

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.5542 of 2023

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Youth For Equality & Ors.

... .. Petitioner/s

Versus

The State of Bihar & Ors.

... .. Respondent/s

=====

with

Civil Writ Jurisdiction Case No. 4624 of 2023

=====

Sh. Akhilesh Kumar

... .. Petitioner/s

Versus

The State of Bihar & Ors.

... .. Respondent/s

=====

with

Civil Writ Jurisdiction Case No. 4650 of 2023

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EK SOCH EK PRAYAS

... .. Petitioner/s

Versus

Union of India & Ors.

... .. Respondent/s

=====

with

Civil Writ Jurisdiction Case No. 6505 of 2023

=====

Reshma Prasad

... .. Petitioner/s

Versus

State of Bihar & Ors.

... .. Respondent/s

=====

with

Civil Writ Jurisdiction Case No. 6506 of 2023

=====

Ms. Muskan Kumari

... .. Petitioner/s

Versus

The State of Bihar & Ors.



... .. Respondent/s

Appearance :

(In Civil Writ Jurisdiction Case No. 5542 of 2023)

For the Petitioner/s : Mr. Abhinav Srivastava, Advocate
Mr. Dhananjay Kumar Tiwari, Advocate
Mr. Rajat Kashyap, Advocate
Mr. Deep Shekhar, Advocate
Mr. Amit Anand, Advocate
For the State : Mr. P.K. Shahi, AG
Mr. Anjani Kumar, AAG-4
Mr. Shailendra Kumar Singh, Advocate
Mr. Alok Kumar Rahi, Advocate
Mr. Vikash Kumar, AC to AG
Mr. Manish Dhari Singh, AC to AG
Mr. Amish Kumar, AC to AG
For the U.O.I : Mr. Naresh Dixit, Advocate
Ms. Kalpana, Advocate

(In Civil Writ Jurisdiction Case No. 4624 of 2023)

For the Petitioner/s : Mr. Dinu Kumar, Sr. Advocate
Ms. Ritika Rani, Advocate
Ms. Hinja Gautam, Advocate
Mr. Vardan Mangalam, Advocate
For the U.O.I : Mr. Naresh Dixit, Advocate
Ms. Kalpana, Advocate
For the State : Mr. P.K. Shahi, AG
Mr. Anjani Kumar, AAG-4
Mr. Alok Kumar Rahi, Advocate
Mr. Vikash Kumar, AC to AG
Mr. Manish Dhari Singh, AC to AG
Mr. Amish Kumar, AC to AG
Mr. Alok Kumar Rahi, AC to AAG-4

(In Civil Writ Jurisdiction Case No. 4650 of 2023)

For the Petitioner/s : Mr. Avinash Kumar Pandey, Advocate
Mr. Brajesh Nath Pandey, Advocate
For the State : Mr. P.K. Shahi, AG
Mr. Anjani Kumar, AAG-4
Mr. Vikash Kumar, AC to AG
Mr. Manish Dhari Singh, AC to AG
Mr. Amish Kumar, AC to AG
For the U.O.I : Mr. Naresh Dixit, Advocate
Ms. Kalpana, Advocate

(In Civil Writ Jurisdiction Case No. 6505 of 2023)

For the Petitioner/s : Mr. Shashwat, Advocate
Mr. Sachina, Advocate
Mr. Sumit Kumar, Advocate
Ms. Shudi Bharti, Advocate
For the State : Mr. P.K. Shahi, AG
Mr. Vikash Kumar, AC to AG
Mr. Manish Dhari Singh, AC to AG
Mr. Amish Kumar, AC to AG



For the U.O.I : Mr. Uma Shankar Verma, Sr. Advocate
Ms. Kalpana, Advocate

(In Civil Writ Jurisdiction Case No. 6506 of 2023)

For the Petitioner/s : Mr. M.P. Dixit, Advocate
Mr. S.K. Dixit, Advocate
Mr. Sanjay Kumar Chaubey, Advocate
Ms. Swastika, Advocate

