by us hereinabove.

(iv) The aforementioned directions have been issued, without prejudice to the rights and contentions of both the parties.

7. Since the learned Single Judge has fixed the matter before the vacation Bench on 10.06.2022, we would request the concerned bench to dispose of the same, if time permits, on that date or any other date which is convenient to the concerned Bench. This decision will be of the concerned Bench, sitting in vacation.

8. At this stage, Mr Sethi says that similar directions would be required vis-a-vis group companies as well, since the debarment qua the appellant impacts other sister concerns.

8.1. To our minds, since the other sister concerns are not before us in this appeal, liberty is given to the appellant to move the learned Single Judge by way of an appropriate action, albeit as per law.

8.2. As and when an action is instituted, the learned Single Judge will consider it, as per law.

9. Parties will act based on the digitally signed copy of this order.

10. Consequently, pending application shall stand closed."

20. Pursuant to the directions set out in para 6.5 of that order this Court has been granting interim protection enabling the petitioner to participate in tenders which are unconnected with the MHI. It may be lastly noted that the debarment of JBM Ecolife pursuant to a communication of 26 April

2022 had come to be challenged by that entity by means of W.P.(C) 6708/2022. That writ petition came to be dismissed by the Court on 10 May 2022. While rejecting the challenge raised by JBM Ecolife, this Court in its judgment held as follows: -

> "57. The submission of Mr. Dave that the Guidelines for debarment stand restricted to contracts relating to procurement is clearly untenable for the following reasons. While the Guidelines may have been framed to deal with procurement and supply contracts, this Court finds itself unable to construe or interpret paragraphs 15, 16 and 19 thereof as being inapplicable in the facts and circumstances of the present case. It becomes pertinent to note that a holistic reading of the Guidelines does not lead one to conclude that they stand restricted only to situations where a debarment may have been ordered in connection with a procurement or supply contract. The extension of debarment to allied firms in any case cannot possible be read or understood in the restrictive sense as advocated by Mr. Dave.
>
> 58. The argument resting on paragraph 11 also merits negation for the following reasons. The order of 29 April 2022 clearly establishes that the debarment of JBM Electric and its group companies was to extend to all schemes and tenders issued by the MHI. It would be pertinent to recollect that the Grand Challenge Tender, with which the present petition is concerned, was a process initiated by the second respondent in implementation of the stated MHI policy to augment the public sector bus fleet and to strength and modernise public transport in India. The Court thus fails to find any plausible or valid distinction or disconnect between the debarment of JBM Electric, its disqualification to be in receipt of benefits under the PLI Scheme and the disqualification of the petitioner from the present tendering process.
>
> 59. Regard must also be had to the fact that the communication apprising the second respondent to apprise them of the disqualification of JBM Electric and for the consequential debarment of its group companies was issued by MHI. It was the same Ministry which called upon the second respondent to debar JBM Electric and its group companies from the subject tender for e-buses under the FAME Scheme of that Ministry. It would therefore be wholly incorrect to assume or understand the action taken against JBM Electric and the consequential disqualification of the petitioner as being the outcome of a decision taken by two separate or distinct Ministries of the Union

> Government. The submission to the effect that debarment proceedings could have been initiated only at the instance of the Department of Expenditure is noticed only to be rejected since undisputedly, the blacklisting of JBM Electric is not directed to operate across ministries but in respect of tenders moved by MHI.
>
> 62**.** Undisputedly, the debarment of the petitioner has come about as a consequence of the blacklisting of its sister concern and in light of the provisions made in the Guidelines referred to above. As this Court views those Guidelines, it is manifest that debarment of an allied firm or sister concern is contemplated to be automatic and as a necessary and an inevitable consequence to an allied or sister concern coming to be blacklisted. This is clear from the provisions made in paragraphs 15 to 19 of the Guidelines. The provisions made in those Guidelines unequivocally point towards and provide for an obvious and inevitable consequence of debarment coming to be attached to an allied firm/sister concern. The applicability of the Guidelines, the factum of the petitioner being viewed as an allied firm/sister concern was neither questioned nor assailed by either Mr. Dave or Mr. Nayyar in the course of their oral submissions. Viewed and tested on the anvil of the provisions made in the Guidelines, it is manifest and evident that once JBM Electric came to be debarred, the disqualification of JBM Ecolife was an inescapable and unpreventable consequence. It is in the aforesaid backdrop that the challenge to the impugned order as being in violation of the principles of natural justice would have to be evaluated."

21. It may be noted that although LPA 327/2022 has been preferred by JBM Ecolife aggrieved by that decision, no interim orders operate on that appeal which remains pending on the board of the Division Bench.

22. It would be pertinent to note that JBM Ecolife had in the aforenoted writ petition assailed the validity of a communication dated 26 April 2022 addressed by CESL apprising it of the decision of 25 April 2022 issued by the MHI debarring the petitioner here. That communication had proceeded to note that on account of the debarment of the petitioner and in terms of the Debarment Guidelines framed by the Ministry of Expenditure, JBM

Ecolife would stand disqualified from participation in the tender process which had been initiated for procurement of e-buses. The Court had in its decision and upon noticing the Debarment Guidelines framed by the Department of Expenditure, found that since the debarment of an allied concern was automatic and self-activating, no relief was liable to be granted to JBM Ecolife**.** It is equally significant to note that at the time when the aforesaid judgment came to be rendered, the petitioner here had not mounted any challenge to the communication of 25 April 2022 issued by the MHI and which is impugned in the present writ petition. This writ petition ultimately came to be filed around 12 May 2022 and came before the Court for the first time on 23 May 2022.

23. Mr. Rohatgi, learned senior counsel appearing for the petitioner has submitted that as is manifest from a reading of the impugned communication of 25 April 2022, the petitioner had been found to be ineligible for benefits flowing from the PLI Scheme based on a purported decision taken by the MHI. It is further pointed out that the communication of 25 April 2022 was addressed to CESL which was overseeing the tendering process for procurement of e-buses in which JBM Ecolife was an applicant. Learned senior counsel further referred to the recitals appearing in the impugned order of 29 April 2022 where the second respondent refers to a purported decision taken by MHI on 25 April 2022 rejecting the application of the petitioner under the PLI Scheme and to debar it and its group companies from all future schemes. It was argued that till date the purported decision taken by MHI has neither been communicated to the

petitioner nor placed in the present proceedings. Mr. Rohatgi vehemently contended that undisputedly MHI never placed the petitioner on notice with respect to its ineligibility under the PLI Scheme and that no opportunity of hearing was provided to the petitioner by that Ministry prior to its decision to hold it as being ineligible under the Scheme and liable to be debarred. It was further urged that respondent No. 2 appears to have acted on the sheer dictate of MHI while proceeding to reject the application of the petitioner under the PLI Scheme. It was then submitted that a reading of the Scheme itself would indicate that while defining Global Group Revenue, applicants were never advised to deduct intra group sales. Mr. Rohatgi contended that the Scheme as notified only required the applicant to have a Global Group Revenue from automotive or auto component manufacturing activities of a minimum of Rs. 10,000 crores. Learned senior counsel would contend that it has been the categorical assertion of the petitioner that intra group revenues are liable to be taken into account for the purposes of evaluating the eligibility of an applicant and in the absence of any specific exclusion in respect thereof, the stand as taken by the respondents is rendered wholly untenable.

