

(2014) 04 CAL CK 0020
In the Calcutta High Court
Case No : W.P. No. 1049 of 2013

Rashmi Metaliks Limited and Others

APPELLANT

Vs

State of West Bengal and Others

RESPONDENT

Date of Decision : 29-04-2014

Acts Referred:

Constitution of India, 1950 — Article 142 19(1)(g)
Penal Code, 1860 (IPC) — Section 294 323 34 341 376

Citation : (2015) 3 WBLR 571

Hon'ble Judges : Dipankar Datta, J

Bench : Single Bench

Advocate : Jishnu Choudhury, P.K. Srivastava, Arif Ali, A. Saha, Sounavo Ghosh, Aritra Basu and Koushiki Bhattacharya, Advocate for the Appellant; Partha Sarathi Sengupta, Santosh Kumar Ray, Sreemoyee Purkayastha and Bitika Kaur, Advocate for the Respondent;

Final Decision : Allowed

Judgement

Dipankar Datta, J.

1. This writ petition is directed against an order dated September 11, 2013 of the Executive Engineer, Resources Division, Public Health Engineering Directorate, Govt. of West Bengal (hereafter the engineer and the department, wherever the context so requires). By the said order, the first petitioner has been suspended from participating in tenders on e-tender platform of the department for three years w.e.f. May 16, 2013. The basic facts are undisputed. A tender notice dated February 19, 2013 was issued by the engineer on behalf of the department for supply and delivery of ISI marked centrifugally cast (spun) ductile iron pressure pipes (hereafter DI Pipe). It contained, inter alia, the following clauses:

"3. ELIGIBILITY CRITERIA FOR APPLICANTS (D.I. PIPE MANUFACTURERS):

(h) A declaration in non-judicial stamp paper of Rs. 10/- should be submitted that the applicant is not barred/delisted/blacklisted by Govt/Undertaking (Govt)/

Municipality in DI Pipe Supply tender during last five years. In case of any barring/delisting/black listing a brief notes regarding the same is to be submitted."

"5. INSTRUCTIONS TO BIDDERS

9.--Penalty for suppression/distortion of facts:--If any tenderer fails to produce the original hard copies of the documents or any other documents on demand of the Tender Evaluation Committee within a specified time frame or if any deviation is detected in the hard copies from the uploaded soft copies or if there is any suppression, the tenderer will be suspended from participating in the tenders on e- Tender platform for a period of 3 (three) years. In addition, his user ID will be deactivated and Earnest Money Deposit will stand forfeited, besides, the P.H.E. Directorate may take appropriate legal action against such defaulting tenderer."

2. The intending bidders were, therefore, required to be careful as well as candid in their response, or else consequences as stipulated were likely to follow.

3. The first petitioner responded to the tender notice dated February 19, 2013. It did not disclose the fact of Rishra Municipality (hereafter the said municipality) having debarred it from participating in any tender invited by it vide memo dated January 11, 2013. Only on the ground of suppression, the bid of the first petitioner was not considered and it was disqualified. It was informed of the disqualification in due course, vide memo dated March 28, 2013.

4. The disqualification was challenged by the petitioners in the writ jurisdiction of this Court. The writ petition was dismissed by an order dated March 28, 2013. A writ appeal was preferred against such order. During the pendency of such appeal, the Chairman of the said municipality by a letter dated May 27, 2013, informed the first petitioner as follows:

"This has reference to the letter No. 1776/XI dated 11.01.2013 issued by us in which case we had mistakenly declared M/s. Rashmi Metaliks Ltd. has (sic as) debarred. It is hereby further notified that the debarred declaration should be treated as an error. In convenience caused regarding the matter is regretted."

5. Soon thereafter, the writ appeal came up for consideration before the Division Bench on June 6, 2013. The aforesaid withdrawal order was cited on behalf of the petitioners in support of their plea that the first petitioner should not have been disqualified. The Division Bench dismissed the writ appeal, inter alia, holding that the withdrawal order did not exist when the disqualification was ordered by the engineer.

6. Close on the heels of the aforesaid dismissal of the appeal, a notice dated June 7, 2013 was issued by the engineer to the first petitioner, in purported exercise of clause 9 (supra), conveying to it the decision of the department to suspend, it from participating in DI Pipe supply tenders on e-tender platform for three years and it was called upon to furnish its representation, if any, against such suspension within 15 days.

