

(2022) 05 DEL CK 0047

In the Delhi High Court

Case No : Civil Writ Petition No. 6708 Of 2022, Civil Miscellaneous Application No. 20563, 20975 Of 2022

M/S JBM Ecolife Mobility Private Limited

APPELLANT

Vs

Union Of India & Anr

RESPONDENT

Date of Decision : 10-05-2022

Acts Referred:

Constitution Of India, 1950 — Article 14, 136, 226

Citation : (2022) 05 DEL CK 0047

Hon'ble Judges : Yashwant Varma, J

Bench : Single Bench

Advocate : Dushyant Dave, Rajiv Nayyar, Atul Sharma, Sanjay Gupta, Abhinav Agnihotri, Siddarth Mehra, Anuj Trivedi, Dipan Seth, Chetan Sharma, Manish Mohan, Apoorv Kurup, Amit Gupta, Devendra Kumar, Ojaswa Pathak, Rishav Dubey, Sahaj Garg, Nidhi Mittal, Parag Tripathi, Tine Abraham, Shivani Rawat, Mishika Bajpai, Jojon Gandha Ray, Shourya Bari, Dr.Abhishek Manu Singhvi, Gopal Jain, Nandini Gore, Aditi Bhatt, Sarthak Gaur, Yash Dubey, Amit Bhandari, Shashank Agarwal

Final Decision : Dismissed

Judgement

Yashwant Varma, J

CM APPL. 20975/2022 (for impleadment)

1. This application has been moved on behalf of Tata Motors an entity which had also participated in the Grant Challenge Tender for the selection of e-bus operators. The applicant asserts that despite a caveat having been lodged, a copy of the writ petition was neither served nor provided to it. It is further asserted that bearing in mind the challenge which is raised in the instant writ petition and the consequences that would ensue in case the reliefs as claimed were granted, it has a right to be impleaded as a party respondent. Dr. Singhvi, learned senior counsel appearing for Tata Motors, has contended that not only is the applicant a necessary and a proper party, the Court even otherwise has the

jurisdiction to permit it to intervene and to address submissions in opposition to the writ petition.

2. The aforesaid submissions are countered by Mr. Dave, learned senior counsel appearing for the petitioner, who submits that undisputedly the contract has not been awarded to the applicant as yet and, therefore, it cannot be construed to be a necessary or proper party. The prayer for impleadment is opposed on the aforesaid grounds.

3. This Court is of the opinion that a party may be permitted to join in proceedings if it be found that its presence is necessary to effectively and completely adjudicate upon the dispute which falls for consideration. Notwithstanding the fact that the contract may not have been awarded to Tata Motors formally, if the tendering process were to be interdicted or the reliefs claimed granted, it would clearly have an impact on the interest of the applicant. It becomes pertinent to note that, although the petitioner asserts that based on the financial bids submitted in the tendering process, it is liable to be declared as L-1 in three out of the five categories, if the act of the respondents in debarring it from participating further were to be upheld, it would leave the applicant alone to be considered as eligible for the award of contract. It is important to bear in mind that in matters relating to tenders and award of contracts, the non-joinder of competing bidders may not be an issue of a mere technicality but would clearly be a matter of substance especially when the grant of reliefs as prayed for may result in the inclusion or exclusion of a particular bidder or impact the consideration of bids that may have been submitted.

4. Bearing in mind the aforesaid facts, the preferred impleadment application is allowed.

W.P.(C) 6708/2022, CM APPL. 20563/2022 (for Stay)

1. This writ petition has been preferred impugning the communication dated 26 April 2022 in terms of which the petitioner [hereinafter and for the sake of convenience to be referred to as "JBM Ecolife"], has been held to be ineligible to continue further in the tendering process consequent to M/s JBM Electric Vehicle Pvt. Ltd [to be referred to hereinafter as "JBM Electric"] having been debarred by the Ministry of Heavy Industries [MHI]. As a result of debarment of JBM Electric, the respondent No.2 acting upon the request and directive of MHI has proceeded to hold the petitioner ineligible to continue further in the "Grand Challenge Tender" for e-buses. When the writ petition was initially taken up for consideration, the Court had taken note of the submission addressed on behalf of the petitioner that JBM Electric which had been debarred and as a result of which the petitioner had been held to be disqualified, had been never placed on notice of the proposed action of debarment. It was further contended that prior to the receipt of the impugned communication of 26 April 2022, JBM Electric had not been served with any order of debarment. On 02 May 2022, the Court took note of the contention addressed on behalf of the petitioner that since it had chosen

to participate in the bidding process individually and not as part of a consortium, it could not have been held to be ineligible or disqualified from proceeding further in the tendering process merely because a related entity had been blacklisted.

2. Dr. Singhvi, learned senior counsel who had appeared on behalf of Tata Motors, had brought to the attention of the Court that despite a caveat having been duly lodged at its instance, the same was neither noticed nor reported. However, bearing in mind the nature of the interest which Tata Motors claimed in the instant litigation, it was accorded permission to address submissions on the writ petition as well as on its application for impleadment being CM APPL. 20975/2022. That application has since been allowed. The matter was thereafter listed on 04 and 05 May 2022. The Court had heard Mr.Dushyant Dave and Mr.Rajiv Nayyar, learned senior counsels on behalf of the petitioner, Mr.Chetan Sharma, the learned ASG who has appeared on behalf of MHI, Mr. Parag Tripathi, learned senior counsel, who appeared for respondent No.2 and Dr. Singhvi for the newly impleaded respondent. The respondent No.2 has placed a compilation of documents, a convenience compilation as well as a limited reply which has been duly circulated amongst respective parties.

3. In order to appreciate the substance of the grievance as raised in the writ petition, it would be pertinent to refer to the following undisputed facts. The writ petition itself has come to be instituted pursuant to proceedings which were initiated by the respondent No.2 which had invited tenders under the "Grand Challenge Tender" for selection of e-bus operators for procurement, supply, operation and maintenance of 5450 bus. Out of the aforesaid, 3472 were to receive subsidies under the Faster Adoption and Manufacturing of Hybrid & Electric Vehicles in India [FAME], while the remainder 1978 were to receive subsidies from the respective State Governments. The buses which were to be supplied were to be fully built electric buses of 9m and 12m length. The tendering process appears to have been initiated in implementation of the objective of the Government of India to move towards an accelerated adoption of electric vehicles by 2030 and the imperative to reduce carbon emissions. In order to achieve the aforesaid target, the Government of India is stated to have set a benchmark of reaching 25% EV adoption by 2030. Phase II of the FAME scheme which spreads over a period of three years commenced from 01 April 2019 with a total budgetary support of Rs.10,000 crores. The aforesaid scheme has now been extended up to 31 March 2024 with the core focus of this phase being the electrification of public and shared transportation vehicles.

4. For the purposes of implementation and completion of the targets and objectives formulated by the Government of India, Energy Efficiency Services Limited [EESL] came to be incorporated as a joint venture of various public sector undertakings working under the Ministry of Power. For the purposes of fulfillment of its mandate, EESL incorporated a wholly owned subsidiary which is the respondent No.2 before this Court. The respondent No.2 is to act in consultation with State Transport Undertakings, MHI and other entities of the

Government of India in order to achieve the objectives of the FAME scheme. The tender from which the present dispute emanates pertains to the procurement of buses which would fulfill the needs of public and shared transportation in the cities of Mumbai, Delhi, Bangalore, Hyderabad, Ahmedabad, Chennai, Calcutta, Kolkata, Surat, and Pune. JBM Ecolife also submitted its bid in response to the Grand Challenge Tender which came to be issued by respondent No.2. Both JBM Ecolife and JBM Electric are admittedly wholly owned subsidiaries of JBM Auto Limited [JBM Auto]. From the disclosures which have been made by JBM Ecolife before the respondents and which documents have been placed on the record by way of a convenience compilation by the second respondent, it is evident that JBM Auto holds 99.99% of the shareholding of JBM Ecolife. Similarly, JBM Auto holds 100% of the total share holding of JBM Electric. JBM Ecolife was formed as a Special Purpose Vehicle by JBM Auto for the purposes of participating in the Grand Challenge Tender. Since it appears to have been incorporated as a SPV for the purposes of participating in the present tender, in order to fulfill the financial criteria as fixed, JBM Auto submitted a Letter of Undertaking before the respondent No.2 which reads thus:-

"LETTER OF UNDERTAKING

Ref.: NIT/Bid Document No.: CESL/06/2021-22/GC/Electric Buses/212201006 dated 20.01.2022

Bidder's Name and Address:

JBM Ecolife Mobility Private Limited

601, Hemkunt Chambers, 89,

Nehru Place, New Delhi – 110019

To,

CGM (SCM)

Convergence Energy Services Limited

(A 100% EESL Owned Subsidiary)

Core-3, 2nd Floor, SCOPE Complex, Lodhi Road, New Delhi-110003

Dear Sir,

1. We, M/s JBM Auto Limited, having registered office at 601, Hemkunt Chambers, 89, Nehru Place, New Delhi - 110019 declare that we are the holding company of M/s JBM Ecolife Mobility Private Limited and have controlling interest therein.

