WP(C) 433/2007
BEFORE
THE HON'BLE MR JUSTICE I A ANSARI
JUDGEMENT AND ORDER (ORAL)

By this common judgment and order, I propose to dispose of all these three writ petitions, for, all these writ petitions are inextricably linked with each other and the decision, if rendered in any of these three writ petitions, would have a bearing on the out-come of the remaining writ petitions.

2. The respondent No. 4, namely, Golaghat Development Authority (in short, ' G.D.A') published, on 31.10.2006, Notice Inviting Tender (N.I.T.) for construction of two Storm Water Drains in two different localities of Golaghat town. The project in respect of one such drains is called GMSD-I, the approximate value whereof is Rs. 1.29 Crores, and the other project of the drain is called GMSD-II, the approximate value whereof is Rs. 81 lakhs. While offering their bids, the bidders were required to quote their rates on percentage basis up to digits of two decimals only. The tender documents were opened on 21.11.2006. The summery sheets for evaluation of tender documents were prepared and signed by the contractors/their authorized representatives. The tender documents and bids offered were examined by the Tender Evaluation Committee. The respondent No. 5, namely, Chairman, G.D.A., forwarded, vide his letter, dated 30.11.2006, to the Director, Town and Country Planning, Government of Assam, the findings recorded by the Tender Evaluation Committee and all other relevant documents. By his letter, dated 19.12.2006, Deputy Secretary to the Government of Assam, Urban Development Department, conveyed to respondent No. 5 the decision of the Government to allot the work as mentioned in the said letter. While WP(C) No. 433/2007 challenges the said allotment order made, in respect of the project, which is known as GMSD-II, in favour of the private respondent (i.e., respondent No. 6 in WP(C) No. 433/2007), WP(C) No. 434/2007 challenges the allotment of work of the project, namely, GMSD-I in favour of the private respondent (i.e., respondent No. 6 in WP(C) No. 434/2007), this private respondent having been made respondent No. 4 in WP(C) No. 555/2007, wherein also the allotment order, dated 19.12.2006, aforesaid stands challenged. In short, thus, and as already indicated hereinbefore, the allotment of the work of the project, namely, GMSD-II, made in favour of respondent No. 6 stands impugned in WP(C) No. 433/2007 and the allotment of the work of the project, namely, GMSD-1, made in favour of the private respondent stands challenged in the remaining two writ petitions, namely, WP(C) No. 434/2007 and WP(C) No. 555/2007, the allottee having been made, in these two Writ Petitions, respondent No. 6 and respondent No. 4 respectively. What is also worth pointing out is that while the offer of the writ petitioner in WP(C) No. 433/2007, in respect of GMSD-II, was 10% below the schedule of the estimated rate, the offer of the private respondent (i.e., respondent No. 6 in WP(C) No. 433/2007) was at par the estimated rate. Similarly, while the rate offered by the writ petitioner in WP(C) No. 434/2007, in respect of GMSD-I, was 10% below the schedule of the estimated rate and that of the writ petitioner in WP(C) No. 555/2007 was 6% below the schedule of the estimated rate, the offer, made by the private respondent (i.e. respondent No. 6 in WP(C) No. 434/2007 and respondent No. 4 in WP(C) No. 555/2007), was at par the estimated rate.

3. While issuing Notice of Motion, on 31.01.07, the High Court directed the parties to maintain status-quo as on the date of the passing of the said order, i.e. 31.01.2007. The parties to these three writ petitions, thereafter, completed their pleadings expeditiously and, on the request made on their behalf, all these three writ petitions have been taken up for final disposal at the admission stage.

4. I have heard Mr. P. K. Goswami, learned Senior counsel, appearing on behalf of the petitioners in WP(C) No. 433/2007 and WP(C) No. 434/2007, and Mr. Y. Doloi, learned counsel for the petitioner in WP(C) No. 555/2007. I have also heard Ms. B. L. Sinha, learned Government Advocate, appearing on behalf of the St

ate Government, and Mr. D.K. Mishra, learned Senior counsel appearing on behalf of the G.D.A. Mr. G. N. Sahewala, learned Senior counsel, has been heard on beh alf of the private respondents in all the three writ petitions.

5. Presenting the case, on behalf of the petitioners (in WP(C) No. 433 and 434 of 2007), Mr. P.K. Goswami, learned Senior counsel, has submitted that in te rms of the provisions of Rule 22 of the Assam Town and Country Planning (Constit ution of Authority) Rules, 1961 (in short, the 'Constitution Rules'), a contract , which involves an expenditure exceeding rupees one lakh, shall not be made by the Chairman of the Development Authority without previous sanction of the Devel opment Authority and the State Government. Rule 24 of the Constitution Rules fu rther makes it clear, submits Mr. P.K. Goswami, that while seeking sanction for acceptance of tenders, where the value of the contract work is above one lakh ru pees, the development authority shall specify the particular tender, which the d evelopment authority proposes to accept. Thus, the role of the development auth ority, while seeking, in such a case, sanction from the State Government, is, ac cording to Mr. Goswami, that of a primary authority, though the State Government may or may not sanction or approve the proposal of the development authority.

6. In the present case, points out Mr. Goswami, the G.D.A. merely forwarded the findings of the Tender Evaluation Committee, Summary-sheets, etc. to the S tate Government without specifying the tender, which the G.D.A. proposed to acce pt and it (G.D.A.) wanted the Government to accord sanction to. The G.D.A. have , thus, contends Mr. Goswami, abdicated, in the present case, their authority in favour of the State Government, though the role of the G.D.A. is that of a stat utory authority and the law did not permit the GDA to abdicate the authority in the manner as the GDA has done in the present case. On the other hand, the Stat e Government, points out Mr. Goswami, took upon the responsibility of dischargin g the functions of the primary authority, namely, G.D.A. and, thus, ushurped the reby the power, which, otherwise, belonged to the G.D.A., by according sanction to the acceptance of the tenders of the private respondents, without there being any decision of the GDA, as the primary authority, indicating as to which tende r they had found fit for acceptance and proposed to accept. Hence, the sanction granted by the government suffers from, submits Mr. Goswami, serious infirmity o f law and the impugned orders need to be held as illegal and ineffective. Suppo rt for the submissions, so made, are sought to be derived by Mr. Goswami from th e decisions in Commissioner of Police vs. Gordhan Das Bhanji(AIR 1952 SC 16) and The Purtabpore Co. Ltd. vs. Cane Commissioner of Bihar & ors, reported in (196 9) 1 SCC 308.

