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STATE OF ASSAM AND ANR.

v

M/S. ABHINANDAN TRADING (P) LTD. AND ANR.

NOVEMBER 8, 2006

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[G.P. MATHUR AND ALTAMAS KABIR, JJ.]

Contract—Contract of supply of potable alcohol/rectified spirit (Gr.I) to excise warehouse of State—Notice inviting tender—Specifying basis for viable range of price—Contract given to the party whose quotation was below the viable range—Two tenderers challenged grant of contract in Writ Petition—Contract set aside by Single Judge of High Court—Order of Single Judge upheld in Writ Appeal—Potable spirit kept being supplied to the Government on the basis of agreement—On appeal, held: The contract was rightly granted though the procedure adopted by the State for fixing viable price range may not be prudent as the same is amenable to misuse to favour a particular applicant—But in absence of such allegation, decision of State cannot be held wrong—It may be more prudent for the Government to adopt a different procedure in future—But it has to be left to the Government to resort to such procedure—Court cannot express any opinion as to what procedure Government should adopt—It will not be in the interest of the Government or the people to prevent the supply—Assam Excise Rules, 1945—Rule 91.

Tenders were invited by the State of Assam under Rule 91 of Assam Excise Rules, 1945 for grant of exclusive privilege of supplying potable alcohol/rectified spirit (Gr. I). Clause 28 of Notice Inviting Tender specified that the contract would be given to the tenderer found suitable from the 'viable range' which was to be determined on the basis of analysis of the cost price, export duty, transport cost etc. Five tenders were forwarded to the State Government for consideration. Commissioner of Excise worked out the viable/reasonable rate for supply of the potable alcohol/rectified spirit at Rs.18.23 per London Proof Litre (LPL). The rate was worked out after taking into consideration various factors referred to in Clause 28 of the Notice Inviting Tenders (NIT). The Commissioner and Secretary to the Government of Assam, Excise Department were of the view that viable rate should be Rs. 24/- per LPL. However, it was recommended that the lower rate from amongst the rate

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offered by recommended firms within the viability range of Rs. 17.11 to Rs. 18.95 per LPL be considered because rate of Rs. 24/- would cause the prices to go up and cause hardship to the consumer. Thus the contract was awarded in favour of 'R' at the offered rate of Rs. 17.11 per LPL. Other two tenderers 'S' and 'A' whose quotations were Rs. 15.10 per LPL and Rs. 18.95 per LPL respectively, challenged the grant of tender to 'R' by filing Writ Petitions. Writ Petitions were allowed by Single Judge of High Court setting aside the grant of the contract on the ground that such grant did not disclose any logical, acceptable or reasonable basis. The judgment was challenged in writ Appeals. The same was dismissed by Division Bench of High Court holding that stipulation contained in Clause 28 of NIT had not been complied with as a viable rate of Rs. 18.23 per LPL was fixed instead of determining the viable price range. Hence the present appeals.

Allowing the appeals, the Court

HELD: 1. It is no doubt true that there is scope of the concept of "viability range" being misused to favour a particular applicant, but there is no such allegation in the instant case, nor has any *mala fides* been attributed to the action taken by the authorities in awarding the contract to 'R' whose offer was much lower than the fixed rate. [714-A-B]

2. Although, doubts were expressed by this Court in *Dutta Associates* regarding the concept of "viability range", its necessity or its real purpose, the decision of the Government of Assam to resort to such a procedure has to be left to the Government of Assam itself. Unless, it can be shown that the said procedure had been misused to favour any particular individual, which is not so in the instant case, it would not be proper for this Court to express any opinion as to the procedure the Government should adopt except to say that whatever procedure is adopted should be open, fair and transparent.

[714-C-E]

3. In the instant case, the methodology adopted for fixing the viable price range, indicates that even if the said method may not be the ideal method for granting of contracts, an average of different rates quoted against different heads by all the applicants are taken together and the ratio thereof is arrived at for fixing the viable range. It may be more prudent for the Government of Assam to adopt a different procedure in future, but as far as the present case is concerned, although the Commissioner of Excise had fixed the "viable rate" at Rs.18.23 per LPL, a "viable range" was computed between Rs. 17.11 per LPL and Rs. 18.95 per LPL. Considering the fact that the offer made by 'A' (Rs.18.95 per LPL) was higher than the rate fixed by the Excise

A Commissioner, the Government in its wisdom thought it best to award the contract to 'R' whose offer of Rs.17.11 per LPL was lower than the fixed price.

