

GAHC010018672023



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : WA/78/2023

THEON PHARMACEUTICAL LTD.,
A COMPANY DULY REGISTERED UNDER THE PROVISIONS OF THE
COMPANIES ACT, 1956 AND HAVING ITS ADMINISTRATIVE OFFICE AT
PLOT NO. 400, INDUSTRIAL AREA PHASE- I, PANCHKULA, HARYANA,
INDIA AND IS REP. BY SATINDER PAL SINGH, AUTHORIZED SIGNATORY
AND GENERAL MANAGER, INSTITUTIONAL SALES.

VERSUS

1:THE STATE OF ASSAM AND ORS. B
REP. BY THE COMMISSIONER AND SECRETARY TO THE GOVT. OF ASSAM
HEALTH AND FAMILY WELFARE DEPTT., DISPUR, GUWAHATI- 6.

2:THE MISSION DIRECTOR
O/O MISSION DIRECTOR NATIONAL HELTH MISSION SAIKIA
COMMERCIAL COMPLEX SRINAGAR PATH CHRISTIAN BASTI G.S. ROAD
GUWAHATI-781005 ASSAM

3:MANAGING DIRECTOR
AMSCL ASSAM
O/O THE MANAGING DIRECTOR ASSAM MEDICAL SERVICES
CORPORATION LTD. CENTRAL DRUG WARE HOUE CAMPUS
PATHERQUERY NARENGI
GUWAHATI
ASSAM-78102

For Appellant : Mr. G.N. Sahewalla, Senior Advocate.
Ms. K. Bhattacharyya, Advocate.

For respondent(s) : Mr. B. Gogoi, Standing Counsel,
Health and Family Welfare Department.

– BEFORE –

HON'BLE THE CHIEF JUSTICE

HON'BLE MR. JUSTICE PARTHIVJYOTI SAIKIA

11.04.2023

1. This intra-Court writ appeal is directed against the order dated 20.12.2022 passed in WP(C) No.7950 of 2022 whereby, the learned Single Bench refused to grant interim protection to the appellant/writ petitioner company on the order dated 14.07.2022 issued by the Managing Director, Assam Medical Services Corporation Ltd., whereby the petitioner/appellant company was debarred for next 3 (three) years, from the date of issuance of the order, from participating in any tender issued by TIA (Tender Inviting Authority) for procuring drug items.

2. Mr. Sahewalla, learned Senior counsel for the appellant/writ petitioner urged that the direction to debar/black-list the appellant company is in gross contravention of the terms and conditions of the tender. He drew the Court's attention to Clause 5.18.2 of the Corrigendum No.1 dated 16.10.2019 issued after the main tender which empowers the tender inviting authority to debar/black-list a firm. He urged that debarment under this provision can only entail in case three batches of a particular drug item supplied by the firm fail in the quality test and consequential penalty of product debarment for those drugs is imposed upon the firm by virtue of Clause 5.18.2.(2) of the Corrigendum. He urged that the order of debarment issued against the appellant company is based solely on the ground that the writ appellant failed to supply the drugs under the tender.

3. As per Mr. Sahewalla, the consequence of non-supply of drugs is provided

under Tender condition Nos. 5.11, 5.11.1 and 5.11.2, which only entails penalties of termination of contract and damages. He urged that the final show-cause notice dated 30.03.2022, which was given to the petitioner firm before issuance of the order of debarment, clearly indicates that the action was proposed in reference to Tender clause Nos. 5.6, 5.6.1, 5.6.2, 5.11, 5.11.1, 5.11.2 & 5.18.2 Pt.(3).

4. Mr. Sahewalla submitted that the show-cause notice clearly indicates that the action of debarment was being proposed with reference to the stipulations in the tender condition. As Clause 5.18.2 (Part 3) entails the consequences of black-listing only pursuant to 3(three) drugs items supplied by the firm failing in the quality test, which component is totally lacking in the present case, the direction to black-list/debar the appellant is grossly arbitrary and illegal. Thus, as per Mr. Sahewalla, the order of debarment does not stand to scrutiny and hence the same is liable to quashed.