M/s JBM Ecolife Mobility Private Limited proposes to submit the bid for the package CESL/06/2021-22/GC/Electric Buses/212201006 dated 20.01.2022 for "Request for proposal for selection of Bus operator for procurement, operation

and maintenance of 5450 Electric Buses and 135 Double Decker Electric Buses and allied electric and civil infrastructure on Gross Cost Contract" under bid reference no CESL/06/2021-22/GC/Electric Buses/212201006 dated 20.01.2022 and have sought financial strength and support from us for meeting the stipulated Financial Qualifying Requirement as per Clause Section 3 and its subsequent amendment.

2. We hereby undertake that we hereby pledge our unconditional & irrevocable financial support for the execution of the said package to M/s JBM Ecolife Mobility Private Limited, for the execution of the Contract, in case they are awarded the Contract for the said package at the end of the bidding process. We further agree that this undertaking shall be without prejudice to the various liabilities that M/s JBM Ecolife Mobility Private Limited would be required to undertake in terms of the Contract including the Performance Security as well as other obligations of M/s JBM Ecolife Mobility Private Limited.

3. This undertaking is irrevocable and unconditional, and shall remain in force till the successful execution and performance of the entire contract and/or till it is discharged by CESL.

4. We are herewith enclosing a copy of the Board Resolution in support of this undertaking."

5. The Board of JBM Auto also passed a resolution on 28 February 2022 which reads thus:-

"The Committee was informed that JBM Ecolife Mobility Private Limited, a wholly-owned subsidiary of Company, has requested to authorize to use JBM Auto Limited (Parent Company) credential or financial information e.g. net worth, turnover, profit or other financial information for filing tender with Convergence Energy Services Limited for procurement, operation and maintenance of 5,450 Electric Buses and 135 Double Decker Electric buses and allied electric and civil infrastructure on Gross Cost Contract. Further being a wholly owned subsidiary, the same can be used as per business requirement.

The Committee discussed at length and approved the following Resolution unanimously in this connection:

"RESOLVED THAT JBM Ecolife Mobility Private Limited, a wholly-owned subsidiary of JBM Auto Limited (Parent Company), be and is hereby authorised to use of the credential or financial information e.g. net worth, turnover, profit or other financial information of parent company regarding filing of the tender with Convergence Energy Services Limited for procurement, operation and maintenance of 5,450 Electric Buses and 135 Double Decker Electric buses and allied electric and civil infrastructure on Gross Cost Contract.

RESOLVED FURTHER THAT Mr. Vivek Gupta, Chief Financial Officer & Company Secretary of the Company and any other committee members be and is hereby severally authorised to do all other acts, deeds and things as are necessary

incidental to or expedient for the purpose of giving effect to the aforesaid resolution.”

6. In terms of the tender document and the various stipulations contained therein, JBM Ecolife furnished the following Self-Declaration of not being debarred as on 20 January 2022. That self-declaration reads thus:-

“NIT/Bid Document No : CESL/06/2021-22/GC/Electric Buses/212201006 dated 20.01.2022

MS JBM Ecolife Mobility Private Limited (Subsidiary of M/S JBM Auto Limited) Registered Address 601, HEMKUNT CHAMBER, HEMKUNT CHAMBER, 89, NEHRU PLACE, NEAR MODI TOWER, DELHI, South Delhi along with our associate M/S JBM Auto Limited (Parent company of M/S JBM Ecolife Mobility Private Limited) Registered Address-601, HEMKUNT CHAMBER, HEMKUNT CHAMBER, 89, NEHRU PLACE, NEAR MODI TOWER, DELHI, South Delhi Delhi, 110019 hereby declare that we are not being under debar list/undergoing debarment period on account of breach of the code of integrity under rule 175(1)(i)(h) of general financial rules for giving false declaration of local content.”

7. It is also admitted to the petitioner that for the purposes of evaluating the financial soundness of JBM Ecolife, it was the turnover of JBM Auto which was submitted for the consideration of the respondents. The certificate in support of the aforesaid assertion as was placed before the respondent No.2 and forms part of the convenience compilation shows that the turnover of JBM Ecolife in FY 2018-19, 2019-20, 2020-21 was zero. The turnover of JBM Auto for the aforesaid three financial years is what was relied upon by the petitioner in the tendering process. Similarly, it was the net worth of JBM Auto which was placed on record for the purposes of consideration of JBM Ecolife fulfilling the financial criteria as was fixed. Admittedly, both the petitioner as well as Tata Motors qualified the technical evaluation process and also submitted their financial bids.

8. The record, however, bears out that parallelly and on receipt of a complaint with respect to the eligibility of JBM Electric to benefits flowing from the Production Linked Incentive Scheme [PLI], separate proceedings came to be drawn. An e-mail of 21 March 2022 sent by the Joint Secretary in MHI and addressed to EESL alludes to an issue having been raised with respect to the eligibility of JBM Electric for benefits under the PLI Scheme being under scrutiny on the ground of it having not disclosed complete information. That e-mail further notes that since the report in respect of the aforesaid issue was awaited, opening of financial bids may be deferred. It would be pertinent to note that the financial bids were to be initially opened on 21 March 2022. The opening of the bids appears to have been delayed and postponed on account of the aforesaid communication. On 25 April 2022, the respondent No.2 was addressed a communication from the MHI which reads thus: -

“Udyog Bhawan, New Delhi- 110011

Dated the 25th April, 2022

To

Ms. Mahua Acharya

Managing Director & CEO

CESL.

Subject : Tender No. 1880 under CESL Grand Challenge Electric Bus against FAME scheme -reg.

Dear Madam,

I am directed to refer your email dated 18.04.2022 regarding opening of financial bids of the Tender No. 1880 under CESL Grand Challenge Electric Bus wherein M/s. JBM Electric Vehicles Private Limited (JEVPL) is one of the applicants. It is to say that JEVPL had filed application under the PLI Scheme for Automobile and Auto Components of MHI. However, a complaint was received i.r.o. the application of JEVPL and the case was re-examined. On reexamination, it is found that the applicant furnished incorrect information in its application for this scheme to meet the eligibility criteria, thereby violating the spirit of the 'Integrity Pact Undertaking' of the Application Form.

2. Accordingly, it has been decided to debar JEVPL and its Group Company(ies) for all the future schemes and tenders/RFPs of MHI for the entire period of the PLI Scheme for Automobile and Auto Components i.e with immediate effect and upto 31 51 Mar 2027.

3. CESL is, therefore, requested to debar JEVPL and its Group Company(ies) from the above cited tender for e-buses against FAME scheme of MHI.

4. This issue with the approval of competent authority."

9. It is the said communication which led to the issuance of the impugned orders disqualifying the petitioner and debarring it from the Grand Challenge Tender. The respondents thereafter and more particularly on 29 April 2022 acting through Industrial Finance Corporation of India [IFCI] addressed a formal communication to JBM Electric informing it of the rejection of its application under the PLI Scheme for Automobile and Auto Component Industries. This very communication further apprised JBM Electric that not only did its application under the PLI scheme stand rejected, it along with its group companies would stand debarred from future schemes and tenders / RFPs issued by the MHI for the entire period of the PLI scheme and up to 31 March 2027.

10. The aforesaid order is based on the asserted stand that while computing the global group revenue which constituted an integral component to evaluate an entity fulfilling the basic eligibility criteria under the PLI scheme, JBM Electric had accounted for an amount of Rs.910.54 crores from intragroup sale of goods. The order of 29 April 2022 records that JBM Electric declared global group revenues

of Rs.10,590.74 crores which included Rs.910.54 crores. According to this communication, the intragroup sale of goods was liable to be excluded and it would thus fall below the threshold of Rs.10,000 crores and thus be disentitled from benefits under the PLI Scheme. The communication further records that the aforesaid incorrect disclosure of JBM Electric clearly amounted to a violation of the terms of the Integrity Pact and therefore warranted the debarment of that entity as well as its group companies. From the aforesaid recital of facts, it is evident that the petitioner has come to be debarred from the tendering process on account of JBM Electric having been blacklisted and debarred in terms of the communication of 29 April, 2022. In order to appreciate the outcome of the debarment of JBM Electric and its impact on the rights of the petitioner to participate in the tendering process it would be necessary to advert to the following additional facts.

11. The petitioner has placed on the record the General Financial Rules 2017 framed by the Department of Expenditure, Ministry of Finance in the Union Government as well as the Guidelines that have been framed governing the issue of blacklisting and debarment. Those Guidelines have been placed on the record by the petitioners themselves in support of their submission that an order of blacklisting must abide by the principles of natural justice, a facet which has been highlighted and reiterated in the Guidelines itself. Those very guidelines also contained the following salient provisions. The Guidelines define the expression 'Allied Firm' as under: -

"3. Allied firm: All concerns which come within the sphere of effective influence of the debarred firms shall be treated as allied firms. In determining this, the following factors may be taken into consideration:

- a. Whether the management is common;
- b. Majority interest in the management is held by the partners or directors of banned/ suspended firm;
- c. Substantial or majority shares are owned by the banned/ suspended firm and by virtue of this it has a controlling voice.
- d. Directly or indirectly controls, or is controlled by or is under common control with another bidder.
- e. All successor firms will also be considered as allied firms."

12. Clause 15 of the Guidelines reads as follows:-

"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."

13. Of equal significance are clauses 16 to 19, which read thus: -

"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".

