

(1991) 11 PAT CK 0003

In the Patna High Court

Case No : Civil Writ Jurisdiction Case No. 413 of 1991 (R)

Zainul Haque Ansari

APPELLANT

Vs

State of Bihar and Others

RESPONDENT

Date of Decision : 20-11-1991

Acts Referred:

Bihar and Orissa General Clauses Act, 1917 — Section 19
Bihar Gram Panchayat Election Rules, 1959 — Rule 57, 70
Bihar Panchayat Raj Act, 1947 — Section 10, 11, 11A, 11A(1), 11A(2)
Constitution of India, 1950 — Article 226

Citation : (1992) 1 PLJR 360

Hon'ble Judges : S.B. Sinha, J; R.N. Sahay, J

Bench : Division Bench

Advocate : M.S. Anwar and M.S. Azad, for the Appellant; V.P. Singh and A.K. Sinha, for the Respondent

Final Decision : Allowed

Judgement

S.B. Sinha, J.—The Petitioner in this application has sought for issuance of an appropriate writ for quashing of a resolution of the Executive Committee of Ararha Gram Panchayat dated 15.1.1991 as contained in Annexure-2 to the writ application whereby and whereunder a no-confidence motion was passed against the Petitioner as Mukhiya of the said Gram Panchayat and also for quashing of the order as contained in letter dated 29.1.1991 issued by Respondent No. 2 to Respondent No. 4 whereby the Petitioner was removed from the post of Up Mukhiya and Respondent No. 3 was elected as Up Mukhiya.

2. The fact of the matter lies in a very narrow compass and are not at all in dispute.

3. The Petitioner was elected as Up Mukhiya by the Executive Committee in a meeting held in June, 1978. The Mukhiya of the aforementioned Gram Panchayat died on 22.12.1989 and in terms of the provisions contained in Section 11A(1) of the Bihar Panchayat Raj Act, 1947, the Petitioner began discharging the functions

of the Mukhiya till a new Mukhiya was elected. The Executive Committee by reason of a resolution taken in a meeting held on 15.1.1991 and as contained in Annexure 2 to the writ application, adopted a resolution of no-confidence against the Petitioner as Up Mukhiya. By reason of the said resolution, allegedly Respondent No. 4 was also elected to act as Up Mukhiya.

4. Respondent No. 2 purported to be in terms of the aforementioned resolution informed the Petitioner that he is no longer the Up Mukhiya and the Respondent No. 3 shall exercise the powers and duties of Up Mukhiya.

5. Mr. M.S. Anwar learned Counsel appearing for the Petitioner has raised two contentions in support of this application. learned Counsel firstly submitted that the resolution as contained in Annexure-2 passed by the Executive Committee and the decision of the Respondent No. 2 in approving the same is wholly illegal and without jurisdiction. learned Counsel next contended that a duly elected Up Mukhiya cannot be removed by a resolution of vote of no-confidence, as, such power is vested only in Gram Panchayat upon complying with the mandatory provisions of Section 13 of the Bihar Panchayat Raj Act.

6. Bihar Panchayat Raj Act, 1947 (hereinafter to be referred to for the sake of brevity as the said Act) was enacted to establish and develop local self Government in the village communities of the Province of Bihar.

Executive Committee" has been defined in Section 2(e) to mean:

The Executive Committee of the Gram Panchayat consisting of the Mukhiya elected u/s 10 and the members appointed u/s 11.

"Mukhiya" has been defined in Section 2(j) to mean:

the head of the Executive Committee elected u/s 10.

The provisions relating to election of Up Mukhiya and his powers and duties are contained in Section 11A of the said Act which reads as follows:

Election of Up Mukhiya and his power and duties. - (I) The members of the Executive Committee shall elect in the prescribed manner, one of their members to be the Up Mukhiya.

(2) The Mukhiya may with the approval of the Executive Committee delegate all or any of his duties and powers to the Up Mukhiya and may at any time with the like approval withdraw or modify this same.

(3) The Up Mukhiya shall during the vacancy in the office of the Mukhiya or due to the incapacity or temporary absence of the "Mukhiya" perform all his duties and exercise all his powers and at any other time perform any duty and exercise any power delegated to him by the "Mukhiya" under Sub-section (2).

The procedure for election of an Up Mukhiya has been prescribed in Rule 57 of the Bihar Gram Panchayat Election Rules.

