in Srinagar in the name of M/s. Jawahar Lal, Joginder Lal and that he wound up that business somewhere in 1954. It is further stated by him that he did business at Amritsar in the name of M/s. Moti Ram Madan Lal, but that was also wound up after one and a half years.

(10) The trial Court beyond doubt was in error in holding that no notice under section 80, Code of Civil Procedure, was necessary, but the finding to that effect does not affect the result of this suit as it has also been held that a notice was in fact served under the said provision of law. In view of the authoritative pronouncement of their Lordships of the Supreme Court in *Sawai Singhai Nirmal Chand* v. *The Union of India* (5), *Ram Sundri alias Sham Sundri* v. *The Collector, Ludhiana, and others* (6), cannot any more be held to have laid down good law. As observed in *Sawai Singhai Nirmal Chand's case* (5) provisions of section 80 are attracted to a suit filed under Order 21, rule 63, Code of Civil Procedure. Mr. Awasthy did not challenge the factum of service of notice.

(11) For the foregoing reasons, we uphold the findings of the trial Court and consequently the decree passed by it. The appeal is dismissed. In the peculiar circumstances of the case, the parties are left to bear their own costs.

K. S. K.

CIVIL MISCELLANEOUS.

Before R. S. Narula and Rajendra Nath Mittal, JJ.

MANGE RAM ETC.,—*Petitioners.*

versus

THE STATE OF HARYANA ETC..—*Respondents.*

Civil Writ No. 259 of 1972

May 4, 1972.

Punjab Gram Panchayat Act (IV of 1953) as amended by Haryana First Amendment Act (XIX of 1971)—Sections 3(1), 5(2), 6(1), 13A, 13B—Haryana Gram Panchayat Election Rules (1971)—Rules 38(2) and (3),

(5) A.I.R 1966 S.C. 1068.
(6) 1959 P.L.R. 455.

39(3)—*Haryana Gram Panchayat (Co-option of Women Panches) Rules* (1971)—*Rules* 3(2), 3(3) *and* 4(3)—*Section* 6(1), *Panchayat Act before amendment—Co-option of a woman Panch thereunder—Whether "election", capable of being challenged in an election petition—Such co-option after the amendment—Whether amounts to "election"—Period of seven days required under rule* 38(2) *and* (3) *of Election Rules, rule* 3(2) *and* (3) *of Co-option Rules and the period of three days required under rule* 30(3) *of Election Rules and* 4(3) *of Co-option Rules—Whether starts from the "sending" or "giving" of the notices—Expression "three days clear notice"—Whether synonymous with "three clear days notice"—Meeting for the election of a Sarpanch—Requirements of rule* 38(2) *and* (3) *and of rule* 39(3), *Election Rules for issue of notices to the Panches—Whether apply to a Panch elected or co-opted after the issue of such notices—Constitution of India* (1950)—*Article* 226—*Questioning the validity of an election without filing on election petition—Extraordinary constitutional jurisdiction of the High Court under Article* 226—*Whether can be invoked.*

Held, that under section 6(1) of Punjab Gram Panchayat Act, 1952, as it stood before its amendment by Haryana First Amendment Act, 1971, and before the framing of Haryana Gram Panchayat (Co-option of Women Panches) Rules, 1971, the co-option of a woman panch was not an election and could not therefore be called in question by an election petition.

Held, that the co-option of a woman panch under the proviso to sub-section (2) of section 5 of the Act as amended by Amendment Act, 1971 is made "election" within the meaning of section 13-A(e) of the Act and in as much as a co-opted woman Panch is a "panch" within the meaning of section 3(1) of the Act, her election is liable to be called in question by an election petition under section 13-B of the Act read with rule 44 of Haryana Gram Panchayat Election Rules, 1971.

Held, that there is great significance in the use of word "sent" in the expression "notice shall be sent by post" in sub-rule (3) of rule 3 of Haryana Gram Panchayat (Co-option of Women Panches) Rules, 1971 and in sub-rule (3) of rule 38 of the amended Haryana Gram Panchayat Election Rules, 1971. Similarly the omission of the word "served" in the first part of sub-rule (3) of rule 39 of the amended Election Rules and the omissoin of the same word in the opening part of sub-rule (3) of rule 3 of the Co-option Rules shows a deliberate departure from the ordinary phraseology used for such purposes. The word "giving" has been used in sub-rule (3) of the relevant part of both the rules in relation to the notice instead of the word "serving". A third factor which is significant in this respect is that the word "served" has been used in sub-rule (3) of rule 38 as well as in sub-rule (3) of rule 3 (Election Rules and Co-option Rules respectively) in relation to the notice required to be served through an official of Block or through the Gram Sachiv, but no period of such a notice has been prescribed in contradistinction to the number of days which must elapse between the sending of the notice by post and the date of the meeting.

Hence the period of seven days of the notice required to be served on the Panches under sub-rules (2) and (3) of rule 38 of the Election Rules, and sub-rules (2) and (3) of the Co-option Rules, and the period of three days required for a notice under rule 39(3) of the Election Rules and 4(3) of the Co-option Rules starts from the date of sending or giving, i.e., despatching of the notice and not from the time of delivery or service of the notice on the concerned Panch.

Held, that keeping in view the scheme of the Election Rules and Co-Option Rules, it appears that the phrase 'three days clear notice' has been used in the relevant rules to convey the same requirement as is conveyed by the expression 'three clear days notice', which means that three days must elapse between the date on which the notice is sent and the date on which the meeting is held.

