Census Commissioner & Ors vs R.Krishamurthy on 7 November, 2014

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Bench: Uday Umesh Lalit, Rohinton Fali Nariman, Dipak Misra

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION
CIVIL APPEAL NO. 9996 OF 2014
[Arising out of S.L.P. (Civil) No. 480 of 2012]

Census Commissioner & Others ... Appellants
Versus
R. Krishnamurthy ... Respondent

J U D G M E N T

Dipak Misra, J.

The present appeal depicts and, in a way, sculpts the non- acceptance of conceptual limitation in every human sphere including that of adjudication. No adjudicator or a Judge can conceive the idea that the sky is the limit or for that matter there is no barrier or fetters in one's individual perception, for judicial vision should not be allowed to be imprisoned and have the potentiality to cover celestial zones. Be it ingeminated, refrain and restrain are the essential virtues in the arena of adjudication because they guard as sentinel so that virtuousness is constantly sustained. Not for nothing, centuries back Francis Bacon[1] had to say thus:-

> "Judges ought to be more learned than witty, more reverend than plausible, and more advised than confident. Above all things, integrity is their portion and proper virtue……Let the judges also remember that Solomon's throne was supported by lions on both sides: let them be lions, but yet lions under the throne."

2. Almost half a century back Frankfurter, J.[2] sounded a note of caution:-

> "For the Highest exercise of judicial duty is to subordinate one's personal pulls and one's views to the law of which we are all guardians-those impersonal convictions

that make a society a civilized community, and not the victims of personal rule."

3. In this context, it is seemly to reproduce the warning of Benjamin N. Cardozo in The Nature of the Judicial process[3] which rings of poignant and inimitable expression:-

> "The Judge even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight errant roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to 'the primordial necessity of order in social life'."

4. In Tata Cellular V. Union of India (1994) 6 SCC 651, while dealing with the concept of judicial review, this Court referred to a passage worded by Chief Justice Neely, which is as follows:-

> 'I have very few illusions about my own limitations as a judge and from those limitations I generalize to the inherent limitations of all appellate courts reviewing rate cases. It must be remembered that this Court sees approximately 1262 cases a year with five judges. I am not an accountant, electrical engineer, financier, banker, stock broker, or systems management analyst. It is the height of folly to expect judges intelligently to review a 5000 page record addressing the intricacies of public utility operation.'

5. The fundamental intention of referring to the aforesaid statements may at various times in the history of law is to recapitulate basic principles that have to be followed by a Judge, for certain sayings at times become necessitous to be told and re-narrated. The present case exposits such a situation, a sad one.

6. The chronology has its own relevance in the instant case. One Dr. E. Sayedah preferred W.P No. 25785 of 2005 in the High Court of Madras for issue of a writ of certiorari for quashment of the order passed by the Central Administrative Tribunal in O.A. No.3/2002 on the foundation that when there is no Scheduled Tribe population in the Union Territory of Pondicherry and there is no Presidential notification under Article 342 of the Constitution of India there cannot be any reservation for Scheduled Tribe in the said Union Territory and, therefore, the appointment of the applicant in the Original Application who was appointed solely on the base that he belonged to Scheduled Tribe was illegal. However, the High Court declined to interfere with the appointment considering the length of service but observed that the appointee was not entitled for any reservation in promotion. The High Court also recorded certain other conclusions which are really not relevant for the present purpose. The direction that really propelled the problem is as follows:-

> "When it is the position that after 1931, there had never been any caste-wise enumeration or tabulation and when there can not be any dispute that there is increase in the population of SC/ST/OBC manifold after 1931, the percentage of reservation fixed on the basis of population in the year 1931 has to be proportionately

> increased, by conducting caste-wise census by the Government in the interest of the weaker sections of the society. We direct the Census Department of the Government of India to take all such measures towards conducting the caste-wise census in the country at the earliest and in a time bound manner, so as to achieve the goal of social justice in its true sense, which is the need of the hour."