[714-E-G]

B 4. More than one and a half years have elapsed in respect of the period for which the contract had been awarded and despite the orders passed by the single Judge and the Division Bench of the High Court, they have still been supplying potable spirit to the Government of Assam on the basis of such agreement. It will not be in the interest either of the Government of Assam or the people of Assam to prevent from 'R' continuing such supply, especially when the correctness of the Single Judge's order is capable of being disputed. The Division Bench merely gave a stamp of approval to the Single Judge's judgment without examining the legal proposition involved.

[714-H; 715-A-B]

D 5. Having particular regard to the doubts expressed by this Court in *Dutta Associates* in order to avoid future controversy, the Government of Assam may adopt some other procedure for granting similar contracts in future which is open and transparent and will not give rise to controversies of the instant nature in future. [715-D-E]

Dutta Associates Pvt. Ltd. v. Indo Merchants Pvt. Ltd., [1997] 1 SCC 53, referred to.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4730 of 2006.

E From the final Judgment and Order dated 6.10.2005 of the High Court of Gauhati in Writ Appeal No.585/2005.

Dr. A.M. Singhvi, Pragya Baghel, Amrit Bhandari, Baruah, Ruby Singh Ahuja, Arunabh Choudhary, Rajiv Mehta and B. Aggarwal for the Appellants.

F Altaf Ahmad, M.N. Rao, Ajay Sharma, T.A. Khan, Rajeev Sharma and Kishan Datta for the Respondents.

The Judgment of the Court was delivered by:

G ALTAMAS KABIR, J. Leave granted.

On 29th January, 2005, tenders were invited by the State of Assam under Rule 91 of the Assam Excise Rules, 1945 for the granting of exclusive privilege of supplying potable alcohol/rectified spirit (Gr. I) to its excise warehouse at Tinsukia for a period of three years from the date of settlement.

H The estimated annual consumption of country spirit in the area covered by

the Tinsukia Warehouse was contemplated by the Notice Inviting Tender (NIT) to be approximately 15,60,000.000 London Proof Litre (for short LPL). A

Clause 28 of the NIT reads as follows:-”

Contract will be considered to the suitable valid tenderer in the viable range for smooth and continuous supply of Spirit as may be recommended by the Commissioner of Excise, Assam with the approval of Government. The viable range will be determined on the basis of analysis of cost price, export duty, transportation cost etc. by the Commissioner of Excise, Assam.” B

As will appear from the materials on record, in all 8 tenders were received pursuant to the said NIT dated 29th January, 2005 and the same were opened in the presence of the tenderers on 11th March, 2005. C

After processing the same, the Commissioner of Excise submitted his report to the State Government on 10th May, 2005 in which he found three of the said tenders to be defective. The remaining five tenders were forwarded to the State Government for consideration. In the said report submitted to the State Government, the Commissioner of Excise worked out the viable/reasonable rate for supply of potable alcohol/rectified spirit to the excise warehouse at Tinsukia at Rs.18.23 per LPL. The stand of the State Government is that the said viable/reasonable rate was worked out by the Commissioner of Excise after taking into consideration the various factors referred to in Clause 28 of the NIT. Pursuant to the said NIT, one M/s. Satya Capital Services (P) Ltd. submitted its tender quoting an amount of Rs.15.10 per LPL for award of the contract. One M/s. Abhinandan Trading (P) Ltd. quoted a rate of Rs.18.95 per LPL for award of the contract and M/s. Rangpur Trading Company (P) Ltd. quoted a rate of Rs.17.11 per LPL. Ultimately, the contract was awarded to M/s. Rangpur Trading Company (P) Ltd. Such grant of contract to M/s. Rangpur Trading Company (P) Ltd. was challenged by M/s. Satya Capital Services (P) Ltd. by way of Writ Petition, being No.5305/2005, and also by M/s. Abhinandan Trading (P) Ltd. by way of Writ Petition, being No.5132/2005. The learned Single Judge allowed the said writ petitions and set aside the grant of contract in favour of M/s. Rangpur Trading Company (P) Ltd. upon holding that such grant did not disclose any logical, acceptable and/or reasonable basis. The State Government was directed to take a fresh decision in accordance with law and without any further delay. D E F G

