(1984) 07 CAL CK 0003

Calcutta High Court

Case No: C.O. No. 14477 (W) of 1983

Mrinal Kanti Chatterjee and Another		APPELLANT
	Vs	
State of West Bengal and Others		RESPONDENT

Date of Decision: July 20, 1984

Acts Referred:

- Constitution of India, 1950 - Article 14, 298

Citation: 89 CWN 196

Hon'ble Judges: B.C. Ray, J

Bench: Single Bench

Advocate: S.N. Mukherjee and D.P. Mukherjee No. 2, for the Appellant; N.N. Gooptu, Govt. Pleader and Anil Krishna Mukherjee for the State and R.N. Mitra, J.K. Banerjee and Dipti Bhattacharya, for the Respondent

Judgement

B.C. Ray, J.

On the prayer of Mr. Mitra, learned Advocate proforma despondent No. 8 be added as a party; respondent in this application. The two petitioners, Mrinal Kant Chatterji and Hirendra Kanta Banerji, have challenged in the instant. Writ application the acceptance of the tender pursuant to the tender notice No. 5 of 1982-83 published in the middle of January, 19813 by the respondent No. 3, Executive Engineer, Sundarban Development Project, as well as the acceptance of the tenders of the added respondents Nos. 6 and 7 and another contractor and the issuance of the work order in respect of works mentioned in serial Nos. 6, 12, 14 and 15 of the said tender notice on the grounds, inter alia, that these two petitioners," who were experienced contractors and who have fulfilled all the requirements as provided in the tender notice, have been illegally denied issuance of tender forms and thereby depriving them from submitting tenders in respect of the items of work mentioned in serial Nos. 6,12,14 and 15.

2. It has been stated in the petition that the petitioner No. 1, Mrinal Kanti Chatterji who was also the owner of a properietory firm, M. K. Chatterji and Co., is an experienced contractor and he had undertaken various sorts of jobs under the State Government and other statutory corporations for doing works such as excavation of canals, earth removing, silt clearance and other sorts of project works. It has been further stated that he is a bona fide contractor under the irrigation and Water Ways Department, Public Works Department (Roads), Calcutta Metropolitan Development Authority and also other various statutory corporations and his firm which is a proprietory one has been engaged in doing these sorts of work since the day of its registration in July,1963, It has been further stated that the petitioner No. 1 has undertaken works for more than Rs. 10 lakhs and duty completed the said work within the stipulated period to the entire satisfaction of the authorities, more specifically under the Irrigation and Waterways Directorate. It has been further pleaded in the petition that the petitioner No. 2, Hirendra Kanta Banerji, is the proprietor of H.K. Banerji and Co. engaged in doing various sorts of work including earth work, excavation of canals, different protection works. It has been further, stated that the petitioner No. 2 is undergoing such types of work under the Irrigation and Waterways Directorate for the last 12 years and he has now undertaken works for more than four lakhs of rupees under various departments. It has been stated that the petitioners came to know in the middle of February, 1983 from publication of tender notice No. 5 of 1982-83 by the Executive Engineer that several works were going to be undertaken for the purpose of development of Sunderban areas by the Drainage and Irrigation Division of the Sunderban Project. In the said tender notice, the nature of the works was duly mentioned and the estimated cost of each items of work were mentioned in the said notice and the approximate time for completion of the said work has been given and the earnest money to be deposited has also been mentioned therein. It also appears from the said notice that contractors desirous of submitting tenders are to fulfil the requisite qualifications mentioned therein. The last date for application for tender forms was fixed as 23rd February, 1983. It. has been mentioned in clause 10 of the tender notice that a contractor who is eligible in accordance with the qualifications described in the said notice to participate in the submission of tenders has to inspect the site and to understand the implications of the nature of work involved and then to submit his tender within the time prescribed therein. It has also been pleaded that as against the works in serial Nos. 6, 12, 14 and 15, it has been provided that a contractor must be either a class-I contractor under the Irrigation and Waterways Directorate or he must be an outside bona fide contractor having, an experience and ability in executing such type of works. It has been stated that the petitioners are outside contractors having wide experiences in undertaking similar nature of works as indicated in the aforesaid serial numbers of the tender notice.

3. The petitioners on 22nd February, 1983 made an application to the respondent No. 3 for supply of tender forms. The petitioner No. 1 mentioned in his application for supply of tender forms in respect of the works in items Nos. 14 and 15 of the tender notice whereas the petitioner No. 2 also made an application on the same day, i.e. 22nd February, 1983

asking for supply of tender forms in respect of works appearing in serial Nos. 6 and 12. It. has been stated that the petitioners were not given tender forms as requested by them to be supplied in their letters but they were supplied tender forms in respect of works in serial Nos. 23 and 20 of the tender notice for which they have not asked for any tender forms. This tender form was issued on 25th February, 1983 at about 5 P. M. On 26th February, 1983; both the petitioners sent letters protesting against the issuance of such tender forms against serial Nos. 23 and 20 for which the petitioners did not at all ask for tender forms and requested the respondent No. 3, the Executive Engineer, to state the reason why they were not provided with tender forms asked for and what was the reason for refusal of such tender forms to them, in order to enable them to prefer appeal under clause 39 of the tender notice to the higher authority. It has been stated that 26th and 27h February, 1983 were holidays. No reply was received by them and this representation, as appears from the endorsement of the officer, has been received at about 12 Noon, whereas the time fixed for opening the tender was 1-30 P.M. on 28th February, 1083. It has been stated that the Executive Engineer, respondent No. 3, did not consider their representation at all nor did he give any reply to the said representation. On the other hand, respondent No. 3 opened the tenders at 1-30 P.M. It, has been pleaded that this deliberate refusal and failure on the part of the respondent No. 3 to supply tender forms as requested by the petitioners and the supply of tender forms in respect of which the petitioners did not at all ask for is a clear denial of the priciples of natural justice, it has been further submitted that when a public authority has formulated a principle and also invited tenders, it is incumbent on such statutory authority to follow the said policy or principle. It has been further stated that the petitioners, duly complied with all the requirements as regards the qualifications of a contractor to entitle them to apply for supply of tender forms in respect of the aforesaid works. It has also been stated that the petitioners annexed income tax and sales-tax clearance certificates in order to prove their ability to do these types of works of the value mentioned in the tender notice. The petitioner No. 1 had annexed two certificates and petitioner No. 2 had annexed three certificates from the different departments of the Government to show that they have satisfactorily completed works of the types mentioned in item Nos. 6, 12, 14 and 15 but also works of higher value to the full satisfaction of the authorities concerned wihin the stipulated time. It has been, pleaded that respondent No. 3 acted mala fide and in an arbitrary manner in refusing to supply tender forms to the petitioners and thereby depriving them from participating in the submission of tenders in respect of the works mentioned hereinbefore. It has, therefore, been submitted that this action of the public authority like the respondent No. 3 is discriminatory and in utter violation of the principles of equality envisaged in Article 14 of the Constitution. It has also been pleaded that the action of the respondent No. 3 in allotting the work to respondents Nos. 6 and 7 and another added respondent No. 8, is also bad being in contravention of the policy laid down in the tender notice itself. It has, therefore, been prayed that a Writ of Mandamus be issued commanding the respondents to act in accordance with law and to act on the basis of the terms and conditions contained in the tender notice. There was also a prayer for a Writ of Mandamus commanding the respondents to forbear from giving effect to the