14. The respondents base their decision to disqualify the petitioner from the tendering process in question in light of the provisions contained in the Guidelines and the clauses extracted hereinabove. The tender document also incorporated certain provisions relating to the subject of blacklisting and debarment. In paragraph 5 of the tender document which laid out the qualification and eligibility criteria, the following provisions were made and incorporated: -

"G4-The Bidder/s or its parent/subsidiary/sister concern, (any member of consortium) shall not have been blacklisted or barred from carrying out its business by any Regulator/Government Authority/Court of Law, or proved to have indulged in serious fraudulent practices by a Court of Law or an independent Commission of Inquiry in India or abroad at the time of due date of submission."

15. It would also be apposite to refer to clause 11.3 of the tender document which set forth the circumstances in which a bid would be liable to be rejected and the relevant part whereof is extracted hereinbelow:-

"11.3. A bid is likely to be rejected by CESL without any further correspondence, as non-responsive, if,

h. Debarred or terminated or blacklisted in India by Central Govt. organization / State Govt. organization / any Municipal Corporation / ULBs etc. or in abroad."

16. Apart from the issue of allied firms which was set forth in the Guidelines referred to above, the amended tender document and more particularly clause 6 thereof establishes that a bidder could apply either as a single bidder or as a member or of a consortium. Clause 6.1 while explaining the expressions

"associate", "parent", "subsidiary" or "sister concern" made the following provisions:-

"In evaluating the Qualification Criteria of the Bidder herein above, aggregating the financial and technical capability of any Associates of the Bidder for the purpose of meeting the respective Qualification Criteria required of the Bidder shall be permitted.

For the purpose hereof, the word "Associate" shall mean, in relation to the Bidder, a firm which controls the Bidder (i.e. Parent/Holding Company) or is controlled by the Bidder (i.e. subsidiary), or is under the common control with the Bidder (i.e. sister concern)."

17. Clause 8 while dealing with the subject of conflict of interest carried the following explanation:-

"In case a Bidder is a Consortium, then the term Bidder as used in this Clause, shall include each Member of such Consortium.

For purposes of this RFP, Associate means, in relation to the Bidder/Consortium Member, a person who controls, is controlled by, or is under the common control with such Bidder/Consortium Member (The "Associate"). As used in this definition, the expression "control" means, with respect to a person which is a company or corporation, the ownership, directly or indirectly, of more than 50% (fifty percent) of the voting shares of such person, and with respect to a person which is not a company or corporation, the power to direct the management and policies of such person by operation of law."

18. The aforesaid clauses as appearing in the Guidelines and the tender document have been extracted hereinabove essentially to underline how the concept of allied or sister concerns was understood and defined by the respondents. It would be relevant to note here that the petitioner did not apply as part of or as a member of a consortium but independently and individually and subject to the declarations and letters of support as submitted by JBM Auto referred to hereinabove. It would at this stage be relevant to also note that the petitioner does not challenge the applicability of the debarment provisions on the ground of JBM Ecolife suffering a disqualification based on the blacklisting of JBM Electric nor did learned senior counsel appearing on its behalf question JBM Ecolife and JBM Electric being allied and sister concerns and thus subject to the provisions of the Guidelines and the provisions contained in the tender document noticed hereinabove. The challenge which was raised at the behest of the petitioner is noticed hereinafter.

19. Assailing the impugned order of debarment and disqualification, Mr. Dave, learned Senior Counsel appearing on behalf of the petitioner, has contended that the impugned action is manifestly arbitrary and unjust since the petitioner was not afforded any opportunity of hearing prior to the passing of the order of debarment. Learned Senior Counsel reiterated the submission that the principles

of natural justice which stand engrained in our jurisprudence were violated since the petitioner was never placed on notice of the proposed action. It was submitted that the impugned communications were issued late in the night of 26 April 2022 after the petitioner and other intending bidders had submitted their financial bids. Learned Senior Counsel submitted that the obligation to afford an opportunity of hearing prior to debarring or blacklisting an entity has been consistently recognized right from the decision of the Supreme Court in *Erusian Equipment & Chemicals Ltd. vs. State of West Bengal & Anr.* 1975 AIR 266. Mr. Dave submits that the principles which were enunciated in *Erusian Equipment*, which constitutes the "locus classicus" on the subject, has not been deviated from and has consistently held the field. Learned Senior Counsel would submit that since there has been an admitted failure to adhere to the aforesaid principles, the impugned orders are liable to be quashed and set aside on this ground alone. The obligation to adhere to the principles of natural justice when it comes to blacklisting a bidder, according to learned Senior Counsel, has been recognized, bearing the mind the serious civil consequences that flow and would necessarily visit the intending bidder. In support of this submission, Mr. Dave drew the attention of the Court to the following observations as made by the Supreme Court in *Raghunath Thakur vs. State of Bihar & Ors.* 1989 1 SCC 229.

"4.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 black-listing any person in respect of business ventures has civil consequence for the future business of the person concerned in any event."

20. Continuing along this thread, Mr. Dave then placed reliance on the decision of the Supreme Court in *Kulja Industries Ltd. vs. General Manager Western Telecom BSNL & Ors.* 2014 14 SCC 731 and more particularly to paragraph 17 of the report which is extracted hereinbelow: -

"17. That apart the power to blacklist a contractor whether the contract be for supply of material equipment or for the execution of any her 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 pre-condition 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.”

21. Mr. Dave further drew the attention of the Court to the well-settled principles of a notice necessarily preceding an order of blacklisting as was reiterated by the Supreme Court in its recent decision in UMC Technologies Private Limited vs. Food Corporation of India & Anr 2021 2 SCC 551.

“13. At the outset, it must be noted that it is the first principle of civilised jurisprudence that a person against whom any action is sought to be taken or whose right or interests are being affected should be given a reasonable opportunity to defend himself. The basic principle of natural justice is that before adjudication starts, the authority concerned should give to the affected party a notice of the case against him so that he can defend himself. Such notice should be adequate and the grounds necessitating action and the penalty/action proposed should be mentioned specifically and unambiguously. An order travelling beyond the bounds of notice is impermissible and without jurisdiction to that extent This Court in Nasir Ahmad v. Assistant Custodian General, Evacuee Property. Lucknow and Anr,¹ has held that it is essential for the notice to specify the particular grounds on the basis of which an action is proposed to be taken so as to enable the noticee to answer the case against him. If these conditions are not satisfied, the person cannot be said to have been granted any reasonable opportunity of being heard.

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, particularized and unambiguous show cause notice is particularly crucial due to the severe consequences of blacklisting and the stigmatization 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 15 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 discrimination. Not only does blacklisting takes 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.”

22. Learned Senior Counsel further argued that a failure to comply with the principles of natural justice would necessarily result in the order being rendered void-ab-initio and of no legal efficacy. In support of the aforesaid submission, learned Senior Counsel placed reliance on the judgment of the Supreme Court in Nawabkhan Abas khan vs. State of Gujarat 1974 2 SCC 121 and more particularly on paragraphs 14 and 20 of the report which are reproduced hereinbelow:-

"14. Where hearing is obligated by a statute which affects the fundamental right of a citizen, the duty to give the hearing sounds in constitutional requirement and failure to comply with such a duty is fatal. Maybe that in ordinary legislation or at common law a tribunal, having jurisdiction and failing to hear the parties, may commit an illegality which may render the proceedings voidable when a direct attack is made thereon by way of appeal, revision or review, but nullity is the consequence of unconstitutionality and so without going into the larger issue and its plural divisions, we may roundly conclude that the order of an administrative authority charged with the duty of complying with natural justice in the exercise of power before restricting the fundamental right of a citizen is void and ab initio of no legal efficacy. The duty to hear manacles his jurisdictional exercise and any act is, in its inception, void except when performed in accordance with the conditions laid down in regard to hearing. Maybe, this is a radical approach, but the alternative is a travesty of constitutional guarantees, which leads to the conclusion of post-legitimated disobedience of initially unconstitutional orders.

20. We express no final opinion on the many wide-ranging problems in public law of illegal orders and violations thereof by citizens, grave though some of them may be. But we do hold that an order which is void may be directly and collaterally challenged in legal proceedings, An order is null and void if the statute clothing the Administrative Tribunal with power conditions it with the obligation to hear, expressly or by implication. Beyond doubt, an order which infringes a fundamental freedom passed in violation of the audi alteram partem rule is a nullity. When a competent court holds such official act or order invalid, or sets it aside, it operates from nativity, i.e., the impugned act or order was never valid. The French jurists call it L'inexistence or outlawed order (Brawn and Garner: French Administrative Law, p. 127) and could not found the ground for a prosecution. On this limited ratio the appellant is entitled to an acquittal. We allow his appeal."

23. Reliance was then placed on the following pertinent observations as entered by the Supreme Court in *Dafodills Pharmaceuticals Ltd. vs. State of U.P.* 2020 18 SCC 550 which are reproduced hereinbelow: -

15. In the present case, even if one assumes that Surender Chaudhary, the accused in the pending criminal case was involved and had sought to indulge in objectionable activities, that ipso facto could not have resulted in unilateral action of the kind which the State resorted to against Daffodills, which was never granted any opportunity of hearing or a chance to represent against the impugned order. If there is one constant lodestar that lights the judicial horizon in this country, it is this: that no one can be inflicted with an adverse order, without being afforded a minimum opportunity of hearing, and prior intimation of such a move. This principle is too well entrenched in the legal ethos of this country to be ignored, as the State did, in this case.

