

Before Sudhir Mittal, J.

DR. NEETU KUKAR—Petitioner

versus

UNION OF INDIA AND OTHERS—Respondents

CWP No. 36086 of 2019

February 28, 2020

A. *Constitution of India, 1950—Art. 21-A—Right of Children to Free and Compulsory Education Act, 2009—Ss.16, 17 and 31—Commission for Protection of Child Rights Act, 2005—S.15 and 17—Punjab State Commission for Protection of Child Rights—Grouping of students into sections on the basis of marks—The Commission ordered discontinuance of practice forthwith— Subsequently, reviewed order without notice to the other side and permitted school to continue with practice of grouping students till the end of academic session—The High Court approached challenging the review order and seeking directions against the school for discrimination and causing mental trauma— Held, classification of children into sections on the basis of marks creates feeling of inferiority among children scoring less marks, and, thus violates fundamental right of elementary education, and also the right to equal opportunity.*

B. *Right of Children to Free and Compulsory Education Act, 2009—S.31(3) —In the absence of Commission for Protection of Child Rights having been constituted, the Government is empowered to constitute an authority for performing the functions specified—Principal Secretary to the Government was constituted as the Authority—Held, thus, order passed by it was not without jurisdiction—Further held, the Commission is only entitled to make recommendations—However, where violation of fundamental rights is brought to its notice, it is bound to ensure the violation is removed.*

C. *Right of Children to Free and Compulsory Education Act, 2009—Commission for Protection of Child Rights Act, 2005—Power of review—Not conferred on the Commission either by the 2005 Act or 2009 Act—Thus, the review order, passed without notice, held to be without jurisdiction.*

Held that, by virtue of Article 21-A of the Constitution of India, elementary education is a fundamental right. Thus, it is the duty of the

State to provide free and compulsory elementary education. Education is not bookish knowledge alone. It is an inclusive concept, the object being all round development of children. It encompasses moral as well as mental development. Thus, a child is entitled to an atmosphere conducive to all round development. Necessarily, stimuli which impair such development, have to be kept out. It is the duty of a school to ensure that children are not subjected to negative inputs which have the effect of inducing a feeling of inferiority. It is for this specific reason that provisions of Sections 16 and 17 have been made incorporated in the 2009 Act. Classification of children into sections on the basis of their marks has the tendency of creating a feeling of inferiority amongst children securing less marks and, thus, the practice is a violation of fundamental right of elementary education.

(Para 13)

Further held that, the aforementioned Act also violates the right of equal opportunity enshrined in the Constitution. If an action induces a sense of inferiority in a child, it is being denied the right to development and growth at par with a child who does not suffer from such feeling of inferiority. Under the constitutional scheme, institutions providing elementary education are bound to create a free and open atmosphere that promotes a sense of equality. Any action which promotes inequality cannot be permitted.

(Para 14)

Further held that, this provision empowers the appropriate Government to constitute an authority to perform functions mentioned in sub-section (1), clauses (a) to (c) of Section 31, in the absence of a lawfully constituted Commission. In exercise of this power, State Government had issued order dated 16.04.2019 constituting the Principal Secretary, Government of Punjab, Department of Social Security and Women and Child Development as the authority entitled to discharge the said functions and, thus, the order dated 07.08.2019 cannot be held to be without jurisdiction.

(Para 18)

Further held that, learned counsel for respondents No. 8 and 9 is, however, right in contending that the Commission is only authorised to make recommendations. However, where violation of a fundamental right is brought to the notice of the State or its functionaries, it is their duty to ensure that the violation is removed forthwith. The order dated 07.08.2019 was also forwarded to the Deputy Commissioner, Faridkot, and he should have taken remedial action immediately. The petitioner

is, thus, entitled to claim execution of the order dated 07.08.2019 through the State functionaries.

(Para 19)

Further held that, the Commission has been created by virtue of the 2005 Act and this Act does not confer any power of review upon it. The 2009 Act under which the Commission exercises the duty of monitoring a child's right to education also does not vest in it the right to review its orders. Thus, the order dated 07.08.2019 could not have been modified, especially without notice or grant of opportunity of hearing to the petitioner. Thus, order dated 09.09.2019 is held to be illegal and without jurisdiction.