impugned allotment of works by the respondent No. 3 in favour of different contractors including respondent No. 6, as well as from proceeding any further with the execution of the work as mentioned in the tender notice annexed as annexure "A" to the Writ application. There is also a prayer for a Writ of certiorari calling upon the respondents to transmit the entire records of the case to this Court to enable this Court to cancel, quash and set aside the impugned orders.

4. This application was filed on 23rd March, 1983. On 24th March, 1983 after hearing learned Advocates for the petitioners as well as for the State respondents this Court directed this application to appear two weeks hence granting time to both the parties to file affidavits in the meantime An interim order was made to this extent That the respondents would not proceed any further in this matter on the basis of the tender notice without the leave of this Court. This application came up for further consideration of the interim order on 13th May, 1983 and after hearing learned Advocates for both the parties, this Court modified the interim order to this extent that the interim order will remain so far as with regard to items of works in items Nos. 6, 12, 14 and 15. It was further made clear in the said order that the interim order would continue till the disposal of the prayer for extension of interim order. The interim order with regard to other items of works mentioned in the tender notice was vacated. Thereafter on 19th September, 1983, Mr. Rabindra Nath Mitra, learned Advocate, made an application for addition of parties on behalf of some of the contractors in whose favour work order was issued. That application was heard on 19th September, 1983 and the application was allowed and they were directed to be added as party respondents in the Writ petition. Time was granted to file affidavit-in-opposition by those respondents. These petitioners were added as respondents Nos. 6 and 7. On 20th March, 1984 further consideration of the interim order was taken up by this Court and after hearing learned Advocates, for the added respondents as well as for the State, the interim order that was made earlier was varied to this extent "that the work may be continued and completed but no payment should be made to the parties in the pending application without the leave of this Court". The application was directed to appear in the list for hearing at the top on 27th March, 1984.

5. An affidavit-in-opposition sworn by one Santi Ranjan Biswas, Executive Engineer, respondents No. 3, on 12th August, 1983 has been filed. In paragraph 5 of the said affidavit, it has been stated that one M. K. Chatterjee prayed for tender form in his individual capacity and not as a proprietor of his firm. In the application there was no mention of its being a proprietorship firm. No credential was submitted along with the application indicating his bona fide as a contractor under Irrigation and Water ways Directorate. P.W. (Road) Dept. or C.M.D.A. in his petition save and except, one certificate of completion of work (without any mention of the period of its execution) from C.M.W.S.A. a non-Government body. This certificate clearly denotes the applicant as an individual and not a proprietorship firm. It has been denied that while submitting the instant Writ petition before this court, the petitioner has represented his locus standi as a proprietorship firm, the prayer for tender form has been submitted in the capacity of an

individual. A copy of the said application has been annexed as annexure "A" to the said affidavit. It has been submitted that the petitioner has obtained this order in question from this Hon"ble court by suppressing material facts on record. In paragraph 6 of the said affidavit, it has been submitted that the firm has not submitted requisite credentials in support of their statements contained in their petition. In paragraph 8, clause 19 of the items of the tender has been mentioned which is to the effect that tender, paper will not be sold to such contractors who are not considered fit for the work. The decision of the Executive Engineer in this regard will be final. In paragraph 8(a) it has been stated that the petitioners have suppressed material facts and obtained this civil order and also an interim order of injunction. It has been further stated that vital credentials that are required to be submitted to the respondent No. 3 in order to satisfy him for obtaining tender/forms had not been submitted. It has been further stated in paragraph 9 that the petitioner No. 1, M. K. Chatterjee, applied for tender forms against serial nos. 15 and 16 in his individual capacity and not in the capacity of a firm as mentioned in the Wirt petition. It has been further stated that the value of the work against serial nos. 15, and 16 is Rs. 5.40.479.00 whereas the petitioner no. 1 while submitting the application for tender has submitted a certificate from the Executive Engineer, C.M.W. S. A. a non Government body, dated 29th November, 1977 to the effect that he has completed a work amounting to Rs. 3,75,534/-. It has been further stated that the type of work, year of allotment and time taken for completion have not been mentioned. The certificate is also not a recent one which is one of the important requirements. Hence the petitioners did not satisfy the conditions which were laid down in the notice inviting tenders. It has been further stated that petitioner No. 2 submitted only one work order, dated 26.2.82 of the Executive Engineer, Canals, Division, allotting him one-fourth of work amounting to Rs. 85,836/- only, i.e. one-fourth of the amount of Rs. 3;43,746/- whereas the value of the work against serial nos. 6 and 12 is Rs. 6,07,020/-. A work against which work order was issued might not have been executed for one reason or other. That is why such documents could not be considered sufficient for issue of tender forms for such works of considerable valuation. It has been stated in paragraph 9(c) of the said affidavit by the deponent that while rejecting the prayer of petitioner No. 1 for serial nos. 15 and 16 and of the petitioner No. 2 for serial nos. 6 and 12, it was however considered that they might be able to execute work against serial nos. 20 and 23 respectively of such lesser value. They were, therefore, given an opportunity against these serial nos. 20 and 23. However, they did not prefer to accept this nor did they approach the appropriate authority in time to establish their credence or ventilate their grievance. They issued Advocate"s notice dated 27.2.83 which was received on 28.2.83 when last date of issue of forms had already expired on 25.2.83. It has been stated that the petitioners did not approach higher authority as provided for in the tender notice. It has been stated in paragraph 10 that tenders against serials nos. 6, 12, 14 and 15 along with others had been accepted by the Project Director, Sundarban Development Project (IFAD-Assisted) on the 8th March, 1983. All works were duly started and considerable volume was completed upto the date of receiving the interim order of this court through the Advocate of the petitioners. Other portions of this affidavit being not relevant for deciding the issues involved are not referred to herein.

