1943 *Present :* **Jayetileke J.**

JOSEPH *v.* KANNANGARA *et al.*

IN THE MATTER OF A WRIT OF *Certiorari* AND *Mandamus* AGAINST THE RETURNING OFFICER, COLOMBO MUNICIPALITY

No. 528.

Municipal Council election—Validity of nomination—Failure of Returning Officer to put a member in nomination—Election void—Writ of Mandamus—*Colombo Municipal Council (Constitution) Ordinance, Sec. 37 (1) and (2).*

Where no objection is taken to a nomination paper submitted by a candidate at a Municipal Council election, the nomination is valid and the Returning Officer is bound to carry out the steps indicated in section 37, sub-sections (1) and (2).

Where an election is held without putting such candidate in nomination the election is void and the Supreme Court will by *Mandamus* order a fresh election to be held.

A copy of a nomination paper on which the written consent of the candidate is not endorsed or to which such written consent is not affixed is not a true copy within the meaning of section 31.

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

N. Nadarajah, K.C. (with him *C. S. Barr Kumarakulasingam* and *Vernon Wijetunge*), for petitioner.

N. K. Choksy (with him *R. A. Kannangara*), for respondent.

Cyril E. S. Perera (with him *V. F. Guneratne*) for intervenient.

Cur. adv. vult.

December 20, 1943. JAYETILEKE J.—

This is an application for a writ of *mandamus* to compel the first respondent to take the necessary steps under section 37 of the Colombo Municipal Council (Constitution) Ordinance on the footing that the petitioner is a duly nominated candidate for the Mutwal Ward. In the course of the inquiry the petitioner amended the petition *ex abundanti cautela* and asked for a writ of *certiorari* to quash the decision of the first respondent that he was not a duly nominated candidate.

The petitioner, the second respondent and one Mr. Mendis were nominated as candidates for election for the Mutwal Ward at the general election of the Colombo Municipal Council. The first respondent was duly appointed Returning Officer for that ward.

On nomination day the petitioner handed to the first respondent two nomination papers A and R 1 and copies of each B and R 2. The papers were not examined by the first respondent but placed in a tray which was on his table. They were passed on by a clerk called Fernando to another clerk who had been detailed by the first respondent to scrutinise them. The latter found that the written consent of the petitioner to be nominated as a candidate was not annexed to or endorsed on B and he brought the fact to the notice of the first respondent. R 1 and R 2 had got mixed up with some other nomination papers and were not scrutinised by him. The first respondent inquired whether there were any papers besides A and B and was informed there were none. He then took the objection that B was not a true copy of A within the meaning of section 31 of the Ordinance.

The first respondent says that he took the objection before 1.30 P.M., upheld it, and announced his decision at 3.30 P.M. on the microphone.

A large volume of evidence was led by the petitioner to prove that no such announcement was made. It seems unnecessary for me to decide whether such an announcement was made because section 32 (4) does not require the Returning Officer to make a public announcement of his decision on an objection. There is ample evidence that the first respondent informed the petitioner of the objection taken by him and of his decision thereon as required by the sub-section.

Mr. Nadarajah faintly argued that it was not necessary to have the written consent of the candidate annexed to or endorsed on the copy. The short answer to this contention is that section 31 provides that a *true copy* must be delivered with every nomination paper. B is not a true copy of A because the written consent of the petitioner which is endorsed on A does not appear on it.

The petitioner alleged in his affidavit that he handed to the first respondent two nomination papers and a copy of each. He further alleged that candidates were prevented from scrutinising nomination papers, that copies of nomination papers were not posted up on the board before 1.30 P.M., that objections were entertained after 1.30 P.M., that there was a large crowd round the first respondent, and that the proceedings were conducted by the first respondent in a very unbusiness-like manner.

These allegations were not denied by the first respondent. The cause of the trouble seems to have been that one person had been appointed Returning Officer for 30 wards.

There can be no doubt that whoever was responsible for making the appointment has committed an egregious blunder. It was not humanly possible for one person to examine and pass 700 nomination papers within the time prescribed. The first respondent has himself failed in his duty to make adequate arrangements to have the nomination papers scrutinised for he had only twelve clerks to help him in the work.