24. Mr. Rohatgi then submitted that even if it be the position of the respondents that intra group sales were liable to be excluded, in light of the apparent ambiguity in this respect in the PLI Scheme and the PLI Guidelines, it was imperative upon the respondents to have provided an opportunity of hearing to the petitioners. Mr. Rohatgi further submitted that an impression was given to this Court in the litigation initiated by JBM

Ecolife that the order of 25 April 2022 was preceded by an opportunity of hearing having been provided by the respondents to the petitioner here. It was submitted that the aforesaid assertion of the respondents is factually incorrect and baseless since no such opportunity was ever provided to the petitioner. It was explained that the meeting of 14 February 2022 was one which was initiated by the petitioner who had approached the respondents upon finding its name excluded from the list of selected applicants which came to be published on 11 February 2022. Mr. Rohatgi argued that it was in that meeting that the respondents for the first time disclosed that a complaint had been received and questions raised with respect to intra group sales having been taken into account by the petitioner while computing its gross global revenue. This, in the submission of Mr. Rohatgi, cannot possibly be countenanced as an adherence to the principles of natural justice and consequently the impugned communications are liable to be quashed on this ground alone.

25. Turning then to the Integrity Pact and the declarations made by the petitioner in terms of Paragraph 4 of the Integrity Compliance Format, Mr. Rohatgi submitted that a bare perusal thereof would establish that blacklisting was not a measure contemplated to be invoked if it be found that an applicant had made an incorrect statement in its application. Mr. Rohatgi contended that on a plain reading of Paragraph 4, it is manifest that in the eventuality of the competent authority finding that an applicant had made any incorrect disclosure or statement, its application was liable to be closed and rejected with MHI reserving the right to initiate legal action.

Mr. Rohatgi sought to underline the fact that the punishment of blacklisting was one which was contemplated in the latter part of Paragraph 4 and liable to be invoked only in cases where incentives had come to be disbursed to an applicant under the PLI Scheme and in which eventuality the respondents reserved the right to not only recover that amount along with interest, but to also blacklist the said applicant and initiate further legal action. It was then contended that the Debarment Guidelines as framed by the Department of Expenditure as well as the Rules which have been referred to by the respondents clearly have no application since they would stand attracted in a case of a tendering process that may be initiated or where bids may come to be submitted. It was his submission that an application made under the PLI Scheme cannot be placed at par with a tender or a bid that may be submitted. It was contended that apart from Paragraph 4 of the Integrity Compliance Format which forms part of the PLI Scheme and PLI Guidelines, the respondents have failed to base their decision to debar the petitioner as well as to hold it as ineligible under the Scheme on any other provision. For the aforesaid reasons also, it was his contention that the impugned orders are liable to be set aside and quashed.

26. Referring to the well settled position in law of the principles of natural justice being liable to be adhered to in cases of blacklisting, Mr. Rohatgi referred to the decision of the Supreme Court **in UMC**

Technologies (P) Ltd. v. Food Corporation of India[8] where the following principles came to be laid down: -

> "**14.** Specifically, in the context of blacklisting of a person or an entity by the State or a State Corporation, the requirement of a valid, particularised and unambiguous show-cause notice is particularly crucial due to the severe consequences of blacklisting and the stigmatisation that accrues to the person/entity being blacklisted. Here, it may be gainful to describe the concept of blacklisting and the graveness of the consequences occasioned by it. Blacklisting has the effect of denying a person or an entity the privileged opportunity of entering into government contracts. This privilege arises because it is the State who is the counterparty in government contracts and as such, every eligible person is to be afforded an equal opportunity to participate in such contracts, without arbitrariness and discrimination. Not only does blacklisting take away this privilege, it also tarnishes the blacklisted person's reputation and brings the person's character into question. Blacklisting also has long-lasting civil consequences for the future business prospects of the blacklisted person.
>
> **16.** The severity of the effects of blacklisting and the resultant need for strict observance of the principles of natural justice before passing an order of blacklisting were highlighted by this Court in *Erusian Equipment & Chemicals Ltd.* v. *State of W.B.* [*Erusian Equipment & Chemicals Ltd.* v. *State of W.B.*, (1975) 1 SCC 70] in the following terms: (SCC pp. 74-75, paras 12, 15 & 20)
>
> > "*12*. … The order of blacklisting has the effect of depriving a person of equality of opportunity in the matter of public contract. A person who is on the approved list is unable to enter into advantageous relations with the Government because of the order of blacklisting. 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.
> >
> > ***
> >
> > *15*. … The blacklisting order involves civil consequences. It casts a slur. It creates a barrier between the persons blacklisted and the Government in the matter of transactions. The blacklists are "instruments of coercion".

[8] (2021) 2 SCC 551

***

20. 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."

25. The mere existence of a clause in the bid document, which mentions blacklisting as a bar against eligibility, cannot satisfy the mandatory requirement of a clear mention of the proposed action in the show-cause notice. The Corporation's notice is completely silent about blacklisting and as such, it could not have led the appellant to infer that such an action could be taken by the Corporation in pursuance of this notice. Had the Corporation expressed its mind in the show-cause notice to blacklist, the appellant could have filed a suitable reply for the same. Therefore, we are of the opinion that the show-cause notice dated 10-4-2018 does not fulfil the requirements of a valid show-cause notice for blacklisting. In our view, the order of blacklisting the appellant clearly traversed beyond the bounds of the show-cause notice which is impermissible in law. As a result, the consequent blacklisting order dated 9-1-2019 cannot be sustained…"

27. Mr. Rohatgi then laid emphasis on the following passages as appearing in the decision of the Supreme Court in **Gorkha Security Services v. Govt. (NCT of Delhi)**[9] where the necessity of a show cause notice being a prerequisite to an action of blacklisting was reiterated in the following terms:-

"**16.** It is a common case of the parties that the blacklisting has to be preceded by a show-cause notice. Law in this regard is firmly grounded and does not even demand much amplification. The necessity of compliance with the principles of natural justice by giving the opportunity to the person against whom action of blacklisting is sought to be taken has a valid and solid rationale behind it. With blacklisting, many civil and/or evil consequences follow. It is described as "civil death" of a person who is foisted with the order of blacklisting. Such an order is stigmatic in

[9] (2014) 9 SCC 105

nature and debars such a person from participating in government tenders which means precluding him from the award of government contracts.

17. Way back in the year 1975, this Court in *Erusian Equipment & Chemicals Ltd.* v. *State of W.B.* [*Erusian Equipment & Chemicals Ltd.* v. *State of W.B.*, (1975) 1 SCC 70] , highlighted the necessity of giving an opportunity to such a person by serving a show-cause notice thereby giving him opportunity to meet the allegations which were in the mind of the authority contemplating blacklisting of such a person. This is clear from the reading of paras 12 and 20 of the said judgment. Necessitating this requirement, the Court observed thus: (SCC pp. 74-75)

> "*12*. Under Article 298 of the Constitution the executive power of the Union and the State shall extend to the carrying on of any trade and to the acquisition, holding and disposal of property and the making of contracts for any purpose. The State can carry on executive function by making a law or without making a law. The exercise of such powers and functions in trade by the State is subject to Part III of the Constitution. Article 14 speaks of equality before the law and equal protection of the laws. Equality of opportunity should apply to matters of public contracts. The State has the right to trade. The State has there the duty to observe equality. An ordinary individual can choose not to deal with any person. The Government cannot choose to exclude persons by discrimination. The order of blacklisting has the effect of depriving a person of equality of opportunity in the matter of public contract. A person who is on the approved list is unable to enter into advantageous relations with the Government because of the order of blacklisting. 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.
>
> ***
>
> *20*. 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."