17. Normally, this Court would have quashed the Government of U.P.'s decision,

and left it to grant a hearing to Daffodills, before taking any action. However, given that the impugned order of debarring (i.e. directive not to procure locally from Daffodills) was made over 4 years and 3 months ago, this Court is of the opinion that it would be in the overall interest of justice that appropriate relief is granted. Accordingly, the said order of the Principal Secretary, Government of U.P. directing all departments concerned to desist from resorting to local purchase from the appellant is, hereby quashed. The impugned judgment [Daffodills Pharmaceuticals Ltd. v. State of U.P. 2017 SCC OnLine All 2914] of the High Court is hereby set aside. The appeal is allowed in the above terms. No costs.”

24. Mr. Dave further urged that it is by now well-settled that even when the State or its instrumentality enters into the contractual arena, it is still bound by its constitutional obligation to comply with Article 14 of the Constitution and to ensure that it acts fairly and justly with parties. To buttress the aforesaid submission, learned Senior Counsel sought to draw sustenance from the reiteration of the settled legal position in *Unitech Limited and Others vs. Telangana State Industrial Infrastructure* 2021 SCC OnLine SC 99:-

“41. Therefore, while exercising its jurisdiction under Article 226, the Court is entitled to enquire into whether the action of the State or its instrumentalities is arbitrary or unfair and in consequence, in violation of Article 14. The jurisdiction under Article 226 is a valuable constitutional safeguard against an arbitrary exercise of state power or a misuse of authority. In determining as to whether the jurisdiction should be exercised in a contractual dispute, the Court must, undoubtedly eschew, disputed questions of fact which would depend upon an evidentiary determination requiring a trial. But equally, it is well-settled that the jurisdiction under Article 226 cannot be ousted only on the basis that the dispute pertains to the contractual arena. This is for the simple reason that the State and its instrumentalities are not exempt from the duty to act fairly merely because in their business dealings they have entered into the realm of contract. Similarly, the presence of an arbitration clause does oust the jurisdiction under Article 226 in all cases though, it still needs to be decided from case to case as to whether recourse to a public law remedy can justifiably be invoked. The jurisdiction under Article 226 was rightly invoked by the Single Judge and the Division Bench of the Andhra Pradesh in this case, when the foundational representation of the contract has failed. TSIIC, a state instrumentality, has not just reneged on its contractual obligation, but hoarded the refund of the principal and interest on the consideration that was paid by Unitech over a decade ago. It does not dispute the entitlement of Unitech to the refund of its principal.”

25. Mr. Dave has further drawn the attention of the Court to the additional affidavit which has been filed to submit that the disqualification of the petitioner and the rejection of its bid would result in immense loss being caused to public exchequer. It was pointed out that if the financial bid of the petitioner had been opened and taken into consideration, it would have been declared as the L-1

bidder in three out of the five categories. This according to him would have resulted in a total outlay of Rs.19,995 Crores whereas presently and upon the exclusion of the petitioner from the bidding process, the respondents would have to bear a contract cost of Rs.20,182 Crores. This, Mr. Dave points out would result in a loss of Rs. 186 Crores being caused and suffered by the respondents.

26. Appearing for the first respondent, the learned ASG firstly contended that admittedly no challenge has been laid to the order of 29 April 2022 in terms of which JBM Electric came to be debarred. According to Mr. Sharma, the learned ASG, till that order holds the field, no possible relief, interim or otherwise, is liable to be granted to the petitioner here. The learned ASG drew the attention of the Court to the fact that the order of 29 April 2022 would clearly bear out that JBM Electric had been duly placed on notice and had been accorded an opportunity to represent against the proposed action of debarment. In view of the above, it was contended that the order of 29 April 2022, which has proceeded to record elaborate reasons in support of the ultimate decision to debar JBM Electric must be given full effect and the petitioner which is a sister concern must suffer the logical consequence.

27. Mr. Sharma drew the attention of the Court to the fact that JBM Electric had suffered debarment on account of incorrect disclosures having been made by it while seeking benefits under the PLI Scheme. Drawing the attention of the Court to the underlying objectives of that Scheme as well as the present tender for e-buses, it was submitted that there was an indelible connect between the PLI Scheme and the present tender. Reference in this connection was made to paragraph 5(G7) of the tender document which is reproduced hereinbelow: -

"G7. Bidder to declare the incentive received/to be received through the Production Linked Incentive Scheme (PLI) for Automobile and Auto component industry and PLI scheme for National Programme on Advanced chemistry cell (ACC) battery storage (if eligible for any) that necessarily transform the reduction of electric bus cost."

28. Turning then to the main question of blacklisting, the learned ASG placed reliance upon paragraph 5(G4) to submit that all bidders were liable to submit an undertaking that neither the bidder nor its parent/subsidiary/sister concern had been blacklisted or debarred from carrying on business by any regulator or governmental authority. According to the learned ASG, this particular clause clearly establishes that the petitioner would stand automatically disqualified the moment its parent/subsidiary/ or sister concern came to be blacklisted or debarred. The learned ASG contends that any doubts that may possibly be harbored in this respect are clearly laid to rest when one views the provisions made in the Guidelines relating to debarment as formulated by the Department of Expenditure.

29. Mr. Sharma, in support of this submissions, has also placed reliance upon 15 to 19 of the Guidelines which have been extracted hereinabove.

30. It was contended that undisputedly JBM Electric is liable to be viewed as an allied firm of JBM Ecolife. In order to buttress the aforesaid submission, the learned ASG drew the attention of the Court to the material placed on the record by the second respondent in its convenience compilation to contend that undisputedly both JBM Ecolife and JBM Electric were the wholly owned subsidiaries of JBM Auto. Learned ASG also highlighted the commonality of managerial personnel in JBM Ecolife and JBM Electric drawing the attention of the Court to the fact that one Mr. Vivek Gupta was a Director and signatory in both the companies. It was further pointed out that Mr. Vivek Gupta was the Chief Financial Officer and Company Secretary of JBM Auto Limited, the parent company and which had authorized the said officer to take all further steps in connection with the bid which JBM Ecolife was proposing to submit in the tendering process. It was submitted that once it is established that JBM Electric was an allied firm, its debarment would automatically lead to the petitioner being rendered disqualified from proceeding in the tendering process. Reliance was placed on paragraphs 15 to 19 of the Guidelines to submit that the petitioner in unambiguous terms had been placed on notice that once an allied firm or sister concern came to be debarred by any Ministry or Department of the Union, it would automatically extend to all related parties in terms of the Guidelines which applied.

31. On the issue of the asserted violation of the principles of natural justice, the learned ASG submitted that the principles of an opportunity of hearing as enunciated by courts are not liable to be viewed as encompassed in a straight jacket. It was submitted that those fundamental rules of fair play have always been recognised to be flexible and the extent of their application dependent upon the facts of a particular case. It was submitted that right from the celebrated decision of the Supreme Court in *S.L. Kapoor vs. Jagmohan* 1980 4 SCC 379, it has been consistently held that where on a given set of admitted facts only one conclusion is possible, the Court would not issue a futile writ. It was pointed out that in the facts of the present case, it is evident that the sister concern of the petitioner has been debarred. Learned ASG submits that as long as the aforesaid order stands, the petitioner would clearly stand disqualified. In that view of the matter, it was submitted that providing of an opportunity of hearing would have been a useless formality.

32. Dealing with the scope of interference in contractual matters, the learned ASG referred to the following principles as enunciated by the Supreme Court in *Jagdish Mandal vs. State of Orissa* 2007 14 SCC 517:-

"22. Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and mala fides. Its purpose is to check whether choice or decision is made "lawfully" and not to check whether choice or decision is "sound". When the power of judicial review is invoked in matters relating to tenders or award of contracts, certain special features should be borne in mind. A contract is a commercial transaction. Evaluating tenders and awarding

contracts are essentially commercial functions. Principles of equity and natural justice stay at a distance. If the decision relating to award of contract is bona fide and is in public interest, courts will not, in exercise of power of judicial review, interfere even if a procedural aberration or error in assessment or prejudice to a tenderer, is made out. The power of judicial review will not be permitted to be invoked to protect private interest at the cost of public interest, or to decide contractual disputes. The tenderer or contractor with a grievance can always seek damages in a civil court. Attempts by unsuccessful tenderers with imaginary grievances, wounded pride and business rivalry, to make mountains out of molehills of some technical/procedural violation or some prejudice to self, and persuade courts to interfere by exercising power of judicial review, should be resisted. Such interferences, either interim or final, may hold up public works for years, or delay relief and succour to thousands and millions and may increase the project cost manifold. Therefore, a court before interfering in tender or contractual matters in exercise of power of judicial review, should pose to itself the following questions:

(i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone;

OR

Whether the process adopted or decision made is so arbitrary and irrational that the court can say: "the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached";

(ii) Whether public interest is affected.

If the answers are in the negative, there should be no interference under Article 226. Cases involving blacklisting or imposition of penal consequences on a tenderer/contractor or distribution of State largesse (allotment of sites/shops, grant of licences, dealerships and franchises) stand on a different footing as they may require a higher degree of fairness in action."

