
(2006) 05 GAU CK 0107
In the Gauhati High Court
Case No : PIL No. 24 of 2006

Barnaddi Gramya Unnayan Samity

APPELLANT

Vs

State of Assam and Others

RESPONDENT

Date of Decision : 17-05-2006

Acts Referred:

Citation : (2006) 3 GLT 567

Hon'ble Judges : B.S. Reddy, C.J; Amitava Roy, J

Bench : Division Bench

Advocate : S.S. Dey, A.K. Sharma, S. Baruah, D. Kalita and R. Dev, for the Appellant; B. Goyal, M. Bhuyan, S. Sharma, T. Deka and B. Sharma, for the Respondent

Final Decision : Dismissed

Judgement

Amitava Roy, J.—The Petitioner, claiming to be an non-governmental organization dedicated to public causes, solicits the intervention of this Court in the on going process of laying the synthetic athletic tract for the ensuing 33rd National Games at Guwahati accusing it to be dissentient to public interest.

2. I have heard Mr. S.S. Dey, learned Counsel for the Petitioner, Mr. S. Sharma, learned Counsel for the official Respondents and Mr. M. Bhuyan, learned Counsel for the Respondent No. 3. The parties having exchanged their pleadings, the petition was heard finally at the admission stage.

3. The pleaded facts deserve attention. By a global NIT issued on 27.4.2004 by the National Games Secretariat, tenders were invited from established manufacturers, amongst others, for laying Synthetic PU Surface for Athletic Track at the 33rd National Games-2005 Sports Complex at Guwahati on Turn Key basis. The quantity of work mentioned in the NIT was referred to as hereunder.

8000m² for a 400m-8-lane running track and 4-lane practice track without D on two sides.

4. The work specification provided required that the Synthetic Athletic Surface was to be of approved quality as applicable for IAAF competitions Category and conform to the specification as laid by IAAF for such surface and as certified by the laboratories accredited by IAAF.

5. In response thereto, six firms in all submitted their tenders and offered their samples for the assessment of the quality of their product, besides quoting their rates. According to the Petitioner, as per the specifications in the tender documents, the required material for setting up the synthetic Athletic Track is PU i.e. Polytan PUR. The High Power Purchase Committee, (hereafter referred to also as the Purchase Committee) thereafter, in its meeting of 6.6.2005 after consulting the Technical Committee's report and verifying the samples supplied by the tenderers decided that "Polytan Pur" offered by Polytan SPORTS tatlenbou Bmbh (hereafter referred to as Polytan SPORTS) was the best and, therefore, unanimously agreed to invite the said firm represented by M/s Inderjit Construction Pvt. Ltd., New Delhi, for essential negotiations. According to the Petitioners, eventually, the Polytan SPORTS (Respondent No. 3) was awarded the work at Rs. 2,87,83,464/- against its original quoted rate of Rs. 3,03,85,840/- thus saving public money to the tune of Rs. 16,02,376/-. The grievance expressed by the Petitioner is that the above notwithstanding, in complete disregard of the recommendation of the technical Committee and the Purchase Committee, inferior Polytan Sandwich material was being used for the athletic track. This the Petitioner has asserted, is the yield of unwarranted intervention of unscrupulous officials in power which if not rectified at this juncture would not only deprive the state of a much needed and aspired athletic track of the international standard but also project it in poor light in the national and international perspectives. As the laying of the track with inferior synthetic material would result in compromise with the quality mandated by the global NIT, the exercise undertaken is apparently illegal besides grossly opposed to public interest. Its representation before the concerned authorities voicing its protest and seeking remedial steps having failed to evoke the desired response, this petition has been filed with the prayer to cancel the works executed in the violation of the tender norms and injunct disbursement of funds therefore and independent impartial enquiry into the matter has also been prayed for.

6. In the written response submitted on behalf of the official Respondents and sworn by the Director (Operation), National Games Secretariat, to begin with, the standing of the Petitioner and its bonafide has been questioned. Apart from contending that it is acting as a proxy of some third party, the challenge has been scoffed at on the ground of delay and laches. Besides pleading that the Petitioner had wrongly interpreted the term "PU" as Polytan PUR in place of "Polyurethane", the answering Respondents have doubted the veracity of its source of information and the credibility of its knowledge on the material for levelling the allegations. While admitting the facts relating to the Global NIT and the bids received in response thereto as set out in the petition, it has been categorically denied that polytan PUR is of superior quality. According to the

answering Respondents, for synthetic athletic running track, the Respondent No. 3 manufactures the following products.

