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

Judgement reserved on : 13.09.2022

% *Judgement pronounced on : 11.10.2022*

\+ **LPA 327/2022, CM Nos. 23025/2022 & 35938/2022**

M/S JBM ECOLIFE MOBILITY PRIVATE LIMITED ... Appellant

Through: Mr Mukul Rohtagi and Mr Sandeep Sethi, Sr. Advs. with Mr Atul Sharma and Mr Sanjay Gupta, Advs.

versus

UNION OF INDIA & ORS. ..... Respondents

Through: Mr N. Venkatraman, ASG with Mr Apoorv Kurup, CGSC and Ms Nidhi Mittal, Advs. for R-1.
Ms Shivani Rawat with Ms Jojongandha Ray, Advs. for R-2.
Dr. Abhishek Manu Singhvi, Sr. Adv. with Mr Gopal Jain, Sr. Adv. with Mr Nalin Kohli, Ms Nandini Gore and Ms Aditi Bhatt, Advs. for R-3.

\+ **LPA 500/2022, CAV 256/2022 & CM Nos.38085-86/2022**

UNION OF INDIA ..... Appellant

Through: Mr N. Venkatraman, ASG with Mr Apoorv Kurup, CGSC and Ms Nidhi Mittal, Advs.

versus

M/S JBM ELECTRIC VEHICLES PVT LTD & ANR.... Respondents

Through: Mr Mukul Rohtagi and Mr Sandeep Sethi, Sr. Advs. with Mr Atul Sharma and Mr Sanjay Gupta, Advs. For R-1.
Mr Kush Chaturvedi with Ms Priyashree Sharma, Advs. for R-2.

CORAM:
HON'BLE MR JUSTICE RAJIV SHAKDHER
HON'BLE MS JUSTICE TARA VITASTA GANJU

[**Physical Court hearing/ Hybrid hearing (as per request)**]

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RAJIV SHAKDHER, J.:

Preface:

1. The above-captioned appeals, though, preferred against two separate judgements passed by the learned Single Judge, are inextricably interconnected; an aspect which will emerge once the broad facts are set forth by us.

1.1 The first appeal i.e., LPA 327/2022 has been preferred by an entity going by the name JBM Ecolife Mobility Pvt. Ltd. [hereafter referred to as "JBM Ecolife"]. This appeal has been lodged against the judgment of the learned Single Judge dated 10.05.2022 passed in WP(C) 6708/2022 [hereafter referred to as the "first impugned judgement"]. *Via* the first impugned judgment, the learned Single Judge dismissed the writ petition of JBM Ecolife.

1.2 The second appeal i.e., LPA 500/2022 has been preferred by the Union of India [hereafter referred to as "UOI"] against the judgment of the learned Single Judge dated 08.08.2022 passed in WP(C) 8047/2022 [hereafter referred to as the "second impugned judgment"]. *Via* this judgment the learned Single Judge quashed two communications i.e., letters

dated 25.04.2022 and 29.04.2022 which had been issued by the Ministry of Heavy Industries [hereafter referred to as "MHI"] and Industrial Finance Corporation of India Ltd. [hereafter referred to as "IFCI Ltd."], respectively. Pertinently, this writ petition had been filed by a sister concern of JBM Ecolife i.e., an entity going by the name JBM Electric Vehicles Pvt. Ltd. [hereafter referred to as "JBM Electric"]. The reason JBM Electric had approached the learned Single Judge for relief, centred around its grievance that it (and by association, all companies which were part of the JBM Group, which included JBM Ecolife) had been debarred from participation in all future tenders and the interconnected Production Linked Incentive Scheme [hereafter referred to as "PLI Scheme"] up until 31.03.2027.

1.3 Thus, the net effect of the second impugned judgment is that the debarment directive issued by MHI on 25.04.2022, which was communicated to JBM Electric by IFCI Ltd. on 29.04.2022, is no longer operable; at least not for the moment. Much will depend, though, upon the outcome of the instant appeals.

1.4. JBM Electric's sister concern i.e., JBM Ecolife had preferred the appeal (i.e., LPA 327/2022) against the dismissal of its writ petition by the learned Single Judge *via* the first impugned judgment at the point in time when debarment directive issued against JBM Electric was in operation. The main thrust of its appeal was that it had been knocked out of the race for being awarded the subject contract, although it had tendered the lowest bid, *albeit*, only on the ground that its sister concern i.e., JBM Electric had been debarred/blacklisted. The learned Single Judge *via* the first impugned judgment had refused to grant any relief to JBM Ecolife, as according to him, its ouster from the race was a "self-activating" eventuality which got

triggered the moment its sister concern i.e., JBM Electric was debarred/blacklisted. In the process the learned Single Judge rejected the pleas advanced on behalf of JBM Ecolife that its ouster was illegal as it violated the basic norms of principles of natural justice i.e., it had neither been served any show cause notice nor was it heard before being subjected to an outcome which had grave consequences.

2. Since the second impugned judgment was rendered while the appeal against the first judgment was pending adjudication, an application (i.e., CM Appl. 35938/2022) was moved by JBM Ecolife praying that its appeal ought to be allowed, having regard to the fact that the debarment directive issued against JBM Electric was no longer operative. On 18.08.2022, we had issued notice in the application and on return of notice, a request was made on behalf of UOI to stand over the appeal i.e., LPA 327/2022, as UOI was intending to file an appeal against the second impugned judgment rendered by the learned Single Judge. The request was acceded to. It is in this backdrop that the second appeal i.e., LPA 500/2022, came to be lodged before us.

3. For completion of the narrative, it would also be relevant to note that since the learned Single Judge had not granted interim relief to JBM Electric in WP(C) 8047/2022, it had preferred an appeal, which was numbered as LPA 357/2022. This appeal was disposed of by us *via* an order dated 27.05.2022.

3.1. The learned Single Judge in paragraph 19 of the second impugned judgment has referred to this aspect of the matter. The operative directions issued by us *via* the order dated 27.05.2022 read thus:

> *"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."

4. At this juncture, it would be relevant to note that JBM Electric was debarred/blacklisted by MHI on account of its alleged failure to disclose that the Global Group Revenue (GGR) figure mentioned in its application preferred under the PLI scheme included revenue earned through intra-group sales. This, according to MHI, violated Clause 4[1] of the Integrity Pact Undertaking given at the time when JBM Electric had applied under the PLI Scheme.

4.1. As per Clause 3.2[2] of the PLI Scheme, the threshold eligibility criteria

[1] **4.** The applicant agrees that if it is found that the applicant has made any incorrect statement on the 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 three 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.

[2] **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 Minimum ₹500 crore.(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	Global Investment of Company or its Group* Company(ies) in fixed assets (gross block) of ₹150 crore.

which an applicant had to meet was a GGR of Rs. 10,000 crores. According to MHI, JBM Electric had incorrectly pegged its GGR at Rs. 10,590.74[3] crores which included intra-group sales worth Rs. 910.54 crores.

4.2. The learned Judge in the second impugned judgment has alluded to the fact that none of the tender documents required the applicants to exclude intra-group sales while reporting their GGR figures. In this context, reference was made by the learned Single Judge to both the PLI Scheme as well as the PLI Guidelines. The learned Single Judge also took into account the definition of GGR given in paragraph 2.16[4] of PLI Guidelines which defined GGR as the total revenue of group companies from automotive and auto component manufacturing activity in a given year.