7. The said Act, however, was amended by Act No. VII of 1990 and Section 11A(i) was deleted and renumbered as 12(ka) thereof.

By reason of the said Bihar Act No. VII of 1990 Sub-section (3) of Section 13 has been deleted.

8. Section 13 of the said Act as it now stands after enactment of Bihar Act No. VII of 1990 reads as follows:

13 eqf[k;k ;k dk;Zikfydk lfevr ds fdLh vU; InL; dks gVk;k tkuk] inR;kx vkfn rFkk mlds ifj.kke & ?1? xzke & iapk;r] blds iz;kstufkZ fo"ks" :i ls cqyk;h x;h cSBd esa ml fLFkr vkSj er nsusokys InL;ksa ds cgqer ls fofgrjhfr ls eqf[k;k dks gVk ldsxh A

?2? ljdkj vopkj ? nqj.kp.k ? vleFkZrk ;k d?kZO; dh vis{kk ds fy, fofgr izkf/kdkjh dh flQkfj"k ij eqf[k;k ;k dk;Zikfydk lfevr gS fdLh vU; InL; dks gVk ldsxh A ijUrq bl mi&/kkjk ds v/khu dksbZ dkjZokbZ djus ds iwoZ ;FkkfLFkfr] eqf[k;k ;k fdLh vU; InL; dks dkj.k fn[kykus dk volj fn;k tk;xk %

ijUrq ;g vkSj Hkh fd ljdkj ,slh dkjZokbZ dj ldsxh tks og mfpr le>s ;fn ;jdkj }kkj mfYyf[kr vof/k ds Hkhrj] ;FkkfLFkfr eqf[k;k ;k dksbZ InL; dkj.k fn[kkus esa pwd djsa A

?2d? dksbZ eqf[k;k] mi&eqf[k;k ;k InL; tks mi&/kkjk ?1? ,oa ?2? ds v/khu in ls gVk;k x;k gks] vius in ls gVk;s tkuh dh rkjh[k ds dqN o"ksZa dh vof/k ds Hkhrj eqf[k;k] mi&eqf[k;k dk;Zikfydk lfevr ds InL; ;k ljiap ;k iap ds :i esa iqfuzokZpu dk ik= u gksxk]

(3) x x x

?4? eqf[k;k ;k dk;Zikfydk lfevr dk dksbZ Hkh InL; fcgkj iapk;r lfevr vkSj ftyk ifj"kn~ vf/kfu;e] 1961 ? fcgkj vf/kfu;e 6] 1962 ? ds v/khu xBr ;FkkfLFkfr iapk;r lfevr;ksa dks viuk R;kx & i= izLqr djrs gq, viuh inkof/k ds nksjku inR;kx dj ldsxk vkSj R;kx & i= ds Lohd`fr gks tkus ij ;g le>k tk;sxk fd mlus viuk in fjDr dj fn;k A

?5? tc eqf[k;k dk in mlds gVk;s tkus] inR;kx] e`R;q ;k vU; dkj.k ls fjDr gks tk;s rks xzke & iapk;r] ;Fkk"kh/kz ? N% eghuksa ds vUnj ? /kkjk 13 d }kkj ;Fkkisf{kr vU; eqf[k;k dk fuokZpu djsxh A

It not in dispute that election of Mukhiya as not yet taken place in terms of Sub-section (sic) Section 13 of the said Act.

9. In view of the fact that Sub-section (3) Section 13 Of the Bihar Panchayat Raj Act as been deleted, it is evident that the Petitioner not have been removed from the (Sic) Mukhiya on the basis of a no-confider motion passed on a resolution in the prescribed manner by a majority of not less than 3rd of the total membership of the Executive Committee.

10. In this View or the matter, there cannot be any doubt whatsoever that the Petitioner could have been removed from the post of Mukhiya and/or Up-Mukhiya only in a specially convened meeting of Gram Panchayat as contemplated under

Sub-section (1) of Section 13 of the said Act.

11. No counter affidavit has been filed on behalf of the State. However, a counter affidavit has been filed on behalf of Respondent No. 3. In the said counter affidavit, also it has not been nor could be contended that the impugned resolution dated 15.1.91 was passed by the Gram Panchayat in a meeting specially convened for the purpose. It is also not the case of the State and/or Respondent No. 3 that prior to passing of the impugned order dated 29.1.91 the State Government had adopted the procedure laid down under Sub-section (2) of Section 13 of the said Act.

