

1952

Present : Gunasekara J.

A. R. M. THASSIM, Petitioner, and W. T. WIJEKULASURIYA  
et al., Respondents

S. C. 21—IN THE MATTER OF AN APPLICATION FOR A WRIT OF QUO  
WARRANTO ON (1) W. T. WIJEKULASURIYA, AND (2) A. V.  
CHINNIAM, COMMISSIONER, MUNICIPAL COUNCIL, GALLE.

S. C. 24—IN THE MATTER OF AN APPLICATION FOR A WRIT OF MANDAMUS  
ON (1) A. V. CHINNIAM, COMMISSIONER, MUNICIPAL COUNCIL,  
GALLE, AND (2) W. T. WIJEKULASURIYA.

*Quo warranto—Local Authority—Municipal Council—Procedure for election of Mayor  
—Irregularity—Acquiescence—Estoppel—Municipal Councils Ordinance,  
No. 29 of 1947, as amended by Local Authorities (Election of Officials) Act,  
No. 39 of 1951—Section 14 (4)—“Candidate”.*

A member of a local authority is estopped from coming forward as a relator to impeach a title conferred by an election in which he has concurred or acquiesced. Where, therefore, in the election of the Mayor of a Municipal Council, the provisions of section 14 (4) of the Municipal Councils Ordinance, No. 29 of 1947, as amended by the Local Authorities (Election of Officials) Act, No. 39 of 1951, which prescribe the procedure, have been infringed, a Councillor who participated in the irregularity is not entitled, by way of an application for a writ of *quo warranto*, to impeach the title of the person who was elected Mayor. In such a case, the Councillor cannot plead ignorance of the law as an excuse.

The word “candidate” in section 14 (4) of the Municipal Councils Ordinance means no more than a Councillor who has consented to his name being proposed and seconded for election.

**A**PPPLICATIONS for mandates in the nature of a writ of *quo warranto* and a writ of *mandamus* against the Mayor of the Galle Municipal Council and the Municipal Commissioner.

*H. V. Perera, Q.C.*, with *E. B. Wikramanayake, Q.C.*, *Sir Ukwatte Jayasundera, Q.C.*, *S. Nadesan, M. H. A. Azeez, H. W. Jayewardene* and *G. T. Samarawickreme*, for the petitioner.

*N. E. Weerasooria, Q.C.*, with *S. J. V. Chelvanayakam, Q.C.*, *C. S. B. Kumarakulasinghe, Vernon Wijetunge, Izadeen Mohamed* and *A. S. Vanigasooriyar*, for the 1st respondent in S. C. No. 21 and 2nd respondent in S. C. No. 24.

*G. E. Chitty*, with *P. Somatilakam, S. Sharvananda* and *Joseph St. George*, for the 2nd respondent in S. C. No. 21 and 1st respondent in S. C. No. 24.

*Cur. adv. vult.*

March 18, 1952. GUNASEKARA J.—

These two applications for mandates in the nature of a writ of *quo warranto* and a writ of *mandamus* respectively were heard together. I shall deal first with Application No. 21, which is the application for a writ of *quo warranto*.

The petitioner and the first respondent were candidates for election as Mayor of the Galle Municipal Council at a meeting that was held on the 15th January, and the other respondent, who is the Municipal Commissioner, was the Chairman of that meeting. All the Councillors, fifteen in number, were present, and after certain proceedings had been taken for the election of a Mayor, the Commissioner declared the first respondent elected, upon the footing that he had received eight votes and the petitioner the other seven. In due course the first respondent took the chair and the petitioner made a magnanimous speech congratulating him on his election and assuring him of his fullest co-operation in the execution of his duties as Mayor. He then consulted his lawyers and filed the present application for the purpose of having the first respondent's election declared null and void and having himself declared elected as the Mayor.

