

(2023) 08 KL CK 0001

In the High Court Of Kerala

Case No : Original Petition (Crl) No. 710 Of 2022

Kerala State Legal Services Authority

APPELLANT

Vs

State Of Kerala

RESPONDENT

Date of Decision : 01-08-2023

Acts Referred:

Constitution of India, 1950 — Article 226, 227

Code of Criminal Procedure, 1973 — Section 357, 357A, 357A(1)

Indian Penal Code, 1860 — Section 354A, 354B, 354C, 354D, 376A, 376B, 376C, 376D, 376E, 509

Protection of Children from Sexual Offences Act, 2012 — Section 2(j), 11, 12, 33(8), 45, 45(2)(c)

Protection of Children from Sexual Offences Rules, 2020 — Rule 9, 9(1), 9(2)

Citation : (2023) 08 KL CK 0001

Hon'ble Judges : Dr. Kauser Edappagath, J

Bench : Single Bench

Advocate : Roshen.D.Alexander, Tina Alex Thomas, Harimohan, Kochurani James, P Narayanan, K.K.Dheerendrakrishnan

Final Decision : Dismissed

Judgement

Dr. Kauser Edappagath, J

1. A question of seminal importance related to the entitlement of compensation by the 'sexual harassment victims' under the Kerala Victim Compensation Scheme, 2017, as amended in 2021, falls for consideration in this original petition.

2. The Special Court for Trial of Offences Relating to Atrocities Against Women and Children Including POCSO Cases (Additional Sessions Court-I), Alappuzha (for short, the court below) passed two orders of similar nature (Exts.P7 and P8) directing the District Legal Services Authority, Alappuzha to pay interim compensation to the victims involved in two cases (SC Nos.848/2016 and 849/2016) pending before it. The offence involved in both cases is under Section 11, read with Section 12 of the Protection of Children from Sexual Offences Act,

2012 (for short, the POCSO Act), apart from the offences under the Indian Penal Code (for short, the IPC). Section 11 of the POCSO Act deals with the offence of sexual harassment, while Section 12 provides for its punishment. The court below, in both cases, granted interim compensation of `50,000/- to each victim invoking section 357A of Cr. P.C, Section 33(8) of the POCSO Act and Rule 9(1) of Protection of Children from Sexual Offences Rules, 2020 (for short, the POCSO Rules). The petitioners, the Kerala Legal Services Authority and the District Legal Services Authority, Alappuzha, the statutory authorities entrusted with the power to give compensation to the victims as per the Victim Compensation Scheme under section 357A of Cr. P.C as well as under section 33(8) of the POCSO Act, challenges Exts.P7 and P8 orders on the ground that since the offence 'sexual harassment' is not included as an injury in the Schedule of the Kerala Victim Compensation Scheme, 2017, the victims are not eligible for compensation.

3. Taking note of the critical question of law involved in the case, this court appointed Sri.K.K.Dheerendrakrishnan as Amicus Curiae to assist the court.

4. I have heard Sri. Roshan D. Alexander, the learned counsel for the petitioners, Sri. P. Narayanan, the learned Additional Public Prosecutor as well the learned Amicus Curiae.

5. The learned counsel for the petitioners Sri. Roshan D. Alexander submitted that since the offence 'sexual harassment' as defined under Section 2(j) read with 11 of the POCSO Act is not included as an injury in the Schedule of the Kerala Victim Compensation Scheme, 2017, the victim of sexual harassment cannot claim compensation invoking section 357A of Cr.P.C, Section 33(8) of the POCSO Act, Rule 9(1) of POCSO Rules, 2020 and the provisions of the Kerala Victim Compensation Scheme, 2017, as amended in 2021. On the other hand, the learned Amicus Curiae Sri.K.K.Dheerendrakrishnan submitted that the Victim Compensation Scheme is a beneficial scheme for the victim and, hence, the term 'sexual assault' in the Schedule requires a liberal construction to include within it 'sexual harassment' as well. Inviting my attention to the definition of the terms 'injury' and 'sexual assault victims' in Clauses (d) and (g), respectively, in Chapter II of the Amended Scheme, the learned Amicus Curiae submitted that the victim in both the cases qualifies for compensation.

