

erasing therefrom the name of any councillor, who has ceased to possess the qualifications which persons whose names are on such lists were required to possess, or who have become subject to any disability which would deprive a person of the right to have his name placed therein, and who upon the erasure of his names ceases to be a councillor.

THIS was an appeal from an order of the Chairman of the Municipal Council of Kandy, directing the erasure of the name of an elected member of the said Council from the list of persons entitled to be elected as councillors under section 31 of the Municipal Councils Ordinance, on the ground that the member was interested in a contract made with Council at the time of his election.

Keuneman (with Abeysekera), for appellant.—The qualifications necessary for a man to have his name on the list of those qualified to be elected as a Councillor are set out in section 10 (3) of Ordinance No. 6 of 1910. These qualifications the appellant possessed. The disqualifications which prevent a man's name getting on the list are contained in section 10 (4), and being interested in a contract with the Council is not one of them.

The right of being and sitting as a councillor must be kept distinct from a man's right to have his name on the list of those qualified to be elected.

Section 31 was the wrong section to proceed under. That section is only concerned with the disqualifications mentioned in section 10—it contemplates the loss of some qualifications which a man had at the time of his election but has since lost.

What the appellant has done may affect his right to continue as a councillor, under section 29, but not his right to have his name on the list. Section 31 of the Ordinance of 1887 corresponds to section 29 of the 1910 Ordinance. The words there are "no person shall be qualified to sit or shall continue to be" The change of language in the 1910

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Present : Garvin A.C.J. and
Jayewardene A.J.

USOOF ISMAIL v. MOHAMED ZAIR

26—D. C. (Inty.), *Election Petition*,
Kandy.

Municipal Councillor—Member interested in contract—Disqualification—Application to erase name of member from list—Proper procedure—Municipal Councils Ordinance, 1910, s. 31.

Section 31 of the Municipal Councils Ordinance does not provide a procedure for removing from office a councillor who at the time of election or subsequent thereto has become disqualified from continuing as such by reason of the fact that he is interested in a contract or work made or done with the Council.

The section must be construed as providing a procedure for rectifying the list of persons entitled to be elected by

¹ 1 E. and B. 516.

Ordinance, which I emphasize, shows that the section was not intended to deal with the disqualification of councillors, though the marginal note has been retained. To try to read section 29 with section 31 is not a possible construction.

It is possible for a man who has a contract with the Council and who is not thereby disqualified from having his name on the list, to get elected and then give up his contract. The appellant assigned his lease on December 20, 1929. Sitting for new Council was not to begin till January 1, 1930.

The procedure under section 31 is wrong. If it was right, appellant had already assigned the lease and section 31 would have no effect.

The correct procedure would be a prosecution before a Police Magistrate under sections 33 and 239.

Percira, K.C. (with Weerasooria).—It is immaterial with regard to which period the application is made. Appellant was a councillor either under 1926 or 1929 elections.

The date of nomination is the crucial date, and at that date appellant had a contract with the Council.

The appellant's counsel has misconceived the scope of the alteration of the wording in the 1910 Ordinance. Section 9 of the 1887 Ordinance, which corresponds to section 10 of the 1910 Ordinance, does not contain the disqualifications mentioned in section 10 (4) (b) and (c) of the 1910 Ordinance. The words qualified to be in section 31 of the 1887 Ordinance were omitted in section 29 of the 1910 Ordinance, because there qualifications had been set out in section 10. The appellant entered upon office and then was subject to the disqualifications set out in section 29. Section 33 of the 1887 Ordinance stops short of section 31 of the 1910 Ordinance. The words "or became subject to any one of such disqualifications" are absent in the 1887 Ordinance. A comparison of the two sections shows that by section 31 of the 1910 Ordinance,

the legislature intended to catch up all cases. Section 31 is the right section, and the mere fact that it was open to us to go to a Criminal Court does not make it the wrong section. The draftsman in section 31, when mentioning "disqualifications" must have had section 29 in mind.

With regard to the lease the object of the Legislature is to prevent private interests clashing with public duty. The evidence in this case shows that the appellant voted in Council in connection with the lease. Further, his firm was selling goods to the Municipality.

A lease for a day has been held to be a disqualification (*Nell v. Longbottom*,¹ also *Kink v. Rowlands*,² *Ford v. Newth*³).

It has been held that assignment of a contract by a councillor does not remove the disqualification. See *Harford v. Lynskey*⁴ and 19 *Halsbury* 305.

Counsel also cited *In re Election of Councillor for Galle Municipality*⁵ and *Weerasuriya v. Senaratne*.⁶

Keuneman, in reply.