The aforesaid judgment of the learned Single Judge dated 27th September, H

- A 2005, was challenged by way of three separate appeals—one by the State of Assam, being Writ Appeal No.585/2005, and the other two by the successful tenderer, M/s. Rangpur Trading Company (P) Ltd., being Writ Appeal Nos. 581 and 582 of 2005. The three Writ Appeals having been filed against the common judgment and order passed by the learned Single Judge dated 27th September, 2005 in W.P. (C) No.5132/05 and 5305/05, they were taken up for hearing and disposal together and were disposed of by the Division Bench by a common judgment and order dated 6th October, 2005. Agreeing with the findings of the learned Single Judge holding that the Commissioner of Excise had failed to comply with the stipulation contained in Clause 28 of the NIT and had fixed a viable rate at Rs.18.23 per LPL instead of determining the viable price range, the Division Bench held that the entire process of granting the contract had been vitiated resulting in an arbitrary decision. The Division Bench took note of the fact that the Commissioner and Secretary to the Government of Assam, Excise Department, had been of the view that the viable rate should be Rs. 24/- per LPL, but the same had not been accepted and the contract had been awarded to M/s. Rangpur Trading Company (P) Ltd. at the rate of Rs.17.11 per LPL.

- The State of Assam has filed SLP (C) No.23889/2005 against the judgment of the Division Bench of the Gauhati High Court affirming the judgment of the learned Single Judge allowing the Writ Petitions filed by M/s. Satya Capital Services (P) Ltd. and M/s. Abhinandan Trading Company (P) Ltd. M/s. Rangpur Trading Company (P) Ltd., whose contract had been quashed by the learned Single Judge, has filed two Special Leave Petitions, namely, SLP (C) Nos.24565 and 24566/2005. Since all the three Special Leave Petitions arise out of the common judgment of the Division Bench of the Gauhati High Court, in the three Writ Appeals referred to hereinbefore, they have been taken up for hearing and disposal together and special leave has been granted in all the three matters.

- Appearing for the State of Assam, Dr. A.M. Singhvi, learned senior advocate, explained that in order to eliminate speculative bidders and to ensure uninterrupted supply of potable alcohol to the excise warehouse at Tinsukia, the State of Assam had included Clause 28 in the NIT which specified the criteria on the basis whereof the price range was to be computed.

- He urged that the concept of “viability range” had been considered and upheld by the Division Bench of the Gauhati High Court in *Prasanna Dutta v. State of Assam*, reported in (2004) 3 GLT 146.

As indicated hereinbefore, a viable/reasonable rate had been worked out by the Commissioner of Excise at Rs.18.23 per LPL. On the other hand, the Commissioner and Secretary to the Government of Assam, Excise Department, was of the view that the viable rate should be Rs.24/- per LPL. Ultimately, however, as it was felt that the said rate of Rs.24/- per LPL would cause the prices to go up and cause hardship to the consumer, the said Commissioner and Secretary, Excise Department, Government of Assam, recommended that the lower rate from amongst the rate offered by recommended firms within the viability range of Rs.17.11 to Rs.18.95 per LPL be considered. Such recommendation resulted in the awarding of the contract in favour of M/s. Rangpur Trading Company (P) Ltd. at the offered rate of Rs.17.11 per LPL.

Dr. Singhvi submitted that since three different rates had been quoted and the accepted rate was Rs.18.23 per LPL, the said three prices quoted were taken to be the viability range and the tenderer whose rate was found to be the lowest in relation to the viable range was given the contract. Special emphasis was laid on Clause 28 of the Notice Inviting Tender which has been extracted hereinbefore.

It was stated that after receiving the various applications, the average of the different amounts calculated against the different heads were computed and the viable/reasonable rate was arrived at on the basis thereof. In this process, the offer made by M/s. Satya Capital Services (P) Ltd., was held to be unworkable.

Dr. Singhvi submitted that the aforesaid policy to formulate a viable range had been taken keeping in mind the fluctuations in the price of raw materials, cost of transportation, duties and margin of profit, not only for the year in which the contract was awarded but also for the next two years since the contract was for a period of three years. It was submitted that such a policy had to be adopted on account of the fact that Assam by itself did not produce potable spirit and was dependent on the supply of the said commodity from neighbouring States.