The procedure for an election is prescribed by section 14 of the Municipal Councils Ordinance, No. 29 of 1947, as amended by the Local Authorities (Election of Officials) Act, No. 39 of 1951. Sub-section (3) provides that the name of any Councillor may with his consent be proposed and seconded for election as Mayor by any other Councillor present at the meeting and the Councillors present shall thereupon elect, in accordance with the provisions of sub-section (4), a Mayor from among the Councillors proposed and seconded for election. At the meeting in question the names of three Councillors—the petitioner, the first respondent, and E. D. Nagahawatte—were proposed and seconded for election. The

Councillors then determined, under paragraph (b) of sub-section (4), that the mode of election should be by open voting. Thereupon the Commissioner purported to take the votes in the manner provided by paragraph (c), which reads as follows :

“ Where it is determined under paragraph (b) that the election of a Mayor or a Deputy Mayor shall be by open voting, the Commissioner shall take the votes by calling the name of each Councillor present and asking him how he desires to vote and recording the votes accordingly. A Councillor may state that he declines to vote, and in such case the Commissioner shall record that such Councillor declined to vote. The Commissioner shall declare the result of the voting. ”

The Councillor whose name was the first to be called voted for the first respondent. The next two declined to vote. At that stage, according to the “ voting sheet ” comprising the record made by the Commissioner at the time, E. D. Nagahawatta “ withdrew ”. The Commissioner recorded this “ withdrawal ” and continued with the taking of the votes. In the result seven of the Councillors voted for the petitioner and six for the first respondent, and two declined to vote.

It is contended for the petitioner that that was a valid voting and that having received more votes than the aggregate of the votes received by the first respondent and Nagahawatta he was duly elected Mayor in accordance with the provisions of paragraph (e) of sub-section (4). The terms of this paragraph are as follow :

“ Where more than two candidates are proposed and seconded for election as Mayor or Deputy Mayor and no candidate receives at the first voting more votes than the aggregate of the votes received by the remaining candidates, one candidate shall be excluded from the election as hereinafter provided and the voting shall proceed, one candidate being excluded from the election after each subsequent voting, until a candidate receives at a voting more votes than the aggregate of the votes received by the remaining candidates at that voting, or, as the case may be, until voting in respect of two candidates only is held and completed. ”

Paragraph (f) provides for the exclusion of the candidate receiving the lowest number of votes or one such candidate selected by lot.

After the voting to which I have just referred, the Commissioner purported to hold a second voting. On this occasion all the Councillors gave their votes, including the two who declined at the first voting and also the petitioner himself. Eight voted for the first respondent and seven for the petitioner, and the Commissioner declared the former elected Mayor. It is contended for the petitioner that this second voting and the purported election of the first respondent were a nullity and that at the end of the first voting it was the Commissioner's duty to declare the petitioner elected.

In an affidavit dated the 16th February the second respondent has given his account of the circumstances in which he decided to hold the second voting. When two of the Councillors declined to vote, he says,

Nagahawatta "stated that he did not wish to stand for election and withdrew from the election and requested the Councillors supporting him to vote for W. T. Wijekulasuriya, the first respondent", and he thereupon "recorded in the voting sheet that E. D. Nagahawatta stated that he withdrew from the election", and he "proceeded to register the voting of the rest of the Councillors". The result of this voting, he continues, was that the petitioner received seven votes, the first respondent six and Nagahawatta none, and he "announced the result of this voting to the Councillors". As, however, Nagahawatta "had declared his unwillingness to stand for election after three Councillors had exercised their rights at the voting" he thought that his proceeding to take the votes of the rest of the Councillors was "unfair and irregular", and he, therefore, "without declaring the petitioner Mayor requested the Councillors to vote between the first respondent and the petitioner who were now the only candidates". He proceeds to say that he would not have taken this step if either of these two candidates had received at least eight votes on the first occasion, because then "whichever way the two votes of those who originally declined to vote were cast it could not have affected the result".