7. On a challenge being thrown to the said notice by the first petitioner, a learned judge of this Court by order dated June 17, 2013 was pleased to set aside the same and directed the engineer to consider the matter afresh after receiving the explanation of the first petitioner and upon extending to it an opportunity of personal hearing.

8. The first petitioner was thereafter put on notice for a personal hearing, on July 5, 2013. A questionnaire was made over to its representative for answer. Defence was duly raised to the effect that the order of debarment dated January 11, 2013 had been subsequently withdrawn and, thus, no order of suspension was called for. In addition, certain other reasons for which the debarment order dated January 11, 2013 could not be disclosed were urged.

9. The engineer in his order dated September 11, 2013 observed that irrespective of subsequent withdrawal of the debarment order dated January 11, 2013 by the said municipality, the same was valid and in existence when the first petitioner submitted its bid on March 18, 2013 and, therefore, was guilty of suppression of a vital fact. The other reasons urged by the first petitioner were found to be inconsistent with each other and thus not accepted.

10. Appearing in support of the writ petition, Mr. Choudhury, learned Advocate dwelled on the history of victimization of the first petitioner by the various Government departments and the municipalities in the State at the instance of a rival in trade, who happens to be their blue-eyed baby. Orders passed by learned single judges of this Court and the Apex Court in favour of the first petitioner in various litigations between it and the State/the municipalities were referred to, for impressing the Court that step-motherly treatment had been meted out to the first petitioner at regular intervals. He was, however, candid in saying that the petitioners' state before the Division Bench was absolutely clean; they never succeeded either as appellant or respondent. The debarment order dated January 11, 2013 of the said municipality, according to him, was one such deliberate instance of faulting the first petitioner's credentials to keep it out of the race and after the purpose was achieved, to withdraw it unconditionally. It was contended that the petitioners unfortunately contributed by not being careful but once the debarment order stood unconditionally withdrawn, the order of debarment did not exist in the eye of law and the engineer acted illegally and in an arbitrary manner in suspending the first petitioner for three years.

11. Various authorities were cited by Mr. Choudhury to persuade the Court to hold that the process of decision making leading to the impugned order is not lawful and that the order itself is incurably bad and ultra vires.

12. Mr. Sengupta, learned Advocate representing the respondents, contended that the impugned order was well reasoned and passed on proper application of mind to the defence taken. According to him, the decisive date was March 18, 2013 i.e. the day on which the first petitioner submitted its bid and on that day the debarment order dated January 11, 2013 being in force, the first petitioner is

not entitled in law to derive any benefit from the subsequent withdrawal order dated May 27, 2013. He urged that the impugned order not being infected with any infirmity, the Court may decline interference.

13. It was also submitted by Mr. Sengupta in course of his arguments that in view of the terms and conditions of the notice inviting tender in question, the engineer did not enjoy any discretion of imposing a lesser punishment and, therefore, was left with no other option but to order that the suspension would be operative for three years.

14. Mr. Sengupta also cited various decisions to drive home the point that subsequent withdrawal of the debarment order is of no consequence; the first petitioner being guilty of suppression of a material fact, it was rightly penalized.

15. I may immediately place on record that it is not the claim in the counter affidavit of the department, sworn by the engineer, that he did not enjoy any discretion in the matter of imposing a lesser punishment; it is a point that has been argued from the bar on behalf of the department.

16. On the rival arguments, the first question that surfaces for consideration is did clause 9 (supra), having regard to the terms and conditions of the notice inviting tender read as a whole, allow any scope for exercise of discretion by the engineer to impose a lesser penalty?

17. Before proceeding to consider the question, it would be of immense help to note the views of the Apex Court on/what discretion connotes, when exercise of discretion is called for and how it is to be exercised.

18. One may in this context profitably refer to the decision in Reliance Airport Developers Pvt. Ltd. Vs. Airports Authority of India and Others, , wherein what is "discretion" was traced:

"30. Discretion, in general, is the discernment of what is right and proper. It denotes knowledge and prudence, that discernment which enables a person to judge critically of what is correct and proper united with caution; nice discernment, and judgment directed by circumspection: deliberate judgment; soundness of judgment; a science or understanding to discern between falsity and truth, between wrong and right, between shadow and substance, between equity and colourable glosses and pretences, and not to do according to the will and private affections of persons.