4.3. The fact that UOI and other official respondents had not drawn his attention to any recognised norm which obtained in the industry or an accounting standard, fortified him in concluding that the allegation made against JBM Electric, that it had made a deliberate misstatement or a misleading declaration, was unsustainable. According to him, in the absence of a clear and explicit stipulation which mandated the exclusion of intra-group sales, the debarment/blacklisting of JBM Electric was unjustified. That said, the learned Single Judge, after quashing the impugned

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*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)

Note: i. Above Eligibility criteria to be met based on audited financial statements for year ending March 31, 2021. ii. An applicant company or its Group company(ies) must satisfy the entire eligibility criteria to be eligible under the scheme.

[3] Although the GGR figure noted in the communication dated 29.04.2022 issued by IFCI Ltd. is Rs.10,590.74 crores, JBM Electric's online application for the PLI Scheme appended with LPA 500/2022 indicates that that the figure is Rs.10,590.75 crores.

[4] **2.16 Global Group Revenue**: Total revenue of the group companies from global operations (from automotive and auto component manufacturing in a given year).

communications dated 25.04.2022 and 29.04.2022, as noticed above, made the following crucial observation in the second impugned judgment:

> *".....**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."*
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> [Emphasis is ours]

5. Therefore, according to us, two principal issues which arise for consideration are:

(i) First, whether debarment/blacklisting of JBM Electric by MHI in the given circumstances was justified?

(ii) Second, if the Court were to hold that MHI was not justified in debarring/blacklisting JBM Electric, what impact it would have on the fate of JBM Ecolife, both concerning the subject tender as well as tenders that MHI will float in the future?

6. Before we get into the nitty-gritty of the arguments advanced before us it may be useful to etch out the broad contours of the case.

7. On 01.04.2015 the Government of India (GOI) framed a scheme for giving a fillip to the manufacture of electric vehicles in India. This scheme came to be known as Faster Adoption and Manufacturing of Electric Vehicles in India (FAME). This scheme was initially valid for two years and was extended from time to time. As of now, it would expire on 31.03.2024.

8. Alongside the FAME Scheme, GOI also notified the PLI Scheme for automotive and auto components. The notification in this behalf was issued

on 23.09.2021. Guidelines for the PLI Scheme were also notified *via* a notification of the same date i.e., 23.09.2021.

8.1. Besides this, on 02.11.2021, the Procurement Policy Division of the Ministry of Finance, UOI issued an Office Memorandum (OM) titled "Guidelines for Debarment of Firms from Bidding".

9. It is in this setting that JBM Electric, on 09.01.2022 submitted its application under the Champion and Component Champion OEM Incentive Scheme. This scheme was floated under the umbrella PLI Scheme.

10. In and about the same time i.e., on 20.01.2022, Convergence Energy Services Limited [hereafter referred to as "CESL"] floated a tender for procurement, operation and maintenance of 5450 electric buses and 135 double-decker electric buses and allied civil, as also electric infrastructure, *albeit*, on gross contract basis [hereafter referred to as the "subject tender"].

10.1 To be noted, CESL is a subsidiary of Energy Efficiency Services Limited [hereafter referred to as "EESL"] which is a joint venture of various public sector undertakings.

11. On the same date i.e., 20.01.2022 IFCI Ltd. through its officer, one Mr Aman Gahoi issued a communication whereby it sought the following information/documents from JBM Electric:

> "*1. Shareholding certificate and latest financials of group companies (FY2020-21), considered in the application for global group revenue and global investment in fixed assets.*
> *2. Define how a particular company is a group company with the help of Tree Diagram (showing relationship between companies and shareholding in those company).*"

12. The information as sought by IFCI Ltd. was furnished by JBM Electric *via* several emails dated 21/22.01.2022.

13. On 10.02.2022 JBM Electric came to know *via* a news report broadcast through a T.V. channel that its application under the PLI Scheme had been accepted.

14. The record would show that by the end of the day i.e., at 23.59 hrs. on 10.02.2022, a complaint had been received by Mr Aman Gahoi of IFCI Ltd. *via* WhatsApp through one Mr Abhishek Goel. The complainant i.e., Mr Abhishek Goel is a Consultant, who, as per Mr Gahoi is employed with a consultancy firm going by the name Finex Advisors. Finex Advisors, according to Mr Gahoi, at the relevant time, was acting as a Consultant for several tenderers. The record would also disclose that it was Mr Goel, who, in the first instance, flagged the objection concerning the inclusion of intra-group sales by JBM Electric in its GGR figure. Although Mr Gahoi claims that the complaint was received by him in the first instance on 10.02.2022, the WhatsApp chat between Mr Gahoi and Mr Goel shows that the issue was raised by him on 07.02.2022, despite which, no perceptible action was taken until 11.02.2022.

15. The record also discloses that in the morning hours of 11.02.2022, there was a telephonic interaction between Mr Gahoi and Mr Goel. The record reveals that Mr Gahoi, thereafter, brought the issue to the notice of one Mr Kunal Naik, DGM, IFCI Ltd., at about 11.00 hrs. on 11.02.2022. Apparently, the matter was thereafter, placed before Mr Rajnesh Singh, Director, MHI and the Joint Secretary, GOI, MHI.

16. The fallout of these meetings was that JBM Electric was excluded (*albeit*, without recourse to it) from the final list published by MHI concerning those applicants whose applications had been approved under the PLI Scheme.

17. This triggered a meeting between the representative of JBM Electric and the officers of IFCI Ltd. on 14.02.2022. It is at this meeting that JBM Electric was informed that its application under the PLI Scheme was rejected as it had wrongly included intra-group sales in its GGR figure and that once intra-group sales were excluded, its GGR would fall below the minimum eligibility threshold of Rs. 10,000 crores.

18. JBM Electric defended its position and in this context, furnished information and its defence *via* communications dated 15.02.2022, 17.02.2022 and 18.02.2022. Besides the said communications, a communication dated 28.02.2022 was also sent, which was suggestive of the fact that if the turnover of other entities in the group was added, its GGR figure would, in any event, be above the prescribed minimum threshold.

19. While JBM Electric's battle regarding the rejection of its application under the PLI Scheme was on, its sister concern i.e., JBM Ecolife, on 15.03.2022, filed its bid against the subject tender published on CESL's e-tender portal. As required, JBM Ecolife submitted its bid in two parts: the first part concerned its technical viability, while the second part related to price.

20. At 08:44 hrs. on 21.03.2022, CESL sent a link *via* e-mail informing the various bidders, including JBM Ecolife, that the price bids would be opened on that date. However, by 11:06 hrs. the position had changed; the bidders were informed by CESL that due to a technical glitch obtaining in the tender portal, the opening of price bids would have to be deferred. It is pertinent to note that on that very date i.e., on 21.03.2022, Joint Secretary, GOI, MHI had, apparently, communicated to EESL that JBM Electric had not met the eligibility criteria under the PLI Scheme.

21. Nearly a month later, i.e., on 25.04.2022, JBM Ecolife was informed by CESL that the financial bids would be opened "in a day or two".

21.1 The record discloses that on the same day i.e., 25.04.2022, CESL received a communication from MHI which *inter alia*, indicated that since JBM Electric had violated the Integrity Pact Undertaking, it had been decided to bar, not only JBM Electric but all its group companies from progressing the tender and future tenders up until 31.03.2027.

