

IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
APPELLATE SIDE

Present:

The Hon'ble Justice Harish Tandon
And
The Hon'ble Justice Soumen Sen

W.P.A. (P) 214 of 2021

**The Chairperson, West Bengal Commission for
protection of Child Rights**
Vs.
Election Commission of India & Ors.

For the Petitioner : Ms. Aparna Bhat, Adv.,
Mr. Debasish Banerjee, Adv.,
Mr. Suvonil Chakraborty, Adv.,
Mr. Supreem Naskar, Adv.

For the respondents/E.C.I : Mr. Arvind Dattar, Sr. Adv.,
Mr. Siddhant Kumar, Adv.,
Ms. Manyaa Chandok, Adv.,
Mr. Anuran Samanta, Adv.

For the State : Md. T. M. Siddiqui, Adv.,
Mr. D. Ghosh, Adv.,
Mr. N. Chatterjee, Adv.

Hearing concluded on : 22nd April, 2022.

Judgment Date : 20th May, 2022

Soumen Sen, J.: The Chairperson West Bengal Commission for Protection of Child Rights has filed an application under Article 226 of the Constitution of India in the nature of public interest litigation.

In the writ petition the petitioner has prayed, *inter alia*, for a writ in the nature of mandamus directing the Election Commission of India to compensate each of the families of the children who have lost their lives due to Covid-19 disease in the State following the announcement of general

election on 26th February, 2021 as the said Commission is responsible and accountable for the death of such children. The petitioner has prayed for other reliefs which are connected and/or incidental to the reliefs as stated above.

The petitioner has stated that being the Chairperson of the West Bengal Commission for Protection of Child Rights she wants to highlight the plight of children affected by Covid-19 in the state and the appalling condition of the children which was the direct outcome of the insensible decision of the election commission to conduct the general election in the state in eight phases during covid and its failure to prevent the rapid spread of the disease while such elections were in progress. The writ petitioner alleged that statistics of pre and post poll Covid cases would reveal that a large number of children have been directly and indirectly affected during the time when the general election was conducted in the State. The decision of the Election Commission in conducting assembly elections in the State of West Bengal spanning over a period of 34 days with an unprecedented eight phases covering 295 constituencies had aggravated the pandemic situation existing at the relevant time and because of such irrational and arbitrary decision of the election commission to hold election in the State, a large number of children have lost their lives and are now required to be compensated by the Election Commission.

Before we enter into further details in this regard, we would like to address first as to whether the writ petition would at all be entertained in view of the objection raised on behalf of the Election Commission relating to the maintainability of the writ petition.

Mr. Arvind Dattar, the learned Senior Counsel appearing on behalf of the Election Commission has raised the issue of maintainability of the writ petition *inter alia* on the following grounds:

i) The West Bengal Commission for Protection of Child Rights (the '**Commission**') can file a Writ Petition only if the enquiry is completed in terms of Section 15(1)(ii) read with Section 24 of the Commission for Protection of Child Rights Act, 2005 (the '**Act**').

However, no such enquiry has been conducted by the writ petitioner.

ii) Unless such an enquiry is completed no writ petition is maintainable as held by the Division Bench of Gauhati High Court in ***National Commission for Protection of Child Rights v. State of Arunachal Pradesh***, reported in **(2021) GauLR 351**.

iii) The Child Rights Commission Act has a statutory body and accordingly it is not open to the writ petitioner i.e. a chairperson of a commission to file the present writ petition in her individual capacity.

Mr. Dattar, the learned Senior Counsel has submitted that during the election time the Election Commission is only concerned with administration of elections while the general administration continues to be the obligation of the respective state governments including implementation of the Disaster Management Act, 2005 and in this regard he has relied upon paragraph 70 and 71 of the full bench judgment of this court in ***Susmita Saha Dutta v. The Union of India & Ors.***, in **WPA(P) 142 of 2021**.

The learned Counsel has submitted that a prayer for omnibus compensation has been claimed against a regulatory body without there being an investigation with regard to any negligent conduct on the part of the Election Commission.

Mr. Dattar has submitted that election commission cannot be held responsible for death of any children during the Covid-19 pandemic and relief by way of ex gratia assistance in this regard he has referred to the decision of the Hon'ble Supreme Court in ***Reepak Kansal v. Union of India & Ors.***, reported in **2021(9) SCC 251** (paragraphs 42 to 46). The following paragraphs are stated below:

“42. Now the next question which is posed for the consideration of this Court is, what further relief the Petitioners are entitled to. Whether a writ of mandamus can be issued directing the Central Government/National Authority/State Governments to pay a particular amount by way of ex gratia assistance, more particularly Rs. 4 lacs, as prayed by the Petitioners? Whether the Court can/may direct to pay a particular amount by way of ex gratia assistance?