7. At this juncture, to continue the chronology, it is pertinent to mention that a Writ Petition No. 21172/2009 was filed before the High Court of Judicature at Madras, which was disposed of on 21.1.2010. While disposing of the writ petition, the High Court had directed as follows:

> "6. The second respondent, has filed a counter and in paragraph 5 thereof, it is stated that the second respondent have taken up the matter with the Ministry of Social Justice and Empowerment, as the issues relating to SCs, STs and OBCs; are within the domain of that Ministry. The learned counsel for the respondents, on the instructions of the Regional Director, Chennai from the office of the second respondent, states that the petitioner will got a reply from the respondents within eight weeks from today. We hope that the respondents will consider the representation of the petitioner Association in all seriousness and send them an appropriate reply."

8. Be it stated, the Registrar General and Census Commissioner was the respondent no.2 therein. After the writ petition was disposed of, the representation preferred by Mr. K. Balu, President, Advocates Forum for Social Justice, was disposed and the order was communicated to the writ petitioner. It reads as follows:-

> "2. Caste-wise enumeration in the census has been given up as a matter of policy from 1951 onwards. In pursuance of this policy decision, castes other than Scheduled Castes and Scheduled Tribes have not been enumerated in all the Censuses since 1951. In Census 2011 also no question on enumeration of castes other than Scheduled Castes and Scheduled Tribes has been included. As such, the first phase of Census 2011 enumeration, namely, the Houselisting and Housing Census is commencing on the 1st of April, 2010. The forms required for this phase of the Census has already been printed in many States and Instruction Manuals required for training the enumerators has also been finalized and printed. The second phase of Census 2011, namely, Population Enumeration, is due to be conducted in February 2011. The data gathered in the first phase (April to September 2010) is linked to the data to be collected in February-March 2011. Hence, enumerating castes other than Scheduled Castes and Scheduled Tribes will not be possible in that phase also. As such, it is not possible to include any question relating to the enumeration of Castes other than Scheduled Castes and Scheduled Tribes in the Census of India 2011.
>
> 3. As regards the policy decision whether castes other than the Scheduled Castes and Scheduled Tribes should be enumerated, the manner in which such enumeration should be done and by whom, the matter has been referred to the nodal Ministry, i.e.

Ministry of Social Justice and Empowerment."

9. At this juncture, it may be noticed that the Writ Petition(C) No. 132/2010 was filed before this Court by one Kishore Govind Kanhere Vidharbha and Another seeking the similar relief, which was disposed of on 13.09.2010 by passing the following order:

> "Learned counsel for the petitioners states that as the purpose of the writ petition stands worked out, he would like to withdraw the petition. The writ petition is, accordingly, dismissed as withdrawn."

10. Presently, we shall proceed to state how the purpose of the writ petition had worked out. The respondent, R. Krishnamurthy had preferred Writ Petition(C) No. 10090/2010 which stood disposed of by Division Bench by the impugned order. As is manifest, the Division Bench has referred to its earlier decision passed in W.P.(C) No. 25785/2005 and after reproducing the paragraph from the said judgment, opined as follows:-

> "Since the relief sought for in the present writ petition has already been answered in the affirmative by issuing a direction to the authorities to take all measures towards conducting the caste-wise census in the country, we are of the considered opinion that this petition is also entitled to be allowed. Accordingly, this writ petition is allowed on the same terms."

11. Criticizing the aforesaid direction, it is submitted by Mr. R.S. Suri, learned senior counsel that the High Court on the earlier occasion had issued a direction without making the Census Commissioner as a party and further there was no justification for issuance of such a direction. As far as the impugned order is concerned, it is urged by Mr. Suri that the direction issued by the Division Bench tantamounts to interference in a policy decision as framed under Section 8 of the Census Act, 1940, (for brevity 'the Act') as amended in 1993. Learned senior counsel would contend that the policy stipulates for carrying out the census which includes scheduled castes and scheduled tribes, but not the other castes. He would urge that many a High Court have dismissed similar writ petitions and, in fact, this Court in WP(C) No. 133/2009 have declined to interfere and the same was dismissed as withdrawn. It is proponed by him the view expressed by the High Court is absolutely vulnerable and hence, deserved to be lancinated.