5. Mr. Sahewalla urged that the adjudication of the issue as to whether the action of debarment/black-listing of the appellant firm could have ensued only on account of non-supply of tendered drugs, would amount to expression of final opinion on the issue raised by the petitioner in the writ petition. It was his submission that the writ petition of the petitioner itself may finally be decided in this intra-Court Writ Appeal.

6. *E-converso*, Mr. B. Gogoi, learned Standing Counsel, Health and Family Welfare Department vehemently and fervently opposed the submissions advanced by Mr. Sahewalla, learned counsel for the appellant. He urged that neither any ground has been raised in the writ petition that the penalty of debarment/black-listing could have been inflicted upon the petitioner only if 3(three) drugs supplied by the appellant failed in the quality test, nor was any

such argument advanced before the learned Single Judge when the stay petition was considered. He thus urged that the appeal lacks merit and should be dismissed.

7. We have given our thoughtful consideration on the submissions advanced at Bar and have gone through the record of the writ petition which has been enclosed with this appeal.

8. We feel that the adjudication, which this Court is called upon to make in this writ appeal would finally decide the controversy which has been raised in the writ petition. Thus, rather than adjudicating upon the legality or otherwise of the impugned order dated 20.12.2022 passed by the learned Single Judge in WP(C) No.7950/2022 the Single Bench, whereby interim relief was denied to the appellant/writ petitioner, we intend to decide the entire controversy on merits.

For doing so, we are persuaded by the submission of Mr. Sahewalla that black-listing amounts to civil death of a firm or a company and that if such an action is taken without following the process of law, it would cause irreparable loss to the business entity.

9. The bid of the petitioner/appellant firm was accepted for supply of certain drugs, purchase order dated 08.05.2021 was issued to the appellant granting 90 days' time for making the supplies. However, the appellant company failed to supply the drugs and complete the work order within the stipulated time and necessary intimations were forwarded to the appellant about the consequences of non-supply of the drugs as per schedule. The petitioner offered reply to these notices by contending that the supply chain was badly hampered on account of unprecedented situation (Covid-19 pandemic) which had made impossible to make supply of drugs as per the purchase order. It is trite that in the period

beginning from March, 2020, when the Covid pandemic struck, the entire flow of supplies of medicines across the country was severally affected so much so that the Government on its own was compelled to devise different mechanisms for procurement and supply of drugs. The supply chains were disrupted, modes of transportation came to a stand-still. Thus, the writ appellant might have had a valid ground/justification for not being able to make supply in terms of the work order.

10. A perusal of the final show-cause notice dated 30.03.2022 issued to the appellant company would indicate that the same was issued requiring the company to complete the order of supply of drugs under the Tender dated 05.07.2019 and Corrigendum dated 16.10.2019.

11. Be that as it may, as we are not called upon to decide the consequences of other penalties imposed upon the appellant/writ petitioner on account of non-performance of the contract, we need not make any further comment on this aspect of the matter. However, it is not in dispute that the impugned action of debarment/black-listing of the appellant has been executed by placing reliance on Sub-Clause (3) of Clause 5.18.2.

12. For understanding and appreciating the controversy, the entire clause 5.18.2 along with Sub-Clauses(1), (2) and (3) of the Tender Corrigendum dated 16.10.2019 is reproduced herein-below.

“5.18.2 If the sample drawn from any supplied drug fails the quality test (by any Government or empaneled NABL accredited lab by the Tender Inviting Authority) or the sample doesn’t conform to the statutory standards and specifications, then the supplier will be liable for penalty (Administrative¹ & Financial) based on the nature and degree of default as given below.

¹Administrative penalty includes debarment or disqualification for

participating from future bidding process.