33. It was lastly submitted that the Supreme Court in its recent decision of N.G. Projects Ltd. Vs. Vinod Kumar Jain¹⁶ had once again reiterated and reaffirmed the limits of the judicial review power exercisable by constitutional courts while dealing with matters falling in the contractual field and made the following pertinent observations:-

"23. In view of the above judgments of this Court, the Writ Court should refrain itself from imposing its decision over the decision of the employer as to whether or not to accept the bid of a tenderer. The Court does not have the expertise to examine the terms and conditions of the present-day economic activities of the State and this limitation should be kept in view. Courts should be even more reluctant in interfering with contracts involving technical issues as there is a requirement of the necessary expertise to adjudicate upon such issues. The approach of the Court should be not to find fault with magnifying glass in its

hands, rather the Court should examine as to whether the decision-making process is after complying with the procedure contemplated by the tender conditions. If the Court finds that there is total arbitrariness or that the tender has been granted in a malafide manner, still the Court should refrain from interfering in the grant of tender but instead relegate the parties to seek damages for the wrongful exclusion rather than to injunct the execution of the contract. The injunction or interference in the tender leads to additional costs on the State and is also against public interest. Therefore, the State and its citizens suffer twice, firstly by paying escalation costs and secondly, by being deprived of the infrastructure for which the present-day Governments are expected to work.

24. The State has paid over a sum of Rs. 3,98,52,396/- to the appellant till date, though the stand of the appellant is that it had submitted bills of work of Rs. 8.5 crores. The termination of contract would cause additional financial burden on the State and also deprive the amenity of road for a longer period. Learned counsel for the appellant has stated that it shall not claim escalation of costs for the period when the writ petition before the High Court was pending and there was a stay granted.

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26. A word of caution ought to be mentioned herein that any contract of public service should not be interfered with lightly and in any case, there should not be any interim order derailing the entire process of the services meant for larger public good. The grant of interim injunction by the learned Single Bench of the High Court has helped no-one except a contractor who lost a contract bid and has only caused loss to the State with no corresponding gain to anyone."

34. Learned ASG further submitted that admittedly no challenge was ever laid or raised by the petitioner with respect to either paragraph G4 of the tender document or the Guidelines framed by the Department of Expenditure which clearly applied. In view of the aforesaid, the learned Solicitor would contend that the writ petition is liable to be dismissed.

35. Mr. Parag Tripathi, learned Senior Advocate appearing for the second respondent, has taken the Court in great detail through the limited reply which was filed in the writ petition and has made the following submissions. It is firstly disclosed that the petitioner submitted its bid on 15 March 2022. Upon being found to be technically responsive, the petitioner was invited to participate in the process of submission of financial bids. Mr. Tripathi, has referred to an e-mail of 21 March 2022 received from the MHI apprising the second respondent of the fact that the proposal submitted by JBM Electric under the PLI Scheme was being examined by IFCI based on information that incorrect particulars had been submitted in order to obtain benefits under that Scheme. That e-mail, Mr. Tripathi points out, had requested the second respondent to consequently defer the opening of financial bids by a few days. According to learned Senior Counsel acting on the basis of that e-mail, the opening of financial bids on 21 March 2022

was postponed. The attention of the Court was then drawn to the e-mail of 18 April 2022 addressed by the second respondent to the MHI. The second respondent while highlighting the prejudice being caused on account of the delays in finalization of the present tendering process, had sought guidance from the MHI. It transpires from the record that in response to the aforesaid e-mail, MHI on 25 April 2022 addressed a letter to the second respondent apprising it of the debarment of JBM Electric and the decision of the concerned Ministry to debar not only JBM Electric but also all its group companies from future schemes and tenders published by MHI. That communication requested the second respondent to consequently debar JBM Electric as well as its group companies from the tender for e-buses. Mr. Tripathi apprises the Court that acting upon the aforesaid communication, on 26 April 2022 a decision was taken by the second respondent to hold the petitioner disqualified from proceeding further in the tendering process.

36. Mr. Tripathi, learned Senior Counsel appearing for the second respondent then took the Court through the detailed order of 29 April 2022 to urge that a reasoned and principled decision was taken by IFCI to debar JBM Electric and its other group companies on account of submission of incorrect particulars while seeking to draw benefits under the PLI Scheme.

37. Mr. Tripathi referring to the recordal of facts as appearing in the order of 29 April 2022, submitted that they would clearly establish that JBM Electric had been duly placed on notice and called upon to submit an explanation before the passing of the aforesaid order. It was submitted that on account of the submission of incorrect facts, JBM Electric had been found to have violated the Integrity Pact and thus leading to its inevitable debarment in terms of the provisions made in the PLI Scheme.

38. It was submitted that once the aforesaid order had come to be passed against JBM Electric, the disqualification of the petitioner here was an inevitable outcome. Referring to the provisions made in the tender document as well as the Guidelines that applied, Mr. Tripathi argued that once an allied firm of the petitioner had come to be debarred, the second respondent had no option but to hold the petitioner here as being rendered disqualified from proceeding further in the tendering process. It was submitted that the alleged infraction of the principle of natural justice is an argument without any substance, since in the facts of the present case it would have clearly been a useless and empty formality. According to Mr. Tripathi, the Guidelines contemplate automatic debarment and in the absence of any challenge to the provisions made therein, the petition is liable to fail.

39. Appearing for Tata Motors, Dr. Singhvi, learned Senior Counsel, firstly submitted that a detailed debarment order had come to be passed against JBM Electric. It was contended that bearing in mind the limited scope of judicial review which would apply in such matters, it is manifest that no occasion or justifiable reason exists for this Court to interfere with the decision ultimately

taken by the respondents.

40. Dr. Singhvi then submitted that in matters relating to the award of contracts by the State or its instrumentalities, the issue of public interest must override all other considerations and interference by the Court under Article 226 of the Constitution would be justified only if it be established that the action of the State or its instrumentality either results in manifest injustice or is an outcome of malice.

41. It was submitted that the scope of interference in award of contracts as well as the deleterious effect that interference by Courts in the implementation of large public projects were issues which had been recently considered and decided by the Supreme Court in N.G. Projects Ltd. vs. Vinod Kumar Jain 2022 SCC OnLine SC 336. Dr. Singhvi drew the attention of the Court to the following observations as made by the Supreme Court in that decision:-

"23. In view of the above judgments of this Court, the Writ Court should refrain itself from imposing its decision over the decision of the employer as to whether or not to accept the bid of a tenderer. The Court does not have the expertise to examine the terms and conditions of the present-day economic activities of the State and this limitation should be kept in view. Courts should be even more reluctant in interfering with contracts involving technical issues as there is a requirement of the necessary expertise to adjudicate upon such issues. The approach of the Court should be not to find fault with magnifying glass in its hands, rather the Court should examine as to whether the decision-making process is after complying with the procedure contemplated by the tender conditions. If the Court finds that there is total arbitrariness or that the tender has been granted in a mala fide manner, still the Court should refrain from interfering in the grant of tender but instead relegate the parties to seek damages for the wrongful exclusion rather than to injunct the execution of the contract. The injunction or interference in the tender leads to additional costs on the State and is also against public interest. Therefore, the State and its citizens suffer twice, firstly by paying escalation costs and secondly, by being deprived of the infrastructure for which the present-day Governments are expected to work.

24. The State has paid over a sum of Rs. 3,98,52,396/- to the appellant till date, though the stand of the appellant is that it had submitted bills of work of Rs. 8.5 crores. The termination of contract would cause additional financial burden on the State and also deprive the amenity of road for a longer period. Learned counsel for the appellant has stated that it shall not claim escalation of costs for the period when the writ petition before the High Court was pending and there was a stay granted.

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26. A word of caution ought to be mentioned herein that any contract of public service should not be interfered with lightly and in any case, there should not be any interim order derailing the entire process of the services meant for larger

public good. The grant of interim injunction by the learned Single Bench of the High Court has helped no-one except a contractor who lost a contract bid and has only caused loss to the State with no corresponding gain to anyone.”

42. Reliance was also placed on the following observations as made by the Supreme Court in *Central Coal Fields Ltd. vs. SLL-SML (Joint Venture Consortium)* [(2016) 8 SCC 622]:-

“47. The result of this discussion is that the issue of the acceptance or rejection of a bid or a bidder should be looked at not only from the point of view of the unsuccessful party but also from the point of view of the employer. As held in *Ramana Dayaram Shetty [Ramana Dayaram Shetty v. International Airport Authority of India, (1979) 3 SCC 489]* the terms of NIT cannot be ignored as being redundant or superfluous. They must be given a meaning and the necessary significance. As pointed out in *Tata Cellular [Tata Cellular v. Union of India, (1994) 6 SCC 651]* there must be judicial restraint in interfering with administrative action. Ordinarily, the soundness of the decision taken by the employer ought not to be questioned but the decision-making process can certainly be subject to judicial review. The soundness of the decision may be questioned if it is irrational or mala fide or intended to favour someone or a decision “that no responsible authority acting reasonably and in accordance with relevant law could have reached” as held in *Jagdish Mandal [Jagdish Mandal v. State of Orissa, (2007) 14 SCC 517]* followed in *Michigan Rubber [Michigan Rubber (India) Ltd. v. State of Karnataka, (2012) 8 SCC 216]*.

51. Not only this, any decision taken by the employer in accepting or rejecting a particular bank guarantee in a format not prescribed by it could lead to (avoidable) litigation requiring the employer to justify the rejection or acceptance of each bank guarantee. This is hardly conducive to a smooth and hassle-free bidding process.”