7. Persuing further his arguments, Mr. Goswami submits that Rule 20 read wi th Rule 25 of the Assam Town and Country Planning (Financial) Rules, 1962 (in sh ort, the 'Financial Rules') makes it clear that, ordinarily, the award of a cont ract shall be to the lowest tenderer and exception to this general rule is permi ssible only when it is found by the authority concerned that it is undesirable t o accept the lowest tender. Rule 25, however, requires, submits Mr. Goswami, th at when the lowest tender is not accepted, reason be recorded, in writing. This apart, the Office Memorandum, dated 15.12.03, issued by the Finance (Esstt-A) D epartment, Government of Assam, directs all concerned that lowest tenderer shoul d be allotted the work and, in the case of any exception thereto, reasons should be invariably recorded and should be signed by the appropriate authority. In t he face of the provisions of the Financial Rules and the Office Memorandum, date d 15.12.03, aforementioned, it is, contends Mr. Goswami, obligatory, on the part of the Development Authority and the State Government, not to accept any tender other than the lowest tender and if the lowest tender is not accepted, reasons must be clearly assigned. In the present case, points out Mr. Goswami, no reaso n whatsoever was assigned at the time of taking the decision, on 19.12.06, for a llotment of the work of the said two projects to the private respondents and tha t the reasons, in this regard, have been assigned much later, i.e. on 06.01.07; whereas the decision was taken on 19.12.2006. Thus, according to Mr. Goswami, t

he reasons for not awarding the contract to the eligible lowest tenders have bee n discovered by the State Government subsequent to the making of the orders of a llotment in favour of the private respondents. This approach of the authority c oncerned is, submits Mr. Goswami, wholly illegal and such allotment of work may not be sustained.

8. Moreover, points out Mr. Goswami, while the petitioners in the two wri t petitions, namely, WP(C) No. 433/2007 and WP(C) No. 434/2007, quoted rates, wh ich were 10% below the estimated rates, the rates quoted by the private responde nts were at par the estimated rate. The State Government has, however, further points out Mr. Goswami, allotted the work to the private respondents at a higher value ignoring the lowest bid of the said two writ petitioners. The act of ign oring the lowest bid of the said two writ petitioners and acceptance of the high er bids offered by the private respondents, without assigning any reason whatsoe ver, in this regard, is, contends Mr. Goswami, nothing, but arbitrary and needs to be struck down. For the submissions, so made, Mr. Goswami places reliance on the case of FCI vs. M/s Kamdhenu Cattle Feeds Industries, reported in (1993) 1 SCC 71.

9. Assailing further the allotment of work of the said two projects to the private respondents, Mr. Goswami submits that the private respondent No. 6 in WP (C) No. 433/2007 did not, contrary to Clause 1.1 of the tender documents, submit Bar Chart, which was mandatory for the purpose of determining as to how the wor k of the project would be carried out by the tenderer within the given time-fram e. Similarly, both the private respondents in WP(C) Nos. 433/2007 and 434/2007 did not submit, contrary to the requirement of Clause 3.3 of the tender document s, the certificates, which were to be furnished by a bank declaring that it (the bank) would provide credit facility or over draft to the tenderer concerned. Ig noring, however, the failure of the private respondents to submit these certific ates, which were, contends Mr. Goswami, mandatory in nature, the State Governmen t has allotted the work to the private respondents. It has also been pointed ou t by Mr. Goswami that the reason assigned, though belatedly, by the State Govern ment, to the effect that the awarding of the contract at a rate lower than the e stimated rate may lead to poor quality of work is wholly unreasonable in the con text of the facts of the present case inasmuch as the Government has allotted si milar contract work, on 06.10.2006, in the adjoining district of Jorhat at a rat e, which was 10% lower than the estimated rate. Similarly, even as late as on 0 7.02.2007, the State Government allotted the work of a similar project in the di strict of Barpeta, at a quoted rate, which was 10% below the estimated rate. Th e reason, thus, assigned by the State Government for not awarding the contract a t the rates, which were 10% lower than the estimated rate, is not bona fide and cannot be sustained. This apart, points out Mr. Goswami, the State Government ha s assigned no reason as to why it has concluded that the allotment of work at a rate, which was 10% lower than the estimated rate, would lead to poor quality of construction. Thus, the reason assigned for not allotting the wok to the writ petitioners is, according to Mr. Goswami, not a reason at all, but mere conclusi ons, which are not supported by reasons. The approach of the State Government t o the whole process of selection of the bidders is, thus, contends Mr. Goswami, arbitrary, most unreasonable, non-transparent, mala fide and needs to be interfe red with by this Court in exercise of this Court’s powers under Article 226 of t he Constitution of India.

10. Adopting the above submissions, made by Mr. Goswami, Mr. Y. Doloi, learn ed counsel for the petitioner in WP(C) No. 555/2007, has submitted that the priv ate respondent, who has been allotted the work of GMSD-I, never carried out the work of the nature, which the said projects required. Though, under the tender documents, the tenderer was, according to Mr. Y. Doloi, required to have the exp erience of having executed the work of storm water drain, the authorities concer ned have selected the private respondent, on extraneous consideration, ignoring the legitimate claim of the writ petitioner, who had done similar work in the r

ecent past.

11. Controverting the submissions made on behalf of the writ petitioners, Ms. V. L. Sinha, learned Government advocate, has merely submitted that the State Government has acted in accordance with law and in the interest of the general public in accepting the bids of the private respondents and, hence, the allotments of work in favour of the private respondents need no interference.