- (a) "Polytan PUR" for Olympic and International Standard and Certified by IAAF.
- (b) "Polytan M" for International and National Standard and Certified by IAAF.
- (c) "Polytan WS" for National and Training Standard and Certified by IAAF.
- (d) Polytan IS/SE for National and School Standard.

7. The Respondents maintained that in the tender process initiated by the Global NIT, in the eventual analysis, the bids of Respondents 3 and Mr. Sportina Exim Pvt. Ltd., survived for the final choice. Whereas Respondent No. 3 quoted rates for two of its products, Polytan PUR for Rs. 3,03,85,840/- and Polytan M for Rs. 2,58,50,640/-, Sportina Exim Pvt. Ltd. offered its rate for its product at Rs. 2,76,64,720/-. The Respondents claimed that Polytan PUR is full polyurethane and a fast and firm track used for competition only in Olympic and International events and does not have a training track. According to them, to perform in such a track straightway one needs adequate expertise/training and experience at the national level and thus is not suitable for National Games more particularly when to be staged in a State like Assam where there is not a single synthetic athletic track far less any track certified by the IAAF. It has been contended that on the other hand Polytan M is a sandwich seamless system consisting of polyurethane and black SBR rubber base followed by a layer of liquid polyurethane and red EPDM rubber granules more yielding than the full polyurethane system and is suitable both for competition and training purposes in the international and national events. Apart from the fact that both Polytan PUR and polytan M are certified by the IAAF and recognized all the world over, for a State like Assam, Polytan M Track is more suitable for the forthcoming event as well as for the future needs of the budding sport-persons thereof. The official Respondents have stated that on 10.5.2005, a meeting of the Purchase Committee was held and it decided to invite the Respondent No. 3 for its product Polytan Pur for the pre-settlement negotiations. The quoted price of Rs. 3,03,85,840 was scaled down to Rs. 2,86,83,646/- in the meeting of the Negotiation Committee (High Power Purchase Committee) held on 6.6.2005. Thereafter in its meeting held on 17.8.2005, noticing that both Polytan PUR and Polytan M were equally recognized and adopted at the international and domestic sports arena and that the rate quoted for Polytan M by the Respondent No. 3 was the lowest, decided to opt for the said product at Rs. 2,55,00,000/- subject to negotiations. After necessary negotiations with the two tenderers, the Technical Committee accepted the Respondent No. 3 's offer for Polytan M at Rs. 2,57,00,000/-.

8. The Respondents have asserted that after the completion of the necessary formalities i.e. execution of the agreement, the Respondent No. 3 commenced the work of installation of the track w.e.f. 27.1.2006 and that about 95% of the work for the competition track and 75% of the work for training track has already been completed and that therefore any interference with the process at

this stage would totally dislocate the same prejudicially effecting public interest.

9. The Respondent No. 3 has in substance echoed the above stand in its counter. It has reiterated that synthetic athletic running surfaces manufactured by M/s Polytan Sports, tested and certified by the IAAF, are possessed of different brand names of respective specifications. It has been maintained that both the products Polytan PUR and Polytan M are certified for use in all international competitions and are produced by M/s Polytan Sports according to the client's requirement, climatic conditions etc. While asserting that the products Polytan PUR and Polytan M are at par in quality, the Respondent No. 3 has averred that Polytan M has an edge over Polytan PUR in that the resilience of the said track makes it suitable both for competition and training purposes at a lower cost. The allegation that inferior or cheap quality synthetic track was being laid has been categorically denied. According to the answering Respondent, the meeting of the Negotiation Committee on 6.6.2005 was in respect of bid evaluation confined to the price aspect and not on technical specifications. The final decision was taken in the meeting of the Technical Committee held on 17.8.2005 where after a prolonged discussion it decided to opt for Polytan M for the synthetic track at a cost of Rs. 2,55,00,000/- subject to negotiations. The Respondent No. 3 reiterated that on being settled with the contract, it had started the work in right earnest and that more than 95% of the work has in the meantime been completed. Bearing in mind that the national games is scheduled to commence from 5.10.2006, any interference at this stage would disrupt the project.

