1943 *Present:* **Hearne J.**

PERERA *v.* KANNANGARA.

IN THE MATTER OF AN APPLICATION FOR A WRIT OF CERTIORARI AND MANDAMUS AGAINST THE RETURNING OFFICER OF THE COLOMBO MUNICIPALITY.

Writ of certiorari—*Objection to nomination paper—Returning officer upholds objection after time fixed by law —Acts without jurisdiction—Judicial capacity—Nomination regular—Power of Supreme Court to order—Contested election—Writ of* mandamus—*Colombo Municipal Council Constitution Ordinance (Cap. 194) s. 32 (2) and (4) and s. 37.*

Section 32 (2) of the Municipal Council (Constitution) Ordinance, which enacts that no objection to a nomination paper shall be allowed unless it is made to a Returning Officer between the hours of 12 noon and 1.30 P.M. on nomination days, expressly prohibits, a Returning Officer from entertaining an objection unless it is preferred within the time fixed by the section.

Where a Returning Officer upholds an objection, which is not made within the time fixed by law, he acts without jurisdiction and a writ of *certiorari* would lie to review his decision.

Where the Supreme Court holds that the nomination paper of a candidate, which the Returning Officer had rejected, was regular, the Court has power by *Mandamus* to order the Returning Officer to carry out the provisions of section 37 of the Ordinance with regard to a contested election.

THIS was an application for a writ of *Certiorari* and a writ of *Mandamus* against the Returning Officer of the Colombo Municipality.

H. V. Perera, K.C. (with him *J. L. M. Fernando*), in support.

J. E. M. Obeyesekere (with him *S. Kadirgamer*), for first respondent.

N. E. Weerasooria, K.C. (with him *E. B. Wikremanayake*), for second respondent.

Cur. adv. vult.

November 29, 1943. HEARNE J.—

The petitioner was a candidate for election as member for the Kochchikade Ward of the Colombo Municipal Council. In his petition, which was verified by affidavit, he stated *inter alia*, that " between 12 noon and 1 P.M. on nomination day (November 11th) he delivered two nomination papers with true copies thereof to the Returning Officer ": that " a nomination paper nominating S. Saravanamuttu was also " delivered ": that at 2.15 P.M. S. Saravanamuttu objected to his (the petitioner's) nomination: that at 3.45 P.M. the Returning Officer announced that he upheld the objection of S. Saravanamuttu on the ground that " the nomination paper of the petitioner had not been delivered in accordance with section 32 (1) (*b*) of the Colombo Municipal Council (Constitution) Ordinance " and declared S. Saravanamuttu to be elected: that he ascertained that the Returning Officer considered only one of his nomination papers: and, finally, that no decision was given by the Returning

Officer in respect of the other duly perfected nomination paper which had been delivered with a copy annexed. He prayed for the issue of a writ of *certiorari* to quash the decision of the Returning Officer and also for a writ of *mandamus* ordering him to take the steps required to be taken under section 37 of the Ordinance on the footing that more than one candidate had been naminated for Kochchikade Ward.

The Returning Officer is the first and S. Saravanamuttu the second respondent to the petition.

From the affidavits submitted by the first respondent and on his behalf it would appear that confusion must have reigned supreme in the "Hall where the nomination proceedings had taken place". It is not surprising and the first respondent is deserving of sympathy. He was doing at the same time and in the same place the work of Returning Officer for Kochchikade Ward and 29 other wards as well, in fact *all* the wards of the Colombo Municipal Council.

In answer to the allegation of the petitioner that "he had delivered two nomination papers with copies thereof" to the first respondent, the latter in his affidavit says "certain papers" were handed to him by the petitioner and other candidates and that these papers were then handed by him to his clerk, Mr. Fernando. No record appears to have been kept of papers handed in or the time of receipt. The first respondent does not appear to have had the opportunity or perhaps the inclination to examine the papers at once. He certainly does not claim to have done so. "I handed them" he says "to Mr. Fernando in the first instance" Mr. Fernando in his affidavit says that "the nomination papers delivered to the Returning Officer were passed on by him to other clerks for scrutiny-". The names of the clerks are Pulle and Benzie. He too did not examine the papers and, in answer to me, stated that he does not know how many papers of the petitioner he handled—"two or three or four". It seems to follow that the claim of the petitioner that he had handed two original nominations together with a true copy of each to the first respondent has not been and indeed cannot be contested by the first respondent or Mr. Fernando of their own personal knowledge.