18. Again, in *Raghunath Thakur* v. *State of Bihar* [(1989) 1 SCC 229] the aforesaid principle was reiterated in the following manner: (SCC p. 230, para 4)

> "*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. Insofar 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 realised 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 representations against the order. In that view of the matter, the last portion of the order insofar 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 that 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 so entitled to do in accordance with law i.e. after 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."

19. Recently, in *Patel Engg. Ltd.* v. *Union of India* [*Patel Engg. Ltd.* v. *Union of India*, (2012) 11 SCC 257 : (2013) 1 SCC (Civ) 445] speaking through one of us (Jasti Chelameswar, J.) this Court emphatically reiterated the principle by explaining the same in the following manner: (SCC pp. 262-63, paras 13-15)

> "*13*. The concept of 'blacklisting' is explained by this Court in *Erusian Equipment & Chemicals Ltd.* v. *State of W.B.* [*Erusian*

Equipment & Chemicals Ltd. v. *State of W.B.*, (1975) 1 SCC 70] as under: (SCC p. 75, para 20)

> '*20*. 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.'

14. The nature of the authority of the State to blacklist the persons was considered by this Court in the abovementioned case ["*12*. Under Article 298 of the Constitution the executive power of the Union and the State shall extend to the carrying on of any trade and to the acquisition, holding and disposal of property and the making of contracts for any purpose. The State can carry on executive function by making a law or without making a law. The exercise of such powers and functions in trade by the State is subject to Part III of the Constitution. Article 14 speaks of equality before the law and equal protection of the laws. Equality of opportunity should apply to matters of public contracts. The State has the right to trade. The State has there the duty to observe equality. An ordinary individual can choose not to deal with any person. The Government cannot choose to exclude persons by discrimination. The order of blacklisting has the effect of depriving a person of equality of opportunity in the matter of public contract. A person who is on the approved list is unable to enter into advantageous relations with the Government because of the order of blacklisting. A person who has been dealing with the Government in the matter of sale and purchase of materials has a legitimate interest or expectation."(*Erusian Equipment case* [*Erusian Equipment & Chemicals Ltd.* v. *State of W.B.*, (1975) 1 SCC 70] , [(1975) 1 SCC 70], SCC p. 74, para 12)] and took note of the constitutional provision (Article 298) ["**298.*Power to carry on trade, etc*.—The executive power of the Union and of each State shall extend to the carrying on of any trade or business and to the acquisition, holding and disposal of property and the making of contracts for any purpose:Provided that—(*a*) the said executive power of the Union shall, insofar as such trade or business or such purpose is not one with respect to which Parliament may make laws, be subject in each State to legislation by the State; and(*b*) the said executive power of each State shall, insofar as such trade or business or such purpose is not one with respect to which the State Legislature may make laws, be subject to legislation by Parliament."] , which authorises both the Union of India and the States to make contracts for any purpose and to carry on any trade or business. It also authorises the acquisition, holding and disposal of property. This Court also took note of the fact that the right to make a contract

includes the right not to make a contract. By definition, the said right is inherent in every person capable of entering into a contract. However, such a right either to enter or not to enter into a contract with any person is subject to a constitutional obligation to obey the command of Article 14. Though nobody has any right to compel the State to enter into a contract, everybody has a right to be treated equally when the State seeks to establish contractual relationships. ["*17*. The Government is a Government of laws and not of men. It is true that neither the petitioner nor the respondent has any right to enter into a contract but they are entitled to equal treatment with others who offer tender or quotations for the purchase of the goods. The privilege arises because it is the Government which is trading with the public and the democratic form of Government demands equality and absence of arbitrariness and discrimination in such transactions. Hohfeld treats privileges as a form of liberty as opposed to a duty. The activities of the Government have a public element and, therefore, there should be fairness and equality. The State need not enter into any contract with any one but if it does so, it must do so fairly without discrimination and without unfair procedure. Reputation is a part of a person's character and personality. Blacklisting tarnishes one's reputation."(*Erusian Equipment case* [*Erusian Equipment & Chemicals Ltd.* v. *State of W.B.*, (1975) 1 SCC 70] , [(1975) 1 SCC 70], SCC p. 75, para 17)]] The effect of excluding a person from entering into a contractual relationship with the State would be to deprive such person to be treated equally with those, who are also engaged in similar activity.

15. It follows from the above judgment in *Erusian Equipment case* [*Erusian Equipment & Chemicals Ltd.* v. *State of W.B.*, (1975) 1 SCC 70] that the decision of the State or its instrumentalities not to deal with certain persons or class of persons on account of the undesirability of entering into the contractual relationship with such persons is called blacklisting. The State can decline to enter into a contractual relationship with a person or a class of persons for a legitimate purpose. The authority of the State to blacklist a person is a necessary concomitant to the executive power of the State to carry on the trade or the business and making of contracts for any purpose, etc. There need not be any statutory grant of such power. The only legal limitation upon the exercise of such an authority is that the State is to act fairly and rationally without in any way being arbitrary—thereby such a decision can be taken for some legitimate purpose. What is the legitimate purpose that is sought to be achieved by the State in a given case can vary depending upon various factors."

> **20.** Thus, there is no dispute about the requirement of serving show-cause notice. We may also hasten to add that once the show-cause notice is given and opportunity to reply to the show-cause notice is afforded, it is not even necessary to give an oral hearing. The High Court has rightly repudiated the appellant's attempt in finding foul with the impugned order on this ground. Such a contention was specifically repelled in *Patel Engg.* [*Patel Engg. Ltd.* v. *Union of India*, (2012) 11 SCC 257 : (2013) 1 SCC (Civ) 445]"

28. Reliance was then placed on the following observations as came to be entered by the Supreme Court while dealing with the argument of prejudice as was advanced by the respondents in that decision: -

> "**32.** It was sought to be argued by Mr Maninder Singh, learned Additional Solicitor General appearing for the respondent, that even if it is accepted that the show-cause notice should have contained the proposed action of blacklisting, no prejudice was caused to the appellant inasmuch as all necessary details mentioning defaults/prejudices committed by the appellant were given in the show-cause notice and the appellant had even given its reply thereto. According to him, even if the action of blacklisting was not proposed in the show-cause notice, the reply of the appellant would have remained the same. On this premise, the learned Additional Solicitor General has argued that there is no prejudice caused to the appellant by non-mentioning of the proposed action of blacklisting. He argued that unless the appellant was able to show that non-mentioning of blacklisting as the proposed penalty has caused prejudice and has resulted in miscarriage of justice, the impugned action cannot be nullified. For this proposition he referred to the judgment of this Court in *Haryana Financial Corpn.* v. *Kailash Chandra Ahuja* [(2008) 9 SCC 31 : (2008) 2 SCC (L&S) 789] : (SCC pp. 38, 40-41 & 44, paras 21, 31, 36 & 44)
>
> > "*21*. From the ratio laid down in *B. Karunakar* [*ECIL* v. *B. Karunakar*, (1993) 4 SCC 727 : 1993 SCC (L&S) 1184 : (1993) 25 ATC 704] it is explicitly clear that the doctrine of natural justice requires supply of a copy of the inquiry officer's report to the delinquent if such inquiry officer is other than the disciplinary authority. It is also clear that non-supply of report of the inquiry officer is in the breach of natural justice. But it is equally clear that failure to supply a report of the inquiry officer to the

delinquent employee would not ipso facto result in the proceedings being declared null and void and the order of punishment non est and ineffective. It is for the delinquent employee to plead and prove that non-supply of such report had caused prejudice and resulted in miscarriage of justice. If he is unable to satisfy the court on that point, the order of punishment cannot *automatically* be set aside.