For the State : Mr. P.K. Shahi, AG
Mr. Anjani Kumar, AAG-4
Mr. Vikash Kumar, AC to AG
Mr. Manish Dhari Singh, AC to AG
Mr. Amish Kumar, AC to AG

For the U.O.I : Mr. Naresh Dixit, Advocate
Ms. Kalpana, Advocate

**CORAM: HONOURABLE THE CHIEF JUSTICE
and
HONOURABLE MR. JUSTICE MADHURESH PRASAD
ORAL ORDER**

(Per: HONOURABLE THE CHIEF JUSTICE)

6 04-05-2023 *“The Invisible arm that turns the gears in nearly every system...”* is how caste was exasperatingly described by Yashica Dutt in her book ‘Coming out as Dalit’. The petitioners in CWJC No. 5542 of 2023, a collective of the young and the aged; students, teachers and professionals, concerned with populist measures harming the social fabric of the country, have filed the writ petition in public interest against the caste census attempted by the State of Bihar.

2. We heard the above writ petition along with CWJC No. 4624 of 2023 and CWJC No. 6506 of 2023, specifically on directions of the Hon’ble Supreme Court to consider and dispose of the interim application filed.

3. Sri Abhinav Srivastava, learned counsel for the



petitioner in CWJC No.5542 of 2023 attacked the so-called survey initiated by the Government, blatantly styled as a caste survey to be a census in form and content. At the outset, it is pointed out that the authority to carry out a census is with the Central Government under Entry 69 of List I of the Seventh Schedule to the Constitution of India. The State cannot attempt to carry out a caste census in the garb of a survey, especially when the State has absolutely no legislative competence and, in that circumstance, neither can an executive order be sustained under Article 162 of the Constitution of India. Census though not defined in the Act, the common parlance definition is put forth before us from generic sources, to argue that it is quite distinguishable from a survey as commonly defined. A census while defined as a process of officially counting something, especially a country's population and recording the facts relating to the individuals comprising the polity; a survey is an investigation into the opinions and behavior patterns of a particular group of people. In a survey the opinions are elicited by asking prepared questions, for multifarious purpose, like deciding the marketing strategy in a purely commercial venture or the shape the welfare schemes should take, a governmental function. Hence, when a survey is carried out, there is a



specific objective, which is totally absent in the present exercise which again raises the question of whether the present survey carried on as a caste based one, is in effect a Census; especially when in reality it is an attempt to elicit the caste status of the individuals native to the State. It is pointed out that the last Census was carried out in the year 1931, before independence and there were identified 74 (seventy-four) categories of castes within the State of Bihar which has now risen to 215 (two hundred and fifteen) even as per the Government's showing as displayed from the castes identified for the purpose of the survey. It is argued that there is no legislative power to carry out such a survey which in effect is a Census and there is also no disclosed object for carrying out such a survey.

4. Answering the contention of the State, that there is no compulsion on any individual to disclose their personal details, it is pointed out from the guidelines issued to the hierarchical officers that, the details are to be collected from the eldest family member and in the case of caste status it could even be from the relatives or neighbors which militates against the claim of voluntary disclosure. From the guidelines it is pointed out that in the case of a woman, in the event of non-



disclosure of caste of the father of her child, the officers are directed to ensure such disclosure in the presence of another person, which deprives the woman of the right to not disclose the details and further degrades her on account of her gender alone. In effect, it turns out to be a compulsory disclosure which is in violation of the right to privacy of an individual which is held to be an intrinsic part of Article 21 of the Constitution of India by the Hon'ble Supreme Court in the case of *K.S. Puttaswamy v Union of India (2017) 10 SCC 1*. It is pointed out that positive discrimination on the ground of caste could be upheld only under sub-clauses (4), respectively of Articles 15 and 16 of the Constitution of India and otherwise it falls foul of Article 14.

