

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

CWP No. 15915 of 2020 (O&M)

Reserved on : 05.10.2020

Pronounced on : 06.10.2020

Social Service Welfare Society and others

...Petitioners

Versus

State of Punjab

...Respondent

CORAM: HON'BLE MR. JUSTICE ARVIND SINGH SANGWAN

Present: Mr. D. S. Patwalia, Senior Advocate with
Mr. Adityajit Singh Chadha, Advocate
for the petitioners-Societies.

Ms. Anu Chatrath, Addl. A. G., Punjab
for the respondent/Caveator.

ARVIND SINGH SANGWAN, J.

Prayer in this writ petition, filed under Articles 226/227 of the Constitution of India is for quashing the letters dated 11.09.2020 (Annexures P-15 to P-21), whereby the respondent-department has cancelled/terminated the Concession Agreements dated 29.12.2004, vide which the petitioners-societies were given permission to run Industrial Training Institutes (*for short 'ITIs'*) since 2004 onwards.

Learned senior counsel, appearing for the petitioners-societies, has argued that all the petitioners-societies are registered in Punjab and the Punjab Infrastructure Development Board (*for short 'PIDB'*) had invited bids in the year 2003 for implementation of development projects of ITIs.

The petitioners-societies were the successful bidders for the ITIs situated at

Abohar, Khadur Sahib, Banarasi, Nathana, Pratap Pura, Kahnuwan and Mukerian.

Learned senior counsel has further submitted that a concession agreement dated 29.12.2004 was entered into between the petitioners-societies and the respondent-department, a copy of one of such agreements is annexed as Annexure P-1. It is further submitted that as per the agreement, the concessionaires, i.e the petitioners herein, had entered into a commercial public private partnership with respondent-department for the upgradation and management of the ITIs. As per the agreement, the concessionaires are required to pay 'Concession Fees' to the Concessioneing Authority under the Clause 'Concession Fee' in terms of price proposal as executed by PIDB.

Learned senior counsel has further submitted that as referred to, various clauses of the agreement deal with the grant of concession, action in support of concession, concession fee, revenue sharing and academic fee. It is further submitted that in the year 2014-15, the Concessioneing Authority had increased the sealing of the fees to be charged by the petitioners-societies and for the years from 2010 to 2018, the respondent-department never raised any objection regarding non-payment or late payment of concession fees, incremental fees or revenue share. Therefore, the petitioners-societies had every reason to believe that nothing is due towards aforesaid fees from 2010 to 2018.

Learned senior counsel further submitted that on 11.04.2018, notices were issued to the petitioners-societies, with an intention to terminate the concession agreement for 'concessionaires event of default'. In response to these notices (Annexures P-4 to P-10), the petitioners-societies refuted the claim of the respondent-department on the ground that concession fee is to be charged from the date of commencement of operation and not from the

date of the concession agreement and the respondent-department cannot demand interest on account of procedural delay in making payment of concession fee; the revenue share from increase in admission fees is also incorrectly claimed due to drop out rate of the students in most of the ITIs; due to non-charging of fee from SC/ST students and that in the corresponding years, when the petitioners-societies were depositing the fee, no objection was raised.

Learned senior counsel further submitted that in view of the reply (Annexures P-11 and P12), filed by the petitioners-societies, the respondent-department constituted a Committee/Consultation Panel under Article 22 Clause 22.1 of the concession agreement relates to redressal of the grievances of the petitioners-societies and the Consultation Panel set up by the department was consisting of its Director, Additional Director (I.T.), Deputy Director (Administration), Deputy Controller (Finance & Accounts) and Deputy Director (Legal) and apart from them, one representative of each of the petitioners-societies was also called upon to attend the meeting of Consultation Panel. After conducting three meetings, a report (Annexure P-13) was submitted by the Consultation Panel on 03.04.2019, in which a conclusion has been drawn that in respect of charging compound interest, the Government should fix a rate of interest for delayed payment and that no written intimation was ever given to the petitioners-societies regarding pending amount and that in the absence of any specific clause in the agreement, the interest cannot be charged.

Learned senior counsel further argued that instead of referring the dispute under Clause 22.1, the respondent-department has invoked the termination procedure under Article 17, in an illegal and arbitrary manner

and has issued the impugned termination letters dated 11.09.2020 (Annexures P-15 to P-21).

Learned senior counsel has challenged aforesaid orders/letters primarily on the ground that the same have been invoked on the basis of earlier notices given by the department which were contested by the petitioners and by showing a huge amount against the petitioners-societies as on 30.09.2017, the following orders were passed:

“6. Thus, in view of the above, action as per the following is taken as under:-

- i) The agreement entered upon in respect of I.T.I. Banarasi is cancelled/terminated with immediate effect under Article 17 of the agreement for non-performance of obligations for not depositing the concession fee and revenue sharing under Article 6 “Obligation of the concessioner” clause 6.2 and 12.2 of Article 12 “Concession fee and revenue sharing”.
- ii) Upon the cancellation of the agreement, the admission of the Institution from the Session August, 2020 is closed with immediate effect.
- iii) The bank guarantee of Rs. 15 lacs deposited by you is forfeited under clause 5.2 of the concession agreement, towards the concession fees/enhanced concession fees/revenue share/late payment and the recovery of interest.
- iv) After forfeiting the bank guarantee, action will be taken for the recovery of the remaining outstanding amount under clause 17.2 © of the agreement, separately.”

