
(1990) 10 AHC CK 0062

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No's. 11258 and 11786 of 1990

Shamsher Singh

APPELLANT

Vs

VI Addl. District Judge and Others

RESPONDENT

Date of Decision : 25-10-1990

Acts Referred:

Penal Code, 1860 (IPC) — Section 186, 420, 467, 468, 469
Uttar Pradesh Panchayat Raj Act, 1947 — Section 12, 12C, 12C(1)
Uttar Pradesh Panchayat Raj Rules, 1947 — Rule 24, 24(1), 25
Civil Procedure Code, 1908 (CPC) — Order 6 Rule 16

Citation : (1991) 1 AWC 1

Hon'ble Judges : Palok Basu, J

Bench : Single Bench

Final Decision : Partly Allowed

Judgement

Palok Basu, J.—Shamsher Singh has filed Writ Petition No. 11258 of 1990 challenging the order of the S.D.M. and that of the revisional court setting aside his election as Pradhan. He alleges that he is still holding the charge of the office of Pradhan. Radhey Shyam has filed writ petition No. 11786 of 1990 challenging the alleged interference of Shamsher Singh and others in the discharge of his functioning as Pradhan having taken over charge in due course after Shamsher Singh's election was set aside.

2. Shamsher Singh was declared elected Gram Pradhan of village Khurukhunja Chandauli, Varanasi, by the Returning Officer on 6-6-1988 in the elections for the said post held under the U.P. Panchayat Raj Act, 1947 (for short the Act) having polled 498 votes defeating his nearest rival Radhey Shyam polling 493 votes. Radhey Shyam filed election petition on 10-6-1988 (Election Petition No. 9 of 1988) before the S.D.M. Chandauli East, who is the Prescribed Tribunal/Authority under the Act. By the judgment and order dated 31-1-1989 the S.D.M. found Radhey Shyam having polled 11 votes more than Shamsher Singh and consequently allowed the election petition and held, that the result declared by the Returning Officer was materially affected and that Radhey Shyam stood

elected having defeated Shamsher Singh by 11 votes. A revision by Shamsher Singh was taken to the District Judge, Varanasi, u/s 12 of the Act which was numbered as Revision No. 13 of 1982 which ultimately came to be decided by the VIth Additional District Judge, Varanasi, who dismissed it on 12-4-1990.

3. Shamsher Singh's writ petition has been admitted by this Court on 30-4-1990 and on the application for interim prayer it was said that in the meantime operation of the orders dated 12-4-1990 and 31-1-1990 (correct date 31-1-1989) shall remain stayed. In Radhey Shyam's writ petition it was directed that it should be listed for admission along with writ petition of Shamsher Singh. In the meantime affidavits between Shamsher Singh and Radhey Shyam were exchanged. No counter affidavit has been filed on behalf of the State of U.P. or the Returning Officer or the Additional District Judge or any other official impleaded in either of the writ petitions in spite of time having been granted for the said purpose to the Standing Counsel. These two petitions were heard together and are being disposed of by this judgment.

4. It may be stated that if Shamsher Singh's writ petition is dismissed in to to then this Court will be called upon to decide the writ petition of Radhey Shyam as the assertion of Radhey Shyam about having taken charge of the office of Pradhan would mature into conferring rights on Radhey Shyam only when Shamsher Singh fails. If Shamsher Singh succeeds even partly, Radhey Shyam's writ petition dies a natural death.

5. Sri Devendra Pratap Singh and Sri R. N. Singh, learned Counsel for the Petitioners Shamsher Singh and Radhey Shyam respectively have been heard at sufficient length. They have also filed written arguments in this Court.