(Para 20)

D.S. Khurana, Advocate
for the petitioner (in CWP No. 36086 of 2019)
for respondent No. 5 (in CWP No. 32762 of 2019)

Gagneshwar Walia, Advocate
for the petitioner (in CWP No. 32762 of 2019)
for respondents No. 8 and 9 (in CWP No. 36086 of 2019)

Monica Chibber Sharma, Sr. DAG Punjab

J.S. Ghuman, Advocate
for respondent No. 3

M.K. Garg, Advocate with
Charu Sharma, Advocate
for respondent No. 10

SUDHIR MITTAL, J.

(1) This judgment shall decide CWP Nos. 36086 and 32762 of 2019 as common questions of facts and law are involved.

(2) CWP No. 36086 of 2019 has been filed by the parent of a child studying in Dashmesh Public School, Talwandi Road, Faridkot (hereinafter referred to as 'the School'), the Director and Principal of which have been impleaded as respondents No. 8 and 9, respectively. Her basic grievance is that from Class VI onwards, the children are being classified into sections on the basis of marks secured in the previous examination. Another parent had raised a similar grievance by sending a representation dated 20.05.2019 to respondent No. 9. The representation was necessitated because the child of the said parent had become extremely upset as she could not make it to the top section. She

had even taken the extreme step of gulping liquid hand wash in an attempt to end her life. No action was taken upon the said representation and, therefore, the petitioner sent a representation dated 23.05.2019 to respondent No. 9 and to various officials of the Central Government, State Government, Central Board of Secondary Education and the National and State Commissions constituted for protection of child rights. The Punjab State Commission for Protection of Child Rights (respondent No. 12) took cognizance and issued notice to respondent No. 9. A reply dated 19.06.2009 was filed on behalf of the said respondent wherein grouping children into sections on the basis of their marks was not denied. Infact, the same was defended on the ground of being an age old norm for the purpose of bringing homogeneity in the class. The allegation that the top sections are being provided better teaching facilities was, however, denied. The complaint was labelled as 'motivated' as the child of the petitioner was not able to get the section of her choice. Respondent No. 12 - Punjab State Commission for Protection of Child Rights (hereinafter referred to as 'the Commission') decided the issue vide order dated 07.08.2019 and directed respondents No. 8 and 9 to discontinue the practice of forming sections on the basis of merit forthwith. The directions were also issued to reshuffle the sections within 10 days from the date of receipt of the order. The parties were not given an opportunity to lead evidence as the allegations had been admitted by respondent No. 9 although the said respondent had tried to justify the same. The School failed to implement the directions of the Commission and, therefore, the petitioner got a legal notice dated 18.08.2019 sent through her lawyer. The Deputy Commissioner, Faridkot, also asked the School to implement the order to which the School responded vide communication dated 20.08.2019 that the order shall be implemented after conclusion of the half yearly session, the examination for which ended on 03.08.2019. Thereafter, the School and some parents of children of the top section approached the Commission for review/modification of its order dated 07.08.2019. The Commission modified its order on 09.09.2019 without issuing notice to the petitioner or granting her an opportunity of hearing. Modification was to the extent of permitting the School to continue with the existing sections till the end of the academic session. Consequently, the present writ petition has been filed with the prayer of quashing order dated 09.09.2019 passed by the Commission and for direction to respondents No. 1 to 6 to get the order dated 07.08.2019 implemented. Directions have also been sought to the said respondent to take appropriate action

against respondents No. 8 and 9 for discrimination and causing mental trauma.

(3) The School has filed CWP No. 32762 of 2019 for quashing the order dated 07.08.2019 and order dated 09.09.2019 passed by the Commission and for permitting the School to carry on with its practice of grouping children into sections on the basis of their marks.

(4) On behalf of the State of Punjab and its officials a detailed written statement has been filed. The order passed by the Commission has been supported on the ground that no practice which makes a child feel inferior can be permitted. The modern trend of education is to make the same stress free and, thus, system of grading has been introduced. The action of the School is contrary to this thought process.

(5) A short written statement has been filed on behalf of the Commission wherein, predictably, its orders have been supported.