22. This, as it appears, triggered the issuance of the communication dated 26.04.2022, which was issued at 11:25 hrs. *Via* this communication CESL, now, directly informed JBM Ecolife that JBM Electric and its group companies had been barred from progressing the subject tender and that this decision was based on the communication dated 25.04.2022 received by it from MHI. Notably, the decision taken by MHI was not enclosed by CESL in its communication dated 26.04.2022.

22.1 The aforesaid communication was followed by another communication of even date i.e., 26.04.2022. This communication was sent at 12:55 hrs. *Via* this communication, JBM Ecolife was tersely informed by CESL that its bid had been found "non-responsive for technical evaluation." Within the next five minutes i.e., at 13:00 hrs. CESL opened the financial bids concerning the subject tender.

23. Being pushed to the corner, JBM Ecolife moved the writ court the very next day i.e., 27.04.2022. By this writ petition i.e., WP(C) 6708/2022 JBM Ecolife laid a challenge to the two communications dated 26.04.2022 served by CESL on JBM Ecolife.

24. Curiously, JBM Electric was informed by IFCI Ltd only on 29.04.2022 that it had not only been found ineligible under the PLI Scheme

but had also been debarred from future tenders along with its group companies.

25. As noticed right at the outset, JBM Ecolife failed to persuade the learned Single Judge that it had wrongly been ousted from the subject tender. Thus, its writ action which was dismissed *via* the first impugned judgment, resulted in JBM Ecolife preferring an appeal i.e., LPA 327/2022.

26. This appeal was lodged on 11.05.2022. Almost simultaneously i.e., on 12.05.2022, JBM Electric filed a separate writ action before the learned Single Judge i.e., WP(C) 8047/2022, having wisened up to the fact that its failure to approach the Court [notwithstanding the fact that it had not been issued a show cause notice before being debarred/blacklisted by MHI], was impacting the commercial cause and business interest of its sister concerns including JBM Ecolife. In this writ petition i.e., WP(C) 8047/2022, JBM Electric, as noticed hereinabove, impugned the communications dated 25.04.2022 and 29.04.2022 issued by MHI and IFCI Ltd., respectively.

27. JBM Ecolife's appeal i.e., LPA 327/2022, which came to be listed before a coordinate bench on 13.05.2022, was transferred to the Bench comprising one of us i.e., Rajiv Shakdher, J. on 17.05.2022. On that date, while issuing notice in the appeal, it was indicated that the next steps taken in the matter would be subject to the final outcome of the appeal.

28. The record would also show, something that we have noticed above, that in JBM Electric's writ petition i.e., WP(C) 8047/2022, although notice was issued by the learned Single Judge on 13.05.2022, no interim order was passed. This led to JBM Electric preferring an appeal, which was disposed of on 27.05.2022 with certain directions, the gist of which is culled out in paragraph 3.1. above.

29. JBM Electric's writ petition i.e., WP(C) 8047/2022 was disposed of by the learned Single Judge *via* the second impugned judgment. This time around, since the learned Single Judge ruled in favour of the writ petitioner i.e., JBM Electric, UOI decided to prefer an appeal. This is how UOI's appeal i.e., LPA 500/2022, came to be listed before us on 01.09.2022, upon being transferred by a coordinate bench *via* order dated 31.08.2022.

30. Because of the interconnection between the appeals, both causes were heard together.

Submissions of Counsels:

31. Submissions on behalf of UOI were advanced by Mr N. Venkatraman, learned Additional Solicitor General (ASG), while arguments on behalf of JBM Electric and JBM Ecolife were put forth by two Senior Advocates i.e., Mr Mukul Rohatgi and Mr Sandeep Sethi.

32. The submissions of Mr Venkataraman can, broadly, be paraphrased as follows :

32.1 Upon an inquiry being conducted pursuant to a complaint received by the Project Management Authority (PMA), i.e., IFCI Ltd., it was found that JBM Electric had "surreptitiously" included intra-group sales transaction within its GGR figure in contravention of Clause 3.2 of the PLI Scheme and Clause 2.1 of the PLI Guidelines.

32.2 The application filed by JBM Electric disclosed that it had achieved a GGR of Rs.10,590.75 crores. What was not disclosed was that it contained intra-group sales worth Rs.910.54 crores. Once this figure was adjusted, JBM Electric's GGR would fall below the minimum prescribed eligibility threshold of Rs.10,000 crores. This was an aspect which was deliberately kept under wraps by JBM Electric while filing its application under the PLI

Scheme.

32.3 IFCI Ltd. in its capacity as a Project Management Agency (PMA) had brought the aforesaid aspect to the notice of the representative of JBM Electric at a meeting convened on 14.02.2022. JBM Electric, on its part, had sought to defend its position *via* representations made through e-mails dated 15.02.2022 and 17.02.2022. Since JBM Electric had made a false declaration concerning its GGR, the provisions of Clause 4 of the Integrity Pact/Undertaking were triggered and a decision was taken by MHI to debar/blacklist JBM Electric and its sister concerns/group companies. This decision was taken by MHI, which was communicated to CESL on 25.04.2022. CESL, on its part, communicated MHI's decision to JBM Ecolife, the sister concern of JBM Electric, on 26.04.2022. IFCI Ltd. communicated the decision to JBM Electric on 29.04.2022.

32.4 There can be no doubt that JBM Electric was required to exclude intra-group sales while furnishing the GGR figure. This is a conclusion that one could reach upon a plain reading of the definition of GGR given in Clause 2.16 of the PLI Guidelines. The definition, in no uncertain terms, provides that GGR is concerned with the "total revenue of the group companies from global operations." The expression "global operations" unmistakably points to such transactions which are undertaken by the applicant with third parties.

32.5 Furthermore, the well-established accounting standards/principles commend the exclusion of intra-group sales; an aspect *qua* which knowledge can be attributed to JBM Electric, having regard to the fact that its application under the PLI Scheme was filed by its Chief Financial Officer, one Mr Vivek Gupta.

32.6 The inclusion of intra-group sales was not without reason as JBM Electric, which had applied under the PLI Scheme, had zero revenue from automotive and/or auto component manufacturing; besides the fact that it had zero net worth as on 31.03.2021.

32.7 The exclusion of intra-group sales is necessary as it makes adjustments against the "double counting" of sales made by JBM Electric to its sister concern(s) within the JBM Group.

32.8. This is an aspect which emerges upon a plain reading of the Guidance Note concerning Consolidated Financial Statements issued by the Institute of Chartered Accountants of India [hereafter referred to as "ICAI"] and Accounting Standard [AS] 21.

32.9. The submission made on behalf of JBM Electric based on AS110 that intra-group sales need to be excluded only if there is a parent/subsidiary relationship between entities is misconceived as the said AS does not preclude the application of AS 21 while preparing consolidated financial statements of sister concerns which form part of a business group.

32.10 If this principle is not applied, a business group, which seeks to avail of loans, subsidies and other benefits, would gain an unfair advantage as it could inflate its revenue figures.

32.11 UOI cannot permit the subsistence of a non-level playing field when it, *inter alia*, involves the disbursal of public funds.

32.12 The other submission advanced on behalf of JBM Electric that debarment/blacklisting could be ordered only if the applicant had availed of the benefit under the PLI Scheme is erroneous for the reason that if a false declaration was made, as it is contended on behalf of UOI, the consequences should be the same, whether or not the applicant succeeded in its attempt to

secure the desired benefits.