Held, that requirements of sub-rule (2) and of the purview of sub-rule (3) of rule 38 and of sub-rule (3) of rule 39 of the Election Rules do not apply to the notice which has to be served on a Panch elected or co-opted after the issue of notices of the meeting for electing a Sarpanch. Notice to such a Panch can be validly served by the Presiding Officer of the meeting in such manner as he deems fit under the proviso to rule 38(3) of the Election Rules.

Held, that though the High Court will not ordinarily entertain a writ petition for questioning the validity of an election which could be called in question by an election petition under the Act, there is nothing in the Constitution which bars the High Court from exercising its writ jurisdiction in a fit case where refusal to grant the relief is likely to result in manifest injustice and the error of law or of jurisdiction is apparent on the face of the admitted record of the election proceedings. Inspite of the fact that section 13-B of the Panchayat Act bars all remedies for questioning an election under the Act except by an election petition, it does not create a bar to the invoking of the extraordinary constitutional jurisdiction of the High Court under Article 226.

Petition under Articles 226 and 227 of the Constitution of India praying that a writ in the nature of quo warranto or any other appropriate writ, direction or order be issued directing respondents 4 and 5 to furnish information to this Hon'ble Court as to their right to hold the office of Panch and Sarpanch respectively and their co-option and election be set aside.

R. S. Mittal, Advocate, *for the petitioners.*

B. S. Gupta, Advocate for Advocate-General, Haryana, *for respondents* 1—3.

H. S. Hooda, Advocate, *for respondents* 4 to 7.

JUDGMENT.

NARULA, J.—We are called upon to pronounce in this petition under Articles 226 and 227 of the Constitution upon the validity of the co-option of Mst. Nanhti respondent No. 4 as a Panch and upon the election of Dhan Singh respondent No. 5 as Sarpanch of the Gram Panchayat Pichoppa Kalan, tahsil Charkhi Dadri, district Mohindergarh (Haryana) (hereinafter called the Panchayat) in the circumstances hereinafter mentioned.

(2) Mange Ram petitioner No. 1, Dhan Singh, Chander and Rameshwar, respondents Nos. 5 to 7, one Jai Chand, and one member of a Scheduled Caste, namely Pahlad, were elected as Panches of the Panchayat in the election held on July 5, 1971. Notice (Annexure 'A') was issued by the Block Development and Panchayat Officer (respondent No. 3) on December 13, 1971, to all the above-mentioned Panches for holding a meeting of the elected Panches at 8 A.M. on December 17, 1971, for co-opting a woman Panch for the Panchayat, under rule 4 of the Haryana Gram Panchayat (Co-option of Women Panches) Rules, 1971 (hereinafter referred to as the Co-option Rules). On the same day respondent No. 3 issued another notice (Annexure 'B') to all the Panches for electing a Sarpanch of the Panchayat under rule 39 of the Haryana Gram Panchayat Election Rules, 1971 (hereinafter called the Election Rules) at 10.30 A.M. on December 17, 1971. Both the notices were received by Mange Ram petitioner on December 14, 1971.

(3) Nanhti respondent No. 4 was declared elected as a co-opted woman Panch defeating her rival candidate Mst. Shanti petitioner No. 2 in the meeting held at 8 A.M. on December 17, 1971. In the second meeting, in which Nanhti also voted, Dhan Singh respondent No. 5 was declared elected as Sarpanch defeating Mange Ram petitioner. On December 23, 1971, this joint petition was filed by Mange Ram and Shanti impugning the co-option of respondent No. 4 and election of respondent No. 5 as Sarpanch. In contesting the petition respondent No. 1 (the State of Haryana), respondent No. 2 (the Inspector Co-operative Society, Charkhi Dadri, who presided over the two meetings) and respondent No. 5 (the elected Sarpanch), have filed separate written statements. The petitioners have filed a replication in reply to the written statement of respondent No. 5.

(4) Before noticing the rival contentions of the parties on the merits of the controversy involved in this case, it is necessary to dispose of two objections of a somewhat preliminary nature raised

by Mr. H. S. Hooda Advocate for respondents Nos. 4 to 7 at almost the fag end of the hearing of this petition. He has firstly contended that this petition suffers from a misjoinder of parties in as much as the defeated Sarpanch and the defeated candidate for election as a woman Panch cannot be permitted to join together in filing a writ petition for questioning two separate elections for two separate offices. At the first sight this argument appears to be quite attractive. On the facts of this case, however, much of the charm in the argument is lost by the fact that both the petitioners impugned both the elections on grounds which are common to each of the two elections. Though Mr. Mittal went to the length of suggesting that if we feel that a joint petition could not be filed by the two petitioners, we may in the circumstances of this case entertain, hear and decide this petition as confined to the claim of Mange Ram petitioner No. 1, and not dismiss the petition on that ground, yet he made it clear that he was not asking for that course being adopted at his instance. After having heard counsel on the merits of the controversy, we are of the opinion that even if we entertain and decide the claim of petitioner No. 1 alone, we will have to pronounce on the validity of all the grounds urged against the legality of the election of the co-opted woman Panch by which the second petitioner is aggrieved. Mr. Hooda has relied in support of this objection of his on my judgment in *Amrik Singh Waryam Singh* v. *B. S. Malik and others*(1). The real objection in the case of *Amrik Singh Waryam Singh* was against a single election petition having been filed for calling in question the election of a Sarpanch and a Panch. It was on those facts that I had held that in view of the provisions of sections 13-B and 13-C of the Act and rules 44 and 45 of the Election Rules one composite election petition could not be filed. In the case before us we are concerned with the legality of two independent persons having joined together in filing a single writ petition to question two separate elections. We cannot, however, lose sight of the fact that neither the joint petition has caused any prejudice to any of the respondents, nor has it in any manner complicated the issues involved in this litigation. After carefully considering the submissions made by the learned counsel, we are inclined to think that in view of the peculiar facts of this case and in view of the common grounds sought to be urged by both the petitioners, it cannot be said that this petition is liable to be dismissed on account of multifariousness or misjoinder of petitioners.