43. The scope of judicial review is discussed hereinabove. It cannot also be disputed that Covid-19 pandemic is a peculiar disaster, which the country and the world has experienced in a long time. It has an extraordinary spread and impact from that of other natural disaster/disasters. Therefore, its extreme spread and impact requires an approach different from the one that is applied to other disasters/natural disasters. Other natural disasters would have a different effect/impact. Covid-19 pandemic is having an on-going impact/effect. The pandemic is still not over in the country as also the world and it is extremely difficult to predict with accuracy, it's further trajectory, mutations and waves. Looking to its peculiarity and the impact and effect, the Covid-19 pandemic is required to be viewed differently from other disasters. There

is a need to focus simultaneously on prevention, preparedness, mitigation and recovery, which calls for a different order of mobilization of both financial and technical resources.

44. The Government is required to and as so stated in the counter affidavit and as submitted by Shri Mehta, learned Solicitor General, a huge fund is required for the purpose of creating the infrastructure, hospitals, ventilators, oxygen, testing, vaccination etc. According to the Central Government, the Government has bona fide and in the larger public interest has decided the priorities and focused simultaneously on prevention, preparedness, mitigation and recovery. According to the official figure, the pandemic has caused more than 3,85,000 deaths, the same is likely to increase further. It cannot be disputed that these deaths have affected the families from all classes-the rich and poor, professionals and informal workers, and traders and farmers. It has also affected the kins as well as elderly members, old parents. Many have lost the sole bread earner. However, at the same time, and as observed hereinabove, the impact and effect of the present pandemic/disaster would be different from the other disasters/natural disasters for which ex gratia assistance is provided. There shall not be any justification to provide for the same/similar amount by way of ex gratia assistance as provided in the case of other disasters/natural disaster, i.e., Rs. 4 lacs.

45. As observed hereinabove, the Government has to decide its own priorities and reliefs to the different sectors/for different reliefs. The Government is required to take various measures in different fields/sectors, like public health, employment, providing food and shelter to the common people/migrants, transportation to migrants etc. The Government is also required to deal with the effect of the pandemic on the economy. As observed hereinabove, a huge amount is required to be spent from the NDRF/SDRF, even while providing minimum standards of relief. It cannot be disputed that ex gratia assistance would also have financial implications and which may affect the other minimum standards of relief to be provided to the persons affected by disaster. No State or country has unlimited resources. That is why it only announces

*the financial reliefs/packages to the extent it is possible. When the Government forms its policy, it is based on a number of circumstances, on facts, law including constraint based governmental resources. As observed by this Court in the case of *Nandlal Jaiswal (supra)*, the Government, as laid down in *Permian Basin Area Rate Cases*, 20 L Ed (2d) 312, is entitled to make pragmatic adjustments which may be called for by particular circumstances. As observed by this Court hereinabove, the function of the Court is to see that lawful authority is not abused but not to appropriate to itself the task entrusted to that authority.*

46. *Therefore, the Courts would be very slow to interfere with priorities fixed by the government in providing reliefs, unless it is patently arbitrary and/or not in the larger public interest at all. The Government should be free to take policy decisions/decide priorities (of course to achieve the ultimate goal of DMA 2005, government should be free to take its own decisions/priorities while providing minimum standards of relief and even towards preparedness, mitigation, prevention and recovery), subject to the availability of the resources/funds and the amount to be spent towards other reliefs on the aid and advice of the experts and looking to the circumstances from time to time. Therefore, no relief can be granted to direct the National Authority/Central Government/State Governments to pay a particular amount towards ex gratia assistance on account of loss of life to the family members of the persons who have died due to Covid-19. It should be left to the wisdom of National Authority while considering the guidelines/recommendations of the Finance Commission in its XVth Finance Commission Report and the funds required for other reliefs/priorities. The recommendations of the Finance commission provide sufficient guidelines. However, at the same time, as observed hereinabove, while recommending guidelines for the minimum standards of relief to be provided to persons affected by disaster/Covid-19 pandemic, the authority has to consider issuing/recommend guidelines on ex gratia assistance on account of loss of life. As observed hereinabove, ex-gratia assistance on account of loss of life is part of minimum standards of relief, which must be considered*

by the National Authority while providing for the minimum standards of relief to be provided to the persons affected by disaster-in the present case Covid-19 pandemic.”