6. Two basic questions have been argued. Firstly, there was no justification for the S.D.M. to order recounting of votes. Secondly, the actual recounting was not legally done inasmuch as it appears to have been done stealthily without prior information to the Petitioner Shamsher Singh. In reply it was stated that both the arguments were baseless inasmuch as the materials placed before this Court indicates beyond doubt that Radhey Shyam pressed his election petition on the ground of recounting and, therefore, the said prayer was rightly allowed by a specific order, which order has not been interfered with by this Court on two earlier occasions once by a single Judge and then by a Division Bench. The said order having thus been upheld does not require interference. The recounting was properly done and, therefore,

7. Sri Devendra Pratap Singh has said that the election petition itself filed by Radhey Shyam was defective for two reasons (i) it was not accompanied by a treasury challan of Rs. 5/- as required by Rule 24 of the Uttar Pradesh Panchayat Raj Rules, 1947 and (ii) not only that the order dated 10th June, 1988, directing recounting was bad, Shamsher Singh's application under Order VI Rule 16, Code of Civil Procedure, which was moved on 22-7-1988, praying for striking out the paragraph in the election petition was not decided appropriately.

8. Rule 24 of the said Rules provides the form of application challenging an election u/s 12-C of the Act. In Sub-section (1) of detailed instructions about the contents of the election petition have been given and then through a proviso it has been provided that a sum of Rs. 5/- shall have been deposited in the personnel Ledger Account of the Gaon Sabha concerned as security and its treasury challan should accompany the petition. Admittedly the said sum of Rs. 5/- was deposited on 14-6-1988 and no challan was filed along with the election petition. The limitation for filing an election petition has been fixed as 90 days by the aforesaid Sub-rule (1) of Rule 24 of the said Rules. Therefore, if a deposit is made much prior to the expiry of limitation, it must be held that compliance of the rule has been made. Security deposit of Rs. 5/- by itself does not mean much except that it should indicate the seriousness on the part of the person who challenges the election. It may also indicate that the election Petitioner has the intention of genuinely pursuing the election. In any case, the deposit of Rs. 5/- has been added only as a proviso to the main Sub-rule and it must be held that even before final adjudication takes place or before the limitation for filing the election petition has expired, the making of the deposit at a point earlier than the said two events will be sufficient compliance of the law. It is, therefore, held that there is no force in the argument that the election petition was defective for the treasury challan not accompanying the election petition, as the sum of Rs. 5/- was deposited within four days of the filing of the election petition.

9. Coming to the second point, it may be noted that the elections for electing the Pradhan of the Goan Sabha Khurubunja was held on 5-5-1988 and the counting was done on 6-6-1988 by the Returning Officer. One of the main grounds canvassed in the election petition was that on 6-6-1988 the election Petitioner Radhey Shyam, his brother as well as his Agents were put under arrest because of the manipulations of Shamsher Singh with the help of Circle Officer and a false case was registered against him and others under Sections 420/467/468 IPC. The Counting was done at the back of Radhey Shyam and his Agents. The Returning Officer flouted the rules and had deliberately made wrong counting prejudicing the case of Radhey Shyam and that even though he should have been factually declared elected, the Returning Officer illegally declared Shamsher Singh victorious. Hence he filed the election petition. However, on hearing Radhey Shyam, the election petition was duly registered and a recount of votes was ordered. On coming to know of the pendency of the election petition Shamsher Singh put in appearance and by a separate application prayed for recalling of the order directing a recounting of the votes. The date of recounting was fixed as 16-6-1988 which was postponed to 29-6-88. Shamsher Singh held another application again specifically praying that the order of recounting be recalled.

10. It may be stated that Radhey Shyam had made detailed averments in the election petition as to the reasons on the basis of which he claimed a recount of the votes. Not only that, a separate application was also filed by Radhey Shyam. True copies of the election petition as well as the separate application moved by

Radhey Shyam has been filed as Annexures-1 and 2 to the writ petition of Shamsher Singh. From Annexure-3 it appears that the S.D.M. had directed the matter to be put up on 16-6-1988 for recounting of the ballot papers.

11. At this stage the two writ petitions filed by the Petitioner Shamsher Singh in this Court have to be referred to in detail. On 24-6-1988 Shamsher Singh filed a writ petition for issue of a writ of mandamus/certiorari praying that the order of recount be quashed. Under the Rules of Court, Shamsher Singh's writ petition came up before an Hon"ble Single Judge and the following order was passed:

The Petitioner in this writ petition has prayed a writ of certiorari quashing the order dated 10-6-1988 passed by Respondent No. 2 be issued.