***

31. At the same time, however, effect of violation of the rule of audi alteram partem has to be considered. Even if hearing is not afforded to the person who is sought to be affected or penalised, can it not be argued that 'notice would have served no purpose' or 'hearing could not have made difference' or 'the person could not have offered any defence whatsoever'. In this connection, it is interesting to note that under the English law, it was held few years before that non-compliance with principles of natural justice would make the order null and void and no further inquiry was necessary.

***

36. The recent trend, however, is of 'prejudice'. Even in those cases where procedural requirements have not been complied with, the action has not been held ipso facto illegal, unlawful or void unless it is shown that non-observance had prejudicially affected the applicant.

***

44. From the aforesaid decisions, it is clear that though supply of report of the inquiry officer is part and parcel of natural justice and must be furnished to the delinquent employee, failure to do so would not automatically result in quashing or setting aside of the order or the order being declared null and void. For that, the delinquent employee has to show 'prejudice'. Unless he is able to show that non-supply of report of the inquiry officer has resulted in prejudice or miscarriage of justice, an order of punishment cannot be held to be vitiated. And whether prejudice had been caused to the delinquent employee depends upon the facts and circumstances of each case and no rule of universal application can be laid down."

(emphasis in original)

33. When we apply the ratio of the aforesaid judgment to the facts of the present case, it becomes difficult to accept the argument of the learned Additional Solicitor General. In the first instance, we may point out that

> no such case was set up by the respondents that by omitting to state the proposed action of blacklisting the appellant in the show-cause notice, has not caused any prejudice to the appellant. Moreover, had the action of blacklisting being specifically proposed in the show-cause notice, the appellant could have mentioned as to why such extreme penalty is not justified. It could have come out with extenuating circumstances defending such an action even if the defaults were there and the Department was not satisfied with the explanation qua the defaults. It could have even pleaded with the Department not to blacklist the appellant or do it for a lesser period in case the Department still wanted to blacklist the appellant. Therefore, it is not at all acceptable that non-mentioning of proposed blacklisting in the show-cause notice has not caused any prejudice to the appellant. This apart, the extreme nature of such a harsh penalty like blacklisting with severe consequences, would itself amount to causing prejudice to the appellant."

29. Appearing for the respondents, learned ASG submitted that the power of the respondents to blacklist the petitioner is to be gathered on a holistic reading of Clauses 13.4 and 13.5 of the PLI Guidelines together with the declaration which each applicant had to furnish in terms of Paragraph 4 of the Proforma of Integrity Compliance. It was submitted that those clauses when read together would clearly establish that the furnishing of incorrect information was liable to be visited with an action of blacklisting. It was argued that Paragraph 4 is not liable to be read disjunctively as was advocated on behalf of the petitioner and when harmoniously construed it would be manifest that the respondents did retain the power to blacklist an applicant even in a situation where disbursements may not have been made under the Scheme. Learned ASG then submitted that the power to blacklist also flows from the Debarment Guidelines as well as the General Financial Rules. According to the learned ASG, they

sufficiently empowered the respondents to debar the petitioner on account of having made factually incorrect disclosures in its application.

30. Without prejudice to the above, it was the submission of learned ASG that the power to blacklist flows from the right of the State not to deal with certain persons or class of persons and that in the exercise of its executive power, it is always open to the State to refrain or desist from entering into a contractual relationship with a person. Learned ASG referred to the following salient principles as enunciated by the Supreme Court in **Patel Engineering Ltd. v. Union of India**[10]**:-**

> **15.** It follows from the above judgment in *Erusian Equipment case* [(1975) 1 SCC 70] that the decision of the State or its instrumentalities not to deal with certain persons or class of persons on account of the undesirability of entering into the contractual relationship with such persons is called blacklisting. The State can decline to enter into a contractual relationship with a person or a class of persons for a legitimate purpose. The authority of the State to blacklist a person is a necessary concomitant to the executive power of the State to carry on the trade or the business and making of contracts for any purpose, etc. There need not be any statutory grant of such power. The only legal limitation upon the exercise of such an authority is that the State is to act fairly and rationally without in any way being arbitrary—thereby such a decision can be taken for some legitimate purpose. What is the legitimate purpose that is sought to be achieved by the State in a given case can vary depending upon various factors.

31. In view of the aforesaid principles, it was the submission of learned ASG that the act of blacklisting warrants no interference by this Court especially in light of the sensitive nature of the PLI Scheme and the importance of good practices being adopted in that process. It was

[10] (2012) 11 SCC 257

emphasized that the PLI Scheme represented a flagship measure adopted by the Union in order to incentivize the automotive industry of the country. Turning then to the provisions of the Scheme itself, learned ASG submitted that the definition of "Global Group Revenue" and more particularly, Clause 4.1 thereof would clearly indicate that what was required was a disclosure of the independent revenues generated by each company of the group and sales *inter se* being duly excluded. Learned ASG contended that various applicants who had participated in the process of selection for enlistment under the Scheme had of their volition deducted intra group sales. In view of the aforesaid, it was his submission that the petitioner deliberately chose to include those intra group sales in order to obtain undue advantage and to claim benefits under the Scheme. Learned ASG then contended that undisputedly if intra group sales were excluded from the declarations that had been made by the petitioner in its application, it would undoubtedly fall short of the Basic Eligibility Criteria and thus no prejudice stands caused to the petitioner. He referred to the decision rendered by a Division Bench of the Allahabad High Court in **Amit Kumar vs. State of U.P. & Anr.**[11] where in a case of blacklisting the empty formality principle was adopted and the stand of the respondents there upheld. Learned ASG referred to the following passages as appearing in that decision: -

> "34. The applicability of the 'useless formality test' or the 'test of prejudice' in the context of the nature, scope and applicability of the

[11] 2020 SCC OnLine All 1317

principles of natural justice has been explained in *Dharampal Satyapal Ltd.* v. *Deputy Commissioner of Central Excise, Gauhati* and it was held that there may be situations where it is felt that a fair hearing 'would make no difference' - meaning that a hearing would not change the ultimate conclusion reached by the decision-maker; then no legal duty to supply a hearing arises and it may not be necessary to strike down the action and refer the matter back to the authorities to take a fresh decision after complying with the procedural requirements in those cases where non-grant of hearing has not caused any prejudice to the person against whom the action is taken. The observations made in this regard in the judgment are as follows:—

> "38. …While the law on the principle of audi alteram partem has progressed in the manner mentioned above, at the same time, the courts have also repeatedly remarked that the principles of natural justice are very flexible principles. They cannot be applied in any straitjacket formula. It all depends upon the kind of functions performed and to the extent to which a person is likely to be affected. For this reason, certain exceptions to the aforesaid principles have been invoked under certain circumstances. For example, the courts have held that it would be sufficient to allow a person to make a representation and oral hearing may not be necessary in all cases, though in some matters, depending upon the nature of the case, not only full-fledged oral hearing but even cross-examination of witnesses is treated as a necessary concomitant of the principles of natural justice. Likewise, in service matters relating to major punishment by way of disciplinary action, the requirement is very strict and full-fledged opportunity is envisaged under the statutory rules as well. On the other hand, in those cases where there is an admission of charge, even when no such formal inquiry is held, the punishment based on such admission is upheld. It is for this reason, in certain circumstances, even post-decisional hearing is held to be permissible. Further, the courts have held that under certain circumstances principles of natural justice may even be excluded by reason of diverse factors like time, place, the apprehended danger and so on.
>
> 39. We are not concerned with these aspects in the present case as the issue relates to giving of notice before taking action. While emphasising that the principles of natural justice cannot be applied in straitjacket formula, the aforesaid instances are given. We have highlighted the jurisprudential basis of adhering to the principles of natural justice which are grounded on the doctrine of procedural fairness, accuracy of outcome leading to general social goals, etc. Nevertheless, there may be situations wherein for some reason--perhaps because the evidence

against the individual is thought to be utterly compelling--it is felt that a fair hearing "would make no difference"--meaning that a hearing would not change the ultimate conclusion reached by the decision-maker--then no legal duty to supply a hearing arises. Such an approach was endorsed by Lord Wilberforce in *Malloch* v. *Aberdeen Corpn.*, who said that: (WLR p. 1595 : All ER p.1294)

"…A breach of procedure…cannot give [rise to] a remedy in the courts, unless behind it there is something of substance which has been lost by the failure. The court does not act in vain."