32.13 Given the aforesaid submissions, it is clear that the infraction committed by JBM Electric of including intra-group sales while calculating GGR is not in dispute. Therefore, given this admitted fact, the learned Single Judge ought not to have set aside the impugned communications. This is a case where the learned Single Judge had issued a futile writ as the result even after remand would be no different.

32.14 The government i.e., MHI has an inherent right to debar entities, even if there was no express stipulation provided in the tender. There are several cases where the courts have upheld the debarment of entities where incorrect information was provided or vital information was withheld.

32.15 The MHI, as a matter of procedure, could delegate the task of receiving representations to another entity before taking a decision on the applications filed under the PLI Scheme.

32.16 In support of the aforesaid submissions, reliance was placed on the following judgments :

(i) ***Amit Kumar v. State of U.P.*** AIR 2021 (NOC 616) 234

(ii) ***James Edward Jeffs & Ors. v. New Zealand Diary Production and Marketing Board*** (1967) 1 AC 551.

(iii) ***Patel Engg. Ltd. V. Union of India*** (2012) 11 SCC 257

(iv) ***Otik Hotels & Resorts Pvt. Ltd. V. Indian Railway Catering & Tourism Corporation Ltd.*** (2010) 169 DLT 459

(v) ***Centurion Laboratories (Division of Centurion Remedies Pvt. Ltd.) v. State of Kerala*** AIR (2021) (NOC 36) (14)

(vi) ***Techno Precision Engineers Pvt. Ltd. V. Western Coalfields Ltd.*** (2014) 2 AIR Bom R 511

33. Although, Dr. Abhishek Manu Singhvi, learned Senior Counsel had joined proceedings *via* V.C. on behalf of TATA Motors Ltd. [TML]; no separate oral submissions were advanced by him. Apparently, TML seeks to ride alongside UOI, whose stand has been articulated by Mr Venkataraman.

33.1 The record shows that in LPA No.327/2022, TML has filed a reply which takes the same position that has been broadly advanced by Mr Venkataraman *albeit*, with some greater emphasis on certain aspects that have already been touched upon on behalf of UOI. This approach stands to reason as TML is hopeful of securing the subject contract in case JBM Ecolife were to be excluded from the race, provided it is declared as the next lowest bidder. As noticed above, JBM Ecolife has asserted before us that it is the lowest bidder and has been ousted from the race for securing the subject tender on extraneous grounds.

33.2 We may note that TML has also made a claim that JBM Ecolife's bid may get impacted if JBM Electric's application under the PLI Scheme stands rejected.

34. On the other hand, Messrs Rohatgi and Sethi made the following submissions on behalf of JBM Electric and JBM Ecolife.

34.1. The application under the PLI Scheme was an online application which had limited fields. Therefore, the steps that the applicant [in this case, JBM Electric] was required to take were simply the following:

(i) In the first instance, the applicant was to identify group companies as defined in the PLI Scheme.

(ii) The next step involved crystalizing the revenue which each of the companies falling in the group had earned from manufacturing activity.

(iii) In arriving at the GGR, the applicant was required to add up the

revenue earned by each of the companies which formed part of the group from manufacturing activities.

34.2 There was no indication whatsoever in the PLI Scheme, PLI Guidelines and/or FAQs that the applicant(s) was/were required to exclude intra-group sales while framing up its/their GGR figure.

34.3 There was no misdeclaration as alleged or at all. JBM Electric had not only furnished an annual report of its holding company but had also submitted duly audited financial statements of its group companies in support of the GGR figure mentioned in the application filed under the PLI Scheme. The self-certification of the revenue from the group companies was also filed along with the application.

34.4 The financial statements of its group companies [that were submitted by JBM Electric] were aligned with the provisions of AS 24 which requires disclosure of all "related party" transactions. The related party transactions are thoroughly examined by statutory auditors and also form part of the notes to the accounts, which are included in the concerned balance sheets. Therefore, to even suggest that intra-group sales were surreptitiously added to the GGR figure is far from true.

34.5 The allegation made by UOI, based on the chart submitted by JBM Electric along with its e-mail dated 15.02.2022, that there has been double or even triple accounting of sales is baseless, apart from the fact that there was no attempt to mislead. It is required to be emphasised that each group company manufactures different components according to its core competency. Once a product is manufactured by one company and sold to another company within the same group, the latter company makes a value addition which changes the nature of the product before it is sold to a third

party. The transactions between two or three group companies are on an arm's length basis. Thus, while calculating GGR under the PLI Scheme, JBM Electric did not take into account trading/input sales. It only took into account revenue which was derived by a company within the group from its manufacturing activity. This aspect is recognized by PLI Scheme as is evident from a perusal of the definition of "manufacturing" set out in Clause 2.21 of the said scheme.

34.6 Since the product sold by a company to another within the same group forms the raw material for the latter, the value addition made by the purchasing company before it is sold to a third party makes out a case of inclusion of both intra-group sales as well as the sales made to third parties while arriving at the GGR figure. As adverted to above, both sale values were rightly included in GGR as they were derived from independent activities concerning the manufacture of automotive and/or auto components.

34.7 The guidance note and AS 21 is wrongly been relied upon by UOI to justify its stand that a false declaration concerning GGR had been made by JBM Electric. It requires to be noticed that while there is a reference to the alleged wrongful inclusion of intra-group sales by JBM Electric while arriving at GGR, there is no averment whatsoever in the pleadings concerning the Guidance Note or AS 21.

34.8 The reliance on Guidance Note and AS 21 was made in the course of arguments, *albeit*, across the bar, before the learned Single Judge. That said, the Guidance Note on which reliance is placed by UOI caters to specific situations i.e., for instance, if financial information is sought for use in Initial Public Offerings (IPOs), demergers, takeovers, etc. In such situations,

while preparing combined financial statements, it is advised that the same principle should be followed as those which apply to consolidated financial statements. In other words, when combined financial statements are prepared, *inter alia*, intra-group transactions and profits or losses should be excluded. Thus, the guidance note, apart from being recommendatory, has no general application in all situations, which will include a situation, which arose in the instant case, i.e., an application being preferred under the PLI Scheme.

34.9 Likewise, AS 21 has no applicability to the instant case. AS 21 concerns principles to be adopted while preparing consolidated financial statements. JBM Electric, as is evident, was required to place on record its GGR and not financial statements. The objective with which AS 21 has been framed is to provide information about the parent/holding company and its subsidiaries as a single economic entity. The emphasis is, thus, on economic resources controlled by a group.

34.10 PLI Scheme, on the other hand, was framed with a different objective and therefore, the GGR figure was sought to assess the applicant's manufacturing capability. It is keeping this in mind, that the definition of "GGR" is provided in Clause 3.2 of the PLI Scheme. Therefore, according to JBM Electric, it rightly included revenue earned by its group companies, *albeit*, from manufacturing activities, both, on account of sales carried out within the group and those that were carried out with third parties falling outside the group.

34.11 The allegation that JBM Electric had made a false declaration is utterly unsustainable for two reasons.

(i) First, as submitted above, the documents filed by JBM Electric

included the intra-group sales transactions. IFCI Ltd. which was responsible for evaluating and scrutinizing the documents submitted by applicants had found no irregularity or inaccuracy in the contents of the application filed on behalf of JBM Electric.

(ii) Second, a complaint was received by Mr Gahoi of IFCI Ltd., which was based on documents that were already available with IFCI Ltd.