43. It was then submitted that the contention of the petitioner that its bids if accepted would result in a saving of Rs. 186 crores would also clearly not be of any significance when one bears in mind the undisputed fact that the total contract value was of Rs. 20,000 crores. Dr. Singhvi took strong objection to what was termed to be a deliberate attempt by the petitioner to avoid the caveat petition which had been lodged by Tata Motors and had failed to implead it even after this Court had accorded it liberty to address submissions. The conduct of JBM Ecolife, according to Dr. Singhvi, clearly disentitles it from the grant of any reliefs. It was submitted that the failure to implead Tata Motors which was undisputedly the L-1 bidder is not a mere technicality but a matter of immense significance. It was contended that if the Court were to annul the tendering process without hearing the L-1 bidder, it would not only be contrary to the rule of law and opposed to the principles of fair play, justice and equity, it would have also caused grave and irreparable prejudice to it. It was urged that the failure on the part of the petitioner to implead Tata Motors which was clearly a necessary and proper party would itself constitute sufficient ground to dismiss the writ

petition.

44. It becomes relevant to note that while Mr. Dave in his initial submissions had restricted the challenge to the impugned orders on the grounds of violation of the principles of natural justice and the failure on the part of the respondents to abide by the well settled obligation to place an entity on notice before passing orders of blacklisting, in light of the submissions addressed by the respondents turning upon the provisions made in the tender document and the Guidelines of debarment, learned senior counsel addressed the following additional submissions in rejoinder.

45. It was firstly contended that the tender document clearly establishes that it was open to a party to submit a bid either individually or as a member of a consortium. It was submitted that the petitioner here had participated in the tendering process as a single bidder and thus distinct from a consortium bid. Viewed in the aforesaid backdrop, it was contended that the debarment of JBM Electric could have had no bearing or significance on the bid which was submitted by the petitioner. It was also urged that a reading of the Guidelines would show and establish that they essentially pertained to procurement contracts that may be issued by Ministries or Departments of the Union Government. It was contended that the debarment of JBM Electric was clearly not in relation to any procurement or supply contract. Taking the Court through the order of 29 April 2022 it was submitted that it is manifest that JBM Electric came to be debarred based on a perceived disclosure of incorrect information and particulars. The submission of those particulars, Mr. Dave points out, was in relation to its claim for extension of benefits under the PLI Scheme. According to Mr. Dave, the said claim was akin to the grant of subsidies. In view of the aforesaid, he would submit that the debarment of JBM Electric could have not been used as a factor relevant for disentitling the petitioner from proceeding further in the tendering process.

46. Taking the Court through the provisions made in the Guidelines themselves, it was submitted that various checks and measures stand incorporated to ensure that arbitrary orders of debarment and blacklisting do not come to be passed. Referring to the provisions contained in the Guidelines, it was submitted that while individual Ministries, Departments and entities of the Union Government had been granted independent powers to issue orders of blacklisting, in case an entity were to be blacklisted across various Ministries or Departments, orders could have been passed only by the Department of Expenditure and that too, after following the procedure as envisaged in paragraphs 11 to 14 thereof. It was submitted that the blacklisting of JBM Electric was wholly unrelated to the tendering process in which the petitioner participated and for the aforesaid reason also the impugned orders are liable to be quashed.

47. Before proceeding to rule on the rival submissions noticed above, it would be apposite to notice the following undisputed facts. Admittedly, the petitioner was held to be technically responsive in terms of the qualifications spelt out in the

tender document. The Anti Blacklisting Certificate which was submitted by the petitioner in the tendering process is dated 12 March 2022. Undisputedly and as on that date, no order of blacklisting or debarment had been passed with respect to the allied firms or sister concerns of the petitioner. However, the Guidelines, and the application of which was not questioned, clearly contemplates an automatic debarment and blacklisting of allied firms and sister concerns. It would be pertinent to note that the assertion of the respondent that JBM Electric and JBM Ecolife would fall within the ambit of an allied firm or a sister concern as defined in the tender document was neither questioned nor assailed.

48. The order of 29 April 2022 holds JBM Electric to be ineligible for the grant of benefits under the PLI scheme. That finding has come to be recorded in the order of 29 April 2022 based on the assertion that its declaration with respect to intragroup sales of goods was incorrect and that it would not meet the threshold of Rs.10,000 crores and thus qualify under the PLI Scheme. The order records that JBM Electric did not meet the basic eligibility criteria and having made an incorrect disclosure had violated paragraph 4 of the Integrity Pact. Paragraph 4 of the Integrity Pact shows that apart from recoveries of benefits that may have been disbursed under the PLI Scheme to an entity, it also exposes it to face an action of blacklisting at the discretion of the concerned Ministry. From a reading of the order of 29 April 2022, it further transpires that JBM Electric had been called upon to furnish its explanation in terms of notices dated 15 and 17 February 2022. The order thus appears to have been passed only after JBM Electric had been duly placed on notice and upon a consideration of its reply before the respondents. In paragraph 12 of the order of 29 April 2022 reference is made to a decision of the competent authority on 25 April 2022 to reject the application of JBM Electric under the PLI Scheme and to debar it as well as its group companies from schemes and tenders floated by MHI up to 31 March 2027. It is thus manifest that a decision to debar JBM Electric came to be taken on 25 April 2022. The aforesaid decision appears to have been formally communicated to JBM Electric on 29 April 2022 by IFCI. No challenge to the aforesaid order was stated to have been initiated till this petition was closed for judgment.

49. From the material placed on the record by the second respondent, it further transpires that the factum of debarment of JBM Electric was duly communicated to the second respondent by MHI on 25 April 2022. It is in the aforesaid backdrop that on 26 April 2022, the second respondent proceeded to disqualify the petitioner from proceeding further in the tendering process. The Court thus must necessarily proceed further bearing in mind the admitted facts which emerge from the material placed before the Court.

50. As this Court reads para 5 (G 4) of the tender document, it is evident that the bid of the petitioner as was submitted could not have been rejected since undisputedly the Anti Blacklisting Certificate was submitted by the petitioner on 12 March 2022. Undisputedly, on that date none of the allied firms or sister

concerns of the petitioner had been blacklisted or debarred by any Ministry or Department of the Union Government. Similarly, Paragraph 11.3 (h) of the tender document would also not render the petitioner disqualified since it had not been debarred, terminated or blacklisted individually by any Central Government organisation. The disqualification as suffered by the petitioner would thus have to be evaluated and examined based upon the provisions made in the Guidelines for debarment of firms. It becomes pertinent to note that the expression "allied firm" has been explained to mean all concerns which come within the sphere of effective influence of a debarred firm. Amongst the various factors which those Guidelines bid to be taken into consideration is where management is common, where majority interest in the management is held by partners or directors of the banned firm, where substantial or majority shares are owned by the banned firm or one which may be directly or indirectly controlled or be under the common control of another bidder.

51. The Court has already noticed the shareholding structure of JBM Electric and JBM Ecolife in the preceding paragraphs of this decision. From the material placed on the record, it is manifest and evident that both are wholly owned subsidiaries of JBM Auto. One of the directors in the two companies is also common. That Director is further stated to be the Chief Financial Officer and Company Secretary of the holding company, namely, JBM Auto. The authorisation made by JBM Auto, the parent company, submitted in support of the bid submitted by JBM Ecolife also authorised and appointed the said Chief Financial Officer and Company Secretary to do all further acts, deeds and things as may be necessary, incidental to or expedient for the proposes of the bid which was proposed to be submitted by JBM Ecolife. The tender document also explains the meaning to be ascribed to the expressions "associate", "subsidiary" or a "sister concern". Explaining the aforesaid, it provides that an associate in relation to a bidder would mean a firm which is controlled by a parent or a holding company or is controlled by a subsidiary or is under the common control with a sister concern. The expression "control" has been further defined in the tender document to mean a company which is under the ownership of common shareholders or where the right to appoint the majority of directors or to control the management or policy decisions is found to exist in a parent entity. Viewed in the aforesaid backdrop, it is evident that both JBM Electric as well as JBM Ecolife are liable to be viewed as allied firms/sister concerns.

52. As this Court reads the various provisions contained in the Guidelines, it is apparent that the respondents stand placed under an unambiguous command not to place any contract on a debarred firm including its allied firms. Similarly, paragraph 16 in unequivocal terms mandates that no contract shall be placed on a debarred firm including its allied firms after the issuance of a debarment order by a Ministry or Department of the Union Government. Paragraph 16 more significantly provides that bids from only such firms would be considered which are neither debarred on the date of opening of the tender nor debarred on the date of award of contract. The aforesaid thus clearly establishes that the

petitioner being an allied firm of JBM Electric would suffer disqualification the moment the former came to be blacklisted and debarred. Additionally, it becomes relevant to note that paragraphs 16 would render it ineligible to proceed further under the contract notwithstanding the fact that the petitioner did not stand debarred by implication and extension on 12 March 2022 when it submitted the Anti Blacklisting Certificate. The petitioner became ineligible and debarred from proceeding further consequent to the blacklisting of JBM Electric on 25 March 2022. This debarment came to apply to it by extension and in light of the provisions made in paragraphs 15 and 16 of the Guidelines. Any doubt or dispute that could have possibly been raised or urged with respect to the aforesaid stands laid to rest when one reads paragraph 19 of the same Guidelines. Paragraph 19 in unequivocal terms mandates the "automatic" extension of debarment to all allied firms. That clause, in a sense is self-activating. It thus logically follows that the moment JBM Electric came to be blacklisted on 25 April 2022, the petitioner here became ineligible to proceed further in the tendering process.