5. Annexure-1 is the notification issued by the Government which does not disclose any perceivable object for carrying out such a survey and Annexure-2 is the communication issued to the District Officers, who have, by Annexure-3 directed the lower hierarchical officers to comply with the procedure directed. Annexure-4 is the mode of implementation giving specific guidelines as to how the details have to be elicited. Annexure-4 specifically speaks of collecting the information through the head of the family and



the details of any other member given by the head of the family cannot be voluntary disclosure of the members of the family. It is pointed out from Annexure-4 that there are 17 different parameters of which caste is only one of them; but the survey all the same is termed a caste survey, laying bare the very intention of the Government. As far as the reference to *Indira Sawhney v. Union of India, 1992 Supp (3) SCC 217* is concerned, the dictum revolves around reservation to educational institutions and public employment, which affirmative action has not been declared as an objective by the State Government, of the present exercise. In fact, even the Government of India has confessed to the practical difficulties in carrying out a caste-based census thus, making the present survey a mindless exercise. It is argued that the State cannot be allowed to justify its actions by virtue of the statements made in a counter affidavit filed in the writ petition. Especially when there is no perceivable reason or deliberation, stated, prior or simultaneous to the bringing out of Annexure-1 notification. The decision in *K.S. Puttaswamy v. Union of India (Aadhaar Case), (2019) 1 SCC 1*, is also relied on to point out that privacy being an inextricable facet of Article 21, there cannot be any compulsory extraction of the personal details from the



citizens, which would fall foul of the constitutional guarantee to life, under Article 21, which has also been held to be a right to live with dignity.

6. It is argued that in addition to the total absence of data integrity, there is also no measure implemented by the State to ensure the data security. Even if the collection of data is on a voluntary basis, there can be no public consumption of such data, which would again violate the right to privacy of an individual; even if the data is given voluntarily. It is also pointed out that transgenders were included as a caste which goes against the principles enunciated in *National Legal Services Authority v. Union of India, (2014) 5 SCC 438*. The judgment in *K.S.Puttaswamy (2)* (supra) is specifically referred to argue that there are two types of privacy involved in Article 21, the informational privacy and the privacy of choice, both of which would be violated by the procedural guidelines issued by the State Government by Annexure-1 as also by reason of the absence of a secure measure to store the data. Any collection of data by the Government should be with sufficient protection afforded for the personal details and if that is not ensured it would lead to dissemination of the information collected, leading to infringement of informational privacy and the



individuals autonomy to decide how the sensitive personal data is to be used. In conclusion, it is pointed out that there is no legislation to support the caste based survey and in fact, there is no legislative power conferred on the State to carry out such an exercise. There is absolute absence of statement of objects which should also be a reasonable one having nexus with the ultimate aim and contemplated prior to the notification or simultaneous to its issuance. The action cannot be substantiated through any object or explanation, stated in the counter affidavit filed to the writ petition. Lastly, it is argued that the entire exercise violates the principles of proportionality.

7. Sri Dinu Kumar, learned counsel appearing in CWJC No.4624 of 2023 while adopting the arguments already advanced, placed emphasis on two points; one, the expenditure of Rs.500 Crores and the dissemination of information to all the political parties, as is proclaimed in the notification itself. Specific reference is made to Article 267 of the Constitution of India and the Bihar Contingency Fund Act, 1950 and the Bihar Contingency Fund Rules, 1953 to point out that there is no backing for the intention to expend money from the Contingency Fund of the State; by a proper appropriation for the expenditure. The decision of a Division Bench of this Court



in *Sushil Kumar Modi v. State of Bihar, (1996) 1 PLJR 561* is placed before us to buttress the above contention. Rule 62 from the Bihar Financial Rules is put forth to argue against the expenditure intended by the State. It is then pointed out that the entire exercise has been initiated without any deliberation and the whole exercise is *malafide*. Reliance is placed on a decision of the Hon'ble Supreme Court in *East Coast Railway v. Mahadev Appa Rao, (2010) 7 SCC 678. K.S. Puttaswamy (1)* (supra) to impress upon us the lack of security for the information supplied by the citizen, which is evident from the notification itself. The Census Act, 1948, the Census Rules and The Collection of Statistics Act, 2008 are specifically referred to, to appraise us of the elaborate procedure contemplated by the Central Legislature in carrying out a similar measure, under the said enactments, which is totally absent in the present exercise. Reference is made to the counter affidavit which declares the survey being initiated for the purpose of collecting details for emancipation of the socially, educationally and economically backward communities; which is not enabled by the caste based survey.