34.12 Therefore, the decision taken to reject JBM Electric's application was an afterthought which was triggered by a complaint lodged at the nth hour by someone who had no locus to intercede in the evaluatory process.

34.13 The record would show that Mr Gahoi of IFCI Ltd. had received the complaint *via* WhatsApp at 23:59 hrs. on 10.02.2022 which was a day prior to when the list of applicants who had been declared successful under the PLI Scheme was required to be published. It is obvious that vital information was being leaked by Mr Gahoi or somebody in his office to third parties who were interested in derailing JBM Electric's application preferred under the PLI Scheme. The action of, both, UOI and IFCI Ltd. smacks of *malafides*.

34.14 The complaint ought not to have been entertained and instead JBM Electric's name should have been included in the list published by MHI concerning those applicants who were found eligible for grant of benefits under the PLI Scheme.

Analysis and Reasons:

35. Having examined the record and heard the counsel for the parties in support of their respective cases, as alluded to above, there are two broad issues which arise for our consideration.

(i) First, whether MHI was justified, in the given facts and

circumstances, to straightaway debar/blacklist JBM Electric.

(ii) Second, if we were to find that MHI's action is not justified, how would it impact the fate of JBM Ecolife, which stood excluded from the race to win the subject tender because its group company i.e., JBM Electric had been debarred/blacklisted.

36. Insofar as the first issue is concerned, it is the common case of parties that JBM Electric had pegged its GGR at Rs.10,540.75 crores and that this figure, although above the minimum prescribed threshold which was set at Rs.10,000 crores, included intra-group sales transactions amounting to Rs.910.54 crores. Therefore, if the intra-group sales transactions are excluded, as is contended on behalf of UOI, JBM Electric's GGR would fall below the minimum threshold i.e., Rs.10,000 crores.

36.1. Thus, while the aforesaid facts are not in dispute, what contesting parties wrangle about is, one, whether there was any obligation cast on JBM Electric to exclude intra-group sales and, two, whether, in the given circumstances, the inclusion of intra-group sales would tantamount to misrepresentation/misdeclaration, leading without more, to blacklisting/debarment.

37. The argument advanced on behalf of UOI that JBM Electric was duty-bound to exclude intra-group sales, is based on a rather tenuous and/or amorphous plea. This plea, in effect, boils down to the argument that anyone, who is well-versed in the preparation of financial statements and submission of information based on such statements, should have known that GGR figure could not have included intra-group sales.

38. Before we examine this contention further, it would be relevant to note what is not in dispute; only to lend a certain perspective to the

submissions advanced before us on this count.

38.1 Notably, the aforesaid stand articulated on behalf of UOI, cannot derogate from the position that the audited financial statements submitted by JBM Electric adverted to related party transactions. Pertinently, in the course of the oral arguments, we heard no submission made on behalf of UOI denying this stand which was explicitly taken on behalf of JBM Electric.

38.2 Therefore, once the material based on which GGR was calculated, was placed by JBM Electric for consideration and evaluation by the PMA i.e., IFCI Ltd., it becomes evident that the financial expert who advised JBM Electric had a different understanding of how GGR had to be calculated.

39. UOI has asserted that there is only one way of understanding the purport, scope and ambit of what constitutes GGR. This argument is founded on the approach recommended by ICAI while preparing combined financial statements. It is no one's case, least of all UOI's, that JBM Electric was called upon to draw combined financial statements of all entities which formed part of the group. Instead, what has emerged is that JBM Electric was required to, *inter alia*, provide the revenue earned by each of the companies that formed part of the group which in turn was derived from manufacturing automotive and auto components. The summation of the revenues earned by each entity in the group was required to be given as GGR.

40. Insofar as the "Guidance Note on Combined and Carve-out Financial Statements" issued by ICAI is concerned, on which UOI has placed reliance, the following clauses shed light on the scope and ambit of the said Guidance Note:

*"**Introduction***

1. Generally, consolidated financial statements of an entity are required to be presented under the relevant legal or regulatory requirements. In India, these requirements are met by presenting consolidated financial statements prepared under the applicable Accounting Standards.

2. There may be occasions such as take-overs of entities and/or divisions/segments/businesses, demergers, spin-offs, initial public offerings, etc. where specific financial information is required for part or parts of entities which may or may not be part of a group. Similarly, group financials may be required for group loan arrangements. The term 'group', in such cases, for the purpose of this Guidance Note may include the entities and/or divisions/segments/businesses which are being combined as per the terms of the loan arrangement. In the absence of control, preparation of consolidated financial statements would not be appropriate. In such cases, as well as to present relevant combined financial information of part or parts of one or more entities, combined financial statements may be prepared….

xxx xxx xxx

Objective

6. This Guidance Note provides the meaning of combined/carve-out financial statements, indicative situations in which these may be required to be prepared and procedure for preparation of the same and required disclosures.

Scope

7. This Guidance Note applies in the preparation and presentation of combined/carve-out financial statements.

8. This Guidance Note should not be construed to be applicable to the general purpose financial statements as the combined/carve-out financial statements are prepared for specific purposes and, therefore, are 'special purpose financial statements'.

xxx xxx xxx

Definitions

9. The following terms are used in the Guidance Note with the meanings specified :

xxx xxx xxx

Combined Financial Statements : *Combined financial statements are the financial statements that present the combined historical financial information of combining businesses that do not comprise a group for which the consolidated financial statements can be prepared.*

xxx xxx xxx

Circumstances in which Combined/Carve-out Financial Statements may be prepared

11. Combined financial statements can be prepared in cases where:

a) two or more entities are combined in their entirety; or

xxx xxx xxx

Preparation of Combined Financial Statements

Procedure for preparation of combined financial statements for two or more entities

14. The guidance given in paragraphs 15 and 16 is applicable for preparation of combined financial statements for combining businesses of two or more entities in their entirety.

15. The procedure for preparing combined financial statements of the combining entities is the same as that for consolidated financial statements as per the applicable Accounting Standards. Accordingly, when combined financial statements are prepared, intra-group transactions and profits or losses should be eliminated, and non-controlling interests, foreign operations, different financial reporting periods, accounting policies or income taxes should be treated in the same manner as in consolidated financial statements prepared under the applicable Accounting Standards.

xxx xxx xxx"

40.1 A perusal of the clauses of the Guidance Note would show that where consolidated financial statements are not available and financial information

is required in certain situations, such as the takeover of entities, demergers, spin-offs or IPOs concerning entities which may or may not form part of the group—such information, if sought, can be presented as a combined financial statement or carve-out financial statements.

41. As noted above, no such obligation was cast on the applicants while filing their applications under the PLI Scheme. The information that was sought *via* the online application was under the following heads :

(i) Name of the company.

(ii) Registered address.

(iii) Registration number.

(iv) Relationship with the group company.

(v) Revenue from automotive and/or auto component manufacturing (for existing automotive manufacturing company). This was the information to be given for FY 2020-2021 (Rs. in crores).

(vi) Investment in fixed assets (gross block) (for existing automotive manufacturing company) as on 31.03.2021.

(vii) Net worth (for new non-automotive investment company) (Rs. in crores).