S. No.	Nature of Default	Penalty
1	In case of one batch of a particular drug item supplied by a Firm failed the quality test. <i>The quality test to be done by any Government or empaneled NABL accredited lab by Tender Inviting Authority.</i>	- The supplier has to withdraw entire batch of the drug remaining unconsumed within 30 days of intimation of the failure at its own cost. - The supplier shall not be entitled for any payment for the quantity supplied from that particular batch which was declared NSQ subsequently, irrespective of the fact that the drugs have been consumed partially. Penalty for delay in withdrawal of NSQ Drugs: In case the supplier fails to withdraw the NSQ drugs from respective facilities or stores wherever it is lying, within 30 days of notice period, shall be liable for a demurrage charge of 2% of the total value of NSQ drugs supplied for each week of delay (delay period shall start after expiry of 30 days of notice period), failing which authority may take steps for destruction or safe disposal of the NSQ drugs and recover the expenses from the supplier in addition to demurrage charges. Penalty for delay in replacement of NSQ Drugs: Supplier shall be liable to replace entire quantity of drugs supplied from that batch, even if consumed partially, within 45 days of intimation of such failure with a penalty of 2% of the

		value of delay or part thereof (delay period shall start after expiry of 45 days of notice period), up to maximum of 5 weeks. • Penalty for non-supply or non-replacement: If the Supplier fails to replace the entire batch of NSQ drugs supplied within penal period of 5(five) weeks post the notice period of 45 days, the rate contract shall be liable to be terminated and supplier shall be debarred for 3 years from participating in any tender issued by the Tender Inviting Authority (TIA) for that item or product.
2	In case three batches of particular drug item supplied by a Firm failed the quality test. <i>The quality test to be done by any Government or empanelled NABL accredited by Tender Inviting Authority.</i>	• Product debarment: In addition to above penalties, the Firm shall be debarred from participation in any tender floated by the TIA for three years from the date of issue of letter of debarment for that item.
3	Where the supplier has rate contract for three (3) or more drug items and debarred for a minimum of three drug items.	• Firm Debarment: The firm shall be black listed and debarred from participating in any tender for any drug item(s) issued by the TIA for 3(three) years from the date of intimation. • Forfeiture of Performance Security: In addition to firm debarment the entire performance security deposited by the supplier shall be forfeited and apportioned towards financial penalty.

13. A perusal of Sub-Clauses 2 and 3 of Clause 15.18.2 of Corrigendum No.1 dated 16.10.2019 manifests that in case 3(three) batches of a particular drug item supplied by the firm fail the quality test, the penalty proposed, in addition to the penalties prescribed in Sub-Clause 1, would be product debarment whereby the firm would be debarred from participating in any tender floated by the TIA (Tender Inviting Authority) for 3(three) years from the date of issuance of the letter of debarment for that item, that is to say that the firm would be liable to face debarment from participating in any tender for 3 years the particular drugs which failed the quality test. Clause 3 would come into picture where the supplier has rate contract for 3(three) or more drug items and is debarred for minimum of 3(three) drugs, meaning thereby, the consequence of debarment of the firm/company from participating in the future tenders can ensue only when different drug items supplied by the contractor fail the quality test and there is a product debarment for minimum 3 drug items. In that event, the consequences of black-listing and debarment of the company/firm from participating in future tender processes for any drug item(s) could follow in addition to forfeiture of performance security.

14. There is not an iota of allegation that any of the drugs supplied by the appellant company failed in the performance/quality test in terms of Sub-Clause (2) of Clause 5.18.2., what to say of 3 drugs failing such test. As a result, the penal power under Sub-Clause (3) of Clause 5.18.2, could not have been exercised so as to black-list the appellant firm from participating in the future tender process.

15. Consequently, the impugned order dated 14.07.2022, whereby the appellant firm/Company was black-listed and debarred from participating in the future tender process to be conducted by TIA for next three years is grossly

illegal and *de hors* the terms and conditions of tender and Corrigendum dated 16.10.2019 and hence, the same is liable to be struck down.

16. Accordingly, the impugned order/communication dated 14.07.2022, to the extent the appellant firm was black-listed and debarred for next three years from participating in tenders for any drug item issued by TIA, is hereby quashed and struck down.

17. Consequently, Writ Appeal No.78/2023 and WP(C) No.7950/2022 filed by the appellant/writ petitioner are hereby allowed.

No order as to costs.

JUDGE

CHIEF JUSTICE

Comparing Assistant