Relying on these comments, *Brandon L.J. opined in Cinnamond* v. *British Airports Authority* that : (WLR p. 593 : All ER p. 377)

"…no one can complain of not being given an opportunity to make representations if such an opportunity would have availed him nothing."

In such situations, fair procedures appear to serve no purpose since the "right" result can be secured without according such treatment to the individual.

40. In this behalf, we need to notice one other exception which has been carved out to the aforesaid principle by the courts. Even if it is found by the court that there is a violation of principles of natural justice, the courts have held that it may not be necessary to strike down the action and refer the matter back to the authorities to take fresh decision after complying with the procedural requirement in those cases where non-grant of hearing has not caused any prejudice to the person against whom the action is taken. Therefore, every violation of a facet of natural justice may not lead to the conclusion that the order passed is always null and void. The validity of the order has to be decided on the touchstone of "prejudice". The ultimate test is always the same viz. the test of prejudice or the test of fair hearing.

41. In *ECIL* v. *B. Karunakar*, (1993) 4 SCC 727, the majority opinion, penned down by Sawant, J., while summing up the discussion and answering the various questions posed, had to say as under qua the prejudice principle : (SCC pp. 756-58, para 30)

"30. Hence the incidental questions raised above may be answered as follows:

***

(v) The next question to be answered is what is the effect on the order of punishment when the report of the enquiry officer is not

furnished to the employee and what relief should be granted to him in such cases. The answer to this question has to be relative to the punishment awarded. When the employee is dismissed or removed from service and the inquiry is set aside because the report is not furnished to him, in some cases the non-furnishing of the report may have prejudiced him gravely while in other cases it may have made no difference to the ultimate punishment awarded to him. Hence to direct reinstatement of the employee with back wages in all cases is to reduce the rules of justice to a mechanical ritual. The theory of reasonable opportunity and the principles of natural justice have been evolved to uphold the rule of law and to assist the individual to vindicate his just rights. They are not incantations to be invoked nor rites to be performed on all and sundry occasions. Whether in fact, prejudice has been caused to the employee or not on account of the denial to him of the report, has to be considered on the facts and circumstances of each case. Where, therefore, even after the furnishing of the report, no different consequence would have followed, it would be a perversion of justice to permit the employee to resume duty and to get all the consequential benefits. It amounts to rewarding the dishonest and the guilty and thus to stretching the concept of justice to illogical and exasperating limits. It amounts to an "unnatural expansion of natural justice' which in itself is antithetical to justice."

44. At the same time, it cannot be denied that as far as courts are concerned, they are empowered to consider as to whether any purpose would be served in remanding the case keeping in mind whether any prejudice is caused to the person against whom the action is taken. This was so clarified in *ECIL*, (1993) 4 SCC 727 itself in the following words : (SCC p. 758, para 31)

"31. Hence, in all cases where the enquiry officer's report is not furnished to the delinquent employee in the disciplinary proceedings, the courts and tribunals should cause the copy of the report to be furnished to the aggrieved employee if he has not already secured it before coming to the court/tribunal and given the employee an opportunity to show how his or her case was prejudiced because of the non-supply of the report. If after hearing the parties, the court/tribunal comes to the conclusion that the non-supply of the report would have made no difference to the ultimate findings and the punishment given, the court/tribunal should not interfere with the order of punishment. The court/tribunal should not mechanically set aside the order of punishment on the ground that the report was not

furnished as is regrettably being done at present. The courts should avoid resorting to short cuts. Since it is the courts/tribunals which will apply their judicial mind to the question and give their reasons for setting aside or not setting aside the order of punishment, (and not any internal appellate or revisional authority), there would be neither a breach of the principles of natural justice nor a denial of the reasonable opportunity. It is only if the court/tribunal finds that the furnishing of the report would have made a difference to the result in the case that it should set aside the order of punishment."

45. Keeping in view the aforesaid principles in mind, even when we find that there is an infraction of principles of natural justice, we have to address a further question as to whether any purpose would be served in remitting the case to the authority to make fresh demand of amount recoverable, only after issuing notice to show cause to the appellant. In the facts of the present case, we find that such an exercise would be totally futile having regard to the law laid down by this Court in *R.C. Tobacco (P) Ltd.* v. *Union of India*, (2005) 7 SCC 725.

47. In *Escorts Farms Ltd.* v. *Commr.*, (2004) 4 SCC 281, this Court, while reiterating the position that rules of natural justice are to be followed for doing substantial justice, held that, at the same time, it would be of no use if it amounts to completing a mere ritual of hearing without possibility of any change in the decision of the case on merits. It was so explained in the following terms : (SCC pp. 309-10, para 64)

"64. Right of hearing to a necessary party is a valuable right. Denial of such right is serious breach of statutory procedure prescribed and violation of rules of natural justice. In these appeals preferred by the holder of lands and some other transferees, we have found that the terms of government grant did not permit transfers of land without permission of the State as grantor. Remand of cases of a group of transferees who were not heard, would, therefore, be of no legal consequence, more so, when on this legal question all affected parties have got full opportunity of hearing before the High Court and in this appeal before this Court. Rules of natural justice are to be followed for doing substantial justice and not for completing a mere ritual of hearing without possibility of any change in the decision of the case on merits. In view of the legal position explained by us above, we, therefore, refrain from remanding these cases in exercise of our discretionary powers under Article 136 of the Constitution of India."

35. The aforementioned view that in a case where the facts are admitted and no amount of explanation can change the ultimate result -- the same being a fait accompli, a Division Bench of this Court has in its recent judgment in *Krishna Nand Rai* v. *State of U.P.* held that no purpose would be served in remitting the matter back to the authority for decision afresh after providing opportunity of hearing to the petitioner, inasmuch as the defect was incurable.

36. In the facts of the present case, the petitioner does not dispute the fact that he had been duly served upon with a notice calling upon him to submit an explanation with regard to his disqualification as per terms of the eligibility criteria prescribed under the guidelines contained in the relevant government order. The petitioner has also not disputed the fact that his mother was indeed the owner of a rice mill and accordingly as per terms of the eligibility criteria he was not eligible. It has also not been denied that the declaration made by him in the affidavit filed along with his application while participating in e-tender in this regard was not correct. In view of the aforesaid facts, the contention sought to be raised on behalf of the petitioner that the opportunity granted was not reasonable, is not tenable.

37. We may reiterate that in a case of a mere technical infraction of principles of natural justice where the facts are admitted and undisputed and no prejudice can be demonstrated, there is a considerable case law and literature for the proposition that relief can be refused if the Court thinks that the case of the petitioner is not one of 'real substance' or that there is no substantial possibility of his success or that the result would not be different, even if fresh opportunity is to be granted.