12. Appearing on behalf of the G.D.A. and its Chairman, M. D.K. Mishra, learned Senior counsel, has submitted that though the responsibility to publish the N.I.T. was given to the G.D.A., the projects, in question, were not covered by the master plan of Golaghat town and, hence, the provisions of the Constitution Rules, which the writ petitioners have relied upon, are not at all attracted to the facts of the case at hand. Drawing this Court's attention to the language used in Rule 24(3) of the Constitution Rules, Mr. Mishra has submitted that Sub-Rule (3) makes it clear that the Development Authority may or may not specify, while seeking sanction of the State Government, any particular tender, which it proposes to accept and wants the State Government to accord sanction thereto. In the face of the provisions of Rule 24(3), it cannot be said, contends Mr. Mishra, that any illegality was committed by the G.D.A. and/ or its Chairman in not taking any decision as to which tender should be accepted and in leaving it entirely to the discretion of the State Government to decide as to which tender is acceptable to the State Government and to grant sanction to the tender, which is acceptable by the State Government. Pointing out to the provisions of Rule 25 of the Financial Rules, Mr. Mishra has submitted that the requirement of assigning reason for acceptance of a tender, other than the lowest tender, is an internal matter of the Department and is really meant for its own auditing and, hence, if no reason is assigned for not accepting the lowest tender, the sanction, accorded by the State Government, cannot be treated to have become illegal. In the case at hand, submits Mr. Mishra, the work to be allotted was meant for the use of the general public and the quality of construction of work was one of the prime considerations of the Government and it is in this context that the acceptance of the tenders of the private respondents, who had quoted rates at par the estimated rate, needs to be viewed.

13. The State Government has, according to Mr. Mishra, given cogent reasons for not accepting offers of the writ petitioners inasmuch as their offers were, if accepted, contends M. Mishra, likely to lead to poor quality of work. Referring to the requirements of submission of Bar Chart and certificates of credit facility/overdraft, Mr. Mishra contends that submissions of these documents are not mandatory and, in the facts and circumstances of the present case, the acceptance of the tenders of the private respondents by the State Government cannot be said to have suffered from any infirmity, legal or factual.

14. As far as Mr. G. N. Sahewala, learned Senior counsel, appearing on behalf of the private respondents, is concerned, his submission, in tune with the submissions of Mr. Mishra, is that the Constitution Rules do not make it mandatory for the Development Authority to propose acceptance of any of the tenders and, hence the G.D.A., contends Mr. Sahewala, committed no wrong in not taking decision as to which tender should be accepted and in leaving the matter entirely in the hands of the State Government. In the present case, the State Government, contends Mr. Sahewala, assigned good reasons fo acceptance of the offers of the private respondents, for, allotment of work to the writ petitioners, contends Mr. Sahewala, was likely to lead to poor quality of work inasmuch as the rates, quoted by them, were not found workable. It is also contended by Mr. Sahewala that the submission of Bar Chart was not necessary nor was it a mandatory requirement for the tenderer to furnish certificate by any banker promising to provide credit facility or overdraft to the tenderer. In such circumstances, submits Mr. Sahewalla, the private respondents could not have been held to be ineligible to participate in the tender process. The State Government has, thus, according to Mr. Sahewala, acted within the ambits of its powers in accepting the offers of the private respondents and in making the allotment orders in their favour.

15. Reacting to the submissions, made on behalf of the respondents, Mr. Goswami has submitted that the documents on record clearly reveal that the projects are financed by the Central Government under Golaghat Master Plan. In such circumstances, contends Mr. Goswami, the function of the G.D.A. has to be in tune with the relevant provisions of law; but in the present case, points out Mr. Goswami, the G.D.A. as well as the State Government have not adhered to the mandatory requirements of law and the conditions of the tender documents and have, thus, acted arbitrarily in accepting the offers of the respondent Nos. 6. No good reason, insists Mr. Goswami, has been assigned by the State Government for accepting the offers of the private respondents. The reasons assigned are, contends Mr. Goswami, mere conclusions, for, the State Government has not assigned any reason as to why it had come to conclude that the allotment of work to the writ petitioners would lead to inferior quality of work. Referring to the tender documents and also to the Office Memorandum, dated 14.03.01, issued by the Public Works Department (Development-A-I branch), Government of Assam, Mr. Goswami has submitted that this Office Memorandum makes it clear that the Government has decided not to accept the rates below 10% of the schedule of estimated rates. This clearly shows, contends Mr. Goswami, that there is no policy decision of the Government not to accept the rates, which are below the estimated rate. What the Office Memorandum, dated 14.03.01, aforementioned, points out Mr. Goswami, reflects is that the rate, which may be below the schedule of estimated rate, can be accepted unless the rate quoted is below 10% of the estimated rate. In such circumstances, contends Mr. Goswami, non-acceptance of the offers of the writ petitioners and acceptance of the offers of the private respondents, though the private respondents had quoted higher rates and had not submitted documents, which were mandatory to be submitted, rendered the allotment of the work in favour of the private respondents wholly illegal and unsustainable in law.

16. As these writ petitions have been resisted, at its very threshold, by contending that the projects, which are the subject-matters of the N.I.T. aforementioned, are special projects financed by the Central Government and that the projects do not fall under the Master Plan for Golaghat prepared by the Golaghat Development Authority (in short, 'the G.D.A.'), it is imperative that one takes note of the relevant provisions of the Assam Town and Country Planning Act, 1959 (in short, the Act), whereunder the development authority is constituted. Section 8A of the Act of 1959 Act clearly shows that it is the State Government, which, by notification in the official Gazette, constitutes, for the purpose of the Act, an authority to be called the development authority with jurisdiction over such area as may be specified in the notification.

17. The functions and powers of the development authority are embodied in Section 8D, which reads, 8-D. Functions and powers of the Authority. Subject to the provisions of this Act, rules and directions of the State Government, the functions of the Authority shall be to promote and secure the development of the area according to the Master Plan and for that purpose it may carry out or cause to be carried out surveys of the area and to prepare report or reports of such surveys, and to perform any other function which is supplemental, incidental or consequential to any of the functions aforesaid or which may be prescribed.