Referring to the judgment of the learned Single Judge, Dr. Singhvi submitted that it had been contended on behalf of the writ petitioners that the very concept of a viable range/rate was arbitrary and beyond the competence of the respondents. Such a submission had not been fully accepted by the learned Single Judge who proceeded to examine the manner in which

A the viable rate had been arrived at firstly by the Excise Commissioner and thereafter by the Departmental Commissioner. Having arrived at a conclusion that a viable rate and not a viable range had been fixed by the Commissioner of Excise, and that too after ignoring the view of the Departmental Commissioner that the correct viable rate should have been Rs.24/- per LPL, the learned Single Judge observed that the contract had been given to a person whose rate was below the viable rate, which was contrary to the policy which prompted the authorities to provide for a viable range for grant of such contract.

C It was submitted that the learned Single Judge had misunderstood the purport of fixation of a viable price range and had erred in concluding that the grant of contract made in favour of M/s. Rangpur Trading Company (P) Ltd. did not disclose any logical, acceptable and/or reasonable basis.

D A further submission was made that despite referring to the decision of this Court in the case of *Dutta Associates Pvt. Ltd. v. Indo Merchants Pvt. Ltd. & Ors.*, reported in [1997] 1 SCC 53, wherein certain reservations were expressed regarding the policy of fixation of a viable range, the learned Single Judge made it clear that he was not expressing any opinion on the power and competence of the State Government to fix such a viable rate/range by incorporation of a specific clause in the Notice Inviting Tender.

E Apart from referring to the aforesaid decision in the *Dutta Associates Pvt. Ltd.* (supra), Dr. Singhvi also referred to the decision of this Court in *M/s. Produce Exchange Corporation Ltd. v. Commissioner of Excise, Assam and Anr.*, reported in [1972] 3 SCC 713, which was a decision for the proposition that under the Assam Excise Rules the Government was not prohibited from entering into negotiation with tenderers since it was interested in getting the country liquor at the cheapest rate and to ensure regular supplies.

G Certain other decisions were also referred to in support of the proposition that the Court was entitled to examine decisions taken to award contracts to private parties, but the same need not detain us since we are not really called upon to examine such question in the instant case.

H Dr. Singhvi submitted that the Division Bench while considering the writ appeals filed against the judgment of the learned Single Judge merely referred to Clause 28 of the Notice Inviting Tender and observed that the learned Single Judge had rightly held that the entire process of granting the contract had been vitiated as the concerned authority issuing the tender

notice had failed to discharge its stipulated responsibilities resulting in an arbitrary decision. No other reasoning has been given by the Division Bench even with regard to the decision to compute a viable range for the purpose of grant of contract for supply of potable spirit. A

Dr. Singhvi concluded on the note that the procedure evolved for the computation of a viable range was fair and transparent and was not meant to favour any individual and that the three different prices quoted by the three short-listed applicants, in fact, comprised the price range contemplated in clause 28 of the N.I.T. He urged that the judgment of the learned Single Judge was based on the sole consideration that instead of fixing a viable price range, the Commissioner of Excise had fixed a rate of Rs.18.23 per LPL, which according to the learned Single Judge vitiated the entire process. B C

Dr. Singhvi's submissions were adopted by learned counsel appearing on behalf of the appellant in the Civil Appeal arising out of SLP (C) No.24565-24566/05. In addition it was stated that after having been awarded the contract, the appellant had been continuing to supply potable spirit to the Government of Assam at its Tinsukia Excise Warehouse in terms of the contract and notwithstanding the decision of the Gauhati High Court, it had continued to make such supplies in view of the interim order passed by this Court on 2nd December, 2005. D

While supporting the judgment of the Gauhati High Court impugned in these appeals, Mr. Altaf Ahmed, learned senior counsel, broadened the scope of his submissions in contending that the very concept of fixing a viable price range was improper and was capable of misuse. It was submitted that as had been observed by the learned Single Judge of the High Court when the Departmental Commissioner was of the view that the viable rate should be Rs.24 per LPL, there was no logical explanation as to why the contract had been awarded to M/s. Rangpur Trading Company (P) Ltd. whose quoted price was far lower than the viable rate as computed by the Departmental Commissioner. It was contended that the very intention of maintaining regular supply of potable spirit, which was the basis of the decision to fix a viable range of prices, stood defeated by the grant of the contract in favour of M/s. Rangpur Trading Company (P) Ltd. E F G