6. An affidavit in reply sworn by petitioner no. 1 Mrinal Kanti Chatterjee, on 2nd September, 1983 has been filed. It has been stated in paragraph 5 that the distinction sought to be drawn between, M.K. Chatterjee in his individual capacity and M.K. Chatterji as the proprietor of a firm is not only mala fide but also childish. It has been stated that M.K. Chatterji is a contractor working in various departments of the State Government including that of Irrigation and Waterways Department, Calcutta Metropolitan Devolopment Authority and C.M.S.W.A. That two credentials were submitted along with the application for issuance of tender by M.K. Chatterji, Contractor. The statements to the contrary are incorrect and untrue. These two credentials were issued, one by the Executive Engineer, Central Calcutta Division dated 29.12.80. The said credential relates to a work done by M.K. Chatterji, Contractor which relates to a work amounting to Rs. 10.50 lakhs approx. The other credential which was also given along with the application for tender by M.K. Chatterji, Contractor is by the Executive Engineer Div. II, C.M.S.W.A. dated 29.11.77 which relates to completion of work for a sum of Rs. 3,75,534/-. Copies of the said credentials have been annexed and marked collectively with letter "A" to this affidavit-in-reply. It has been further stated by this deponent that for obvious reason and in order to bestow favour upon his own candidates, the deponent of the said affidavit has removed the other credentials. It is indeed strange and surprising why the said deponent did not ask the said M. K. Chatterji to explain the matter or why he did not reject his application for tender form but issued a form for a different work altogether of substantially lesser value. It has been stated that this was done with dishonest motive in order to eliminate competition and facilitate the introduction of candidates of his own. It has further been stated in paragraph 6. by the deponent that it is practically unthinkable that a contractor will not submit any credential which was issued by a competent authority testifying the work done by a contractor for a sum of Rs. 10.50 lakhs, the work being a work done quite later than a work done under the C.M.S.W.A. It has been stated that along with the application, M.K. Chatterjee filed two credentials, one dated 29.11.77 and the other dated 29.12.80. It has been stated that the respondents deliberately suppressed the fact that the petitioner No. 1 along with his petition filed two credentials and not one. This has been done with a mala fide and dishonest intention in order to justify the illegal action taken by the respondents in issuing tenders to contractors who have lesser capability than the petitioner No. 1. it has been further stated that Sri M.K. Chatterji and M.K. Chatterji are the self-same person who is a contractor undertaking work under different Government authorities. In paragraph 7, it has been stated that the petitioners duly fulfilled all the requirements for issue of tender and accordingly they were favoured with tenders but not the same tender forms which they applied for namely, tender forms against items nos. 6, 12, 14 and 15. It has also been submitted that petitioner No. 2 along with the application filed two credentials, One credential issued by the respondeat No. 3 while he was in Kakdwip Irrigation Division. The said credential relates to an amount of Rs. 2,75,711/-. This has been done by the petitioner No. 2 under the Irrigation and Waterways Directorate and a certificate was issued by the respondent No. 3 testifying the capability of the petitioner No. 2. That apart, the petitioner no. 2 annexed another credential testifying the capability of the petitioner No. 2 to perform and complete a Work

for a sum of Rs. 8,43,746/- and the same was dated 26.2.82. The third credential was issued by the Executive Engineer, Bidyadhari Dr. Division which testifies the fact that the petitioner No. 2 has completed work amounting to Rs. 4,59,424/-. It has been stated that these three credentials were annexed with the application so filed by the petitioner No. 2. It has also been stated that both the petitioners nos. 1 and 2 in the Writ petition also stated that they have income tax and Sales-tax clearance certificates. True, copies of the said credentials have been annexed and marked with letter "B" collectively in this affidavit. It has been further stated that the petitioners in the Writ petition have fulfilled all the requirements as specified under clauses 1, 12 and 19 of the Clauses and paragraph 6 of the item of works. Clause 19 cannot be deemed as a requirement for issue of a notice. It has been further stated that the choice for submitting tenders in respect of works lies upon the contractors, to select a particular type of job he will undertake and to make prayer for issue of tender form as against a particular serial number. It has been stated in paragraph 9 of the reply that the respondent No. 3 wilfully and deliberately suppressed the credential which is most vital and which was issued, by the CMDA. On the other hand in so far as the credential of petitioner No. 2, the respondent No. 3 upon a misleading of the amount for which the credential was issued has made a frivolous statement in his affidavit. If the credentials, were properly considered, in that event tender forms ought to have been issued in their favour as against serial nos. 6, 12, 14-and 15. It has been stated that in order to disentitle the petitioners, the respondent No.3 deliberately suppressed the credentials and has misread the credential of petitioner no. 2. Respondent No. 3 has been vested with powers to issue tender forms but such power does not mean and imply arbitrary use of such powers. It has been stated that it was not open to the Executice Engineer to refuse to supply tender forms on the plea that the petitioners were unfit on any other ground without providing the petitioners an opportunity of being heard and with an opportunity to establish their eligibility, The petitioners have been deprived of their fundamental rights under Article 14 of the Constitution of India. It has been stated in paragraph 11, that the person with whom works as against number 6, 12, 14 and 15 were given are not better candidates than that of the petitioners and in any event, they had no such better eligibility as to find favour with respondent No. 3. The deponent states that he craves leave of this Court to call upon the respondents to produce the relevant records including the records containing the applications and credentials of different candidates in respect of the different works in dispute under the present tender notice at the time of hearing of this application. It has been further stated that those respondents have been favoured with the said tenders for extraneous and other reasons. It has also been stated that considerable volume of work was done till the petition was affirmed on 18th March, 1983.

