

1928.

Present : Lyall Grant J.

In the Matter of an Application for a *Mandamus* on the
GOVERNMENT AGENT, WESTERN PROVINCE.

APPUHAMY v. THAINE.

Mandamus—Local option poll—Elimination of voters who have died or left the Island—Decision of presiding officer.

Where an application was made to the presiding officer at a local option poll to eliminate the names of certain persons from the voters' list on the ground that they were dead or had left the Island, and where the presiding officer refused without proof of the facts to eliminate the names in determining the proportion of recorded votes to the number on the voters' list,—

Held, that no *mandamus* would lie to review the decision of the presiding officer.

A PPLICATION for a writ of *mandamus* on the Government Agent, Western Province. The application was made by a voter on the voters' list made for the local option poll for the San Sebastian ward of the city of Colombo. The *mandamus* asked for an order on the respondent to declare that the percentage of votes necessary for the abolition of certain licences was cast at a poll held on November 26, 1927.

Arulanandan (with *Gunasekera*), for applicant.

Obeyesekera, J. E. M., C.C., for respondent.

March 6, 1928. LYALL GRANT J.—

This is an application for a writ of *mandamus* on the Government Agent, Western Province. The application is made by one D. J. S. Paranayapa Appuhamy, a voter on the list of voters made for the local option poll for the San Sebastian ward of the Municipality of Colombo. The *mandamus* asked for is an order on the respondent to declare that the percentage of votes necessary for the abolition of certain licences was cast at a poll held on November 26, 1927.

By Excise Notification No. 146 made under Excise Ordinance, No. 8 of 1912, and dated August 14, 1925, certain rules were promulgated for the conduct of voting by ballot for or against the existence of arrack, toddy, and foreign liquor taverns, &c., in different areas. These areas in Colombo corresponded to the city wards.

The second of these rules provides that a local option poll may be held in any area on the application of a certain number of voters.

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Where such an application has been made, rule 5 provides that the Government Agent shall cause a preliminary list of all persons entitled to vote at such elections to be prepared on or before May 15, that the list shall be available for inspection by the public, that objections to and claims for the inclusion of names in the list shall be made and received up to and including May 31, and that the Government Agent shall investigate all such claims and objections.

After this inspection it is the duty of the Government Agent to post on the Kachcheri notice board on or before June 30 a certified copy of the final list.

The rule proceeds :—

“ No names shall be added to or struck out from such final list after such publication and the local option poll shall be held on such lists, which shall be final and conclusive for all the purposes of these rules.”

Rule 8 provides that—

“ If at a local option poll in an area within the Municipality of Colombo 51 per cent. of the final list of voters in the area vote for the abolition of the licences, the licences shall be abolished”

“ The names of voters who before the holding of the poll have died or left the Island, and the names of those who at the time of the ballot are in jail or are prevented by operation of law from being present at the poll shall not be taken into consideration in determining the proportion of votes recorded to the number of voters on the list .”

Rule 19 provides that the votes shall be counted as soon as possible after the close of the ballot and the result declared immediately after it has been ascertained.

It is not disputed by the present applicant that the list for San Sebastian ward was properly prepared. It is alleged, however, that certain names of voters who at the date of the poll had died or left the Island were taken into consideration in determining the proportion of votes recorded to the number of voters on the roll.

From the affidavits furnished both by the applicant and the Government Agent, Western Province, it appears that some days before the poll the applicant wrote to the Government Agent enclosing a list of voters who had either died or left the Island.

The Government Agent replied (1) that the time for objections had lapsed, and (2) that he could only eliminate the names of the dead voters and those who had left the Island, provided that satisfactory proof thereof was produced before the presiding officer, that is to say, at the poll.

On the day of the poll application was made to the assistant to the presiding officer to leave out of consideration the names of persons alleged to be dead or to have left the Island. After inquiry by him the name of one person proved to be dead and the names of four persons absent from the Island were excluded from the list by the presiding officer.

The Assistant Government Agent, who was the presiding officer, also excluded the names of 58 other persons whose names had been duplicated on the list.

The total number on the voters' list was 2,232. The presiding officer at the request of the secretary of the Local Option Committee omitted 63 of these, as enumerated above, for the purposes of rule 9. The total number of votes cast for abolition of licences was 1,066.

The petitioners aver that in addition to those names struck out by the presiding officer there were 78 other names which ought not to have been reckoned, and they have produced affidavits to show that 28 of these additional persons were dead at the date of the poll and 58 out of the Island and that one name appeared three times on the list. They also aver that if these names are excluded the total on the list is reduced to 2,081, and that this being the proper number to be reckoned under rule 9 they have actually polled a percentage of 51.3.

It was argued on behalf of the applicant that rule 9 cast upon the Government Agent an absolute duty to omit from consideration in determining the proportion of recorded votes to the number of voters on the list the names of all voters who at the date of the poll had died or left the Island or were otherwise under disability.

They argued further that if it were shown to the satisfaction of the Court that the number of voters reckoned by the Government Agent was in fact greater than the number he ought to have reckoned, this Court could make the necessary alteration in the numbers and could order the Government Agent to declare the result of the poll in accordance with those numbers.

If its strict meaning is to be given to rule 9 it is obvious that there could be no finality in any declaration of a poll. Rule 19, however, provides that a declaration of a poll should be made as soon as possible, and no provision is made for its subsequent correction.

It is only reasonable to suppose that the Legislature intended that all questions arising out of rule 9 should be settled on the day of the poll. A comparison of rules 9 and 19 makes this clear. The rules are completely silent on the question of how the Government Agent is to ascertain the number of dead and absent voters. The ascertainment of the facts referred to in rule 9 constitutes a judicial act. The Government Agent has to weigh evidence and to give a decision on facts.

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The judicial act has in the present case been performed by the Government Agent in a way which seems not unreasonable, and in such circumstances as *mandamus* is not granted.

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A *mandamus* is only granted to compel performance of a duty of a judicial character where there has been a refusal to perform it in any way, and not where it has been done in one way rather than in another, even though the method pursued may have been erroneous. Still less will the Court take upon itself to upset what amounts to a judicial decision based upon evidence and to direct a public officer to come to an opposite decision upon evidence which was not before him. See *Short on Mandamus*, p. 256.

The application is refused, with costs.

Rule discharged.