12. Despite service of notice, there has been no appearance on behalf of the respondent.

13. To appreciate the submissions canvassed by the learned counsel for the appellant, it is necessary to refer to Section 8 of the Act, which reads as follows: -

> "Section 8 – Asking of questions and obligation to answer (1) A census officer may ask all such questions of all persons within the limits of the local area for which he is appointed as, by instructions issued in this behalf by the [Central Government] and published in the Official Gazette, he may be directed to ask.

(2) Every person of whom any question is asked under sub-

section(1) shall be legally bound to answer such question to the best of his knowledge or belief:

> Provided that no person shall be bound to state the name of any female member of his household, and no woman shall be bound to state the name of her husband or deceased husband or of any other person whose name she is forbidden by custom to mention."

14. On the foundation of the aforesaid provision, the competent authority of the Central Government, in exercise of the power conferred by sub-section(1) of section 8 of the Census Act, had issued a Notification on 13.1.2000 which relates to instructions meant for Census Officers. Clause 8 of the said Notification being relevant is reproduced below:

> "8. Information relating to the head of the household
>
> (a) Name of the head of the household
>
> (b) Male – 1/Female – 2
>
> (c) If SC(Scheduled Caste) or ST (Scheduled Tribe) or Other?

SC(Scheduled Caste)-1/ST(Scheduled Tribe)-2/Other-3"

15. After the said census was carried out, another Notification dated 25.2.2010 was issued. Clause 10 of the said Notification reads as follows:

> "10. If Scheduled Caste/Scheduled Tribe/Others.

16. After the Notification in the year 2010 was issued, the Office of the Registrar General and Census Commissioner issued the Instruction Manual for Houselisting and Housing Census. In Paragraph 1.2, the historical background has been stated. It is as follows:

> "Historical background of Indian Census 1.2 The Indian Census has a rich tradition and enjoys the reputation of being one of the best in the world. The first Census in India was conducted in the year 1872. This was conducted at different points of time in different parts of the country. In 1881 a Census was taken for the entire country simultaneously. Since then, Census has been conducted every ten years, without a break. Thus, the Census of India 2011 will be the fifteenth in this unbroken series since 1872 and the seventh after independence. It is through the missionary zeal and dedication of Enumerators like you that the great historical tradition of conducting the Census uninterruptedly has been maintained in spite of several adversities like wars, epidemics, natural calamities, political unrest, etc. Participation in the Census by the people of India is indeed a true reflection of the national spirit of unity in

diversity."

17. Thereafter, the Instruction Manual provides for objectives of conducting a census. We think it appropriate to reproduce the same:

"1.3 India is a welfare State. Since independence, Five Year Plans, Annual Plans and various welfare schemes have been launched for the benefit of the common man. All these require information at the grass root level. This information is provided by the Census.

4. Have you ever wondered how the number of seats in Parliamentary/Assembly Constituencies, Panchayats and other local bodies are determined? Similarly, how the boundaries of such constituencies are demarcated? Well the answer to that is also the Census. These are just a few examples. Census provides information on a large number of areas. Thus, you are not merely collecting information; you are actually a part of a massive nation building activity.

5. The Houselisting and Housing Census has immense utility as it will provide comprehensive data on the conditions of human settlements, housing deficit and consequently the housing requirement to be taken care of in the formulation of housing policies. This will also provide a wide range of data on amenities and assets available to the households, information much needed by various departments of the Union and State Governments and other non-Governmental agencies for development and planning at the local level as well as the State level.

This would also provide the base for Population Enumeration.