6. Section 357A, a facet of victimology, was inserted by the Code of Criminal Procedure (Amendment) Act, 2008 (Act 5 of 2009), on the recommendation of the Law Commission, to oblige the State Government to prepare, in coordination with the Central Government, a scheme called Victim Compensation Scheme for the purpose of providing compensation to the victim or his/her dependent who had suffered loss or injury because of any crime and who requires rehabilitation. It is a laudable legislative effort by the State to apply criminal jurisprudence horizontally. Prior to Amendment Act 5 of 2009, there was no comprehensive legislation or a well-designed statutory scheme in India that allowed a victim to seek compensation from either the perpetrator or the State. The criminal law in the country provided for compensation to victims and their dependents only in a

limited manner under section 357 of Cr.P.C. With the observations of the Apex Court relating to compensatory justice in criminal law in *Hari Singh v. Sukhbir Singh and Others* [(1988) 4 SCC 551], it was felt that the principles of compensation to crime victims need to be reviewed and expanded to cover all cases. It was also felt that the compensation should not be limited only to fines or penalties, if realised, but the State should accept the principle of providing assistance to victims out of its funds, even in case of acquittals or where the offender is not traceable or identifiable. It was in this backdrop, and after noticing that the existing provisions for compensation to crime victims had their own weaknesses, that the Law Commission of India, in its 154th report, recommended incorporating a provision like section 357A to the Cr.P.C. While recommending the inclusion of such a scheme for victim compensation, the Commission reported that the said scheme is justified from the State funds on the principle that the State has a humanitarian responsibility to assist crime victims and that the assistance is provided because of the social conscience of its citizens and as a symbolic act of compassion. By incorporating Section 357A, the legislature gave statutory acknowledgement to the constitutional duty of the State to compensate and rehabilitate victims of crime or their dependants in addition to compensation payable by a convict under S.357, Cr.P.C. and enjoining upon the State the duty to formulate and fund appropriate Victim Compensation Schemes. It recognises compensation as one of the methods of protection of victims as observed by the Apex Court in *Suresh and Another v. State of Haryana* [(2015) 2 SCC 227]. While compensation awarded under S.357, Cr.P.C. is based on principles of tortious liability in private law and is dependent on the economic capabilities of the accused, the scope and ambit of compensation awarded to the victims under a scheme formulated under S.357A of Cr.P.C. is founded on the constitutional duty to provide just compensation to victims of crime for loss of life, limb and/or properties in the public law domain. Sub Section (1) of Section 357A makes it mandatory for State Government to frame a Scheme in coordination with Central Government for providing funds for compensation to victims or his/her dependants. Whereas Sub Section (2) casts a duty on District Legal Service Authority or the State Legal Service Authority, as the case may be, to decide the quantum of compensation to be awarded to the victim under the Scheme referred to in subsection (1). For reference, Section 357A of Cr.P.C. is extracted below:

“357A. Victim compensation scheme.

(1) Every State Government, in co-ordination with the Central Government, shall prepare a scheme for providing funds for the purpose of compensation to the victim or his dependents who have suffered loss or injury as a result of the crime and who require rehabilitation.

(2) Whenever a recommendation is made by the Court for compensation, the District Legal Service Authority or the State Legal Service Authority, as the case may be, shall decide the quantum of compensation to be awarded under the

scheme referred to in sub-section (1).

(3) If the trial Court, at the conclusion of the trial, is satisfied, that the compensation awarded under section 357 is not adequate for such rehabilitation, or where the cases end in acquittal or discharge and the victim has to be rehabilitated, it may make recommendation for compensation.

(4) Where the offender is not traced or identified, but the victim is identified, and where no trial takes place, the victim or his dependents may make an application to the State or the District Legal Services Authority for award of compensation.

(5) On receipt of such recommendations or on the application under sub-section (4), the State or the District Legal Services Authority shall, after due enquiry award adequate compensation by completing the enquiry within two months.

(6) The State or the District Legal Services Authority, as the case may be, to alleviate the suffering of the victim, may order for immediate first-aid facility or medical benefits to be made available free of cost on the certificate of the police officer not below the rank of the officer in charge of the police station or a Magistrate of the area concerned, or any other interim relief as the appropriate authority deems fit."

