

same date, that is, on 5th September, 1972. That shows that the copy of the impugned order was filed along with the petition.

(6) It is then contended that a claim in the nature of a writ of certiorari for quashing an order passed by a quasi-judicial tribunal could not be made under Article 227 of the Constitution but under Article 226. This objection is misconceived. This Court under Article 227 of the Constitution has power to set aside or annul any order passed by any judicial tribunal functioning within the jurisdiction of this Court if the order is without jurisdiction. Having held that the order is without jurisdiction, there is no bar to the grant of this petition under Article 227.

(7) On the merits of the controversy Mr. Vimal tried to reiterate the grounds on which the order was passed by the prescribed authority, in which I have already found no force.

(8) So far as the matter of costs is concerned, normally the election petitioner should have been burdened with costs of this petition. He has, however, been well advised not to appear and contest this petition. Respondent No. 1 alone has contested the petition. He will, therefore, pay the costs of the petitioner.

N. K. S.

CRIMINAL MISCELLANEOUS

*Before Kulwant Singh Tiwana, J.*

RAM KALA ETC.,—Petitioners.

*versus*

STATE OF HARYANA AND ANOTHER—*Respondents.*

Criminal Misc. No. 472-M of 1975 (O&M)

July 8, 1976.

*Code of Criminal Procedure (V of 1898)—Sections 107, 150 and 202—Application to a Magistrate under sections 107 and 150—Whether can be sent to the Police for inquiry—Proceedings started on a police report—Whether vitiated.*

Ram Kala etc. v. State of Haryana etc. (K. S. Tiwana, J.)

*Held*, that the words "is informed" in section 107 of the Code of Criminal Procedure 1898 are very wide and do not restrict the source of information of the Magistrate for taking action under this section. The information which leads to action under section 107 of the Code may be of varied type. It may be oral, sworn, unsworn need not be in writing. It may be from any source; official or unofficial; formal or informal. It may be derived by the Magistrate from his own source, police, private individuals. This source of information of the Magistrate as contained in section 107 of the Code is difficult to be exhaustively described. No hard and fast rule can be laid down about the quality and character of the information on which the Magistrate should or should not act. When the source of information as given in this section cannot be limited or restricted and he is to act by assuming jurisdiction then he has a right to check the correctness of the information to his satisfaction before proceeding to act against whom the information is received. The Magistrate must be left free with a wide discretion in this matter and it is not desirable to limit or restrict the means of his satisfaction in this respect. As it is his responsibility to maintain the public tranquillity or peace the Magistrate is competent to use the administrative machinery or other sources available to him before he issues a show cause notice to a person reported against. Thus a Magistrate can send to the Police for inquiry and report an application received under section 107 and 150 of the Code and the proceedings started thereon are not vitiated.

(Paras 5 and 6)

*Petition under Section 482 Criminal Procedure Code, read with Section 401 Criminal Procedure Code praying that the order dated 4th January, 1974, passed by the learned Sub-Divisional Magistrate, Gurgaon, in a case No. 390/4 of 30th October, 1973, under Section 107/151, I.P.C., be quashed.*

CRIMINAL MISC. No. 473 OF 1975.

*Application under Section 482 Cr.P.C. praying that pending decision of the petition in this Hon'ble Court all further proceedings in case titled as Om Parkash Vs. Ram Kala and others u/s. 107/151, I.P.C. in the court of Sub Divisional Magistrate, Gurgaon, fixed for 10th March, 1975 be stayed.*

K. D. Singh, Advocate, for the Petitioners.

H. N. Mehtani, Deputy Advocate-General, (Haryana), for the Respondents.

#### JUDGMENT

TIWANA, J.—(1) Facts giving-rise to this revision are that an application presented by Om Parkash, respondent No. 2, under

section 107/150, *Indian Penal Code*, against the petitioners was sent by Sub-Divisional Magistrate, Gurgaon, on 3rd October, 1973, to the police for inquiry and report. The police reported about the existence of the apprehension of the breach of the peace between the parties because of a dispute between them about the right of a passage over the *gitwar*. On receipt of that report the learned Sub-Divisional Magistrate,—*vide* orders, dated 4th January, 1974, summoned the petitioners.

(2) The petitioners filed the present petition under section 482, Criminal Procedure Code, 1973, for quashing of the order of the Sub-Divisional Magistrate, Gurgaon, summoning the petitioners, on two grounds. The first ground was that the application of Om Parkash to the Sub-Divisional Magistrate was under section 107/150, Indian Penal Code and that he being an Executive Magistrate could not take cognizance of the offence under the Indian Penal Code. Mela Ram Sharma, J., while admitting the petition on 7th February, 1975 disposed of this objection being a clerical mistake. The mistake was deemed to be corrected under the orders of the Court. The second ground taken by the petitioners is that the Sub-Divisional Magistrate had no power to send an application under section 107/150, Criminal Procedure Code to the police for inquiry and report and for that reason the proceedings started by him on the basis of the police report are vitiated.