6. Population Enumeration provides valuable information about the land and its people at a given point of time. It provides trends in the population and its various characteristics, which are an essential input for planning. The Census data are frequently required to develop sound policies and programmes aimed at fostering the welfare of the country and its people. This data source has become indispensable for effective and efficient public administration besides serving the needs of scholars, businessmen, industrialists, planners and electoral authorities, etc. Therefore, Census has become a regular feature in progressive counties, whatever be their size and political set up. It is conducted at regular intervals for fulfilling well-defined objectives. One of the essential features of Population Enumeration is that each person is enumerated and her/his individual particulars are collected at a well-defined point of time."

18. From the aforesaid, it is graphically vivid that at no point of time, the Central Government had issued a Notification to have a census conducted on the caste basis. What is reflectible is that there is census of Scheduled Castes and Scheduled Tribes, but census is not done in respect of other castes or on caste basis. That apart, the instructions elaborately spell out the necessity and the purpose. It is reflectible of the concern pertaining to assimilation of certain datas that would help in nation-building, trends of population, availability of requisite inputs for planning and fostering the

welfare of the country. Be it noted, the Notifications dated 13.01.2000 and 25.02.2010 enumerate collection of many an information including household number, total number of persons normally residing in the household (persons, males, females), name of the head of the household, ownership status of the house, number of married couple(s) living in the household, main source of drinking water, availability of drinking water source, main source of lighting, latrine within the premises, type of latrine facility, waster water outlet, bathing facility, kitchen, fuel used for cooking, Radio/Transistor, Television, Computer/Laptop, Telephone/Mobile phone, Bicycle, Scooter/Motor Cycle/ Moped, Car/Jeep/Van, and availing banking services, etc. Thus, the Central Government has framed a policy and the policy, as is demonstrable, covers many an arena keeping in view certain goals and objectives.

19. As we evince from the sequence of events, the High Court in the earlier judgment had issued the direction relating to carrying of census in a particular manner by adding certain facets though the lis was absolutely different. The appellant, the real aggrieved party, was not arrayed as a party-respondent. The issue was squarely raised in the subsequent writ petition where the Census Commissioner was a party and the earlier order was repeated. There can be no shadow of doubt that earlier order is not binding on the appellant as he was not a party to the said lis. This view of ours gets fructified by the decision in H.C. Kulwant Singh and others V. H.C. Daya Ram and others[4] wherein this Court, after referring to the judgments in Khetrabasi Biswal V. Ajaya Kumar Baral & Ors.[5], Udit Narain Singh Malpaharia V. Board of Revenue[6], Prabodh Verma & Ors. Vs. State of U.P. & Ors.[7] and Tridip Kumar Dingal & Ors. V. State of W.B. & Ors.[8] has ruled thus:

> "..... if a person who is likely to suffer from the order of the court and has not been impleaded as a party has a right to ignore the said order as it has been passed in violation of the principles of natural justice."

20. The earlier decision being not a binding precedent, it can be stated with certitude that the impugned judgment has really compelled the appellant to question the defensibility of the same.

21. The centripodal question that emanates for consideration is whether the High Court could have issued such a mandamus commanding the appellant to carry out a census in a particular manner. The High Court has tried to inject the concept of social justice to fructify its direction. It is evincible that the said direction has been issued without any deliberation and being oblivious of the principle that the courts on very rare occasion, in exercise of powers of judicial review, would interfere with a policy decision. Interference with the policy decision and issue of a mandamus to frame a policy in a particular manner are absolutely different. The Act has conferred power on the Central Government to issue Notification regarding the manner in which the census has to be carried out and the Central Government has issued Notifications, and the competent authority has issued directions. It is not within the domain of the Court to legislate. The courts do interpret the law and in such interpretation certain creative process is involved. The courts have the jurisdiction to declare the law as unconstitutional. That too, where it is called for. The court may also fill up the gaps in certain spheres applying the doctrine of constitutional silence or abeyance. But, the courts are not to plunge into policy making by adding something to the policy by way of issuing a writ of mandamus. There the judicial restraint is called for remembering what we have stated in the beginning. The courts are

