

1947

Present: Nagalingam A.J.

PERERA, Petitioner, and MUNICIPAL COUNCIL OF COLOMBO
et al., Respondents.

358—Application for Writ of *Mandamus* against the
COLOMBO MUNICIPAL COUNCIL and the LOCAL
GOVERNMENT SERVICE COMMISSION.

Writ of mandamus—Breach of duty arising from contract of service and not of a public character—Not remediable by mandamus—Writ will not be granted where another remedy is available.

The petitioner who was employed as a dispensary medical officer under the 1st respondent, the Colombo Municipal Council, applied for a writ of *mandamus* to compel the 1st respondent and the Local Government Service Commission, the 2nd respondent, to reinstate him in the post, from which he had been interdicted, and to pay him arrears of salary from the date of his interdiction till reinstatement.

Held, that in an application for a writ of *mandamus* the applicant must have a right to the performance of some duty of a public and not merely of a private character.

Held, further, that a writ of *mandamus* is issued only where no other specific means of securing relief exists.

APPPLICATION for a writ of *mandamus* against the Colombo Municipal Council and the Local Government Service Commission.

N. E. Weerasooria, K.C. (with him *N. Kumarasingham*), for the petitioner.

H. V. Perera, K.C. (with him *E. B. Wikramanayake*), for the 1st respondent.

N. Nadarajah, K.C. (with him *Walter Jayawardene*), for the 2nd respondent.

Cur. adv. vult.

January 21, 1947. NAGALINGAM A.J.—

This is an application by the petitioner who was employed as a dispensary medical officer under the 1st respondent, the Colombo Municipal Council, for a writ of *Mandamus* on the Council and on the Local Government Service Commission, the 2nd respondent, to compel them to reinstate the petitioner in the post held by him from which he had been interdicted and to pay him arrears of salary from the date of his interdiction till reinstatement.

The respondents take the objection that a writ of *Mandamus* does not lie in the circumstances disclosed by the applicant's petition. The facts which give rise to this petition are: The petitioner was appointed Dispensary Medical Officer under the 1st respondent on June 14, 1939, the terms of employment being set out in an agreement of that date filed of record. One of the terms of employment is stated to be that if the employee should seriously misconduct himself in his office it would be competent for the Council to declare his appointment at an end and to dismiss the officer. On or about September 19, 1945, the then Acting Commissioner of the Council in consequence of certain representations made to him against the petitioner in regard to the latter's conduct as Dispensary Medical Officer interdicted the petitioner from service and took steps under certain standing orders of the Council to have charges framed against him and to have the charges investigated by a committee of five members of the Council. The committee concluded its investigations on or about February 12, 1946, but before it could submit its report to the Council the functions of the Council in regard to the appointment of, disciplinary action against, and dismissal of its servants became vested in the 2nd respondent, the Local Government Service Commission, which perforce had to commence proceedings *de novo* in regard to the investigation of the charges framed against the petitioner. The petitioner while complaining of delay in regard to the inquiry of the charges framed against him avers that he has been paid only half salary from the date of his interdiction and that as no final decision has been arrived at in regard to the charges framed against him even after the lapse of a considerable period since his interdiction he makes his application for the writ to secure his reinstatement.

On these facts it would be manifest that the object of the application is to compel the performance by the respondents of certain obligations arising between the petitioner and the respondents out of the contract of

service entered into by the petitioner with the 1st respondent. That the petitioner is merely an employee or a servant of the 1st respondent there can be no doubt that there can be equally little doubt that the neglect or refusal on the part of the respondent Council to pay the petitioner his salary in full or to reinstate him in his office is a breach of a duty not of a public but of a private character.

Shortt in "Informations, Mandamus and Prohibition" (page 227) lays down that one of the principal general rules governing the issue of a writ of *Mandamus* is that "the applicant must have a legal right to the performance of some duty of a public and not merely of a private character". In support of this proposition he cites a passage from Lord Hardwick's judgment in the case of *Rex v. Wheeler* referred to therein from which I shall quote an excerpt :—

"The reason why we grant these writs is to prevent a failure of justice and for the execution of the common law or of some statute or of the King's charter ; and never as a private remedy . . . Now here there don't appear to be any failure of justice but only a dispute about a private right."

A passage from Bailey J's judgment in *Rex v. Bank of England* (1819) 2 B & Ald. 622 is also cited :—

"The Court never grants this writ except for public purposes and to compel performance of public duties."

The most familiar examples of the issue of a writ of *Mandamus* in our Courts is in regard to the refusal of a Judge of an inferior Court to exercise jurisdiction or against a public officer neglecting or refusing to fix a day for nomination of candidates to a local body or to take the necessary subsequent steps. Certainly the petitioner's Counsel has not been able to cite an instance where this writ has been invoked to assist a party to secure private remedy.

Having regard to this aspect of the matter alone, therefore, there cannot be any doubt that the application cannot be acceded to ; but there is another equally fatal objection to the application, and that, to use the language of Shortt (page 227) is that—

"There must be no other effective lawful method of enforcing the right."

In the case of *re Barlow* (1861) 30 L.J.Q.B. 271 the proposition is thus stated :—

"It is well settled that where there is a remedy equally convenient, beneficial and effectual, a mandamus will not be granted. This is not a rule of law but a rule regulating the discretion of the Court in granting writs of *Mandamus*."

To the same effect is the dictum of Patteson J. in *ex parte Robbins* (1839) 7 Dowl. 568 :—

"The Court will never grant a *Mandamus* to enforce a general law of the land which may be enforced by action."

The interdiction and the payment of half salary to the petitioner is either in accordance with the terms and conditions though not express

but implied governing the employment by the Council of its officers or it is not. If the latter it has not been gainsaid that the employee has not the right to institute an ordinary civil action to enforce his remedies against the Council and in fact to claim continuing damages if the interdiction was unlawful till reinstatement. Recourse, therefore, need not be had to the issue of a writ of *mandamus*, which is a high prerogative writ and which is issued only where no other specific means of securing relief exists.

In view of the foregoing it follows that the application fails and is therefore dismissed with costs.

Application dismissed.