8. Sri Munna Prasad Dixit, learned counsel appearing in CWJCNo.6506 of 2023, also supported the



arguments already raised before us. Sri Shashwat, learned counsel appearing in CWJC No.6505 of 2023 relied on the decision in *National Legal Services Authority* (supra) to point out that the transgenders' individual identity and entity were compromised by putting them together as a caste. Though they have been qualified as a backward community for the purpose of getting State relief, there is no reason to put them in a single caste category, which caste category does not really exist. It is pointed out that though the Government has clarified that transgenders would not be classified as a caste, the classification remains in the guidelines issued by the State Government, which prejudices them.

9. The learned Advocate General, first of all, pointed out that the notification itself was issued on 06.06.2022 and after a detailed exercise of training undertaken, the first field survey commenced in January, 2023 and the second phase is expected to conclude by 15.05.2023. As of now 80% of the work is completed. The petitioners are wayfarers who were sitting on the fence; when the entire exercise was commenced and undertaken, without raising any challenge. The learned Advocate General points out that two writ petitions were filed, admittedly by different parties, before this Court challenging



the appropriation of Rs.500 Crores from the contingency fund, which writ petitions were withdrawn on the submission made by the then Advocate General that appropriation bills were placed and passed. It is asserted that at that stage and even now the submission of the State is that an appropriation bill was passed but then, not a single farthing was withdrawn from the contingency fund. The petitioners are guilty of gross delay and they were conscious of the exercise commenced by the State as early as in June, 2022. Yet another party had approached the Hon'ble Supreme Court with a writ petition in January, 2023, which was dismissed granting liberty to approach the High Court. Further delay was caused by filing a writ petition and not curing the defects and the entire exercise smacks of an ill motivated, *malafide* attempt to stall a valid exercise initiated by the State.

10. It is asserted that there is no *prima facie* case projected by the petitioners for grant of an interim order and in fact, there is absolutely no case on the facts or law, as coming out from the pleadings, regarding the caste survey contemplated and continued by the State of Bihar. The learned Advocate General specifically refers to the equality clause in the Preamble of the Constitution of India, which, it is urged,



has to be read in consonance with the directive principles, which puts forth the ultimate goal. It is for the ultimate purpose of achieving an ideal situation as contemplated in the directive principles that both Houses of the elected representatives in the State of Bihar unanimously resolved to carry out a caste census. The decision of the Hon'ble Supreme Court in *Indira Sawhney* (supra) is specifically relied on and Paragraph 859 (3) (a) and (b) at page 766 thereof are read over. It is pointed out that the last caste census was carried out in 1931 and Mungeri Lal Commission appointed by the State Government in 1978 relied on the data collected in the year 1931. The attempt of the said Commission was to find the backwardness among the backward communities and there was a classification made of backward communities and extremely backward communities. The affirmative exercise of granting reservation would depend upon the caste census to be carried out and this is also sanctioned by the nine-Judges Constitution Bench decision in *Indira Sawhney* (supra). The entire population of the State of Bihar is being surveyed and the experience of such survey has opened the eyes of the State Government to a number of shortcomings which are also sought to be rectified. It is asserted that when such policy



decision has been taken, there is no scope for a public interest litigation against the said policy. Placing reliance on lofty, abstract ground of right to privacy; which no common man is concerned with, the above writ petition attempts to hamper a legitimate exercise of a survey carried out by the State Government to better understand the needs and requirements of its people; all aimed at ensuring it's people, a life with dignity.