31. The word "discretion" standing single and unsupported by circumstances signifies exercise of judgment, skill or wisdom as distinguished from folly, unthinking or haste; evidently therefore a discretion cannot be arbitrary but must be a result of judicial thinking. The word in itself implies vigilant circumspection and care, therefore, where the legislature concedes discretion it also imposes a heavy responsibility."

19. In Bangalore Medical Trust Vs. B.S. Muddappa and others, , an enlightening

discussion on "exercise of discretion" by a public authority appears. The relevant passages are quoted below:

"46. *** Speedy or quick action in public institutions call for appreciation but our democratic system shuns exercise of individualised discretion in public matters requiring participatory decision by rules and regulations. No one howsoever high can arrogate to himself or assume without any authorisation express or implied in law a discretion to ignore the rules and deviate from rationality by adopting a strained or distorted interpretation as it renders the action ultra vires and bad in law. When the law requires an authority to act or decide, "if it appears to it necessary" or if he is "of opinion that a particular act should be done" then it is implicit that it should be done objectively, fairly and reasonably. Decisions affecting public interest or the necessity of doing it in the light of guidance provided by the Act and rules may not require intimation to person affected yet the exercise of discretion is vitiated if the action is bereft of rationality lacks objective and purposive approach. The action or decision must not only be reached reasonably and intelligibly but it must be related to the purpose for which power is exercised. ***

48. *** Discretion is an effective tool in administration. But wrong notions about it results in ill-conceived consequences. In law it provides an option to the authority concerned to adopt one or the other alternative. But a better, proper and legal exercise of discretion is one where the authority examines the fact, is aware of law and then decides objectively and rationally what serves the interest better. When a Statute either provides guidance or rules or Regulations are framed for exercise of discretion then the action should be in accordance with it Even where Statutes are silent and only power is conferred to act in one or the other manner, the Authority cannot act whimsically or arbitrarily. It should be guided by reasonableness and fairness. The legislature never intends its authorities to abuse the law or use it unfairly.***"

20. Bearing in mind the above, I now propose to find an answer to the question.

21. It is not desirable for an administrative authority, who is conferred the power to take penal action, to exercise such power mechanically. Law is well settled that more exceptional the power, the more circumspect the repository thereof must be in its exercise. If the exercise of the power is challenged, it is for him to satisfy the Court that it exercised the power bona fide and on material relevant to establishing the existence of the factual situation necessary for exercise of such power.

22. It is trite that an order of the nature impugned herein has the effect of not only preventing the first petitioner from the privilege of entering into a contract with the department, but such order is also likely to influence other departments/ municipalities/undertakings while any offer of the first petitioner in response to future tender notices issued by them is under consideration. It might well be so, if the terms and conditions of such tenders so provide, that the first petitioner

would be told off at the gate without being allowed entry into the zone of consideration. Because of the very fact that such an order creates a disability having civil consequences insofar as the first petitioner is concerned, the objective satisfaction of the authority passing such an order is a condition precedent.

23. I am not persuaded to agree with Mr. Sengupta that the engineer had no discretion in the matter. Here, the executive engineer was deciding whether the first petitioner should be penalized for suppressing the order of debarment dated January 11, 2013. Clause 9, to which reference was made by Mr. Sengupta as denuding the engineer of any discretion, cannot be read in isolation as a fetter for such exercise. Clause 9 was part of the chapter titled "Instructions to Bidders". Such clause indicates the consequence (penalty) that a tenderer is likely to suffer, should (i) he not produce the original hard copies of the documents or any other documents on demand of the Tender Evaluation Committee within a specified time frame or (ii) any deviation be detected in the hard copies from the uploaded soft copies or (iii) there be any suppression. The essence of clause 9 is a stipulation in terrorem warning that if any misdeed of the nature referred to therein is indulged in by a tenderer, the penalty would be three years' suspension. It could not, however, have been the department's intention to confer power on the engineer to treat the varied (three) types of misdeeds referred to in clause 9 at par for imposition of the same penalty (three years' suspension), irrespective of what the explanation furnished is. In my view, for reasons following, the clause ought to be read as empowering the engineer to impose a penalty as high as three years' suspension and not three years' suspension in every detected case of misdeed, irrespective of what is raised in defence. The word "will" in clause 9, having regard to the object that was sought to be achieved, was required to be read as "may". Should the occasion arise to impose a penalty, the motive of or the occasion for each of such misdeeds would of necessity require ascertainment and the situation dealt with in a fair, rational and reasonable manner, meaning thereby "objectively". A tenderer could indulge in either one or all the misdeeds for several reasons, which are not capable of exhaustive enumeration. Relevant documents may not be furnished by a tenderer, who is part of a cartel, to delay the tender process. One might indulge in suppression to steal a march over others. Definitely, withholding of documents intended to delay the tender process and suppression to hoodwink the tender issuing authority into awarding the contract are indeed misdeeds, which would call for strict action unless plausible explanation therefor is furnished. However, in each case where the exercise of the power to impose penalty arises, the concerned authority is required to form an opinion objectively on relevant considerations. Take a case where the tenderer sets up a claim before the tender issuing authority that he had defaulted in producing the original hard copies of the documents or any other document on demand beyond only a few minutes of the stipulated time and that such delayed production was not actuated by mala fides and succeeds in proving its claim, can it be argued