It is submitted that due to unprecedented and extraordinary spread of Covid-19 the world has suffered immensely and it is extremely difficult for the country to cope with the situation even if all measures had been taken, as it is very difficult to predict the different symptoms of Covid and its variants due to constant mutations and waves. The petitioner has not been able to establish that the Election Commission acted irrationally or had failed to take the required measures during the election period. In fact, the National Disaster Management Authority was directed to recommend guidelines for *ex gratia* assistance on account of the loss of life to the family members of the persons who died due to Covid-19 as mandated under Section 12 (iii) of the Disaster Management Act, 2005 for the minimum standards of relief to be provided to the persons affected by this disaster (Covid-19 Pandemic); over and above the guidelines already recommended for minimum standards of relief to be provided to the persons affected by Covid-19.

Our attention is drawn to the Hon’ble Supreme Court is dated 4th October 2021 passed in connection with **Reepak Kansal (supra)** that was heard along with Gaurav Kumar Bansal.

The Hon’ble Supreme Court has issued further directions with regard to the payment of *ex gratia* and/or financial held to certain categories of person who had died due to Covid-19.

Mr. Dattar has further argued that the causes proxima of the death of the children are not established and the record would not reveal that the Commission has acted negligently. In this regard reliance was placed on the decision of the Hon'ble Supreme Court in **S.D.O. Grid Corporation of Orissa Ltd. & Ors. v. Timudu Oram** reported in **2005 (6) SCC 156.**

Mr. Dattar has further submitted that the State of West Bengal is a necessary party but has been conveniently left out.

In reply, Ms. Aparna Bhat, the learned Counsel representing the writ petitioner has submitted that the Child Rights Act does not bar the Chairperson of the Commission to file a petition in her individual capacity. In view thereof, the submission made on behalf of the Commission that the Child Rights Commission ought to have held an enquiry in terms of the Child Rights Act is without any substance. The writ petitioner merely because of the position as Chairperson of the Commission cannot be held to be disqualified to file the writ petition and if serious issues have been raised in the writ petition concerning violation of child rights the constitutional court may not dismiss the writ petition *in limine* as it would affect the rights of the children and the families who suffered due to the death of their children during the Covid-19 pandemic.

In the aforesaid backdrop we need to consider the maintainability of the writ petition.

The constitutional courts are endowed with high prerogative writ jurisdiction. All statutes are subservient to the Constitution. The Constitutional court would not ordinarily decline to excise its power under

writ jurisdiction unless there is an efficacious alternative remedy available under the Act. The writ petitioner is indisputably the Chairperson of the West Bengal Commission for Protection of Child Rights. She has filed the writ petition in the capacity as a Chairperson of the said Commission. However, in the affidavit in reply the writ petitioner made an attempt to dilute her position in relation to the writ petition by stating that she has filed the writ petition in her individual capacity.

The Commission for Protection of Child Rights Act, 2005 provides for constitution of a National Commission and State Commission for Protection of Child Rights and children's courts for providing speedy trial of offences against children or of violation of child rights.

Section 13 of the Act defines the functions and powers of the commission. The power is more in the nature of an investigation or inquisition (See. ***National Commission for Protection of Child Rights v. Rajesh Kumar***, reported at **2020(11) SCC 377**).

Section 15 defines the steps to be taken for completion of an enquiry. The said Section reads:

“15. Steps after inquiry.- The Commission may take any of the following steps upon the completion of an inquiry held under this Act, namely:-

i) where the inquiry discloses, the Commission of violation of child rights of a serious nature or contravention of provisions of any law for the time being in force, it may recommend to the concerned Government or authority the initiation of proceedings for prosecution or such other action as the Commission may deem fit against the concerned person or persons;

ii) approach the Supreme Court or the High Court concerned for such directions, orders or writs as that Court may deem necessary;

iii) recommend to the concerned Government or authority for the grant of such interim relief to the victim or the members of his family as the Commission may consider necessary.”

Section 24 of the said Act refers to a few sections which *inter alia*, include Section 15 that are also applicable to a State Commission.

In the instant case admittedly, there is no inquiry initiated by the State Commission in terms of Section 15 of the said Act. We could not find any plausible explanation from the writ petitioner for not exercising the said power. When a State Commission is empowered to carry on such investigation and inquiry and ascertain the cause of death it is expected that such enquiry should be conducted first before approaching a constitutional court with such findings and implementations of its recommendations if Government concerned failed to implement such recommendations. Death of any person including a child is unfortunate and undesirable whatever the reasons may be for the cause of such death. A child is a precious asset. It is only expected that if there is any violation of a child's right the Commission would without delay invoke the provisions of the Act and take such measures and steps as they are expected to take under the said Act.