11. The learned Advocate General asserts that on the question of privacy, it is to be mentioned that there is no law prohibiting the disclosure of caste nor the exercise of a survey carried out by the State of Bihar. In the Indian context, it cannot be said that disclosure of caste is a violation of privacy; especially when the same is disclosed for the purpose of reservation and availing benefit of welfare schemes by the citizens themselves, voluntarily. It is also pointed out that the Hon'ble Supreme Court has laid down a triple test which has been noticed by a Division Bench of this Court in *Sunil Kumar vs. State of Bihar, 2022 (4) PLJR 428*. The determination of ratio of representation to the local bodies is one of the triple tests, to satisfy which, definitely there should be a survey in the manner in which it is now conducted. In this context, it is pointed out that as of now only 37% reservation is



provided for elections to the Local Self Government Institutions with 50% horizontal reservation for women. Only extremely backward classes have been granted 20% reservation out of 37% and there remains 13%; to determine which necessarily there should be a caste survey, which alone could bring in the realization of proportionate political representation to the various classes and categories. It is emphasized that after 75 years of independence, the ideal situation of equality, still eludes the nation; and the right to privacy, in the balancing scale of social welfare, has to take a back seat. It is specifically pointed out that the entire details collected by the State are already available in the public domain and what is attempted is only collecting and collating the information already available. There is absolute cooperation from the general public and the survey is an accepted exercise within the State. The judgment in *Indira Sawhney* (supra) was referred to copiously to point out the necessity for such survey, which is recognized by the Constitution Bench. The Census Act provides for an obligation on the citizen and un-hindered access to the officers of the Government, involved in the activity of census; which is absent in the present survey attempted by the State since it is voluntary in nature. Entry 45 of List III of the Concurrent List



along with Entries 20, 23, 24 and 30 were pointed out to emphasize the legislative power on the State. It is argued that the State has the absolute exclusive privilege of shaping its policies to give maximum advantage to the citizens; especially the marginalized, which is the ultimate objective of the caste based survey.

12. Learned Advocate General summarized; that, (i) the delay in approaching the Court is fatal and the exercise is almost over, (ii) there is no money taken from the contingency fund and the legislature has approved the budgetary provisions for the expenditure, (iii) there is no question asked, which in any manner infringes the right to privacy. There is a unanimous resolution taken in the two House of the State to carry out the survey which also has been approved by the State Cabinet. There could arise minor infirmities in an exercise of this magnitude, which is normal and natural, but will be rectified and redressed. The learned Advocate General specifically points out the grievance raised by the transgenders and the community of 'Lohars', which arose in the midst of the survey, which have been addressed by the State Government.

13. Caste, is a stark reality deeply ingrained in the



society; despite social reformers, through awareness having attempted to educate the masses and legislators, through preventive and regulatory measures as also affirmative action, strived to vanquish. It refuses to vanish and often rears its head to cause dissension among the polity and destroy the comity of citizens; an imperative for national advancement. The social reform movement started before the pre-independence era and continued after the independence unabated; but the caste-based divisions are still not overcome.

14. The petitioners assert that the present survey would only reinforce the said divisions and result in the perpetuation of deprivations to which many were subjected to, in the sole name of caste. It is famously said that a progress backwards into and not over the tombs can result in disastrous consequences. But, we are not social reformers and it is best left to those working within the societies and the legislators, elected directly by the people, who also shape the policies of the State. Here, we are concerned with the ticklish question of whether the instant survey falls within the policy realm or in the legislative domain; and if in the latter, whether there is a power so to do.

15. From the arguments addressed before us, we



have raised three issues which come up for adjudication at this stage of *prima facie* consideration of an interim order in the writ petition filed. The three issues are: (i) whether the expenditure for the massive exercise is with the due sanction of law, (ii) whether the exercise of a caste based survey is one in accordance with law & (iii) whether the questions asked result in infringement of privacy. We propose to answer these in-seriatim and if on any issue, we find favour with the arguments of the petitioners, then the other issue/issues need not be considered; which need be considered only at the final stage. However, if we find all the points urged to be not sustainable, then necessarily interim prayer would have to be declined.