that the concerned officer/authority has no discretion to choose between two options and to even let the tenderer go scot-free? Or, take the present case where before the penalty was imposed by the engineer for suppression of the debarment order of the said municipality, the Chairman thereof withdraws it citing mistake and error as the grounds; considering the changed scenario, was the first petitioner not entitled to protection against the harshest penalty? The answers to these questions must go against the department and it must be held that the engineer did have discretion in the matter of imposition of penalty. For the simple reason that the engineer proceeded on the premise that he had no discretion and ordering 3 (three) years suspension was the only course open to him, as contended by Mr. Sengupta, it is clear that there was no objective consideration based on relevant materials and the penalty of three years" suspension was imposed mechanically once the suppression was detected.

24. I could have ended my judgment here by setting aside the impugned order and remitting the matter to the engineer for fresh decision to be taken conscious of the discretionary power that he is entitled to exercise in course thereof. However, the engineer passed the impugned order while complying with this Court's order dated June 17, 2013. Since there has been no proper and correct understanding of the law by him and an order has been passed mechanically, which effectively is the reiteration of his earlier intent to suspend the first petitioner irrespective of its defence, which this Court nipped in the bud, interest of justice would not be served if the petitioners were to be relegated to him once again.

25. Instead, I now propose to move on to decide the other question that arises for decision considering the defence of strict adherence to legal principles raised in the counter affidavit of the department, i.e. (whether the impugned order of suspension suffers from any of the vices based whereon the Court exercising power of judicial review may interfere and pass suitable direction for setting things right?

26. Decisions are legion that a judicial review Court is not so much concerned with the merits of the decision as such, but reviews the process leading to the impugned decision. Illegality, irrationality and procedural impropriety are well recognized grounds of judicial review. Wednesbury principle, being part of the irrationality ground, is one of the tests that may be applied to review a decision on the touchstone that no sensible person upon application of mind to the issue to be decided could have arrived at the impugned decision. The test of proportionality is also gaining ground as one of the precise tests requiring the Court to judge as whether the action that has been taken was really needed and was within the range of courses of action, which could reasonably be followed.

27. It would now be my endeavour to decide, irrespective of whether or not the engineer enjoyed any discretion, whether judicial review is attracted on facts and in the circumstances based on the well-recognised grounds therefor.

28. The clause of the notice inviting tender which the petitioners failed to abide by, has been noted. A question would obviously arise, what is the purpose for insertion of such a clause? To my mind, the tender issuing authority thought it proper to seek information regarding the past performances of it the tenderers and to form an opinion regarding their trustworthiness. It is settled law that while finalizing a tender process it is not always necessary to award the contract in favour of the lowest eligible bidder; for reasons to be recorded, which are cogent, a tender issuing authority may award the contract to such bidder, who may not have quoted the lowest bid, but consideration of the totality of his past performance and trustworthiness commends to the tender issuing authority to be most suitable, and fit for execution of the work. The consequence that a tenderer may suffer for his misdeed(s) is also indicated in the instruction to the bidders, which is likely to act as a deterrent.