Heard the learned Counsel for the parties and perused the papers.

By order dated 10-6-1988 the Respondent No. 2 fixed 16-6-1988 for recounting of ballot papers and notices were also ordered to be issued to the opposite party (Petitioner). On 16-6-1988 the Respondent No. 2 fixed 29-6-1988 for filing written statement and for hearing the argument with regard to the aforesaid order dated 10-6-1988

From the order dated 16-6-1988 it is clear that the Respondent No. 2 has yet to hear arguments with regard to the order dated 10-6-1988. The Respondent No. 2 shall decide the question of recounting of the ballot papers after perusal of written statement and after hearing the arguments of the parties.

12. On 20th December, 1988, the Petitioner Shamsher Singh filed another writ petition with the same reliefs praying for quashing of the order of recount. Under the Rules of the Court, this time Shamsher Singh's writ petition came up before a Division Bench and was dismissed in limine on 20-12-1988 with the following observations:

Upon hearing the learned Counsel for the Petitioner we direct the Respondent No. 3 to proceed with the election dispute strictly in accordance with the law and keeping in view the directions of this Court contained in its order dated 24-6-88 copy of which has been filed as Annexure-2 to the writ petition. The writ petition is accordingly disposed of.

Let a copy of this order be issued to the learned Counsel for the Petitioner on payment of usual charges within 48 hours.

13. The prescribed Tribunal/Authority as well as the revisional court have interpreted the two orders of this Court to mean that the original order of recounting passed by the S.D.M. on 10-6-1988 was left intact by the High Court on the two occasions when it was sought to be got quashed and thus the said order had received the stamp of approval from this Court twice. On behalf of the Petitioner, however, it was contended that since the Petitioner had already prayed for recalling of the order of recounting before the S.D.M. the said order should have been recalled. It was further argued that there was not enough material to

justify the order of recount. Reliance in this connection was placed on two decisions:

(i) Kara Adhar v. Distt. Judge (1984 AWC 246) and

(ii) P.K.K. Shamsudeen Vs. K.A.M. Mappillai Mohindeen and Others, .

14. The law appears to be settled beyond doubt that recounting can be ordered only in exceptional cases when there is sufficient material for justifying such an order. It is further apparent that the result of the recounting should not influence the mind of the Court while judging whether the initial order directing recount should have been passed or not. As stated above, in the application and the averments in the sworn-petition challenging the election of Shamsher Singh, there was enough material on the basis of which the S.D.M. may have passed an order directing the recount. It goes without saying that had the order been absolutely illegal, his two earlier writ petitions would not have been dismissed. The two orders show that the S.D.M.'s order directing recount was not interfered with but while dismissing those It was observed that if after filing of the written statement by Shamsher Singh, a case for recalling of the said order was made out, the S.D.M. may do so.

15. On the materials existing in these writ petitions and the various orders passed by the S.D.M. as noted in the order sheet, it cannot be said that at any point of time the S.D.M felt inclined to review his aforesaid order of recounting and has thus impliedly rejected such a prayer. It appears that the written statement was filed by Shamsher Singh on 20-9-1988. From the order sheet dated 23-9-88 (as shown in the order sheet-Annexure 10) it is clear that the S.D.M. heard arguments of both sides and directed that the ballot papers and other documents be put under sealed cover for recounting. The arguments on the application moved later by parties was heard on 9-12-1988 and 6-1-1989. On 27-1-89 the S.D.M. directed that the ballot papers be summoned from the office of P.R.O. and the case be posted for hearing in his court on 31-1-1989. From these proceedings it is clear that the parties have full knowledge that the S.D.M. did not allow the review application and instead fixed 31-1-1989 as the date of recount in the presence of the parties. Under the circumstances it shall have to be held that the order dated 10-6-1988 has been twice approved by this Court-once by a single Judge and then by a Division Bench, and the S.D.M. has proceeded in terms of the order of this Court dated 29-6-1988. Therefore, this Court cannot now entertain any argument and interpret that the order dated 10-6-1988 directing a recount of the votes polled is illegal. Moreover, the order dated 31-1-89 indicates that at the actual counting by the Returning Officer, Radhey Shyam and his Agents were kept away by getting a case registered, against them. This is a very serious matter. One need not emphasise that the ultimate of election process is dependent upon the counting of votes and if the presence of one of the contestants or his Agents at the time of counting is successfully prevented, it is likely to cause immense damage to the allegedly losing candidate. The other important factor to be remembered here is that