16. With respect to the allegation of Rs.500 Crores having been taken from the contingency fund without due appropriation as provided under the Constitution of India, the legislation on that count as also the Rules of Business framed by the State, have to be looked at on the basis of the arguments raised by the learned Advocate General, regarding the absence of a challenge to the submission made before this Court, on the strength of which the earlier writ petitions on similar lines were closed. Along with the counter affidavit, the State has produced two orders of this Court in public interest litigations



challenging the very same notification issued on 06.06.2022. Annexure-R-1 is the judgment in CWJC No.9137 of 2022 filed by a public spirited individual, wherein the then learned Advocate General informed the Court that the supplementary budget stands presented and passed by the Legislative Assembly of Bihar, in the context of which the proceedings were closed. Annexure-R-2 is the judgment in CWJC No.9339 of 2022 filed by one Veterans Forum for Transparency in Public Life, again, challenging the notification dated 06.06.2022 wherein also, on similar submissions made by the then Advocate General, the writ proceedings were closed. The learned Advocate General specifically points out that in fact Annexure-R-2 has been filed by the very same advocate who has filed CWJC No.4624 of 2023 and hence the mere fact that there is no specific contention raised in the present writ petition, doubting the veracity of the submission made by the then learned Advocate General; has prevented the State from answering it completely with substantiating records.

17. Learned counsel appearing for the petitioner in CWJC No.4624 of 2023 admits that there is no such contention raised in the writ petition. We are conscious of the fact that the petitioners are different, but it has to be noticed that the



advocate who settles the pleadings has a duty to his client and also an onerous duty to the Court to disclose the full facts, to both the client and the Court. Hence, it cannot be said that the petitioner in CWJC No.4624 of 2023 was not aware of the earlier proceedings having been closed on the submission of the learned Advocate General regarding budgetary allocation having been made and passed by the legislature. The veracity of such submission having not been challenged, we are of the opinion that at this stage we need not look into the specific allegation raised of expenditure, without sanction of law and the same would be reserved for consideration at the final hearing; if the petitioner makes suitable amendments with notice to the State, in which event the State would also be enabled to resist it with substantiating materials. The said ground cannot result in an interim order, definitely.

18. The difference between “census” and “survey” as has been pointed out by the learned counsel for the petitioners has to be understood from the generic sources, since the relevant statutes do not define it. Black’s Law Dictionary defines ‘census’ as an official count of people, made for the purpose of compiling social and economic data of the political sub-division to which the people belong. ‘Census’ as defined in



Webster's New Collegiate Dictionary is the count of a population and a property evaluation in early Rome, which is almost a complete enumeration of the population, made by the Government. The Concise Law Dictionary by P. Ramanatha Aiyar defines it as an official enumeration of the inhabitants of the State or country with details of sex, age, family, occupation, possession etc.

19. "Survey" on the other hand, as defined in the Oxford Advanced Dictionary, is an investigation of the opinions, behaviour, etc. of a particular group of people, which is usually done by asking them pre framed question. Black's Law Dictionary defines it as an appraisal and a general consideration of something and also includes the measuring of a tract of land. It has also been defined as a poll or questionnaire, especially one examining popular opinions.

20. The essential difference between a 'census' and 'survey', as we discern from the above definitions, is that the former contemplates collection of accurate facts and verifiable details; while, a survey is intended at collection and analysis of opinions and perceptions of the general public which may be aimed at a specific community or group of people or the extended community of a polity. Hence, while in a 'census' the



details of an individual are collected, in a 'survey' often the opinions and perceptions of the targeted persons are collected. Both result in an analysis of the data collected; which in the case of a 'census' are empirical, while in a 'survey' are mostly logical conclusions. Viewed from the above perspective, the present exercise by the State of Bihar can only be seen as an attempt to carry out a 'census' under the name of a 'survey'.

21. 'Census' is included in List I of the Seventh Schedule of the Constitution of India at Entry 69. It is trite that the entries in the various Lists of the Seventh Schedule are only fields of legislation and the source of the legislative power is to be traced to Article 246 of the Constitution of India. Article 246(1) is a *non-obstante* provision which overrides clauses (2) and (3) and confers Parliament with the exclusive power to make laws with respect to any of the matters enumerated in List I of the Seventh Schedule. The State's power to legislate on the matters enumerated in List II is also made subject to clause (1) of Article 246. The power to carry out a census being in the exclusive domain of the Union Parliament, the State Legislature cannot embark upon such an exercise. The learned Advocate General has specifically referred to Entry 45 in List III, the Concurrent List, which are read along with Entries 20,



23, 24 and 30 of the Concurrent List from which source flows the power of the State.