(1) A.I.R. 1966 Pb. 344.

(5) The second objection of Mr. Hooda is really responsible for this petition having been admitted to a Division Bench in the very first instance. According to the learned counsel for respondents 4 to 7, this petition must be dismissed on the short ground that the petitioners have not exhausted the alternative remedy available to them for questioning the election of respondents 6 and 7 as Panches, of respondent No. 4 as co-opted woman Panch, and of respondent No. 5 as Sarpanch by way of appropriate election petitions under section 13-B of the Punjab Gram Panchayat Act, 1952 (Act 4 of 1953) (hereinafter called the Act) as applicable to the State of Haryana, read with rule 44 of the Election Rules. (The question of impugning the election of respondents 6 and 7 as Panches has arisen on account of one of the points raised in the case being about those particular Panches having illegally voted at the impugned elections on the ground that they were not qualified to be elected or to continue as Panches of the Panchayat, as they were tenants of the Panchayat.) Section 13-B of the Act reads as follows :—

> "No election of a Sarpanch or Panch shall be called in question except by an election petition presented in accordance with the provisions of this Chapter".

Rule 44 of the Election Rules is in the following terms :—

> "(1) The election petition under section 13-B of the Act, shall be preferred to the Ilaqa Magistrate within whose jurisdiction the Sabha area is situate. He shall be the prescribed authority in this behalf.
>
> (2) The petitioner shall enclose with the petition copies of the petition and of its enclosures equal to the number of respondents."

(6) When this petition came up for motion hearing before Gurdev Singh and Gopal Singh, JJ. on February 1, 1972, Mr. R. S. Mittal, the learned counsel for the petitioners, placed reliance on the judgment of B. R. Tuli J. in *Bishan Kaur* v. *The State of Punjab and others* (2), in support of his contention that the co-option of respondent No. 4 was not an "election", and the same could not, therefore, be questioned in an election petition under section 13-B of the Act. That argument was advanced in support of the proposition that section 13-B did not, therefore, bar the filing of this petition in relation

(2) I.L.R. (1971)1 Pb. & Hr. 428.

to the impugned co-option. Notice of motion of the petition was thereupon ordered to issue to the respondents. At the adjourned motion hearing, the petition was admitted and directed to be heard by a Division Bench in the very first instance as it has been contended that the judgment of Tuli, J. in *Bishan Kaur's case* (2) (supra) did not apply to the impugned co-option, and it was thought to be desirable to avoid accumulation of petitions involving similar points.

(7) The first point to be considered in this context is whether Nanhti respondent No. 4 has been co-opted as a Panch "by election" or not, and if so, whether her election as a Panch by the previously elected Panches could or could not be called in question by an election petition under section 13-B of the Act. If it is found that the election of a co-opted Panch can be questioned in an election petition under the Act and the Election Rules, it will have to be decided whether the judgment of Tuli, J. in *Bishan Kaur's case* (2) needs reconsideration or not.

(8) Section 13-B of the Act and rule 44 of the Election Rules have already been quoted. In order to answer the question posed above, we have to find out two things, namely (i) whether the co-opted Panch is or is not a "Panch" within the meaning of section 3(i) of the Act: and (ii) whether the process by which respondent 4 has been co-opted under section 5 of the Act and the Co-option Rules does or does not constitute an "election" within the meaning of section 13-A(e) of the Act. "Panch" is defined in section 3(i) to mean *inter alia* a member of a Gram Panchayat "elected or appointed under this Act and includes a Sarpanch." It is apparent that a co-opted woman would always be a "Panch" within the meaning of the statutory definition of that expression irrespective of whether she is elected or otherwise appointed.

(9) Constitution of a Gram Panchayat was originally provided by section 6 of the Act. The relevant part of the said section (sub-sections 1 to 3) when originally enacted in the principal Act was in the following terms:—

> "(1) Every Sabha shall, in the prescribed manner, elect from amongst its members a Chairman of the Sabha and an executive committee consisting of such number of persons not being less than five or more than nine including the

Sarpanch of the Executive Committee as the Government may determine taking into account the population of the Sabha area:

Provided that if no woman is elected as a Panch of any Sabha, the woman candidate securing the highest number of votes amongst the woman candidates in that election shall be co-opted by the Panchayat as a Panch of that Sabha and where no such woman candidate is available the prescribed authority shall co-opt as such Panch a woman member of the Sabha who is qualified to be elected as a Panch.

(2) The Chairman shall also be called the Sarpanch of the Executive Committee which shall be styled as the Gram Panchayat, the members, thereof to be called Panches.

(3) Every woman co-opted as a Panch under the proviso to sub-section (1) shall have the right to vote at a meeting of the Gram Panchayat.

(4) * * * * * * *

(5) * * * * * * *

(10) It may be noticed at this very stage that the proviso to sub-section (1) of section 6 under which a woman had to be co-opted as a Panch on a Panchayat did not originally provide for any kind of an election for that purpose in any contingency. In case one or more women candidates had contested the election and at least one of them had been elected as a Panch, no question of co-option arose. In case none of the women candidates was elected, the one securing the highest number of votes amongst the defeated women candidates had to be co-opted by the Panchayat. Where no such woman candidate was available, a duty had been enjoined on the prescribed authority to co-opt any woman member of the Gram Sabha who might have been qualified to be elected as a Panch as such a Panch on the Panchayat in question. When Tuli, J. held in *Bishan Kaur's case* (2) that the co-option of a woman Panch does not amount to "election" which requires to be set aside by an election petition, the learned Judge was dealing with a Punjab case which arose under the original provision as quoted above. We have no doubt that the view taken by the learned Judge of the legal position as it prevailed

under the unamended relevant portion of section 6 of the Act is unexceptionable. Section 6 of the Act underwent a modification by operation of section 4 of the Punjab Gram Panchayat (Haryana Amendment) Act (19 of 1971). Section 4 of the Haryana First Amendment Act replaced Sections 5 and 6 of the principal Act by new provisions. The relevant portion of original section 6 has been brought into sub-sections (2) and (3) of section 5. Sub-sections (1), (2) and (3) of the newly enacted section 5 read as follows:—

"(1) Government may, by notification, establish a Gram Panchayat by name in every Sabha area.

