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Present: Schneider A.C.J.

In the Matter of the Petitions of D. M. DE S. ABHAYANAYAKE of Kandy.

Municipal Councils Ordinance—Residence within a Municipal town—Permissive occupation of furnished rooms—Ordinance No. 6 of 1910, ss. 9 (2) and 11 (2) (c).

Where the question was whether a temporary occupation of sleeping apartments, within Municipal limits, was sufficient to constitute residence within the meaning of section 9 (2) of the Municipal Councils Ordinance, and where the facts disclosed at the inquiry indicated a permissive use of the apartments as guest, or an absence of the liberty to return to them at any time.

Held, that such an occupation of apartments was insufficient to constitute legal residence.

APPEAL from an order of the Chairman of the Municipal Council of Kandy declaring three persons to be duly qualified voters and to be entitled to have their names retained in the list of voters.

The facts appear from the judgment.

H. V. Perera (with him *Ameresekere*), for petitioner.

N. E. Weerasooriya, for respondent.

November 8, 1926. SCHNEIDER A.C.J.—

In these appeals the appellant is the same person. They raise the same question of law. They have been numbered in the Registry of this Court as connected appeals. They can conveniently be disposed of in one judgment.

The appellant objected to the names of the respondents appearing in the list of persons duly qualified as voters, published as a supplement to the "Ceylon Government Gazette" of September 3, 1926, on the ground that they did not satisfy the requirement in section 11 (2) (c). The Chairman of the Municipal Council held that they did. Against that holding these appeals are preferred under the provisions of section 16 (1) of the Municipal Councils Ordinance, 1910,[1] which grants an appeal to the Supreme Court "on any question of law involved in the adjudication but not on any other ground."

[1] (*No. 6 of 1910.*)

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The question of law is stated clearly in the petitions of appeal which have been carefully drafted. It is that the evidence regarding "residence" is insufficient to satisfy the requirement in section 11 (2) (*c*). It becomes necessary therefore to ascertain "what the evidence is," which the Chairman had accepted as proving residence.

In appeal No. 659 the respondent is M. B. Panabokke. He gave evidence at the inquiry and stated that he was the owner of certain premises within the Municipal town; that he had leased them to an Association which ran a hostel in them; that he had not reserved any portion of the premises for his own use but that the Secretary, by arrangement between them, allowed him the use of a room and that the room was furnished with a bed in which he slept whenever he came to Kandy, which was three or four times in a month. But under cross-examination he said that he had occupied the room about three times since the Association had taken possession under the lease about six months before the date of the inquiry. The date of the inquiry was September 30, 1926.

In appeal No. 659*a* the respondent is R. Divitotawela. He did not appear at the inquiry, but was represented by a Proctor who called one witness. This witness stated that he knew the respondent to own property within the Municipal town; that the respondent usually resided in Uva, but whenever he came to Kandy he went to the house of his mother-in-law which was within the Municipal town; that he had a room of his own there furnished by himself; that there was a bed in that room; and that during the six months preceding the inquiry the respondent had come to Kandy three or four times, and on each occasion had stayed about a week. He also stated that the respondent was "not a mere guest."

In appeal No. 659*b* the respondent is B. Ratwatte. He too did not appear at the inquiry or give evidence, but was represented by the same Proctor who represented the other respondents. For him, too, the same witness gave evidence. The witness said that this respondent was his brother and was a Ratemahatmaya living at Balangoda, but that whenever the respondent came to Kandy, which was once every two or three months, he lived at his mother's house, within the Municipal town; that he had his own set of rooms there, and regarded his mother's house as his own; that whenever he came to that house he brought his wife and family with him and stayed one or two days, and sometimes even a month at a time.

The question for decision is whether on this evidence each of the respondents can be held to have been residing within the Municipal town of Kandy at the time the list was prepared. According to section 40 the list should have been prepared in July, 1926. As this question is of wide and practical importance it has to be considered carefully. Section 11 (2) (*c*) enacts that a person shall not be entitled to have his name placed on the list in any year unless

he " resides within the Municipal town." The inquiry, consequent upon any objection taken to the name of any person appearing in the list, should therefore be directed to ascertain whether the person whose qualification is called in question had that qualification not at the date of the objection, but at the time the person claimed to have his name placed on the list. The word " reside " should be construed in the light of the explanation to be found enacted in section 9 (2) of the Ordinance. It is:—

> " For the purposes of this section and of the following sections in this part, a person is said to ' reside ' in any dwelling in which he sometimes uses a sleeping apartment, although he does not use it uninterruptedly, or has elsewhere a dwelling where he has, and sometimes uses, another such apartment. A person does not, for the purposes aforesaid, cease to reside in a dwelling where he has such an apartment merely because he is absent from it, if there is the liberty of returning at any time and no abandonment of the intention to return at pleasure."

This explanation is of considerable assistance, the more so as it embodies almost word for word the principles laid down in *Elliott on Registration* [1] which Earle C.J. adopted in the leading case of *Powell v. Guest* [2]:—

> " In order to constitute residence, a party must possess at the least a sleeping apartment, but an uninterrupted abiding at such dwelling is not requisite. Absence, no matter how long, if there be the liberty of returning at any time, and no abandonment of the intention to return whenever it may suit the party's pleasure or convenience so to do, will not prevent a constructive legal residence. But if he has debarred himself of the liberty of returning to such dwelling by letting it for a period, however short, or has abandoned his intention of returning, he cannot any longer be said to have even a legal residence there."