53. 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 possibly be read or understood in the restrictive sense as advocated by Mr. Dave.

54. 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.

55. 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

56. Turning then, to the principal argument of the action being in breach of the principles of natural justice, it may be noted that there cannot possibly be a dispute with respect to the well settled proposition of blacklisting and debarment entailing serious civil consequences. Right from the decision of Erusian Equipment, our Courts have consistently held that bearing in mind the deleterious effect that an order of blacklisting would have on an entity, it must be preceded by a notice affording an opportunity to the concerned party to show cause against the proposed action. This would necessarily be a requirement of the principles of natural justice. Undisputedly, JBM Electric appears to have been afforded that opportunity prior to the passing of the order of 29 April 2022. That order, as noted above, does not form subject matter of challenge in the present petition. However, the principal questions which arise for consideration here are whether (a) the petitioner was independently required to be afforded an opportunity of hearing before being disqualified from the tendering process and (b) whether the impugned action is liable to be interfered with consequent to a failure on the part of the respondents to have provided that opportunity of hearing to the petitioner.

57. The respondents have tacitly admitted that no separate notice was served upon the petitioner prior to the issuance of the impugned communications. The defense proffered essentially rested on the principles of "useless formality", a failure to prove "prejudice" and Courts not being obliged to issue a "futile writ" where on a given set of facts, the ultimate conclusion or decision would not be impacted or influenced at all.

58. 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.

59. While it is true that the earlier line of decisions rendered by our Supreme Court did hold that an administrative decision rendered in violation of the principles of natural justice was liable to be viewed as void ab initio, over a period of time the jurisprudence as expounded by the Supreme Court in this regard has seen an evident and perceivable shift. As the role of administrative authorities became ever more pervasive and their right to adjudicate and rule upon the asserted rights and claims of people more expansive, the Supreme Court though not even remotely suggesting a dilution of the primordial obligation to abide by the principles of natural justice, of an opportunity to show cause and explain, a right of hearing, has indubitably carved out certain well recognised exceptions. These exceptions govern situations where while an infraction of a facet of the natural justice principles may be evident, the facts of a case may not justify interference with the ultimate decision taken by an authority. It is in these spaces that the precepts of useless formality and prejudice have come to be enunciated and ordained to apply. This shift in the line of reasoning is based upon the well settled precept of the principles of natural justice being flexible and not, as they have been repeatedly described, cast in a straightjacket. These rules are not to be viewed as codified canons to be invoked as a matter of rote irrespective of the facts of a particular case and the Courts while exercising their powers of judicial review not pausing to question whether a failure to provide an opportunity of hearing would have impacted the ultimate decision which is assailed. This slight and qualified change in the jurisprudence revolving around the principle of an opportunity of hearing was lucidly explained by the Supreme Court in *Canara Bank Vs. Debasis Das* as follows (2003) 4 SCC 572:-

"19. Concept of natural justice has undergone a great deal of change in recent years. Rules of natural justice are not rules embodied always expressly in a statute or in rules framed thereunder. They may be implied from the nature of the duty to be performed under a statute. What particular rule of natural justice should be implied and what its context should be in a given case must depend to a great extent on the facts and circumstances of that case, the framework of the statute under which the enquiry is held. The old distinction between a judicial act and an administrative act has withered away. Even an administrative order which involves civil consequences must be consistent with the rules of natural justice. The expression "civil consequences" encompasses infraction of not merely property or personal rights but of civil liberties, material deprivations and non-pecuniary damages. In its wide umbrella comes everything that affects a citizen in his civil life.

21. How then have the principles of natural justice been interpreted in the courts

and within what limits are they to be confined? Over the years by a process of judicial interpretation two rules have been evolved as representing the principles of natural justice in judicial process, including therein quasi-judicial and administrative process. They constitute the basic elements of a fair hearing, having their roots in the innate sense of man for fair play and justice which is not the preserve of any particular race or country but is shared in common by all men. The first rule is "nemo judex in causa sua" or "nemo debet esse judex in propria causa sua" as stated in Earl of Derby's case [(1605) 12 Co Rep 114 : 77 ER 1390] that is, "no man shall be a judge in his own cause". Coke used the form "aliquis non debet esse judex in propria causa, quia non potest esse judex et pars" (Co. Litt. 1418), that is, "no man ought to be a judge in his own case, because he cannot act as judge and at the same time be a party". The form "nemo potest esse simul actor et judex", that is, "no one can be at once suitor and judge" is also at times used. The second rule is "audi alteram partem", that is, "hear the other side". At times and particularly in continental countries, the form "audietur et altera pars" is used, meaning very much the same thing. A corollary has been deduced from the above two rules and particularly the audi alteram partem rule, namely "qui aliquid statuerit, parte inaudita altera acquum licet dixerit, haud acquum fecerit" that is, "he who shall decide anything without the other side having been heard, although he may have said what is right, will not have been what is right" [see Boswel's case [(1605) 6 Co Rep 48b : 77 ER 326] (Co Rep at p. 52-a)] or in other words, as it is now expressed, "justice should not only be done but should manifestly be seen to be done". Whenever an order is struck down as invalid being in violation of principles of natural justice, there is no final decision of the case and fresh proceedings are left upon (sic open). All that is done is to vacate the order assailed by virtue of its inherent defect, but the proceedings are not terminated.

22. What is known as "useless formality theory" has received consideration of this Court in *M.C. Mehta v. Union of India* [(1999) 6 SCC 237]. It was observed as under: (SCC pp. 245-47, paras 22-23)

"22. Before we go into the final aspects of this contention, we would like to state that cases relating to breach of natural justice do also occur where all facts are not admitted or are not all beyond dispute. In the context of those cases there is a considerable case-law and literature as to whether relief can be refused even if the court thinks that the case of the applicant is not one of 'real substance' or that there is no substantial possibility of his success or that the result will not be different, even if natural justice is followed see *Malloch v. Aberdeen Corpn.* [(1971) 2 All ER 1278 : (1971) 1 WLR 1578 (HL)] (per Lord Reid and Lord Wilberforce), *Glynn v. Keele University* [(1971) 2 All ER 89 : (1971) 1 WLR 487] , *Cinnamond v. British Airports Authority* [(1980) 2 All ER 368 : (1980) 1 WLR 582 (CA)] and other cases where such a view has been held. The latest addition to this view is *R. v. Ealing Magistrates' Court, ex p Fannaran* [(1996) 8 Admn LR 351] (Admn LR at p. 358) [see de Smith, Suppl. p. 89 (1998)] where *Straughton, L.J.* held that there must be 'demonstrable beyond doubt' that the

result would have been different. Lord Woolf in *Lloyd v. McMahon* [(1987) 1 All ER 1118 : 1987 AC 625 : (1987) 2 WLR 821 (CA)] has also not disfavoured refusal of discretion in certain cases of breach of natural justice. The New Zealand Court in *McCarthy v. Grant* [1959 NZLR 1014] however goes halfway when it says that (as in the case of bias), it is sufficient for the applicant to show that there is 'real likelihood — not certainty — of prejudice'. On the other hand, Garner's *Administrative Law* (8th Edn., 1996, pp. 271-72) says that slight proof that the result would have been different is sufficient. On the other side of the argument, we have apart from *Ridge v. Baldwin* [1964 AC 40 : (1963) 2 All ER 66 : (1963) 2 WLR 935 (HL)] , Megarry, J. in *John v. Rees* [(1969) 2 All ER 274 : 1970 Ch 345 : (1969) 2 WLR 1294] stating that there are always 'open and shut cases' and no absolute rule of proof of prejudice can be laid down. Merits are not for the court but for the authority to consider. Ackner, J. has said that the 'useless formality theory' is a dangerous one and, however inconvenient, natural justice must be followed. His Lordship observed that 'convenience and justice are often not on speaking terms'. More recently, Lord Bingham has deprecated the 'useless formality theory' in *R. v. Chief Constable of the Thames Valley Police Forces, ex p Cotton* [1990 IRLR 344] by giving six reasons. (See also his article 'Should Public Law Remedies be Discretionary?' 1991 PL, p. 64.) A detailed and emphatic criticism of the 'useless formality theory' has been made much earlier in 'Natural Justice, Substance or Shadow' by Prof. D.H. Clark of Canada (see 1975 PL, pp. 27-63) contending that *Malloch* [(1971) 2 All ER 1278 : (1971) 1 WLR 1578 (HL)] and *Glynn* [(1971) 2 All ER 89 : (1971) 1 WLR 487] were wrongly decided. Foulkes (*Administrative Law*, 8th Edn., 1996, p. 323), Craig (*Administrative Law*, 3rd Edn., p. 596) and others say that the court cannot prejudge what is to be decided by the decision-making authority. de Smith (5th Edn., 1994, paras 10.031 to 10.036) says courts have not yet committed themselves to any one view though discretion is always with the court. Wade (*Administrative Law*, 5th Edn., 1994, pp. 526-30) says that while futile writs may not be issued, a distinction has to be made according to the nature of the decision. Thus, in relation to cases other than those relating to admitted or indisputable facts, there is a considerable divergence of opinion whether the applicant can be compelled to prove that the outcome will be in his favour or he has to prove a case of substance or if he can prove a 'real likelihood' of success or if he is entitled to relief even if there is some remote chance of success. We may, however, point out that even in cases where the facts are not all admitted or beyond dispute, there is a considerable unanimity that the courts can, in exercise of their 'discretion', refuse certiorari, prohibition, mandamus or injunction even though natural justice is not followed. We may also state that there is yet another line of cases as in *State Bank of Patiala v. S.K. Sharma* [(1996) 3 SCC 364 : 1996 SCC (L&S) 717] , *Rajendra Singh v. State of M.P.* [(1996) 5 SCC 460] that even in relation to statutory provisions requiring notice, a distinction is to be made between cases where the provision is intended for individual benefit and where a provision is intended to protect public interest. In the former case, it can be waived while in the case of the latter, it cannot be

waived.