(2) Every such Gram Panchayat shall consist of such number of Panches not being less than five or more than nine as Government may determine taking into account the population of the Sabha area and such Panches shall be elected by the Sabha, in the prescribed manner, from amongst its members :

Provided that if no woman is elected as a Panch of any Gram Panchayat, the woman candidate securing the highest number of votes amongst the women candidates in that election shall be co-opted by the Gram Panchayat as a Panch of that Gram Panchayat and where no such woman candidate is available the prescribed authority shall co-opt as such Panch a woman member of the Sabha who is qualified to be elected as a Panch.

(3) Every woman co-opted as a Panch under the proviso to sub-section (2) shall have the right to vote at a meeting of the Gram Panchayat."

The new provision does not contain any modification which may be material for our purposes. The proviso to sub-section (2) of section 5 of the replaced provision in the principal Act was further amended by section 2 of the Punjab Gram Panchayat (Haryana Second Amendment) Act (29 of 1971) to read as follows:—

"Provided that if no woman is elected as a Panch of any Gram Panchayat, the elected Panches shall co-opt, in the manner prescribed, as Panch a woman member of the Sabha who is qualified to be so elected."

The above mentioned amendment came into force by operation of sub-section (2) of section 1 of the Second Amendment Act with effect from the 1st day of June, 1971. The co-option rules framed under section 101 of the Act were notified in the Haryana Government Gazette (Extraordinary), dated September 22, 1971. Rule 5 of the Co-option Rules prescribes the method of co-option of a Woman Panch and is in the following terms:—

"(1) At the time and place appointed for co-option of a Woman Panch the Presiding Officer shall ask the Panches present to propose the names of women members of the Sabha, who are qualified to be elected as Panches, as candidate for co-option and shall write down the name of each candidate along with the name of the proposer and shall obtain signatures or thumb mark of the proposer against the name of the candidate proposed :

Provided that a Panch shall not propose more than one candidate for co-option.

(2) After all the names have been proposed, the Presiding Officer shall read out to the Panches, the names of the candidates and hear objections, if any, raised by a Panch against the eligibility of the proposed candidates for being co-opted as Panch. The Presiding Officer shall also satisfy himself from the electoral roll of the State Legislative Assembly pertaining to the Sabha area whether the names of the candidates find mention therein or not. In case the candidate is not found to be qualified to be elected as Panch under section 5 or 102 of the Act or her name does not exist in the electoral roll, her candidature shall be rejected and the reasons for rejection should be recorded in writing. The Presiding Officer shall then read out to the Panches present the names of the candidates who, after scrutiny, are found to have been rightly proposed for being co-opted as Panch.

(3) The Presiding Officer shall be supplied with a copy of the electoral roll of the State Legislative Assembly pertaining to the Sabha area.

(4) If only one name of woman candidate is proposed, the Presiding Officer shall declare such woman to be co-opted.

Otherwise, he shall call upon the Panches to decide the co-option of a Woman Panch by secret ballot in the manner laid down in the following sub-rules.

(5) The Presiding Officer shall provide at the place where the meeting is held, a ballot box with such mechanical device that the ballot paper could be inserted therein but cannot be withdrawn therefrom without the box being opened. The ballot box shall be placed where it is visible to the Presiding Officer and the Panches.

(6) Immediately before voting the Presiding-Officer shall show the ballot box in open condition, to the Panches present, so that they may see that the box is empty. Thereafter the ballot box shall be closed and sealed in the presence of the Panches.

(7) (i) The Presiding Officer shall be supplied with sufficient number of the ballot papers in Form A containing printed symbols on which the names and particulars of the woman contesting candidates shall be typed or legibly written in Hindi in an alphabetical order against each symbol. The Presiding Officer shall explain to the Panches the symbol appearing against the name of each candidate by exhibiting a ballot paper to all the Panches present.

(ii) Every Panch wishing to vote shall be supplied with a ballot paper. The ballot paper shall be signed by the Presiding Officer before being handed over to the Panches. Every Panch shall on receiving the ballot paper proceed to the place set apart for voting and then put a cross mark (X) with red pencil against the name and symbol of the candidate for whom he wishes to vote. He shall then fold the ballot paper and insert it into the ballot box.

(8) In case a Panch is blind or is physically incapacitated from voting, the Presiding Officer shall, at his request, permit him to be accompanied by an agent not being a Panch who shall after ascertaining the choice of the Panch, put an X mark against the name of the candidate of his choice and thereafter cast vote on his behalf. A note of the use of the agent shall be kept by the Presiding Officer who

will also obtain the signatures or thumb impression of both the Panch and the Agent on the note.

(9) The Presiding Officer shall make all necessary arrangements to ensure secrecy of ballot.

(10) After the voting is over, the Presiding Officer shall open ballot-box in the presence of the Panches, if any, count the votes and prepare a statement showing the number of invalid votes and the number of valid votes polled in favour of each candidate, upon which the Panches may put their signatures, if they so desire.