18. A careful reading of the contents of Section 8D shows that the functions of the development authority shall be to promote and secure the development of the area according to the Master Plan and it may, inter alia, perform any other function, which is supplemental, incidental or consequential to any of the functions aforesaid or which may be prescribed. Thus, Rule 8D determines the ambit of the function of the development authority. The development authority is, in the face of the provisions of Section 8D, unquestionably, entrusted with the responsibility to promote and secure the development of its area according to the Master Plan and its all other functions shall be supplemental, incidental or conse

quential to such function and not in supersession thereof. Logically, therefore , the development authority cannot perform any function other than what can prom ote and secure the development of the area according to the master plan. There i s no dispute before me that there is no other rule, notification, etc, which dir ects or prescribes the Development Authority to perform any function other than the function of promoting and securing the development of the area according to the master plan.

19. The provisions, as regard the preparation and publication of master pl an, find place in Sections 9 and 10, which fall found under Chapter 3 of the Act . A combined reading of Sections 9 and 10 clearly reveals that a master plan is nothing, but a plan for development of an area. The master plan, according to S ections 9 and 10, is drawn by the Director, Assam Town and Country Planning, in consultation with the local authority concerned and submitted to the State Gover nment for examination and approval. On receipt of the master plan, the State Go vernment has the obligation of publishing the same inviting public opinion or ob jection, if any, and upon consideration of the objections, suggestions and repre sentations, which may have been received, the State Government shall have the pl an finally prepared by the Director and adopt the same. Thus, the master plan o f any development authority, including the G.D.A., is the master plan adopted by the State Government and the function of the G.D.A. is to promote and secure th e development of the area according to this master plan and not beyond. Viewed thus, it is clear that when the State Government has assigned the responsibility of inviting tenders to the G.D.A., the projects are within the master plan and, hence, the provisions of the Act and the Rules made thereunder are attracted t o the facts of the present case. This position remains no longer in doubt if on e closely examines the letter No.UDD(TCP)/180/2003/Pt(Golaghat), dated 15.02.200 5, which was addressed to the Department of Urban Development, Ministry of Urban Development and Poverty Alleviation, Govt. of India, New Delhi, by the Commissi oner & Secretary, Urban Development Department, Govt. of Assam, seeking sanction for projects, in question. This letter clearly indicates that the detailed pro ject report for Golaghat master plan area, Storm Water Drainage scheme, Phase-I, was submitted to the Central Government by the State Government for sanctioning requisite amount for the project. In fact, even the detailed project report (D PR) was prepared by the G.D.A. In this letter, dated 15.02.05, the State Govern ment also made it clear to the Central Government that the work, under the proje ct, would be done, under the supervision of the State Government, by the G.D.A., which is a statutory body notified under the Act. Confronted with this letter, dated 15.02.05, aforementioned, neither the State Government nor the G.D.A. coul d show anything to support its contention that the projects, in question, do not fall under Golaghat Master Plan area. In fact, as already indicated above, the projects, though financed by the Central Government, are projects under the Gol aghat Master plan area and the function of the G.D.A. and of the State Governmen t, while making allotment of work under the NIT aforementioned, has to be within the ambit of the Act and cannot be in supersession and/or ignorance thereof.

20. Turning to the question as to whether the G.D.A. was obliged, under law, to specify any particular tender, which it proposed to accept, it is necessary to take note of Rule 20 of the Financial Rules and Rule 21 and 22 of the Constit ution Rules. These three Rules are, therefore, reproduced hereinbelow:

20. Power of sanction. Every estimate or contract for the expenditure on works of any sum for carrying out any of the purposes of the rules shall be subject to the approval of the authority or authorities empowered as under:

(1) a contract involving an expenditure not exceeding Rupees fifty thousand only shall be made by the Chairman without the previous sanction of the Authority; .

(2) a contract involving an expenditure exceeding Rupees fifty thousand only but not exceeding Rupees five lakhs shall not be made by the Chairman without the p revious sanction of the Authority; and

(3) a contract involving an expenditure exceeding Rupees five lakhs shall not be

made by the Chairman without the previous sanction of the Authority and also th e State Government.
All contracts shall be made on behalf of the Authority by the Chairman.
21. Power to make and perform contracts. The Authority may enter into and perfor m all such contracts as it may consider necessary or expedient for carrying out any of the.. purposes of these rules.
22. Execution of contracts and approval of estimates. (1) Every contract shall b e made on behalf of the Authority by the Chairman:
Provided that-
(a) a contract involving an expenditure exceeding three thousand rupees but not exceeding one lakh rupees shall not be made by the Chairman without the previous sanction of the Authority; and
(b) a contract involving an expenditure exceeding one lakh rupees shall not be m ade by the Chairman without the previous sanction of the Authority and the State Government.
(2) Every estimate for the expenditure of any sum for carrying out any of the pu rposes of these rules shall be subject to the approval of the Authority or Autho rities empowered under sub-R. (1) to make, or as the case may be, to sanction th e making of, a contract involving the expenditure of a like sum.
(3) Sub-rules (1) and (2) shall apply to every variation or abandonment of a con tract or estimate, as well as to an original contract or estimate.

21. A careful reading of Rule 20 of the Financial Rules shows that not only a contract, but even an estimate for expenditure of work shall be subject to pre vious sanction of the State Government if the contract involves an expenditure e xceeding five lakh rupees. In other words, the estimate of work as well as the allotment of work of a contract, involving an expenditure exceeding five lakh ru pees, cannot be finalized by a development authority except with the previous sa nction of the State Government. Rule 22 of the Constitution Rules makes it furt her clear that even a contract, involving an expenditure exceeding one lakh rupe es, shall not be made by the development authority without the previous sanction of the State Government.