June 30, 1930. GARVIN A.C.J.—

This is an appeal from an order made by the Chairman of the Municipal Council of Kandy directing the erasure of the name of Madar Saibo Usoof Ismail, an elected member of the said Council, from the list of persons entitled to be elected as councillors. The facts are well ascertained. At an election held in December, 1926, Usoof Ismail, the present appellant, was elected a councillor for Ward No. 2 for the triennial period commencing January 1, 1927. On December 5, 1929, he was once again elected for the same ward. That election proceeded upon lists duly certified in October, 1929. The petition upon which this proceeding was taken is dated December 4, 1929, and the allegation against the appellant was that the appellant in October, 1926, became the lessee of a certain building site belonging to the

¹ (1894) 1 *Q. B.* 767.

² (1906) 2 *K. B.* 292.

³ (1901) 1 *K. B.* 683.

⁴ (1899) 1 *Q. B.* 852.

⁵ 8 *N. L. R.* 300.

⁶ 29 *N. L. R.* 485.

Council under a lease which was subsisting at the date of both elections and that he thereby became and was, at all material dates, interested in a contract made with the Municipal Council of Kandy. It is proved that from November 1, 1926, the appellant became, as alleged, the lessee of the Municipal Council of Kandy, in respect of the premises referred to, for a period of 25 years, though the formal lease was not actually executed till some time in the following year. The inquiry into this petition took place on January 10, 1930, when the period for which the appellant was originally elected a member had expired but during the currency of the term for which he was elected on December 5, 1929. At the date of his election for the triennial period January 1, 1930, to December 31, 1932, which took place on December 7, the lease referred to was current. That a lease is such a contract as is contemplated by the Municipal Councils Ordinance was held by Wood Renton J. in 1905, *vide In the Matter of an Election of a Councillor for the Galpiadda Ward of the Galle Municipality*¹. The submission of counsel for the appellant was that the procedure prescribed by section 31 was not applicable to the case of a person who at the time of election or subsequent thereto during his tenure of office became interested in any contract with the Council. He submitted that whatever penalty a councillor may incur by reason of being concerned or interested in any such contract or whatever other remedy may be available for the purpose of removing him from office, it was not competent for the Chairman to proceed under the provisions of section 31 and order the erasure of his name from the list of those entitled to be elected as was done in this case. His argument in brief is that section 31 must be limited to the case of a person who (a) at the date of his election did not possess the qualifications which entitled a person to have his name inserted in the list of persons qualified to be elected as

councillors or laboured under any of the disabilities which would deprive him of that right, or (b) subsequent to his election ceased to possess any such qualification or become subject to any such disqualification. The qualifications which entitle a person to have his name in the list of persons qualified to be elected as councillors are set out in section 10 (3). The circumstances which disqualify a person otherwise qualified to have his name inserted in that list are set out in section 10 (4). That section makes no reference whatever to the case of a person who is concerned or interested in any contract or work with the Council which is not a circumstance which disqualifies him from having his name inserted in the list of persons entitled to be elected as councillors. There is one other section which should be noted in this connection, and that is section 32, which lays a person convicted in terms thereof under a permanent disqualification. If therefore the statement of counsel for the appellant that the "disqualifications" contemplated by section 31 are circumstances which would deprive a person of the right to have his name inserted in the list of persons qualified to be elected, this case does not fall within its provisions.

It is provided by section 19 that the list prepared and certified in accordance with the Ordinance shall be "final and conclusive evidence and the only evidence of the due qualification of the persons whose names appear in such lists, to be elected"; and the same effect is given to the annual lists made and certified as required by the Ordinance—*vide* section 42. The interval between the certification of such a list and the election renders it possible that a person might be elected who at the date of the election did not possess the necessary qualifications or at that date lay under one of the disabilities which would, had it existed at the date of the preparation of the lists, have resulted in his exclusion from the lists; and it would also be necessary to contemplate the case of a councillor

¹ (1905) 8 N. L. R. 300.

since his election ceasing to possess the necessary qualifications or becoming subject to any such disqualifications.

It seems to me that section 31 was intended to provide for these cases. It is as follows :—

If at any time it is proved to the satisfaction of the Chairman that any councillor was at the date of his election not possessed of all the qualifications required by this Ordinance in respect of persons entitled to have their names placed on the list of persons qualified to be elected, or at such date was under any of the disqualifications specified in this Ordinance, or that such councillor has since his election ceased to possess such qualifications, or become subject to any one of such disqualifications, the Chairman is hereby required after notice to such councillor to order the erasure of the name of such person from the list of persons entitled to be elected, and the Chairman shall erase such name from such list, and the councillor whose name is erased shall thereupon cease to be a councillor :

Provided, however, that every order of erasure so made by the Chairman shall be subject to an appeal to the Supreme Court. Every such appeal shall be by petition, and shall be liable to a stamp duty of five rupees, and shall be preferred by such councillor *within five days of such order being notified in writing to him*, and shall be heard and determined by the said court in the same manner as though it were an appeal from an interlocutory order of a District Court. The Supreme Court shall also make such order as to costs as it shall deem just.