7. An affidavit-in-opposition has been sworn on behalf of respondents nos. 6 and 7 by Kamal Kanti Roy Choudhury. In paragraph 3 of the said affidavit has been stated by the deponent the he is an enlisted contractor having class-I category under the Irrigation and Waterways Directorate and he has executed so many big jobs under the Irrigation and Waterways Directorate. In paragraph 7 of the said affidavit, it has been stated that as and

when these respondents got the work on 28.2.83 on competition with other applicants, they started preparation of work, brought coolies at the work site, engaged supervisor and started other preliminary works, inasmuch as, the formal work orders are usually issued sometimes after the allotment of the work.

8. An afffdayit-in-reply sworn by the petitioner No. 2, H. K. Banerjee, has been filed on 26.9.83. In paragraph 9 of the said affidavit it has been denied that the respondent No. 6 is an enlisted Class I contractor and the deponent has called upon the respondent No. 6 to prove the same. It has been denied that the respondent No. 7 has completed any big job under the Irrigation and Waterways Directorte or under any other department before obtaining the present disputed work. It has been further stated that the respondent No. 7 before obtaining the present work has never executed any work of more than Rs. 30,000/-. in value in the Irrigation and Waterways Directorate. The respondent No. 7 obtained and did some work in Kakdwip irrigation division under the respondent no. 3. It has therefore been stated that during the time when the respondent No. 7 obtained the said work, Sunil Kumar Mitra, a close relative of the sole proprietor of the respondent No. 7 firm was acting as the Assistant Engineer in the Mousumi Irrigation Subdivision under the Kakdwip Irrigation Division. The respondent No. 7 has not alone any other work under the Irrigation and Waterways Directorate. It has been stated that the deponent introduced Sri Naren Chowdhury, the sole proprietor of respondent No. 7, when he opened his current Bank account being Current Account No. 8|251 on 8th April, 1982 with the Alipore Branch of the Bank of Baroda. It has been denied that respondent No. 8 has done any big job under the Irrigation and Waterways Directorate or the P. W. D. and respondent No. 8 has been called upon by the deponent to produce papers and documents to prove the said allegation. Other portions of the said affidavit being not relevant are not referred to herein.

9. Mr. Sakti Nath Mukherjee, learned Advocate appearing on behalf of the petitioners, has submitted that the petitioners Nos. 1 and 2 have fulfilled all the requisite conditions mentioned in the tender notice inviting tenders. Both the petitioners have executed similar types of works of excavating canals, silt clearance and doing earth work and they have produced in support of their such eligibility, credentials from the authorities concerned. It has been stated that the petitioner no. 1 filed two credentials along with his application filed on 22nd February, 1983 to respondent No. 3, the Executive Engineer, Irrigation and Waterways Directorate. One or the certificates, was issued by the Executive Engineer, Central Calcutta Division, S & D Sector, C.M.D.A. dated 29th December, 1980. It appears from the said certificate that the petitioner No. 1 was entrusted to execute work of renovation of Chetla Boat Canal valued at Rs. 10 lakhs 50 thousand and the petitioner No. 1 satisfactorily completed the said work within the stipulated time. It has been further stated that another certificate was issued by the Executive Engineer, Divn. VIII, CMSWA, which is dated 29th November, 1977 certifying that the petitioner successfully executed works regarding construction of Lead canal worth" Rs. 3,75,534/-. Similarly the petitioner No. 2, H. K. Banerjee, also annexed three credentials along with The application filed on

22nd February, 1983 before the respondent No. 3 requesting him to supply tender forms. These three credentials were issued by the Executive Engineer, Bidyadhari Dr. Division, Barasat (I & W Dte) in respect of successful completion of the work amounting to Rs. 4,59,424/-. Another certificate issued by the Executive Engineer, Kakdwip Irrigation Division, relating to work worth of Rs. 2,75,711/- was filed. The third one was issued by the Executive Engineer, Canals Division, Calcutta on 26.2.82 in respect of work valued at Rs. 8,43,746/-. It has been submitted by Mr. Mukherjee that both the petitioners duly fulfilled all the requirements specified in the tender notice and as such they being bonafide outside contractors capable of undertaking works as mentioned in the serial nos. 6, 12, 14 and 15, the Executive Engineer, respondent no. 3, illegally and arbitrarily refused to supply tender forms to them. It has been further submitted by Mr. Mukherjee that the last of date of issuance of tender forms was 25th February, 1983. The office of the respondent no. 3 supplied to the petitioners two tender forms against serial Nos. 23 and 20 respectively at 5 P.M. on 25th February, 1983 26th and 27th February, 1983 were holidays. Representations were made through their Advocate''s letter on 27th February, 1983 which was received by the respondent No. 3 on 28th February, 1983 at about 1150 a.m. in his office while time for opening the tenders was fixed at 1-30 P.M. on that very date. i.e. 28th February, 1983. It has been submitted that respondent No. 3 did not at all consider the representations nor intimate them the reasons for refusal of supply of tender forms to them inspite of their fulfilling the requisite qualifications mentioned in the tender notice. On the other hand, the tenders were opened at 1-30 P.M. It has been submitted that the respondent No. 3 acted mala, fide and also arbitrarily, in rejecting the petitioners'' applications without giving them any opportunity of hearing and without recording any reason therefor and thereby depriving them from participating in the submission of tenders. It has. therefore been submitted by Mr. Mukherjee that the impugned order that has been made accepting the tenders and alloting works to added- respondents Nos. 6 and 7 and also another added respondent No. 8 is for extraneous and oblique purposes and the same is in utter violation of the principles of natural justice. It has been further submitted by Mr. Mukherjee that the respondents who have been allotted the works have not the requisite qualifications as none of them has got any credential showing that they had satisfactorily completed works of the value as mentioned against the items Nos 6, 12, 14 and 15 of the tender notice. It is unthinkable that the respondent No. 3 without being satisfied at all had allowed them to submit tenders and had accepted their tenders and issued work orders in their favour, Mr. Mukherjee, therefore, submitted that such issuance of work orders is utterly contrary to the standard that has been laid down by a public.authority, namely, the Executive Engineer in the present case. The impugned order accepting the tenders in respect of those items of work and also issuance of work orders to the contractors is wholly arbitrary and bad and as such the same should be quashed and, set aside and appropriate orders should be made. Mr. Mukherjee in support of his submissions has cited some decisions of the Supreme Court at the Bar.