22. Bearing in mind what is indicated above, when I turn to Rule 24(3) of th e Constitution Rules, it transpires that according to Rule 24(3), whenever accep tance of a tender would involve an expenditure exceeding the limit of one lakh r upees, the development authority shall submit to the State Government not only t he specifications, conditions and estimates, but also all the tenders, which may have been received. While, however, submitting the specifications, conditions and estimates along with all the tenders received, the development authority may also specify the particular tender, the acceptance of which it proposes to the State Government for sanction. There is nothing in Rule 24 or in any other Cons titutional or Financial Rules indicating that while seeking sanction for the pur pose of acceptance of tender, the development authority must specify the particu lar tender, which it proposes to accept and seeks sanction therefor. Situated th us, it is abundantly clear that in the facts of the present case, the G.D.A. did not abdicate its authority, when it did not propose to the State Government the particular tender, which the G.D.A. proposed to accept. The language, used in Sub-Rule (3) of Rule 24, makes it clear that the development authority has the d iscretion of specifying or not specifying the particular tender, which it propos es to accept and seeks sanction thereto. Similarly, the State Government also d oes not usurp the powers of the development authority if it decides as to which tender needs to be accepted and accords sanction for such acceptance. To put it a little differently, there is no impediment, on the part of the State Governme nt, in granting sanction for acceptance of any tender if the tender is, otherwis e, valid and acceptable in the facts of a given case and there is no legal oblig ation, on the part of a development authority, to specify to the State Governmen t as to which particular tender it proposes to accept. Since the present case d oes not suffer from abdication of power by any statutory authority, the law laid

down, in Gordhan Das Bhanji (supra) and Purtabpore Company Ltd (supra), have no application at all.

23. Coming to the question as to whether a development authority is bound, ordinarily, to accept the lowest tender, one needs to take note of Rule 25 of the Financial Rules, which reads:

> 25.Lowest Tender shall ordinarily be accepted: Where it is undesirable to accept the lowest tender, the reasons shall be clearly recorded in writing and made available for the purpose of audit.

24. While considering the Financial Rules, what needs to be noted is that these Rules control the financial functions of a development authority. In this context, when Rule 25 is read, it becomes transparent that a development authority shall, ordinarily, accept the lowest tender; but if it finds that it is not desirable to accept the lowest tender, it may accept a tender other than the lowest tender; but it cannot do so without clearly recording the reasons, in writing, as to why it has found the lowest tender undesirable for accceptance. What Rule 25 also lays down is that the reasons, which the authority may so record, shall be made available for the purpose of audit so that at the time of auditing, it can be ascertained, irrespective of the question, as to whether the acceptance of a tender other than the lowest tender is challenged or not, if the reasons, assigned by the authority concerned, are tenable in the facts of a given case. It cannot, therefore, be said that the penning down of reasons under Rule 25 is merely for the purpose of audit. What Rule 25 lays down is that if the authority concerned has to accept a tender other than the lowest tender, it must assign reasons, in writing, and when the audit is held, such reasons must be made available to the auditor. It cannot, therefore, be said, as contended by Mr. D. K. Mishra, learned Senior counsel for the Golaghat Development Authority, that assigning of reasons for non-acceptance of the lowest tender is merely for the purpose of audit and cannot be insisted upon in the present cases. When the State Government has framed the Financial Rules, the State Government is equally bound by these Rules and Rule 25, which the State Government has framed, obliged the State Government, even in the present cases, to assign reasons clearly as to why it had accepted the tender of the private respondents and ignored the tender of the writ petitioners, who had quoted rates 10% below the estimated rates.

25. In the case at hand, it is interesting to note that it is contended, on behalf of the respondents, that assigning of reasons for not accepting the lowest tender is not mandatory. At the same time, however, it is insisted by the respondents that the State Government has assigned good reasons for not accepting the tenders of the writ petitioners, though these tenders quoted rates, which were lower than those of the private respondents.

26. While considering the above aspect of the case, what needs to be pointed out is that the obligation to assign reason has to be discharged before the decision to allot a contract is taken and not that the reasons would be assigned, when challenge to non-acceptance of the lowest tender is posed. In the present cases, there is absolutely no material to show that the reasons were assigned by the respondents/authorities concerned at or before their decision not to accept the lower tenders of the writ petitioners and/or their decision to accept the tenders of the private respondents were taken. Assigning of reasons is not like wine that older it grows, tastier it becomes. To a pointed query made by this Court, learned Government Advocate has conceded that the State Government did not assign any reason before its decision not to accept the tenders of the writ petitioners was taken. Further, the validity of the impugned order must be judged by the reason mentioned in the order and cannot be supplemented by fresh reasons in the shape of an affidavit or otherwise, for, subsequently. assigned reasons, if allowed to prevail, would mean that an order, which was bad in the beginning, may, by the time it comes to the Court on account of the challenge posed to it, gets validated by additional grounds later brought out. The Apex Court, therefor

e, in Commissioner of Police v. Govrdhan Das Bhanji, (AIR1952 SC 16), held as u nder:
\Public orders, publicly made, in exercise of a statutory authority cannot be co nstrued in the light of explanations subsequently given by the officer making th e order of what he meant, or what was in his mind, or what he intended to do. Pu blic orders made by public authorities are meant to have public effect and are i ntended to affect the action and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself'.

The above passage, occurring in Govrdhan Das Bhanji (supra), was quoted with a pproval by the Apex Court in MS Gill v. Chief Election Commissioner, (1978) 1 SC C 409, wherein the Apex Court further held that the orders are not like old wine becoming better as they grow older.

27. Coupled with the above, what cannot be ignored is that according to the affidavit of the State Government, it did not accept the lowest tenders of the w rit petitioners for the simple reason that the rates, lower than the estimated r ates, were found not acceptable as it might have led to inferior quality of work . While considering the reasons, so assigned by the State Government, it is of utmost importance to note that there is a difference between reason and conclusi on. Reasons are the live link between the facts and the conclusions drawn. If the ground, which has been assigned by the State Government in its affidavit, is dispassionately examined, it becomes clear that the Government has assigned no reason as to why it had concluded that the acceptance of rates, which were lower than the estimated rates, might lead to inferior quality of work. The conclusi on, reached by the State Government that the rates, which were lower than the es timated rates, might lead to inferior quality of work, is not really supported b y any reason whatsoever.