38. It would be in such situation that 'useless formality theory' may be pressed into if it would be reasonable to believe that a fair hearing would make no difference or that grant of a fresh opportunity of hearing would not change the ultimate conclusion to be reached by the decision maker. In such situations, in our view, there would be no legal duty to grant a fresh opportunity of hearing and it may not be necessary to strike down the action and remit the matter back to the authority concerned to take a fresh decision.

39. In our view, every violation of a facet of natural justice may not always lead to the conclusion that order passed is always null and void. The validity of the order is to be tested on the touchstone of 'prejudice' and in a case where the petitioner is not able to demonstrate real likelihood or certainty of prejudice, this Court may refuse to exercise its discretionary jurisdiction to interfere in the matter."

32. In his rejoinder submissions, Mr. Rohatgi urged that the invocation of the useless formality theory is clearly misplaced since the same would have stood attracted only in a situation where the computation of the Gross Global Revenue was free from doubt. Mr. Rohatgi submitted that the respondents have not placed on the record any authoritative regulation or directive of a competent authority which mandates that sales between entities of a group are liable to be excluded. It was submitted that the doctrine of empty formality would have no application in the facts of the present case. It was urged that the contention of the respondents made in this respect is liable to be tested in the factual backdrop of the petitioner having neither been heard by MHI nor having been afforded an opportunity to explain its position. Mr. Rohatgi reiterated the fact that the petitioner was informed of the objection taken to its eligibility under the PLI Scheme only in the meeting of 14 February 2022. Learned senior counsel then referred to the following pertinent observations as made by the Supreme Court in **S.L. Kapoor v. Jagmohan**[12].

> "**17.** Linked with this question is the question whether the failure to observe natural justice does at all matter if the observance of natural justice would have made no difference, the admitted or indisputable facts speaking for themselves. Where on the admitted or indisputable facts only one conclusion is possible and under the law only one penalty is permissible, the court may not issue its writ to compel the observance of natural justice, not because it approves the non-observance of natural justice but because courts do not issue futile writs. But it will be a pernicious principle to apply in other situations where conclusions are controversial, however, slightly, and penalties are discretionary.

[12] (1980) 4 SCC 379

20. In *Annamunthodo* v. *Oilfields Workers' Trade Union* [(1961) 3 All ER 621, 625 (HL)] Lord Denning, in his speech said (at p. 625):

> "Counsel for the respondent Union did suggest that a man could not complain of a failure of natural justice unless he could show that he had been prejudiced by it. Their Lordships cannot accept this suggestion. If a domestic tribunal fails to act in accordance with natural justice, the person affected by their decision can always seek redress in the courts. *It is a prejudice to any man-to be denied justice.*"

24. The matter has also been treated as an application of the general principle that justice should not only be done but should be seen to be done. *Jackson's Natural Justice* (1980 Edn.) contains a very interesting discussion of the subject. He says:

> "The distinction between justice being done and being seen to be done has been emphasised in many cases. . . .
> The requirement that justice should be seen to be done may be regarded as a general principle which in some cases can be satisfied only by the observance of the rules of natural justice or as itself forming one of those rules. Both explanations of the significance of the maxim are found in Lord Widgery, C.J.'s judgment in *R.* v. *Home Secretary* [(1977) 1 WLR 766, 772] , *ex. p. Hosenball*, where after saying that "the principles of natural justice are those fundamental rules, the breach of which will prevent justice from being seen to be done" he went on to describe the maxim as "one of the rules generally accepted in the bundle of the rules making up natural justice".
> It is the recognition of the importance of the requirement that justice is seen to be done that justifies the giving of a remedy to a litigant even when it may be claimed that a decision alleged to be vitiated by a breach of natural justice would still have been reached had a fair hearing been given by an impartial tribunal. The maxim is applicable precisely when the court is concerned not with a case of actual injustice but with the appearance of injustice or possible injustice. In *Altco Ltd.* v. *Sutherland* [(1971) 2 Lloyd's Rep 515] Donaldson, J., said that the court, in deciding whether to interfere where an arbitrator had not given a party a full hearing was not concerned with whether a further hearing would produce a different or the same result. It was important that the parties should not only be given justice, but, as reasonable men, know that they had had justice or "to use the time hallowed phrase" that justice should not only be done

> but be seen to be done. In *R.* v. *Thames Magistrates' Court, ex. p. Polemis* [(1974) 1 WLR 1371], the applicant obtained an order of certiorari to quash his conviction by a stipendiary magistrate on the ground that he had not had sufficient time to prepare his defence. The Divisional Court rejected the argument that, in its discretion, it ought to refuse relief because the applicant had no defence to the charge.
> It is again absolutely basic to our system that justice must not only be done but must manifestly be seen to be done. If justice was so clearly not seen to be done, as on the afternoon in question here, it seems to me that it is no answer to the applicant to say: 'Well, even if the case had been properly conducted, the result would have been the same. That is mixing up doing justice with seeing that justice is done (per Lord Widgery, C.J. at p. 1375)."

> In our view the principles of natural justice know of no exclusionary rule dependent on whether it would have made any difference if natural justice had been observed. The non-observance of natural justice is itself prejudice to any man and proof of prejudice independently of proof of denial of natural justice is unnecessary. It ill comes from a person who has denied justice that the person who has been denied justice is not prejudiced. As we said earlier where on the admitted or indisputable facts only one conclusion is possible and under the law only one penalty is permissible, the court may not issue its writ to compel the observance of natural justice, not because it is not necessary to observe natural justice but because courts do not issue futile writs. We do not agree with the contrary view taken by the Delhi High Court in the judgment under appeal."

33. It was lastly urged that even if it were assumed that a power to debar was inherent in the State when it was entering in the contractual field, that would not detract from the fundamental obligation to comply with the principles of natural justice. Mr. Rohatgi submitted that the respondents in any case could not have travelled beyond the ambit of Paragraph 4 and which restricted the power of blacklisting only to situations where disbursements had come to be made under the PLI Scheme.

34. While both sides have addressed elaborate submissions on the scope of the provisions of the PLI Scheme, the PLI Guidelines framed for its

implementation, the Integrity Pact as well as the Debarment Guidelines framed by the Ministry of Expenditure with respect to the power to blacklist and debar, in the considered opinion of this Court, those contentions pale into insignificance bearing in mind the salient principles enunciated by the Supreme Court in **Patel Engineering** and as reiterated in **Kulja Industries Ltd. v. Western Telecom Project BSN[13].** While the passage of **Patel Engineering** has been extracted hereinabove, it would be apposite to also notice the following pertinent observations made by the Supreme Court in **Kulja**: -

> 16. A literal construction of the provisions of Paras 31 and 32 extracted above would mean that the power to disqualify or blacklist a supplier is available to the purchaser only in the three situations enumerated in Paras 31 and 32 and no other. Any such interpretation would, however, give rise to anomalous results. We say so because in cases where a supplier is found guilty of much graver offences, failures or violations, resulting in much heavier losses and greater detriment to the purchasers in terms of money, reputation or prejudice to public interest may go unpunished simply because all such acts of fraud, misrepresentation or the like have not been specifically enumerated as grounds for blacklisting of the supplier in Paras 31 and 32 of the tender document. That could in our opinion never be the true intention of the purchaser when it stipulated Paras 31 and 32 as conditions of the tender document by which the purchaser has reserved to itself the right to disqualify or blacklist bidders for breach or violation committed by them. If the bidders who commit a breach of a lesser degree could be punished by an order of blacklisting there is no reason why a breach of a more serious nature should go unpunished, be ignored or rendered inconsequential by reason only of an omission of such breach or violation in the text of Paras 31 and 32 of the tender document. Paras 31 and 32 cannot, in that view, be said to be exhaustive; nor is the power to blacklist limited to situations mentioned therein.