22. Entry 45 of the Concurrent List deals with inquiries and statistics for the purpose of any of the matters specified in List II or List III. List I stands excluded and collection and enumeration of the details of caste does not find a place in either List II or List III, in which circumstance, the power has to be found exclusively confined on the Union Parliament, by virtue of Article 246 read with Entry 69 of List I which deals with census. Entry 20 of the Concurrent List deals with economic and social planning, Entry 23 deals with social security and social insurance; employment and unemployment, Entry 24 is concerned with welfare of labour including conditions of work and Entry 30 is with respect to vital statistics including registration of births and deaths. We do not find the collection of caste details to be inextricable linked with or related to any of the specific entries pointed out by the State and these entries are not sufficient and relevant to carry out a collection of caste details from the individual citizens. It is trite law that when the State does not have the power to legislate, the Executive Government also cannot bring out any orders exercising the executive power under Article 162. Article 162



specifically empowers the executive of the State to deal with only matters with respect to which the Legislature of the State has the power to make laws. Executive power under Article 162 can extend to only those areas, which coincide with the legislative power [*G.J. Fernandez vs. State of Mysore (1967) 3 SCR 636*] and when that area is not covered by an enactment [*A.P.D Jain Pathasala vs. Shivaji Bhagwat, (2011) 13 SCC 99*]. If there is a power under any of the Entries in List III concurrently on the State and the Union and if there is no law on the subject, either by the Union or the State, then the State would be entitled to bring out an executive order. In the present case, we have found that census would be in the exclusive domain of the Parliament and there could be no orders brought out in exercise of the coinciding legislative power, like the impugned notification for reason of the total absence of such legislative power.

23. In this context, we have to notice that the notification produced at Annexure-1 specifically speaks of the State Government having decided to conduct a caste-based survey through the General Administration Department, expenditure of which was intended to be taken from the Bihar Contingency Fund, with a target to complete the exercise by



February, 2023. Annexure-2, communication issued by the Principal Secretary to the District Officers, also indicates the subject to be of 'Bihar Caste-based enumeration for determination of caste list for 2022.' The proforma in which the survey is to be conducted enumerates seventeen heads or details to be collected; one of which is 'caste'. The details of even caste and income of every family member would be taken from the head of the family and not from the respective individual, which itself militates against the veracity and integrity of the data supplied. This also stands against the contention taken of a voluntary disclosure. It was pointed out by the learned Advocate General that the data would be entered only after each & every individual, who is a native of Bihar and not resident within the State, at the time of survey, being contacted and the enumerator verifying the data through video conferencing. We are of the *prima facie* opinion that such data obtained from the head of the family, cannot be merely verified through video conferencing, which would also require due authentication of the identity of the person who comes on video conferencing. Further, over and above the mere collection and collation of the details, there is insisted a declaration to be made by the head of the family; which could be used against an



individual if there is no data integrity & security ensured. In this context, we reckon the arguments of the learned Advocate General, with reference to the counter affidavit and the measures brought in for ensuring the security of the data. We are not for the moment proposing to consider this aspect, since the accuracy & integrity of the data collected; under the seventeen enumerated heads as seen from the proforma produced along with the writ petition, in the haphazard manner in which it is contemplated, through the head of the family, neighbours and relatives, could itself be in question. It has also to be pertinently observed that survey, though extends to the age, gender, marital status, income, possessions and educational qualification of each individual, the intention was solely to identify the caste, which is more than evident from the terminology with which the survey has been called, i.e.: '*a caste-based survey*'.

24. It is the vehement contention of the State that the entire data now collected is available in the public domain; different individuals having given it for the purpose of availing reservation, social welfare measures, getting employment and so on and so forth. If the details are available in the public domain, we fail to understand why such a massive exercise,



expending public resources has to be undertaken. It is admitted that to satisfy the 'triple tests', ensuring proportionate representation in the Local Self Government Institutions, there is appointed a Commission, which could very well consider the issue.