When the POCSO Act was enacted in the year 2012 with the primary objective of protecting children from various kinds of sexual abuses and offences, a specific provision was incorporated therein empowering the Special Courts to direct payment of compensation, in addition to punishment, for physical or mental trauma caused to the child victim, or for immediate rehabilitation. The procedure and powers of the Special Court under the POCSO Act for payment of compensation are enumerated under Section 33(8) of the POCSO Act, which reads as follows:

"S.33: Procedure and powers of Special Court

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(8) In appropriate cases, the Special Court may, in addition to the punishment, direct payment of such compensation as may be prescribed to the child for any physical or mental trauma caused to him or for immediate rehabilitation of such child."

7. As per Section 2(g) of the POCSO Act, 'prescribed' means prescribed by Rules made under the POCSO Act. Section 45 of the POCSO Act enumerates the power to make Rules by the Central Government. This power includes, under Section 45(2)(c), the power to make Rules for payment of compensation under Section 33(8). As contemplated under the Act, POCSO Rules 2020 was promulgated in exercise of the power conferred by Section 45. Rule 9 of the POCSO Rules, 2020 deals with compensation. For easy reference, Rule 9 is extracted below:

"9. Compensation. --(1) The Special Court may, in appropriate cases, on its own or on an application filed by or on behalf of the child, pass an order for

interim compensation to meet the needs of the child for relief or rehabilitation at any stage after registration of the First Information Report. Such interim compensation paid to the child shall be adjusted against the final compensation, if any.

(2) The Special Court may, on its own or on an application filed by or on behalf of the victim, recommend the award of compensation where the accused is convicted, or where the case ends in acquittal or discharge, or the accused is not traced or identified, and in the opinion of the Special Court the child has suffered loss or injury as a result of that offence.

(3) Where the Special Court, under sub-section (8) of section 33 of the Act read with sub-sections (2) and (3) of section 357A of the Code of Criminal Procedure, 1973 (2 of 1974) makes a direction for the award of compensation to the victim, it shall take into account all relevant factors relating to the loss or injury caused to the victim, including the following:-

(i) type of abuse, gravity of the offence and the severity of the mental or physical harm or injury suffered by the child;

(ii) the expenditure incurred or likely to be incurred on child's medical treatment for physical or mental health or on both;

(iii) loss of educational opportunity as a consequence of the offence, including absence from school due to mental trauma, bodily injury, medical treatment, investigation and trial of the offence, or any other reason;

(iv) loss of employment as a result of the offence, including absence from place of employment due to mental trauma, bodily injury, medical treatment, investigation and trial of the offence, or any other reason;

(v) the relationship of the child to the offender, if any;

(vi) whether the abuse was a single isolated incidence or whether the abuse took place over a period of time;

(vii) whether the child became pregnant as a result of the offence;

(viii) whether the child contracted a sexually transmitted disease (STD) as a result of the offence;

(ix) whether the child contracted human immunodeficiency virus (HIV) as a result of the offence;

(x) any disability suffered by the child as a result of the offence;

(xi) financial condition of the child against whom the offence has been committed so as to determine such child's need for rehabilitation;

(xii) any other factor that the Special Court may consider to be relevant.

(4) The compensation awarded by the Special Court is to be paid by the State

Government from the Victims Compensation Fund or other scheme or fund established by it for the purposes of compensating and rehabilitating victims under section 357A of the Code of Criminal Procedure, 1973 or any other law for the time being in force, or, where such fund or scheme does not exist, by the State Government.

(5) The State Government shall pay the compensation ordered by the Special Court within 30 days of receipt of such order.

(6) Nothing in these rules shall prevent a child or child's parent or guardian or any other person in whom the child has trust and confidence from submitting an application for seeking relief under any other rules or scheme of the Central Government or State Government."

8. On a reading of Section 33(8) of the POCSO Act and Rule 9 (1), (2) of the POCSO Rules 2020, it becomes clear that the Special Court is competent to award either interim compensation or final compensation or both for meeting the immediate relief and rehabilitation needs of the child either on its own or an application filed by or on behalf of the child. The said compensation shall be payable by the State Government through Schemes or Funds established for such purpose. The provisions regarding the compensation under the POCSO Act and Rules are based on Section 357A of Cr.P.C, with suitable changes, to ensure immediate and speedy relief to the child.