(11) Any ballot paper which bears any mark or signature by which the voter can be identified on which the cross mark is put against the names of more than one candidate or in an ambiguous manner or is not put or which does not bear the signatures of the Presiding Officer, shall be declared invalid and the Presiding Officer shall make a record of this on the ballot-paper in red pencil under his signatures.

(12) The Presiding Officer shall declare the candidate who is found to have obtained the largest number of valid votes to have been co-opted as woman Panch:

Provided that if two or more candidates have obtained the same number of votes, the Presiding Officer shall draw a lot of such candidates in the presence of Panches and the candidate whose name is first drawn shall be declared by the Presiding Officer to have been co-opted as woman Panch."

(11) A mere reading of the proviso to sub-section (2) of section 5 and rule 5 of the Co-option Rules, under which provisions the disputed election was held in December, 1971, would show that there was no room at the relevant time for anybody being appointed as a co-opted woman Panch by the prescribed authority and that such a Panch had to be elected in accordance with the prescribed procedure from out of any eligible qualified woman member of the Gram Sabha by the previously elected Panches. Detailed procedure for election has been set out in Rule 5. The word "election" has been defined in section 13A(e) to mean "an election to fill the office

of a Sarpanch or Panch." I have already held above that a woman appointed to fill the office of a Panch by co-option is a "Panch" within the meaning of the Act. So long as there was no provision for election for co-opting a woman member (as in the principal Act and also in the Act after its amendment in Haryana by the Haryana First Amendment Act (19 of 1971), the process by which a woman was co-opted to the Panchayat could not be called an election, as in fact she was not elected, but appointed. Rule 5 of the Co-option Rules now lays down in great detail the entire procedure for election of a woman Panch. In view of the change brought into the proviso to sub-section (2) of section 5 of the Act by the Haryana Second Amendment Act (29 of 1971), and the promulgation and enforcement of the Co-option Rules, it cannot now be said that the office of a woman Panch is not filled by election. In fact it cannot now be filled by any method other than election. It is significant to notice in this respect the observations of Tuli, J. in *Bishan Kaur's case* (2),to the effect that "co-option may be a form of election by a smaller body, but in the case of this Act, a co-option of a woman Panch under section 6 of the Act does not amount to 'election' which can be set aside by an election petition." It was correctly so held by Tuli, J. as no process of election was involved under the proviso to section 6(1) before the Haryana Amendments. The learned Judge took notice of the dictionary meaning of the word "co-opt"—"to elect into any body by the votes of its members", and then made the above quoted observations. The mere use of the word "election" or "co-option" does not, in my opinion, by itself lead to the conclusion whether a process of election is or is not involved in the selection of a Panch. Even if the word "election" had been used in the proviso to sub-section (1) of section 6 of the principal Act, the woman Panch appointed under that provision could not be held to have been 'elected'. So long as a woman Panch is now required to be appointed only by election in the manner prescribed by rule 5 of the Co-option Rules, the mere retention of the word "co-option" would not detract from the fact that the woman member is also elected though by a different and smaller electoral college.. That being so, her election could be called in question by way of an election petition.

(12) Mr. Hooda has contended that the petition should be dismissed on the short ground that alternative remedy by way of an election petition was available to petitioner No. 1 to question the election of respondent No. 5, and to petitioner No. 2 to impugn the

election of respondent No. 4 and we should not, therfore, permit the petitioners to ask this Court to grant them in a writ petition the relief which they could have asked for in an election petition. He has relied in this connection on the judgment of a Division Bench of the Patna High Court in *Sukhdeo Narayan and others* v. *Mahadevananda Giri* (3). It was held in that case that the Court would enquire into the conduct and motives of the applicant and the Court might in its discretion decline to grant a *quo warranto* information where, *inter alia*, there is an alternative remedy which is equally appropriate and effective. It was further held that where there are statutory provisions dealing with the conduct of an election, the writ of *quo warranto* is displaced, and that an election can then be challenged in the manner laid down by the statute. The writ petition was dismissed by the Patna High Court in *Sukhdeo Narayan's case* (3), for the further reason that though information in the nature of *quo warranto* had been sought to invalidate an election on the ground that the candidate was not qualified to be elected on the date of his election, yet the candidate had become qualified at the date of the hearing of the petition, and there was nothing to bar his re-election. It is well settled that the availability of an alternative remedy is not an absolute bar to the grant of relief under Article 226 of the Constitution. Things are different in case of elections under the Representation of the People Act where Article 329(b) of the Constitution creates an absolute bar notwithstanding anything contained in the Constitution itself to any election being called in question except by an election petition presented to the prescribed authority in the prescribed manner (prescribed by appropriate law of the competent Legislature). Section 13-B of the Act does create a bar to any election being called in question "except by an election petition" presented in accordance with the provisions of Chapter II-A of the Act. Whereas that bar excludes the possibility of an election being called in question otherwise than in the manner provided in section 13-B in all other Courts, it cannot cut an inroad into the constitutional jurisdiction of this Court under Article 226 of the Constitution. It cannot, therefore, be held that this Court has no jurisdiction to entertain a petition for questioning an election which could be impugned under section 13-B of the Act. At the same time it appears to be equally clear that this Court would normally be loathe to take upon itself the functions of the prescribed authority under the Act to hear election petitions. Each

(3) A.I.R. 1961 Patna 475.

case must depend on its own facts for the purpose of exercise of jurisdiction by this Court under Article 226 of the Constitution. It is neither possible nor proper to lay down any hard and fast rule for the exercise of discretion by this Court in such matters.