29. Now, sub-clause (h) of clause 3 extracted supra no doubt required a tenderer to declare that he has not been barred/delisted/blacklisted by the bodies mentioned therein in respect of DI Pipe supply tender for the last five years. Such clause also required the tenderer to furnish a brief note in case he has suffered such barring/delisting/blacklisting order. In view of the second requirement, it is clear that a tenderer who has during the last five years suffered an order of barring/delisting/blacklisting, ipso facto, does not incur a disqualification so as to be kept out of the zone of consideration. If the petitioners had disclosed the debarment order of the said municipality and were otherwise found technically qualified, they would have most certainly been entitled to participate in the tender process and have their financial bid considered. I need not examine here what course the tender issuing authority might have followed, if the first petitioner were ultimately found to be otherwise technically qualified and the lowest bidder. Suffice it to note that the tender issuing authority reserved unto itself the discretion of making an appropriate choice considering the nature of deficiency leading to the barring/delisting/blacklisting order.

30. To steer clear of all controversy, the first petitioner ought to have disclosed in its bid that it had suffered a debarment order issued by the said municipality. That the order was passed without hearing it and therefore it was a nullity (as mentioned in paragraph 21 of the writ petition), could also have been indicated. For reasons best known to it, such fact was not disclosed. The first petitioner was disqualified and not allowed to participate in the tender process. Its venture to the judicial fora did not yield success and, therefore, it had to rest content being kept out of the arena. No exception can or could be taken against such decision of disqualification. So far so good! Importantly, although the first petitioner was disqualified sometime in the later part of March 2013, the order of suspension was not issued soon thereafter. Why action was not taken in terms of clause 9 extracted supra immediately after disqualifying the first petitioner, has not been explained. The process to suspend the first petitioner was initiated on June 7, 2013 after the writ appeal was dismissed, but in the meanwhile the withdrawal order dated May 27, 2013 had seen the light of the day. If an order of

suspension were passed before May 27, 2013, perhaps the petitioners could have little reason to join issue. However, the order dated May 27, 2013 brought about a sea change in the circumstances. The nature of the order dated May 27, 2013 was such that the debarment order dated January 11, 2013 was to be treated as void ab initio, except as regards things done or transactions past and closed. The fact that the debarment order dated January 11, 2013 did not exist on the date the impugned order was passed was a very vital fact which ought to have been taken into consideration as relevant and germane for deciding the question of penalty, if at all, to be inflicted on the first petitioner. As on date the impugned order was passed, the engineer ought to have posed the following question: what has the first petitioner suppressed while submitting its bid on March 18, 2013? Obviously, the answer thereto would be that it has suppressed the debarment order dated January 11, 2013. Having regard to the defence taken by the petitioners that the said debarment order has been unconditionally withdrawn by the said municipality observing that it had been mistakenly issued, the next question that the engineer ought to have posed is, what is the effect of suppression of a debarment order which in the eye of law never existed? Regrettably, the engineer did not pose the correct question for an answer and the first petitioner was penalized for suppression of a document which, in the eye of law, had no existence. He thereby acted illegally and committed an error of law.

31. As has been expressed before, the order of debarment dated January 11, 2013 could have been a relevant material if suspension were ordered prior to May 27, 2013. In fact, the entire situation would have taken a different turn had the said executive engineer considered the issue of penalizing the first petitioner on any day prior to May 27, 2013. The debarment order dated January 11, 2013 was well in force and any post facto withdrawal would not have enured to the petitioners' benefit. The engineer while considering the question of infliction of penalty on the first petitioner as on September 11, 2013 ought to have applied his mind as to whether there has been suppression of such a material fact that the first petitioner cannot escape penalty. As it were, the first petitioner was tried for suppression of a non-existing fact. The impugned order is thoroughly unreasonable in the sense that no sensible person, upon due application of mind to the issue to be decided, could have arrived at the conclusion the engineer did.

32. The impugned order may now be judged from the angle of proportionality. It follows from binding precedents that proportionality is concerned with the way in which the decision-maker has ordered his priorities; the very essence of decision-making consists, surely, in attribution of relative importance to the factors in the case. As part of the concept of judicial review, the doctrine of proportionality ensures that the decision of an administrator as to sentence (even on an aspect otherwise within the exclusive province of such administrator) would not be immune from correction, if it were in outrageous defiance of logic and shockingly disproportionate. A decision which overrides a fundamental right without sufficient objective justification will, as a matter of law, necessarily be