(3) Elaborating his argument in support of the only objection surviving for decision Mr. K. D. Singh, learned counsel for the petitioner, cited a decision of this Court in *Nachhatar Singh v. The State of Punjab* (1), wherein it was held—

“The question for determination is, whether the provisions of section 202, Criminal Procedure Code, apply to proceedings instituted under section 107, Criminal Procedure Code. A proceeding under section 107, Criminal Procedure Code, cannot be regarded as a complaint and, therefore, section 202 of the Code under which the Executive Magistrate directed to the police to hold an enquiry is not applicable”.

It was urged that the proceedings before the Executive Magistrate against the petitioner require to be quashed on this ground. The

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(1) 1973 C.L.R. 169.

Ram Kala etc. v. State of Haryana etc. (K. S. Tiwana, J.)

Learned Single Judge deciding *Nachhatar Singh's* case relied on the decision of the Lahore High Court in *Hari Singh v. Jagta and others* (2), to come to a conclusion that the Magistrate has no power to send an application under section 107, Criminal Procedure Code, to the police for enquiry under section 202, Criminal Procedure Code.

(4) Provisions of Chapter XVI, Criminal Procedure Code, 1898, (which was applicable to the case), which contains section 202, do not have any application to Chapter VIII, Criminal Procedure Code (hereinafter called the Code) placed in part IV of the Code dealing with "prevention of offences". Both these chapters are independent of each other and section 202 of the Code embraces only complaints. There is a good deal of authority in support of the view that proceedings under section 107 of the Code are not complaints as defined in section 4(1) (h) of the Code.

(5) Section 107 of the Code which invests the Executive Magistrate with jurisdiction to proceed under Chapter VIII of the Code is as follows:—

"(1) Whenever a Presidency Magistrate, District Magistrate, Sub-divisional Magistrate or Executive Magistrate of the first class is informed that any person is likely to commit a breach of the peace or disturb the public tranquillity, or to do any wrongful act that may probably occasion a breach of the peace, or disturb the public tranquillity the Magistrate if in his opinion there is sufficient ground for proceeding may, in manner hereinafter provided, require such person to show cause why he should not be ordered to execute a bond with or without sureties, for keeping the peace for such period not exceeding one year as the Magistrate thinks fit to fix.

(2) \* \* \* \* \*"

The words in this provision which require pertinent attention are "is informed". These words are very wide and do not restrict the source of information of the Magistrate for taking action under this section. The information which leads to action under section 107 of the Code may be of varied type. It may be oral, sworn, unsworn, need not

(2) A.I.R. 1928 Lahore 694.

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be in writing. It may be from any source; official or unofficial; formal or informal. It may be derived by the Magistrate from his own source, police, private individuals. In a Division Bench decision of the Lahore High Court in *Ismail v. Jagat Singh and others*, (3), it was observed:—

“It will be seen that in order to start proceedings under this section it is not necessary that the Magistrate should have been moved by a written petition. All that is required is that he be ‘informed’ of the apprehended breach of the peace. The information may have been received orally or in writing, by post or in any other way. On receipt of such information the Magistrate has to see if ‘in his opinion there is sufficient ground for proceeding’ and it is after he has satisfied himself that this is so that he will issue notice to the person, by whom breach of the peace is apprehended, to show cause why he should not be bound down.”

(6) This source of information of the Magistrate as contained in section 107 of the Code is difficult to be exhaustively described. No hard and fast rule can be laid down about the quality and character of the information on which the Magistrate should or should not act. When the source of information as given in this section cannot be limited or restricted and he is to act by assuming jurisdiction then he has a right to check the correctness of the information to his satisfaction before proceeding to act against whom the information is received. The Magistrate must be left free with a wide discretion in this matter and it is not desirable to limit or restrict the means of his satisfaction in this respect. As it is his responsibility to maintain the public tranquillity of peace the Magistrate is competent to use the administrative machinery or other sources available to him before he issues a show cause notice to a person reported against.

(7) *Hari Singh's case* (supra), which was followed in *Nachhatar Singh's case* (supra) was considered by a Division Bench of the Lahore High Court in *Ismail's case* (supra). The facts of *Ismail's case* were that Ismail presented a petition before a Magistrate at Gurdaspur alleging apprehension of the breach of the peace. The

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(3) A.I.R. 1938, Lahore 861.

Ram Kala etc. v. State of Haryana etc. (K. S. Tiwana, J.)

petition was sent to the police for enquiry. Ismail contested the order of the Magistrate by way of revision before the Sessions Judge and ultimately came to be decided by a Division Bench of the Lahore High Court. Dealing with *Hari Singh's case* (supra) the Division Bench, after referring to the scheme and provisions of Part IV of the Code, observed as under:—

“It will be seen that the section is very wide in its terms. It does not prescribe any particular mode in which the Magistrate has to satisfy himself of the sufficiency of grounds for taking action under the section. The Legislature appears to have purposely left the matter open and given a wide discretion to the Magistrate. He may do so, by holding an enquiry himself, or by the police, or through any private person, or in any other manner as he thinks fit. The enquiry may be public or private; it may be held in open Court or in *camera*. Having regard to the wide phraseology of section 107, which was added by the Amending Act 18 of 1923, we see no reason to hold that the only way in which the Magistrate might satisfy himself before issuing notice is to hold an enquiry himself and that he is precluded from seeking the aid of a local enquiry by the police in this matter.”