(6) The basic argument of learned counsel for the petitioner is that the practice of grouping students into sections based on their marks at the elementary level is a discriminatory practice and it is violative of Article 14 of the Constitution of India. It is also violative of the provisions of Right of Children to Free and Compulsory Education Act, 2009 (hereinafter referred to as '2009 Act'). The Commission has been established pursuant to enactment of the Commission for Protection of Child Rights Act, 2005 (hereinafter referred to as '2005 Act') and one of its functions is to enquire into complaints of violation of child rights. The order dated 07.08.2019 has been passed in exercise of its statutory functions and the functionaries of the State are bound to implement the order. However, the Commission being a creature of the statute, could not have reviewed or modified the said order as no power of review has been vested in it under the statute. Thus, order dated 09.09.2019 is without jurisdiction apart from the same being violative of principles of natural justice as no notice was issued to the petitioner before passing the said order.

(7) Learned counsel for respondents No. 8 and 9 submits that the Commission is only a recommendatory body and in case its enquiry reveals violation of child rights, it can recommend appropriate action to the concerned Government or authority for initiating prosecution. It can also approach the High Court concerned or the Supreme Court for necessary directions. It can not issue any executive directions to the violator and, thus, the order dated 07.08.2019 is without jurisdiction. For this purpose reliance has been placed upon Section 15 of 2005 Act.

It has been further argued that the impugned order has been passed by the Principal Secretary, Government of Punjab, Department of Social Security of Women and Child Development. The said official could not have exercised the powers of the Commission. The constitution of the Commission is governed by Section 17 of the 2005 Act. According to this provision, the Commission comprises of a Chairperson and six members. Its business is transacted through decisions taken by majority as is evident from Section 10 of the said Act. Thus, a single person could not have constituted the Commission and on this ground also the impugned order is illegal and without jurisdiction. Carrying this argument further, learned counsel has submitted that the complaint was against 12 separate entities but notice was issued only to his clients. No order could have been passed without hearing the other parties. On merits of the case, it has been argued that only the top section has been constituted on the basis of marks and all other sections have students possessing different merit. A top Section has been created in the interest of the students so that the School can get better results. Malafides have also been alleged against the writ petitioner as her daughter had failed to make it to the top section in Class VII.

(8) The State of Punjab has supported the writ petitioner.

(9) Thus, the following issues arise for consideration:-

(a) Whether the action of the School of grouping students of Class VI onwards into Sections on the basis of marks is arbitrary, discriminatory and violative of child rights?

(b) Whether order dated 7.8.2019 passed by the Commission was within its jurisdiction?

(c) Whether the Commission has the right to review/modify its order?

(10) Article 21-A was inserted in the Constitution by way of Constitution (86th Amendment Act, 2002) w.e.f. 01.04.2010. This Article provides for free and compulsory education to all children in the age group of 6 to 14 years. However, the manner of providing such education has been left to the State Government. The 2009 Act has been enacted pursuant to this Constitutional amendment. The statement of objects and reasons of this Act declares that for upholding of democratic principles, especially the constitutional goal of providing equal opportunities, it is essential to provide universal elementary education. The aim of this enactment is not only to ensure universal

elementary education but it is also to ensure good elementary education. The 2009 Act lists various duties and responsibilities of the Government, local authorities, parents, school and teachers. It also provides a mechanism for protection of the right guaranteed under Article 21-A of the Constitution. To ensure that children grow up in a free atmosphere conducive to inclusive growth, Section 17 has been incorporated which prohibits physical punishment and mental harassment of children. Section 31 empowers the Commission *inter alia* to enquire into complaints relating to a child's right to free and compulsory education. Sub Section 3 thereof authorizes the appropriate Government to constitute an authority in such a manner as may be prescribed to carry out the functions of the Commission where it has not been constituted. Section 32 entitles any person to make a written complaint to a local authority having jurisdiction and the said authority is bound to decide the complaint within a period of three months. Unamended Section 16 of this Act prescribes that no child can be held back in any class or expelled from School till the completion of elementary education. This has, however, been substituted vide Act No. 1 of 2019. The prohibition of expulsion has been retained but examination has been prescribed in Vth class and VIIIth class. However, whether a child who fails in this examination is promoted or not has been left to the wisdom of the appropriate Government.