disproportionate to the aims in view. It is well settled in criminal jurisprudence that by deft modulation, sentencing process be stern where it should be, and tempered with mercy where it warrants to be. Taking a cue therefrom, I may observe that one does not use an axe if a knife would suffice (for acts of commission/omission amounting to misconduct, an employee invariably is not dismissed/removed from service; instead he may be reduced in rank or his pay slashed, both being major penalties, as per requirement of the situation). Tested on the anvil of these principles, the order impugned goes beyond what was necessary to be achieved and is clearly indefensible. In a case of the present nature, it would not be just, fair and proper for the Court to not look at the realities and allow a gross injustice to be meted to the petitioners, resulting in curtailment of their fundamental right protected under Article 19(1)(g) of the Constitution, on a mere technicality that as on March 18, 2013 there had been a suppression, notwithstanding that the order of debarment was required to be treated as "non-existent in the eye of law".

33. In *Nawabkhan Abbaskhan Vs. The State of Gujarat*, , the Supreme Court was considering a case where the fundamental right of the petitioner had been encroached upon by the police commissioner without due hearing. An order of externment, which was passed by the administrator abandoning constitutional discipline and limits of power, was held to be of no effect and its violation of no consequence. The Court quashed the order, performing the formal obsequies of the order which had died at birth, and observed that the accused was never guilty of flouting an order which never legally existed. The dictum applies on all fours here.

34. In my view thus, the order impugned cannot be sustained on the triumvirate grounds i.e. illegality, irrationality and proportionality.

35. Mr. Sengupta had, in his usual forcefulness, relied on the following decisions:

- i) *Union of India and others Vs. M. Bhaskaran, G. Radhakrishnan and C. Devan*, ;
- ii) *Kendriya Vidyalaya Sangathan and Others Vs. Ram Ratan Yadav*, ;
- iii) *R. Radhakrishnan Vs. The Director General of Police and Others*, ; and
- iv) *Union of India (UOI) and Others Vs. Bipad Bhanjan Gayen*, .

36. I had referred the decision of the Supreme Court in *Jainendra Singh Vs. State of U.P. Tr. Prinl. Section Home and Others*, . There, the aforesaid decisions cited by him were considered together with other decisions. Considering the decisions of the Supreme Court in *Commissioner of Police, Delhi and Another Vs. Dhaval Singh*, ; *Kamal Nayan Mishra Vs. State of Madhya Pradesh and Others*, ; *Commr. of Police and Others Vs. Sandeep Kumar*, and *Ram Kumar Vs. State of U.P. and Others*, , a reference to a larger bench of the Supreme Court had been made for an authoritative decision on the question as to whether different yardsticks could be applied in the matter of grant of relief to candidates who deliberately suppress information at the time of recruitment.

37. Mr. Sengupta submitted that relief had been granted to Dhaval Singh, Kamal Nayan Mishra, Sandip Kumar and Ram Kumar having regard to the peculiar facts of their cases and also in exercise of power conferred on the Supreme Court by Article 142 of the Constitution and in fact there is no conflict of views in the two sets of authorities referred to in Jainendra Singh (supra) while granting and declining relief.

38. Although there seems to be force in Mr. Sengupta's submission that in fact there is no conflict of views, but the Supreme Court having noticed that contrary view had been expressed in the second set of decisions and that it was time for a larger bench of the Supreme Court to render an authoritative pronouncement to prevent "conflict of views" and to "enable the Courts to apply the law uniformly while dealing with such issues", I need not examine the aspect of conflicting views in any great detail. However the decisions on which Mr. Sengupta placed reliance are now considered for ascertaining whether the law laid down therein applies to the facts of the present case or not.

39. In M. Bhaskaran (supra), the respondents/workmen had obtained appointment in railway service on the basis of bogus and forged casual labourer service cards. Once the fraud was detected, proceedings were initiated and the concerned workmen removed from service. Repelling the contention of the workmen that they were illiterate and employed as casual labourers years back in 1983 and subsequently given temporary status and, therefore, should not be thrown out of employment after passage of such a long time, the Supreme Court observed as follows:

"7. *** It is difficult to agree with this contention. By mere passage of time a fraudulent practice would not get any sanctity. The appellant authorities having come to know about the fraud of the respondents in obtaining employment as casual labourers, started departmental proceedings year back in 1987 and these proceedings have dragged on for number of years. Earlier removal orders of the respondents were set aside by the Central Administrative Tribunal, Madras Bench and proceedings were remanded and after remand fresh removal orders were passed and after remand first removal orders were passed by the appellant which have been set aside by the Central Administrative Tribunal, Ernakulam Bench and which are the subject matter of the present proceedings. Therefore, it cannot be said that the appellants are estopped from recalling such fraudulently obtained employment orders of the respondents subject of course to following due procedure of law and in due compliance with the principles of natural justice, on which aspect there is no dispute between the parties. If any lenient view is taken on the facts of the present case in favour of the respondents then it would amount at putting premium on dishonesty and sharp practice which on the facts of the present cases cannot be permitted."