10. Mr. N. N. Gooptu, Government Pleader appearing on behalf of the respondents Nos. 1 to 5 along with- Mr. Anil Kumar Mukherjee. learned Advocate, has submitted in the first

place that this application is liable to be rejected in limine on the grounds that the petitioners have got no locus standi to move this application, more particularly petitioner No, 1. It has been submitted by Mr. Gooptu that petitioner No. 1 applied for tender forms in. his individual capacity whereas the one credential he has produced is.in favour of the firm, M. K. Chatterji and Company. The credential, therefore, is. not a credential which satisfied the requirement provided in the tender notice. As such the tender form was not supplied to him in respect of items of work in serial Nos. 15 and 16. Here, of course, there is a dispute, as the petitioner states that he applied for tender forms in respect of works in serial Nos. 14 and 15 and not 15 and 16. It has been next submitted by Mr. Gooptu that this application is not maintainable, inasmuch as, the petitioners did not avail of the alternative remedy provided in clause 39 of the notice inviting tenders where it has been specifically provided that anybody aggrieved against the order of the Executive Engineer may prefer appeal to the Project Directorate Sundarban Development Project, S.E. against such order of refusal to issue tender forms. It has been submitted by Mr. Gooptu that the petitioners having failed to avail of this alternative remedy, by preferring appeal, this application for high prerogative Writ should not be entertained and the application should be dismissed. It has been next submitted by Mr. Gooptu that the petitioner No. 1 only annexed one credential and it is of a much earlier date., i.e. November, 1977 and it relates to a work worth Rs. 3,75,534/- issued by the Executive Engineer, Division VIII, C. M. W. S. A. The petitioner No, 1 did not file any recent credential as mentioned in the tender notice. It has been further stated that the total value of the works in serial Nos. 15 and 16 and|or 15 and 16 are much higher than the aforesaid amount of Rs. 3 lakhs 75 thousand and odd in respect of which certificate had been filed. Respondent No. 3, the Executive Engineer, after duly considering the said certificate has rightly exercised his discretion in not supplying any tender form to the petitioner No. 1 in respect of these items of work asked for by him. But on a consideration of this certificate, he has. issued tender form in respect of work against serial No. 23 of the tender notice which is of a value a little over Rs. 50,000/-. It has been submitted that there is no arbitrariness nor any un-reasonableness for non-supply of the tender forms in respect of items of work against serial Nos. 14 and 15 or 15 and (sic) fonder form in respect of ed in this connection by Mr. Gooptu that the respondent No. 3 has not acted arbitrarily or un-reasonably or in a discriminatory manner in refusing to supply tender form in respect of work in serial Nos. 6 and 12 of the tender notice and in supply of tender form in respect of work in serial No. 20 which is of the value of Rs. 50,000/- and odd. It has therefore been submited that the impugned orders are not per se bad or arbitrary and as such this application is liable to be rejected in limine. It has further been submitted by Mr. Gooptu in this connection that a considerable part of the work has been done and this aspect should be taken into consideration and this Court should not interfere in this application at this stage.

Mr. Rabindra Nath Mitra, learned Advocate appearing on behalf of added respondents Nos. 6 and 7 has submitted that his clients are class-I contractors in Irrigation and Waterways directorate and as such in accordance with the terms and conditions prescribed in the tender notice, they are not to submit any credential to prove their

eligibility as contractors to have tender forms for the purpose of submitting tenders in respct of items of work mentioned in serial Nos. 6, 12, 14 and 15. It has been submitted by Mr. Mitra that for this reason the authorities did not ask for any credential nor did they submit any credential and there is no arbitrariness in supplying tender forms to them and also in considering the tender forms and in accepting the same as it is the lowest tender. It has been further submitted that the work order has been issued to his clients and the work has been completed by his clients. Mr. Mitra by showing a letter from the Bank where from his client took, advance for (sic) on this work has braved before this court that an order be made permitting the said respondents to pay part of money in order to enable him to satisfy the Bank advance.

11. The most vital question that requires consideration in this application is whether the Executive Engineer, respondent No. 3, as a public authority has acted arbitrarily in the matter of refusal to supply of tender forms to the two petitioners Nos. 1 and 2 or not. Connected with this question, another vital question needs to be decided is whether the standard that has been laid down in the tender notice has been followed by the respondent No. 3 in the matter of supplying tender forms and consideration of tender forms and allotment of works.

12. To decide the first question, it is necessary to mention in this connection the qualifications mentioned in the tender notice annexed as annexure "A" to the Writ petition. It runs as follows:-"Enlisted 1st class registered contractors of I & W. D. & outside bona fide contractors having experience and ability in executing such type of work are eligible to submit tenders".