Referring to the decision of this Court in *Dutta Associates Pvt.Ltd.* (supra), Mr. Ahmed submitted that a similar question had arisen in the above case regarding the grant of contract for supply of potable spirit on the basis of the concept of "viable range". He pointed out that while the "viability H

A range” had been fixed in the said case between Rs.14.72 to Rs.15.71 per LPL, *M/s. Dutta Associates* who had quoted a lower figure than the lowest end of the viability range was asked to increase its bid and only thereafter the contract was awarded to it. Such action on the part of the authorities of the Excise Department was challenged before the Gauhati High Court in a Writ Petition which was dismissed by the learned Single Judge but, on appeal, the Division Bench allowed the Writ Appeal and set aside the acceptance of the tender upon holding that the authorities had acted unfairly in calling upon *Dutta Associates* alone to submit a counter offer while not giving a similar opportunity to other tenderers. Directions were given to call for fresh tenders to award the contract. Mr. Ahmed submitted that when the matter was brought to this Court, this Court expressed its misgivings about the procedure relating to the fixation of a viability range. It was observed by the learned Judges that they had not been able to understand or appreciate the concept of viability range, its necessity or its real purpose. While affirming the judgment of the Division Bench in the Writ Appeal, this Court directed that the procedure to be followed in the matter of acceptance of a tender should be transparent, fair and open.

Mr. Ahmed submitted that when the decision of the Assam Government to grant contracts on the basis of “viability range” had been commented upon with disfavour by this Court, it was improper on the part of the Government of Assam to resort to the same methodology for awarding the contract for potable spirit on the same basis. Furthermore, in the instant case, no viability price range had been fixed which was one of the main reasons which prompted the learned Single Judge of the Gauhati High Court to set aside the contract awarded in favour of *M/s. Rangpur Trading Company (P) Ltd.*

It was urged that even if the above position was to be ignored, there was no explanation forthcoming as to why a viable price had been resorted to for the purpose of granting the contract when it had been decided to prepare a viable price range and the learned Single Judge had rightly set aside the contract granted in favour of *M/s. Rangpur Trading Company (P) Ltd.* on that basis.

Mr.M.N. Rao, learned senior counsel appearing for *M/s. Satya Capital Services (P) Ltd.*, submitted that the offer of the said respondent had not even been considered on the ground that the price quoted at Rs.15.10 per LPL was far lower than the viable price fixed at Rs. 18.23 per LPL. According to Mr. Rao, the same logic which prompted the authorities of the Excise Department

to award the contract to M/s. Rangpur Trading Co. (P) Ltd. should have been applied for awarding the contract to his client. On the other hand, the refusal to grant the contract to his client was sought to be justified by the authorities by taking resort to the theory of viable price range, although the lower extreme of the purported price range was arbitrarily fixed at Rs.17.11 per LPL which was the price quoted by M/s. Rangpur Trading Co. (P) Ltd.

Mr. Rao submitted that this very same question had been considered by this Court in the case of *Dutta Associates* (supra) and it had been observed that all those making offers were hard-headed businessmen who were quite alive to the economic viability of the offers made by them. Mr. Rao submitted that if his client was ready and willing to supply potable spirit at the rate of Rs.15.10 per LPL, which was lower than the rate offered by M/s. Rangpur Trading Company (P) Ltd., there could be no proper or logical explanation on the part of the Government of Assam to refuse to award the contract to his client.

All the learned counsel appearing in this matter had occasion to refer to and rely upon the decision of this Court in *Dutta Associates* (supra). In the said case, the tender notice did not specify the "viability range" nor did it indicate that only the tenders coming within the "viability range" would be considered. Such omission led this Court to observe that fairness demanded that the authority should have notified in the tender notice itself the procedure which they proposed to adopt while accepting the tender.

