

(2004) 12 PAT CK 0056
In the Patna High Court
Case No : CWJC No. 8734 of 2004

Kaushal Kishor Verma

APPELLANT

Vs

State of Bihar and Others

RESPONDENT

Date of Decision : 15-12-2004

Acts Referred:

Bihar Panchayat Raj Act, 1993 — Section 18, 18(5)

Citation : (2005) 1 PLJR 263

Hon'ble Judges : R.S. Garg, J

Bench : Single Bench

Advocate : A.K. Mallick and Rajeev Ranjan, for the Appellant; A.B. Sinha, M/s S.P. Mukherjee, R.C. Thakur, Kamal Kishore Singh and Ashok Kumar, for the Respondent

Judgement

R.S. Garg, J.—Heard learned counsel for the parties. The petitioner Kaushal Kishor Verma, an elected Mukhiya of Gram Panchayat Khairkhan, Block Forbesganj, Araria, being aggrieved by memo No. 272 dated 19.7.2004, issued by the Collector (annexure-11) restraining the petitioner from exercising his authority as Mukhiya of the Panchayat and requiring Up-Mukhiya, the respondent No. 5 in the public interest and the interest of the State so also looking to the administrative exigencies to work as Mukhiya is, before this Court.

2. Learned counsel for the petitioner submits that under the Bihar Panchayat Raj Act, an elected Mukhiya can be removed in a particular manner. The State Government is authorised to remove a Mukhiya from the post for misconduct in discharge of his duty only after giving an opportunity of hearing to him. According to him, the order of restrain could not be passed by the Collector under any provision of law.

3. Learned counsel for the State, on the other hand, submitted that though there are no provisions in the Act to meet such an exigency, but the Respondent-Collector had defended his order by detailing the misconduct committed by the petitioner. The respondent No. 5 who has been asked by the Collector to

discharge the function as a Mukhiya has also supported the order and while opposing the writ application submitted that though there is no provision in the Act but the doctrine of necessity required the District Magistrate/Collector to issue such an order.

4. Section 18 of the Bihar Panchayat Raj Act, 1993 allows the resignation or removal of Mukhiya or Up-Mukhiya. For purposes of this writ application sub-section 5 of section 18 would be material. The said sub-section says that without prejudice to the provisions of the Act a Mukhiya or Up-Mukhiya may be removed from their office by the Government for misconduct in the discharge of his duties or neglect or incapacity to perform his duties or for being persistently remiss in the discharge thereof of quality of any disgraceful conduct, and the Mukhiya or Up-Mukhiya so removed shall not be eligible for election to the said post for the remaining term. The sub-section further provides that no such Mukhiya or Up-Mukhiya be removed from office unless he has been given a reasonable opportunity to furnish his explanation.

5. According to sub-section 5 of section 18 the authority to remove the Mukhiya or Up-Mukhiya vests in the State Government, he can be removed only after a due opportunity of hearing to him. In the present matter though order of removal has not been passed, but the nature of the order passed by the Collector would clearly show that for all practical purposes he has removed the Mukhiya from his post and has conferred all authorities of Mukhiya upon the respondent No. 5. The law nowhere says that even the State would have an authority to suspend the authority of a Mukhiya during the pendency of the proceedings under sub-section 5 of section 18 of the Act. If the legislation in its wisdom has not conferred any right upon the Collector to take an action against Mukhiya under sub-section 5 of section 18 of the Act or has not reserved any right unto itself to suspend the authority of Mukhiya during the pendency of the proceedings initiated under sub-section 5 of section 18 then the Collector could not assume jurisdiction nor could the Collector nor the State would have authority to suspend the authority of the elected Mukhiya.

6. So far as the doctrine of necessity is concerned. I must immediately observe that the said principle is a hat which has lost its shape. Any wrong act cannot be protected by any person who has committed a wrong by saying that there was a necessity and but for the said wrong act nothing could be done. The doctrine of the necessity in fact fits every head. In the present matter the doctrine of necessity would not be applicable because the Collector if had no authority at all then under the principle of doctrine of necessity he could not proceed further. The doctrine of necessity requires a person to act beyond his jurisdiction in exercise of his discretion if the person is exercising the discretion as the basic jurisdiction. If the basic jurisdiction is missing then the doctrine of necessity would not confer any jurisdiction or discretion upon the person exercising his authority wearing the shapeless hat of doctrine of necessity. The order dated 19.7.2004 restraining the petitioner from working in developmental works and

conferring the powers upon respondent No. 5 deserves to and is accordingly quashed. It is however, made clear that since after 19.7.2004 if the Up-Mukhiya has passed any resolution then the same shall not be subject to scrutiny because the Up-Mukhiya believing bonafide has exercised his authority as Mukhiya and he cannot be allowed to be exposed simply because the order is being quashed. If the District Magistrate, Araria, is of the opinion that the petitioner has committed misconduct then he may submit his recommendation to the State Government and if the State is of the opinion that the present petitioner deserves to be removed under sub-section 5 of section 18 then following the provisions of law they may pass final order in the matter.