Mr. R. S. Mittal, the learned counsel for the petitioners, referred us to the judgment of A. D. Koshal, J., in *Ude Singh* v. *The State of Haryana and others* (4), for supporting his argument to the effect that a petition under Article 226 of the Constitution of India is not barred by any provision thereof if it relates to questions concerning an election to a Gram Panchayat. Though it was held in that case that the High Court would normally refuse to entertain such a petition when the alternative remedy of an election petition has not been availed of, it was further held by the learned Judge that there is no justification for the writ petition being dismissed at the stage of its final hearing as being not maintainable on account of the availability of an alternative remedy when it has not only been entertained and heard on merits, but the alternative remedy in question has itself become barred by time. That may indeed be another valid consideration for the Court in the matter of exercise of its discretion under Article 226 of the Constitution though we would not risk to lay it down as a general principle of law applicable to all cases. The fact remains that in the present case not only has the period of limitation for filing the election petition expired but there was genuine doubt about the maintainability of an election petition against the co-option of respondent No. 4 at the time when the writ petition was filed. Mention of that doubt has also been made in the orders of the Motion Bench to which reference has already been made. In these peculiar circumstances of this case it appears to us to be rather unfair to throwout the writ petition at this late stage after having heard it on merits on the mere ground that the petitioners have come to this Court without exhausting the alternative remedy which was available to them according to the law now laid down by us. We do not, therefore, feel justified in allowing even the second objection of Mr. Hooda.

(13) We do not apear to be called upon to deal with certain cases relating to the scope of issue of a writ in the nature of *quo warranto* as there is hardly any dispute about the conditions precedent for issuing such a writ as the same have been authoritatively laid down by their Lordships of the Supreme Court in the *University*

(4) 1972 P.L.J. 20.

of Mysore v. *C. D. Govinda Rao and another* (5). It has been held in that case that before a citizen can claim a writ of *quo warranto* he must satisfy the Court that the office in question is a public office and is held by a usurper without legal authority, which necessarily leads to the enquiry as to whether the appointment of the said alleged usurper has been made in accordance with law or not.

(14) This takes me to the merits of the controversy. The first point on which both the elections (of the co-opted Panch and of the Sarpanch) have been impugned by Mr. R. S. Mittal, learned counsel for the petitioners, is that the entire proceedings of the two meetings in question were illegal and the result of the elections held therein was null and void as the notices of the meetings for December 17, 1971, served on petitioner No. 1 were of a period shorter than that prescribed by the relevant rules. The facts that the meetings for both the purposes had been originally called for December 13, 1971, but could not be held on that day for want of quorum, and that each of the meetings held on December 17, 1971, was an adjourned meeting, and that only three days notice and not seven days notice was, therefore, required in respect of the meetings in question have not been disputed before us.

(15) The principal Election Rules, which were notified on June 9, 1971, have been amended in their application to the State of Haryana by the Haryana Gram Panchayat (First Amendment) Election Rules, 1971, published in the official Haryana Government Gazette (Extraordinary), dated September 22, 1971. The amended rule 38(2) provides that the Block Development and Panchayat Officer shall issue a notice in writing to all Panches intimating the date, time and place of the meeting of Panches for electing the Sarpanch. Sub-rule (3) of rule 38 states as follows:—

> "The notice shall be sent by post at least seven days before the date of meeting at the ordinary place of residence of each Panch and shall also be served through an official of the Block and a copy thereof shall be exhibited on the notice-board of the Panchayat.
>
> Provided that the notice to a Panch, who is elected, co-opted or nominated after the issue of the notice under sub-rule (2) shall be issued and served by the Presiding Officer in such manner as he deems fit before the meeting."

(5) A.I.R. 1965 S.C. 491.

Sub-rule (1) of rule 39 as amended provides that not less than half of the total number of Panches shall constitute a quorum for the election of a Sarpanch. Sub-rule (2) authorises the Presiding Officer to adjourn the first meeting for the election of a Sarpanch for want of quorum. Sub-rule (3) then states:—

> "When a meeting is adjourned under sub-rule (2), another meeting shall be convened by the Block Development and Panchayat Officer for the purpose of electing a Sarpanch by giving three days clear notice to the Panches in the manner prescribed in sub-rules (2) and (3) of rule 38. There shall be no quorum for the second meeting."

The rest of the provisions of rules 38 and 39 are not relevant for our purposes. It being an admitted fact that the meeting at which Dhan Singh respondent was elected as a Sarpanch was held under sub-rule (3) of rule 39 of the Election Rules, it has been argued by Mr. Mittal that the meeting could be valid only if it had been held "by giving three days clear notice," to the Panches including the first petitioner. The contention is that the notice having been served on December 14, 1971, and the meeting having been held on December 17, 1971, three clear days did not intervene between the two dates, but only two clear days, i.e., the 15th and 16th, intervened between the two termini. Rules 3 and 4 of the Co-option Rules are almost verbatim copies of rules 38 and 39 of the Election Rules. The phraseology of sub-rule (3) of rule 4 of the Co-option Rules is for all practical purposes the same from the point of view of the period of notice as sub-rule (3) of rule 39 of the amended Election Rules. In the case of each of the two meetings in question, therefore, it was necessary to give "three days clear notice" to the elected Panches. In order to pronounce on the validity of the meetings from this point of view, we are called upon to answer three questions, namely:—

(i) Whether the "sending" or "giving" of three days notice envisages the counting of three days from the date of service of the notice;

(ii) Whether the expression "three days clear notice" is synonymous with the phrase "three clear days notice"; and

(iii) Whether the requirement of "three days clear notice" is mandatory or directory in the sense that non-compliance with that requirement must necessarily vitiate the election or not.