28. In the backdrop of what has been indicated above, when one turns to the tender documents, what becomes glaringly noticeable to the eyes is that under th e NIT, the offer to the Chairman of the Golaghat Development Authority was to be made by a bidder by way of a letter. The format of the letter, to be submitted to the Chairman, GDA, while submitting the tender documents, has been given in t he bid documents. The relevant format of the letter, in question, reads as unde r:

To : Chairman,
Golaghat Development Authority,

Dear Sir,

I/We hereby tender for execution of the work described above in accordan ce with the true intent and meaning of the instructions, drawing and specificati ons in this Tender Document together with the Conditions of Contract accompanyin g this Bid.

Price @ - (a) At par the Schedule of estimated rate.
(b) & &% Below (in words & & & & & & &.percent) of the schedule of estimated rate.
(c) & &.% Above (in words & & & & & &.. Percent) of the schedule of estimated rate.

I/We agree to execute the work at my/our tendered rate together with the terms of the Tender Document.

I/We agree that our rates for the work are inclusive of every aspects as embodied in the Tender Document and shall remain bound to pay all taxes, duties , octrois, works contract tax etc. which are inclusive of rates quoted by me/us.

I/We confirm that this Bid complies with the Bid validity and Bid securi

ty required by the Tender Document.

Thanking you.

Details of Earnest Money: Yours faithfully,
Amount : Rs & & & & & &.. & &
NSC/KVP/CDR/FDR No & & &..
& & & & & & & & &Dt & & & & Authorised signature

Name and title of the signatory & & & & & & & & & & &..
Name of the Firm/Company & & & & & & & & & & & & &
Postal Address:- & & & & & & & & & & & & & & & &..
Telephone No & & & & & & & & & & & & & & & & &
Mobile No. & & & & & & & & &

29. From the contents of the letter, quoted above, it is clear that the bids could have been offered at three different rates. I have already indicated above that the N.I.T. required the bidders to quote their rates on percentage basis up to digits of two decimals only. If the contents of the letter, to be given to the Chairman, while making the offer, as given in the bidding documents, is considered, it becomes clear that in the present cases, one could have offered to work at par the schedule of the estimated rate or below the schedule of the estimated rate or above the schedule of the estimated rate. It is, therefore, wholly illogical for the State Government to contend that the acceptance of the rates, which were lower than the estimated rate, might have led to poor quality of work. Had it been the stand of the Government that they would not accept such a rate, which was lower than the estimated rate, it ought to have made this stand clear to the bidders, while inviting the tenders. The condition precedent for a fair, just and transparent process of selection of contract work is that every factor, which would be taken into account for the purpose of determining the acceptability or otherwise of a tender, must be made known, in advance, to the intending tenderers so that nobody is misled, no adhocism is arbitrarily adopted or no tender is arbitrarily rejected. When the tender documents provide for quoting of rates below the schedule of the estimated rate, the State Government could not have rejected outright the writ petitioners' tenders on the ground that the rates quoted by them were below the schedule of the estimated rate, for, such rejection would be nothing, but arbitrary inasmuch as the tenderers, such as the writ petitioners, had not been informed that one cannot quote below the estimated rate.

30. Whether the works, in question, can be done, in the present cases, even at a rate, which is below the schedule of the estimated rate, is a question, which I will deal with a little later. Suffice it to point out, at this stage, that the Office Memorandum, dated 14.03.01, issued by the Public Works Department, Govt. of Assam, shows that the Government has decided not to allow rates below 10% of the schedule of estimated rate and that this standard has been chosen to put a check against sub-standard quality of work. This Office Memorandum, however, further makes it clear that the tenders, which quoted such rates, which were below 10% of the scheduled rate, should be rejected outright, but the reasons should be incorporated distinctly in the N.I.T. itself and that this requirement needs to be strictly followed henceforth. In the face of the Government policy, as reflected by the Office Memorandum, dated 14.02.01, aforementioned, when the tender documents, in question, are considered, it becomes transparent that it was in tune with the Government policy that the N.I.T. aforementioned had made it clear that one could quote rate at par the estimated rate, below the estimated rate or even above the estimated rate. The writ petitioners' tenders could not have been rejected merely on the ground that they had quoted rates, which were below the schedule of the estimated rate, particularly, when the Government's own

policy permits quoting of rates up to 10% below the schedule of the estimated rate. Had the rates, quoted by the writ petitioners, been lower than 10% of the schedule of estimated rate, one could have understood the State Government's decision not to accept the writ petitioners' tenders on the ground that the acceptance of such tenders might lead to poor quality of work.

31. Besides what have been indicated above, the writ petitioner has pointed out, by way of affidavit, that the concept of estimated value of a project is not the floor cost price of a project, below which no project can be carried out. The estimated value is equally applicable all over the State irrespective of the location of the project except in certain areas, such as, N.C. Hills and Dhemaji district. The actual cost of a project is not same in different locations of the State. Locations, where raw materials and labours are available at a cheaper rate, would be advantageous compared to those locations, where the cost of raw materials and labour is higher. It is pointed out by the writ petitioners that the estimated value by a tenderer is worked out on the basis of an average cost factor of the advantageous as well as disadvantageous locations and, hence, when a project is located in an advantageous location, the work can be carried out, in such a location, at a cost, which may be below the estimated value, without compromising the quality of the work. No wonder, therefore, that the tender documents permit submitting of tender below the estimated rates. In the present case, Golaghat is, admittedly, primary source of sand as well as the stone-chips for the whole of upper Assam. The writ petitioners have, therefore, substantial force, when they contend that the raw materials for the said projects are available at a comparatively much cheaper price at Golaghat.