13. Clause 1 of the tender notice which is also relevant and which has been quoted in the affidavit-in-opposition of the respondents Nos. 1, 3-5 is as follows :- "Intending tenderers will have to satisfy the Executive Engineer, Drainage & Irrigation Division, Project Director/S. E- IFAD-Assisted Sundarban Development Project, as the case may be, with documentary evidence about their financial and other resources, bonafides and past experience in the type of work involved for being entitled to receive tender documents etc"

14. Clause 12 of the tender notice is as follows :-

The intending tenderers must produce valid Sales Tax and Income Tax Clearance Certificates from the appropriate authorities at the time of issue of tender form to him. Outside/Contractors shall in addition, have to satisfy the Executive Engineer, Drainage & Irrigation, IFAD- Assisted S.D.P. about their financial resources, past experiences in the type of work involved and about their having in employment technically qualified personnel to look after the work satisfactorily. Credentials should be attached with application for tender form. They shall have apply well in time to the said Executive Engineer. No tender paper will be issued without orders from the Executive Engineer.

Clause 19 which is also relevant runs as follows;-

Tender paper will not be sold to such contractors who are not considered fit for the work. The decision of the Executive Engineer in this regard will be final.

15. The petitioners have stated specifically in their petition that they are outside contractors doing earth work, silt clearance work and excavation of canals and other works both under the Irrigation and Waterways Directorate, C.M.D.A. and also other statutory authorities for a considerable period of time. It also appears that the petitioner No. 1 who is the proprietor of the proprietorship firm, M.K. Chatterji and Company, registered some time in July, 1963, has been doing jobs of the aforesaid types since that period. The petitioner No. 1 admittedly made an application on 22nd February, 1983 in the office of the respondent No. 3, the Executive Engineer, Drainage and Irrigation Division requesting him to supply tender forms to enable him to submit tender against serial Nos. 14 and 15. Along with the application, the petitioner No. 1 has filed, as has been stated by him, two credentials in support of his ability and efficiency to undertake works of silt clearance, exacavating canals etc like the works in items Nos. 14 and 15. A certificate dated 29th November 1977 issued by the Executive Engineer, Division VIII, C.M.W.S.A., certifying that the petitioner No. 1 successfully completed the job of construction of Lead Canal-I, cost of the work being Rs. 3,75,534/-. It also appears that the petitioner submitted another credential issued by the Executive Engineer, Central Calcutta Division, S & D Sector, C.M.D.A. dated 29th December, 1980, certifying that the petitioner No. 1 successfully completed the work of renovation of Chetla Boar Canal estimated cost of which was Rs. 10 lakhs 50 thousand. It also appears that the petitioner No. 2 has filed three credentials along with his application filed on 22nd February, 1983 in the office of the respondent No. 3. The first certificate dated 3rd March, 1981 issued by the Executive Engineer, Bidyadhari Dr. Division, Barasat (I & W D te) about successful completion of the one-third of the work allotted to him and the value of the work was Rs. 4,59,424/-. The second certificate dated 3rd February, 1982 was issued by the Executive Engineer, Kakdwip Irrigation Division, that is the present respondent No. 3, who was there in that capacity at the relevant time, certifying that he successfully completed the work worth Rs. 2,75,711/- and the third certificate dated 26th February, 1982 given by the Executive Engineer, Canals Division, certifying that successful completion of the work valued at Rs. 8,43,746/- by the petitioner No. 2, within the stipulated time.

16. There is some dispute however, that the petitioner No. 1 according to the State respondents, did not mention in his application for supply of tender forms serial No. 14, but he mentioned serial No. 16. This has been seriously contested by the learned Advocate appearing on behalf of the petitioners and it appears from order dated 4th April, 1984 that the learned Advocate for the petitioners drew the notice of the Court to para 7 of the Writ application where it has been specifically stated on oath that the petitioner No. 1 asked for tender forms in respect of the item Nos. 14 and 15. It has been further stated that because of the non-supply of the tender forms asked by him, two letters from his lawyer dated 26th February, 1982 and 27th February, 1982 were sent to the Executive

Engineer concerned. On the directions of this Court relevant letters were produced and it appears from those letters that the statements made in paragraph 7 were correct. This Court thereafter directed to mark the Xerox copy of the said two letters as annexures "X" and "XI". It appears clear from the said two annexures that the petitioner No. 1 really applied for supply of tender forms against serial Nos. 14 and 15 of the tender Notice No. 5 of 1982-83 and not 15 and 16, as stated an the affidavit in opposition. Moreover, it appeared before this Court that there is some overwriting as regards the figure 14. There is no denial on the side of the State respondents that the two petitioners produced both sales tax and income tax clearance certificates as required under the tender notice. The only ground for non-supply of tender form, as stated in paragraph 6 is that the petitioners have not submitted the requisite credentials in support of the statements made in their applications. It has been further stated in paragraph 5 that the credential that has-been submitted by the petitioner No. 1 along with the application is not the credential in support of his petition which he made in his individual capacity, and not in the capacity of proprietor of the firm, M.K. Chatterjee & Co. The other ground was that the certificate of completion of work that was obtained from C.M.W.S.A. was a non-Government body and there is no mention of the period of execution of the work and the certificate also was issued to the applicant as an individual, and not as a proprietor of the said firm. Therefore this credential was not accepted as the proper credential and the tender form was not supplied to the petitioner No. 1.

17. It has also been stated with regard to the refusal to supply of tender form to the petitioner No. 2 on the ground that though he submitted along with his application only one certificate dated 26-2-1982, the Executive Engineer, Canal Division allotted to him only one work whereas the value of the work against serial No. 16 and 12 is less and as such, it was stated that the work against which an work order has been issued might not be executed for one reason or the other. That is why the documents were not considered at that time for issuance of the tender works.