9. As per Section 357A of Cr.P.C., Kerala Victim Compensation Scheme was introduced in the State of Kerala in 2014. By virtue of GO(Ms) No.37/2014/Home dated 24/2/2014, the State Government has promulgated the Scheme. The Schedule of the said Scheme contemplates 20 different types of injuries. The 2014 Scheme was later superseded and repealed by another Scheme by the name Kerala Victim Compensation Scheme, 2017, published as GO(MS) No.224/2017/Home dated 5/11/2017. The number of injuries in the Schedule of the said Scheme was increased from 20 to 22.

10. The 2017 Scheme was further amended by the Kerala Victim Compensation (Amendment) Scheme, 2021, published as GO(Ms) No.59/2021/Home dated 20/2/2021. By virtue of the Amended Scheme, for the first time, Chapter II, with the title 'Compensation Scheme for Women Victims/Survivors of Sexual Assault/ Other Crimes', and Schedule II, with the title 'Applicable to Women Victim of Crimes' was added. But, unlike Chapter I, Chapter II is not a gender-neutral one. It applies to women victims only. By virtue of Clause 12 of the said Scheme, a separate fund is constituted by the name 'Women Victims Compensation Fund', which has to be paid to a woman victim or her dependents. In Chapter II, the term 'offence' under Clause 11(f) has been defined as an offence committed against women punishable under the IPC or any other law. Explanation to Clause 27 states that "the provisions of this Chapter (Chapter II) do not apply to minor victims for the offences under the Protection of Children from Sexual Offences Act, 2012 (Central Act 32 of 2012)". By this exclusion, minor victims under the

POCSO Act are excluded from the accountability of the provisions of Chapter II. Thus, the minor victims under POCSO Act can seek compensation only under Chapter I of the Victim Compensation Scheme, 2017, as amended in 2021, placing reliance on Schedule I.

11. The offence 'sexual harassment' defined under Section 2(j) r/w Section 11 of the PCOSO Act is not included as an injury under Schedule I. What is included in Schedule I is only the offence of 'sexual assault'. According to the petitioners, since sexual harassment is not included as an injury in the Schedule of the Kerala Victim Compensation Scheme, the District Legal Service Authority is not legally liable to comply with Exts.P7 and P8 orders.

12. Section 357A of Cr.P.C. is a beneficial provision introduced for the benefit of the victim of a crime. So also, the Kerala Victim Compensation Scheme framed by the State of Kerala is a beneficial scheme for the victim. The object and purpose of Section 357A as well as the Victim Compensation Scheme, therefore, conceives a scheme of protective measure with the object to protect victims of crimes. When the welfare statute is made with the single focus of the benefit of victims, such an Act must be treated as remedial to protect the victims. While interpreting a provision brought in as a remedial measure, that too, as a means of welfare for the victims of crimes, the court must always interpret the words in such a manner that the relief contemplated by the provision is secured and not denied to the class intended to be benefitted. Hence, Section 357A of Cr.P.C., as well as the Kerala Victim Compensation Scheme introduced as per that provision, requires a liberal interpretation in the victim's favour if any ambiguity prevails.

13. It is true that in Schedules I and II of the Scheme, what is included is only the offence of sexual assault. To put it differently, the term 'sexual harassment' is not included as an injury in either of the Schedules of the Scheme. Chapter I of the Scheme applies to all the victims/dependents who have suffered injury because of a crime. It is not confined to sexual assault victims alone. Chapter II applies to women victims of sexual assault/other crimes. The term 'offence', as defined in Chapter II, means an offence committed against women punishable under Indian Penal Code or any other law. However, Chapter II expressly excludes the minor victims of the offence under the POCSO Act. Hence, the term 'sexual assault' found in either of the Schedules of the Scheme cannot be taken as a 'sexual assault' as defined under the POCSO Act. On the other hand, the general meaning of the term 'sexual assault' has to be taken. Black's Law Dictionary defines 'sexual assault' as (i) sexual intercourse with another person who does not consent (ii) offensive sexual contact with another person, exclusive of rape. According to Webster's Dictionary, the word 'sexual assault' means the crime of touching someone in an unwanted sexual way. Thus, the term 'sexual assault' found in either of the Schedules of the Scheme has to be construed as any sexual offence against a victim, including sexual harassment. Hence, the contention of the petitioners that the offence 'sexual harassment' as defined under Section 2(j) r/w Section 11 of the PCOSO Act is not included as an injury

under Schedule I of the Kerala Victim Compensation Scheme, 2017, cannot be sustained.