Much the same account appears in the minutes of the meeting signed by the second respondent as Municipal Commissioner. Having stated that the result of the voting was that the petitioner received seven votes, the first respondent six, and Nagahawatta none, and that two Councillors declined to vote, the minutes continue :

"As neither of the two candidates obtained a minimum of eight votes and as Mr. E. D. Nagahawatta had declined to stand for election after a section of the House had already voted, the Municipal Commissioner proceeded to obtain a fresh voting between Messrs. Thassim and Wijekulasuriya."

The first respondent's affidavit adds nothing to what has been stated by the second on this point. The petitioner's account is contained in the following paragraphs of his affidavit of the 20th January :

"4. At the first voting I obtained seven votes, the 1st respondent six votes and E. D. Nagahawatta no votes. I having thus received more votes than the aggregate of the votes received by the remaining candidates was in terms of section 14 of the Municipal Council Ordinance, No. 29 of 1947, as amended by the Local Authorities (Election of Officials) Act, No. 39 of 1951 duly elected Mayor.

5. The second respondent without declaring the result of the voting to be as set out in the last preceding paragraph held further proceedings without any warrant or justification in law by purporting to have a second voting after excluding the said E. D. Nagahawatta from the election and thereafter purported to declare the 1st respondent duly elected Mayor for 1952. I was not then aware that the said further proceedings were void."

This account suggests that the procedure followed was that prescribed, not for such a case as this, but for a case where more than two candidates are proposed and seconded for election and no candidate receives at the

first voting more votes than the aggregate of the votes received by the remaining candidates. That this was the procedure which the Commissioner regarded himself as adopting is made clear by a document that he handed to the petitioner on the very next day, the 16th January, in response to a request for a copy of the minutes. This document, which purports to be a draft of the minutes, states :

“ When three votes were recorded, Mr. E. D. Nagahawatta declined to stand for election. The Commissioner stated that his name may be excluded after the first voting was fully recorded.

The voting resulted as follows :—

*First Voting*

*For Mr. A. R. M. Thassim* : Messrs. B. M. Charles, D. Y. Weerasirie, A. R. M. Thassim, H. K. Edmund, A. I. H. A. Wahab, L. E. Mendis and T. D. Abeywardena.

*For Mr. W. T. Wijekulasuriya* : Messrs. W. Dahanayake, W. T. Wijekulasuriya, E. D. Nagahawatta, D. A. S. P. Dahanayake, A. D. H. Weeratunge and M. Thaha Cassim.

*For Mr. E. D. Nagahawatta* : Nil.

Declined to vote : Messrs. A. H. E. Fernando and D. S. Goonesekera.

Mr. Nagahawatta's name was excluded.

*Second Voting*

*For Mr. A. R. M. Thassim* : Messrs. B. M. Charles, D. Y. Weerasirie, A. R. M. Thassim, H. K. Edmund, A. I. H. A. Wahab, L. E. Mendis and T. D. Abeywardena.

*For Mr. W. T. Wijekulasuriya* : Messrs. W. Dahanayake, A. H. E. Fernando, D. S. Goonesekere, W. T. Wijekulasuriya, E. D. Nagahawatta, D. A. S. P. Dahanayake, A. D. H. Weeratunga and M. Thaha Cassim.

Mr. W. T. Wijekulasuriya was declared duly elected Mayor for 1952.”

The words “ Mr Nagahawatta's name was excluded ” were inserted in the draft by the second respondent in the presence of the petitioner before he handed the document to him.

I do not think that there is any material inconsistency between this version and the second respondent's affidavit, but if there is the former should be preferred for the reason that his recollection of the events would have been better at the time when he prepared or adopted the draft minutes. It seems to me that the second respondent treated the election as one in which there were three candidates until the end of the first voting, and that at that stage he excluded from the election, in supposed compliance with the provisions of paragraphs (e) and (f) of section 14 (4), the candidate who received no votes. It is apparent that Nagahawatta's

interruption of the proceedings raised a problem for the second respondent as to how he should proceed, in view of the other's statement that he did not wish to stand for election and that he withdrew and the element of confusion that it may well have introduced. Apparently he was in doubt as to whether Nagahawatta's name should be excluded immediately, but he thought that the problem would solve itself at the end of that poll if he took the rest of the votes; and so he seems to have "stated that his (Nagahawatta's) name may be excluded after the first voting was fully recorded". When at the end of the voting he found that no candidate had received a majority of the possible votes, by polling at least eight votes, it appears to have occurred to him that the procedure he had adopted could result in unfairness and must therefore be "irregular", but he seems to have thought that any irregularity would be cured and any unfairness redressed by the next step that he thought he should take of excluding Nagahawatta from the election at that stage.