There is no whisper about the other two credentials submitted by the petitioner in respect of his completion of work to the tune of Rs. 8 lakhs and odd and another in respect of four lakhs and odd. It has been specifically stated on oath by the petitioners in paragraph 6 of the affidavit-in-reply that the petitioner No. 1 filed two credentials along with the application for issuance of the tender forms dated 29th November, 1977 relating to completion of work by him for a sum of Rs. 3,75,554/- and also a credential relating to the work done by him in respect of work worth Rs. 10.50 lakhs approximately. It has been also alleged that the deponent of the said affidavit, namely, respondent No. 3 the Executive Engineer in order to bestow favour upon his own Candidates has removed the other credentials. It is also curious that when the two petitioners made representations on 27th February, 1983 to the respondent No. 3 requesting him to intimate as to what are the reasons for non-supply of the tender forms to the petitioners in spite of their furnishing the qualifications prescribed in the tender notice, the respondent No. 3 kept mum. The application was received by him on 28-2-1983 at 11-55 hours, and the time for opening

tender was fixed at 1-30 P. M. on 28-2-83. Neither any reasons have been recorded nor the same was intimated to the petitioners in order to enable them to avail of the opportunity provided by Clause 39 for preferring appeal against the order of refusal. This clearly shows that the action on the part of the respondent No. 3 is not giving any reply and in not recording any reasons for non-supply of tender forms to the petitioners is wholly arbitrary unreasonable and against all principles of natural justice. It has been tried to be submitted on behalf of the respondents by the Govt. Pleader that the petitioners have no locus standi to move this application before this Court. The question of locus standi has been well-settled by several decisions of the Supreme Court and this Court had occasion to render such decisions to the effect that any person who has been genuinely aggrieved by an action of any public authority, is certainly entitled to move this Court for redress of his grievances. In this case there is no iota of doubt that the petitioners were denied the supply of tender forms which they are entitled to get and hence they are certainly aggrieved persons. In these circumstances, the preliminary objection taken on behalf of the State respondents by the Government Pleader, in my opinion, is totally devoid of any substance and the same is liable to be rejected in limine. It has been held by the Supreme Court in the case reported in Erusian Equipment and Chemicals Ltd. Vs. State of West Bengal and Another, that the executive power of the Union or the State to carry on any trade and to acquire or hold or dispose of property as conferred by article 298 of the constitution of India has to be exercised subject to the limitation imposed by Part III of the constitution. So he exercise of such powers and functions in trade by the State is subject to Article 14. The State has the duty to observe equality. The Government cannot choose to exclude any person by discrimination. The order of blacklisting has the effect of depriving a person in the matter of public contract. Thus any person has a fundamental right to insist that the Government must enter into a contract with him. A citizen has a right nevertheless to enter into a contract. These observations of the Supreme Court has been referred to and relied upon in a later pronouncement of the Supreme Court in Radhakrishna Agarwal and Others Vs. State of Bihar and Others, where it has been held that at the very threshold or at the time of entry into the field of consideration of persons with whom the Government could contract at all, the State, no doubt, acts purely in its executive capacity and is bound by the obligations which dealings of the State with the individual citizens import into every transaction entered into in exercise of its constitutional powers. This view has also been reiterated in a subsequent pronouncement of the Supreme Court in Joseph Vilangandan Vs. The Executive Engineer, (Pwd), Ernakulam and Others, This court has the opportunity to decide in the case of 1978 (2) CLJ 166 and also in Barun K. Sinha and Another Vs. District Magistrate, Murshidabad and Others, . In a later decision, Ramana Dayaram Shetty Vs. International Airport Authority of India and Others, at page 1637 Bhagawati, J. observed as follows :-

The activities of the Government have a public element and therefore there should be fairness and equality. The State need not enter into any contract with anyone, but if it does so, it must do so fairly without discrimination and without unfair procedure. The

proposition would hold good to all cases, of dealing by the Government with the public, where the interest sought to be protected is a privilege. It must, therefore, be taken to be the law that where the Government is dealing with the public, whether by way of giving jobs or entering into contracts or issuing quotas or licences or granting other forms of largess, the Government cannot act arbitrarily at its sweet will and, like a private individual, deal with any person it pleases, but its action must be in conformity with standard or norm which is not arbitrary, irrational or irrelevant. The power of discretion of the Government in the matter of grant of largess including award of jobs, contracts, quotas, licences etc. must be confined and strucutred by rational, relevant and nondiscriminatory standard or norm and if the government departs from each standard or norm in any particular case or cases, the action of the Government would be liable to be struck down, unless it can be shown by the Government that the departure was not arbitrary, but was based on some valid principle which in itself was not irrational unreasonable or discriminatory.

In this connection one very vital fact cannot be lost sight of, namely, that the deponent of the affidavit sworn on 28.9.83 has stated categorically in paragraph 8 of the reply to sworn on behalf of the respondents nos. 6 and 7 that the last date of receiving application for issuance of tender forms was mentioned in the tender notice as 23.2.83 up to 13 hours. The last date and time for issuing tender forms was 25.2.83 up to 13 hours. The petitioners received tender forms against serial Nos. 20 and 23 at 5 P.M. i.e. just on the eve of the close of the office of the Executive Engineer, respondent no. 3 February 26, 1983 being the fourth Saturday of the month, the office was closed. 27th February, 1983 was a Sunday The application, that is, the two Advocate''s letters containing grievances of the petitioners was sent on 27th February, 1983 and the same were received by the office of the respondent no. 3 on 28th February, 1983 at 11-55 hours. An argument was tried to be advanced on behalf of the State respondents by, the learned Government Pleader that the petitioners intentionally delayed in making the representations and thereafter in order to create obstructions they have come before this court and by obtaining an interim order have tried to frustrate the carrying on of the vital works for which World Bank has given the necessary finances. This argument, in view of the discussions made above, falls to the ground.