Radhey Shyam gave details and exact specifications of the faults in the counting by the Returning Officer. In his election petition as well as in the separate application which were duly sworn (praying for recounting of votes) he had pleaded that 9 valid votes cast in his favour were wrongly shown by the Returning Officer as invalid (i.e there were only 11 invalid votes instead of 20) and that 7 invalid votes have been added as valid (instead of 498 valid votes. Shamsheer Singh has secured 491 valid votes). The moving of the application praying for recounting, even though there were more than sufficient averments in the election petition itself, indicates that the election-Petitioner Radhey Shyam wanted to place his case only on recounting of the votes and on no other points of challenge. In this view of the matter the application of Shamsheer Singh moved later on before the S.D.M. praying that some averments in the election petition be struck off, loses importance. Therefore, it must be said that there was sufficient material before the S.D.M. for directing recount. The further proceedings, the order noted in the order sheet of the Court of S.D.M. (Annexure 10) and the other connected materials indicate that the SDM has not accepted the prayer to review or recall the said order. Therefore, the order of the S.D.M. dated 10-6-1988 directing recount has to be upheld on merits as also on the ground that on two previous occasions this Court refused to interfere with the order of recount.

16. However, a very serious controversy has been raised as to how and when a recounting was done in the Court of the S.D.M. concerned. It may be relevant to mention here that the Petitioner Shamsheer Singh has filed a document (Annexure 10-1) which purports to be an enquiry made by him in the said court of the S.D.M. the English version of which is as follows:

Question Answer Will you please tell as to Today dated 31-1-89 I came whether in the aforesaid case to Court at 10,30. In my Question Answer relating to the election of presence counting was not Gram Sabha Khurukhunja, done.

recounting of the votes was at all done in the court on 31-1-1989?

17. Keeping this document in mind, the averments in Shamsheer Singh's petition become very relevant. It has been averred in paragraph 24 to 28 that no recounting was done meaning that no recounting was done in the presence of either Shamsheer Singh or his counsel. As stated above, no counter affidavit has been filed by the state. The reply of Radhey Shyam is contained in paragraphs 18, 19 and 20 of the counter affidavit. Not only that, the replies are evasive and non-committal, no document has been filed as proof of the recounting by the S.D.M. in paragraph 20 of the counter affidavit filed by Radhey Shyam to the writ petition of Shamsheer Singh it has been stated that Shamsheer Singh and his associates abused the S.D.M. Chandauli and tampered with the office record of the case. The S.D.M. Chandauli reported the matter to the Police Station Chunduli, district Varanasi. During the course of arguments it was stated at the Bar that a charge sheet had been filed relating to the incident which took place on 31-1-1989 in the court. The alleged criminal assault (marpit), tempering of

the record etc is said to have been made on 31-1-1989 at 10.45 A.M. in the court of S.D.M. Chandauli. Neither of the parties has filed any document showing that memorandum was prepared by the S.D.M. which may indicate the mode and method adopted by the S.D.M. at the recounting of the votes. It is also strange that the State of U.P. has not come out with any counter affidavit indicating the manner in which the recounting may have been done in view of the serious controversy noted above, it is not clear as to how and when the recounting was done. The result of recount is found mentioned only in the order.