It is contended for both respondents that the first voting was a nullity. One ground upon which Mr. Chitty bases that contention is that Nagahawatta's conduct showed that he did not consent to stand for election. I do not think that this is a tenable ground: Nagahawatta made no protest when his name was proposed and seconded for election and it does not appear that even at the late stage at which he did speak he denied having consented to his name being proposed. Mr. Chitty next argues that if he did so consent he withdrew his consent later and thereby ceased to be a candidate. Mr. Chelvanayakam's argument, too, is that Nagahawatta ceased to be a candidate and therefore the first voting was a nullity: he had ceased to be a candidate in fact and the law does not say that he must be deemed to be a candidate nonetheless. The view submitted by Mr. H. V. Perera in his reply is that sub-section (4) merely gives the Commissioner directions as to the steps that he must take in the election and does not, by the introduction of the word "candidate", add a new condition upon which those steps must be taken. The only conditions, he points out, are those laid down in sub-section (3), and a "continuing consent" to stand for election is not one of them. I agree with this view. The word "candidate" in the context in which it appears means no more, I think, than a Councillor who has consented to his name being proposed and seconded for election.

It seems to me, however, that it is implicit in this view of the effect of sub-section (4) that the ground on which the first respondent's title to the office is impeached is merely a defect in the procedure by which he was elected. The Councillors who were present at the meeting were empowered by sub-section (3) to elect a Mayor from among those who were duly proposed and seconded for election, and they chose the first respondent from among such candidates by a majority of the whole number of Councillors (and not merely of those who were present), but the provisions of sub-section (4) which prescribes the mode of election were infringed. The petitioner himself participated in the irregularity, however, and is disqualified by his concurrence in the mode of election for impeaching the first respondent's title to the office. His plea that he was "not then aware that the said further proceedings were void" is only

a plea of ignorance of the law, which is not an excuse. The gist of the decisions regarding the effect of acquiescence is stated by Jayawardene A. J. in *Inasitamby v. Government Agent, Northern Province* <sup>1</sup>, as follows :

“ It is a general rule of corporation law that a corporator is estopped from coming forward as a relator to impeach a title conferred by an election in which he has concurred (*Rex v. Lane* <sup>2</sup> and *Rex v. Cobb* <sup>3</sup>). It is a valid objection to a relator that he was present and concurred at the time of the objectionable election even though he was then ignorant of the objection, for a corporator must be taken to be cognizant of the contents of his own charter and of the law arising therefrom (*Rex v. Trevanon* <sup>4</sup>). Where a corporator has attended and voted at a meeting, he will not be allowed to become a relator, unless he shows that at the time of the election he was ignorant of the objection subsequently taken (*Rex v. Slythe* <sup>5</sup>). A relator who has acquiesced in and himself adopted the mode of voting he now objects to is disqualified from applying for a rule (*Rex v. Lofthouse* <sup>6</sup>), and a rule will not be granted to a relator who has participated in the alleged irregularities on which he based his application (*Rex v. Colclough* <sup>7</sup>). ”

(The ignorance referred to in *Rex v. Slythe* is ignorance of some fact making the election invalid and not ignorance of the law.)

Application No. 21 is refused. Application No. 24, for a mandate in the nature of a writ of *mandamus* is also refused. In each case the petitioner will pay the costs of the first respondent, that is to say, the respondent W. T. Wijekulasuriya in Application No. 21 and the respondent A. V. Chinniah in Application No. 24.

*Applications refused.*

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