14. The POCSO Act is a gender-neutral legislation enacted with the laudable object of protecting children from offences of sexual assault, sexual harassment, and pornography. It is imperative that the law operates in a manner in the best interest and well-being of the child. The duty of the Special Court is not only the protection of children from sexual offences and to convict the accused where the accused is found guilty, but also to grant compensation in terms of Section 33(8) of the POCSO Act in addition to the punishment as may be prescribed to the child for any physical or mental trauma caused to it or for immediate rehabilitation of such child. Rule 9 of POCSO Rules, 2020 expands upon this provision and prescribes how, when, and based on what factors compensation can be directed by the Special Courts. The inclusion of such provisions within a penal statute is because the POCSO Act is intended as a self-contained comprehensive legislation for the protection of children from sexual offences, with emphasis on the best interest and well-being of the child at every stage of the criminal process, and to ensure the healthy physical, emotional, intellectual, and social development of the child. From a reading of Rule 9 (1), (2) of the POCSO Rules, 2020 with Section 33(8) of the POCSO Act, it becomes clear that the Special Court is competent to award either interim compensation or final compensation or both for meeting the immediate relief and rehabilitation needs of the child. In view of the express provisions of Section 33(8) of the POCSO Act and Rule 9 of the POCSO Rules, the duty to award compensation in appropriate cases has been conferred on the Special Court, and therefore, it is incumbent on the Special Court to pass necessary orders for compensation/interim compensation in appropriate cases irrespective of the nature of the offences committed against the child, be it sexual assault, penetrative sexual assault, aggravated sexual assault, aggravated penetrative sexual assault, sexual harassment or using child for pornographic purpose. The duty of the District Legal Services Authority is to ensure payment of compensation in terms of Rule 10 and to disburse it. Rule 9(4) of the POCSO Rules states that the compensation awarded should be paid from the Victim Compensation Fund or any other Government Scheme or fund established by it for compensating and rehabilitating victims under Section 357A. When Section 357A of Cr.P.C, Section 33(8) of the POCSO Act or Rule 9 of the POCSO Rules does not contemplate that 'sexual assault victims' alone are eligible for compensation, a Scheme formulated in the exercise of the power conferred by such statutory provisions cannot impose a restriction that a particular class of victims alone are entitled to victim compensation. A beneficial legislation/scheme cannot distinguish between victims of crimes. A conjoint reading of Section 33(8) of the POCSO Act, along with Rule 9 of the POCSO Rules, make it amply clear that the power of the Special Court to award interim/final compensation is not restricted to the terms of the Victim Compensation Fund promulgated by the State but empowers the Court to award such reasonable and just amount as may be determined by it in the facts of the case in the light of the parameters laid

down in Rule 9(3) of the aforesaid Rules to provide support to a child victim. Thus, it is not open for the State Legal Services Authority or District Legal Services Authority to contend that since the offence 'sexual harassment' is not included as an injury in the Schedule of the Victim Compensation Scheme, 2017, the victims are not eligible for compensation.

15. As per Clause (g), Chapter II of the Amended Scheme, 'sexual assault victims' means a female who has suffered mental or physical injury or both as a result of a sexual offence, including Sections 376A, 376B, 376C, 376D, 376E, 354A, 354B, 354C, 354D and Section 509 of IPC. In the cases involved in Exts.P7 and P8 proceedings, the prosecution was, among other provisions, under Sections 354A and 509 of IPC, respectively. Those offences are covered in clause (g), Chapter II of the Amended Scheme. The 'injury' sustained by the victim in both cases falls within the definition (d) in Chapter II of the said Scheme. For all these reasons, I hold that the victims in both cases are eligible for compensation which was rightly awarded by the court below.