40. Ram Platan Yadav (supra) proceeded to uphold the view of the Central Administrative Tribunal that "the Courts/Tribunals are not to pat a person on his shoulders in a case where he is making false statement to the authorities

concerned for obtaining employment". The respondent while accepting the offer of appointment dated December 10, 1997 was bound by the terms and conditions thereof. Paragraph 8 of the offer required him to fill up an attestation form, while paragraph 9 thereof provided that "(s)uppression of any information will be considered a major offence for which the punishment may extend to dismissal from the service." Despite being involved in a case registered under Sections 323/341/294/506B/34 of the Indian Penal Code, the respondent had not disclosed the same and answered columns 12 and 13 of the attestation form requiring information about prosecution/detention/conviction by a Court of Law for any offence, and pendency of any case at the time of filing up the attestation form, in the negative. His service was terminated, which was upheld by the tribunal. Considering that the respondent may have failed to understand the implications of not disclosing the pendency of the criminal case and further that subsequently the criminal case had been withdrawn by the State Government, meaning that the case was not so serious, it was held by the High Court that the respondent did not involve in moral turpitude disqualifying him from seeking employment. Upon hearing the rival contentions, the Supreme Court observed as follows:

"11. *** It is not the case that column Nos. 12 and 13 are left blank. The respondent could not have said "no" as against column Nos. 12 and 13 without understanding the contents. Subsequent withdrawal of criminal case registered against the respondent or the nature of offences, in our opinion, were not material. The requirement of filling column Nos. 12 and 13 of the attestation form was for the purpose of verification of character and antecedents of the respondent as on the date of filling and attestation of the form. Suppression of material information and making a false statement has a clear bearing on the character and antecedents of the respondent in relation to his continuance in service."

12. *** A candidate having suppressed material information and/or giving false information cannot claim right to continue in service. The employer having regard to the nature of the employment and all other aspects had discretion to terminate his services, which is made expressly clear in para 9 of the offer of appointment. The purpose of seeking information as per columns 12 and 13 was not to find out either the nature or gravity of the offence or the result of a criminal case ultimately. The information in the said columns was sought with a view to judge the character and antecedents of the respondent to continue in service or not. The High Court, in our view, has failed to see this aspect of the matter. It went wrong in saying that the criminal case had been subsequently withdrawn and that the offences, in which the respondent was alleged to have been involved, were also not of serious nature. In the present case the respondent was to serve as a Physical Education Teacher in Kendriya Vidyalaya. The character, conduct and antecedent of a teacher will have some impact on the minds of the students of impressionable age. The appellants having considered all the aspects passed the order of dismissal of the respondent from service. The

Tribunal after due consideration rightly recorded a finding of fact in upholding the order of dismissal passed by the appellants. The High Court was clearly in error in upsetting the order of the Tribunal. The High Court was again not right in taking note of the withdrawal of the case by the State Government and that the case was not of a serious nature to set aside the order of the Tribunal on that ground as well. The respondent accepted the offer of appointment subject to the terms and conditions mentioned therein with his eyes wide open. Para 9 of the said memorandum extracted above in clear terms kept the respondent informed that the suppression of any information may lead to dismissal from service. In the attestation form, the respondent has certified that the information given by him is correct and complete to the best of his knowledge and belief; if he could not understand the contents of column Nos. 12 and 13, he could not certify so. Having certified that the information given by him is correct and complete, his version cannot be accepted. The order of termination of services clearly shows that there has been due consideration of various aspects. In this view, the argument of the learned Counsel for the respondent that as per para 9 of the memorandum, the termination of service was not automatic, cannot be accepted."

The appeal was, accordingly, allowed and the order of the tribunal restored.

