

IN THE HIGH COURT AT CALCUTTA
CONSTITUTIONAL WRIT JURISDICTION
(Appellate Side)

WPA (P) 611 of 2022

Reserved on: 17.03.2023

Pronounced on: 28.03.2023

Suvendu Adhikari

...Petitioner

-Vs-

The State of West Bengal & Ors.

...Respondents

Present:-

Mr. Paramjit Singh Patwalia, Sr. Adv.

Mr. Nilanjan Bhattacharya

Mr. Kabir Shankar Bose

Ms. P. Tibrewal

Mr. L.K. Chatterjee

Mr. S. Chakraborty

Ms. H. Verma

Mr. V. Singh

Mr. C. Pal

Mr. R.N. Banerjee

Mr. A.K. Mukherjee

Mr. S. Das

Ms. O. Chowdhury

... .. for the petitioner

Mr. S.N. Mookherjee, AG

Mr. A. Ray, GP

Mr. Md. T.M. Siddiqui

Mr. N. Chatterjee

Ms. A. Pandey

... .. for the State

Mr. Jayanta Mitra, Sr. Adv.

Mr. Jishnu Saha, Sr. Adv.

Ms. Sonal Sinha

... .. for the WBSEC

Mr. Ashok Kumar Chakraborty

Mr. Kumar Jyoti Tewari

Mr. Sukanta Ghosh

... .. for the respondent no. 6

Coram: THE HON'BLE JUSTICE PRAKASH SHRIVASTAVA,
CHIEF JUSTICE

THE HON'BLE JUSTICE RAJARSHI BHARADWAJ,
JUDGE

Prakash Shrivastava, CJ:

1. Learned senior counsel for the petitioner has, at the outset, submitted that he is confining this petition to the prayers relating to the challenge to the notifications dated 29th of July, 2022 and 2nd of August, 2022 and to the issue relating to computation of population for the purpose of reservation of seats for SC/ST and Backward Classes. He has sought permission to withdraw the petition in respect of other prayers with liberty to file a fresh petition in respect thereof after the elections are notified.
2. The prayer is allowed and the petitioner is permitted to confine the petition to the above prayer which is pressed during argument by granting liberty to file fresh petition in respect of other prayers at the appropriate stage, if the need so arises.
3. The Gram Panchayat Elections are due to be held in the State of West Bengal this year, 2023. The State Election Commission had, vide notifications dated 29th of July, 2022 and 2nd of August, 2022, issued various directives to compute the population of the Backward Classes for the purpose of delimitation during the upcoming Gram Panchayat Elections. The said notifications direct a State-wide survey to obtain the relevant information for determination of population of Backward Classes in West Bengal for reservation of seats in Panchayat General Elections. It further states that since no public figure of population of Backward Classes disaggregated to the level of Gram Panchayat Constituencies are available in the State, a decision to conduct State-wide survey for determination of population belonging to Backward Classes in the areas under 3-tier Panchayat Raj Institutions is taken by the State. In respect of SC/ST, the population figure is to be arrived at by adding 7.5% decadal growth rate of population to the census figure of 2011. The petitioner being aggrieved with

the same, had submitted the representation dated 1st of November, 2022 to the West Bengal State Election Commission. The said representation was rejected by the State Election Commission vide order dated 17th of November, 2022. Thereafter, the present petition was filed on 6th of December, 2022.

4. Submission of learned counsel for the petitioner is that in view of Section 5 of the West Bengal Panchayat Act, 1973 and Section 17 of the West Bengal Panchayat Elections Act, 2003 and Rule 22 of the West Bengal Panchayat Elections Rules, 2006, reservation of seats for SC/ST and Backward Classes in the Gram Panchayat should bear the same proportion to the total number of seats in that Gram Panchayat to be filled up by election as the population of SC/ST or Backward Classes in that *gram* bears to the total population of that *gram*. His further submission is that the decision of the State to arrive at the figure of population of SC/ST on the basis of census figure of 2011 by adding the decadal growth of 7.5% and arriving the figure of population of Backward Classes on the basis of survey in 2022 is defective as two different yardsticks cannot be adopted for ascertaining the proportion of population of SC/ST and OBC. He submits that for SC/ST population, estimated figure of 2021 are considered whereas for OBC population, population figure of 2022 are taken into account which itself is defective and will lead to incorrect result as numerator and denominator should be ascertained by adopting some formula and for the same year.

5. Learned counsel appearing for the respondent State Election Commission has submitted that the term of the Gram Panchayats in the State is expiring in May, 2023 and elections are imminent, therefore, no interference at this stage is required. He submits that delimitation of

constituency is done every 10 years and reservation is done every 5 years, therefore, for this election, delimitation and reservation, both are required to be done. He submits that since the census figure of population of Backward Classes is not available, therefore, the same is ascertained by conducting survey and since the census population figure of SC/ST is available in census, 2011, therefore, their population is arrived at by adding 7.5% decadal growth. He has further submitted that the order rejecting the petitioner's representation has not been challenged in this petition and that the final notification relating to reservation of constituencies for SC/ST and BC and delimitation has already been published.