16. The Apex Court in *Nipun Saxena and Another v. Union of India and Others* (2017 SCC OnLine SC 1776), while making severe observations with respect to the implementation of Victim Compensation Schemes by different State Governments, directed the National Legal Service Authority (NALSA) to prepare model rules for victim compensation for sexual offences and acid attacks. Pursuant to the said direction, though a Chapter was inserted in the Central Victim Compensation Scheme, the same excluded victim compensation under the POCSO Act since the Act and Rules envisage its own unique procedure for compensating victims of sexual abuse. Recognising the absence of victim compensation scheme with regard to the victims of sexual abuse under the provisions of the POCSO Act, the Apex Court in *Nipun Saxena and Another v. Union of India and Others* [(2019) 13 SCC 715] by order dated 5/9/2018 directed that till a compensation scheme specifically for child victims in POCSO cases is framed, the NALSA compensation scheme shall act as a guideline to special Courts to award compensation to child victims of sexual abuse. In *Abhishek v. State of Kerala* (2020 (5) KLT 276), after finding that implementation of the provisions of the POCSO Act needs to be improved radically, this Court in the exercise of its power under Articles 226 and 227 of the Constitution of India and with a view to protect the children involved in the cases from the risk of secondary victimisation and to make the justice delivery under the statute effective and meaningful had issued 26 general directions. Among the directions issued, direction No.24 reads thus:

"24. The State Government shall take necessary steps forthwith to enable the Kerala State Legal Services Authority to draw and disburse the compensation payable to the victims in cases arising under the POCSO Act, in terms of the provisions of the Kerala Victim Compensation Scheme, 2017 by considering the requests made by the Legal Services Authority in this regard, or by providing the advance amount to them, and shall ensure that no victim is made to wait for the

compensation ordered to be paid by the Special Court, especially for meeting an urgent need.”

Despite the directions of the Apex Court in *Nipun Saxena* (supra) and of this court in *Abhishek* (supra), so far, no compensation scheme specifically for child victims in POCSO cases has been framed in the State of Kerala. It is pertinent to note that the 2017 Scheme was amended by the Kerala Victim Compensation (Amendment) Scheme, 2021, after the above directions of the Apex Court and this court. By virtue of the Amended Scheme Chapter II, with the title ‘Compensation Scheme for Women Victims/Survivors of Sexual Assault/other Crimes’, and Schedule II, with the title ‘Applicable to Women Victim of Crimes’, was added. But, going by the Explanation to Clause 27 of the Amended Scheme, Chapter II and Schedule II are not applicable to the victims of POCSO offences. It only applies to women victims of other crimes except under the POCSO Act. To make it worse, by virtue of the Amendment in Sl. No.12 of Schedule I, women victims of sexual assault were excluded from claiming compensation. Further, sexual offences under the POCSO Act, such as penetrative sexual assault, aggravated sexual assault, aggravated penetrative sexual assault, sexual harassment, and using a child for pornography, are not explicitly covered under either Schedule. Thus, the existing Scheme, even after the amendment in 2021, is inadequate for compensating victims of sexual abuse under the POCSO Act.

17. For these reasons and in view of guidelines of the Apex court in *Nipun Saxena* (supra) and of this court in *Abhishek* (supra) as referred to above, it is obligatory on the part of the State Government to formulate a comprehensive victim compensation scheme specifically for the victims of sexual offences under the POCSO Act or to make necessary amendments in the existing Kerala Victim Compensation Scheme, 2017 (As amended in 2021) incorporating a separate Schedule applicable to sexual offence victims under the POCSO Act. The State Government shall take necessary steps in this regard forthwith. Till the framing of such a comprehensive scheme or making amendments to the existing scheme as stated above, the NALSA Scheme, 2018 shall act as a guideline to the Special Court to award compensation to child victims of sexual offences under the POCSO Act as directed in *Nipun Saxena* (supra).

18. The original petition is dismissed with the above directions. The Registry is directed to send a copy of this judgment to the Chief Secretary, Government of Kerala.

I record the appreciation for the able and valuable assistance rendered by the learned Amicus Curiae Sri.K.K.Dheerendrakrishnan as well as the learned counsel for the petitioners Sri. Roshan D. Alexander.