32. The pointed attention of this Court has also been drawn to the fact that for the similar project and under the same scheme, in the adjoining district of Jorhat, the Government has made, on 06.10.2006, allotment of work at a rate, which was 10% below the estimated rate. Even as late as on 07.02.07, the State Government has approved allotment of wok for the similar work, under the same project, in the district of Barpeta, at a rate, which was 10% below the estimated rate. The correctness and veracity of the allotment orders contained the letters of allotment, dated 06.10.06 and 07.02.07, aforementioned could not be disputed before this Court. In the face of these admitted facts, it does not really lie in the mouth of the State Government to contend that the acceptance of any rate, which was below the estimated rate, was likely to lead to poor quality of work, particularly, when it has assigned no reason whatsoever as to why it came to such conclusion, when its own tender documents had invited people to bid even below the schedule of the estimated rate and when it has allotted works, under the same scheme and for similar projects, at rates, which were 10% below the estimated rates.

33. What emerges from the above discussion is that the rejection of the writ petitioners' tenders on the ground that they had quoted rates lower than the schedule of the estimated rate is nothing, but an arbitrary and colourable exercise of power.

34. In Dutta Associates Pvt Ltd. Vs. Indo Merchantiles Pvt. Ltd, reported in (1997) 1 SCC 53, the Apex Court has clearly laid down that fairness in a selection process of tender demands that the authority should have notified, in the NIT itself, the procedure, which it proposes to adopt, while accepting the tender. In the present cases too, if it was the State Government's decision not to accept any tender below the estimated rate, it ought to have informed the intending tenderers that any tender, quoting a rate, which is below the estimated rate, would be ineligible for consideration. Far from this, the NIT and the bid documents permitted the tenderers to bid not only at par the estimated rate, but below or above the estimated rate. In such circumstances, rejection of the tenders of the writ petitioners is against a fair and transparent process of selection. (See also Sargous Tours and Travels and another Vs. Union of India, reported in 2003

(3) GLT 202). Non-arbitrariness, fairness and due consideration of legitimate expectation of tenderers are essential requisites for a valid and sustainable State action. In the facts of the present cases, reference made by Mr. PK Goswami, learned Senior counsel, to the case of M/s. Kamdhenu Cattle Feed Industries (supra), is not wholly misplaced.

35. Though the conclusions reached above would have been enough to set aside the impugned order of allotment made in favour of the private respondents, what needs to be noted is that in the present cases, the writ petitioners also contend that the private respondents were, in the light of the terms and conditions of the N.I.T. and the tender documents, not even eligible for consideration.

36. The eligibility of the private respondents have been challenged, broadly speaking, on three distinct grounds, namely (i) that the private respondents, in all the writ petitions, had not fulfilled the financial criteria, which the tender documents had imposed for making a bidder eligible for consideration; (ii) that the bidders were required, in terms of the tender documents, to give a complete description of the drawings including the Bar Chart, but the private respondent in WP(C) No.433/2007 had not submitted the Bar Chart; and (iii) that the tenderers were required to have the experience of having done similar work during the last three years, but the private respondents lacked such experience.

37. It is contended, on behalf of the writ petitioners, that the allottee of the work, under GMSD-II, had not given the banker certificate undertaking to provide credit facility or overdraft to the allottee nor did he submit the Bar Chart, which could have given an indication as to how this tenderer would be able to execute the work and complete the same within the stipulated period. This apart, the allottee of the GMSD-II lacked requisite experience, for, he had never carried out any work of the nature, which is stipulated under GMSD-II. As regards the allottee of the work under GMSD-I, it is contended that besides the fact that this tender had not given requisite financial certificate from the banker, it also lacked requisite experience.

38. Let me, now, deal with the question as to whether the private respondents had fulfilled the financial criteria, which could make a bidder’s bidding eligible for consideration. Clause 3 of the tender documents is the clause, which embodies the eligibility criteria of the bidders. Clause 3.3 reads, Documentary evidence of adequate financial standing as certified by bankers as per the proforma enclosed . The proforma enclosed (Annexure I) reads as under:

BID SECURITY (BANK GUARANTEE)

SAMPLE COPY FOR EVIDENCE OF ACCESS TO OR AVAILABILITY OF CREDIT FACILITIES

This is to certify that Sri /M/S & & & & & & & & & & & & & & & & &.is a reputed good financial standing. If the contract of the work namely & & & & & & & & & & & & & & & &.is awarded to the above firm/company we shall be able to provide overdra/credit facilities to the extent of Rs & & & &(& & & & & &.... & &) to meet their apital requirement for executing the above work/contract.

SIGNATURE OF THE BANK MANAGER

Name of the Bank & & & & & & & & & & & & & &
Address of the Bank Branch & & & & & & & & & &

Note:

1. The Bidder should insert the amount of the guarantee in words and figures denominated in Indian Rupees. This figure should be the same as per the Instructions to Bidders.

39. When the contents of Clause 3.3. are read in the light of Annexure 1 aforementioned, it becomes clear that mere solvency certificate, if furnished by a tenderer, could not have made him eligible for consideration, for, it did not meet the financial criteria of eligibility inasmuch as the adequate financial standing, in terms of the tender documents, could have been met only by a guarantee from the bank that it would provide the bidder with overdraft or credit facility to the extent, as may be mentioned in annexure 1, in order to meet the bidder's requirement of working capital to execute the work. That a mere solvency certificate was not enough, but a guarantee was mandatory, is also clear from the fact that annexure 2 of the tender document reads as under:

PERFORMANCE BANK GUARANTEE

To:_____[name of Employer]
_____[address of Employer]

WHEREAS_____[name and address of Contractor]

(hereinafter called the Contractor) has undertaken, in pursuance of Contract No. _____dated_____to execute _____ [name of Contract and brief description of Works] (hereinafter called the Contract

AND WHEREAS we have agreed to give the Contractor such a Bank Guarantee;

NOW THEREFORE we hereby affirm that we are the Guarantor and responsible to you, on behalf of the Contractor, up to a total of _____[amount of guarantee] _____ [In words], such sum being payable in the types and proportions of currencies in which the Contract Price is payable, and we undertake to pay you, upon your first written demand, the without cavil or argument, any sum or sums within the limits of _____ _____[amount of guarantee] as aforesaid without your needing to prove or to show grounds or reasons for your demand for the sum specified therein.

We hereby waive the necessity of your demanding the said debt from the Contractor before presenting us with the demand.