14. It is, therefore, clear that on the admitted facts, the impugned resolution dated 15.1.91 as contained in Annexure-2 as also the order of the State Government dated 19.1.91 is wholly illegal and without jurisdiction.

15. Learned Government Pleader No. 2 appearing on behalf of the State fairly conceded that the impugned resolution and the order as contained in Annexures 2 and 3 to the writ application are not sustainable in law.

16. Mr. V.P. Singh learned Counsel appearing on behalf of Respondent No. 3, however, submitted that on the basis of Section 12(2)(ka) that the Petitioner could not have continued to function as Mukhiya for a period exceeding six months.

Section 12(2)(ka) reads as follows:

“2 d? ;fn eqf[k;k vkSj vi eqf[k;k ds in fjDr gksa rks dk;Zkfuydk lfeFr ds lnL; vius esa ls ,d O;fDr dks fofgr jhfr ls d;Zdkjh eqf[k;k fuokZpr djsxsa tks vius fuokZpu dh rkjh[k ls vf/kd ls vf/kd N% eghus rd ;k tc rd nksuksa fjfDr;ksa esa ls dksbZ fjDr Hkjh u tk;sa] nksuksa esa tks Hkh vof/k igys gks] eqf[k;k ds :i esa dk;Z djsxk A

17. From a bare perusal of the aforementioned provision it is evident that the same has no application in the facts and circumstances of this case inasmuch as it has not been disputed that the post of Mukhiya has not yet been filled up by holding an election as provided for u/s 13(5) of the Act.

18. In any view of the matter, by reason of Annexure-3 to the writ application, the Petitioner could not have been removed from the post of Up-Mukhiya on the basis of no confidence motion dated 15.1.1991.

19. Mr. Singh, thereafter, submitted that in terms of Section 19 of the Bihar and Orissa General Clauses Act, the Executive Committee could have removed the Petitioner from the post of Up-Mukhiya as he was elected to that post by the said Committee.

20. The contention of Mr. Singh is fallacious. Section 19 of the Bihar & Orissa General Clauses Act can by no stretch of imagination be said to have any application whatsoever in the facts and circumstances of this case. The procedure to elect an Up-Mukhiya of a Gram Panchayat as also the procedure to

remove him has been laid down in the said Act itself. The Petitioner, therefore, could have been removed from the post of Mukhiya/Up Mukhiya only upon strict compliance of the provisions contained in Section 13 of the said Act and not otherwise.

21. Evidently the Petitioner was removed and Respondent No. 3 was sought to be elected as an Up Mukhiya in a general meeting by reason of a resolution of no-confidence.

22. Section 13(3) as it stood prior to enactment of Act No. VII of 1990 being no longer in existence, the same could not have been taken recourse to at all. It is now well known that this Court cannot supply *casus omissus*.

23. Mr. Singh thereafter submitted that in any event as Respondent No. 3 having been elected as an Up Mukhiya, his election can be set aside by filing an election petition in terms of Rule 70 of the Bihar Panchayat Raj Election Rules.

24. Rule 70 of the Bihar Panchayat Raj Election Rules does not and cannot debar this Court from exercising its jurisdiction under Article 226 of the Constitution of India. It is now a well settled principle of law that this Court should not ordinarily direct a writ Petitioner to take recourse to alternative remedy once a writ petition has been admitted.

Further, in this case, the Petitioner has principally questioned the validity of the (sic) dated 15.1.1991 as contained in Annexure-2 and the order passed by Respondent No. 2 as contained in Annexure-3 to the writ application whereby he has been removed from Up post of Mukhiya/Up Mukhiya.

25 In view of my findings aforementioned as the Petitioner has not been removed validity the question of filling up of the vacancy by electing Respondent No. 3 as Up Mukhiya does not arise.

Rule 70 of the said Rules, therefore, cannot be taken recourse to in this case.

26. In the result, this application is allowed. The impugned resolution dated 15.1.1991 as contained in Annexure-2 and the order dated 22.1.1991 as passed by Respondent No. 2 are hereby quashed. However, it is observed that in view of Section 13(5) of the said Act, the election for the post of Mukhiya should be held forthwith.

In the facts and circumstances of this case, there will be no order as to costs.

R.N. Sahay, J.

27. I agree.