41.1 None of these columns even remotely indicated that revenue earned through intra-group sales had to be excluded.

42. Likewise, AS 21, which is also relied upon by UOI, has very specific objective criteria i.e., preparation and presentation of consolidated financial statements, which are used by parent/holding companies to provide financial information about the economic activities of its group. Clause 16 of AS 21, on which reliance has been placed by UOI, would have to be viewed in the

light of the objective and the scope outlined in AS 21. The relevant parts of AS 21 are extracted hereafter:

> ***"Objective***
> *The objective of this Standard is to lay down principles and procedures for preparation and presentation of consolidated financial statements. Consolidated financial statements are presented by a parent (also known as holding enterprise) to provide financial information about the economic activities of its group. These statements are intended to present financial information about a parent and its subsidiary(ies) as a single economic entity to show the economic resources controlled by the group, the obligations of the group and results the group achieves with its resources.*
> ***Scope***
> *1. This Standard should be applied in the preparation and presentation of consolidated financial statements for a group of enterprises under the control of a parent.*
> *2. This Standard should also be applied in accounting for investments in subsidiaries in the separate financial statements of a parent."*
> ***xxx xxx xxx***
> *"16. Intragroup balances and intragroup transactions and resulting unrealised profits should be eliminated in full. Unrealised losses resulting from intragroup transactions should also be eliminated unless cost cannot be recovered."*

42.1 Clearly, the subject Guidance Note had not been made part of the format application form evolved for those seeking to apply the PLI Scheme, even by way of reference. The subject Guidance Note, in particular, Clause 16, could have been relied upon by UOI had they sought a combined financial statement of all constituents of the applicant group [in this case, the JBM Group]. The reference to the consolidated financial statement [as per applicable accounting standard i.e., AS 21] would have helped the cause of UOI had the Guidance Note been made applicable to applications submitted under the PLI Scheme.

42.2 The intrinsic evidence available is suggestive of the fact that IFCI Ltd., on evaluation of the application along with the material furnished by JBM Electric, had found no irregularity in the calculation of GGR.

42.3 IFCI Ltd. is a financial institution having a bevvy of accounting and financial experts who would have flagged the issue concerning the inclusion of intra-group sales if, according to it, an applicant, while calculating its GGR, ought not to have included intra-group sales. Evidently, this was not the understanding of IFCI Ltd till it was egged on by a rank outsider.

43. The submission of Mr Venkataraman that the onus for disclosing the inclusion of intra-group sales could not be shifted to the UOI, misses two crucial points. First, this argument could have been sustained if there was an explicit requirement to exclude intra-group sales while calculating GGR. Second, the UOI through the PMA i.e., IFCI Ltd. had sought relevant material [i.e., financial statements of group companies] from which the information concerning revenue earned by each one of the constituents for FY 2020-2021 through activities involving the manufacture of automotives or auto components was ultimately extracted. As alluded to above, the audited financial statements, according to JBM Electric, adverted to related party transactions and, therefore, information concerning intra-group sales transactions was always available with UOI's financial evaluator i.e., IFCI Ltd.

44. This brings us to the second aspect which is, whether JBM Electric indulged in misrepresentation or misdeclaration in submitting the GGR figure. The answer to this poser lies in the facts adverted to hereinabove. There is no denial of the fact that the financial statement of each of the constituents was submitted by JBM Electric along with its application form

filed under the PLI Scheme. In any event, even before the issuance of the orders impugned in the writ petitions, the financial statements of the JBM group constituents were furnished along with emails dated 21.01.2022 and 22.01.2022.

44.1. JBM Electric, as advised, it appears, verily believed that intra-group sales could be included in arriving at GGR. JBM Electric's stand is that what they have included in its intra-group sales transaction is only the revenue component and not the trading/input sales. It has also been argued that each of such constituents is independently carrying out its manufacturing activity and the product manufactured by one group company which is bought by another constituent of the group is acquired as raw material, which once worked upon, morphs into a new product before it is sold to an unconnected third party/customer. The purchasing constituent company, thus, makes a value addition before offloading the product to an unconnected third party/customer. Therefore, the contention advanced on behalf of JBM Electric is that it had rightly included intra-group sales while calculating the GGR.

45. Therefore, in our view, even if we were to assume, for the sake of argument, that UOI is right in its contention that intra-group sales ought not to have been included while arriving at the GGR figure, it certainly is not a case of misrepresentation or false declaration.

45.1 At worst, from the point of view of JBM Electric, it would be a case of misconception. If that is the position, we are of the opinion that MHI could not have straightaway debarred/blacklisted JBM Electric without issuing a proper show-cause notice and calling upon it to explain its position.

46. We are also not impressed with the submission made on behalf of

UOI that since at the meeting held on 14.02.2022 between the representatives of IFCI Ltd. and those of JBM Electric, the basis for rejecting the application had been brought to the fore, the rudiments of principles of justice stood fulfilled, for the reason that the principles of natural justice are founded on the well accepted universal norm that justice is not only done but should also manifestly seen to be done.

46.1 Though, principles of natural justice do not lie in a straight jacket and in their application [depending on the kind of inquiry and the subject matter which is being inquired into], a certain amount of flexibility may have to be factored in, it still does not efface the right of the affected party to insist that it ought to be put to notice both as regards the charge levelled against it and the possible penalty that would follow if the charge was proved.

46.2 This principle would apply with greater force where the penalty imposed could lead to grave civil and criminal consequences. Blacklisting/debarment is a grave civil consequence for a business entity. It leads to a loss of reputation, goodwill and trust in business circles; which is why, even when the period of debarment/blacklisting is over, the aggrieved party continues to litigate only to defend its reputation and goodwill.

47. Thus, for the very same reasons, we are not persuaded to accept the submission advanced on behalf of UOI that the learned Single Judge had issued a futile writ, as on remand the result would be no different. This submission of UOI is premised on the argument that there is no dispute concerning the fact that JBM Electric had factored in intra-group sales while calculating the GGR.

48. To appreciate this submission, one would have to examine the contours of Clause 4 of the Integrity Undertaking Pact. For the sake of

convenience, the same is extracted hereafter:

> ***"4.*** *The applicant agrees that if it is found that the applicant has made any incorrect statement on the 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 three 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."*

48.1 A careful perusal of the aforementioned clause would show that it can be read in two parts and, perhaps, in two ways. The first part provides that where MHI concludes that an incorrect statement has been made by an applicant, it has various options available with it, which include closure or rejection of the application and initiation of legal action "of whatsoever nature". The second part of the very same clause provides that if MHI has disbursed incentives under the PLI Scheme [based obviously on the statements made by the applicant], which are found to be incorrect, MHI has a right to seek its recovery along with interest calculated at three years at SBI MCLR prevailing on the date of disbursement; compounded annually. In addition to recovery of the incentives along with interest, MHI is also empowered to blacklist the applicant and initiate legal action, of whatsoever nature, *albeit*, at its sole discretion.

48.2 Therefore, what emerges is that MHI has a slew of options available to it once it concludes that an incorrect statement has been made in an application filed for obtaining benefits under the PLI Scheme.

48.3 Mr Venkatraman's argument that whether or not incentives under the PLI Scheme are disbursed, MHI has the power to blacklist, is one way of

looking at the clause. The other way of interpreting the clause [an interpretation espoused by Messrs Rohatgi and Sethi] is that the punishment of blacklisting could be imposed on a delinquent applicant only if disbursal of incentives under the PLI Scheme takes place as such an eventuality would have caused loss to the public exchequer.