required to understand the policy decisions framed by the Executive. If a policy decision or a Notification is arbitrary, it may invite the frown of Article 14 of the Constitution. But when the Notification was not under assail and the same is in consonance with the Act, it is really unfathomable how the High Court could issue directions as to the manner in which a census would be carried out by adding certain aspects. It is, in fact, issuance of a direction for framing a policy in a specific manner. In this context, we may refer to a three-Judge Bench decision in Suresh Seth V. Commr., Indore Municipal Corporation[9] wherein a prayer was made before this Court to issue directions for appropriate amendment in the M.P. Municipal Corporation Act, 1956 so that a person may be debarred from simultaneously holding two elected offices, namely, that of a Member of the Legislative Assembly and also of a Mayor of a Municipal Corporation. Repelling the said submission, the Court held:

> "In our opinion, this is a matter of policy for the elected representatives of people to decide and no direction in this regard can be issued by the Court. That apart this Court cannot issue any direction to the legislature to make any particular kind of enactment. Under out constitutional scheme Parliament and Legislative Assemblies exercise sovereign power to enact laws and no outside power or authority can issue a direction to enact a particular piece of legislation. In Supreme Court Employees' Welfare Assn. v. Union of India[10] (SCC para 51) it has been held that no court can direct a legislature to enact a particular law. Similarly, when an executive authority exercises a legislative power by way of a subordinate legislation pursuant to the delegated authority of a legislature, such executive authority cannot be asked to enact a law which it has been empowered to do under the delegated legislative authority. This view has been reiterated in state of J & K v A.R. Zakki[11]. In A.K. Roy v. Union of India[12] it was held that no mandamus can be issued to enforce an Act which has been passed by the legislature."

22. At this juncture, we may refer to certain authorities about the justification in interference with the policy framed by the Government. It needs no special emphasis to state that interference with the policy, though is permissible in law, yet the policy has to be scrutinized with ample circumspection. In N.D. Jayal and Anr. V. Union of India & Ors.[13], the Court has observed that in the matters of policy, when the Government takes a decision bearing in mind several aspects, the Court should not interfere with the same.

23. In Narmada Bachao Andolan V. Union of India[14], it has been held thus:

> "It is now well settled that the courts, in the exercise of their jurisdiction, will not transgress into the field of policy decision. Whether to have an infrastructural project or not and what is the type of project to be undertaken and how it has to be executed, are part of policy-making process and the courts are ill-equipped to adjudicate on a policy decision so undertaken. The court, no doubt, has a duty to see that in the undertaking of a decision, no law is violated and people's fundamental rights are not transgressed upon except to the extent permissible under the Constitution."

24. In this context, it is fruitful to refer to the authority in Rusom Cavasiee Cooper V. Union of India[15], wherein it has been expressed thus:

> "It is again not for this Court to consider the relative merits of the different political theories or economic policies... This Court has the power to strike down a law on the ground of want of authority, but the Court will not sit in appeal over the policy of Parliament in enacting a law".

25. In Premium Granites V. State of Tamil Nadu[16], while dealing with the power of the courts in interfering with the policy decision, the Court has ruled that it is not the domain of the court to embark upon unchartered ocean of public policy in an exercise to consider as to whether a particular public policy is wise or a better public policy could be evolved. Such exercise must be left to the discretion of the executive and legislative authorities as the case may be. The court is called upon to consider the validity of a public policy only when a challenge is made that such policy decision infringes fundamental rights guaranteed by the Constitution of India or any other statutory right.

26. In M.P. Oil Extraction and Anr. V. State of M.P. & Ors.[17], a two-Judge Bench opined that:

> "..... The executive authority of the State must be held to be within its competence to frame a policy for the administration of the State. Unless the policy framed is absolutely capricious and, not being informed by any reason whatsoever, can be clearly held to be arbitrary and founded on mere ipse dixit of the executive functionaries thereby offending Article 14 of the Constitution or such policy offends other constitutional provisions or comes into conflict with any statutory provision, the Court cannot and should not outstep its limit and tinker with the policy decision of the executive functionary of the State."