18. This compels a close look at the impugned order dated 31-1-1989. The judgment runs in 10 closely typed pages (see Annexure-11). In the first paragraph the respective claims of the election-Petitioner Radhey Shyam and the Respondent therein Shamsher Singh have been set out in detail. In second paragraph details of procedural matters have been incorporated while the written statement having not been filed by the Petitioner Shamsher Singh, has been noted. Reference has also been made to the order of this Court dated 24-6-1988. Thereafter the next paragraph deals with the observations of this Court in the writ petitions and also of the District Judge, Varanasi, in some revision taken to his Court at certain interlocutory stages. Then reference has been made to the objections raised by the Petitioner Shamsher Singh. The subsequent paragraph deals with the directions contained in this Court's order dated 20-12-1988 and that of the District Judge's order dated 12-12-1988 rejecting a transfer application. The following paragraph again takes up the case of Radhey Shyam that he and his Agents were wrongly arrested and kept away at the time of counting and falsely implicated in a criminal case under sections 420, 467, 468, 469, 471 and 186 IPC. The next paragraph is the finding of the S.D.M. that the counting was wrongly done in the absence of Radhey Shyam and his Agent Matbar Singh and that the alleged counting happened at 12 in the mid-night. About the said illegal actions of the Returning Officer an FIR was lodged with Sohrab Ali who was another contestant. A further finding has been recorded in this paragraph that the security deposit has already been made though not along with the election petition and, therefore, it will not affect the maintainability of the petition. In the last paragraph it has been put in that the recounting was done which indicates the mistakes (which have been incorporated above) as a result of which the result was materially affected.

19. In view of the analysis of the judgment it is clear that no reference has been made as to whether the recounting was done in the presence of the parties or their counsel. It may be repeated that the alleged misbehavior of Shamsher Singh on the day of recount i.e. 31-1-1989 happened at or before 10.45 A.M. That being so, it is difficult to understand the chronological events on the said date beginning with the opening of the court, arrival of the Presiding Officer, hearing the parties (i.e. counting of the votes, preparing the memorandum or not preparing it?) and then pronouncing the judgment before the said hour.

20. Rule 25 of the Rules framed under the Act lays down that every election

petition shall be tried by the Prescribed Tribunal, as nearly as may be, in accordance with the procedure applicable under the Code of Civil Procedure, to the trial of suits. It goes without saying that in a trial of a suit the presence of the parties or their counsel, properly hearing them and then getting their signature on the order sheet etc. have to be ensured by the court. As stated above, in the present case, no material has been put forth indicating compliance of any of the provisions in the Code of Civil Procedure. The state has not filed any counter affidavit. No separate memorandum incorporating the result of the recount has been filed by any of the parties with the result that for finding out the result of the recounting, one will have to refer to the judgment itself. Normally result of the recounting should be separately and distinctly recorded before the judgment is drawn on the strength of the said memorandum.

21. It is of paramount importance that the recounting should be done " in the fairest manner and strictly in accordance with law. The rights of the contesting parties shall depend on the recounting alone and, therefore, utmost sanctity must be attached to such an occasion. As stated above, there is no hesitation in holding that the method and manner of the recounting appears to be in doubt.

22. The result of the aforesaid discussion is that the writ petition No. 11258 of 1990 filed by Shamsher Singh stands partly allowed. The order of the S.D.M. Chandauli, dated 10-6-1988 directing recount of the votes polled is upheld. The declaration of result as contained in his order dated 31-1-1989 and as upheld, by the order of VI Additional District Judge, Varanasi, on 12-4-1990 are quashed. The S.D.M. is directed to have the recounting done in accordance with law within a period of one month from the date of production of a certified copy of this order before him by any of the parties and with full security protection, with due intimation to the parties and informing the District Judge, Varanasi, of the date and time of the recounting. The District Judge will ensure that the recounting is done peacefully in accordance with law. Thereafter the S D.M. will proceed to pass fresh order on the election petition of Radhey Shyam pending before him. The Writ Petition No. 11786 of 1990 filed by Radhey Shyam is dismissed. All interim orders in the two cases are vacated. In view of the facts and circumstances of the case the parties shall bear their own costs.