But this is far, very far, from being all that requires to be said in fairness to the petitioner. His case was that he had handed in two originals and two copies to the first respondent, and the first respondent has in fact produced two originals (A and D) and two copies (B and C). He has explained how they came into his possession. It is necessary to piece together four affidavits before it can be understood and even then there are obscurities. One of the original nomination papers, he says, came back to him. It was handed to him by Mr. Fernando who says he received it from Mr. Pulle. There was an endorsement on it: "Checked. No duplicate and no deposit receipt" signed by Mr. Pulle. This nomination paper has been marked A and it was with reference to A that it was held that "the provisions of section 32 (1) (*b*) were not complied with". In paragraph 9 of his affidavit the first respondent says that "he upheld the objection as no true copy of the original nomination paper had been handed to him". How can he possibly say so? According to paragraphs 2 and 3 he received "certain papers" from the petitioner and passed them to Mr. Fernando "in the first

instance ", he in turn passed them to Mr. Pulle, and then A came back to the first respondent without a true copy attached to it and an endorsement on it. He cannot say that what he asserts proves that a copy of A did *not* come to his hands.

But, perhaps, from the point of view of the petitioner the cream of the whole matter is that a true copy of A (it is marked C) which, the first respondent is " satisfied ", was not received by him *was found* and it is not clear, even at the present stage, where it was found. According to the affidavit of Mr. Fernando the ambiguities of which he explained to me in person, C was found either on the notice board or " among the papers in the Hall ".

The explanation of the first respondent's ability to produce the original nomination paper " D " is even more baffling. The papers—" certain papers " as he calls them—which passed from him to Mr. Fernando and then to Mr. Pulle included D. Mr. Pulle handed it to Mr. Ratnayake. This clerk (Ratnayake) submitted no affidavit and no explanation has been vouchsafed in regard to what he did with it. Mr. Fernando says that he asked Mr. Pulle if he had seen any nomination papers other than A and that he said no. Mr. Pulle denies that Mr. Fernando questioned him. Meanwhile D mysteriously reappeared. Mr. Fernando found it at 2.25 P.M. " in the tray set apart for Kochchikade Ward ". He did not tell the Returning Officer of his discovery. He passed D to the clerks dealing with Kochchikade Ward and later it was found on the notice board. No comment need be made on this erratic way of dealing with a nomination paper which was admittedly received. As in the case of C, the copy of A, the exact course of the wanderings of B, the copy of D, is not precisely known. Mr. Fernando is uncertain whether he found it on the notice board or in the Hall.

I am not prepared to hold, as Counsel for the first respondent asked me to do, that the affidavits of Mr. Pulle and Mr. Benzie to the effect that, so far as they are concerned, they only handled A and D, constitute a challenge of the petitioner's claim that he delivered not only A and D but also copies of each of these original nomination papers to the first respondent. The latter and, perhaps, Mr. Fernando, if he was working alongside the first respondent could, if believed, effectively destroy the petitioner's claim but neither of them is in a position to contradict him.

In his affidavit Mr. Fernando states that in every case where there was a true copy he " sent it to be placed on the notice board ". The first respondent also states "I caused such copies as I received to be posted". B or C, each of them being a copy, was later found on the notice board. It is pointed out that the public had access to the board. The implication is that the petitioner or an interested party had placed it there. It seems to me that, unless the petitioner had taken leave of his senses, he would not have handed in two originals, at a later stage have placed one copy on the notice board, and then smuggled still another copy into the Hall where the first respondent was working, assuming in the latter case, and I see no reason to make the assumption, *he could have done so.*

I accept the petitioner's affidavit that he delivered A, B, C and D, two nomination papers and two copies to the first respondent between

12 noon and 1 p.m. on November 11. Counsel for the first respondent did not avail himself of the opportunity of cross-examining the petitioner.

The resulting legal position in regard to D is, on my finding, that it was received by the first respondent, that a true copy was also received, that no objection was taken in regard to this duly perfected nomination, and that the first respondent should have carried out the duties which devolved on him by reason of the provisions of section 37.