We further agree that no change or addition to or other modification of the terms of the Contract or of the Works to be performed there under or of any of the Contract documents which may be made between you and the Contractor shall in any way release us from any, liability under this guarantee, and we hereby waive notice of any such change, addition or modification.

This guarantee shall be valid until 28 days from the date of expiry of the Defects Liability Period

Signature and seal of the guarantor :_____
Name of Bank :_____
Address :_____
Date :_____

An amount shall be inserted by the Guarantor, representing the percentage of the Contract Price specified in the Contract and denominated in Indian Rupees.

40. The proforma, given in Annexure 2, clearly shows that after allotment o

f the work, the contractor is required to give a guarantee from a bank that the bank would provide credit facility to the bidder.

41. It has been contended by Mr. Sahewala that if a person has his own money , he need not ask for credit facility. True it is that if a person has his own money, he does not need any credit facility or overdraft from any bank. What is , however, important to note is that the process of selection of a tender has to be based on the terms and conditions stipulated in the NIT and tender documents . If a tender document has laid a condition, such a condition has to be fulfill ed, if mandatory, and remains binding unless the condition imposed is withdrawn or is under challenge. In the present cases, the legality, correctness and/or v alidity of the terms and conditions, embodied in the tender documents, are not u nder challenge or questioned. It is, therefore, clear that adequate financial s tanding of a tenderer, as stipulated in Clause 3.3 aforementioned, was to be pro ved by mandatorily furnishing a certificate, in the form of a bank guarantee, th at it (the bank) would provide overdraft/credit facility to the bidder, as worki ng capital, for execution of the work of the contract. This impression gets str engthened, when one notices that work would not be allowed to be progressed unle ss, in the light of the tender documents, a bank guarantee, on allotment of work , is furnished by the tenderer in the form of annexure 2. In the present cases, the private respondents have, admittedly, not furnished the certificates, as re flected by Annexure 1. Moreover, Annexure 3 contains the check-list for submissi on of bids and it mentions in Clause 7 thus: Bank guarantee (certificate) in th e prescribed format . In such circumstances, particularly, when the requirement of adequate financial standing, in the facts and circumstances of the present ca se, has to be read as mandatory, the private respondents could not have been tre ated as eligible to participate in the said tender process.

42. Coming to the writ petitioner’s contention that the private respondent , i.e., the respondent No. 6 in WP(C) No.433/2007, had not given the Bar chart, which was also mandatory in nature, what needs to be noted is that as far as thi s respondent is concerned, the summary-sheet for evaluation of tender documents, prepared by the G.D.A. and signed by, among others, the private respondent, cle arly shows that apart from the fact that this respondent had not submitted the r equisite certificate by any banker as per the format, even documents in respect of organizational details had not been signed by this respondent nor had this re spondent given the Bar Chart. Clause 1.1 of the tender documents reads, Prop osed work-method and schedule. The bidder should attach descriptions, drawings and Bar charts as necessary to comply with the requirements of the bidding docum ents .

43. The Bar Chart, as correctly pointed out by the writ petitioner, is not a n empty formality, for, the Bar chart could really provide the authority concern ed with an insight into the manner in which a tenderer would proceed to execute the work inasmuch as the Bar chart reflects the various phases in which the ten derer would execute the work. Without the Bar Chart, how the State Government h ad decided that the respondent No. 6 in WP(C) No.433/2007 was capable of executi ng the work within the given time-frame and would, at the same time, maintain th e quality, is not understandable.

44. To a pointed query made, in this regard, by this Court, the learned Gove rnment Advocate could submit nothing. In fact, the State Government has not bee n able to show as to why it has ignored the requirement of the Bar Chart. It is of great importance to note that while seeking allotment of fund, the letter, d ated 03.12.03, aforementioned, sent to the Union Government by the State Governm ent, clearly stated that the scheme would be implemented by the Development Aut hority through the Golaghat Development Authority and that there would be a high -power committee to monitor the progress of the scheme to guarantee the executio n of various works under the scheme efficiently and as per the time schedule. T his letter clearly shows that the State Government undertook to complete the pro

ject within the given time-frame. When such was the condition subject to which the scheme was being funded by the Union Government, it was incumbent, upon the State Government, to ensure that the works are completed within the given time s chedule and if this was to be achieved, furnishing of Bar Chart and appraisal th ereof by the State Government was imperative. The effect of the Bar Chart having not furnished by the private respondent means, if put it in simplest of words, that this respondent had not mentioned the manner in which he would proceed with the work and the phases in which he would execute the works. In the complete a bsence of Bar Chart, it cannot be said that the private respondent No. 6 (in WP(C) No.433/2007) had given a complete and effective schedule of work and, in the absence of an effective schedule of work, particularly, in a scheme of present n ature, this respondent could not have been considered eligible to participate in the said tender process.

45. It is well settled that power of judicial review is exercisable under Ar ticle 226 not against the decision, but the decision-making process. If, in a de cision-making process involving allotment of contract, relevant factors are not taken into account or irrelevant factors are taken into account, such a decision -making process is nothing, but arbitrary and cannot be sustained. In the presen t cases, the selection processes, adopted by the State Government, did not only suffer from non-consideration of relevant factors, but also suffered from consid eration of irrelevant factors. Such a selection process is not at all sustainabl e in law.

46. What crystallizes from the above discussion is that the private responde nts were ineligible for consideration of allotment of work. At the same time, th e State Government has arbitrarily ignored the bids offered by the writ petition ers. If such a selection process is not interfered with, it would amount to putt ing this Court’s seal of approval at an grossly unfair action of the State Gover nment, which would be against the public interest, for, such arbitrary State act ion, if permitted to survive, would shake the confidence of the people in the ru le of law.

47. In the result and for the reasons discussed above, these writ petitions succeed. The impugned order of allotment made in favour of the private responden ts is hereby set aside and the State Government is hereby directed to consider afresh the tenders submitted by the writ petitioners along with the eligible ten derers, if any, who may be similarly situated.

48. With the above observations and directions, these writ petitions shall s tand disposed of.

49. No order as to costs.