41. In *R. Radhakrishnan* (supra), the appellant had suppressed the factum of involvement in a criminal case while applying for recruitment to the post of firemen. While rejecting the submission advanced on behalf of the appellant that a sympathetic view should be taken and dismissing the appeal, the Court held as follows:

"10. Indisputably, Appellant intended to obtain appointment in a uniformed service. The standard expected of a person intended to serve in such a service is different from the one of a person who intended to serve other services. Application for appointment and the verification roll were both in Hindi as also in English. He, therefore, knew and understood the implication of his statement or omission to disclose a vital information. The fact that in the event such a disclosure had been made, the authority could have verified his character as also suitability of the appointment is not in dispute. It is also not in dispute that the persons who had not made such disclosures and were, thus, similarly situated had not been appointed."

42. In *Bipad Bhanjan Gayen* (supra), the respondent was selected for training for subsequent appointment as constable in the Railway Protection Force pending verification of the declaration made by him regarding character and antecedents. While he was sent for training, the declaration was verified by the District Magistrate and it was revealed that he had been involved in two criminal cases, one registered under Section 376 and the other under Section 417, Indian Penal Code. Based thereon, he was not continued in service. Relying on the decision in *R. Radhakrishnan* (supra), the appeal filed by the Union of India was allowed. It was held in paragraph 13 as follows:

"13. *** We find that the observations in the above cited case are fully applicable to the present matter as well. We are of the opinion that it was a deliberate attempt on the part of the respondent to withhold relevant information and it is this omission which has led to the termination of his service during the probation period. The question of any penal consequences or a reading of the principles of natural justice in such a situation cannot be countenanced. The mere fact that the respondent has been subsequently discharged in the criminal cases will not in any way absolve him of his liability to have filled in the attestation form correctly and accurately as on the date he had done so.***"

43. One common feature of the decisions cited by Mr. Sengupta is that they all arise out of causes related to recruitment in public service. Another common feature is that the Courts of the first instance were approached challenging termination orders.

44. It is well-known that prior to obtaining employment under the State, an aspirant for a post must pass the test of verification of character and antecedents. If indeed a criminal case is pending against him, he would not be appointed so long the prosecution withdraws the case or an acquittal is secured or he is discharged for want of sufficient evidence. Since the disclosure of involvement in a criminal case would have the effect of creating an impediment insofar as future appointment is concerned, by and large there is a tendency if one is involved in a criminal case to either withhold information by not replying to a question or by giving a false answer to a pointed question. More often than not, those withholding information or misrepresenting facts do not succeed. Either at pre-appointment or post-appointment stage, detection of involvement is invariably made resulting in action being taken including disqualification or termination of service, as the case may be.

45. Mr. Sengupta has stressed on the fact that in Ram Ratan Yadav (supra) and Bipad Bhanjan Gayen (supra), even after withdrawal of the criminal case, the Supreme Court did not provide succour to the concerned respondents. He is right in his reading of the said decisions. However, such decisions do not lend assistance to the department since the dates on which the criminal case was withdrawn in one case or a discharge was ordered in the other do not appear from the reports. In my reading of the decisions, the criminal case may have been withdrawn or the discharge ordered after the terminations were effected and during the time proceedings were pending before the Courts and hence were found to be immaterial. In any event, suppression of a material fact by an aspirant for a post to gain public employment by withholding information/misrepresenting facts even on the face of clear instructions regarding the consequences of such withholding/misrepresentation cannot be equated with a case of blacklisting/suspending a firm to enter into contracts, the degrees of culpability being quite at variance. The first petitioner was disqualified from participating in the tender process for suppressing the debarment order, and this was in line with the ratio of the decisions cited by Mr. Sengupta. This Court did

not, for obvious reasons, interfere in the order of disqualification. However, the debarment order was withdrawn prior to the impugned suspension being ordered. This distinction, though fine, is real and called for a different treatment of the situation. Suspension as a consequence of the self-same suppression, in addition to disqualification, could necessarily follow if the debarment order were quite as effective on September 11, 2013 when the impugned order came to be made. Regard being had to the factual differences noticed above, the ratio of the cited decisions do not apply and hence the respondents' claim is not upheld. For the reasons aforesaid, the order of suspension was not called for. The writ petition succeeds and the impugned order is quashed. The respondents 2 and 3 shall allow the first petitioner to participate in future tender processes, if it is otherwise eligible in terms of the tender terms and conditions. However, the parties shall bear their own costs.

Photostat certified copy of this judgment and order, if applied for, shall be made available to the parties at an early date.