25. *Indira Sawhney* (supra) *inter alia* held that reservations, by affirmative action, can be provided by the Parliament, State Legislatures, statutory rules as well as by way of executive instructions issued by the Central Government from time to time. This is not to say that the State can carry out a caste-based census. While recommending the approach and methodology adopted by Justice O Chinnappa Reddy Commission, the Constitution Bench also observed that it was not the only procedure or method or approach and it is for the authority (appointed to identify) to adopt such approach and procedure as it thinks appropriate and so long as the approach adopted by it is fair and adequate, the Court has no say in the matter. The identification, dealt with by the Hon'ble Supreme Court, was identification of backwardness, which may as well start with the castes and proceed to occupational groupings among others. To effectuate affirmative action and identify backwardness, a Commission has already been appointed. We



are afraid the impugned exercise is not of identification of backwardness but of the caste- status of the natives of the State of Bihar. This is explicit from the requirement in the guidelines to ascertain the caste of an individual, from the head of the family, relative or neighbour. As far as a child is concerned, the guidelines insist for ascertainment of the father's caste from the mother.

26. There is also a compulsion on the mother, if she fails to disclose it, to do so in front of any other person present there. The guidelines also prohibits the caste of the mother to be entered as that of the child; which is in violation of the Hon'ble Supreme Court declaration that the backwardness of a person, for reason of his belonging to a caste, should be determined by the circumstance in which he grows up. The possibility of deprivation having visited on the child on account of the caste status, in which he is brought up, is the relevant aspect to be considered for the purpose of enabling the benefits of an affirmative action.

27. It was also pointed out to us that both the Houses of the Legislature unanimously resolved to carry out the caste-based survey, which has also been approved by the Cabinet. We fail to understand why if there was law making



power available with the Legislature and there being unanimous agreement across the treasury and opposition benches, why a legislation was not brought about; especially in the teeth of the argument raised of lack of legislative power.

28. We are also not impressed with the argument raised of delay, especially since the writ petition is filed in public interest and there is no question arising of having slept over individual rights. We are convinced that the survey, in the manner in which it is carried out, cannot be said to be within the policy realm of the State. Even the defence raised was to source the State's power to legislate under the Concurrent List; which we have found to be untenable.

29. On the above reasoning, we find that the caste-based survey is a census in the garb of a survey; the power to carry out which is exclusively on the Union Parliament which has also enacted a Census Act, 1948. True, there is a compulsion by way of an obligation on the citizen under the Census Act and un-hindered entry conferred on the authorized officers; but also a protection from the records of census not being open to inspection nor admissible in evidence; under Section 15. Though it has been vehemently urged that both Houses of the State Legislature has sanctioned the survey, there



is nothing placed on record regarding the deliberations made or the objects sought to be achieved by embarking upon such a massive exercise, that too for the collection of details which include the sensitive issue of caste. There are broad reasons stated in the counter affidavit, but nothing comes out from the notification, nor is any specific reasoning or object stated to have motivated the initiation of the exercise of a caste-based survey, which reasoning or motivation should also be relatable to a time, contemporaneous with the time of bringing out the notification. It is also submitted before us that 80% of the work is over and what remains is mere collation of the details collected and the further action based on such data collected and made available to the State.

30. We are of the considered opinion that the petitioners have made out a *prima facie* case against the continuation of the process of caste- based survey, as attempted by the State of Bihar. There is also the question raised of data integrity and security which has to be more elaborately addressed by the State. *Prima facie*, we are of the opinion that the State has no power to carry out a caste-based survey, in the manner in which it is fashioned now, which would amount to a census, thus impinging upon the legislative power of the Union



Parliament. We also see from the notification issued that the Government intends to share data with the leaders of different parties of the State Assembly, the ruling party and opposition party which is also a matter of great concern. There definitely arises the larger question of right to privacy, which the Hon'ble Supreme Court has held to be a facet of right to life.

31. In such circumstances, we direct the State Government to immediately stop the caste-based survey and ensure that the data already collected are secured and not shared with anybody till final orders are passed in the writ petition.

32. Post the writ petitions for hearing on 03.07.2023.

(K. Vinod Chandran, CJ)

(Madhuresh Prasad, J)

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