10. Mr. Dey has argued that the work of laying down the synthetic athletic track now in execution being in departure from the prescriptions in the global tender and the product utilized therefore being inferior to the quality insisted thereby, intervention of this Court in public interest is unavoidably called for. Referring to the minutes of the meetings of the Purchase Committee and the Technical Committee held on various dates between 10.5.2005 and 17.8.2005, the learned Counsel has urged that it would be apparent therefrom that the product Polytan PUR after having been recommended for the track for some inexplicable reason, the choice shifted to Polytan M, inferior in quality to the former. According to him, the decision to the above

effect was purportedly taken in the meeting of the so called Technical Committee in the meeting dated 17.8.2005 in absence of any technical expert. As the utilization of Polytan M for the synthetic athletic track signifies compromising with the quality prescribed for the event, Mr. Dey has emphatically submitted that the process is vitiated by non-transparency and arbitrariness to the prejudice of the public in general and the sporting community of the State in particular and, therefore, the reliefs as prayed for ought to be granted. The learned Counsel, however, admitted that 75% of the work had been completed at the time of institution of the instant proceeding. The delay was sought to be explained by him by contending that the necessary facts and documents to highlight the irregularities as above were not readily available to the Petitioner.

11. Mr. Sharmaper contra while reiterating the pleaded stand bearing on the standing and bonafide of the Petitioner has argued that having regard to the local conditions and the specifications in the global NIT, use of Polytan M which is by no means inferior to Polytan PUR, is not antithetical either to the project or public interest. The learned Counsel elaborately referred to the pleadings, the minutes of the meetings of the Purchase and the Technical Committees as well as the certificates issued by the IAAF for Polytan M and contended that the said product was better suited for the requirements set out in the global tender and that therefore all contentions to the contrary are misconceived. While submitting that the members of the Technical Committee present on 17.8.2005 were all officials associated with the Games and, therefore, fully authorized to take the decision recorded therein argued that the selection of Polytan M for the synthetic surface at the rate agreed is also in the interest of public revenue. He submitted on instructions that in the meantime the work has almost been completed and that no interference at this stage would be justified.

12. Mr. Bhuyan while endorsing the above clarified that Polytan PUR and Polytan M are only brand names of the synthetic surface produced by M/s Polytan Sports in which poly-urethane is the common basic material. While emphasizing that Polytan M was in no way inferior to Polytan PUR, the learned Counsel reiterated that the product chosen for the synthetic athletic track for the National Games was tailor made for the requirements of competition and training purposes as enumerated in the global NIT. Besides with an eye to the lesser cost incurred, the decision cannot in any view of the matter be dubbed as anti-public. He affirmed that the works had been commenced in the month of January, 2006 and as on date more than 95% thereof has been achieved and considering the scheduled dates for the Games any interception thereof would jeopardize the timely completion of the prestigious enterprise.

13. The competing arguments have received our thoughtful consideration. Having taken up the petition for final disposal on merits as the same raises an issue of general importance, we are not inclined to dilate on the plea of want of locus of the Petitioner. As it is, over the years, there has been an increased liberal approach on standing qua public law proceedings.

14. The impugment founded on non-transparency and resultant prejudice to public interest, however, needs attention. The global tender reveals the work in question to be one of laying synthetic PU Surface for athletic track for the ensuing 33rd National Games to be held at Guwahati in the State of Assam. Thereunder, 8000m² of such surface for a 400m-8-lane running track and 4-lane practice track without D on two sides has to be provided. The tender requirement is that the synthetic athletic track has to be of approved quality as applicable to IAAF competitions Category and confirming to the specifications as laid by IAAF and as certified by the laboratories accredited by IAAF.

15. The particulars reflected in the comparative statement relating to the contending tenderers as submitted by the Technical Committee constituted for

the purpose disclose that the Respondent No. 3 had offered its product with brand names Polytan PUR and Polytan M quoting its rates to be Rs. 3,03,85,840/- and Rs. 2,58,50,640/- therefore respectively. The other bidder, M/s Sportina Exim Pvt. Ltd. identified its product Regupol Compact with its price to be Rs. 2,76,64,720/-. The Purchase Committee in its meeting held on 10.5.2005 after due deliberations and on a consideration of the views expressed by the Technical Committee in the matter decided to invite M/s Polytan Sports for necessary negotiations for its product Polytan PUR. The Committee also decided to keep M/s Sportina Exim Pvt. Ltd. in line if in case negotiations with M/s Polytan Sports failed. The minutes of the said meeting, however, do not conclusively establish that a final decision was taken to select Polytan PUR for laying the synthetic athletic track. In its meeting held on 6.6.2005, the Purchase Committee confined the negotiations only to the rate following which the representative of Polytan Sports agreed to scale down the bid to Rs. 2,87,83,464/-. Finally on 17.8.2005, the Technical Committee in its meeting decided to opt for Polytan M offered by M/s Polytan Sports being satisfied that the same was at par with Polytan PUR and equally recognized and accepted at the domestic and international levels to be used in Sports stadia. The lower rate offered for Polytan M was also one of the considerations for the said choice.