The doubts expressed by this Court in the aforesaid decision were taken note of by the Government of Assam and it led to the inclusion of Clause 28 in the Notice Inviting Tender where the aforesaid omission was sought to be remedied. Clause 28 of the NIT which has been extracted hereinbefore, specifies that the contract would be given to the tenderer found suitable from the "viable range" which was to be determined on the basis of analysis of the cost price, export duty, transport cost etc. by the Commissioner of Excise, Assam. What had been left unspecified in the Notice Inviting Tender was, therefore, introduced subsequent to the decision in the case of *Dutta Associates* and the applicants for grant of the contract can have no further grievance on such score.

However, apart from expressing doubts over the decision of the Government of Assam of taking recourse to the concept of "viability range", the discussion thereupon was not taken any further and the decision was rendered on a different set of facts, namely, that for granting the contract

A negotiations were entered into with one of the applicants only.

It is no doubt true that there is scope of the concept of “viability range” being misused to favour a particular applicant, but there is no such allegation in the instant case, nor has any *mala fides* been attributed to the action taken by the authorities in awarding the contract to M/s. Rangpur Trading Company (P) Ltd. whose offer was much lower than the fixed rate. One of the arguments advanced was that the offer made by M/s. Abhinandan Trading (P) Ltd. was, in fact, closer to the fixed rate than that of M/s. Rangpur Trading Company (P) Ltd.

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Considering the submissions made and the ground realities regarding supply of potable spirit to Assam, we are inclined to accept Dr. Singhvi’s submission and to reject those made by Mr. Altaf Ahmed and Mr. M.N. Rao. Although, doubts were expressed by this Court in *Dutta Associates* (supra) regarding the concept of “viability range”, its necessity or its real purpose, the decision of the Government of Assam to resort to such a procedure has to be left to the Government of Assam itself. Unless, it can be shown that the said procedure had been misused to favour any particular individual, which is not so in the instant case, it would not be proper for us to express any opinion as to the procedure the government should adopt except to say that whatever procedure is adopted should be open, fair and transparent.

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In the instant case, the methodology adopted for fixing the viable price range, as explained by Dr. Singhvi, indicates that even if the said method may not be the ideal method for granting of contracts, an average of different rates quoted against different heads by all the applicants are taken together and the ratio thereof is arrived at for fixing the viable range. It may be more prudent for the Government of Assam to adopt a different procedure in future, but as far as the present case is concerned, although the Commissioner of Excise had fixed the “viable rate” at Rs.18.23 per LPL, a “viable range” was computed between Rs. 17.11 per LPL and Rs. 18.95 per LPL. Considering the fact that the offer made by M/s. Abhinandan Trading (P) Ltd. (Rs.18.95 per LPL) was higher than the rate fixed by the Excise Commissioner, the Government in its wisdom thought it best to award the contract to M/s. Rangpur Trading Company (P) Ltd. whose offer of Rs.17.11 per LPL was lower than the fixed price.

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More than one and a half years have elapsed in respect of the period for which the contract had been awarded in favour of M/s. Rangpur Trading Company (P) Ltd. and as we have been informed, despite the orders passed

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by the learned single Judge and the Division Bench of the Gauhati High Court, they have still been supplying potable spirit to the Government of Assam on the basis of such agreement. In our view, it will not be in the interest either of the Government of Assam or the people of Assam to prevent M/s. Rangpur Trading Company (P) Ltd. from continuing such supply, especially when the correctness of the learned Single Judge's order is capable of being disputed. The Division Bench merely gave a stamp of approval to the learned Single Judge's judgment without examining the legal proposition involved.

For the reasons aforesaid, we are of the view that all the three appeals should be allowed and they are allowed accordingly. The common judgment and order dated 27th September, 2005 passed by the learned Single Judge in W.P. (C) No.5132/2005 and W.P.) No.5305/2005 as also that of the Division Bench dated 6th October, 2005, passed in Writ Appeal No.585/2005 filed by the State of Assam and Writ Appeal Nos.581 and 582/2005 filed by M/s. Rangpur Trading Company (P) Ltd., are hereby set aside.

Before we part with this matter, having particular regard to the doubts expressed by this Court in *Dutta Associates* (supra), we merely express the view that in order to avoid future controversy, the Government of Assam may adopt some other procedure for granting similar contracts in future which is open and transparent and will not give rise to controversies of the instant nature in future.

There will be no order as to costs.

K.K.T.

Appeals allowed.