The word "qualification" in the fourth line clearly means qualification which entitles a person to have his name placed on the list of persons qualified to be elected, and it seems to me that the word "disqualification" in the clause "or at

such date was under any of the disqualifications" must similarly be taken to have reference to that list and mean circumstances which deprive a person, otherwise qualified, of the right to have his name on the list of persons entitled to be elected. The disqualifications to which a person may become subject after election are "such disqualifications" as had they existed then would have been "disqualifications" at the time of election and the disqualifications at the time of election are, it seems to me, such as would deprive a person of the right to have his name placed on the list of persons entitled to be elected. A clue to the interpretation of the section is afforded by the order contemplated which is an order directing "the erasure of the name of such person from the list of persons entitled to be elected." The section would seem to have for its object the rectification of the lists by the erasure therefrom of the name of any councillor who at the date of election was not possessed of or subsequent to his election ceased to be possessed of the qualifications which entitle a person to claim that his name should be placed on the list of persons entitled to be elected or was or became subject to any disability which disqualified him from having his name placed on such a list.

Every circumstance which results in a councillor ceasing to be a councillor does not necessarily of itself disqualify him from having his name on the list of persons entitled to be elected. Section 29 declares that no councillor shall continue to be a councillor "who fails to attend three consecutive general meetings". Such a person ceases *ipso facto* to be a councillor—*vide* section 30. But there can be no reason why he should not submit himself for re-election by the voters or why his name should be erased from the list of persons entitled to be elected. It is section 29 which similarly declares that no councillor shall continue to be a councillor who "is interested otherwise than as a shareholder in a joint stock company in any contract or work made

with or done for the Council". The consequence of being so interested, when a councillor, is that he *ipso facto* ceases to be a councillor—*vide* section 30. But nowhere is it said that a person so interested is disqualified from having his name placed on the list of those entitled to be elected as councillors, or that he may not be elected.

Except in the case of a by-election, there is usually an appreciable interval between the date of election and the commencement of the period for which a person is elected councillor. Till then it may well be that the councillor for the division is a different person. If in that interval the person elected for the next period rids himself of the character of a person in contractual relationship with the Council, I cannot see how it can be said of him at the commencement of the period for which he is elected that he is a councillor who is interested in a contract with the Council, within the contemplation of section 29, or why he should not continue in office.

Inasmuch, therefore, as interest in a contract is not a circumstance which deprives a person of the right to have his name inserted in the list of persons entitled to be elected, it cannot be said of a person so interested, if elected, that "at such date he was under any of the disqualifications specified in the Ordinance" nor could it be said of such a person who after election became or was found to be interested in a contract with the Council "that he became subject to any one of *such* disqualifications" within the meaning of section 31.

The provisions of section 10 (2) are significant :—

A person shall not be qualified to be elected or having been elected to be a councillor, unless his name appears in the lists prepared and certified as hereinafter provided of persons qualified to be elected.

Then follows section 10 (3) which specifies the necessary qualifications, and section 10 (4) which sets out the disqualifying circumstances.

The purpose of section 31 would seem to be to carry out the object of section 10 (2) by erasing from the list the name of any person who at the time of election or subsequent thereto was found to have ceased to possess the necessary qualifications or to have become subject to disabilities which had they existed or been noticed at the time when the lists were prepared would have resulted in the omission of his name from the list. The effect of the erasure of the name of such a person is that, he being no longer a person whose name appears on the list of persons qualified to be elected, consequently ceases to be a councillor. The effect of being interested in a contract is that the councillor ceases *ipso facto* to be a councillor. If the legislature intended to make the condition of being interested in a contract with the Council a ground for depriving a person otherwise qualified of the right to have his name placed on the list of persons entitled to be elected, it has not said so. Similarly, if it intended that section 31 should provide a procedure for removing from office any councillor who at the time of election or subsequent thereto for any reason whatsoever ceased to be entitled to be or act as a councillor that intention has not been clearly manifested.

The matter is by no means free of difficulty, and it is not without diffidence I have come to the conclusion that section 31 must be construed as providing a procedure for rectifying the list of persons entitled to be elected by erasing therefrom the name of any councillor who has ceased to possess the qualifications which persons whose names are on such lists are required to possess or who have become subject to any disability which disentitles a person to have his name placed thereon, and who upon the erasure of his name ceases to be a councillor.

For these reasons I would allow the appeal and set aside the order of the Chairman directing the erasure of the appellant's name from the list of persons entitled to be elected. There will be no order as to costs.

JAYEWARDENE A.J.—

I agree with my Lord, the Chief Justice. I should only like to point out that a curious anomaly may result, if the interpretation of section 31 were otherwise.

Section 29 provides that a person shall not continue to be a councillor, who does not attend three consecutive general meetings, unless the Council otherwise decide. If the Council fail to so decide, he ceases *ipso facto* to be a councillor, but section 29 empowers the Council in their discretion to restore him to office. If section 31 applies to these sections, the Chairman is obliged to order his name to be erased from the list, and he cannot be a councillor.

Appeal allowed.