6. Learned Advocate General has also opposed the petition by submitting that this Court at this stage should not exercise the discretion on going into the issue raised as the same will indefinitely postpone the elections. He submits that the process of delimitation and reservation was completed in November, 2022 whereas the writ petition has been filed on 6th of December, 2022. He has also submitted that the petitioner has not challenged the order of the Election Commission deciding the petitioner's representation and that there is a constitutional bar of interference contained in Article 243-O of the Constitution.

7. Learned counsel appearing for the Union of India has submitted that UOI is a formal party which is not concerned with the issue being argued.

8. We have heard the learned counsel for the parties and have perused the record.

9. Article 243D of the Constitution provides for reservation of seats in Panchayats. In terms of clause (6) of Article 243D, the State Legislature has

been empowered to make provision for reservation of seats in any Panchayat in favour of backward class of citizens.

10. Section 4 of the West Bengal Panchayat Act, 1973 provides for Gram Panchayat and its Constitution. The first and second proviso to Sub-section (2) of Section 4 relates to reservation of seats for Scheduled Castes, Scheduled Tribes and Backward Classes in Gram Panchayat and reads as under:

“(2) Persons whose names are included in the electoral roll prepared in accordance with such rules as may be made by the State Government in this behalf and in force on such date as the State Election Commissioner may declare for the purpose of an election pertaining to the area comprised in the *Gram*, shall elect by secret ballot at such time and in such manner as may be prescribed, from among themselves such number of members not being less than five or more than thirty as the prescribed authority may, having regard to the number of voters in hill areas and other areas and in accordance with such rules as may be made in this behalf by the State Government, determine:

Provided that seats shall be reserved for the Scheduled Castes, the Scheduled Tribes and the Backward Classes in a *Gram Panchayat*, and the number of seats so reserved shall bear, as nearly as may be and in accordance with such rules as may be made in this behalf by the State Government, the same proportion to the total number of seats in that *Gram Panchayat* to be filled up by election as the population of the Scheduled Castes or of the Scheduled Tribes or of the Backward Classes as the case may be, in that *Gram*, bears to the total population of that *Gram* and such seats shall be subject to allocation by rotation, in the manner prescribed, to such different constituencies having Scheduled Castes, Scheduled Tribes or Backward Classes population which bears with the total population in that constituency not less than one-half of the proportion that the total Scheduled Castes population, the Scheduled Tribes population or, the Backward Classes population,

as the case may be, in that *Gram*, bears with the total population in that *Gram*:

Provided further that the total number of seats so reserved for the Scheduled Castes, the Schedules Tribes and the Backward Classes, severally or jointly, as the case may be, shall not exceed fifty per cent of the total number of seats in the *Gram Panchayat* as determined in terms of the first proviso.”

11. Section 17(2A) of the West Bengal Panchayat Elections Act, 2003 provides for reservation of seats for the Backward Classes and the proportion thereof and reads as under:

“17. ...

(2A) Seats shall be reserved for the Backward Classes in every Gram Panchayat, Panchayat Samiti, Zilla Parishad or the Siliguri Mahakuma Parishad in such manner as may be prescribed and the number of seats so reserved shall bear as nearly as may be, the same proportion with the total number of seats to be filled by direct election to the Gram Panchayat, the Panchayat Samiti, the Zilla Parishad or the Siliguri Mahakuma Parishad, as the case may be, as the population of the Backward Classes in the area of the Gram Panchayat, Panchayat Samiti, Zilla Parishad or the Siliguri Mahakuma Parishad, as the case may be, bears with the total population of that area, and such seats may be allotted by rotation to different constituencies of that Gram Panchayat, Panchayat Samiti, Zilla Parishad or the Siliguri Mahakuma Parishad in such manner as may be prescribed.”

12. Rule 22 of the West Bengal Panchayat Elections Rules, 2006 provides for delimitation of constituencies of a Gram Panchayat and allocation of seats, assignment of serial numbers for the constituencies and the reservation of seats. First and second proviso to Explanation II of Rule

22 provides for determination of proportion of the SC/ST or Backward Classes and reads as under:

“Explanation II: For the final stage of calculation for arriving at the number of seats to be reserved, the digit in the second place of decimal, if any shall be totally ignored, and the whole number in the figure obtained shall be raised by one if the digit at the first place of decimal is not less than five while ignoring any digit below five at the first place of decimal.