23. We do not propose to express any opinion on the correctness or otherwise of the 'useless formality' theory and leave the matter for decision in an appropriate case, inasmuch as in the case before us, 'admitted and indisputable' facts show that grant of a writ will be in vain as pointed out by Chinnappa Reddy, J."

23. As was observed by this Court we need not go into "useless formality theory" in detail; in view of the fact that no prejudice has been shown. As is rightly pointed out by learned counsel for the appellants, unless failure of justice is occasioned or that it would not be in public interest to dismiss a petition on the fact situation of a case, this Court may refuse to exercise the said jurisdiction (see *Gadde Venkateswara Rao v. Govt. of A.P.* [AIR 1966 SC 828]). It is to be noted that legal formulations cannot be divorced from the fact situation of the case. Personal hearing was granted by the Appellate Authority, though not statutorily prescribed. In a given case post-decisional hearing can obliterate the procedural deficiency of a pre-decisional hearing. (See *Charan Lal Sahu v. Union of India* [(1990) 1 SCC 613 : AIR 1990 SC 1480] .)"

60. Tracing the ambit of a fair hearing, the rule of prejudice and the precept of useless formality, the Supreme Court in *Dharampal Satyapal Vs. CCE* (2015) 8 SCC 531 explained the legal position in greater detail in the following terms: -

"19. What is the genesis behind this requirement? Why it is necessary that before an adverse action is taken against a person he is to be given notice about the proposed action and be heard in the matter? Why is it treated as inseparable and inextricable part of the doctrine of principles of natural justice?

20. Natural justice is an expression of English Common Law. Natural justice is not a single theory—it is a family of views. In one sense administering justice itself is treated as natural virtue and, therefore, a part of natural justice. It is also called "naturalist" approach to the phrase "natural justice" and is related to "moral naturalism". Moral naturalism captures the essence of commonsense morality—that good and evil, right and wrong, are the real features of the natural world that human reason can comprehend. In this sense, it may comprehend virtue ethics and virtue jurisprudence in relation to justice as all these are attributes of natural justice. We are not addressing ourselves with this connotation of natural justice here.

21. In Common Law, the concept and doctrine of natural justice, particularly which is made applicable in the decision-making by judicial and quasi-judicial bodies, has assumed a different connotation. It is developed with this fundamental in mind that those whose duty is to decide, must act judicially. They must deal with the question referred both without bias and they must give (sic an opportunity) to each of the parties to adequately present the case made. It is perceived that the practice of aforesaid attributes in mind only would lead to doing justice. Since these attributes are treated as natural or fundamental, it is known as "natural justice". The principles of natural justice developed over a

period of time and which is still in vogue and valid even today are: (i) rule against bias i.e. *nemo debet esse iudex in propria sua causa*; and (ii) opportunity of being heard to the party concerned i.e. *audi alteram partem*. These are known as principles of natural justice. To these principles a third principle is added, which is of recent origin. It is the duty to give reasons in support of decision, namely, passing of a "reasoned order".

24. The principles have a sound jurisprudential basis. Since the function of the judicial and quasi-judicial authorities is to secure justice with fairness, these principles provide a great humanising factor intended to invest law with fairness to secure justice and to prevent miscarriage of justice. The principles are extended even to those who have to take an administrative decision and who are not necessarily discharging judicial or quasi-judicial functions. They are a kind of code of fair administrative procedure. In this context, procedure is not a matter of secondary importance as it is only by procedural fairness shown in the decision-making that a decision becomes acceptable. In its proper sense, thus, natural justice would mean the natural sense of what is right and wrong.

25. This aspect of procedural fairness, namely, right to a fair hearing, would mandate what is literally known as "hearing the other side". Prof. D.J. Galligan [On "Procedural Fairness" in Birks (Ed.), *The Frontiers of Liability*, Vol. 1 (Oxford 1994)] attempts to provide what he calls "a general theory of fair treatment" by exploring what it is that legal rules requiring procedural fairness might seek to achieve. He underlines the importance of arriving at correct decisions, which is not possible without adopting the aforesaid procedural fairness, by emphasising that taking of correct decisions would demonstrate that the system is working well. On the other hand, if mistakes are committed leading to incorrect decisions, it would mean that the system is not working well and the social good is to that extent diminished. The rule of procedure is to see that the law is applied accurately and, as a consequence, that the social good is realised. For taking this view, Galligan took support from Bentham [*A Treatise of Judicial Evidence* (London 1825)] , who wrote at length about the need to follow such principles of natural justice in civil and criminal trials and insisted that the said theory developed by Bentham can be transposed to other forms of decision-making as well. This jurisprudence of advancing social good by adhering to the principles of natural justice and arriving at correct decisions is explained by Galligan in the following words:

"On this approach, the value of legal procedures is judged according to their contribution to general social goals. The object is to advance certain social goals, whether through administrative processes, or through the civil or criminal trial. The law and its processes are simply instruments for achieving some social good as determined from time to time by the law-makers of the society. Each case is an instance in achieving the general goal, and a mistaken decision, whether to the benefit or the detriment of a particular person, is simply a failure to achieve the general good in that case. At this level of understanding, judgments of

fairness have no place, for all that matters is whether the social good, as expressed through laws, is effectively achieved.”

Galligan also takes the idea of fair treatment to a second level of understanding, namely, pursuit of common good involves the distribution of benefits and burdens, advantages and disadvantages to individuals (or groups). According to him, principles of justice are the subject-matter of fair treatment. However, that aspect need not be dilated upon.

38. But that is not the end of the matter. 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.* [(1971) 1 WLR 1578 : (1971) 2 All ER 1278 (HL)] , 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* [(1980) 1 WLR 582 : (1980) 2 All ER 368 (CA)] 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.

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.”

48. Therefore, on the facts of this case, we are of the opinion that non-issuance of notice before sending communication dated 23-6-2003 has not resulted in any prejudice to the appellant and it may not be feasible to direct the respondents to

take fresh action after issuing notice as that would be a mere formality.”

61. For the sake of completeness, it would also be pertinent to note a recent judgment of the Supreme Court in *State of U.P. Vs. Sudhir Kumar Singh* 2020 SCC OnLine SC 847. This matter arose from tender proceedings and the cancellation of a contract. While on facts, it was found that prejudice had in fact been caused, the Supreme Court observed thus: -

“39. An analysis of the aforesaid judgments thus reveals:

(1) Natural justice is a flexible tool in the hands of the judiciary to reach out in fit cases to remedy injustice. The breach of the audi alteram partem rule cannot by itself, without more, lead to the conclusion that prejudice is thereby caused.

(2) Where procedural and/or substantive provisions of law embody the principles of natural justice, their infraction per se does not lead to invalidity of the orders passed. Here again, prejudice must be caused to the litigant, except in the case of a mandatory provision of law which is conceived not only in individual interest, but also in public interest.

(3) No prejudice is caused to the person complaining of the breach of natural justice where such person does not dispute the case against him or it. This can happen by reason of estoppel, acquiescence, waiver and by way of non-challenge or non-denial or admission of facts, in cases in which the Court finds on facts that no real prejudice can therefore be said to have been caused to the person complaining of the breach of natural justice.

(4) In cases where facts can be stated to be admitted or indisputable, and only one conclusion is possible, the Court does not pass futile orders of setting aside or remand when there is, in fact, no prejudice caused. This conclusion must be drawn by the Court on an appraisal of the facts of a case, and not by the authority who denies natural justice to a person.

(5) The “prejudice” exception must be more than a mere apprehension or even a reasonable suspicion of a litigant. It should exist as a matter of fact, or be based upon a definite inference of likelihood of prejudice flowing from the non-observance of natural justice.”

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.

63. Before concluding, it would be appropriate to advert to the submission that the exclusion of the petitioner from the field of eligible bidders would result in serious loss to the public exchequer. While it is not for the Court to consider this aspect especially when the contract is yet to be awarded, this would be an issue which must necessarily be left to the judgment and discretion of the respondents. The issue of whether the L1 bid submitted by Tata Motors is to be accepted, is one which must be left for the consideration of the respondents. All that must be stated is that even if the Court were to assume the data submitted by the petitioners to be correct, that would under no circumstances justify the Court by way of a prerogative writ and in exercise of its powers of judicial review, commanding the respondents to include an entity which otherwise stands debarred and rendered ineligible under the tender conditions and the Guidelines which apply.

64. Accordingly and for all the aforesaid reasons, the writ petition stands dismissed.