(11) The 2005 Act provides for constitution of a National Commission and State Commissions for Protection of Child rights and Children's Courts, in view of the country's resolve to ensure that the growth and development of children is at par with children in developed nations. The procedure for transaction of business of the Commission is governed by Section 10 thereof and Section 13 enumerates its functions. Section 15 provides for steps to be taken after enquiry has been conducted. Constitution of the Commission is governed by Section 17 and Section 23 makes it incumbent upon the Commission to submit annual reports. It also has the authority to submit urgent reports, the submission of which can not be deferred till the submission of the annual report.

(12) The questions framed hereinabove shall now be examined with reference to the constitutional and statutory provisions referred to hereinabove.

- a. Whether the action of the School of grouping students of Class VI onwards into Sections on the basis of marks is arbitrary, discriminatory and violative of child rights?

(13) By virtue of Article 21-A of the Constitution of India, elementary education is a fundamental right. Thus, it is the duty of the State to provide free and compulsory elementary education. Education is not bookish knowledge alone. It is an inclusive concept, the object being all round development of children. It encompasses moral as well as mental development. Thus, a child is entitled to an atmosphere conducive to all round development. Necessarily, stimuli which impair such development, have to be kept out. It is the duty of a school to ensure that children are not subjected to negative inputs which have the effect of inducing a feeling of inferiority. It is for this specific reason that provisions of Sections 16 and 17 have been made incorporated in the 2009 Act. Classification of children into sections on the basis of their marks has the tendency of creating a feeling of inferiority amongst children securing less marks and, thus, the practice is a violation of fundamental right of elementary education.

(14) The aforementioned Act also violates the right of equal opportunity enshrined in the Constitution. If an action induces a sense of inferiority in a child, it is being denied the right to development and growth at par with a child who does not suffer from such feeling of inferiority. Under the constitutional scheme, institutions providing elementary education are bound to create a free and open atmosphere that promotes a sense of equality. Any action which promotes inequality cannot be permitted.

(15) The question is, thus, answered in affirmative.

(b) Whether order dated 7.8.2019 passed by the Commission was within its jurisdiction?

(16) Regarding the jurisdiction of the Commission, learned counsel for respondents No. 8 and 9 has argued that impugned order is without jurisdiction as -

a. It was passed by an improperly constituted commission and;

b. the Commission can only make recommendations and can not issue executive directions.

(17) The argument regarding the commission being improperly constituted deserves rejection in view of Section 31(3) of the 2009 Act. This sub-section is reproduced below for ready reference:

“(3) Where the State Commission for Protection of Child Rights has not been constituted in a State, the appropriate

Government may, for the purpose of performing the functions specified in clauses (a) to (c) of sub-section (1), constitute such authority, in such manner and subject to such terms and conditions, as may be prescribed.”

(18) This provision empowers the appropriate Government to constitute an authority to perform functions mentioned in sub-section (1), clauses (a) to (c) of Section 31, in the absence of a lawfully constituted Commission. In exercise of this power, State Government had issued order dated 16.04.2019 constituting the Principal Secretary, Government of Punjab, Department of Social Security and Women and Child Development as the authority entitled to discharge the said functions and, thus, the order dated 07.08.2019 can not be held to be without jurisdiction.

(19) Learned counsel for respondents No. 8 and 9 is, however, right in contending that the Commission is only authorised to make recommendations. However, where violation of a fundamental right is brought to the notice of the State or its functionaries, it is their duty to ensure that the violation is removed forthwith. The order dated 07.08.2019 was also forwarded to the Deputy Commissioner, Faridkot, and he should have taken remedial action immediately. The petitioner is, thus, entitled to claim execution of the order dated 07.08.2019 through the State functionaries.

(c) Whether the Commission has the right to review/modify its order?

(20) The Commission has been created by virtue of the 2005 Act and this Act does not confer any power of review upon it. The 2009 Act under which the Commission exercises the duty of monitoring a child's right to education also does not vest in it the right to review its orders. Thus, the order dated 07.08.2019 could not have been modified, especially without notice or grant of opportunity of hearing to the petitioner. Thus, order dated 09.09.2019 is held to be illegal and without jurisdiction.

(21) In view of the aforementioned reasons, CWP No. 36086 of 2019 is allowed and CWP No. 32762 of 2019 is dismissed. However, keeping in view the fact that the examinations are around the corner, respondents No. 8 and 9 are directed to implement the order of the Commission w.e.f. the next academic session.