48.4 We will, for the moment, accept the construction placed on Clause 4 by Mr Venkatraman. In other words, even when incentives under the PLI Scheme have not been disbursed, but the application is closed or rejected by MHI because of an incorrect statement made therein, MHI would not be denuded of its power to blacklist an applicant. That said, blacklisting/debarment is clearly one of the very many options available to MHI. It is precisely for this reason that MHI needed to issue a show cause notice to JBM Electric which would not only advert to the charge levelled against it but also to the penalty it proposed to impose on JBM Electric. It is quite possible that after according a hearing to its authorized representative, it could conclude that this was a case in which JBM Electric should be blacklisted/debarred. It is also possible that after hearing the authorized representative of JBM Electric and examining the material on record, even if it chose to impose the penalty of blacklisting, the period could be lesser than that which is indicated in the impugned communication. There are, thus, a whole host of options which are available to MHI.

48.5 The MHI, however, by virtue of its decision to debar/blacklist JBM Electric, has thrown to the wind every known principle of natural justice. The competent authority needed to bear in mind, if nothing else, that JBM Electric, which, according to it, is the delinquent applicant, needed to be heard before a decision was reached as to the penalty imposed on it on

account of the alleged infraction.

49. Therefore, according to us, the impugned communications dated 25.04.2022 and 29.04.2022 issued by MHI and IFCI Ltd. respectively, have been correctly quashed by the learned Single Judge *via* the second impugned judgement.

50. This brings us to the connected issue, which is, what would be the fate of JBM Ecolife.

51. There is very little doubt in our minds that the first impugned judgment was founded on the fact that since JBM Electric had been debarred/blacklisted, Clause 16 of the Guidelines on Debarment of Firms kicked-in. To be noted, the aforementioned guidelines were issued under the Office Memorandum dated 02.11.2021 issued by Government of India, Department of Expenditure**,** Ministry of Finance, Procurement Policy Division.

51.1. The following observations made in paragraph 62 of the first impugned judgment make this amply clear :

> *"62. Having noticed the principles that would govern, this would be an appropriate stage to revert to the facts of the present case. As noticed hereinabove, the impugned action is based principally on the debarment and blacklisting of the allied firm/sister concern of the petitioner-JBM Electric. The orders of 25 and 29 April 2022 carry an unambiguous command to debar JBM Electric as well as all its group companies. Both JBM Electric and JBM Ecolife are wholly owned subsidiaries of JBM Auto. The Court has already noticed the shareholding structure of the two companies as well as the aspect of commonality of its key managerial personnel. The moment JBM Electric came to be debarred, all related entities and group companies were also rendered ineligible from participating in tender proceedings initiated by MHI or other entities connected with the implementation of projects being overseen and administered by it. As has been observed in the preceding paragraphs of this decision, the provisions engrafted in the Guidelines envisage a "self-activating" debarment the moment an*

allied firm/sister concern comes to be blacklisted. The disqualification of the petitioner was thus, an inevitable fallout, an inescapable consequence. Regard must also be had to the fact that no fruitful purpose could have been possibly served by the second respondent placing the petitioner on notice. This since it would have been clearly beyond its province to examine or consider any challenge that the petitioner may have taken or urged with respect to the order of 29 April 2022. The Court, in the facts of the present case, thus finds that while the petitioner may not have been afforded an opportunity of hearing, no prejudice stood caused to it. A notice to the petitioner prior to the issuance of the impugned communication would have thus clearly been an empty formality."

52. Since, the impugned communications dated 25.04.2022 and 29.04.2022 issued by MHI and IFCI Ltd. respectively, concerning debarment of JBM Electric and group companies have been quashed by the learned Single Judge *via* the second impugned judgment which has been sustained by us, the logical sequitur would be that the first impugned judgment would have to be set aside.

52.1 We may also take note of the fact that when LPA No.357/2022 was disposed of at the hearing held on 23.05.2022, we were informed by counsel for UOI/MHI, based on instructions, that the debarment of JBM Electric was limited to tenders issued by MHI and not with regard to tenders issued by other ministries and departments of GOI.

53. Before we conclude, we intend to briefly deal with the judgements cited on behalf of UOI.

54. The first in line is the judgement of the Allahabad High Court in the matter of ***Amit Kumar v State of U.P. and Another*** ;(2020) ALR 290. This was a case where the petitioner had approached the Court for relief *inter alia*, on the ground that he had been permanently blacklisted from applying for tenders issued by the Department of Food and Civil Supplies, Uttar

Pradesh. It was contended that the impugned action was violative of principles of natural justice and more particularly because the impugned action had been taken recourse to without affording reasonable opportunity to the petitioner.

54.1. The reason the impugned action had been taken against the petitioner was, that contrary to the guidelines issued for the award of a contract which stipulated that no close relative should be a wholesale dealer or *Aarhatiya*, the petitioner had bid for the subject contract, knowing fully well that his mother was an owner of rice mill.

54.2. It is in this context that the Court, after noticing the judgement of the Supreme Court in ***Kulja Industries Ltd v Chief General Manager, W.T. Project, BSNL***; (2014) 14 SCC 731, in which the Supreme Court *inter alia*, has held that blacklisting cannot run for an indefinite period, refused to issue a writ on the ground that as long as the petitioner's mother continued to remain the owner of the mill, the eligibility criteria would come in his way in bidding for future contracts.

54.3. The court, however, made it clear that if the eligibility criteria was varied or modified and if the petitioner otherwise came within the prescribed criteria, it would be open for him to approach the concerned authority for withdrawing the order of blacklisting.

54.4. This judgement, in our view, would have no applicability, as the concerned authority is required not only to decide whether or not intra-group sales could have been included in calculating the GGR, but also as to the punishment that is to be accorded in the instant case; both aspects need adjudication once a proper show cause notice is framed in that behalf and served on JBM Electric. This is not a case of a futile writ being issued as is

contended on behalf of UOI. The following observations of the Supreme Court in the case of ***SL Kapoor v Jagmohan***; (1980) 4 SCC 379 will make this abundantly clear:

> ***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.***
>
> ***18.*** *In Ridge v. Baldwin [1964 AC 40, 68 : (1963) 2 All ER 66, 73] one of the arguments was that even if the appellant had been heard by the watch committee nothing that he could have said could have made any difference. The House of Lords observed (at p. 68):*
>
> > *"It may be convenient at this point to deal with an argument that, even if as a general rule a watch committee must hear a constable in his own defence before dismissing him, this case was so clear that nothing that the appellant could have said could have made any difference. It is at least very doubtful whether that could be accepted as an excuse. But, even if it could, the watch committee would, in my view, fail on the facts. It may well be that no reasonable body of men could have reinstated the appellant. But as between the other two courses open to the watch committee the case is not so clear. Certainly, on the facts, as we know them, the watch committee could reasonably have decided to forfeit the appellant's pension rights, but I could not hold that they would have acted wrongly or wholly unreasonably if they had in the*

exercise of their discretion decided to take a more lenient course."