I shall also deal with the position in regard to A. It is admitted that the objection of S. Saravanamuttu was not taken till 2.15 P.M. Section 32 (2) enacts that " No objection to a nomination shall be allowed unless it is made to a Returning Officer between the hours of 12 noon and 1.30 P.M. on nomination day ". It was argued that the Returning Officer had the right, and indeed the duty, of deciding on the validity of every objection under section 32 (4) and even if he made a mistake in thinking that he could uphold an objection, although it was not preferred within the time fixed by law, an erroneous decision by him cannot be reviewed. *Certiorari* lies only to quash a decision made without jurisdiction.

Section 32 (4) must be read with section 32 (2) and I take the words in the former " the Returning Officer shall . . . . decide on the validity of every objection " to mean that he shall decide on the validity of every objection that may be legally entertained by him. By section 32 (2) as I construe it, he is expressly shut out from entertaining objections which are not taken between 12 noon and 1.30 P.M.

Counsel for the first respondent has pointed out that the word " allowed " is used both in section 32 (4) and section 32 (2). In my opinion it is not used to convey the same idea in these sections. In the former " allowed " means " upheld " and in the latter " entertained."

Section 32 (1) and section 32 (3) deal with the grounds on which objections may be based and the requirements of law which must be satisfied before they are entertained. The objections must be in writing and must specify the grounds of objection. Section 32 (2), placed as it is between sub-sections (1) and (3), similarly lays down a further condition regarding the *entertainability* of an objection. Section 32 (4) finally confers jurisdiction on the Receiving Officer subject to sub-sections (1), (2) and (3).

On this view of section 32 (2) the law to be applied is the law that was applied in *Rex v. Hammersmith Profiteering Committee*[1].

Counsel for the second respondent suggested that the language in section 32 (3) was mandatory—there is no occasion for me to decide that—and that the language of section 32 (2) was merely directory. It is in my view impossible to hold that section 32 (2) is merely directory. It *prohibits* a Returning Officer from dealing with an objection unless it is made between 12 noon and 1.30 P.M.

Counsel for the second respondent also argued that the Returning Officer's duties were ministerial and not judicial. That argument is, in my view, entirely without merit. He referred to the fact that there was no provision in the Ordinance for the reception of evidence prior to a decision being made. In the present matter a decision appears to have been made without giving the petitioner an opportunity to be heard.

[1] *(1920) 89 L.J.R. (K.B.D. & B.) 604.*

This is against principle, but the fact that no provision is made in the Ordinance for the reception of evidence does not add any weight to Counsel's argument. As was said in *Local Govt. Board v. Arlidge*[1] "Although a tribunal must act judicially, it does not follow that the procedure of every such tribunal must be the same, and where a tribunal is entrusted by the Legislature with judicial duties, Parliament must be taken, in the absence of any declaration to the contrary, to have intended it to follow the procedure which is its own".

Counsel for the first respondent took still another objection in regard to A. He took it in fact as a preliminary objection to the petition. He argued that, assuming this Court quashed the order of the first respondent upholding the objection of S. Saravanamuttu on the ground that the former had acted at the time he did without jurisdiction, the order of this Court cannot serve any practical purpose. The first respondent decided that a copy of A was not delivered to him, that is a question of fact which is incapable of review, and this Court cannot therefore by *mandamus* require the first respondent to carry out the provisions of section 37 of the Ordinance.

Unflattering as it is to the powers of this Court, this conclusion is based upon the fallacy that recognition will be given to a finding of fact whether the tribunal or *quasi*-tribunal responsible for that finding of fact acted with or without jurisdiction. That is not the case. As the first respondent entertained the objection of S. Saravanamuttu after 1.30 P.M. and, in consequence, acted without jurisdiction, the facts which he purported to decide remain legally undetermined. When a decision that is made without jurisdiction is quashed for that reason, the position is the same as if no decision had been made at all. In dealing with the petition this Court will ignore altogether and for all purposes an inquiry which was illegal *ab initio*, it will ascertain for itself by an independent inquiry facts, which have hitherto not been legally ascertained and, upon the result of that inquiry, it will decide whether a *mandamus* lies.

What are the facts ? I find, for the reasons I have given, that they are such that, assuming S. Saravanamuttu to have been duly nominated and that is not questioned, the first respondent had a clear duty to take the steps laid down in section 37 of the Ordinance for the reason "that more than one candidate stood nominated" for Kochchikade Ward.

The rules are made absolute. Two-thirds of the petitioner's costs and disbursements by way of fees will be paid by the first respondent and one-third by the second respondent.

Rules made absolute.

[1] *(1915) A.C. 120 at p. 132.*