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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ W.P.(C) 8361/2018

M/S NYSA COMMUNICATIONS PVT. LTD. Petitioner

Through: Mr Amit Sibal, Sr. Advocate with Mr
Himanshu Nailwal, Advocate.

versus

UNION OF INDIA AND ANR. Respondents

Through: Mr Abhay Prakash Sahay, CGSC
with Mr Suraj Kumar, Advocate for
R-1/UOI.
Mr Gagan Mathur, Advocate for R-2.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

ORDER

% **10.08.2018**

CM No.32086/2018

1. Allowed, subject to all just exceptions.

W.P.(C) 8361/2018 & CM No.32085/2018

2. Issue notice. The learned counsel appearing for the respondents accepts notice.

3. The petitioner has filed the present petition, *inter alia*, praying as under:-

“a. Pass a Writ of certiorari in favour of the Petitioner and against respondents thereby seeking setting aside of the impugned letter dated 30.07.2018 as issued by Deputy Secretary (Agricultural Education) of Respondent no.2 thereby illegally terminating the contract dated 05.06.2018 as executed between the petitioner and

Respondent No.2 without issuing a mandatory show cause notice of 60 days in terms of clause 6.11 of the contract thereby bringing the breaches on record and without giving any opportunity of being heard in total defiance of the law of the land; and

- b. Pass a consequential Writ of Mandamus in favour of the Petitioner and against the Respondents thereby directing them to forthwith refund the performance security amount of Rs.35,00,000/- (Rupees Thirty Five Lakhs Only) so forfeited by the Respondent No.2 by illegally terminating the contract by playing a fraud upon the Petitioner.”

4. The petitioner is essentially aggrieved by the communication dated 30.07.2018 (hereafter ‘the impugned communication’) issued by the Deputy Secretary (Agricultural Education) of respondent no.2 (ICAR), terminating the contract dated 05.06.2018.

5. On 23.03.2018, respondent no.2 had invited technical and financial bids, for conducting of online All India Entrance Examination (AIEE) for admission to undergraduate, post graduate and Ph.D courses in Agricultural Universities located to all over the country and on an annual basis. Till the academic session 2017-2018, such entrance examinations were held in conventional offline (OMR based) mode. Respondent no.2 had decided that such examination be conducted through a Computer Based Test (CBT). It is in the aforesaid context that bids were invited by an E-Procurement Tender Notice dated 23.03.2018.

6. The petitioner participated in the tender process and was awarded the contract. In terms of the contract, the petitioner was to conduct the AIEE in May, 2018. The parties also entered into a formal contract on 05.06.2018.

7. The AIEE for the academic session 2018-19 was conducted at 654 centres all over India during the period on 22.06.2018 and 23.06.2018.

8. Apparently, certain complaints were made regarding the manner in which the AIEE was conducted. In view of the said complaints, the respondent no.2 has terminated the contract with the petitioner by the impugned communication and has, further, forfeited the performance security of ₹35 lakhs furnished by the petitioner.

9. The contract entered into between the parties contains an arbitration clause. Mr Sibal, learned senior counsel appearing for the petitioner states that the impugned communication terminating the contract had been issued without any notice and without affording the petitioner an opportunity to be heard. He further states that although the disputes may be contractual, the termination of the contract has severe adverse effect on the business of the petitioner as it is a normal practice in the industry to disqualify persons whose contract has been terminated by any public entity on account of breach of contract.

10. It is stated that the respondent no.2 is now proceeding to hold the examination on an offline mode (OMR based). Mr Sibal, further states that the petitioner does not wish to interdict the said examination; he has restricted the prayer made in the present petition only for seeking an opportunity to be heard and an opportunity to convince respondent no.2 that the petitioner has not committed any default.

11. The reliefs as sought by the petitioner in the present petition cannot be granted in these proceedings. Admittedly, the contract in question is determinable and, thus, cannot be specifically enforced. Further, as pointed

out by the learned counsel for respondent no.2, the contract includes an arbitration clause and the petitioner has an alternate remedy. However, it is also relevant to note that it is not disputed that the petitioner was not issued any notice and has had no effective opportunity to address the complaints made against it. It is also apparent that termination of the contract on an allegation of breach of contract may have an adverse effect on the petitioner's ability to bid for other contracts. In this view, the Court considers it apposite to direct that an *ex post facto* hearing be provided by respondent no.2 to the representative of the petitioner. If the petitioner is able to satisfy respondent no.2 that there was no breach on the part of the petitioner or that such breach was beyond the control of the petitioner, the respondents may review their decision to terminate the contract (the impugned communication) or to arrive at an amicable resolution of the disputes. It is clarified that no further show cause notice will be required as the allegations, on the basis of which the contract has been terminated, has been set out in the impugned communication.

12. It is clarified that the aforesaid order has been passed only with a view for the parties to have a dialogue and to arrive at an amicable resolution, where the petitioner does not have to suffer the stigma of having not performed the contract awarded by a public entity, if the same is not warranted.

13. The petitioner may make a representation to respondent no.2 within a period of one week from today. The petitioner is also at liberty to approach respondent no.2 for obtaining specific information relating to the allegations made. The petitioner would be afforded a hearing in the last week of August,

2018. If respondent no.2 is persuaded to accept the petitioner's point of view, it shall communicate the same within a period of one week, thereafter.

14. It is further clarified that if the petitioner is not satisfied with the outcome of the aforesaid proceedings, it would be open for the petitioner to avail of the alternative remedies in accordance with law.

15. All contentions of the parties are reserved.

16. The petition and the pending application are, accordingly, disposed of.

17. Order *dasti*.

VIBHU BAKHRU, J

AUGUST 10, 2018
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