In *Powell v. Guest* (*supra*), and the other cases to which I shall presently refer, the Judges interpreted the meaning of residence with reference to a period of time, such as six months, required by Statute law. Our Ordinance makes no mention of residence for a given period of time, but this difference between the English Statutory law and our Ordinance does not cause any difficulty in our adopting and following the decisions of the English Courts, because our Ordinance has in express terms adopted those principles. Section 9 (2) appears to have been intended for cases of " residence " such as that of the respondents, where for much the greater part of

[1] *2nd Ed., p. 204.*
[2] *(1864) 18 C. B. N. S. 72 ; N. & P. 149 ; 34 L. J. C. P. 62.*

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the period of time, which should be taken into consideration in deciding the question of residence, the claimants have been living and sleeping and doing all that constitutes residence in the ordinary sense elsewhere than in the Municipal town. In *Powell v. Guest* (*supra*) it was decided that Guest had not resided for six calendar months within a Borough, because he was for a portion of that time detained in a jail situated beyond a fixed distance from the Borough under a sentence of imprisonment without the option of paying a fine. It was held that he had debarred himself of the liberty of returning when he was guilty of a criminal act by reason of which the laws of his country had taken away from him the power of returning. In the same case Byles J., who was one of the Judges, said:—

> "It is not necessary or convenient to lay down any universal rule on the subject, but I think the fair result of the authorities is that legal inability caused by the criminal and voluntary act of the party, and not from misfortune, breaks the residence and destroys the qualification."

In *Ford v. Hart*,[1] it was held that in the case of a Military Officer subject to the will and pleasure of the Queen, and therefore not *sui juris*, there could not be such an intention of returning as to constitute a constructive residence, although when he obtained leave of absence, which he usually did for three months in the year, he used to reside in the house of his mother occupying apartments there which were always reserved for his use. Keating J. said:—

> "I am by no means disposed to say that in ordinary cases a residence such as existed in the present case, even though it is in some sense permissive may not be a sufficient residence for the purpose of entitling a free man to vote."

Brett J. said:—

> "Not by crime, but by the voluntary acceptance of a duty, the respondent has incapacitated himself from returning to the city of Exeter."

In *Ford v. Pyc*,[2] it was held that there was a break of residence which prevented the claimant from being duly qualified, because he entered into an arrangement with another person by which they agreed to exchange duties and residences for a certain period for the purpose of obtaining relaxation and a change of scene, and in pursuance of this arrangement had left his house and resided for a

[1] *(1873) L. R. 9, C. P. 273.*

[2] *43 L. J. C. P. 21.*

portion of the qualifying period in the house of the other person who came and resided during the same period in the claimant's house. Keating J. said:—

> "The respondent had voluntarily given up the possession of his house for good consideration to another person for that period, but whether the transaction amounted to a demise of the house seems to me to be immaterial. He had authorized another to occupy it for a certain definite period, and he himself not only did not return or reside there during such period, but he never contemplated doing so."

In *Durrant v. Carter*,[1] it was decided that there was no residence by a claimant. The claimant was entitled to the occupation by him of a house, but had been absent from it under the following circumstances. He arranged with another person to do his work during his absence and it was required of this person that he should reside in the house. Upon the claimant's departure this person took up his abode in the house. By arrangement between him and the claimant three rooms in the house were retained by the claimant and kept locked up, the key being left in the possession of a servant who had been employed by the claimant but was during his absence, employed by the other person. The claimant admitted that he could not have returned to reside in the house without providing some other residence for the other person. Keating J. said:—

> "One test would be this: Could Mr. Carter have given permission to any other person to use the house during the period of his absence? I apprehend, clearly not. How then can it be said that there was a residence in the house by Mr. Carter?"

What is the effect when the rule of law with regard to residence to be derived from these authorities is applied to the cases of the respondents?

In the case of M. B. Panabokke (Appeal No. 649) there can be no doubt that he is disqualified. He had debarred himself of the liberty of returning by leasing the premises. He had therefore no legal residence there. The Chairman's order in regard to him must be set aside.

The case of Divitotawela is not quite as clear as that of Panabokke, and presents some difficulty. I am unable to understand the statement in the evidence that he was not a mere guest. The evidence seems to me to indicate that he was only a guest of his mother-in-law upon all those occasions when he is said to have visited Kandy. His residence was clearly permissive, but that of

[1] *43 L. J. C. P. 17.*

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itself would not destroy the qualification. His mother-in-law might have withdrawn her permission at any time, but the evidence is that the permission did in fact exist at all times material for constituting the required residence. But, on the other hand, the effect of the evidence is that he had been received merely as a guest. His visits were at long intervals. The evidence suggests no more than that he was allowed to use a room which had been furnished by himself. This room was not reserved for his use. His claim to have resided is not even as strong as one that might be made by a person who comes to Kandy occasionally and occupies a room in a hotel. The only feature which distinguishes his claim from that of such a person is that he had furnished the room in the house of his mother-in-law. In his case, too, I must hold that he did not reside in the Municipal town of Kandy.

There remains the case of Ratwatte. It presents no difficulty. As a Ratemahatmaya he had taken upon himself the performance of certain duties attached to his office which necessitated his residence at Balangoda, and thereby voluntarily incapacitated himself from returning to his mother's house at his own pleasure. The reasoning in *Ford v. Hart* (*supra*) is clearly applicable to his case. As a public servant he would no doubt be entitled to leave, but might under some circumstances have none at all. He is no longer *sui juris*. The adjudication of the Chairman in his case also must be set aside.

I accordingly direct that the names of the three respondents be erased from the list, and that each of them do pay to the appellant his costs of the inquiry, and of this appeal.

Appeal allowed.