*Hari Singh's case* came up for consideration before Allahabad High Court in *Laxmi Narain v. Emperor* (4), and was not followed. In *Ismail's case* the reasons for dissent of the Bench deciding *Laxmi Narain's case* (supra) with *Hari Singh's case* were accepted by the Division Bench. In *Ismail's case* (p-863) on a pointed reference to *Hari Singh's case* it was observed—

“We hold, therefore, that there is nothing in the Code, which forbids a Magistrate before whom information has been lodged for taking proceedings under section 107, to refer the matter to the police for preliminary enquiry, and that the contrary view taken in Single Bench decisions of this Court in Criminal Revision No. 703 of 1936 and *Hari Singh v. Jagta 2* (*ibid*) cannot be supported either on principle or authority.”

(4) A.I.R. 1932 Allahabad 670.

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(8) Part IV of the Code deals with the prevention of offences. The Magistrate in their discharge of duties for the maintenance of public peace and tranquillity performs some administrative duties. A line has to be drawn between these administrative and judicial actions of the Magistrates when they act under section 107 of the Code. In *Laxmi Narain's case* (supra) the following view was expressed (p-672)—

“But in acting under sections 107, 108 and 109 or section 110 of the Code the Magistrate does not, so long as he does not record an order in writing in accordance with section 112 of the Code calling upon any person to show cause, act judicially. In those sections complete discretion is given to the Magistrate either to act or not to act on the information received by him. The discretion to issue a notice under section 112 in pursuance of an information received by him is absolute and uncontrolled by any conditions whatsoever.”

Following these observations, in *Ismail's case* it was further observed (p-863):—

“It was pointed out that the proceedings at that stage before the Magistrate were more or less of an administrative nature and it was only after he had passed an order under section 112 and issued notice to the opposite party to show cause why he should not be bound down that the proceedings before the Magistrate become judicial proceedings. Therefore, if the Magistrate before issuing a notice under section 112 thinks fit to consult the police in order to form an opinion as to whether or not the matter is one in which such a notice should be issued, there is nothing in the Code to prevent him from doing so. With great respect, we think that this lays down the law correctly.”

The same view was adopted by a Division Bench of Calcutta High Court in *Tulsibala Rakhit and another v. N. N. Khosal* (5). It appears that at the time of decision of *Nachhatar Singh's case* (supra) *Ismail's case* was not brought to the notice of His Lordship. As *Nachhatar Singh's case* was decided on the basis of an over-ruled judgment, I, with

Zile Singh v. The Deputy Commissioner, Sonapat, etc. (Tewatia, J.)

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respect, am unable to agree to that principle. Following the Division Bench judgment in *Ismail's case* (supra), which is binding on this Court, it is held that the order of the Sub-Divisional Magistrate asking for the report of the police, is legal and proper. The petition under section 482, of the Code of Criminal Procedure, 1973, is hereby dismissed.

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N. K. S.

CIVIL MISCELLANEOUS

Before D. S. Tewatia, J.

ZILE SINGH,—*Petitioner.*

*versus*

THE DEPUTY COMMISSIONER, SONEPAT, ETC.,—*Respondents.*

Civil Writ Petition No. 1070 of 1975.

July 8, 1975.

*Punjab Gram Panchayat Act (IV of 1953) as amended by Haryana Legislature Amendment Act 29 of 1971—Sections 5 and 9—Election of Panches set aside by prescribed authority—Member co-opted by such panches—Whether can continue to be member of Gram Panchayat—Challenge to such co-option—Whether to be made through a formal application.*

*Held*, that co-option is nothing but the election of one of the members of the Gram Panchayat; the only difference being that in the case of co-option the electoral college consists of the Panches elected by the Gram Sabha while in regard to the other elected members every adult member not less than 21 years of age of Gram Sabha forms the electoral college which elects the Panches to the Gram Panchayat. If none of the Panches who constituted the electoral college which co-opts a member of the Gram Panchayat was legally elected as Panch, then the co-option by them is automatically rendered as *void ab-initio*. The co-opted member is not entitled to enjoy the full term of five years as envisaged by section 9 of the Punjab Gram Panchayat Act, 1953. The co-option being rendered *void ab-initio* by implication as a result of the order of the prescribed authority setting aside the entire election to the Gram Panchayat, it is not at all necessary to challenge co-option through a formal application before the prescribed authority.

(Paras 7, 8 and 9)