It is significant to mention that wide powers have been given to the Commission under Section 14 during inquiries. The State Commission is consisted of the Chairperson and 6 members from different fields as mentioned in Section 17 (2) of the said Act.

We do not find that any meeting was convened by the Chairperson of the State Commission to look into cause of death of children during the

election period and to find out the cause of such death. The Commission was within its power to enquire and ascertain if the cause of death is due to any negligent conduct of the election commission. The door of the Constitutional court is not closed. Once the Commission on enquiry arrived at a definite finding of negligence and/or violation of any of the rights of a child by any person or persons it can always approach the constitutional court with such findings and recommendations.

Section 13, 14 and 15 if read conjointly would clearly show that the Commission is empowered to enquire into complaints and take *suo motu* cognizance of the violation of the child rights. It is true that the inquiry is not in the nature of a criminal investigation but upon completion of the inquiry under Section 13(2) of the said Act the Commission could have approached the Supreme Court or the High Court concerned for appropriate directions. In this regard we are in agreement with a decision of the Division Bench of Gauhati High Court in ***National Commission for Protection of Child Rights v. State of Arunachal Pradesh*** reported in **2021 (1) Gauhati LR 351** where the Division Bench of the Gauhati High Court has in paragraph 12, 13, 14 and 17 arrived at similar conclusions. The said paragraphs read:

*“12. The aforesaid provisions under Section 13 read with Section 14 of the Act empowering the Commission to enquire into complaints and take *suo motu* notice of violation of child rights et cetera does not partake the character of criminal investigation which is within the exclusive domain of the investigating agency as contemplated under the Code of Criminal Procedure, 1973. Yet, at the same time pendency of any criminal investigation does not come in the way of the Commission to make*

necessary enquiry as contemplated under Section 13 of the Act. This is an independent statutory right conferred on the Commission under the Act to safeguard the children's rights. What has been barred is that the Commission shall not inquire into any matter which is pending before a State Commission or any other Commission duly constituted under any law for the time being in force as mentioned under Section 13(2) of the Act.

However, such an enquiry to be conducted by the Commission is in the nature of civil proceedings as evident from the provisions of Section 14 of the Act.

13. On conclusion of the enquiry as contemplated under Section 13 read with Section 14 of the Act, the Commission is empowered under Section 15 to take certain steps including recommendation to the concerned Government or authority in initiating proceedings for prosecution or such other action as the Commission may deem fit against the concerned person or persons, approach the Supreme Court or the High Court concerned for such directions, orders or writs as that Court may deem necessary and to recommend to the concerned Government or authority, for grant of such interim relief to the victim or the members of his family as the Commission may consider necessary.

Section 15 of the aforesaid Act reads as follows:

15. The Commission may take any of the following steps upon the completion of an inquiry held under this Act, namely:-

(i) where the inquiry discloses, the Commission of violation of child rights of a serious nature or contravention of provisions of any law for the time being in force, it may recommend to the concerned Government or authority the initiation of proceedings for prosecution or such other action as the Commission may deem fit against the concerned person or persons;

(ii) approach the Supreme Court or the High Court concerned for such directions, orders or writs as that Court may deem necessary;

(iii) recommend to the concerned Government or authority for the grant of such interim relief to the victim or the members of his family as the Commission may consider necessary."

14. From the above, it is clear that only when the Commission concludes an enquiry as contemplated under Section 13 read with Section 14 of the Act that the Commission can approach the Supreme Court or the High Court as the case may be for necessary direction under Section 15(ii) of the Act.

17. We are of the opinion that the Commission can approach this Court by invoking Section 15 (ii) of the Act only when an enquiry as contemplated under Section 13 is completed, which appears not to have been done in the present case."

The writ petition is thus premature, as the writ petitioner without exhausting the powers conferred upon the commission under Section 13, 14 and 15 approached the writ court with reliefs which is only possible provided an inquiry under Section 13(2) is complete. The chairperson has not given any cogent reason for not taking the other members of the commission into confidence and exercising powers under the aforesaid Sections. The writ petition is not for implementation of any recommendation of the State Commission. The fact finding authority without exercising and exhausting its power under the Act cannot approach the constitutional court directly. The petitioner cannot bypass the provision of the Act and directly invoke the writ jurisdiction. The writ petitioner being the Chairperson is expected to be aware of the powers and duties of the State Commission and it is only expected that the petitioner should invoke the powers under Sections 14 and 15 first and then with the recommendation approach the court.

On such consideration we are not inclined to accept the writ petition.
The writ petition fails and stands dismissed.

The other issues are not decided.

However, there shall be not order as to costs.

I agree

(Harish Tandon, J.)

(Soumen Sen, J.)