19. *Megarry, J., discussed the question in John v. Rees [(1970) 1 Ch D 345, 402] . He said (at p. 402):*

> *"**It may be that there are some who would decry the importance which the courts attach to the observance of the rules of natural justice. 'When something is obvious', they may say, 'why force everybody to go through the tiresome waste of time involved in framing charges and giving an opportunity to be heard? The result is obvious from the start'. Those who take this view do not, I think, do themselves justice. As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change. Nor are those with any knowledge of human nature who pause to think for a moment likely to underestimate the feelings of resentment of those who find that a decision against them has been made without their being afforded any opportunity to influence the course of events."***

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."*

21. *In Margarita Fuentes v. Tobert L. Shevin [32 L Ed 2d 556, 574] it was said (at p. 574):*

> *"But even assuming that the appellants had fallen behind in their installment payments, arid that they had no other valid defenses; that is immaterial here. The right to be heard does not depend upon an advance showing that one will surely prevail at the hearing. To one who protests against the taking of his property without due process of law, it is no answer to say that in his particular case due process of law would have led to the same result because he had no adequate defense upon the merits."*

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."*
>
> [Emphasis is ours]

55. The next case on which reliance was placed was a decision rendered by the Privy Counsel in ***James Edward Jeffs and Ors. v New Zealand Dairy Production and Marketing Board and Ors***.; (1967) 1 AC 551.

55.1 This was a case where the New Zealand Dairy Production and Marketing Board's decision to make a zoning order concerning factories from which it could get cream and milk was under challenge. The reason for the challenge was the financial conflict of interest it had with one of the entities, which was covered by the zoning order.

55.2 This judgement was cited by UOI for the proposition that MHI's delegatee could entertain representations before MHI takes a final decision regarding the applications filed under the PLI scheme.

55.3 The Privy Council, while repelling the challenge on the ground of conflict of interest, had struck down the zoning order on the ground that it had failed to hear interested parties, as per its obligation to do so in discharge of its duty to act judicially while arriving at a determination *vis-a-vis* zoning applications.

55.4 The conflict of interest argument, as noticed above, was repelled. This argument proceeded on the ground that a party cannot be a judge in its own cause on a reading of the provisions of the statute under which the Board

was constituted. On reading the language of the statute, the Privy Council concluded that the legislature had intended to make an exception to the general rule that a person cannot be a judge in his own cause. The Act, according to the Privy Council, required the Board to determine zoning issues, even though its pecuniary interest might get affected.

55.5 This judgment, in our view, instead of helping the cause of UOI, in our opinion, supports the case set up by JBM Ecolife and JBM Electric.

56. The third case cited on behalf of UOI is the judgment of the Supreme Court in ***Patel Engineering Ltd. v Union of India and Anr.*** (2012) 11 SCC 257.

56.1. This was a case where the bidder i.e., the petitioner was blacklisted after it had refused to issue a confirmation letter although its bid had been accepted. This resulted in the respondent no.2/National Highways Authority of India [hereafter referred to as "authority"], having to award the contract to another entity at a much lower premium, causing substantial loss to it. Resultantly, the petitioner/bidder was debarred from participating or bidding for future projects for one year from the date of the said order being passed.

56.2. Given these facts, the Court refused to intervene with the blacklisting order. The Court ruled that, since respondent no.2/authority had the power to enter into a contract by necessary implication it also had the power not to enter into a contract.

56.3. One cannot quibble with the proposition that UOI has both the power to enter into a contract and for good reason, also the power not to enter into a contract. That said, in cases where the State [in this case UOI] so decides, it will have to conform to the rigour of Article 14 of the Constitution, as every person has a right to be treated equally when the State seeks to

establish a contractual relationship. [See ***Erusian Equipment and Chemicals Ltd. v State of WB***; (1975) 1 SCC 70; this judgement has been cited with approval in ***Patel Engineering Ltd***; see Paragraph 14 and 15 at pages 262-263]

57 The other judgement referred to by UOI is the judgement of a Single Judge of this Court in ***Otik Hotels and Resorts Pvt Ltd***. ***v Indian Railway Catering and Tourism Corporation Ltd.*** ; (2010) 169 DLT 459.

57.1 This case is distinguishable on facts. This was a matter where the petitioner's licence issued by IRCTC was cancelled on account of IRCTC being furnished a balance sheet different from the one which was presented to the Income Tax Department and the Registrar of Companies. The audited balance sheet which was furnished to the Income Tax Department showed that the petitioner had a turnover of less than Rs 3 crores for 2003-2004; thus failing to meet the eligibility criteria. Because there was misrepresentation by the petitioner concerning sales figures, it was banned from engaging in future dealings with IRCTC for two years.

57.2. A perusal of the judgement shows that it was the second round of litigation for the parties. Since there was a failure on the part of IRCTC to accord time to the petitioner to file a reply to the show cause notice, the earlier writ petition was disposed of with directions, which effectively, called upon the IRCTC to deal with the petitioner's defence after it had submitted a reply to the show cause notice. This judgement, once again, on facts, has no applicability to the instant case.

58. Likewise, the judgement in ***Centurion Laboratories (Division of Centurion Remedies Pvt. Ltd.) v State of Kerala***; AIR 2021 (NOC 36) 14, would also have no applicability, as this was a case where the bidder

company which was in the business of pharmaceuticals had withheld the information that it had been blacklisted/debarred from state/central government agencies. It is in this context that the Court refused to interfere with the decision taken by Kerela Medical Services Corporation Ltd. to debar the appellant/company.

59. Similarly, the judgement in ***Techno Precision Engineers Ltd. v Western Coalfields Ltd.***; (2014) 2 AIR Bom R 511, is distinguishable on facts. This was a case where the petitioner company and its director was banned for three years on the ground of cartelisation. The same family had filed three different tenders *via* three different concerns, raising a spectre of underhand/undisclosed understanding,

60. We may also note that insofar as the instant case is concerned, although TML has taken the stand that if benefits under the PLI scheme are not made available to JBM Electic, it would impact JBM Ecolife's bid, this contention has been roundly refuted by JBM Ecolife. We are of the opinion that this is an aspect that the concerned authority will have to examine on remand.

61. Although we have briefly touched upon the manner in which the complaint was received by Mr Gahoi of IFCI Ltd., it was not elaborated as the WhatsApp conversation between Mr Gahoi and Mr Goel are already part of the record, besides the statements made by the former and Rajnesh Singh, Director of MHI, before the court.

61.1 However, at this stage, we may note that the exchange of messages between Messrs. Gahoi and Goel raises concerns with regard to the purity of the process. It is obvious that the system for evaluation put in place under the aegis of MHI is less than foolproof and is amenable to influence and interference from third parties. MHI needs to enquire into this aspect of the

matter so that in the future, such incidents don't occur. We must note, the argument advanced on behalf of the UOI that as long as the complaint had merit it could be progressed further, leaves us with a feeling that the means are not as important as the end. It is our view that means are as important as the end. The State, in our opinion, cannot take a contrary position, as, otherwise, it loses the trust and confidence of the citizenry.

Conclusion:

62. For the foregoing reasons, LPA No.500/2022 preferred by UOI is dismissed and LPA No.327/2022 preferred by JBM Ecolife is allowed. Accordingly, the first impugned judgement is set aside. Consequently, the communication dated 26.04.2022 whereby JBM Ecolife has been held to be "no longer eligible" to continue its participation in the subject tender process would have to be quashed. This would also be the fate of the other communication dated 26.04.2022 which was served on JBM Ecolife by the e-tender administrator whereby it was informed that its bid was found to be "Non-Responsive for Technical Evaluation".

62.1 It is ordered accordingly. Both communications dated 26.04.2022 shall stand quashed.

63. Consequentially, JBM Ecolife would now be allowed to participate in the subject tender from the stage at which it was positioned when it approached the writ court.

64. The appeals are disposed of in the aforesaid terms. Pending applications shall stand closed.

(RAJIV SHAKDHER)
JUDGE

(TARA VITASTA GANJU)
JUDGE

OCTOBER 11, 2022 tr/aj