[13] (2014) 14 SCC 731

> **17.** That apart, the power to blacklist a contractor whether the contract be for supply of material or equipment or for the execution of any other work whatsoever is in our opinion inherent in the party allotting the contract. There is no need for any such power being specifically conferred by statute or reserved by contractor. That is because "blacklisting" simply signifies a business decision by which the party affected by the breach decides not to enter into any contractual relationship with the party committing the breach. Between two private parties the right to take any such decision is absolute and untrammelled by any constraints whatsoever. The freedom to contract or not to contract is unqualified in the case of private parties. But any such decision is subject to judicial review when the same is taken by the State or any of its instrumentalities. This implies that any such decision will be open to scrutiny not only on the touchstone of the principles of natural justice but also on the doctrine of proportionality. A fair hearing to the party being blacklisted thus becomes an essential precondition for a proper exercise of the power and a valid order of blacklisting made pursuant thereto. The order itself being reasonable, fair and proportionate to the gravity of the offence is similarly examinable by a writ court.

35. Both **Kulja** and **Patel Engineering** and the principles enunciated therein were reiterated in a more recent decision of the Supreme Court in **Medipol Pharmaceutical (India) (P) Ltd. v. Post Graduate Institute of Medical Education & Research**[14]**. Patel Engineering** is an authoritative precedent on the right of the State acting through its agencies and constituents to refuse to deal with or enter into a contract with an entity for sound, plausible, rational and justifiable cause. The Supreme Court in **Patel Engineering** has referred to this power as being a necessary concomitant of the executive power of the State and its entities. If that be the settled position in law and one which was not disputed even by Mr. Rohtagi except to the extent noticed by the Court while recording his submissions, it would

[14] (2021) 11 SCC 339

thus have to be necessarily held that the power to blacklist or debar an entity would be inherently available to be exercised by the State and its organs who may take a principled decision to desist from dealing with an entity for valid reasons. The power "not to deal" when taken on justifiable grounds would thus have to be recognised as an inherent right of the State. This implicit right of the State has been duly recognised both in **Patel Engineering** as well as **Kulja**. In fact, the judgment in **Kulja** assumes greater significance in view of the Supreme Court rejecting the argument that the power to blacklist would stand restricted to the eventualities specifically mentioned in the tender document. This is evident when in **Kulja** their Lordships hold that the power to blacklist would be available to be exercised even in the absence of a statutory or contractual conferment of that power.

36. It would thus be correct to conclude that the respondents would be fully justified to debar or blacklist the petitioner even if there be ambiguity with respect to the conferral of such a power under the PLI Scheme, its PLI Guidelines as well as the Integrity Compliance Clause. The same would also apply notwithstanding the asserted inapplicability of the Debarment Guidelines framed by the Ministry of Expenditure and the General Finance Rules. The Court further notes that in light of it having been found that the power to blacklist or debar inheres in the respondents and is a "necessary concomitant" to its executive power, that would be sufficient to negative the submission of Mr. Rohtagi turning upon Paragraph 4 of the Proforma of Integrity Compliance. It would be pertinent to recall that the first of

Paragraph 4 speaks of the power of the MHI to *"initiate legal action of whatsoever nature"*. If the right to blacklist be liable to be accepted and recognised as an inherent right of the State not to deal with an entity, as we have done, it would unmistakably fall within the scope of *"legal action of whatsoever nature"*.

37. The exercise of this power would, of course necessarily be subject to the singular rider of the action being fair and rational as opposed to whimsical and arbitrary. That since the principle of non-arbitrariness is the fundamental and unbreakable thread which holds together our constitutional fabric. The Constitution eschews arbitrariness in all its hues. It is this fundamental tenet to which the State must be held accountable. That test is met only if the action of the State be rational and justified in law.

38. The principal ground of challenge to the impugned orders was based on the assertion that there was a singular lack of notice to the petitioner with respect to the proposed blacklisting and an opportunity to represent against the impending action. It must at the outset be noticed that the facts narrated hereinabove, unerringly point towards a principled decision having been taken by MHI that the petitioner was ineligible to be extended the benefits under the PLI Scheme. However, and undisputedly, MHI never placed the petitioner on notice of its intention to hold that it was disentitled under the PLI Scheme. The petitioner was neither placed on notice by MHI nor asked to represent against its proposed decision to hold the petitioner as being disqualified under the Scheme. In fact, MHI appears to have taken a decision not only to hold the petitioner as being ineligible for benefits under

the PLI Scheme, but also to debar the petitioner and its group companies from all tenders to be invited by it on account of a perceived submission of incorrect information. The decision of the MHI to the above effect is stated to be embodied in its communication to CESL dated 25 April 2022. That communication refers to a complaint having been received and the eligibility of the petitioner having been "re-examined". Upon re-examination, the Ministry appears to have come to conclude that incorrect information had been tendered by the petitioner and it had thus violated the Integrity Pact Undertaking. That communication, as has been noticed above, was addressed to CESL and appears to have been aimed at preempting the consideration of the tender of JBM Ecolife submitted in connection with the procurement of e-buses. The disqualification communication with respect to JBM Ecolife is dated 26 April 2022.

39. Curiously however any decision that MHI may have taken in this regard was never independently communicated to the petitioner. MHI though duly represented in these proceedings has been brazen enough to not even place its purported decision on the record. IFCI acting as the PMA, while purporting to pass an order on 29 April 2022, refers to a decision taken by the "competent authority" to hold the petitioner disqualified under the Scheme stated to have been taken on 25 April 2022. Undisputedly under the PLI Scheme, the principal decision-making authority was MHI. The Court thus proceeds on the assumption that it was that Ministry which would have taken a decision with respect to the ineligibility of the petitioner. The decision of IFCI, as would be manifest from the aforesaid

recordal of facts, clearly appears to be based on a previous view formed by the MHI.

40. More fundamentally, neither MHI nor IFCI are found to have placed the petitioner independently on notice or afforded it an opportunity to explain its stand prior to 25 April 2022. The Court notes that the respondents allude to a complaint of 11 February 2022 questioning the eligibility of the petitioner to be entitled to benefits under the PLI Scheme. The list of selected applicants was notified on the same date. On the date of publication of that list, the fate of the petitioner appears to have been under re-examination as the respondents have chosen to describe that exercise. On the publication of that list on 11 February 2022, the petitioner appears to have approached the respondents to elicit information for its exclusion. This culminated in a meeting which the petitioner attended on 14 February 2022. It becomes important to note that this was not a meeting formally convened by the respondents to confront the petitioner with the complaint and ask it to respond to the allegations levelled. That meeting appears to have been an outcome of an initiative of the petitioner seeking to gather information in connection with its exclusion from the list of successful applicants which had been published on 11 February 2022. It is in the course of this meeting that the complaint and the issue of intra group sales appears to have been disclosed to the petitioner for the first time. The meeting which was sought by the petitioner cannot possibly be understood or countenanced in law as representing compliance with the principles of natural justice. That meeting was essentially representative of the petitioner seeking to elicit reasons for

its exclusion in the list of successful applicants. The respondents to that extent clearly appear to have wrongly and incorrectly described that instance as constituting a providing of an opportunity of being heard. However, and by the time this meeting was convened, the list of successful applicants had already come to be announced. Assuming that the application of the petitioner did not stand rejected on that date and was being reviewed by the respondents in light of the complaint that had been received, it was incumbent upon the respondents to deal with the contentions which were raised by the petitioner in its representations that were made post the meeting of 14 February 2022. A reading of the order of 29 April 2022 passed by IFCI would clearly establish that it fails to consider or even deal with the response that was submitted by the petitioner.