18. Another most important fact has (sic)stated in paragraph 9, of the affidavit-in-reply. It has been stated that the respondent no. 7 before obtaining the present work never executed any work more, than Rs. 30,000/- in value, It has been further stated that in the Irrigation Waterways Directorate respondent no. 7 obtained and did some work in Kakdwip Irrigation Division when the respondent no. 3 was the Executive Engineer in the Irrigation Division. It has been further stated that during the time when the respondent no. 7 obtained the said work, one Sushil Kumar Mukherjee,a close relative of the sole respondent firm was acting as an officer. The respondent No. 7 in other work was in Kakdwip. Thus it has been submitted that in order to make provisions for this contractor the petitioners were illegally refused supply of tender forms. This is a very serious

allegation and it is surprising that though an affidavit-in-opposition has been filed on behalf of the respondent Nos. 6 and 7 concerned by the respondent no. 6, one K. K. Roy Chowdhury has not tried to controvert this serious allegation made by the deponent on oath in paragraph 9 of the affidavit-in-reply. Nor there is any counter - affidavit on behalf of the State-respondent controverting this serious allegation. It has been tried to be contended that this allegation has been made in the affidavit -the reply. Therefore, this portion of the averments in paragraph 9 of the affidavit-in-reply filed on 26th September, 1983 go unchallenged and un-controverted. In this back-ground the allegations and submissions made on behalf of the- petitioners that the tender forms were not supplied to the petitioners by the Executive Engineer, respondent no. 3, in order to favour these Contractors to pet the works knowing fully well that these contractors haw neither any experience to do works of such a magnitude involving 3/4 lakhs of rupees. It is pertinent to mention here that the Executive Engineer in his affidavit-in-opposition averred that the total value of the works against serial nos. 14 and 15 and 6 and 12 exceed the credentials filed by the petitioners. This statement is also wholly unfounded and patently incorrect and perverse. One credential issued by : the Executive Engineer, Central Calcutta section S & D C. M. D. A. clearly proves that the petitioners have successfully undertook and completed renovation of canal estimated at more than ten lakhs of rupees and the total value of the Serial Nos. 14 and 15 in which he asked for tender forms do not in any case exceed this value. Similarly, the Executive Engineer as an Executive Engineer in the Irrigation and Waters-Works Department issued one certificate produced by the respondent no. 2 certifying that the respondent no. 2 is competent to execute work up to the value of 2.1/2 lakhs of rupees. In these circumstances, the ground for non-supply of tender forms to these petitioners, in my considered view is nothing but flimsy baseless and irrelevant which a public authority is not expected to assign thereby depriving a citizen to participate in the submission of public tender in respect of a public work. This is mala fide patent on the face of the order itself. Therefore on the ground of mala fide also the work order issued by the Executive Engineer, Respdt. No. 3, is liable to be quashed and set aside. It is no use arguing that because some part of the work has been done immediately on the date of issuance of the opening of the tender and because the work has been completed considerably, so that should be considered notwithstanding the fact that the work order has been issued in a most arbitrary, unreasonable and mala fide manner. It is too late in the day to point but that an Executive Engineer should be aware of his responsibilities and duties merely because some terms of the tender notice confer on him discretion to supply tender form and to accept the same, it does not mean nor is it implied that as a public authority he can exercise his discretion arbtirarily without following the principles of reasonableness and fairness. I am constrained to point out that our policy is ruled by the rule of law. Every public officer must conform to the rule of law. It will be pertinent to mention here the observations of the Supreme Court in AIR 1969 S.C. 1427 paragraph 14. It has been observed that absence of arbitrary power is the first essential requisite of rule of law upon which the whole constitutional system is based. In a decision is taken without any principle or without any rule such a decision is antithesis of the decision taken in accordance with the rule of law.

19. Before concluding I must point out that the standard that has been laid down by an executive authority in the matter of submission of tenders and in the matter of supply thereof has to be rigorously followed.

20. There is no whisper in the affidavit-in-opposition sworn on behalf of the State respondents by the Executive Engineer, respondent no. 3, whether the added respondent nos. 6 and 7 have filed any credentials to show their entitlement that they have successfully completed the excavation of cannal, de-silting cost amounting to over Rs. 3,00,000/-. On the other hand, Mr. Mitra learned Advocate appearing on behalf of the respondents contended before this Court yesterday that his client being a class I contractor, filing of such credentials are not necessary. On a reference to these very terms of the tender notice which has been quoted by the respondent No. 3 himself in his own affidavit-in-opposition, it cleanly states that whether the applicants are enlisted or not enlisted contractors of any department, he has to file credentials which is, obligatory. If this be the position, how the respondent no. 6, the proprietor of the firm respondent no. 7 can be supplied with tender forms in respect of a work in which he has not filed any credential in support of his eligibility to get such tender form.

21. In these circumstances, the natural conclusion follows that the issue of tender forms to respondent no. 6 has been made not in due compliance with the terms and conditions contained in tender notice, and as such, such a tender submitted by the respondent nos. and 7 cannot be considered by the respondent no. 3. It has been observed by the Supreme Court in the International Airport Authorities case relying on the decision of the United States in viturelli vs. Seaton (1959) 359 US 535 : 3L Ed. 2d 1012 where Justice Frankfurther observed :

An executive agency must be rigorously held to the standards by which it professes its action to be judged. Accordingly, if dismissal from employment is based on a defined procedure, even though generous beyond the requirments that bind such agency, that procedure must be scrupulously observed This judicially evolved rule of administrative law is now firmly established and, if I may add, rightly so. He that fakes the procedural sword shall perish with the sword.

22. The standard that has been laid down prescribing the eligibility qualification of a contractor to entitle him to get tender forms has not been followed by the authority itself, namely, the Executive Engineer, the respondent no. 3. Therefore, the acceptance of the tender and the issuance of the work order on its basis in respect of the works against Serial nos. 6, 12, 14 and 15 of the tender notice is wholly bad being in utter contravention of the standard laid down by the authority himself, namely, the Executive Engineer.

23. For the reasons aforesaid, the conclusion follows that the application succeeds. Let a Writ of Mandamus issue commanding the respondents to forbear from giving any effect or further effect as well as from making any payment in respect of the works allotted by the impugned order made by the Executive Engineer, respondent no. 3. Let a writ of

Certiorari issue calling upon the respondents to cancel, quash and set aside the impugned acceptance of tender as well as allotment of works in pursuance of the acceptance of tender and also the issuance of work order in pursuance thereof.

There will be no order as to costs.