Learned senior counsel further submitted that the action of the respondent-department is patently illegal as in order to invoke Article 17.4, which provides the termination procedure, the respondent-department has

not taken into consideration the recommendations of the Consultation Panel regarding interest and the same is required to be decided by the Punjab Infrastructure Regulatory Authority (*for short 'PIRA'*) under Article 22 relating to dispute resolution.

It is further argued that there was no provision in the concession agreement regarding payment of interest and, therefore, the impugned orders/letters are liable to be set aside as the petitioners-societies were making payments from 2010 to 2018 without any objection by the respondent-department, therefore, without referring to the dispute under Article 22, the impugned orders have been passed illegally.

Learned State counsel, appearing for the respondent-department/Caveator, has rebutted the arguments of the petitioners-societies on the ground that the petitioners were initially issued notices on 11.04.2018 with intention to terminate the concession agreements with completed details of the pending dues to be paid by them. In the notices, the petitioners were directed to indemnify the loss caused by the societies to Government and in that event of default, the State is competent to terminate the concession agreement within a period of 30 days under Article 17.4(b) of the concession agreement.

Learned State counsel has further argued that petitioners were informed that if they fail to deposit the concession fee, incremental concession fee including interest as well as the revenue share as per the details given in the notices and calculation sheets, attached with notices, it was proposed that the agreement will be terminated as Article 17.

Learned State counsel has further argued that after affording sufficient time to the petitioners, vide impugned orders dated 11.09.2020, the concession agreements have been terminated.

Learned State counsel has further raised an objection regarding maintainability of the present writ petition on the ground that it is wrongly stated in para 18 of this petition that petitioners have no other alternative and efficacious remedy of appeal or revision except of filing the instant petition under Articles 22/227 of the Constitution of India, whereas Article 22 of the concession agreement clearly provides the dispute resolution. For ready reference, Article 22 is reproduced herein below:

“Clause 22.1 Amicable Settlement

In the event that any dispute, controversy or claim arises among the Parties in connection with or under this Agreement or the interpretation of any of its provisions or upon the occurrence of an Event of Default, the Concessioneing Authority and the Concessionaire shall appoint one senior representative each, who is not involved in the day-to-day operations relating to the Project and is readily available in the vicinity of Chandigarh to serve on a Consultation Panel (the "Consultation Panel") and such Consultation Panel shall meet promptly upon the request of any member thereto or of any Party, in an effort to resolve such dispute, controversy or claim. All such disputes shall be amicably settled through mutual consultation and negotiation between the representatives on the Consultation Panel. The decision of the Consultation Panel shall be binding upon the Parties. Each Party shall bear all the expenses of its representative. The Parties hereto agree to use their respective best efforts to resolve all disputes arising hereunder through the Consultation Panel.

Clause 22.2 Adjudication by PIRA

(a) In the event that the Parties are unable to resolve any dispute, controversy, or claim in accordance with Clause 22.1, such dispute, controversy or claim shall be

adjudicated upon by the PIRA in accordance with the terms and conditions of the Act.

(b) However, in the event that the PIRA has not been appointed at the time of the Dispute, the parties shall submit the Dispute for Arbitration in accordance with the Arbitration & Conciliation Act, 1996. There shall be a board of 3 arbitrators of whom each party shall select 1 and the third shall be appointed by the two arbitrators appointed by the Parties.

Clause 22.3 Performance During Dispute Resolution

Pending the submission of a dispute, controversy or claim to the Consultation Panel or the PIRA and thereafter until the final decision of the Consultation Panel or the PIRA, as the case may be, the Parties shall continue to perform all of their obligations under this Agreement, without prejudice to a final adjustment in accordance with such decision. Further, this Agreement shall remain subsisting and operative during the consultation or adjudication proceedings and no payment due and payable to either Party shall be withheld except the payment in dispute, if any.”

Learned State counsel has, thus, argued that there is no representation by the petitioners to PIRA before filing the instant writ petition and, therefore, this petition is not maintainable.

In reply, learned senior counsel for the petitioners could not dispute the fact that petitioners have not approached PIRA prior to filing of the present writ petition.

Accordingly, without commenting on the merits of the case, this petition is disposed of with a direction to petitioners-societies to approach PIRA within a period of one month from today along with an application for stay, if so advised, against the impugned orders of

termination. The PIRA-authorities will dispose of the claim of the petitioners-societies within a period of three months thereafter by affording an opportunity of hearing to petitioners (actual or virtual).

Till the time petitioners move an appropriate application before PIRA, i.e. one month from today, the operation of the impugned orders/letters shall remain stayed.

06.10.2020
Waseem Ansari

(ARVIND SINGH SANGWAN)
JUDGE

Whether speaking/reasoned	Yes/No
Whether reportable	Yes/No