41. More importantly, even between 14 February 2022 and 25 and 29 April 2022 when MHI and IFCI ultimately came to pass the impugned orders, no notice or opportunity to represent was provided to the petitioner. This despite a specific request to that effect having been made by the petitioner in its communication of 15 February 2022. It would be pertinent to recollect that under the PLI Scheme, IFCI acting as the PMA is obliged process applications, frame recommendations with respect to eligibility of applicants and forward the same to MHI. Under the Scheme, the ultimate authority stands vested in MHI. MHI prior to issuance of the impugned communication of 25 April 2022 never heard or provided an opportunity of hearing to the petitioner. At the cost of being repetitive, the Court notes that

the decision if any taken by that Ministry and which should have been logically addressed to it has not been placed on the record. All that the respondents rely upon is the communication of MHI addressed to CESL and the subsequent order of IFCI dated 29 April 2022 alluding to a decision taken by the former on 25 April 2022. There cannot perhaps be more telling evidence of a failure to comply with the basic tenets of Article 14 and non-adherence to the principles of natural justice.

42. Decades ago, the Supreme Court in **Erusian** had pertinently observed that equality of opportunity should apply to public contracts. It held that while it would be open for a private individual to not contract with an entity, that decision, if taken by the State, would have to be informed by Article 14. The Supreme Court observed that the decision of the State to exclude a person or entity cannot be founded on discrimination. Our jurisprudence on Article 14 since then has travelled beyond the test of discrimination to fairness, equality and the arbitrary exercise of power. For all the aforesaid reasons, the Court finds that the action of the respondents is unreasonable, arbitrary and merits interference on the aforesaid score alone.

43. The Court then proceeds to deal with the "prejudice" argument as canvassed by the respondents. As this Court had held in **JBM Ecolife**, the precept of prejudice was expounded by our Courts bearing in mind that the principles of natural justice are not liable to be viewed in a *"straitjacket"*. Our Courts have consistently held that the rules of natural justice are not tools meant to find fault with State action even if the ultimate result be an

inescapable or irrefutable conclusion. The rules of natural justice fulfill the fundamental constitutional imperative of subserving justice. It is in that context that **S.L. Kapoor** linked it with the issuance of a *"futile writ"*. This Court invoked that doctrine in **JBM Ecolife** in a situation where the conclusion was inevitable, and the invocation of its requirements would have been an empty formality. The Court noted that the disqualification of JBM Ecolife was on account of a provision which was *"self-activating"* and where the issuance of a notice asking that party to proffer an explanation would have been a futile exercise. It is to that extent and in such situations alone that the useless formality operates.

44. To evaluate whether those principles would apply in the facts of the present case, the Court would have to essentially come to the conclusion that the Basic Eligibility Criteria as set forth under the PLI Scheme clearly required the petitioner to exclude revenue represented by intra-group transactions. As would be evident from a perusal of the PLI Scheme as well as the PLI Guidelines framed in connection therewith, there was no unambiguous or unequivocal stipulation which required applicants to make those deductions or adjustments while computing Gross Group Revenue. Neither the PLI Scheme as notified, nor the PLI Guidelines mandated the exclusion of that revenue for the purposes of computing total turnover in clear and unequivocal terms. The Court comes to this conclusion since neither Clause 3.2 of the PLI Scheme nor Clause 4 of the PLI Guidelines while defining Global Group Revenue explicitly mandate the exclusion of intra group sales. Similarly, para 2.16 of the PLI Guidelines while defining

"Global Group Revenue" also merely defines it to be the total revenue of group companies from automotive and auto component manufacturing activity in a given year. The Court thus finds that the definition of Basic Eligibility Criteria as well as the other stipulations of the PLI Scheme referred to above woefully failed to place applicants on notice of a requirement to keep out or deduct that income while quantifying group revenue.

45. The Court also takes into consideration the fact that the respondents have failed to place for its consideration any principles formulated by an authoritative body which mandates the exclusion of that revenue while determining group revenue. The attention of the Court has not been drawn to any industry recognised norm or accounting standard formulated by a competent and statutorily recognised authority which mandated the exclusion of intra group revenue. The applicants were thus left to evaluate for themselves whether the terms of the policy did require an appropriate deduction being made in that respect.

46. The Court also bears in mind the unstinting stand of the petitioner that it was lawfully entitled to take into consideration the revenues generated from sales between companies forming part of the group. It was its consistent stand that the aforesaid revenue was liable to be taken into consideration for the purposes of computation of group revenue. It was specifically asserted that the revenues generated by companies of the group were in connection with independent manufacturing activity which was undertaken by each constituent of the group. It was on the aforesaid basis

that the petitioner asserted that the intra-group sales were not liable to be excluded. The respondents while passing the impugned orders have failed to assign or record any reasons why this assertion was found to be wholly untenable. It becomes pertinent to observe that the test in such a situation, and especially where blacklisting may be an inevitable fallout, cannot be one which rests on a plausible view that may be possibly taken. In a case of debarment or blacklisting and which in turn is based on an allegation of a false or misleading declaration, the decision of the State must meet a more stringent test. In such a situation it must be found that there was a deliberate concealment or a misleading statement made which merited the power of blacklisting being exercised. In order for it to qualify as a deliberate misstatement or misleading declaration it would have to be established that the applicant knowingly and willfully made a false declaration in order to derive benefit. An allegation of a false declaration would not sustain where the stipulations be either ambiguous or open to more than one plausible interpretation. As this Court views the provisions contained in the PLI Scheme and the PLI Guidelines which accompanied that Scheme, it comes to the firm conclusion that there was a singular lack of clarity on this aspect. There was no clear and explicit stipulation which mandated exclusion of intra group sales from the computation of group revenue. In the absence of such a prescription, the Court finds itself unable to hold that the power to blacklist was justified.

47. As observed hereinabove, the argument of the useless formality theory being applicable would have been justified, if it were established that

it was incumbent upon the respondents to exclude sales between entities forming part of a group based on some well recognised and established industry norm or standard. It was imperative for the respondents to have proven that the same was an acknowledged and settled accounting principle which brook no doubt. However, it is significant to note that the impugned orders do not rest on any such standards or principles that may have been formulated by a competent authority. The respondents in the course of their oral submissions also did not rest their case on a normative or well-established principle which required the exclusion of that revenue.

48. It may be lastly observed that the fact that some applicants did exclude such revenue while computing group revenue cannot constitute a factor, which may be considered germane or relevant for the purposes of answering the issue which stands posited. The perception or understanding of a particular applicant, in the absence of a well-accepted norm, would be a wholly unsound principle to adopt while framing an answer to this question. Consequently, and for all the aforesaid reasons it must be held that the useless formality theory has no application in the facts of the present case.

49. Accordingly, the present writ petition is allowed. The impugned orders of 25 and 29 April 2022 are quashed and set aside. The issues with respect to the eligibility of the petitioner under the PLI Scheme and its debarment are kept open to be considered and decided by the respondents afresh and in light of the observations made hereinabove. The Court further directs that any proceedings that the respondents may draw in light of the

liberty accorded above, would have to be compliant with the principles of natural justice. All contentions of respective parties on merits are kept open.

YASHWANT VARMA, J.

AUGUST 08, 2022
rsk/SU

HIGH COURT OF DELHI
सत्यमेव जयते