(16) After carefully considering the scheme of the relevant rules, I find great significance in the use of the word "sent" in the expression "notice shall be sent by post" in sub-rule (3) of rule 3 of the Co-option Rules, and in sub-rule (3) of rule 38 of the amended Election Rules. Similarly, the omission of the word "served" in the first part of sub-rule (3) of rule 39 of the amended Election Rules and the omission of the same word in the opening part of sub-rule (3) of rule 3 of the Co-option Rules shows a deliberate departure from the ordinary phraseology used for such purposes. The word "giving" has been used in sub-rule (3) of the relevant part of both the rules in relation to the notice instead of the word "serving". A third factor which is significant in this respect is that the word "served" has been used in sub-rule (3) of rule 38 as well as in sub-rule (3) of rule 3 (Election Rules and Co-option Rules respectively) in relation to the notice required to be served through an official of the Block or through the Gram Sachiv, but no period of such a notice has been prescribed in contradistinction to the number of days which must elapse between the sending of the notice by post and the date of the meeting. Keeping these significant facts in view, it appears to us that the period of three days referred to in sub-rule (3) of both the relevant rules has relation to the giving of the notice which in turn is related to the sending of the notice and not to the time of the actual delivery of the notice to the concerned Panches. When the question of the effect of the use of the word "send" in place of the word "serve" in section 87-A(3) of the U.P. Municipalities Act (2 of 1916) came up for consideration before the Supreme Court in *Jai Charan Lal Anal* v. *The State of U.P. and others* (6), it was held by their Lordships that the word "send" shows that the critical date is the date of despatch of the notice. On the facts of that case their Lordships found that the notice "sent" on the 17th for a meeting called on the 25th was valid as seven clear days did intervene between the 17th and the 25th, and there was, therefore, no breach of the relevant provision. Similarly it was held by the Mysore High Court in *S. Ramaiah* v. *State of Mysore and others* (7), that rule 9(1) of the Mysore Municipalities (President and Vice-President) Election Rules, 1965, which directs that notices of the meeting shall be sent to every member by registered post not less than five days before the date of the meeting speaks merely of the despatch of the notice and not that the notices

(6) A.I.R. 1968 S.C. 5.
(7) 1969(1) M.L.J. 395.

so sent should be received by the members five days before the meeting Reference may also with advantage be made in this connection to *Retail Dairy Company, Limited* v. *Clarke* (8), wherein it was held that in the absence of any words in the relevant provision indicating that the word "sent" is used with any other than its ordinary meaning of "dispatched", it must be construed as bearing that meaning alone. The fact that the notices were sent on the 13th though received by the first petitioner on the 14th December, 1971, not being in dispute, we are of the opinion that the requirements of the relevant rules have been satisfied even if the requirement is of three clear days, as time counts from the date of sending and giving the notice and not from the time of its actual service on the concerned Panch. So far as the second question out of the three arising under this point is concerned, we are unable to agree with the learned counsel for the respondents that the word "clear" in the relevant sub-rules is intended to qualify the notice and not the number of days despite somewhat unusual language used by the Haryana Government in the concerned rules. The argument advanced on behalf of the respondents was that the clarity in the notices required under sub-rule (3) comprises of the giving of all the particulars requisite under sub-rule (2) of rule 3 of the Co-option Rules and sub-rule (2) of rule 38 of the amended Election Rules. That does not seem to be the object of using the word "clear" in sub-rule (3) as the said sub-rule distinctly and independently requires compliance with sub-rule (2) of the preceding rule. We, therefore, hold that the notice of each of the two meetings served on the first petitioner was valid.

(17) In the view we have taken on the question of validity of the notices of the meetings, we need not deal with the following cases cited by Mr. B. S. Gupta, learned counsel for the State, to support an argument to the effect that whereas the requirement of sending or giving the notice in the relevant rules is mandatory, the requirement of three days or three clear days is merely directory and non-satisfaction of the said latter requirement would not vitiate the election:—

(i) *Pioneer Ltd., Lucknow* v. *State of Uttar Pradesh and others* (9);

(ii) *Umananda Roy* v. *The Compensation Officer, Dhubri and others* (10);

(8) (1912) 2 K.B.D. 388.
(9) 1964 I L.L.J. 730.
(10) A.I.R. 1966 Assam & Nagaland 81.

(iii) *Pratap Singh* v. *Shri Krishna Gupta and others* (11); and

(iv) *Jai Bhagwan Sharma and another* v. *Matu Ram and others* (12)."

Nor is it necessary to deal with the meaning of the expression "clear days" for which reliance was placed by Mr. Mittal on the pronouncement of the Supreme Court in *Pioneer Motors (Private) Ltd.* v. *Municipal Council, Nagercoil* (13) and various other cases.

(18) Mr. R. S. Mittal next argued in a somewhat half-hearted manner that both the elections in question had been vitiated on account of the votes cast therein by respondents 6 and 7 as they were not entitled to vote on account of their being disqualified from being elected as Panches as they were tenants of the Panchayat. The counsel for respondents 6 and 7 has submitted that this objection had not been raised before the Presiding Officer of the meeting. We called for the record of the elections in question. The sealed covers containing the record were opened in our presence and we found that an objection in writing had been taken in this regard at the elction of the woman Panch and had been overruled by the Presiding Officer on the ground that their election could have been questioned in an election petition. We are unable to find any such error of law apparent on the face of that order as would require us to quash the same. We are also of the opinion that once respondents 6 and 7 had been elected as Panches, their election could not be treated by the Presiding Officer of the two meetings as *non est* merely because an allegation was made before him to the effect that they were not qualified to be elected. Mr. Mittal then contended that even if respondents 6 and 7 had been duly elected, they had ceased to be Panches as section 5(5)(b) of the Act (as amended by the Haryana Second Amendment Act, 1971) states that no one shall be entitled to stand for the election as or continue to be a Panch if he is a tenant or lessee holding a tenancy or lease under the Gram Panchayat, and that we should, therefore, hold that on the date of the disputed meetings respondents 6 and 7 were in any case disqualified to continue to act as Panches. We are unable to enter into this controversy for more than one reason. Firstly, this