The first respondent in his affidavit stated that the petitioner handed to him only one nomination paper and one copy. But in the course of the inquiry he brought to my notice that he caused a search to be made to satisfy his own conscience that there was no other nomination paper and he came across the nomination paper R 1 and the copy R 2 which he produced in Court. He pointed out that R 2 was not a true copy of R 1 as the written consent of the petitioner was not annexed to or endorsed on it. He admitted that no objection was taken by anyone to R 1.

Mr. Nadarajah contended that as no objection was taken to R 1, it must be taken to be a valid nomination paper and that the first respondent was not justified in refusing to put the petitioner in nomination. He relied on the case of *Pritchard v. Mayor, Aldermen and Citizens of Borough of Bangor* [1] in which Lord Watson said at page 252:—

> "If no objection is made, or if objections are stated and repelled by the Mayor, then the nomination becomes a valid nomination. I do not mean to suggest that it is final and conclusive upon questions of disqualification or other similar objections which may be taken to it, but I think it was intended to be conclusive to this effect, that the nomination paper so sustained as valid should form the basis of the election, and that the nominee in that paper should be treated as a person for whom votes could be given before the Returning Officer."

The functions of a Returning Officer with regard to the nominations of candidates are defined in sections 31, 32, 33, 34, 35, 36, and 37 of the Ordinance.

Under section 32 (2) he is under an obligation to reject any objection taken to a nomination paper after 1.30 P.M. on nomination day.

The nominations of the petitioner, the second respondent and Mr. Mendis were duly handed in to the first respondent within the prescribed time. No objections were taken to the nomination papers of either the second respondent or Mr. Mendis but, as I said before, one of the nomination papers of the petitioner, to wit, R 1, was mislaid by the first respondent.

As no objection was taken to R 1, I am of opinion that it must be taken to be a valid nomination. It was, therefore, the duty of the first respondent to put all three candidates in nomination and to take the necessary steps under section 37, sub-sections (1) and (2).

Sub-section (1) provides that if more than one candidate stands nominated for the ward, the Returning Officer shall forthwith adjourn the election to enable a poll to be taken and shall allot to each candidate a colour by which the ballot box for the reception of ballot papers in favour of such candidate shall be distinguished at the poll. Sub-section (2) provides that immediately after such adjournment the Returning Officer shall report to the Commissioner that the election is contested and shall send him copies of the nomination papers and a statement of the colour allotted to each candidate. Sub-section (3) provides that upon the receipt of such report the Commissioner shall take the necessary steps to have the poll taken.

[1] *(1889) 13 Appeal Cases, 241.*

The evidence shows that the first respondent failed to put the petitioner in nomination and that his report under sub-section (3) was that the second respondent and Mr. Mendis stood nominated for the Ward. The poll was taken on December 4, 1943, and the second respondent was declared elected.

The question arises whether the first respondent's failure to put the petitioner in nomination and to comply with the provisions of section 37 (1) and (2) vitiates all the subsequent steps taken by him.

In *Davies v. Lord Kensington* [1], the Returning Officer refused to put in nomination one of two candidates on the ground that he declined to deposit or give security for £40 which the Returning Officer demanded as a moiety of the estimated expenses to be incurred by him in carrying out the provisions of the Ballot Act.

Lord Coleridge C.J. said:—

"He (the Returning Officer) improperly insisted upon a condition which he had no right to impose and his refusal to put Mr. Davies in nomination was without justification, and consequently the election and return of Lord Kensington was void."

Brett J. said:—

"The refusal of the Returning Officer to put the second candidate in nomination was a breach of duty which altogether avoided the election, and therefore we must hold the return of Lord Kensington to be void."

The questions of principle raised here are indistinguishable from those which were argued in the two cases I have referred to. Mr. Choksy urged that a writ of *mandamus*, which is a high prerogative writ, should not be issued in this case because the petitioner has not complied with the provisions of section 31 of the Ordinance.

A writ of *mandamus* is, no doubt, a writ discretionary on the part of this Court. Though R 2 is not a true copy of R 1, I am satisfied on an examination of R 1 that the written consent of the petitioner has been given to his nomination. The petitioner has proved that the first respondent was under a duty to put him in nomination and that he has failed to do so.

In these circumstances I am of opinion that the relief prayed for in para. (*a*) of the petitioner's original petition should be granted by this Court. I declare the election of the second respondent void and make the rule absolute with costs against the first respondent. I would make no order for costs against the second respondent.

Rule made absolute.

[1] *L. R. 9 C. P. 720.*