27. In State of M.P. V. Narmada Bachao Andolan & Anr.[18], after referring to the State of Punjab V. Ram Lubhaya Bagga[19], the Court ruled thus:

> "The Court cannot strike down a policy decision taken by the Government merely because it feels that another decision would have been fairer or more scientific or logical or wiser. The wisdom and advisability of the policies are ordinarily not amenable to judicial review unless the policies [pic]are contrary to statutory or constitutional provisions or arbitrary or irrational or an abuse of power. (See Ram Singh Vijay Pal Singh v. State of U.P.[20], Villianur Iyarkkai Padukappu Maiyam v. Union of India[21] and State of Kerala v. Peoples Union for Civil Liberties[22].)"

28. From the aforesaid pronouncement of law, it is clear as noon day that it is not within the domain of the courts to embark upon an enquiry as to whether a particular public policy is wise and acceptable or whether a better policy could be evolved. The court can only interfere if the policy framed is absolutely capricious or not informed by reasons or totally arbitrary and founded ipse dixit offending the basic requirement of Article 14 of the Constitution. In certain matters, as often said, there can be opinions and opinions but the Court is not expected to sit as an appellate

authority on an opinion.

29. As has been stated earlier, the Central Government had issued a Notification prescribing the series of informations to be collected during the census. It covers many areas. It includes information relating to Scheduled Castes and Scheduled Tribes and does not refer to any other caste. In such a situation, it is extremely difficult to visualize that the High Court, on the first occasion, without having a lis before it in that regard, could even have thought of issuing a command to the Census Department to take all such measures towards conducting the caste-wise census in the country so that the social justice in its true sense, which is the need of the hour, could be achieved. This, irrefragably, is against the power conferred on the court. The High Court had not only travelled beyond the lis in the first round of litigation, but had really yielded to some kind of emotional perspective, possibly paving the adventurous path to innovate. It is legally impermissible. On the second occasion, where the controversy squarely arose, the High Court did not confine to the restrictions put on the jurisdiction and further without any kind of deliberation, repeated the earlier direction. The order is exceptionally cryptical. That apart, it is legally wholly unsustainable. The High Court, to say the least, had no justification to pave such a path and we have no hesitation in treating the said path as a colossal transgression of power of judicial review, and that makes the order sensitively susceptible.

30. Consequently, the appeal is allowed, the judgments and orders dated 24.10.2008 and 12.5.2010 passed in W.P.(C) No. 25785/2005 and W.P.(C) No. 10090/2010 respectively are set aside. There shall be no order as to costs.

.....J. (DIPAK MISRA) .....J. (ROHINTON FALI NARIMAN) .....J. (UDAY UMESH LALIT) NEW DELHI;

NOVEMBER 07, 2014

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[1] BACON, Essays: Of Judicature in I The Works of Francis Bacon (Montague, Basil, Esq. ed., Philadelphia: A Hart, late Carey & Hart, 1852), pp. 58-59.

[2] FRANKFURTEER, Felix in Clark, Tom C., " Mr. Justice Frankfurter: 'A Heritage for all Who Love the Law'" 51 A.B.A.J. 330, 332 (1965) [3] Yale University Press 1921 Edn., Pg- 114 [4] JT 2014 (8) SC 305 [5] (2004) 1 SCC 317 [6] AIR 1963 SC 786 [7] (1984) 4 SCC 251 [8] (2009) 1 SCC 768 [9] (2005) 13 SCC 287 [10] (1989) 4 SCC 187 [11] 1992 Supp (1) SCC 548 [12] (1982) 1 SCC 271 [13] (2004) 9 SCC 362 [14] (2000) 10 SCC 664 [15] (1970) 1 SCC 248 [16] (1994) 2 SCC 691 [17] (1997) 7 SCC 592 [18] (2011) 7 SCC 639 [19] (1998) 4 SCC 117 [20] (2007) 6 SCC 44 [21] (2009) 7 SCC 561 [22] (2009) 8 SCC 46