(11) A.I.R. 1956 S.C. 140.
(12) 1963 P.L.R. 1090.
(13) A.I.R. 1967 S.C. 684.

allegation has been denied by the concerned respondents, and involves such a disputed question of fact which cannot be easily decided in these proceedings. Secondly, it is not the case of the petitioners that respondents 6 and 7 became tenants of the Panchayat after their election, but that they were disqualified even when they were elected. If so their election would have been called in question by an election petition under section 13-B of the Act. Not having done so, the petitioners cannot now in this indirect manner impugn their election. Thirdly, the petitioners have not even taken care to summon from the Panchayat the relevant records of the leases of the Panchayat which could have conclusively showed whether any land of the Panchayat was or was not on lease with respondents 6 and 7 at the relevant time. We are, therefore, unable to find our way to entertain this objection in the present petition.

(19) The last submission of Mr. R. S. Mittal is that the election of the Sarpanch is liable to be set aside as the woman Panch, who voted therein had been co-opted only an hour or so before the election and did not, therefore, have any written notice of the meeting. There may be some logic in the argument, but there is no substance in it. Firstly, this point not having been specifically taken up in the writ petition, it is not safe to presume that no notice of the meeting for electing the Sarpanch was given to her. Secondly, the fact that she attended the meeting and cast her vote in the election shows beyond doubt that she had notice of the meeting. Thirdly, the proviso to sub-rule (3) of rule 38 of the Election Rules is a complete answer to the sufficiency and manner of service of the notice on her. She had been elected as a Panch after notices of the meeting had already been issued under sub-rule (3) of rule 39. Notice to such a Panch is required by the proviso to rule 38(3) (already quoted earlier) to be served by the Presiding Officer "in such manner as he deems fit before the meeting". This had obviously been done. We have, therefore, no hesitation in repelling even this contention of Mr. Mittal.

(20) As none of the contentions raised by the learned counsel for the petitioners has succeeded on merits, it is futile for us to go into the further proposition canvassed before us by Mr. B. S. Gupta, on the authority of the judgment of their Lordships of the Supreme Court in *Partap Singh's case* (11) (supra), to the effect that the tendency of the Court towards technicality in the matter of setting aside elections for non-compliance with directory provisions should

be deprecated. Nor is it for the same reason necessary to refer in any detail to the judgment of Mahajan and Sodhi, JJ., in *Onkar Singh* v. *State of Haryana and others* (14), on which the learned counsel for the respondents relied for the submission that even if the notices of the meetings were invalid this Court would not interfere with the result of the election as no injustice has occurred as a result of the alleged slight delay in the service of the notices of the meetings.

For the foregoing reasons, I would hold that:—

(i) no exception can be taken to the law laid down by Tuli, J., *in Bishan Kaur's case* (2) (supra), insofar as it related to section 6(1) of the Act as it stood before the amendment of that section by the Haryana First Amendment Act of 1971;

(ii) the co-option of a woman Panch under proviso to section 6(1) of the principal Act, before its amendment and before the framing of the Co-option Rules, was not an 'election' and could not, therefore, be called in question by an election petition;

(iii) the co-option of a woman Panch under the proviso to sub-section (2) of section 5 of the Act as amended by the Haryana Second Amendment Act of 1971 (Act, 29 of 1971) is made by "election" within the meaning of section 13(A)(e) of the Act and inasmuch as a co-opted woman Panch is a "Panch" within the meaning of section 3(i) of the Act, her election is liable to be called in question by an election petition, under section 13-B of the Act read with rule 44 of the Election Rules;

(iv) though section 13-B of the Act bars all remedies for questioning an election under the Act except by an election petition, it does not create a bar to the invoking of the extraordinary constitutional jurisdiction of the High Court under Article 226;

(v) though the High Court will not ordinarily entertain a writ petition for questioning the validity of an election which

(14) 1972 P.L.R. 378.

could be called in question by an election petition under the Act, there is nothing in the Constitution which bars the High Court from exercising its writ jurisdiction in a fit case where refusal to grant the relief is likely to result in manifest injustice and the error of law or of jurisdiction is apparent on the face of the admitted record of the election proceedings;

(vi) the period of seven days of the notice required to be served on the Panches under sub-rules (2) and (3) of rule 38 of the Election Rules, and sub-rules (2) and (3) of rule 3 of the Co-option Rules, and the period of three days required for a notice under rule 39(3) of the Election Rules and 4(3) of the Co-option Rules starts from the date of sending or giving, i.e., despatching of the notice and not from the time of delivery or service of the notice on the concerned Panch;

(ii) keeping in view the scheme of the Election Rules and Co-option Rules, it appears that the phrase 'three days clear notice' has been used in the relevant rules to convey the same requirement as is conveyed by the expression 'three clear days notice', which means that three days must elapse between the date on which the notice is sent and the date on which the meeting is held; and

(viii) the requirements of sub-rule (2) and of the purview of sub-rule (3) of rule 38 and of sub-rule (3) of rule 39 of the Election Rules do not apply to the notice which has to be served on a Panch elected or co-opted after the issue of notices of the meeting for electing a Sarpanch. Notice to such a Panch can be validly served by the Presiding Officer of the meeting in such manner as he deems fit under the proviso of rule 38(3) of the Election Rules."

(21) No other point was argued before us by the counsel for the parties. This petition must, therefore, fail and is accordingly dismissed with costs.

R. N. MITTAL, J.—I agree.

K. S. K.