16. The text furnished to this Court by the Respondents pertaining to the two items, Polytan PUR and Polytan M, is demonstrative of the fact that Polytan M is a product duly certified by the IAAF and because of its textural characteristics and utility it is relatively more adaptable to the requirements enumerated in the global tender. The documents per se disclose that synthetic athletic running tracks with Polytan M are more suited for competition and training purposes as specified in the NIT. We, therefore, do not feel inclined to conclude from the available materials on record that Polytan M is either inferior in quality to Polytan PUR judged by the standards prescribed or is ill suited for the project for which the tenders had been invited in the case in hand.

17. On a careful scrutiny of the deliberations recorded in the meetings of the Technical Committee and the Purchase Committee, we are unable to sustain the contention that the selection of Polytan M was influenced by extraneous or impertinent considerations. Looking at the composition of the Purchase Committee and the Technical Committee as well, we are not inclined to deduce that the ultimate decision lacked necessary insight in the matter. The State being the guardian of its own finance, the commercial consideration that informed the decision to choose Polytan M without compromising with quality cannot be denounced. No categorical allegation of malafide as such has been made. There is no factual foundation therefore either in the petition. Noticeably no rejoinder has been filed by the Petitioner controverting the statements made in the counters highlighting inter alia the advantageous traits of Polytan M over Polytan PUR in the context of the use of synthetic athletic surface at the national games. The documents certifying the efficacy of Polytan M and evidencing certification thereof by the IAAF have also remained unchallenged. The overwhelming facts in

support of the Respondent's assertions thus outweigh the Petitioner's contentions to the contrary. In exercise of the present jurisdiction, re-evaluation of the products and substitution of the final decision on merits by us is neither permissible nor called for in the above factual premise.

18. The Apex Court in *Raunaq International Limited Vs. I.V.R. Construction Ltd. and Others*, while emphasizing on the restraint to be exercised by a writ court while examining a challenge to the award of a contract by a public authority or the State, held that no interference is called for unless the decision is vitiated by malafide or is prejudicial to public interest. With reference to public interest litigation, forging such challenge, the Apex Court ruled that in such an eventuality as well, the Court must carefully weigh conflicting public interests before intervening, lest the same may result in delay of the project with the obvious consequence of price escalation. It held that where the decision is taken bonafide and that the choice is exercised on legitimate considerations such a petition ought not to be entertained. On the aspect of delay, it expressed itself as follows:

17. Normally before such a project is undertaken, a detailed consideration of the need, viability, financing and cost-effectiveness of the proposed project and offers received takes place at various levels in the Government. If there is a good reason why the project should not be undertaken, then the time to object is at the time when the same is under consideration and before a final decision is taken to undertake the project. If breach of law in the execution of the project is apprehended, then it is at the stage when the viability of the project is being considered that the objection before the appropriate authorities including the Court must be raised. We would expect that if such objection or material is placed before the government, the same would be considered before a final decision is taken. It is common experience that considerable time spent by the authorities concerned before a final decision is taken regarding the execution of the public project. This is the appropriate time when all aspects and all objections should be considered. It is only when valid objections are not taken into account or ignored that the court may intervene. Even so, the Court should be moved at the earliest possible opportunity. Belated petitions should not be entertained.

19. The same view was reiterated in *Air India Ltd. Vs. Cochin Int., Airport Ltd. and Others*, While acknowledging the authority of the State to choose its own method to arrive at a decision in awarding any contract, the Apex Court held that even when some defect is found in the decision making process, the Court must exercise its discretionary power under Article 226 with great caution and only in furtherance for public interest and not merely on the making out of a legal point. It underlined that the Court should always keep the larger public interest in mind in order to decide whether its intervention is called for or not.

20. Admittedly at the time of filing of the petition, 75% of the works had been completed. As on date, more than 95% thereof has been achieved. There is no

denial of this fact. Obviously bearing in mind, the calendar chalked out for the National Games, the project is a time bound one. No convincing explanation for the delay has been offered. The assailment in the narrated factual perspective also appears to be vague, uninformed and indeterminate. Considering the weight of the materials provided by the Respondents in support of the decision, we are not convinced that the interference with the process is a compelling necessity in public interest. Not only the decision does not suffer from any non-transparency, unreasonableness or malafide, the work is nearing completion and any interdiction would only dislocate the project in public detriment.

In the wake of the above, this petition is devoid of merit and, is therefore, dismissed. We, however, refrain from making any order as to costs.