Provided also that the number of the Scheduled Castes or the Scheduled Tribes population of a *Gram* or the proportion of the Scheduled Castes or the Scheduled Tribes or the Backward classes population as aforesaid shall be determined on the basis of the last preceding census of which the relevant figures have been published:

Provided also that when census figures are not available for any *Gram* or constituency or for any portion of any constituency, the prescribed authority shall, subject to such order of the Commission as may be made in this behalf, determine the proportion which the Scheduled Castes or the Scheduled Tribes or the Backward Classes population bears with the total population on the basis of any other authenticated record maintained by any office or organization of any department of the State Government or, where no such record is available, on the basis of a local enquiry, which may include house to house enumeration, caused by him for the purpose after consulting, whenever necessary, any portion of the census report, electoral roll of the West Bengal Legislative Assembly or any other authenticated record of any other department of the State Government that may be of assistance.”

13. In terms of the first proviso, the SC, ST and BC of a *gram* or their proportion is to be determined on the basis of the last preceding census. The second proviso deals with the eventuality when census figures are not available for *gram* or constituency or for any portion of any constituency and requires determination of proportion which the SC, ST or BC bears with the total population on the basis of any other authenticated record and

in the absence of such record, on the basis of local enquiry which may include house to house enumeration after consultation, whenever necessary, any portion of the census report.

14. In the present case, though the 2011 census figures for SC/ST population are available but no such census figures for Backward Classes are available. The Government of West Bengal, Department of Panchayat and Rural Development had issued the notification dated 29th of July, 2022 to conduct State-wide survey for determination of the population of Backward Classes in the State for reservation of seats in Panchayat General Elections. The detailed guidelines of survey were enclosed with the notification. The enumerators were required to visit all the household under the unit in order to identify the household belonging to Backward Classes. The guidelines provide for draft publication of constituency-wise list of households visited by the enumerators for the survey, invitation of claims and objection and final publication of list of households with population figure in Gram Panchayat constituencies along with data on population of Backward Classes for Gram Panchayats and Blocks. As per the schedule enclosed with the notification, the final publication of data on population for Backward Classes, after decision of objections, was to be made on 2nd of September, 2022. By the order dated 2nd of August, 2022, it was clarified that the existing polling station-wise survey for determination of population of Backward Classes could be undertaken instead of the Gram Panchayat constituency-wise survey.

15. The undisputed facts show that the figures of SC/ST and total population have been arrived at by adding the decadal growth of 7.5% in the 2011 census figure of SC/ST and total population. Hence, the estimated figures so arrived at for SC/CT relate to the year 2021, whereas, household

survey in respect of only the Backward Classes has been conducted in August, 2022. Therefore, we find substance in the argument of the learned counsel for the petitioner that the numerator and denominator in the present case have been taken by adopting different yardsticks and that the estimated population figure for the two categories relate to different years.

16. So far as method of household survey adopted for ascertaining BC population is concerned, learned Advocate General and learned counsel for the Election Commission have pointed out paragraph 33 of the judgment of the Hon'ble Supreme Court in the matter of **Anugrah Narain Singh and Another vs. State of U.P. and Others** reported in (1996) 6 SCC 303 wherein similar issue in respect of elections of municipalities in the State of U.P. was examined and the Hon'ble Supreme Court held that:

“33. In our view, the argument advanced on behalf of the State must be upheld. It is true that Article 243-P(g) has defined ‘population’ to mean “population as ascertained by the last preceding census of which the relevant figures have been published”. The delimitation of constituencies and also preparation of electoral rolls will have to be done on the basis of the figures available from the last census which was taken in 1991. Reservation of seats for Scheduled Castes and Scheduled Tribes is mandatory under Article 243-T of the Constitution. This must also be done on the basis of the available figures from the census. Clause (6) of Article 243-T of the Constitution has made it permissible for the State Government to reserve seats for other Backward Classes. The census of 1991 has not enumerated the number of persons belonging to Backward Classes. Therefore, in order to reserve seats for citizens belonging to Backward Classes, their number will have to be found out. Clause (6) of Article 243-T has impliedly empowered the State Government to ascertain the Backward

Classes and the number of people belonging to such classes. Otherwise, the provisions of clause (6) of Article 243-T will become otiose and meaningless. Merely because, such an enumeration of people belonging to Backward Classes was made, does not mean that the figures enumerated by the last census were discarded. The latest available census figures had to be the basis for delimitation of the constituencies, preparation of electoral rolls and also for reservation of seats for Scheduled Castes, Scheduled Tribes and women. But census figures are not available for persons belonging to Backward Classes. The next census will be in the year 2001. There is no way to reserve seats for Backward Classes in the meantime except by making a survey of the number of persons belonging to such classes for the purpose of giving them assured representation in the municipal bodies. To do this exercise is not to do away with the last available census figures but to find out what was not to be found by the last census. Had such counting been done in the census, then it would not have been open to the State Government to embark upon a survey of its own. The State Government here had only two choices. It could say that there will be no reservation for people belonging to Backward Classes because, the census figures of such people are not available or it could make a survey and count the number of people belonging to the Backward Classes and reserve seats for them in the municipal bodies. The State Government has taken the latter course. This is in consonance with the provisions of clause (6) of Article 243-T. Therefore, the survey made by the State Government for finding out the number of persons belonging to Backward Classes was not in any way contrary to or in conflict with any of the provisions of the Constitution.”

17. In the above paragraph 33, Hon’ble Supreme Court has considered the constitutional scheme and Clause (6) of Article 243-T which is same as Clause (6) of Article 243D of the Constitution and upheld the mode of calculation of BC population by survey and count.

18. The Hon'ble Supreme Court in paragraph 34 of the above judgment in the case of **Anugrah Narain Singh (supra)** has considered the provisions of U.P. Act of 1959 as also Article 243-ZG of the Constitution which relates to bar to interference by Courts in electoral matters in the election to the municipalities, which is *pari materia* to Article 243-O relating to bar to interference by Courts in election matters of Panchayats, and has held that:

“34. Moreover, the U.P. Act of 1959 was amended to make it consistent with the provisions of Part IX-A of the Constitution. ‘Population’ was defined in Section 2(53-A) to mean “population as ascertained at the last preceding census of which the relevant figures have been published”. This is identical to the definition given in Article 243-P(g). Section 32 which deals with delimitation, *inter alia*, provides that the State Government shall by order determine the number of seats to be reserved for Scheduled Castes, Scheduled Tribes, Backward Classes and for women. Section 7 lays down that in every Corporation, seats shall be reserved for Scheduled Castes, Scheduled Tribes and Backward Classes. There is a second proviso to Section 7 which lays down that if the figures of Backward Classes are not available, their population may be determined by carrying out a survey in the manner prescribed by the rules. These provisions come within the ambit of the phrase “any law relating to the delimitation of the constituencies or allotment of seats to such constituencies”. The validity of this law cannot be challenged because of the protection given by Article 243-ZG of the Constitution. Therefore, the question whether the survey made by the State Government to ascertain the figures of persons belonging to Backward Classes was lawful or not cannot be raised in any Court.”

19. In the above judgment, the view taken by the Hon'ble Supreme Court is that the question relating to lawfulness of the survey made by the

State Government to ascertain the figure of persons belonging to Backward Classes cannot be raised in any Court.

20. It is also worth noting that in the present case, the notifications for reservation for SC/ST/BC and delimitation of constituencies, on the basis of population figures arrived at in pursuance to impugned notification, have already been issued and the elections are due in May, 2023, hence, any interference at this stage will result in postponement of the elections.

21. Hon'ble Supreme Court in the matter of **Lakshmi Charan Sen and Others vs. A.K.M. Hassan Uzzaman and Others** reported in (1985) 4 SCC 689 where the electoral roles were questioned, though held that the electoral roles are not part of the process of election within the meaning of Article 329(b) of the Constitution but expressed that the High Court ought not to have passed the interim order as a result of which, the election to the Legislative Assembly stood at risk of being postponed indefinitely and that very often, the exercise of jurisdiction, especially the writ jurisdiction, involves questions of propriety rather than of power and that the fact that the Court has power to do a certain thing does not mean that it must exercise that power regardless of the consequences. In the matter of **Kishansing Tomar vs. Municipal Corporation of the City of Ahmedabad and Others** reported in (2006) 8 SCC 352, Hon'ble Supreme Court has expressed about timely holding of the election.

22. Having regard to the above analysis, though we find substance in the argument of the learned counsel for the petitioner but we decline to interfere at this stage by leaving it open to the respondent Election Commission to consider the effect of the anomaly noted above in arriving at proportion of SC/ST/BC population on the basis of the population of SC/ST arrived at by adding decadal growth of 7.5% in census figure of 2011 and

calculation of population of Backward Classes on the basis of household survey in August, 2022. The Election Commission is expected to ensure that the object of the proviso to Sub-section 2 of Section 4 of West Bengal Panchayat Act, 1973, the provisions of Sub-section 2A of Section 17 of the West Bengal Panchayat Elections Act, 2003 and proviso to Explanation II of Rule 22 of the West Bengal Panchayat Elections Rules, 2006 is not defeated.

23. The petition is accordingly disposed of.

(PRAKASH SHRIVASTAVA)
CHIEF JUSTICE

(RAJARSHI BHARADWAJ)
JUDGE

Kolkata
28.03.2023

PA(RB)

(A.F.R. / N.A.F.R.)